Development Priorities, Human Rights Principles: Globalization and the Place of the Transnational Private Actor[*]

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INTRODUCTION

Globalization, the term applied to describe a social, economic and political phenomenon characterized by the expansion and acceleration of exchange across borders driven by market forces, presents a challenge to the conceptual foundation of international law as premised on state action and responsibility. Global governance has not kept pace with economic and social changes. The gap in global governance has fundamentally changed the dynamics of interactions between states and non-state actors. This paper advances a more expansive vision of the subjects and sources of international law that aims to capture the law breaking and law making conduct of the private transnational actor.

First, the paper describes the traditional scope of international law and explains how changes in global markets and geopolitics have made it necessary to redefine the scope of international law. Next, using the example of multinational corporations to demonstrate the traditional international law's shortcomings in defining a place for the transnational private actor, the paper reviews the lessons that may be learned from current domestic and international attempts towards application and enforcement of international law on private actors. Then, tracking the trajectory of current trends towards corporate accountability under international human rights law, the paper posits that the accountability and democratic deficits accompanying aspects of globalization could be addressed by an expanded understanding of the sources and subjects of international law. Finally, the paper points to evidence of this expansion already underway as demonstrated by the proliferation of pledges by private corporate actors with respect

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to development priorities and human rights principles purporting to take on responsibility. Opportunities abound for expanding understanding the private actor as both a subject and source of international law. Strengthening so-called "soft" international law is the most promising possibility.

I. INTERNATIONAL LAW

A. The Classical Construct

Prior to WWII and the creation of international multilateral institutions like the United Nations in 1945, classic international law was literally the "law of nations" made by and for states to govern relationships between and among sovereign states. States were understood to be the sole "subjects" of international law imbued with "international legal personality" enjoying full participation in the international legal system by virtue of possessing the capability to exercise rights and observe duties under international law. All others, private non-state actors were merely "objects" of international law. Whatever benefits or burdens international law conferred or imposed on non-state actors were derived from their relationship to a state. These objects of international law did not enjoy the full legal personality nor were they deemed capable of creating law or enforcing rights. Non-state actors were understood to be acted upon, bound by international legal regulations promulgated by state consent. In contrast, states as subjects of international law enjoyed the rights of engaging in war, entering into treaties, forming consensual rules of international behavior, claiming breaches of international legal obligations and seeking remedy.

Sovereignty, the principle that each nation need only be held accountable to its domestic order without regard to the larger international community of nations unless the state consented to be bound, is the defining feature states share as subjects of international law. Under the classical system the sovereign state was understood to have complete power within its borders and had the

authority to exercise its power free of outside interference. States sometimes cooperated, sometimes conflicted but under classical international law all were understood to be separate, autonomous, equal and all powerful within their borders. In this regard, sovereign states enjoyed hegemonic control over the international system as the only entities treated as possessing full independent legal personality under international law.

States, as subjects of international law, are the central source of international law. In both classical and contemporary international law, state consent and conduct served as the cornerstones of the consensual basis of rule creation that characterizes international law. Specifically, Article 38 of the Statute of the International Court of Justice, a treaty ratified by all members of the United Nations to create the court, contains a traditional statement of the sources of international law as including: (a) international conventions, whether general or particular, establishing rules expressly recognized by contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d)…judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Contemporary international law, although still considered to be principally the law governing relations between states is no longer deemed to be exclusively limited to state to state relations. Contemporary understandings of international law have expanded the definition of international law to that body of rules governing the conduct of states and of international organizations in their relations with one another as well as with other natural or juridical persons.[1]

Classic and contemporary international law both share the view that states are still the law makers in the global system entering into treaty agreements and creating customary law. Customary international law has a objective and subjective elements and is deemed present where rule has been followed as a "general practice" consider whether states have really followed the rule, consistently, for a sufficient period of time and subjective in that also consider whether the

[1] Restatement of Foreign Relations Law (Third) Section 101 (1987)

state observes a particular practice out of a sense of obligation because it is "opinio juris."[2] The prevailing view is that a rule cannot be deemed to be international law unless it is derived from one of the Article 38 sources.

Classic international law evolved in the context of state relations among a limited number of relatively homogeneous states.[3] After WWII, the United Nations Charter, and decolonization, however, these traditional defining characteristics of classic international law were confronted by the shifting characteristics of the international order. Structurally, the relative homogeneity of the classic system was confronted with a greater number of new and more diverse states presenting a challenge to the traditional established states' power through permanent institutions in the form of the United Nations and its associated agencies. An international system aimed at the protection and promotion of international human rights was born of the realization that the atrocities committed during the war should never be allowed to occur again.

Today, in addition to states, international intergovernmental organizations and individuals are subjects of rights and duties under international law. The United Nations and various international and regional organizations now have legal capacity to enter into treaty relations with states and other international organizations had have agreements held binding under international law.[4] Individuals also have rights and obligations under international law that are not derivative of the state in the classical sense. War crimes trials established direct responsibility of individuals for serious international crimes and the adoption of international human rights treaties recognize the rights individuals have by virtue of their humanity.

After WWII, the United Nations General Assembly adopted the then expressly non-binding Universal Declaration of Human Rights with the shared expectation that it represent a moral

[2] David Bederman, International Law Frameworks 14-24 (2001)
[3] See generally, Antony Anghie, Imperialism, Sovereignty and the Making of International Law 32 (2005) (arguing the universal character of international law to be a consequence of imperial expansion at the end of the nineteenth century).
[4] See e.g., Advisory Opinion on Reparation for Injuries suffered in the Service of the United Nations (1996).

standard of conduct to protect human dignity. The concept of international human rights imbued the individual with rights and to some degree divested the state of absolute and unchallenged sovereignty. Building upon the U.N. Charter and Universal Declaration, subsequent human rights instruments including the Covenants on and specialized Conventions against torture, for children's rights and against discrimination made international law not just a law of states but also a law of individuals. Interference in domain previously under the hegemonic authority of the state could now permissibly be pierced to protect the rights of the individual.

B. The Contemporary Challenge of Globalization

The classic state-centered view of international law is increasing difficult to reconcile with the growing number of private non-state transnational actors who have a significant impact on states and individuals. Classic and even certain contemporary approaches to international law are no longer descriptively or conceptually adequate. The classical approach seems to have little to say about the non-state actor, while the contemporary approach has not quite settled on how international law should see private actors.

Globalization has brought with it practical developments that signal a need to continue to enlarge the number of subjects of international law. Today, large and powerful private actors operating in many nations pose a significant conceptual and practical challenge to international law.

Globalization is driven to a significant degree by economically powerful non-state actors, the multinational enterprise. It must be noted that there are multiple definitions of globalization, however, in this discussion I am centrally concerned with international law's response to globalization understood as the elimination of barriers facilitating the free flow of capital, information, labor and goods creating a greater interdependence of states, the rapid expansion of

trade and capital across national borders characterized by liberalization of trade and deregulation of national and international markets and increasing foreign direct investment.

The process of globalization is eroding the hegemonic place of the state in international law as the subject and source of international law. As a result of globalization the place where power resides in the international system is growing more diffuse. Nevertheless, states remain key players, it would be a mistake to see them as standing on the sidelines. Rather, states are active participants in devolving their own power through promotion of free trade policies and privatization of their previous state activities.[5] Private actors and market mechanisms are increasingly entrusted with the power to perform functions previously understood to be the responsibility of the state.[6]

The new place of prominence for the private non-state actors presents new challenges but it may also provide a new opportunity to globalize norm of justice. International law should not be content with responding to globalization, it must also define how the globalization process will influence the acts and experiences of states, individuals and other groups.

C. Tracking the Trajectory of Trends

Whether and to what extent private industry needs to respect international human rights law is currently the subject of debate in the academy, industry and government.[7] Scholars and commentators offer varied answers to the question: whether the private non-state actor has legal personality under international law? Many commentators answer "no" because corporations have not been recognized as independent legal persons, corporations are always citizens of some jurisdiction, and therefore operate under power of some state. Moreover, there is no agreed binding international legal instrument exists directly addressing the rights and duties of

[5] Discuss examples
[6] Discuss examples
[7] See e.g. Cite selected articles.

corporations and no International Court of Justice decision recognizing the corporate form as capable of possessing international rights and duties with the capacity to maintain its rights by bringing claims for violations of international law independent of their state of citizenship. This paper aims to contribute to the normative case for "yes." Private non-state actor do have full international legal personality such that many of their activities must be understood to bind them.

We are witnessing an evolution in the response of industry to the question: need multinational enterprise care about international human rights law?

- "No!" The initial response of industry tracked the sentiments of Milton Friedman. The purpose of the corporation was to make profits view was the prevailing position during the 1960s.
- "You Can't Make Us." The industry response shifted somewhat to consider, but reject, the question of corporate duties to respect human rights, coinciding with the birth of the global environmental movement and founding of international human rights organizations such as Amnesty International in the 1970s.
- "We Don't Think You Can Make Us…" The response of industry moved from a strong and belligerent "No," still further at a time when environmental reporting systems emerged and public interest NGO's issuing consumer reports continued to proliferate throughout the 1980s.
- "Could You Possibly Pull This Off and Make Us?!" The industry response came around to the recognition that concern for human rights just might have a place in business planning contemporaneously with growing the backlash against globalization as massive public demonstrations like the "Battle in Seattle" protesting the WTO and high profile Alien Tort Claims Act test cases brought by human rights activists against large multinational corporations for abuses abroad in the late 1990s.

- "Don't Worry, We'll Do it Ourselves…" The recent industry response reflects an enlightened self-interest that has given rise to a "Corporate Social Responsibly" movement driven by industry and characterized by a proliferation of codes of conduct, investor relations specialists, green investment funds, etc.

Currently, these trends have culminated in a number of private industry actors committing to a United Nations sponsored "Global Compact" that encompasses respect for human rights in business operations. Some companies are even suggesting that private business has a place in contributing to the United Nation's Millennium Development Goals, an ambitious global anti-poverty plan.

In these trends the international legal community is observing a process that will inevitably lead to institutionalization of accountability for private actors that do not comply with international human rights principles. Private actors are headed on a trajectory towards creating binding international law.

II. HUMAN RIGHTS PRINCIPLES AND MULTINATIONAL ENTERPRISE

The conceptual and regulatory problems multinational corporations would eventually come to pose for law was identified with extraordinary clarity in 1970 by Detlev Vagts, who noted "the present legal framework has no comfortable, tidy receptacle for such an institution.[8]" A truly international corporation would be one organized by international law, however, in reality business that crosses national borders generally takes the form of "a cluster of corporations of

[8] Detlev Vagts, The Multinational Enterprise: A New Challenge for Transnational Law," 83 Harv. L. Rev. 739, 741 (1970)

diverse nationality joined together by common ties of ownership and responsive to a common management strategy."[9]

Given this structure of multinational enterprise, corporations are able to operate across borders often largely outside the effective supervision or regulatory control of domestic and international law resulting in an accountability deficit because they are mobile and able to allocate risk through manipulation of its identify able to reconstitute itself between legally distinct but economically enmeshed units.

Many of the largest multinationals have headquarters in one country, their principle place of business in another country, and manufacturing operations spread across multiple countries. If the host state fails to regulate the conduct of a company, other states, including the corporation's home state of incorporation may also choose to abstain from regulation based on the extraterritorial nature of the dispute. The resulting home state vs. host state enforcement quagmire leaves a regulatory gap.

B. Obligations of the Private Actor Under International Human Rights Law

Initially, human rights organizations such as Amnesty International and Human Rights Watch focused their advocacy efforts primarily on the state. In recent years, rights groups have expanded their field of vision to include private actors. For example, the mission statement of Human Rights Watch included in every investigative report the organization releases reads, in pertinent part, as follows: "We challenge governments *and* those who hold power to end abusive practices and respect international human rights law. We enlist the public and the international community to support the cause of human rights for all."[10] The mission statement reflects an understanding that other private non-state individuals or entities may pose a significant threat to

[9] Id.
[10] See www.hrw.org, emphasis added.

human dignity and violate the principles contained in the entire corpus of international human rights law the organization aims to uphold and ensure compliance with from the United Nations Charter, to the Universal Declaration of Human Rights (UDHR), to the Covenants on civil, political, economic, social and cultural rights, and specialized Conventions prohibiting certain forms of discrimination and torture.[11]

The UDHR is a "common standard of achievement for all peoples and all nations" it both proclaims a set of fundamental values shared by the international community and sets standards recognizing rights and the corresponding duties to protect those rights. The rights contained in the UDHR have been further elaborated in subsequent treaties including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These three documents are referred to as the International Bill of Human rights.

While the UDHR applies to "all organs of society," the exact nature of corporate responsibility for human rights remains the subject of ongoing debate. Human rights NGOs are willing to take a more expansive view of duty holders under international law to place an obligation on all who hold power to commit and end abusive practices, policy makers and scholars adhering to the classic conception of international law reject this view taking a narrower perspective.

In most instances, however, advocates have worked within the paradigm of state responsibility, arguing that the state's failure to protect rights by tolerance of private actors that violate human rights principles breaches the state's duty to protect and promote human rights through preventing abuses and providing remedy and redress to those abused. The state is ultimately responsible for the acts of its organs, for the acts of private entities exercising

[11] Cite corporate reports.

governmental authority, for the conduct of private actors ratified after the fact, and for knowingly assisting another state in illegal activities.[12]

B. Accountability Efforts Domestic and International

Just as there are varied theories on the actors bound by human rights law and the existence and nature of corporate responsibility, there are varied approaches towards securing corporate accountability for breach of the duty.

1. Domestic Litigation and Advocacy: Initiatives to Address Past and Present Violations

To the alarm of the international business community, in the 1990s human rights activists redeployed a law passed in 1789, the Alien Tort Claims Act, in effort to reach the extraterritorial conduct of corporations alleged to violate the human rights of local populations through labor practices and collaboration with repressive regimes. The Act provides the district courts original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[13] Cases brought under the ATCA were not dismissed out of hand, a number of federal courts entertaining the lawsuits. Most notably, cases were brought against Royal Dutch-Shell Oil for violations in Nigerian pipeline project, Unocal in for violations in Burma, and Texaco for violations in Ecuador.

Most recently, in Sosa v. Alvarez-Machain, the Supreme Court in a 6:3 decision upheld the ATCA, but limited it to apply only to those crimes of universal jurisdiction that nations agree are particular heinous. [14] Since Sosa, the ATCA is a weaker weapon against corporations engaged in conduct that violates international human rights law.

[12] Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int'l Law Comm'n, 53rd Sess., pt. I, ch. 1, Art. 4-11 (2001)
[13] 28 U.S. C. Section 1350
[14] Sosa v. Alverez-Machain, 124 S. Ct. 2739 (2004).

2. Self-Policing and Corporate Social Responsibility: Policing the Police

Industry has undertaken, at levels as small as the individual company[15] and as large as an entire business sector,[16] to design and adopt voluntary codes that embrace social and environmental concerns.[17] There is a growing recognition of how a company's reputation affects its bottom line. Many companies, especially large multinationals have adopted voluntary codes of conduct. Globalization has influenced the emergence and importance of corporate codes as with the increasing power of multinational enterprise to impact the lives of people around the world accompanies the weakened capacity of state to regulate business conduct that reaches across borders. Corporate self-regulation emerged as an option to fill the regulatory gap.[18]

Corporate initiated codes of conduct have been praised as useful in the process of addressing violations of human rights for the purpose of raising corporate awareness. Yet, the CSR movement is not without detractors.[19]

III. GLOBALIZATION AND THE PLACE OF THE TRANSNATIONAL PRIVATE ACTOR IN INTERNATIONAL LAW

The trajectory of recent trends for responding to the global governance gap is setting a course for the creation of law.

[15] E.g. Nike, Shell, McDonalds
[16] E.g. Extractive Oil Industry, Apparel, Chocolate, Diamonds
[17] See Hevina Dashwood, Corporate Social Responsibility and the Evolution of International Norms in Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (John Kirton & Michael Trebilcock eds. 2004)
[18] Wesley Cragg, Multinational Corporations, Globalization, and the Challenge of Self-Regulation in Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (John Kirton & Michael Trebilcock eds. 2004); Note other examples movie industry ratings system etc.
[19] The Good Company: A Skeptical Look at Corporate Social Responsibility, The Economist, Jan. 22-28, 2005 ("Better that CSR be undertaken as a cosmetic exercise than as serious surgery to fix what doesn't need fixing").

A. Global Compact as Binding Contract?

In his 1999 address to the World Economic Forum, United Nations Secretary-General Kofi Annan proposed The Global Compact, an initiative that seeks to advance responsible corporate citizenship to engage business in ameliorating the harms associated with globalization and creating "a more sustainable and inclusive global economy."[20] The Compact enlists the private sector to work with the UN, in partnership with international labor and civil society organizations, to promote human rights, labor standards and environmental sustainability within global corporate spheres of influence.

Based in part on Human Rights principles already universally endorsed by governments, the Compact aims to reflect the type of global society to which the international community purportedly aspires. The Compact encompasses ten principles, drawn from the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work. The Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

Specifically, companies are asked to embrace, support and enact, within their sphere of influence, a set of core values in areas of human rights, labor standards, the environment and anti-corruption. The first two principles addressing human rights principles provide: (1) Businesses should support and respect the protection of internationally proclaimed human rights; and, (2) Businesses should make sure that they are not complicit in human rights abuses.[21] A company's human rights commitment under the Compact extends as far as its reasonable capability to influence events.

[20] Corporate Citizenship in the World Economy: The Global Compact, Human Rights, Labour, Environment, Anti-Corruption (2004), available at www.unglobalcompact.org
[21] Office of the High Commissioner for Human Rights, Briefing Paper on The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity 15 (OHCHR, DATE)

Compact partners are urged to consider the nature of the human rights abuses being committed in the country and how the company's activities would relate to those abuses because it is often possible to assess whether the pattern of human rights violations in a given country is going to intersect with some aspect of the firm's operations. Companies participating in the Compact are encouraged to make the Compact and its principles part of their business strategy and operations. Moving towards "good practices" as understood by the broader international community, rather than relying on their often superior bargaining position over national authorities in developing country economies to get away with less.

Nevertheless, the UN maintains that the Compact is a wholly "voluntary corporate citizenship initiative." Compact participants are assured:

> The Global Compact is not a regulatory instrument—it does not "police," enforce or measure the behavior or actions of companies. Rather, the Global Compact relies on public accountability, transparency and the enlightened self interest of companies, labor and civil society to initiate and share substantive action in pursing the principles upon which the Global Compact is based.

The Compact is not a code of conduct, which has drawn the criticism of certain members of the activist community.[22] Instead, the core of the Compact is presented as a "learning forum," in service of reaching a broader consensus-based definition of what corporate conduct constitutes "good practices."[23] Proliferation of socially legitimated "good practices" coming from the Compact will eventually drive out bad ones.

To participate in the Compact, a company sends a letter from the Chief Executive Officer, endorsed by the board, to the U.N. Secretary General expressing support for the Compact and its principles. The corporate participant is then expected to publish an annual report on its progress to demonstrate implementation of the principles. The Compact also encourages participating

[22] See HRW commentary
[23] John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in **Global Economic Governance**, (David Held & Mathias Koenig-Archibugi, eds., forthcoming)

corporations to join regional networks, dialogues and partnership projects designed to support Compact implementation in a local context where the company and other Compact stakeholders can take an active role. Businesses are invited to develop and share examples of corporate practices, experiences and lessons learned on the Compact website.

The Compact remains in its infancy, but at the conclusion of the 2004 Leaders Summit, the Secretary-General called for a strategic review of the Compact and the development of a new governance framework for it that will transform the initiative from its initial phase of experimentation to one of greater focus, transparency and sustained impact. Currently, consultations have been convened in connection with the review to consider ways the Compact can give priority to the attention to the synergies between the global and local levels of its activities, brand management and quality assurance as well as to promoting broader ownership of the initiative by all participants. The Compact is taking on increased importance within the UN itself with the creation of an Inter-Agency Task Team composed of six participating UN agencies; the UNHCHR, ILO, UNEP, UNODC, UNDP and UNIDO. The next phase includes plans for a board to provide strategic and policy advice composed of four constituency groups, business, civil society, labor, and the UN with differentiated roles and responsibilities.

B. Taking Note of Business Norms

The Sub-Commission on the Promotion and Protection of Human Rights has adopted a set of draft norms, based on existing international standards that seek to identify which human rights apply directly to companies within their respective sphere of activity and influence.[24] The draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights focus on the right to equal opportunity and non-discriminatory treatment, the right to security of persons, the rights of workers, consumer protection, environmental protection, and economic, social and cultural rights.

[24] See generally, David Weissbrodt & Muria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 Am. J. Int'l L. 901 (2003)

Like the Compact, U.N. statements concerning the draft emphasize that the Norms are not meant to be legally biding, but simply are offered to provide illustrations to companies wishing to better understand human rights and the content of human rights commitment they have undertaken by participation in the Compact.[25]

C. Development Priorities and the Private Actor: The Business Contribution to the Millennium Development Goals

The Millennium Development Goals (MDGs) are an ambitious agenda for reducing poverty agreed by world leaders at the United Nations Millennium Summit in 2000. For each of the eight goals, targets and indicators have been set to measure progress towards achieving the goals by 2015, using 1990 as a benchmark. The MDGs are an accepted framework for many activists in the international development community.

According to the World Bank, several key factors distinguish the MDGs from previous global commitments to end poverty in that:

- Non-industrialized countries are involved in all aspects of realizing the goals, including strategic planning, implementation and reporting.
- The goals are measurable, with reportable performance evaluation targets, dates, and metrics identified and outlined for each MDG.
- Over 100 participating non-industrialized countries are involved in monitoring and reporting on those performance metrics.
- There is strong business interest and involvement.[26]

[25] E.g. OHCHR Briefing Paper at 17.
[26] World Bank Institute, Business Action for the MDGs: Private Sector Involvement as a Vital Factor in Achieving the Millennium Development Goals 1 (2005)

The UN Millennium Project and its Task Forces act as an independent advisory board commissioned by the UN Secretary General to advise the UN on strategies for achieving the MDGs.

Corporations are actively participating in programs that will impact the achievement of the MDGs although they are under no legal obligation to do so and it is not necessary their stated mission as business enterprises.

In 2005, the CSR practice at the World Bank Institute conducted a survey to identify examples of business' involvement in the achievement of the MDGs. Reasons business gave for becoming involved in the MDGs ranged widely from: accessing newer and larger markets, to creating a healthier and more reliable workforce, to improving productivity, to changing government policies, expansion and image, consumer demand for goods from firms that are committed to environmental protection and human rights, lobbying from other firms active in CSR that have already taken a leading role in regulatory and financial reform, and changing "responsibility norms." Respondents noted that firms around the globe are being held more accountable for their actions both in terms of their financial fiduciary responsibility as well as "to support and not denigrate communities' countries and regions."[27]

Harvard's Kennedy School of Government's Center for Business has also recently conducted a survey of global opinion of leaders in business, civil society and the media to investigate a number of questions in connection with decisions by industry to embrace the MDGs such as: how do companies and other key actors define the concept of international development; what are the conditions necessary for corporations and their development partners to address the needs of developing countries in a mutually beneficial way; what are businesses doing today to support and strengthen the communities in which they market and manufacture their products and

[27] World Bank Institute, Business Action for the MDGs: Private Sector Involvement as a Vital Factor in Achieving the Millennium Development Goals 1 (2005)

services; and the key drivers that determine a company's decisions to engage or not in development partnerships.[28]

The Harvard Study found that while current definitions of and approaches to international development varied among corporations, NGOs and others involved in international development based on philosophy and sometimes terminology, all sectors agreed that business should work on various development issues and concluded that partnerships across sectors could yield positive development results but the platforms to facilitate the creation of cooperation had not yet lived up to the potential to do so. The study found cross sector partnerships were most likely to succeed when all parties made contributions capitalizing on their particular competencies and collaborating on market-based solutions while addressing broader policy issues.

Business leaders expressed view that multilateral institutions should serve as the "glue" connecting the development process together. Industry representatives accepted that multilateral institutions should: serve to coordinate and facilitate the development activities of other partners; provide a balanced objective perspective on key development issues, institute uniform investment frameworks and global standards that will enable companies to do business in both a competitive and responsible way; and, monitor adherence of corporations, governments and other development partners to global standards and practices. Effective partnering is not impossible, far from it. A telecommunications and electronics executive explained that in his view the MDGs were "an opportunity to help companies think about heir vision and their responsibility in a higher level way than they probably have chosen to think about them. A way to organize and think about corporate citizenship and social responsibility objectives. I think they can be tremendously helpful and can serve as a bridge between the public and private sector."

[28] Business and International Development: Opportunities, Responsibilities and Expectations: A Survey of Global Opinion Leaders in Business, Civil Society and the Media (DATE)

Business is not alone in believing that it can promote change in the international community, human rights activists working on social, economic and cultural rights have long maintained the place of private industry in impeding and advancing such rights.[29]

IV. TRACKING THE PLACE OF THE PRIVATE ACTOR: UNDERSTANDING "SOFT LAW" AND SELF REGULATION AS "REAL RULES"

In the face of hard problems, the international community is increasingly turning to soft law solutions in a variety of forms, the Compact and Norms are an example of this trend and are an opportunity for addressing accountability and involving the public in decision making.[30] The hard law of Article 38 is characterized by its reliance on the authority and power of states. Soft law, in contrast, relies on the participation and resources of private non-state actors. There are two primary instruments of soft law: (1) voluntary standards that serve as equivalent to formally legislated and ratified government law and regulation and (2) informal institutions at the international, transnational, and national levels that depend on the voluntary participation and consensual actions of the participants.[31] Soft law represents a shift of power from the formal "hard" law making arenas.[32]

In his remarkable article, International Law Making: A Process of Communicating, Michael Reisman examines the shortcomings of classical and contemporary international law's rigid adherence to an Article 38 view of international legal sources and offers an alternative theory of who makes international law and how and when it is made. Because "the international system produces documents in the legislative genre with promiscuous abandon," Reisman maintains that

[29] Daniel Aguirre, Multinational Corporations and the Realization of Economic Social and Cultural Rights, 35 Cal. W. Int'l L. J. 53 (2004)
[30] Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (John Kirton & Michael Trebilcock eds. 2004)
[31] Id.
[32] See generally, Gunther Handle et al, A Hard Look at Soft Law, 82 Am. Soc'y Int'l L. Proc. 371 (1988)

a way must be devised to distinguish "effective law" from the "legalistic babble of international politics.[33]"

Reisman's view doesn't exclude the possibility that private actors make law, he argues that "law making, or the prescribing of policy as authoritative for a community is a process of communication.[34]" For Reisman, international law is understood to involve "the mediation of subjectivities" as they evolve from a communication, to reach an audience, to become received by and incorporated by the intended audience resulting in a set of expectations that are supposed to influence behavior and contingently to alert community enforcement responses when deviations are deemed to threaten public order.

Under this view, any communication between politically relevant groups which shape wide expectations about appropriate further conduct must be considered as functional lawmaking. Reisman suggests effective international law can be identified by looking the interrelationship among three things: (1) policy content; (2) authority signaling; and (3) control intention. When all three are effectively mediated to the relevant audience—the result is law.

Policy content means the substantive norm, the policy designed to bring about the production of some value through certain conduct or behavior. Taking the Compact as a case in point, the value under production is business responsibility for respecting human rights and refraining from complicity in violations of human rights principles. Similarly, the Norms are seeking to establish that transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international law.

[33] W. Michael Reisman, International Lawmaking: A Process of Communication, 75 Am. Soc'y Int'l L. Proc. 101-13 (1981) (explaining that in international law we see the creation of intentionally unenforceable law was an efficient and economic way of mediating between distinct classes and groups which had irreconcilably incompatible demands).
[34] W. Michael Reisman, International Lawmaking: A Process of Communication, 75 Am. Soc'y Int'l L. Proc. 101-13 (1981).

Authority signaling requires that the values promoted through policy content that have emerged from a mediation of interests must have its origins in a legitimate base of authority. The origin of a given norm is authoritative if it is seen as such by the relevant community. Because there are multiple and heterogeneous sources of authority in pluralistic systems, authority may reside in monarchy, constitutional democracy, divine right, whatever the source it must be legitimate for the relevant audience.

Finally, there must be a control intention. For Reisman, a control intention is broader than the concept of sanctions in contemporary and classic international law. Determining control intention requires as comprehensive as possible a survey of the power process, interests of those most effective in that process which groups constitute the power elite in a particular context. Those with the authority must communicate a credible intent to control conduct so that it must conform to the policy and communicate an ability to make it the policy the controlling policy.

Coordinated and calibrated properly, when these elements are present in a given process, the process makes law. Even a non-authoritative practice that endures may become prescriptive.

The Communication theory of international law offers valuable insight into how best to see the trend trajectory that has culminated in the purportedly non-binding Compact and Norms. In addition to debating whether international law applies to corporations, academic and policy makers should consider whether corporations are making law in making pledges. Is the Global Compact a Contract?

Despite constant reference as "non-binding," the pledges made by companies and contained in the MDGs and the Compact may properly be understood to be law in that they contain a policy statement, are derived from authority, and control intent among private actors (industry and public interest alike) is emerging.

Corporations that intend to conduct their business in a manner consistent with human rights will eventually want the Norms and Compact to be binding. Consumers and governments will come to rely on the representations made by corporate actors. Consumers and governments will

order their actions in expectation that company conduct will be consistent with their statements. Consumers will trust that they are buying goods from a company with production measures that do not violate the commitments made.

A consumer demonstrating control intent may well chose company A's products over company B's products where A is an avowed member of the Compact. The World Bank's CSR study appears to confirm industry's appreciation of this control device. A government will trust the company not to violate the rights of individuals in their territory or degrade or pollute the natural environment. Accordingly, because these other actors on the international stage will calibrate their actions to meet expectations based on representations by corporate actors and rely upon those representations a corporation must understand the commitments made to be binding. This communication, involving disparate audiences will shape expectations and increasingly drive corporations into conduct consistent with the policy prescriptions of the Compact and Norms.

Creating expectations creates obligations. For example, while there may be no abstract duty to rescue a drowning man, if you say that you will effect a rescue but instead stand by and watch him drown then you would be properly estopped from claiming you had no obligation to act.[35]

Of course, many would argue that making the Compact and Norms binding will undermine all efforts to improve corporate conduct by providing a disincentive to corporations silencing them such that they do not pledge or simply do not say anything about human rights violations, environmental degradation, etc. Indeed, this concern is likely the impetus for the U.N.'s persistent emphasis on the "non-binding" and "voluntary" nature of the commitments it seeks from Compact participants.

I submit that nothing may be better than something in this context. Construing the Compact as binding gives those corporations truly willing to conduct operations in a responsible manner an

[35] For example, in Basic v. Levinson, (where no duty to disclose any information, but false information defendant found liable).

added incentive to speak. A binding commitment will act in the interest of civil society by separating out those private actors that intend to act consistent with their commitments from those that do not.

Corporations that are willing and able to act responsibly will seek a "separating equilibrium," some means of separating themselves from corporations that are not responsible in their business activities. For example, companies use warranties to separate themselves form corporations that produce inferior goods. If a system is created in which the good corporations can take actions or send signals to the public that are costly for the "bad' corporations to mimic, then the good can separate themselves. If there is no such signal available, the good and bad corporations will be pooled together and virtually inseparable. The binding commitment of a warranty thus becomes a signal that is costly for the bad corporation to mimic. The corporations that are not willing to act responsibly or willing to develop the ability to do so will instead seek a "pooling equilibrium" whereby they will seek to be indistinguishable from the companies that do conduct themselves consistent with the Norms and Compact. An outside entity is needed to give credibility to corporate claims of responsibility.

Assuming the authority from which the Compact and Norms are derived is perceived to be legitimate, should the control intent become clearer with respect to the values embodied in the Norms and Compact, it would no longer be sufficient for a company to represent that it is responsible, yet remain outside the Compact. As long as the Compact remains non-binding it will provides credibility services at no cost to the persistently, chronically irresponsible.

The Compact, were it truly understood as non-binding and remaining so now and forever could cloak all comers with a temporary benefit of a credible attestation of responsible conduct, but the communication will leave its audiences unconvinced of any control intent and ultimately undermine the authority advancing the policy.

The truly responsible corporation will eventually want the Compact and Norms to become binding. There are instances where a "bad" business simply cannot mimic a "good" one.

Imagine there are two types of used car dealerships in the industry, those dealerships that sell only quality cars and those dealerships that sell lemons.[36] A party outside the industry proposes the WEAK Warranty Regime. If the regime is non-binding, such that a warranty is not going to be required or enforced then all dealerships, those selling quality cars and lemons alike, would have an incentive to sign on. All dealerships would be indistinguishable with respect to whether or not they deal in quality or crap. Consumers might, for a time relying on a dealership's WEAK Warranty Registration status, reasonably infer that all Registered dealerships truly guarantee the quality cars. Some consumers would be left with lemons and no relief under warranty, since the warranty is not binding on the dealership.

In a non-binding regime there is no separating mechanism for determining the quality car from the defective vehicle. The non-binding regime is actually detrimental to both the car consumer stuck with a lemon and the good dealership that has lost a sale. Put another way, the dealerships selling poor performance cars will be pooled together with those dealerships that sell only high quality cars enjoying the same benefits for little or no cost.

The situation is different in a binding regime. Those dealerships with only quality cars will benefit most from a STRONG Warranty Regime, where the warranty guarantee is binding and respected. The "good" dealership will gain deserved recognition for being able to do what the "bad" dealership cannot mimic. A binding regime would have an "unraveling effect" serving to separate out the quality car dealership because a lemon dealer cannot afford to give a guaranteed warranty while the quality dealer can do so with confidence. Under a binding regime, the consumer is better able to discern which dealerships are quality dealers. Moreover, the Consumer might infer from those silent or not joining at least some laxity of quality standards.

Similarly, the Compact seeks to peg company performance to evolving international community based "good practices," thereby "ratcheting up" company performance on an ongoing

[36] See George Akerlof, The Market for "Lemons": Quality, Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970) (discussing market for lemons problem).

basis. Accumulation of experience inevitably will lead to desire for benchmarking or formal codification including by industry leaders wanting to protect themselves against the possibility of suffering competitive disadvantages. Stragglers will have a harder time opposing standards based on actual achievements by their peers. Global Compact well positioned to facilitate such a move. In a sense it constitutes a two way bridge between public and private sectors

The Norms serve as an acknowledgement of the rise of multiples sources of power in which institutions with regulatory authority must compete.[37] Norms provide a template for the character and form of interaction and communication among those systems of governance where multiple competing systems of government only partially overlap no one system can claim a monopoly of power over an object of regulation.

The Norms enlist transnational corporations as agents of international law implementation even against states that have either refused to ratify certain international instruments-process that could crate the basis for the articulation of customary international law principles that will apply to all including states Norms alter the balance of power over corporate governance between inside stakeholders (shareholders, lenders) and outside stakeholders (community, society, state) by providing a substantial role to NGOs to monitor TNCs conformity to the Norms.

The Universal Declaration of Human Rights was, like the Compact and Norms, not intended to be a "binding" rule of law. When the Declaration was first adopted by the U.N. General Assembly the expectation was that it merely represented a moral standard without authoritative effect. Instead the international community has seen over time an ongoing process of communication, practice, and opinion where the substantive content of the Declaration was invoked and applied by individuals and institutions the values contained in it became authoritative in the manner of customary law. Our expectations have evolved and the Declaration has become enduring.

[37] Larry Cata Backer, Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Social Responsibility in International Law, Buffalo Public Interest Law Journal (2005).

The Compact may be "soft", but it must not be seen as weak. A soft law approach offers many advantages principally a bottom-up approach that may serve to offer an increased opportunity for effective means for direct civil society participation in global governance. It should be noted that the soft law approach is not a panacea it may result in uncertainty and complexity, less stringent standards, and power imbalances may promote compromise, or compromised policy content.

CONCLUSION: IS BONO MAKING INTERNATIONAL LAW?

In the trajectory of trends towards addressing the question of the place of the private actor in international law, the international community is witnessing a move from "We'll do it ourselves" to "Okay, fine, do it yourselves but let us help you out." In this latest shift, the communication between multinational enterprise, intergovernmental organizations, and civil society has many features of law and offers an opportunity for the more inclusive making of international law. The public and the private are together engaging in governance, formulating and enforcing laws through their communications, influences and actions.