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ARTICLE: CORPORATE SOCIAL RESPONSIBILITY (CSR): MARKET-BASED REMEDIES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS?

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SUMMARY:

... The problem of poverty presents the opportunity of labour exploitation. ... The corporate social responsibility movement seeks to influence directly or indirectly or control corporate behaviour through a combination of (1) marketplace activism (influence over or via capital structure and sales of the corporation), (2) internal self-regulation (codes of conduct), and (3) shareholder activism. ... Other ways to change corporate behaviour are through nonbinding codes of conduct, shareholder resolutions, and proxy contests. ... Codes of conduct, however, are not the only corporate governance remedy for human rights violations; the shareholder activism model also seeks to influence corporate behaviour by encouraging the corporation or its shareholders to renounce profitable exploitation. ... Ideally, a shareholder resolution will influence management to change its practice and may even result in the selection of at least one member of the corporate board of directors who will represent the interests of the activists. ... Other empirical studies have also concluded that, like codes of conduct, shareholder activism is generally not very effective at encouraging corporate social responsibility. ... Although the corporate social responsibility movement proposes codes of conduct to govern private behaviour, these codes are voluntary and nonbinding. ... to recognise that corporations can and do profit from exploiting third-world labour. ...

TEXT:

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I. Introduction

The problem of poverty presents the opportunity of labour exploitation. Opportunities to profit out of the misery of others occur in a variety of trades,ⁿ¹ including flowers, ⁿ² textiles, ⁿ³ oil, ⁿ⁴ and diamonds. ⁿ⁵ [*104] Multinational companies can make a killing on their investments-literally.ⁿ⁶ Often, as in the case of conflict diamonds, ⁿ⁷ the source of the commodity resulting from exploitation cannot be traced. ⁿ⁸

Not only are labour exploitation patterns recurrent in several industries, human rights violations occur throughout

the third world in places as diverse as Saipan,ⁿ⁹ Ecuador, ⁿ¹⁰ Papua New Guinea, ⁿ¹¹ Indonesia, ⁿ¹² Myanmar (formerly Burma), ⁿ¹³ and Nigeria, ⁿ¹⁴ and often implicate first-world multinational corporations. ⁿ¹⁵

The violations of human rights are just as wide-ranging. Indentured servitude,ⁿ¹⁶ child labour, ⁿ¹⁷ and slave labour ⁿ¹⁸ are typical violations; [*105] however, even charges of murder or genocide are sometimes alleged.ⁿ¹⁹ Quite simply the fact is that consumers want cheap goods, and third-world labour, particularly child and slave labour, is cheap. Companies exploit third-world labour because exploitation is profitable. ⁿ²⁰

These facts, and the instability of local governments,ⁿ²¹ often put corporations doing business in the third world into questionable positions. Usually these ethical problems are resolved quickly by looking to whether profit is hindered or aided. ⁿ²² While we may expect a corporation to behave ethically when it costs nothing, we should realistically expect the corporation to maximise its profits when behaving ethically will reduce profits, even when that means exploiting sweatshop labour, for example. ⁿ²³ Partially, this is because the company will become less competitive with other businesses that do not renounce exploitative profits. ⁿ²⁴ The fact that competition, whether among corporations or states, can lead to sub-optimal outcomes explains why law rightly imposes limits on market transactions. ⁿ²⁵

This Article explores market forces that may contribute to controlling corporate behaviour and the internal regulatory structure of the corporation. The Article particularly looks at nonbinding regulation of the corporation via codes of conduct and guidelines established [*106] by the company itself,ⁿ²⁶ the industry, ⁿ²⁷ pressure groups, ⁿ²⁸ the state, or by international organisations, ⁿ²⁹ such as the International Labour Organisation (ILO) ⁿ³⁰ and the Organisation for Economic Co-operation and Development (OECD). ⁿ³¹ The corporate social responsibility movement seeks to influence directly or indirectly or control corporate behaviour through a combination of (1) marketplace activism (influence over or via capital structure and sales of the corporation), (2) internal self-regulation (codes of conduct), ⁿ³² and (3) shareholder activism. Accordingly, this Article examines indirect influence via market forces affecting capital and sales, and direct control or influence via the corporation's internal organisation through codes of conduct and shareholder activism.

Individually the soft-law norms explored here are generally not very effective.ⁿ³³ However, in concert with other regimes, they can encourage improved human rights protection. ⁿ³⁴ Thus, although the state still plays a key role in the spectrum of international legal entities, it is increasingly supplanted by sub-state and supra-state normative regimes.

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A. The International Legal Personality of Nonstate Actors

1. Multinational Corporations

Multinational corporations (MNCs) are progressively more influential on the world stage,ⁿ³⁵ and are only one of several nonstate actors challenging the role of the state in international law. ⁿ³⁶ Multinational corporations are extremely influential in world politics. ⁿ³⁷ They are loyal only to profit and engage in business activity on several continents. Multinational corporations undermine the hermetic model of Westphalian sovereignty, which saw states as isolated from each other and as the principle object of loyalty of their subjects. ⁿ³⁸ Capital mobility also undermines the state as the primary and ultimate object of power and loyalty on the international stage because it defies the power of the state to regulate its own currency and interest rates. ⁿ³⁹ It is hardly surprising that some commentators have gone so far as to ask whether multinationals are or should be subjects of *jus gentium*. ⁿ⁴⁰ In fact, corporations, like other nonstate actors, do have directly applicable duties and rights under international law. ⁿ⁴¹ Thus, to that extent, corporations may be said to have limited international legal personality. ⁿ⁴²

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2. Individuals

Individuals also increasingly possess human rights and duties under national law and international treaties. Evidence of the limited international legal personality of nonstate actors includes the U.N. Declaration on the Elimination of All Forms of Racial Discrimination,ⁿ⁴³ the U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, ⁿ⁴⁴ and the Rio Declaration on the Environment and Development, ⁿ⁴⁵ inter alia. These conventions state explicitly (or sometimes implicitly) that "private actors have both negative and positive duties in respect of socio-economic rights," ⁿ⁴⁶ and recognise the limited international legal personality of multinational corporations. ⁿ⁴⁷ Thus, international human rights laws can be enforced against corporations. ⁿ⁴⁸

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3. Limits on the International Legal Personality of Nonstate Actors

There are limits, however, on the international legal personality of nonstate actors. Although corporations certainly have great de facto influence in international relations, they do not have a constitutive power in the formation of international law. Even so, nonstate actors such as individuals, corporations, and the World Bankⁿ⁴⁹ can at least contribute to the formation of customary international law. ⁿ⁵⁰ This is accomplished by aiding in the process of elaborating norms, ⁿ⁵¹ even if sometimes only as observers. ⁿ⁵²

B. Market-Based Remedies

Market forces encourage corporations to exploit third-world labour. Is there any way to harness those same forces to encourage corporations to work for better labour standards in the third world? The answer to this question is a qualified yes: market forces alone will probably not suffice to improve human rights; but when market forces are linked to legal regimes they may encourage improved working conditions for third-world labour. We reach this conclusion by examining disincentives and incentives for corporate action in both capital and consumer markets.

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1. Disincentives for Unethical Action

Law controls behaviour in capitalism by making the undesirable unprofitable and the desirable profitable. We thus examine disincentives and incentives in capital markets and sales in order to determine where pressure can be successfully brought to influence corporate behaviour.

When looking at capital markets, it is noteworthy that churches, pensions, universities, and foundations oppose human rights abuse in principle, and yet invest funds in companies.ⁿ⁵³ Corporate behaviour can thus be influenced by threatening to disinvest these funds. ⁿ⁵⁴ The change in corporate behaviour is induced indirectly by the threat that investors will disinvest and that institutional lenders will make loans contingent, or even stop lending entirely, on the corporation changing its behaviour to better respect human rights. Activists can therefore seek to reduce the credit rating of corporations by demonstrating their poor human rights records. ⁿ⁵⁵ Bankers are prudent and may be more reluctant to invest in companies that tolerate or even encourage human rights abuses because the violation of human rights generates political instability, increases the risk of war (with attendant property destruction), and risks nationalisation of the investment. ⁿ⁵⁶

As for their sales, corporations that violate or tolerate violations of human rights risk not only capital flight as individual and institutional investors (usually in equities and debt instruments respectively) disinvest, they also risk consumer boycott,ⁿ⁵⁷ protests, ⁿ⁵⁸ or being denied local or national procurement contracts. ⁿ⁵⁹ It may be counterintuitive, but market-based remedies may have some effect on changing corporate behaviour because a business with no capital and no sales has no future.

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2. Incentives to Act Ethically

Not only can negative disincentives discourage human rights abuse, but positive incentives can also encourage companies to behave ethically. In capital markets, there is a segment of investors that is more interested in investing ethically than in maximising the profitability of their investments. Ethical investment funds exist to serve this market.ⁿ⁶⁰ One possible reform proposes to create an ethical stock index. ⁿ⁶¹ As to consumer markets, just as there are ethical investors, there are also ethical consumers. Some consumers prefer ethically manufactured goods. ⁿ⁶² Therefore, product labelling is another practical way to encourage companies to act ethically by making it profitable to do so. Labelling consists of affixing a mark to a product so that the user knows that the product was manufactured or produced according to certain norms of labour. For example, "Rugmark" indicates that luxurious rugs from the Indian subcontinent were not produced with child labour. ⁿ⁶³ Similarly, the FIFA mark indicates that child labour has not been used in the manufacture of soccer balls. ⁿ⁶⁴

Thus, there are some market-based incentives and disincentives in both the capital and consumer markets that should encourage corporations to act ethically. Market-based remedies alone probably will not solve the problem of human rights, but in combination with binding measures, they may help to improve the standard of living of all people. However, one might wonder what legal remedies exist to discourage corporate misfeasance and encourage good corporate citizenship.

C. Corporate Governance

Market-based remedies alone may not fully address human rights issues, but if we look at the internal structure of the corporation, we may be able to discover other ways to discourage corporate misfeasance and encourage good corporate citizenship. One way to change corporate behaviour is through the corporation's own internal governance. [*112] This argument asserts that if you want to change the corporation's behaviour, take control of the corporation. Other ways to change corporate behaviour are through nonbinding codes of conduct, shareholder resolutions, and proxy contests. Corporate governance may also be influenced by changing securities regulation laws and by including a voluntary or mandatory section in the corporation's annual report that addresses the corporation's human rights obligations and actions.

1. Nonbinding Codes of Conduct

A code of conduct is an internal or external declaration of principles generally adopted by the corporation as a guide to its managers and employees. The corporate social responsibility movement seeks to persuade corporations to internalise human rights standards by inciting the corporation to adopt voluntary, nonbinding codes of good conduct.ⁿ⁶⁵ Essentially, the hope is that by establishing standards, the corporation will be encouraged to meet them. Codes of conduct may be created by a corporation itself, an industry, national administrative bodies, or international organisations.

Codes of conduct may seem only to be a propaganda exercise. However, even where not obeyed and existing only on paper, codes can be used to embarrass and shame the corporation, or even as evidence of action ultra vires if the corporation violates its own code or bylaws. Further, such violations may be presented as evidence against the corporation in the event of lawsuits against the company. If a corporation has expressly stated that it will respect human rights, even in a voluntary and nonbinding code of conduct, it will have greater difficulty defending itself credibly in court when it does not do so.ⁿ⁶⁶

On the other hand, while codes of conduct are not completely useless, believing that corporate self-regulation alone will prevent human rights abuses in the name of profits requires either naivete or disingenuity. Corporate social responsibility is usually nothing more [*113] than a public relations exercise, at best intended to improve the image of the corporation and at worst to whitewash corporate exploitation and delay the establishment of binding legal norms.ⁿ⁶⁷ Corporate social responsibility is not always merely a smokescreen, however. Sometimes, as in the case of

generic drugs used to hinder HIV, pressuring corporations to act ethically works - although such victories are clearly the exception, n68 given that codes of conduct generally do not influence corporate behaviour. n69 For example, the nonbinding and voluntary Sullivan Code of Conduct touted in South Africa during the apartheid era, n70 and the MacBride principles in Eire, n71 had only limited and uncertain impact on their targets. n72 Empirical studies have shown that there is a weak correlation or no correlation at all between profitability and social responsibility; n73 however, no study has shown that social responsibility decreases profit. n74

For these reasons, codes of conduct should be viewed with scepticism. Corporations will not regulate themselves into competitive disadvantage. Codes of conduct, however, are not the only corporate governance remedy for human rights violations; the shareholder activism [*114] model also seeks to influence corporate behaviour by encouraging the corporation or its shareholders to renounce profitable exploitation.

2. Shareholder Activism Through Shareholder Proposals

The principle legal vehicles of shareholder activism are shareholders' proposals (also known as shareholder resolutions), which are introduced into proxy statements and placed before the shareholders for approval or disapproval. n75 Shareholder proposals seek to induce corporate change from within by proposing and implementing resolutions that will prohibit the company from abusing human rights. n76 A shareholder proposal is a "recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders." n77 Shareholder resolutions can be used to amend a corporation's bylaws, n78 and to propose action for the corporation to take or forgo. Shareholder resolutions can be used like a plebiscite recommending policies to management, or like a referendum presenting actions that management must undertake. Ideally, a shareholder resolution will influence management to change its practice and may even result in the selection of at least one member of the corporate board of directors who will represent the interests of the activists.

Shareholder resolutions and proxy contests to cause disinvestment, for example, can sometimes, but not always, n79 generate results. Rodman demonstrates this fact and documents in detail the exact intricacies of bank and corporate disinvestment in South Africa. There, bank disinvestments not only failed to inspire government initiatives, they in fact only followed government initiatives. n80 The private sector [*115] was simply less responsive than the public sector - although private sector disinvestments did ultimately occur. Rodman then compares these ambiguous facts with failed activism in Burma/Myanmar and Nigeria with at best a mixed record as to South Africa. n81 Successful shareholder resolutions to cause corporate change are the exception. Other empirical studies have also concluded that, like codes of conduct, shareholder activism is generally not very effective at encouraging corporate social responsibility. n82 In sum, the empirical evidence is against corporate codes of conduct as a meaningful reform.

3. Proxy Contests

Another remedy against a corporation that violates the principles of human rights is to seek revocation of its corporate charter. n83 In the common law, this is accomplished through the writ of quo warranto, n84 or through a proxy contest in which the insurgent activists present a resolution for adoption or rejection by other shareholders (note here that the activists would have to be shareholders to wage the proxy contest). At least under United States law, shareholders must be provided with a list of shareholders or the corporation must mail the proxy for them. n85 If the shareholders win the proxy contest, their costs will be reimbursed. n86 If a majority of the shareholders adopt the resolution, then management has to implement it.

Finally, it is worth pointing out that writing binding ethical norms into the corporation's structure could be used as an anti-takeover strategy. Socially conscious clauses inserted into a company's articles of incorporation could be used as a "poison pill" to make the corporation less attractive to hostile takeover. n87

[*116] Of course, corporate governance remedies do face a serious practical difficulty: shareholders and directors share a common cause to enjoy the (ill-gotten) profits of labour exploitation. Therefore, corporate governance as a

remedy for exploitation will not alone solve the problem of labour exploitation in the third world.

4. Prohibition of Deceptive Trade Practices

Another potential remedy for corporate misconduct is to sue the offending corporation for deceptive trade practices when it pretends not to exploit labour.ⁿ⁸⁸ Both the EU and the United States have statutes against deceptive trade practices. For example, in *Kasky v. Nike Inc.*,ⁿ⁸⁹ a shareholder activist sued Nike for deceptive trading practices, essentially alleging that Nike was pretending not to exploit third-world labour.ⁿ⁹⁰ Securities regulation also punishes fraudulent statements and deceptive omissions. For example, the United States Securities and Exchange Commission (SEC) punishes false statements in proxy statements and in stock sales either in tort or by criminal prosecution.ⁿ⁹¹ Although any award resulting from such a suit would go to the first-world plaintiffs and not to the third-world worker, it would still deter the first-world company from violating human rights.

5. Reform Proposals

Some reforms have been proposed to increase corporate respect for human rights in the fields of taxation, securities regulation, and annual reporting requirements for corporations. Reforms to encourage respect of human rights could include preferential tax treatmentⁿ⁹² or investment creditsⁿ⁹³ for ethical companies, and penalties for companies that act unethically. While preferential treatments exist in some jurisdictions, penalties for unethical activities are also interesting potential sources of revenue for the state.ⁿ⁹⁴

[*117] Reform proposals also look to national securities regulation for relief. For instance, the United States SEC requires companies to make some information regarding their human rights practices available to their shareholders.ⁿ⁹⁵ Proposals have been made to strengthen disclosure requirements, for example, by increasing the amount of nonfinancial information about the company that must be disclosed in the annual report or proxies.ⁿ⁹⁶ That is hardly radical: United States Supreme Court Justice Brandeis advocated increasing nonfinancial disclosure requirements.ⁿ⁹⁷ Further, full disclosure will increase economic information to investors,ⁿ⁹⁸ which makes good economic sense because it reduces transaction costs by enabling buyers and sellers to make decisions based on complete information. Most efforts before the SEC have focused not on financial disclosure, but with some success on shareholders' rights to propose resolutions for adoption by the company.ⁿ⁹⁹

In addition to reforms of the tax system and securities disclosure requirements, another law reform would require corporations to perform an annual social audit along with the ordinary annual report to outline the company's human rights policy and record.ⁿ¹⁰⁰ Social audits could be included in a company's annual report at little cost and would provide investors valuable information about the company's moral practices; a company that acts unethically outside of United States territory is more likely to behave unethically at home, and one [*118] that respects human rights is more likely to be a secure longterm investment.ⁿ¹⁰¹

In sum, there are a variety of market incentives that can be introduced into national law to discourage unethical corporate behaviour. Such laws, coupled with universal jurisdiction,ⁿ¹⁰² would be an effective method of improving business practices and possibly profitability, as well.

D. Lex Mercatoria?

We have seen that the regulation of corporations under either civil or criminal theories is far from perfect. However, we have also noted that several market incentives can be taken advantage of in practice. This has led some to suggest that we are witnessing the rise of a new *lex mercatoria*.ⁿ¹⁰³

Unfortunately, attempts to analogise corporate liability for violations of human rights law to medieval *lex mercatoria* are ill founded. This is because the analogy is factually incorrect, theoretically inapposite, and not practically workable. Medieval *lex mercatoria* featured specialised courts that served the interests of merchants, not

consumers.ⁿ¹⁰⁴ It was fundamentally a private law of contract and arbitration. This is very different from contemporary human rights law. While there has been a revolution in human rights since 1945 as a result of the transformation of the Westphalian state system,ⁿ¹⁰⁵ it cannot realistically be compared to *lex mercatoria*. *Lex mercatoria* concerned only private parties, was binding, and was a result of voluntary [*119] agreement.ⁿ¹⁰⁶ None of that is true of contemporary human rights law. Although the corporate social responsibility movement proposes codes of conduct to govern private behaviour, these codes are voluntary and nonbinding. The human rights system also features binding norms; however, those norms are imposed by states or international organisations, not by voluntary agreement. For these reasons, the analogy between contemporary human rights law and *lex mercatoria* is inexact. Further, corporations are not the leading force of protection of human rights. We need only look at the facts in *Doe v. Unocal Corp.*ⁿ¹⁰⁷ or *Wiwa v. Royal Dutch Petroleum Co.*ⁿ¹⁰⁸ to recognise that corporations can and do profit from exploiting third-world labour. To expect them to do otherwise in the absence of state sanction is naive or disingenuous.

Not only is the analogy between *lex mercatoria* and the corporate social responsibility movement factually incorrect, it is also theoretically inapt. Market mechanisms based on alienable property rights cannot logically be the foundation of a system of protection of in-alienable human rights.

Another practical objection to the comparison of modern human rights and medieval *lex mercatoria* is that human rights guarantees are not necessary to maintain a functioning market. Because market rights are neither in theory nor in practice the cause of human rights, attempts to ground, model, or analogise human rights and market rights are inapt. There is a correlation between economic development and human rights; however, a basic scientific error is to confuse correlation with causation. Human rights may be a function of a society's economic development, but they do not arise out of individual market transactions. Although market transactions do depend on and assign private individual property rights, those rights are by their nature alienable. In contrast, fundamental rights are conceived of as inalienable. Moreover, the error of trying to ground civil rights in market or property rights can be seen just by looking to history. There we can note that the fascist dictatorships had nicely functioning markets, yet offered little or no human rights protection. Thus, if there is a correlation between human rights and market rights it is not causal. Additionally, even though human rights and property rights may coexist, they are not necessarily mutually reinforcing. After all, it is the property [*120] rights of first-world corporations that impel them to violate the human rights of workers and consumers in the third world.

For all of these reasons the analogy between modern human rights law and medieval *lex mercatoria* is unsuitable. *Lex mercatoria* concerned voluntary transactions between private persons. Although there are some market remedies available to human rights law, these must be seen as the carrot in a "carrot and stick" approach, and require active state sanctions in order to function.

II. Conclusion

As ordinary as directly enforceable rights and duties held by non-state actors under international law may seem today, such rights are a radical departure from the Westphalian system.ⁿ¹⁰⁹ The increasingly common imputation of rights and duties to non-state actors under international law occurs partly because of the integration of world trade and capital mobility - i.e., globalisation.ⁿ¹¹⁰ This shift of rights and duties from states to nonstate and super-state actors defines one aspect of the transformation of the Westphalian state system. Yet the post-Westphalian system is only beginning to develop regulatory mechanisms to govern multinational companies' behaviour.

Codes of conduct alone are one mechanism of governance; however, they are not the best way to prevent human rights abuse in the third world because voluntary codes of good conduct can be used as camouflage to delay, confuse and conceal real reform. In addition, expecting corporations to self-regulate is realistic only when ethical conduct and profitability are linked. On the other hand, codes of good conduct, in combination with binding rules - in either civil or criminal law - can be used to promote higher standards, while the binding rules will guarantee at least minimum standards. The corporate social responsibility movement is thus not necessarily a mere smokescreen, but it will not alone prevent human rights abuses because such abuses are profitable. Still, to some limited extent, investor, consumer,

and corporate self-interest can be harnessed to serve human rights, for example [*121] via shareholder activism.ⁿ¹¹ Codes of good conduct and labelling schemes are just two of several efforts to link profitability and social responsibility. ⁿ¹¹² When combined with the international law instruments, codes may encourage higher standards, while the positive law guarantees at least bare minimum standards. Here, as in human rights conventions, "hard" law guarantees minimum standards, and voluntary codes (or conventions) encourage higher standards. The fact that the corporation has long since escaped regulation within the Westphalian model explains why that model is transforming into a "spectrum" of actors and a system of global governance. Corporations are one of the new actors in the spectrum of international actors and thus corporate social responsibility and shareholder activism are one aspect of the "Post-Westphalian" system.

Legal Topics:

For related research and practice materials, see the following legal topics:

International Law Sovereign States & Individuals Human Rights General Overview Business & Corporate Law Corporations Shareholders General Overview Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Investment Tax Credit (IRC secs. 38, 39, 46-50)

FOOTNOTES:

n1. See Brad J. Kieserman, Profits and Principles: Promoting Multinational Corporate Responsibility By Amending the Alien Tort Claims Act, *48 Cath. U. L. Rev.* 881, 881 (1999) (global capital is highly mobile and follows profit, not human need); see also Comment, Corporate Liability for Violations of International Human Rights Law, *114 Harv. L. Rev.* 2025, 2025 (2001) (most corporate human rights violations go unpunished due to gaps in domestic and international laws).

n2. Jocasta Shakespeare, Gardens of Shame, *World Press Rev.*, Oct. 1, 1995, at 42. See also Nicole J. Krug, Exploiting Child Labour: Corporate Responsibility and the Role of Corporate Codes of Conduct, *14 N.Y.L. Sch. J. Hum. Rts.* 651, 651 (1998).

n3. See, e.g., Deborah J. Karet, Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?, *48 Buff. L. Rev.* 1047, 1061-69 (2000); Clean Clothes Campaign, at <http://www.cleanclothes.org/> (last visited Oct. 26, 2003).

n4. It is worth noting that "no Western oil company was willing to abandon its access to crude because of political risk in the West... . Second, these pressures did not deter new energy investments... . While most MNCs stayed away from Nigeria, oil companies increased their investments." Kenneth Rodman, "Think Globally, Punish Locally": Nonstate Actors, Multinational Corporations, and Human Rights Sanctions, *12 Ethics & Int'l Affairs* 19, 37 (1988).

n5. Diane Marie Amann, Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights, *24 Hastings Int'l & Comp. L. Rev.* 327, 329-31 (2001); Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy, 128, 145-48, available at <http://www.cleanclothes.org/ftp/beyondvoluntarism.pdf> (last visited Oct. 26, 2003).

n6. "When the Ogoni Nine were sentenced to death, Shell was asked by NGOs such as Amnesty International to use its influence to win clemency. Shell's response was "It is not for a commercial organisation to interfere with the legal processes of a sovereign state." Rodman, *supra* note 4, at 35.

n7. Conflict diamonds or, more directly, blood diamonds, are those diamonds produced in West Africa, particularly Sierra Leone and the Congo. These regions are in perpetual conflict because of the diamonds, which are used to finance the incessant barbaric civil wars often waged using child soldiers. The diamonds are both the object and means of financing the civil wars. See *Diamonds in Conflict*, United Nations Security Council, at <http://www.glo-balpolicy.org/security/issues/diamond/> (last visited Oct. 26, 2003).

n8. Blaine Harden, *Africa's Gems: Warfare's Best Friend*, N.Y. Times, Apr. 6, 2000, at A1; Amann, *supra* note 5, at 330.

n9. See Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalisation, *35 U.C. Davis L. Rev.* 705, 761-64 (2002); see also First-Ever Lawsuits Filed Charging Sweatshop Conspiracy Between Major U.S. Clothing Designers, Retailers, Foreign Textile Producers, Sweatshop Watch, at <http://www.sweatshopwatch.org/swatch/marianas/lawsuit.html> (last visited Oct. 26, 2003); William Branigin, Top Clothing Retailers Labelled Labor Abusers Sweatshops Allegedly Run on U.S. Territory, Wash. Post, Jan. 14, 1999, at A14, available at <http://www.house.gov/georgemiller/cnmipostarticle.html> (last visited Oct. 26, 2003).

n10. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

n11. Elizabeth Amon, *Coming to America: Alien Tort Claims Act Provides a Legal Forum for the World*, Nat'l L.J., Oct. 23, 2000, at A1, microformed on UMI Microform 60537-2000 (Bell & Howell Info. & Learning Co.).

n12. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

n13. E.g., *Doe v. Unocal Corp.*, No. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), vacated by No. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (appeal currently being reheard en banc).

n14. E.g., Jason Hoppin, *Chevron Hit with Human Rights Claim*, Nat'l L.J., Apr. 24, 2000, at B1; *Wiwa v. Royal Dutch Petro. Co.*, 226 F.3d 88 (2d Cir. 2000).

n15. See, e.g., Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at <http://www.hrw.org/reports/1999/enron/> (last visited Oct. 26, 2003).

n16. Kimberly Gregalis Granatino, Note, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?*, 23 *Suffolk Transnat'l L. Rev.* 191, 191 (1999) (describing poor-quality working conditions in the third world).

n17. Krug, *supra* note 2, at 651.

n18. Maria Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, 35 *Colum. J.L. & Soc. Probs.* 1, 1 (2001).

n19. See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

n20. See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labour Rights Through Private Initiatives*, 30 *Law & Pol'y Int'l Bus.* 111, 112-13 (1998) (outsourcing to take advantage of cheap unregulated third-world labour); see also Krug, *supra* note 2, at 658.

n21. "[Shell's] general manager explained the irrelevance of human rights to the economic opportunities in blunt terms: "For a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that.'" Rodman, *supra* note 4, at 35.

n22. David P. Forsythe, *The Political Economy of Human Rights: Transnational Corporations*, 14 *Human Rts. Working Papers* (Mar. 14, 2001), at <http://www.du.edu/humanrights/workingpapers/papers/14-forsythe-03-01.pdf> (last visited Oct. 26, 2003).

n23. Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 *Minn. J. Global Trade* 101, 117 (2002).

n24. Joel Makower, *Beyond the Bottom Line* 30 (Simon & Schuster 1994).

n25. Jeremy Lehrer, *Trading Profits for Change*, 25 *Hum. Rts.* 21, 23 (1988). See also Douglas Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 *Fordham Int'l L.J.* 1963, 1977 (1996).

n26. See Su-Ping Lu, *Comment, Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 *Colum. J. Transnat'l L.* 603, 611 (2000) (over 100 companies have voluntarily adopted codes of conduct).

n27. Thus, "the World Diamond Congress, meeting in 2000 in Antwerp, proposed the creation of an international diamond council made up of producers, manufacturers, traders, governments, and international organizations to oversee a new system to verify the provenance of rough diamonds." Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 *B.C. Int'l. Comp. L. Rev.* 273, 314 (2002), available at <http://www.bc.edu/bc<uscore>org/avp/law/lwsch/journals/bcicl/25<uscore>2/06<uscore>TXT.htm> (last visited Oct. 26, 2003). This is an example of nonstate actors taking over the role of states - namely, proposing new international norms, the very core of the distinction between "object" and "subject" of international law. *Id.*

n28. See Liubicic, *supra* note 20.

n29. Macek, *supra* note 23, at 107-09.

n30. Tripartite Declaration of Principles Concerning Multinational Enterprises and Special Policy, 17 Int'l Legal Materials 422 (1978).

n31. Organisation for Economic Cooperation and Development, The OECD Guidelines for Multinational Enterprises, 40 Int'l Legal Materials 236 (2001). See also Michael Anderson, Transnational Corporations and Environmental Damage: Is Tort Law the Answer?, 41 *Washburn L.J.* 399 (2002).

n32. See Lance Compa & Tashia Hinchcliffe Darricarrere, Enforcing International Labor Rights Through Corporate Codes of Conduct, 33 *Colum. J. Transnat'l L.* 663, 674-83 (1995) (analyzing various corporate codes).

n33. Macek, *supra* note 23, at 110.

n34. *Id.* at 119-24.

n35. "Economic globalization has been accompanied by a marked increase in the influence of international financial markets and transnational institutions, including corporations, in determining national policies and priorities." Shelton, *supra* note 27, at 276.

n36. Macek, *supra* note 23, at 108-10.

n37. *Id.*

n38. See U.N. Charter art. 2, para. 1: "The Organization is based on the principle of the sovereign equality of all its Members."; U.N. Charter art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"

n39. See Hans Corell, *Toward the Twenty-First Century*, 89 *Am. Soc'y Int'l L. Proc.* 568, 572 (1995).

n40. Daniel Th^urer, *Modernes Völkerrecht Ein System Im Wandel und Wachstum - Gerechtigkeitsgedanke als Kraft der Ver^anderung*, 60 *Zeitschrift f^ur Ausl^andisches ^uffentliches Recht und Völkerrecht* 557, 587 (2000).

n41. See Corell, *supra* note 39, at 572.

n42. See Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 *BROOK. J. INT'L L.* 17, 25 (1999) ("'Every individual' includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."); see also Robert McCorquodale, *Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations Within the International Human Rights Fence*, 1 *Human Rts. & Human Welfare* 21, 27 (2001), available at <http://www.du.edu/gsis/hrhw/volumes/2001/1-4/mccorquodale-addo.pdf> (last visited Oct. 26, 2003). Of course, the majority view is that transnational corporations do not enjoy any form of legal personality. However, that view is criticised for the practical reason that if transnational corporations have no international legal personality, then they would escape international human rights obligations. See Andrew Clapham, *Whither the State of Human Rights Protection?* (1998), at <http://www.humanrights.ch/bildungarbeit/seminare/pdf/000303<uscore>danailov<uscore>clapham.pdf> (last visited Oct. 26, 2003).

n43. Article 2(1) states that "no State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin." *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904, U.N. GAOR, 18th Sess., art. 2(1), U.N. Doc. A/RES/1904 (1963), <http://www.unesco.org/human<uscore>rights/dcb.htm> (last visited Oct. 26, 2003).

n44. "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs." *United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, art. 2(1), U.N. Doc. A/36/51 (1981), <http://www.church-of-the-lukumi.org/Resolution%2036-02.htm> (last visited Oct. 26, 2003).

n45. *Report of the United Nations Conference on Environment and Development*, U.N. GAOR, 47th Sess., Annex I, U.N. Doc. A/CONF.151/26 (vol. I) (1992), <http://www.un.org/>

documents/ga/conf151/aconf15126-1annex1.htm (last visited Oct. 26, 2003).

n46. Danwood Mzikenge Chirwa, *Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights Under the South African Constitution at Sec. 3.1* (2002), at www.communitylawcentre.org.za/ser/docs<uscore>2002/Researchseries1.doc (last visited Oct. 26, 2003).

n47. Article 2 of the Charter of Economic Rights and Duties of States says that multi-nationals are not to interfere with the internal affairs of a host country. This implicitly recognizes the (limited) international legal personality of multinational corporations. The Charter of Economic Rights and Duties of States, GA Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, art. 2.2(b), U.N. Doc. A/RES/3281 (1974), <http://www.dal.ca/<diff>wwwlaw/kindred.intllaw/ EcRtsandDuties.htm> (last visited Oct. 26, 2003).

n48. Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 *Tul. L. Rev.* 1431, 1457-58 (2002) (describing and refining the three-generation theory of human rights, noting that individuals have rights under international law in cases of violations of jus cogens).

n49. At the World Bank, NGOs or groups of individuals may request an Inspection Panel to investigate claims of injury arising out of an act or omission of the Bank resulting from its failure to follow operational policies and procedures with respect to the design, appraisal, and/or implementation of a Bank project organisations apply the law.

Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 *B.C. Int'l & Comp. L. Rev.* 235, 246 (2002), <http://www.bc.edu/bc<uscore>org/avp/law/lwsch/journals/bcicl/25<uscore>2/04<uscore>TXT.htm> (last visited Oct. 26, 2003).

n50. However, nonstate actors do play a marginal role in the formation of customary international law. "Looking at the activities of individuals, and more specifically NGOs, one finds evidence of an influence both in the formation and the application of international law, albeit one that is qualitatively and quantitatively less than that of states and international organizations." Hollis, *supra* note 49, at 243.

n51. For example, the North American Agreement on Environmental Cooperation [hereinafter NAAEC] permits private parties to petition the NAAEC Secretariat where those petitions are aimed at "enforcement rather than at harassing industry." The Secretariat may request a government to respond to the allegations and, after a two-thirds vote of the Council, may prepare a factual record and release it to the public. North American

Agreement on Environmental Cooperation, Sept. 8-14, 1993, art. 14-15, 32 Int'l Legal Materials 1480, 1488-89.

n52. Hollis, *supra* note 49, at 244.

n53. See, e.g., Penny Shepherd, A History of Ethical Investment, UK Social Investment Forum (May, 2001), at <http://www.uksif.org/Z/Z/Z/lib/2001/05/art-ps-histupd/index.shtml> (last visited Oct. 26, 2003).

n54. See Rodman, *supra* note 4, at 21 (highlighting the impact of disinvestment in South Africa during the apartheid era).

n55. *Id.* at 23.

n56. See John Christopher Anderson, Respecting Human Rights: Multinational Corporations Strike Out, 2 *U. Pa. J. Lab. & Emp. L.* 463, 470-72 (2000).

n57. Rodman, *supra* note 4, at 20; Anderson, *supra* note 56, at 472.

n58. Anderson, *supra* note 56, at 473.

n59. Rodman, *supra* note 4, at 34.

n60. See, e.g., Mary O'Hara, Counting the Cost of Social Responsibility, *The Guardian*, July 27, 2002, at <http://money.guardian.co.uk/ethicalmoney/story/0,1356,763861,00.html> (last visited Oct. 26, 2003).

n61. See, e.g., Canadian Firm Launches Social Index, *SocialFunds.com*, Feb. 2000, at <http://www.socialfunds.com/news/article.cgi/article160.html> (last visited Oct. 26, 2003).

n62. Anderson, *supra* note 56, at 472.

n63. Compa & Darricarrere, *supra* note 32, at 673.

n64. Liubicic, *supra* note 20, at 131.

n65. For a summary of the opposing viewpoints, see Bennet Freeman, *Human Rights and Corporate Responsibility, Issues in Global Education* (The Am. F. for Global Educ., New York, N.Y.), 2001-2002, at 4, <http://www.globaled.org/issues/171.pdf> (last visited Oct. 26, 2003).

n66. For example, Unocal has a code of good conduct that came back to haunt that company when it was sued for human rights violations. See the Unocal code at <http://www.unocal.com/uclcodeofconduct/index.htm> (last visited Oct. 26, 2003).

n67. Richard Howitt, *Report on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct* 11 (Dec. 17, 1998) (describing labour abuse in the third world, noting that some companies that abuse third-world labour have nonbinding codes of good conduct, which they ignore), at <http://www.cleanclothes.org/codes/howit.htm> (last visited Oct. 26, 2003).

n68. Initially, the multinationals ignored developing-country workers, they paid bribes, and they charged the same high price for HIV/AIDS drugs worldwide. Then, at least as regards working conditions and anti-HIV/AIDS drugs, the multinationals changed their behavior when confronted by collective outrage emanating from a community far broader than the corporate world. This community pressure is new, and it did force the multinationals' management to take into account constituencies beyond the shareholders.

Dickerson, *supra* note 48, at 1441.

n69. See generally Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 *BERKELEY J. INT'L L.* 45, 80 (2002) (discussing that codes of conduct include human rights norms that are obligatory duties, not voluntary actions).

n70. See Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 *Geo. Wash. Int'l L. Rev.* 401, 427 (2002). For a laudatory view of Sullivan, see Henry J. Richardson III, *Reverend Leon Sullivan's Principles, Race, and International Law: A Comment*, 15 *Temp. Int'l & Comp. L.J.* 55, 80 (2001).

n71. See the MacBride Principles at <http://www.umn.edu/humanrts/links/macbride.html> (last visited Oct. 26, 2003).

n72. See Compa & Darricarrere, *supra* note 32, at 674 (concluding that codes of conduct sponsored by parties external to corporations have not had much success).

n73. Macek, *supra* note 23, at 117.

n74. *Id.*

n75. The shareholder's resolution in the United States is based on SEC Rule 14a-8. 17 *C.F.R.* 240.14a-8 (2003).

n76. See, e.g., *Med. Comm. for Human Rights v. SEC*, 432 *F.2d* 659, 662 (*D.C. Cir.* 1970), vacated by 404 *U.S.* 403 (1972) (shareholder proposal to stop sale of napalm in part because of use in Vietnam).

n77. 17 *C.F.R.* 240.14a-8.

n78. E.g., *Cal. Pub. Employees' Ret. Sys. v. Coulter*, *C.A. No. 19191*, 2002 *WL* 31888343, at 11 (Del. Ch. Dec. 18, 2002).

n79. "Disinvestment, however, had only a minor impact on the South African economy. Almost all the departing firms sold their equity stakes ... and maintained an ongoing licensing relationship The new firms were no longer bound by their former parents' obligations such as the Sullivan principles... ." Rodman, *supra* note 4, at 28.

n80. *Id.* at 23-29.

n81. See *id.* at 30.

n82. See Roberta Romano, *Less is More: Making Shareholder Activism a Valuable Mechanism of Corporate Governance*, Center for Research on Pensions and Welfare Policies, Working Paper 12/01, at 17, available at <http://cerp.unito.it/Pubblicazioni/archivio/WP<uscore>CeRP/wp<uscore>12.pdf> (last visited Oct. 26, 2003).

n83. Amann, *supra* note 5, at 335-37.

n84. Ralph Steinhardt, *Litigating Corporate Responsibility, Global Dimensions*, at <http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateRe-ponsibility/steinhardtTranscript.htm> (last visited Oct. 26, 2003).

n85. S.E.C. Rule 14a-7, *17 C.F.R. 240.14a-7 (2003)*.

n86. S.E.C. Rule 14a-8, *17 C.F.R. 240.14a-8 (2003)*.

n87. For a case upholding poison pills in the context of shareholder activism, see, e.g., *Int'l Bhd. of Teamsters Gen. Fund. v. Fleming Cos., Inc.*, No. CIV-96-1650-A, 1997 WL 996768, at 1 (W.D. Okla. Jan. 24, 1997), *aff'd* and *remanded* by 173 F.3d 863 (10th Cir. Mar. 26, 1999).

n88. See, e.g., *Kasky v. Nike Inc.*, 45 P.3d 243, 247-48 (Cal. 2002).

n89. Id.

n90. *Id.* at 248.

n91. SEC Rule 14a-9, 17 C.F.R. 240.14a-9 (2003); SEC Rule 10b-5, C.F.R. 240.10b-5 (2003).

n92. Howitt, *supra* note 67, at 17 (preferential tax status for socially beneficial companies in Australia).

n93. Id. (supplementary export credits for socially responsible Swedish companies).

n94. See, e.g., Eric Engle, *La Fiscalite Verte en France*, Net-Iris.com, *Doctrine Juridique*, at <http://www.net-iris.com/publication/author/document.php3?document=90> (last visited Oct. 26, 2003).

n95. See Jane Lampman, *Human Rights Groups Gain 'Disclosure' Victory on Wall Street*, *Christian Sci. Monitor*, May 17, 2001, at 14.

n96. Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 *Harv. L. Rev.* 1433, 1455 (2002). There is controversy as to whether SEC disclosure requirements are obligatory.

n97. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *Harv. L. Rev.* 1197, 1212 (1999) (arguing that SEC has the power and that it is economical to require full disclosure, quoting Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

n98. See Williams, *supra* note 97, at 1284.

n99. See, e.g., Jim Schiro, CEO, Price-Waterhouse-Coopers, United States Securities & Exchange Commission Hearing on Auditor Independence (Sept. 20, 2000) (today, unlike ten years ago, investors want to know intangible assets of companies), available at <http://www.sec.gov/rules/extra/audmin3.htm> (last visited Oct. 26, 2003).

n100. Commission of the European Communities, Green Paper - Promoting a European Framework for Corporate Social Responsibility at 11, available at <http://europa.eu.int/comm/employment&social/soc-dial/csr/greenpaper&en.pdf> (last visited Oct. 26, 2003) (increasing use of social and environmental checklists by financial institutions to evaluate loans and investments; social responsibility can have financial advantages).

n101. *Id.*

n102. See, e.g., Larry D. Newman, RICO and the Russian Mafia: Toward a New Universal Principle Under International Law, 9 *Ind. Int'l & Comp. L. Rev.* 225, 249 (1998). Also note that transnational crime is yet another challenge to the Westphalian order.

n103. See Steinhardt, *supra* note 84, at para. 3; see also Volkmar Gessner & Ali Budak, *Emerging Legal Certainty: Empirical Studies on the Globalisation of Law* (1998). However, unlike Professor Steinhardt, Professor Gessner does not go so far as to say that the emerging global private law regime necessarily protects human rights. Certainly market-based protections alone are not sufficient to protect human rights.

n104. See Report of Proceedings, Human Rights and Corporate Responsibility, A Global Dimensions Seminar, Global Dimensions, June 1, 2001 (Professor Chinkin critiques the theory that modern human rights law is analogous to *lex mercatoria*) at <http://www.lse.ac.uk/collec-tions/globalDimensions/seminars/humanRightsAndCorporateResponsibility/report1.htm> (last visited Oct. 26, 2003) [hereinafter Report of Proceedings].

n105. Douglass Cassel, Corporate Initiatives: A Second Human Rights Revolution?, 19 *Fordham Int'l L.J.* 1963, 1984 (1996) (arguing that the second half of the twentieth century witnessed a second human rights revolution).

n106. See Report of Proceedings, *supra* note 104.

n107. *110 F. Supp. 2d 1294, 1296-1303 (D.C. Cal. 2000)*.

n108. *226 F.3d 88, 92-93 (2d Cir. 2000)*.

n109. See John King Gamble et al., Human Rights Treaties: A Suggested Typology, An Historical Perspective, *7 Buff. Hum. Rts. L. Rev.* 33, 39 (2001) (discussing the relationship between global and regional human rights instruments, arguing that the second half of the twentieth century was propitious for human rights).

n110. Elisa Westfield, Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century, *42 Va. J. Int'l L.* 1075, 1077 (2002).

n111. Steinhardt, *supra* note 84. Professor Ralph Steinhardt distinguishes between a market-based regime, domestic regulation, international regulation, and civil liability. *Id.*

n112. Liubicic, *supra* note 20, at 117.