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The Place of the Private Transnational Actor in International Law: Human Rights Norms, Development Aims, and Understanding Corporate Self-Regulation as Soft Law

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much from abroad (more than $2 billion a day from abroad), and increasingly from lawless regimes such as the People's Republic of China and corrupt Gulf monarchies.[23] In *The Revolt of the Masses,* José Ortega y Gasset compared modern western man to a spoiled child, concerned with only his own well-being, at the same time ignorant about the causes of that well-being, believing that the material and social organization of civilization has been placed at his disposal like the air, unable to see that behind the benefits of civilization are marvels of invention and construction which are only maintained by great effort and foresight.[24]

Today's generation is apparently too busy enjoying all the wonders and frivolity of civilization to remember that it was built on a foundation of massive public investment, public spending and borrowing on a far grander scale than today. Not surprisingly, we witness deteriorating infrastructure, from collapsing bridges to failing public institutions. It becomes harder to imagine how it could be done again. Proposals made by Nobel laureate economists are easily dismissed in the state of amnesia. The so-called Tobin Tax (named after the late James Tobin), a proposal for a small turnover tax on cross-border currency flows to protect the monetary capabilities of nation-states, while endorsed by European parliaments and presidents, was killed off during the Clinton Administration by a captured Treasury Department, the very Wall Street-Treasury Complex.

Today's monetary amnesia is a collective forgetting of our own American history. We forget what it took to build this and other nations, and then we cannot remember how to rebuild after hurricanes or how to reconstruct war torn countries abroad.

This is also an amnesia that is quickly becoming globalized by the Bretton Woods institutions, responding to powerful non-state private financial actors, requiring client states to accept central bank capture and then to call it central bank autonomy. Most of those pushing the program no longer even remember that there was once any alternative, a highly effective alternative. This amnesia, serving private interests, undermining public ends, has now become one of America's most insidious ideological exports, a perverse contribution to the international legal and institutional order that constrains social progress at home and around the world.

THE PLACE OF THE PRIVATE TRANSNATIONAL ACTOR IN INTERNATIONAL LAW: HUMAN RIGHTS NORMS, DEVELOPMENT AIMS, AND UNDERSTANDING CORPORATE SELF-REGULATION AS SOFT LAW

By Erika R. George[*]

My presentation advances a more expansive vision of the subjects and sources of international law by conceptualizing recent efforts to bring the conduct of private transnational commercial actors into compliance with human rights norms as potentially law making. Applying the "communication process theory" of international law making advanced by Professor Michael Reisman to the recent proliferation of pledges made by private corporate actors purporting to embrace international development priorities and human rights principles

[23] Perhaps control of U.S. interest rates is passing to Chinese President Hu Jintao. Paul Krugman, *China Unpegs Itself,* N.Y. TIMES, July 22, 2005, at A19. "Hu's in charge here," according to Robert J. Barbera, chief economist of ITG/Hoenig. Floyd Norris, *Who's in Charge of Determining U.S. Interest Rates? It May be Beijing,* N.Y. TIMES, May 13, 2005, at C1. It is sad enough to remind one of the old Abbott and Costello routine, "Who's on first." "Hu's setting U.S. interest rates?" "Exactly!"

[24] JOSÉ ORTEGA Y GASSET, THE REVOLT OF THE MASSES 58–60 (1932).

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in response to civil society activism, I argue that international legal scholars should develop a critical appreciation for the ways in which non-state actors are engaged in a process of functional norm generation and law making.

Conceptual Challenges Presented by the Private Actor

The multinational corporation presents a challenge to the conceptual foundation of international law as premised on state action and state responsibility rendering certain approaches to international law descriptively and conceptually adequate for the future. Because the place where power resides in the international system is becoming increasingly more diffuse, 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 the international system.

The conceptual and regulatory problems multinational corporations would eventually come to pose for international 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."[1]

While more contemporary understandings of international law have expanded the definition of international law beyond that body of rules governing the conduct of states and international organization in their relations with one another, it is still axiomatic that the corpus of international legal rules are still created by states.

Most recent efforts to address the challenge to international law presented by the multinational corporation have tended to focus on whether or not corporations have any obligations under existing international law. I invite scholars of international law to conceptualize how we might understand the obligations corporations are purporting to assume when they proliferate voluntary codes to guide their conduct.

Tracking the Trajectory of Corporate Accountability Trends

Need multinational enterprise care about international human rights, the environment, sustainable economic development and poverty eradication?

Many commentators would 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. Human rights and environmental advocacy efforts to advance to a normative case for "yes" have yielded an interactive series of responses from corporations.

I submit that we are witnessing an evolution in the response of industry efforts to bring corporate conduct into greater compliance with human right norms. From an early "you can't make us" posture, the industry response shifted somewhat to consider, but reject, the question of corporate duties to respect human rights. This coincided with the birth of the global environmental movement and founding of international human rights organizations such as Amnesty International in the 1970s. Next, the response of industry moved still further towards questioning whether or not they could be made to conform to pro-social and environmental norms advanced by civil society groups at a time when environmental reporting systems emerged and public interest NGO's issuing consumer reports continued to proliferate throughout the 1980s.

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

By the 1990s, the industry response eventually came around to the recognition that concern for human rights just might have a place in business planning contemporaneously with a growing the backlash against globalization as massive public demonstrations protesting the WTO and high profile Alien Tort Claims Act test cases brought by human rights activists against large multinational corporations for abuses abroad grew in number. Most recently, the industry response to these pressures seems to reflect an enlightened self-interest that has given rise to what I will call a corporate social responsibly (''CSR'') shift now driven by industry and characterized by a proliferation of codes of conduct, investor relations specialists, green investment funds, etc.

Now, many companies, especially large multinationals have adopted voluntary codes of conduct. Industry has undertaken, at levels as small as the individual company and as large as an entire business sector, to design and adopt voluntary codes that embrace social and environmental concerns. There is a growing recognition of how a company's reputation affects its bottom line. 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. While 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, the CSR movement is not without detractors.[2]

Evolving and Emerging Norms of Conduct Creating Law?

Professor Michael Reisman offers a theory of who makes international law and how and when it is made which understands ''law making, or the prescribing of policy as authoritative for a community'' as a ''process of communication.''[3] I believe this view offers insight into the CSR pledge proliferation phenomenon and may be used to ground an account of CSR as generative of soft legal norms. There are two primary features 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. Soft law represents a shift of power from the formal ''hard'' law making arenas.[4]

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. Any communication between politically relevant groups which shape wide expectations about appropriate further conduct must be considered as functional lawmaking.

Effective international law can be identified by looking the interrelationship among three things: (1) ''policy content'' which refers to the substantive norm brought about through a mediation of interests which eventually produces some value through certain conduct or behavior; (2) ''authority signaling'' which requires that the values promoted through policy content has origins in a base of authority respected as such by the relevant community; and

[2] *See, e.g., The Good Company: A Skeptical Look at Corporate Social Responsibility*, Economist, Jan. 22–28, 2005.

[3] W. Michael Reisman, *International Law Making: A Process of Communication*, 75 ASIL Proc. 101–03 (1981).

[4] *See generally* Gunther Handle et al., *A Hard Look at Soft Law*, 82 ASIL Proc. 371 (1988).

(3) "control intention" which requires the signaling of a credible intent to control conduct to ensure it conforms with substantive norms. When all three are effectively mediated to the relevant audience—the result is law. Coordinated and calibrated properly, when these elements are present in a given process, even a non-authoritative practice that endures may become prescriptive.

International law must come to recognized that there are multiple and heterogeneous sources of authority in pluralistic systems. Private actors are engaging one another and influencing the evolution of global governances through their processes of mediating interests to generate norms seen as legitimate and supported by an intent to conform conduct to these norms. We must develop an account of private conduct and its meaning for the public international legal system. We should consider whether corporations are making law in making pledges. Is the Global Compact a Contract?

The trend trajectory I've described demonstrates that there is an emerging norm for corporations to respect human rights and refraining from complicity in violations of human rights principles. The civil society and corporate actors engaged in this communication process view their engagement as authoritative and legitimate. Despite constant references made to the "non-binding" nature of the pledges made by companies and contained in the Compact, I submit that the process by which these pledges are coming about may properly be understood to be law in that they contain a policy statement, they are derived from a legitimate authority, and a control intent is increasingly being demonstrated by some number of consumers who may well chose company A's products over company Bs' products where A is an avowed and proven socially responsible business entity. In some circumstances, it may come to be the case that certain "non-binding" or voluntary standards can be understood to serve as the functional equivalent of formally legislated and ratified government law.

Conclusion: Towards Multiple Models of International Norm Creation

I urge international legal scholars to remain open to the possibility that private non-state actors may make law where law making is understood to be a process of communication creating authoritative norms for a community. These norms and standards emerge through forms of multilayered interest mediation and reflect a shift of power from the formal "hard" law making arenas towards new forums and modes of international norm creation.

In addition to debating whether international law applies to corporations, academic and policy makers should consider whether corporations are making law when they making pro-social pledges. The communication between multinational enterprises, 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. The paper attempts to explain this new conflagration of influences and actions. It is this process which will significantly shape the future of international law.

Remittance Liquidity and Citizen "Arbitrage"

By José Gabilondo[*]

My thesis is that the increase in worker remittances—mostly from labor-importing states in the developed world to labor-exporting states in the developing world—has created a

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