

## Article

# The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights

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## INTRODUCTION

Global economic governance régimes are frequently touted as providing innovative ways<sup>1</sup> for transnational business enterprises, often working in collaboration<sup>2</sup> with governments, international organizations, and non-governmental organizations (NGOs),<sup>3</sup> to advance corporate social responsibility (CSR)<sup>4</sup> and tackle social problems in developing

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1. See, e.g., Constantine E. Passaris, *Redesigning Financial Governance for the New Global Economy of the 21<sup>st</sup> Century*, 14:1 J. COMP. INT'L MGMT. 1, 1-2 (2011) (calling multinational and transnational private corporations catalysts of globalization and arguing that global economic régimes are essential to the modern global economy).

2. See Virginia Haufler, *Globalization and Industry Self-Regulation*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 226, 229–30 (Miles Kahler & David A. Lake eds., 2003) [hereinafter GOVERNANCE IN A GLOBAL ECONOMY] (describing the emerging system of governance by non-state, private sector actors alongside national and international regulatory systems).

3. See Miles Kahler & David A. Lake, *Globalization and Governance*, in GOVERNANCE IN A GLOBAL ECONOMY, *supra* note 2, at 1 (noting the shift from “public” and state governance to governance by regions, municipalities, supranational organizations, and private actors like multinational corporations and NGOs).

4. See Peter Gourevitch, *Corporate Governance: Global Markets, National Politics*, in GOVERNANCE IN A GLOBAL ECONOMY *supra* note 2, at 305, 312–15 (arguing that corporate governance is now connected to global governance; mechanisms for corporate governance include market pressures, national regulatory systems, international institutions, treaties, legislation, politicians, specialized associations, and NGOs); James N. Rosenau,

countries.<sup>5</sup> In pursuing these objectives, such régimes typically operate outside of traditional frameworks of “hard” international law.<sup>6</sup>

Yet, the means employed by global governance régimes in the deployment of public-private power and even private power<sup>7</sup> alone should be viewed from a critical perspective to ensure they are subject to adequate restraint. Accordingly, this article argues that the constraints of rule of law and of human rights ought to attach not only to the conduct of states and their agents but also to the conduct of all international economic participants.

The reasons for demanding special scrutiny are simple. First, society cannot trust corporations to be “good”<sup>8</sup> any more so than it can trust nation-states to be “good,”<sup>9</sup> regardless of

*Governance in the Twenty-First Century*, 1 GLOBAL GOVERNANCE 13, 23 (1995) (suggesting that the required control mechanisms for an ever-more interdependent world outstrip the capacity and readiness of national governments, thus leading NGOs to serve as emerging actors in transnational governance).

5. DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 75 (2005) (improving the conditions of factory and agricultural workers in developing countries has become a major focus of contemporary corporate social responsibility (CSR) since the 1990s).

6. See David Vogel, *Private Regulation of Global Corporate Conduct*, in *THE POLITICS OF GLOBAL REGULATION* 151, 153–54 [hereinafter *THE POLITICS OF GLOBAL REGULATION*] (Walter Mattli & Ngaire Woods eds., 2009) (describing how multinational firms and global supply networks operate in a regulatory framework of “soft law” consisting of private, non-state, or market-based standards operating outside and/or alongside the state and “hard” law).

7. See generally VIRGINIA HAUFLE, *A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY* (2001); Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 3, 3–22 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (describing the growing number of non-state and private actors participating in international governance).

8. See Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 207, 207–08 (Doreen McBarnet et al. eds., 2007) [hereinafter *THE NEW CORPORATE ACCOUNTABILITY*] (referencing PHILIP SELZNICK, *THE COMMUNITARIAN PERSUASION* 101–02 (2002) and Selznick’s notion of the need for “corporate conscience” to ensure that businesses are held accountable and take their responsibilities seriously).

9. See generally, e.g., Eric M. Uslaner, *Trust and the Economic Crisis of 2008*, 13 *CORP. REPUTATION REV. (SPECIAL ISSUE)* 110, 110–23 (2010) (explaining that the drop in public confidence in business and government after financial crisis was due to the perception that wealthy business people received inequitable, preferential treatment over ordinary Americans).

how noble-sounding corporations' rhetorics are and despite the fact that NGOs take on roles as corporations' invigilators. Indeed, while many NGOs appear well-intentioned, society often forgets they are special interest organizations committed to advancing narrow agendas. NGOs are not necessarily reliable guardians of the common global good.<sup>10</sup> Second, despite how powerful and influential corporations, international organizations, NGOs, and other economic participants in global civil society are from a descriptive standpoint, considering matters from a normative standpoint leads to a demand for justification and legitimacy.<sup>11</sup> Participants in economic governance cannot, as a matter of justice and morality, stand above the constraints of the rule of law.<sup>12</sup> Nor can they escape responsibilities for human rights.<sup>13</sup> Even though such actors may gain prominence in a descriptive and instrumental sense, they must be regarded as restrained in a normative and non-instrumental sense by objective universal moral standards.<sup>14</sup>

From a logical point of view, it is insufficient to merely describe, as political scientists<sup>15</sup> and economists<sup>16</sup> have, the

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10. Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION*, *supra* note 6, at 44, 47 (explaining that firms, NGOs, and other actors operate in the transnational regulatory space not as neutrals seeking "good governance" but as partisans pursuing their own special interests and values).

11. Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 n.86 (1998) (linking the concepts of normative factors, legitimacy, and justification).

12. *See, e.g.*, Menno T. Kamminga, *Corporate Obligations under International Law*, 71 INT'L ASS'N REP. CONF. 1, 2 (2004) (noting that it has long been established that corporations have legal obligations, especially in areas of labor and environmental law).

13. Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("[E]very individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.").

14. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 80–81 (2004) (referencing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) and Dworkin's notion that the rule of law consists of more than mere rules; it also encompasses the community's shared overarching moral and political principals).

15. *See generally* THE POLITICS OF GLOBAL REGULATION, *supra* note 6 (providing political perspectives on emerging global economic governance).

emergence of new arrangements for global economic governance. Their efforts in documenting, classifying, and providing empirical analysis of power shifts do not provide moral justifications or groundings of legitimacy. It is also insufficient, as management theorists<sup>17</sup> have done, to propose innovative instrumental strategies for managing the various stakeholder interests at play in emerging forms of governance. Indeed, as one surveys relevant literature, it becomes clear that an instrumentalist conception dominates in many of the recent portrayals of “new governance” régimes.<sup>18</sup> Such depictions are mainly concerned with the efficacy of international régimes or networks and with the question of what motivates business enterprises to comply with “soft law.” Generally, “soft law” is seen as an embodiment of corporate social responsibility or sustainability.<sup>19</sup> Some writers explain this compliance in terms of accountability (business competitiveness, risk management and corporate image),<sup>20</sup> profitability,<sup>21</sup> club theory,<sup>22</sup> and

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16. See, e.g., Lisa L. Martin, *The Leverage of Economic Theories: Explaining Governance in an Internationalized Industry*, in GOVERNANCE IN A GLOBAL ECONOMY, *supra* note 2, at 33, 33–59 (describing globalization as the reduction of barriers to economic exchange and a greater mobility in economic integration).

17. See, e.g., Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. STUD. 47, 47–73 (2006) (using neo-institutional and stakeholder theory to reflect on the legitimacy of stakeholder causes and their effects on corporate social responsibility).

18. See e.g., Jean-Pascal Gond, Guido Palazzo, & Kunal Basu, *Reconsidering Instrumental Corporate Social Responsibility through the Mafia Metaphor*, 19 BUS. ETHIC Q. 57, 57–89 (2009) (using an instrumental perspective to critically evaluate CSR in theory and practice by considering the organized Italian mafia).

19. See VOGEL, *supra* note 5, at 16–47 (arguing there is a bottom line case for business virtue that motivates CSR); see also Simon Zadek & Alex McGillivray, *Responsible Competitiveness: Making Sustainability Count in Global Markets*, HARV. INT'L REV. 72, 72–77 (2008).

20. Simon Zadek, *The Logic of Collaborative Governance: Corporate Responsibility, Accountability, and the Social Contract* 3 (Corp. Soc. Responsibility Initiative, Working Paper No. 17, 2006) (framing compliance as a matter of business management, competitiveness, and corporate image).

21. VOGEL, *supra* note 5, at 19–24 (“Virtually all contemporary writing on CSR emphasizes its links to corporate profitability.”).

22. See generally VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE (Matthew Potoski & Aseem Prakash eds., 2009) (suggesting that club theory in voluntary programs offers a compliance mechanism for holding firms socially responsible for their promises).

prisoners' dilemma or coordination externality incentives.<sup>23</sup> While such studies are important, society nevertheless stands in need of a normative, non-instrumental justificatory approach to global economic governance.

An analogy may be helpful to underscore the importance of a call for normative justification beyond mainly descriptive accounts. It is one thing to objectively report and accurately chronicle the rise of organized syndicates alongside of, and sometimes in strategic collaboration with, governmental structures while noting their instrumental success in advancing economic interests.<sup>24</sup> However, it would be nearly impossible to articulate a plausible normative justification for the rise of organized syndicates, especially given their notorious disregard and contempt for the rule of law and human rights.<sup>25</sup> This analogy highlights the wide gulf that can exist between descriptive and normative accounts of phenomena.

The concepts of the rule of law on one hand and human rights on the other make up two of the most critical frameworks for understanding and articulating the legal and moral responsibilities of participants in today's emerging transnational governance régimes. This is the case in both theory and in practice. The discourse of the rule of law and the language of human rights permeate many theories of international law, political theory, and scholarship in international economic relations.<sup>26</sup> The formulation of corporate ethics codes, industry-wide regulatory standards, and collaborative schemes with states and NGOs are examples of how such discussions figure prominently into the practical

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23. Kenneth W. Abbott & Duncan Snidal, *International "Standards" and International Governance*, 8 J. EUR. PUB. POL'Y (SPECIAL ISSUE) 345, 345–70 (2001) (using the concept of the prisoner's dilemma to discuss corporate compliance incentives).

24. See generally THOMAS REPETTO, *AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER* (2004) (chronicling the history of organized syndicates in America); *Gond, Palazzo, & Basu*, *supra* note 18.

25. Anup Shah, *Corporations and Human Rights*, GLOBAL ISSUES, <http://www.globalissues.org/article/51/corporations-and-human-rights> (last updated Sept. 19, 2002) (noting that with companies' drive for profits, "there has often come a disregard for human rights").

26. See, e.g., TAMANAHA, *supra* note 14, at 127–36; Terry Nardin, *Theorising the International Rule of Law*, 34 REV. INT'L STUD. 385, 401 (2008). See also Anthony D'Amato, *Are Human Rights Good for International Business?*, 1 NW. J. INT'L L. & BUS. 22, 22–32 (1979); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 931–1023 (2004).

undertakings of business enterprises.<sup>27</sup> Practical undertakings also support the efforts of civil society and legal officials to delineate the nature and scope of the responsibilities attending those initiatives.<sup>28</sup>

This article addresses the heart of these ideas. It takes an epistemological approach involving higher-order philosophical analysis and reflection providing a conceptual space for articulating a normative and non-instrumental foundation for the rule of law and human rights.

As a logical first step, one needs to define “rule of law” and “human rights.” This is an epistemological problem. Are the schemes based upon non-instrumental moral commitment to law and rights, or instead divorced from the normative realm and driven purely by the instrumental power interests of transnational actors?<sup>29</sup> This article proposes drawing upon concepts from the philosophy of law and relating them to key features of global economic governance arrangements in an effort to comprehend the extent of congruence with the rule of law and human rights taken in normative, non-instrumental terms.

Unlike descriptive theory which explains how things are, normative theory describes how things ought to be.<sup>30</sup> Expressed in terms pertaining to the global governance context, a normative theory is needed to guide economic participants as to

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27. Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability*, in *THE NEW CORPORATE ACCOUNTABILITY*, *supra* note 8, at 10–12 (highlighting the increase in corporate codes of conduct, ethics codes, and industry wide commitments; for example, all US Fortune 500 companies have implemented codes of conduct).

28. Lee A. Tavis, *The Globalization Phenomenon and Multinational Corporate Developmental Responsibility*, in *GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME* 13, 23 (Oliver F. Williams ed., 2000) [hereinafter *GLOBAL CODES OF CONDUCT*] (describing the partnership between civil sector regulation and private and state actors).

29. See, e.g., Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 *BUS. ETHICS Q.* 371, 377 (2010) (providing a non-instrumental moral account of transnational corporations' commitments to defending human rights beyond mere strategy).

30. David Over, *Rationality and the Normative/Descriptive Distinction*, in *BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING* 3 (Derek J. Koehler & Nigel Harvey eds., 2004) (saying that normative theories “aim to tell us how we ideally should or ought to reason, make judgments, and take decisions. These theories, particularly formal logic, probability theory, and decision theory, give us rules to follow or conform to that supposedly make our thought rational,” while descriptive theories “try to describe how people actually think.”).

how they ought to act.<sup>31</sup> Further, a theory may appear to be normative yet actually be a descriptive account, offering contingent directives, what Immanuel Kant termed “hypothetical imperatives,”<sup>32</sup> that instruct participants in an instrumental fashion. These “hypothetical imperatives” tell participants how they should act *if* they wish to attain some particular objective. Nevertheless, a full-blooded normative theory attempts to provide “categorical imperatives,”<sup>33</sup> lending moral direction about how participants ought to act in any case, that is, in a non-instrumental way.

This article has two main sections. The first centers on the rule of law, while the second focuses on human rights. Concerning the rule of law discussion in the first section, a normative, non-instrumental account is achieved through the Kantian conception of a regulative ideal.<sup>34</sup> Regarding the treatment of human rights in the second section, a normative, non-instrumental account is attained by way of a common public justification for human rights norms of business.<sup>35</sup> Such understandings of rule of law and human rights respectively, it is argued, are best suited to provide a normative benchmark against which to assess particular extant régimes.

Part A of the first section begins with an overview of emerging global governance régimes, indicating the ways that such régimes pose special problems from the standpoint of an international rule of law. Part B discusses accountability and methods for enforcement of global governance régimes. Part C attempts to summarize formulations of the rule of law. Contrasting instrumental and non-instrumental conceptions of law, Part C argues that whereas instrumental accounts may appear to lend support to decentralized and fragmented features of global governance, what is called for on a deeper level is a non-instrumental understanding of law. Accomplishing such an understanding requires that the rule of law be posited not as a descriptive constitutive notion but

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31. Rodney J. Blackman, *Supplemental Paper: There Is There There: Defending the Defenseless with Procedural Natural Law*, 37 ARIZ. L. REV. 285, 309 (citing WILLIAM FRANKENA, ETHICS 5 (1963)) (noting that normative theories answer problems about what is right or about what ought to be done).

32. See generally ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY (1989).

33. *Id.*

34. *Id.*

35. Garth Meintjes, *An International Human Rights Perspective on Corporate Codes*, in GLOBAL CODES OF CONDUCT, *supra* note 28, at 83.

instead as a normative regulative principle. Part C concludes by deriving the core of this ideal from mainstream accounts of the rule of law.

Part A of the second section discusses how instrumental justification for human rights in global governance has arisen, first in support of corporate social responsibility generally and then by extension into the human rights context from negative and positive “business case” justifications. Part A provides a discussion of the inadequacy and logical incoherence of such justifications. Part B shows how the deeper non-instrumental character of human rights is established from a common public and invisible law justification, in contradistinction from narrower instrumental justifications.

This article concludes that gaining a philosophically sophisticated understanding of the rule of law and human rights remains a vital task because such theoretical discussions can and do play important roles in the contemporary discourse of global economic governance. The rule of law and human rights, concepts central to the interplay between international law and emerging global governance, deserve careful deliberation. It is important that lawyers, businesspersons, politicians, and citizens consider them carefully in order to facilitate meaningful discussions about them, the conditions that determine their existence, whether they are intrinsically valuable, and whether they constitute justifiable ideals to pursue in the design of an emerging world order.

## I. GLOBAL ECONOMIC GOVERNANCE AND THE RULE OF LAW

### A. OVERVIEW OF EMERGING RÉGIMES

The traditional role of “hard”<sup>36</sup> public international law is being confronted by the emergence of informal regulatory régimes and civil society arrangements for global governance. Unlike traditional domestic legal régimes whose norms are enforced through centralized systems of sanctions, emergent

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36. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421–56 (2000) (defining hard law and explaining differences between hard and soft law; in international law, hard law encompasses self-executing treaties or international agreements and customary laws that give rise to legally enforceable commitments on behalf of states and other subjects of international law).



“soft law”<sup>37</sup> norms of global governance are akin to public international law in the sense that they rely on decentralized enforcement mechanisms.

Unlike “hard” public international law, the enforcement and governance of soft law does not rest on traditional institutions of public authority.<sup>38</sup> Whereas traditionally corporate governance was shaped by substantive law promulgated by governmental authority, today’s transnational businesses function within a new consortium of authorities.<sup>39</sup> Areas of authority traditionally reserved to government are now shared with non-state delegations.<sup>40</sup>

Numerous accounts of emerging global governance régimes portray the promulgation of voluntary civil regulations as a manifestation of acceptance of new social contracts yielded by growing global societal consensus as to the proper performance, responsiveness, and responsibility of business enterprises.<sup>41</sup> Civil regulation is generated within market-based, non-state, and private regulatory structures. These components govern the behavior of transnational enterprises along with their global supply networks.<sup>42</sup>

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37. See Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 499 (1999) (denoting soft law as a self-contained set of obligations arising out of the occasional preference of nation-states to reach non-binding agreements and to pattern relations to avoid application of treaty or customary law); Kinley & Tadaki, *supra* note 26, at 960 (defining soft law instruments as non-binding, quasi-legal instruments); Alan C. Neal, *Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?*, 29 COMP. LAB. L. & POL’Y J. 459, 464 (2008) (noting desirability of so-called soft law regulations as opposed to the traditional hard law regulatory approach); Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 100, 109–110, 113 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE] (attributing the flexibility and non-binding nature of soft law to its existence outside the confines of state made treaties, and noting that soft law allows for participants beyond nation-states and inter-governmental organizations).

38. O’Connell, *supra* note 37, at 110 (“Soft law can fill the gaps of a hard law instrument without the need for entering into laborious procedure of treaty amendment.”).

39. See Inger Ulleberg, *The Role and Impact of NGOs in Capacity Development: From Replacing the State to Reinventing Education* (United Nations Educ., Sci. & Cultural Org. and Int’l Inst. Educ. Plan.), available at [unesdoc.unesco.org/images/0018/001869/186980e.pdf](http://unesdoc.unesco.org/images/0018/001869/186980e.pdf).

40. *Id.* at 8 (“As development actors, NGOs have become the main service providers in countries where the government is unable to fulfill its traditional role.”).

41. See Vogel, *supra* note 6, at 155.

42. See *id.*, at 151, 153–154.

In global governance, civil regulations ordinarily function alongside nation-states rather than from within nation-states.<sup>43</sup> The advent of soft-law's regulatory influence outside nations' regulatory schemes has empowered transnational non-state actors.<sup>44</sup> This gives the private sector a much more prominent public role. Private authorities have a growing role in transnational economic regulation.<sup>45</sup> Corporations are now forming a part of an emerging global public sphere.<sup>46</sup>

Civil regulations are not replacements for nation-states, but instead institute governance régimes within wider global structures of "social capacity and agency" where none existed before.<sup>47</sup> The advent of civil regulation spells the emergence of a global "governance triangle" where nation-states are just one component of global regulatory authority.<sup>48</sup>

The idea of governance without government first appeared in scholarly literature in the 1990s.<sup>49</sup> Arising as a consequence of economic globalization, it signaled changes that globalization caused in the governance structure of international society.<sup>50</sup> The word "governance" began referring to self-organizing systems growing up alongside hierarchies and markets that comprise government structures.<sup>51</sup>

Global governance refers to the expansion of the sphere of influence of governing structures to entities beyond nation-states that do not have sovereign authority.<sup>52</sup> Governance and government are logically distinct phenomena.<sup>53</sup> Governance

43. See Haufler, *supra* note 2.

44. *Id.* at 226–27.

45. HAUFLE, *supra* note 7, at 1–5; Hall & Biersteker, *supra* note 7, at 4–8.

46. HAUFLE, *supra* note 7, at 7.

47. John Gerard Ruggie, *Reconstituting the Global Public Domain – Issues, Actors, and Practices*, 10 EUR. J. INT'L REL. 499, 519 (2004).

48. Abbott & Snidal, *supra* note 10, at 44–50.

49. For an example of an early work discussing governance, see Linda Cornett & James A. Caporaso, "And Still It Moves:" *State Interests and Social Forces in the European Community*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 219, 228 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) (referencing Cecchini Report and White Papers).

50. See generally *id.*

51. R. A. W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652, 660 (1996).

52. Lawrence S. Finkelstein, *What is Global Governance?*, 1 GLOBAL GOVERNANCE, *supra* note 4, at 369.

53. Kahler & Lake, *Globalization and Governance*, in GOVERNANCE IN A GLOBAL ECONOMY, *supra* note 2, at 7 (defining governance as the "sum of the many ways individuals and institutions, public and private, manage their

connotes a process founded on the absence of centralized international governmental authority.<sup>54</sup> “Global governance” can involve joint efforts of public, private, and civil-society organizations undertaking roles within the international realm that governments traditionally have assumed within the nation-state.<sup>55</sup> “Governance” is taken in a “public” sense to mean that which government does.<sup>56</sup> Although global governance is undertaken by a variety of private and public actors across the spectrum of civil society, it is the “public” character underlying the idea of governance that relates to this article’s inquiry about whether and to what extent global governance takes place under the color of rule of law. A demand for justification is insistent given that global governance presumes to deal authoritatively with international human rights, which traditionally have been juridical concepts resting at the core of the rule of law.<sup>57</sup>

### 1. Varieties of Global Civil Regulations

The growth of CSR has brought about novel global governance mechanisms and business civil regulations.<sup>58</sup> Global companies are seeking to propagate principles for responsible business conduct in different ways.<sup>59</sup> These ways

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common affairs” and opining that governance is patterned social interaction.)

54. *Id.* at 8 (emphasizing that regardless of how it is conceived, governance is not government).

55. James N. Rosenau, *Citizenship in a Changing Global Order*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS, *supra* note 49, at 286–287 (noting that depending on an individual’s loyalty, he or she may prefer governance by a territorial community, a previously-existing nation-state, a historic nation, a regional community, etc.).

56. John Donahue, *On Collaborative Governance* 1–2 (Corp. Soc. Responsibility Initiative, Working Paper No. 2, 2004) (contradicting the notion that public governance is outside of and transcendent to government, and instead noting that governance is what government does; firms and NGOs work in collaboration with, not outside of, the government parameter).

57. *See generally* James W. Nickel, *Is Today’s International Human Rights System a Global Governance Regime?*, 6 J. ETHICS 353, 353 (2002).

58. McBarnet, *supra* note 27, at 9–13 (describing the evolution of CSR from focusing on the bottom line alone to considering people, the planet, and profits; as major companies adopt CSR policies, the range of socio-economic issues continue to expand and impact civil society, and particularly NGOs).

59. *See* Laura Albareda, *Corporate Responsibility, Governance and Accountability: From Self-Regulation to Co-Regulation*, 8 CORP. GOVERNANCE 430, 431 (2008) (discussing the rapid growth of responsible business policies among transnational corporations and the evolving corporate behavior, featuring new collaborations and increased cooperation among firms, NGOs, and transnational companies).

are classified as: (1) corporate self-regulatory initiatives which are voluntary projects taken on individually in the market; (2) inter-firm and cross-industry cooperative initiatives which are voluntary tools established cooperatively between firms and business associations; and (3) collaborative arrangements and multi-stakeholder partnerships which are voluntary schemes devised collaboratively with other entities like public-private and hybrid partnerships (governments, international organizations, NGOs, trade unions, and governments).<sup>60</sup>

## 2. Corporate Self-Regulatory Initiatives

Numerous large, global companies institute their own codes of conduct that aim to regulate their operations worldwide.<sup>61</sup> One example of voluntary self-regulation is the Leon Sullivan Foundation's promulgation of the Global Sullivan Principles of Social Responsibility (the "Principles") in 1999.<sup>62</sup> The Principles span a breadth of CSR concerns including employee freedom of association, health and environmental standards, and sustainable development.<sup>63</sup> Fortune 500 companies are now motivated to adjust their internal practices to comply with the standards found within the Principles.<sup>64</sup>

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60. *Id.* at 435–436.

61. *See, e.g.*, Gene R. Laczniak & Jacob Naor, *Global Ethics: Wrestling with the Corporate Conscience*, BUS. 3, 7 (July-Sept. 1985) (discussing the corporate examples of Caterpillar Tractor, Allis Chalmers, Johnson's Wax, and Rexnord).

62. *See Appendix 27: The Sullivan Principles: Statement of Principles of U.S. Firms with Affiliates in the Republic of South Africa*, in GLOBAL CODES OF CONDUCT, *supra* note 28, at 388–90 (listing the seven main principles established by the Sullivan Foundation).

63. Oliver F. Williams, *A Lesson from the Sullivan Principles: The Rewards for Being Productive*, in GLOBAL CODES OF CONDUCT, *supra* note 28, at 57–82 (providing an overview of the purposes of the Sullivan Principles, which include supporting economic, social, and political justice by firms wherever they conduct operations; advancing human rights and promoting equality of opportunity at all levels of employment, including racial and gender diversity on decision-making committees and boards; and training and advancing disadvantaged workers for technical, supervisory, and management opportunities).

64. *See, e.g.*, Gordon Leslie Clark & Tessa Hebb, *Why Do They Care?: The Market for Corporate Global Responsibility and the Role of Institutional Investors* 17–23, 34, (June 16, 2004) (presented at the Using Pensions for Social Control of Capitalist Investment Conference), *available at* [http://www.community-wealth.org/\\_pdfs/articles-publications/state-local/paper-clark.pdf](http://www.community-wealth.org/_pdfs/articles-publications/state-local/paper-clark.pdf) (describing how CalPERS may withhold investments from companies that do not meet the Sullivan Principles, thus creating the

Another example, the Global Business Standards Codex (“GBS Codex”), was published by a group of scholars in 2005.<sup>65</sup> Intended “as a benchmark for [firms] wishing to create their own world-class code,” the GBS Codex set forth eight principles shared by five well-known codes embraced by the world’s largest companies.<sup>66</sup> The principles incorporated standards in the following categories: citizenship, dignity, fairness, fiduciary, property, reliability, responsiveness, and transparency.<sup>67</sup> Individual corporate codes of conduct usually contain an amalgamation of prudential, technical, and moral norms, declared as general principles.<sup>68</sup> Critics point to the various codes’ failures to include enforcement sanctions and failures to emphasize profit maximization.<sup>69</sup> Yet, corporations increasingly specify criteria such as “profitability” and “shareholder interests” in their mission statements.<sup>70</sup> Nevertheless, they also affirm that corporate responsibility for “stakeholder interests” means considering both community interests and sustainability.<sup>71</sup>

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risk of reputational harm).

65. See generally Lynn Paine, Rohit Deshpandé, Joshua D. Margolis, & Kim Eric Bettcher, *Upto Code: Does Your Company’s Conduct Meet World-Class Standards?*, HARV. BUS. REV., Dec. 2005, at 122–133.

66. *Id.* at 124–25.

67. *Id.* at 125.

68. See Arlene I. Broadhurst, *Corporations and the Ethics of Social Responsibility: An Emerging Regime of Expansion and Compliance*, 9 BUS. ETHICS: EUR. REV. 86, 89 (2000) (stating that corporate codes of ethics tend to be a mixture of technical, prudential, and moral imperatives expressed in general statements of principle and with varying degrees of enforcement). See also Robert Kinloch Massie, *Effective Codes of Conduct: Lessons from the Sullivan Principles and CERES Principles*, in GLOBAL CODES OF CONDUCT, *supra* note 28, at 280–82 (describing the blizzard of cultural values making up corporate codes of conduct, including a mix of ends, means, duties, and goals both for companies and for broader corporate responsibility); S. Prakash Sethi, *Gaps in Research in the Formulation, Implementation, and Effectiveness Measurement of International Codes of Conduct*, in GLOBAL CODES OF CONDUCT, *supra* note 28, at 123–25 (listing the core principles in codes of conduct as moral and ethical, economic and competitive, and organizational and institutional).

69. James E. Post, *Global Codes of Conduct: Activists, Lawyers, and Managers in Search of a Solution*, in GLOBAL CODES OF CONDUCT, *supra* note 28, at 111 (discussing the lack of and difficulty associated with enforcement of codes of conduct).

70. Broadhurst, *supra* note 68, at 89.

71. See Johnson & Johnson, *Our Credo*, <http://www.jnj.com/wps/wcm/connect/c7933f004f5563df9e22be1bb31559c7/our-credo.pdf?MOD=AJPERES> (naming its responsibilities to doctors and nurses, parents, its employees, the community, the environment, and its

### 3. Inter-Firm and Cross-Country Cooperative Initiatives

As key agents in the global economy, transnational firms wield enormous influence over economic activities.<sup>72</sup> Firms use various instruments to influence global civil society.<sup>73</sup> Among the more significant mechanisms are cross-industry and inter-firm cooperative initiatives.<sup>74</sup> Such initiatives are developed through CSR business associations,<sup>75</sup> which formulate strategies for concerted action in the form of self-regulating proposals within the private sector.<sup>76</sup> These non-governmental associations of businesses promote the dissemination of best business practices.<sup>77</sup> They aim to establish universal, uniform standards to combat a wide range of practices including apartheid, conflicts of interest, deception, discrimination, embezzlement, executive compensation, fraud, forgery, genocide, insider trading, the misuse of pension funds, slavery, theft, and corruption.<sup>78</sup>

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shareholders).

72. *Virginia Haufler, Self-Regulations and Business Norms: Political Risk, Political Activism*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 199, 199–201 (A. Claire Cutler, Virginia Haufler, & Tony Porter eds., 1999) (noting that corporate agreements among firms impact international economic regulations by conferring a sense of legitimacy by creating an accepted way of doing business in certain industries; industry norms then have greater ramifications for production and local and global political relations).

73. *See, e.g., Albareda, supra* note 59, at 434–36.

74. *See id.* (calling inter-firm cooperation the most important mechanism and noting that the voluntary CSR hybrid crosses industries and creates public-private hybrid partnerships).

75. *See id.*

76. *See id.* at 435 (listing business associations that have adopted CSR mechanisms: Business in the Community, Business for Social Responsibility, Caux Round Table, CSR Europe, Forum Empresa, International Business Leaders Forum, and World Business Council for Sustainable Development (WBCSD)).

77. *E.g., REDEFINING LEADERSHIP: BSR REPORT 2010*, available at [http://www.bsr.org/pdfs/bsr-report/bsr\\_report\\_2010.pdf](http://www.bsr.org/pdfs/bsr-report/bsr_report_2010.pdf) (describing Business for Social Responsibility (BSR)'s annual achievements, including running a program for business ethics, the workplace, the marketplace, the community, the environment, and the global economy).

78. *See Appendix 26: The Caux Principles: Business Behavior for a Better World*, in *GLOBAL CODES OF CONDUCT*, *supra* note 28, at 384–88 (describing the Caux Round Table, an international group of business executives headquartered in Switzerland, which has adopted an international code for multinational firms in Europe, North America, and Japan; the Code identifies five basic principles which serve as the aspirational mark for business leaders worldwide, thus extending beyond principles embodied in earlier codes; the principles address stakeholder responsibility, social justice, mutual support,

Business associations serve as forums for corporate leaders to discuss and agree on CSR plans.<sup>79</sup> This entails creation of consolidated private rules, standards, and management instruments, all in the absence of legally enforceable “hard” sanctions.<sup>80</sup> The associations often serve as means for collective exertion of pressure in order, for instance, to defend corporations’ positions before national governments and international organizations like the European Union and the United Nations.<sup>81</sup> As such, business associations serve as interfaces between public and private authorities.<sup>82</sup>

Joining cooperative regulations is a sage business strategy for companies whose social or environmental practices have been spotlighted by activists.<sup>83</sup> Whereas implementing higher environmental or social standards normally increases costs, inducing the competition to follow suit levels the playing field.<sup>84</sup> At least in theory, industry and cross-industry standards inhibit companies from competing with each other.<sup>85</sup> Without them, firms would be running in a race to the bottom by adopting less rigorous protections for workers or the environment.<sup>86</sup> Similarly, civil regulations help companies

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environmental concern, and avoidance of illicit operations and corrupt practices).

79. Albareda, *supra* note 59, at 435.

80. *Id.* at 433.

81. *See, e.g., id.* at 435 (“The WBCSD has defended a voluntary approach before the United Nations; CSR Europe has done the same before the European Commission and individual European governments, and BSR has done the same with the US government.”).

82. *Id.* at 436 (noting that although inter-firm initiatives are typically funded by corporate contributions, they sometimes receive backing from international organizations like the European Union, various national governments, and the United States).

83. *See generally* Alison Maitland, *Industries Seek Safety in Numbers*, FIN. TIMES, Nov. 25, 2005, at 1–3 (noting the growing phenomenon of global companies working together to implement standards so as to avoid individual reputational attacks).

84. *See* Marvin B. Lieberman & Shigeru Asaba, *Why Do Firms Imitate Each Other?*, 31 ACAD. MGMT. REV. 366, 366–367 (2006) (noting that imitation is common because firms want to avoid falling behind their rivals, and because leveling the playing field breeds competition). *But see* S. Prakash Sethi & Linda M. Sama, *Ethical Behavior as a Strategic Choice by Large Corporations: The Interactive Effect of Marketplace Competition, Industry Structure and Firm Resources*, 8 Bus. Ethics Q. 85, 89 (1998) (arguing that the conventional wisdom and popular notion that competition keeps businesses honest may not be accurate).

85. Kevin Jackson, VIRTUOSITY IN BUSINESS: INVISIBLE LAW GUIDING THE INVISIBLE HAND, 237 (Univ. of Pa. Press 2012).

86. Debora Spar & David Yaffe, *Multinational Enterprises and the*

complement one another in instituting best practices.<sup>87</sup> They also help with communication and implementation of operational upgrades recommended by civil society.<sup>88</sup> NGOs' participation in civil regulations extends a higher level of legitimacy than can be achieved with codes of conduct authored by individual companies.<sup>89</sup>

This partnership increases the credibility of companies' commitments to corporate social responsibility.<sup>90</sup> Moreover, transnational enterprises often follow their industry peers to implement comparable procedures and norms.<sup>91</sup> This follows the leader dynamic spreads to managerial protocols including global CSR undertakings.<sup>92</sup> Hence, if an industry leader consents to a code of practices, its industry peers typically follow suit.<sup>93</sup> This trend also works across sectors.<sup>94</sup> Indeed, the

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*Prospects for Justice*, 52 J. INT'L AFF. 557, 557 (1999) (suggesting that MNCs should act as their own self-regulators in improving corporate governance to avoid a downward race to the bottom where each party lowers its standards).

87. See Broadhurst, *supra* note 68 at 96–97 (discussing Shell as the prototype for other corporations in reforming best practices and encouraging other corporations to promote socially responsible conduct).

88. See *id.* at 97 (Noting that Shell's success is based on its increasing awareness of the complexity of corporate compliance, communicating about agreed norms and business rules at the national and international levels of business ethics, and ultimately encouraging other corporations to implement reformed practices).

89. See, e.g., Dara O'Rourke, *Market Movements: Nongovernmental Organization Strategies to Influence Global Production and Consumption*, 9 J. INDUS. ECOLOGY 115, 122 (2005) (discussing how NGOs' anti-sweatshop campaigns against Nike encouraged Nike to seek sweatshop solutions and incorporate new, NGO-suggested practices into its code of conduct).

90. See O'Rourke, *supra* note 89, at 124–25 (describing the role of NGOs in corporate accountability, including exposing corporate misdeeds to consumers, punishing poor performers, monitoring the environmental and social impacts made by corporations, and promoting broad, long term solutions capable of transforming the entire market).

91. See generally Lieberman & Asaba, *supra* note 84, at 366–385 (suggesting that firms imitate one another because they perceive competitors as having superior information or practices the firms want to incorporate and/or because the firms strive to remain competitive and limit potential rivalry).

92. *Id.* at 367 (noting that several studies have shown that imitation of superior products, processes, and managerial systems is widely recognized as a fundamental part of the competitive process).

93. See, e.g., *id.* at 371 (discussing the major impact that Wal-Mart, Barnes and Noble, and Amazon had in legitimizing web retail by choosing to sell their products online; such firms are leaders and others hope to jump on their successful bandwagons by emulating their past ideas and practices).

94. See e.g., Broadhurst, *supra* note 68, at 91, 95 (depicting the trend of social responsibility practices across sectors through the examples of Tommy



rise of civil regulations among global companies and industries has provided its own impetus as market participants wish to avoid losing reputational capital.<sup>95</sup>

Lastly, even ill-intended modifications in standards often have substantial and lasting impacts on business practices.<sup>96</sup> CSR-type initiatives originating as mere symbolic gestures or efforts at appeasement may well acquire legitimacy among global civil society.<sup>97</sup>

In today's increasingly transparent global economy, staffing a CSR office, sending out an annual CSR report, combining forces with NGOs, signing voluntary industry codes, and having a chief reputation officer are becoming standard operating practices for management at global companies that attract high visibility.<sup>98</sup>

#### 4. Collaborative Arrangements and Mutli-Stakeholder Partnerships

Along with self-regulation instruments, transnational firms are increasingly implementing various CSR mechanisms and civil regulations geared to numerous collaborative schemes.<sup>99</sup> These kinds of initiatives emerge from crossbreed devices originating with civil society bodies and business associations.<sup>100</sup> One of the motivations for collaborative governance is the ability to provide public goods through

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Hilfiger in the clothing industry and Shell in the gas, oil, and petrochemical industry).

95. See Maitland, *supra* note 83, at 1 (arguing that in an increasingly complex and risky global supply chain, the world's largest companies are seeking strength in numbers and collaborating in areas like labor and environmental standards to lower the risk of an attack on their individual reputations).

96. See Lieberman and Asaba, *supra* note 84, at 381–82 (explaining that regardless of the motivation for imitation, it continues to permeate corporate behavior and yield reverberating effects).

97. See Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TULSA. L. REV. 1431, 1439–41 (2001–2002) [hereinafter *Emerging Norm*]; see also Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 U. FLA. L. REV. 611, 613–14 (2001).

98. See generally *Emerging Norm*, *supra* note 97, at 1431 (discussing the relationship between corporate social responsibility and human rights movement).

99. See Albareda, *supra* note 59, at 435–36 (listing and describing collaborative CSR methods).

100. See *id.* at 435–36.

alliances.<sup>101</sup> For example, some civil regulations and civil regulatory bodies have been instituted with the backing of trade unions, inter-state organizations, or governments.<sup>102</sup> Nevertheless, nation-states do not insist on enforcing regulations which are not compulsory.<sup>103</sup> Instead, states commonly play the role of intermediaries.<sup>104</sup> States extend assistance to firms, NGOs, and labor unions to find consensus on mutual standards.<sup>105</sup> Through such efforts, states use multi-stakeholder soft-power to achieve regulatory ends.<sup>106</sup>

Business-NGO cooperative arrangements have become more important within the last decade,<sup>107</sup> displaying a wide variety of configurations.<sup>108</sup> In addition, an array of regulatory bodies is undertaking multi-stakeholder projects like the Ethical Trading Initiative which seeks to promote compliance with labor guidelines within the context of business supply

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101. See Zadek, *supra* note 20, at 4.

102. See *The Voluntary Principles on Security and Human Rights*, available at [http://www.voluntaryprinciples.org/files/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf) (last visited Sept. 24, 2012) (noting that the governments of the United States and the United Kingdom assisted companies in extractive industries in assembling Voluntary Principles on Security and Human Rights).

103. See generally O'CONNELL, *supra* note 37, at 110 (explaining the advantages to nation-states of adopting flexible soft-law solutions that need not be rigidly enforced).

104. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (Cambridge Univ. Press, 2000) (discussing the post-World War II involvement of the United States and other nations in setting up multi-lateral trade negotiation).

105. See *id.* at 199–200 (describing efforts aimed at reaching consensus).

106. See *id.* (detailing the ways states involve themselves in trade beyond hard-law treaties).

107. See Peter Utting, *Corporate Responsibility and the Movement of Business*, 15 DEV. PRAC. 375, 384–85 (2005).

108. NGOs like Amnesty International, the Clean Clothes Campaign, Oxfam, and the World Wildlife Fund team up with trade associations active in the areas of apparel, cocoa, timber, coffee, mining, and toys, as well as trade unions, and other organizations like the Sustainable Forestry Initiative and the International Standards Organization. See Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 11 AM. J. SOC. 297, 335 (2007) [hereinafter *Institutional Emergence in an Era of Globalization*]. See also Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 3 POL. & SOC'Y 433, 434–35 (2003) (discussing cooperation in the area of forest management); Lars H. Gulbrandsen, *Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?*, 4 GLOBAL ENVTL. POL. 75, 84 (2004).

chains.<sup>109</sup> The growth of these arrangements has given corporations a role in global public policy networks.<sup>110</sup> Global public policy networks are coalitions linking civil society organs, firms, government agencies, international organizations, NGOs, professional associations, and religious groups.<sup>111</sup> The establishment of standards, development of regulatory structures, and creation of assessment and enforcement systems form global public policy networks.<sup>112</sup> Companies joining global public policy networks commit to dialoging with other stakeholders to devise ethical standards.<sup>113</sup> Accountability is difficult without these monitoring mechanisms.<sup>114</sup>

For instance, the Global Reporting Initiative is a partnership of the Coalition for Environmentally Responsible Economies (“CERES”) and the United Nations Environmental Program (“UNEP”), linking firms, governments, media, NGOs, and professional associations in an effort to establish uniform reporting standards to assess the organizations’ environmental and social impacts.<sup>115</sup> Signatory firms consent to observe CERES principles and to preserve and protect the environment at levels exceeding what local law mandates.<sup>116</sup> CERES works closely with signatory companies to ensure compliance with core sustainability principles.<sup>117</sup>

Some Western NGOs perceive co-regulation initiatives as

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109. Other multi-stakeholder arrangements include the Forest Stewardship Council, the Global Reporting Initiative, the Marine Stewardship Council, and the United Nations Global Compact. *See, e.g., About GRI*, GLOBALREPORTING.ORG, <http://www.globalreporting.org/About-gri/pages/default.aspx> (last visited Sept. 14, 2012) (describing the multi-stakeholder operations and goals of GRI).

110. David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks*, 71 J. BUS. ETHICS 321, 321 (2007).

111. Wolfgang H. Reinicke, *The Other World Wide Web: Global Public Policy Networks*, 117 FOREIGN POL’Y 44, 44 (2000). *See generally* WOLFGANG H. REINICKE, GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT? 228 (1998).

112. BRAITHWAITE & DRAHOS, *supra* note 104, at 551.

113. *See id.* at 159 (noting the historical development of multi-stakeholder ethics development).

114. *See id.* at 168–69.

115. *See What is GRI*, GLOBALREPORTING.ORG, <https://www.globalreporting.org/information/about-gri/what-is-gri/Pages/default.aspx> (last visited Sept. 14 2012).

116. *See id.*

117. *See id.*

means of exerting some influence on trends in multinational corporate behavior.<sup>118</sup> Adjusting procurement protocols of mega enterprises can bring about greater sustainability gains than enacting numerous national laws and regulations.<sup>119</sup> Although some NGOs stress strategies that “name and shame” multinational enterprises, others try to team up with companies and industry associations to establish voluntary standards and assume an active role in the enforcement of those standards.<sup>120</sup> NGOs’ forming of coalitions with transnational companies has been instrumental to the creation, legitimacy, and efficacy of civil regulations.<sup>121</sup> A number of European governments, including the European Union, have offered substantial support for global CSR.<sup>122</sup> Some European governments implicitly endorse CSR by mandating that companies trading on their stock exchanges disseminate annual reports recounting sustainability accomplishments.<sup>123</sup>

Public pension funds are either encouraged or, at times, required to take firms’ environmental and social track records into account in choosing investments.<sup>124</sup> Some governments grant preferences for privately certified merchandise pursuant

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118. See VOGEL, *supra* note 5, at 167–68.

119. Christopher McCrudden, *Corporate Social Responsibility and Procurement*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 115–16 (Doreen McBarnet et al. eds., 2007). See generally Philipp Pattberg, *The Institutionalization of Private Governance: How Business and Nonprofit Organizations Agree on Transnational Rules*, 18 GOVERNANCE 589, 590 (2005) (describing the shift from public to private accountability forms).

120. See *Institutional Emergence in an Era of Globalization*, *supra* note 108, at 299–300.

121. See Gary Gereffi et al., *The NGO-Industrial Complex*, 125 FOREIGN POLY 56, 61 (2001) (discussing the improvements in civil regulation legitimacy after NGOs became involved); Dennis A. Rondinelli & Ted London, *How Corporations and Environmental Groups Cooperate: Assessing Cross-Sector Alliances and Collaborations*, 1 ACAD. MGMT. EXEC. 61, 71–72 (2003) (detailing successful inter-organizational standard compliance mechanisms); Pattberg, *supra* note 119, at 591–93.

122. Kristina Herrmann, *Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study*, 11 IND. J. GLOBAL LEGAL STUD. 205, 226–27 (2004).

123. See generally Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* 2–3 (Harv. Bus. Sch., Working Paper No. 11–100, 2012) (discussing the types of quasi-mandatory reporting).

124. See ORG. FOR ECON. COOPERATION AND DEV., PROMOTING SUSTAINABLE CONSUMPTION: GOOD PRACTICES IN OECD COUNTRIES 34 (2008).

to governments' procurement policies.<sup>125</sup> Various features of civil regulation resemble characteristically European attitudes toward business regulation in that they lean heavily on voluntary agreements and soft-law, often turning to non-state actors to establish regulatory standards.<sup>126</sup> In the eyes of some European governmental authorities, endorsing global civil regulations is a convenient way of assuaging home-country activists and trade unions that may be antagonistic to globalization and the immense political sway held by multinational enterprises.<sup>127</sup> Nevertheless, this does not serve to extend sole regulatory authority to states over firms doing business within their respective jurisdictions.<sup>128</sup>

One notable benefit of civil regulations as mechanisms of global business regulation is that their terms are outside the World Trade Organization's ("WTO") purview, whose regulations have force only when accepted by national governments.<sup>129</sup> Although the WTO considers government-mandated eco-labels as potential trade barriers, private

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125. See McCrudden, *supra* note 119, at 112 (explaining how this process came into being in the United Kingdom after the Labour Party regained power in the late 1990s).

126. See Jan Willem Biekart, *Negotiated Agreements in EU Environmental Policy*, in NEW INSTRUMENTS FOR ENVIRONMENTAL POLICY IN THE EU 166 (Jonathan Golub ed., 1998); Olivier Borraz et al., *Is It Just About Trust? The Partial Reform of French Food Safety Regulation*, in WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 137-39 (Christopher Ansell & David Vogel eds., 2006); MICHELLE EGAN, CONSTRUCTING A EUROPEAN MARKET 263 (2001); Jonathan Golub, *New Instruments for Environmental Policy in the EU: Introduction and Overview*, in NEW INSTRUMENTS FOR ENVIRONMENTAL POLICY IN THE EU 5, 13-15, (Jonathan Golub ed., 1998); Karl-Heinz Ladeur, *Towards a Legal Concept of the Network in European Standard-Setting*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 151, 156-59 (Christian Joerges & Ellen Vos eds., 1999); Stephen Tindale & Chris Hewett, *New Environmental Policy Instruments in the UK*, in NEW INSTRUMENTS FOR ENVIRONMENTAL POLICY IN THE EU 52-53 (Jonathan Golub ed., 1998); Frans van Waarden, *Taste, Traditions, and Transactions: The Public and Private Regulation of Food*, in WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 56-57 (Christopher Ansell & David Vogel eds., 2006).

127. See *Institutional Emergence in an Era of Globalization*, *supra* note 108, at 337.

128. See, e.g., *General Information*, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, <http://www.iosco.org/about/> (last updated Oct. 2012).

129. See Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575, 577-78 (2008).

product certifications and labels do not have such a status.<sup>130</sup> Similarly, whereas companies may require global suppliers' compliance with sustainability rules and labor standards as a prerequisite for transacting business, governments typically may not condition market access upon such requirements.<sup>131</sup>

In the case of co-regulation and multi-stakeholder partnerships, CSR's focus shifts away from voluntariness and toward accountability and enforcement mechanisms.<sup>132</sup> Accordingly, public accountability mechanisms for private actors constitute a centerpiece of the emerging global governance paradigm.<sup>133</sup> Global firms use corporate legitimacy management to shift the role of businesses in society.<sup>134</sup> Meanwhile, multi-stakeholder initiatives provide the forum for a dialogue between business and society—a dialogue that is required for accountability mechanisms to work.<sup>135</sup> Moreover, involvement in co-regulation and enforcement of multi-stakeholder devices is connected with the new idea of corporate citizenship, or what has been termed “political activism.”<sup>136</sup> Through these devices, citizens can influence and participate in dialogue with the conduct of businesses in the sphere of sustainability and CSR.<sup>137</sup>

### 5. Reaction to Regulatory Breakdown

Globalization has been changing the world economic

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130. Barbara Fliess et al., *CSR and Trade: Informing Consumers About Social and Environmental Conditions of Globalised Production*, ¶¶ 44–46 (Org. Econ. Cooperation & Dev. Working Paper No. 47, 2006).

131. See Vogel, *supra* note 5, at 169–71 (discussing the divergence of public and private interests).

132. See Utting, *supra* note 107, at 381–82.

133. See *id.* at 383–86 (listing and describing various organizations and conventions that utilize public accountability mechanisms).

134. See Beverly Kracher & Kelly D. Martin, *A Moral Evaluation of Online Business Protest Tactics and Implications for Stakeholder Management*, 114 BUS. & SOC'Y REV. 59, 61–64 (2009) (discussing how businesses are managing corporate image in response to activists' uses of the internet to protest “objectionable business practices”).

135. See Guido Palazzo & Andreas Georg Scherer, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 J. BUS. ETHICS 71, 77, 82 (2006) (emphasizing the importance of corporate legitimacy).

136. See generally Hafler, *supra* note 72 (noting that corporate behavior is not dictated only by profit maximization concerns).

137. See Dirk Matten & Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 172–73 (2005) (detailing ways in which corporations interact with people).

landscape for the past several decades.<sup>138</sup> Due to an opening of outlets for goods in emerging countries and decreased costs of producing goods, which is in turn a consequence of lowered labor costs and reduced tax burdens in such countries, significant changes in manufacturing have occurred.<sup>139</sup> As a result, manufacturing operations have shifted away from industrialized nations toward developing nations.<sup>140</sup> In addition, global corporations' production and supply chains transcend national borders more than ever.<sup>141</sup> The bulk of transnational commerce occurs among firms or inter-firm networks, so the ascendance of global civil regulation has, in large part, stemmed from a recognition that globalization dampens the ability of national legal authorities to effectively regulate global companies and markets.<sup>142</sup> Correspondingly, it has been noted that although some multinational firms are as powerful as some small nation-states, they are less accountable.<sup>143</sup>

While state and international business regulations are still growing in range and degree, today's global economy, while highly integrated, is plagued by regulatory breakdown<sup>144</sup> and a so-called "orchestration deficit."<sup>145</sup> The transnational character of global manufacturing strains national governments' capabilities to control economic activity outside of and

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138. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 6–7 (1999). See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 51–53 (2007) (discussing global capitalism after the fall of the Berlin Wall).

139. Martin Wolf, *Manufacturing at Risk from Global Shift to Asia*, *FIN. TIMES*, May 23, 2011, at 3.

140. See ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, *BUSINESS & SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* 395 (7th ed. 2008) (observing the trend for jobs to follow manufacturing).

141. See RICHARD T. DE GEORGE, *COMPETING WITH INTEGRITY IN INTERNATIONAL BUSINESS* 78–79 (1993).

142. See VOGEL, *supra* note 5, at 162–64 (discussing why civil regulation is necessary in a globalized world).

143. See Peter Newell, *Environmental NGOs and Globalization*, in *GLOBAL SOCIAL MOVEMENTS* 117, 121 (Robin Cohen & Shirin Rai eds., 2000).

144. See Peter Newell, *Managing Multinationals: The Governance of Investment for the Environment*, 13 *J. INT'L DEV.* 907, 908 (2002) (arguing that the limited scope of civil regulation leads to it being overwhelmed by the power of international firms).

145. Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through "Transnational New Governance"*, 42 *VAND. J. TRANSNAT'L L.* 501, 544–45 (2009) (describing the need to include more subtle and far-reaching trans-national governance).

straddling their own jurisdictions.<sup>146</sup> National and global regulatory frameworks will remain seriously inadequate so long as national governments and global business enterprises remain incapable or ill-disposed to controlling the sustainability-related facets of international trade. The rise of civil regulation does not signify an outright replacement of state regulation.<sup>147</sup> Rather, it signifies an attempt to expand regulation to a broad array of transnational corporate conduct that remains difficult to regulate via purely national mechanisms.<sup>148</sup> The appearance of new kinds of public civil regulation has resulted in a type of decentralized “soft law” accountability, complementing nation-states’ regulations that have proven inadequate in the era of globalization.<sup>149</sup>

#### B. ACCOUNTABILITY

Because of fallout from major industry scandals, the recent global financial meltdown, and the increasing prevalence of accountability principles, corporate management is now implementing ethical, transparency, and disclosure standards.<sup>150</sup> The need to adopt voluntary civil regulations is especially strong for firms operating in the global environment. The traditional concept of legal accountability is distinguishable from an emerging phenomenon of soft law accountability.<sup>151</sup> The latter is especially intricate because it entails multifaceted components of accountability.<sup>152</sup>

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146. Abbott & Snidal, *supra* note 10, at 44.

147. See Mathias Koenig-Archibugi, *Transnational Corporations and Public Accountability*, 34 GOV'T & OPPOSITION 234, 234–35 (2004).

148. *Id.*

149. See Christoph Knill & Dirk Lehmkuhl, *Private Actors and the State: Internationalization and Changing Patterns of Governance*, 15 GOVERNANCE 41, 44–45 (2002) (discussing the congruence of global problems and global regulatory structures).

150. Among the names implicated in scandals are Bernard Madoff, Nicholas Leeson, Enron, WorldCom, Adelphia, Arthur Anderson, and Tyco. See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 707 (2002). See also Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2126 (2003); Brian A. Warwick, Commentary, *Reinventing the Wheel: Firestone and the Role of Ethics in the Corporation*, 54 ALA. L. REV. 1455, 1466–71 (2003).

151. Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35:1 BROOK. J. INT'L L. 41 (2010).

152. *Id.*



### 1. Hard Versus Soft Law Accountability

Legal accountability means that normative regulatory standards are enforceable.<sup>153</sup> Compliance with black-letter legal rules creates a presumption of validity in the eyes of judicial tribunals or quasi-judicial forums.<sup>154</sup> The notion of legal accountability stems from the rule of law maxim. A vast body of civil and criminal law has developed to hold non-profit and for-profit institutions legally accountable.<sup>155</sup> In the international sphere, the WTO Dispute Settlement System, Hague International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, and International Criminal Court are all institutions that undertake the enforcement of “hard” international law.<sup>156</sup>

As was the case with early international law phenomena, civil regulations lacking hard enforcement mechanisms function as normative standards and are intended to induce compliance.<sup>157</sup> To the extent that corporations comply with soft law, it is not because they are deterred by enforcement sanctions but rather because they are interested in building or

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153. See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 36 (2005) (discussing the requirement that individuals and entities be held to formal rules).

154. Cf. HANS KELSEN, *PURE THEORY OF LAW* 11 (1967) (analyzing norm validity and asserting that if norms are not actually followed, they lack validity).

155. See Christine Parker, *supra* note 8, at 208–15 (discussing meta-regulation in hard-law applications); see also Alnoor Ebrahim, *Making Sense of Accountability: Conceptual Perspectives for Northern and Southern Nonprofits*, 14 NONPROFIT MGMT. & LEADERSHIP 191, 194–95 (2003) (detailing the legal need to meet prescribed standards of behavior).

156. Concerning violence and nation-states, substantial changes have come about in international standards, practices, and institutions. War crimes tribunals and the International Criminal Court were set up to hold heads of states perpetrating acts of violence against their own citizenry accountable. Developments like this signal a significant departure from customary norms governing the principle of national sovereignty. That principle extended immunity to heads of states from legal petitions for accountability, save from members of their own principalities. Indeed, an inaugural precept of the nation-state system, acknowledged from Westphalia in 1648 to Nuremberg in 1946, held that heads of states were immune from prosecution. See generally Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L. J. 649, 650 (2005).

157. But see Terry Nardin, *Theorizing the International Rule of Law*, 34 REV. INT'L STUD. 385, 389 (2008) (citing Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88 (2006)) (noting that compliance with international law is a result of a desire for legitimacy).

preserving their intangible reputational assets.<sup>158</sup> Arguably, a régime of global civil regulations and their attendant informal, decentralized modes of enforcement constitute an integral part of both the domestic and international rule of law. However, they are often ignored by commentators because they are only backed by “soft” sanctions, the nature and extent of which are not well understood.<sup>159</sup>

A deeper look into the various sources of soft law shows how intricate, complex, and subtle they can be. Global civil regulations often represent the result of compromises reached among private and public entities.<sup>160</sup> Instead of imposing cost of compliance with formal regulations, civil regulations encourage corporations to scrutinize their conduct and guide it with voluntary self-regulation.<sup>161</sup> While global civil regulations are subject to rapid change and are continually evolving, national law, dependent on its institutions to act, takes longer to evolve.<sup>162</sup>

Yet, from the standpoint of the conventional rule of law maxim and its experience, voluntary CSR appears deficient. CSR is decentralized, carries conflicting norms, is orchestrated by unelected activists, business executives, and bureaucrats,<sup>163</sup>

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158. See GÖRAN AHRNE & NILS BRUNSSON, *Soft Regulation from an Organizational Perspective*, in *SOFT LAW IN GOVERNANCE AND REGULATION* 171, 187–89 (Ulrika Mörth ed., 2004).

159. See Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 *CHI. J. INT'L L.* 515, 519, 522–23 (2009) (contending that reputational effects of following or forgoing soft law are difficult to anticipate and remain elusive).

160. David Vogel, *Private Global Business Regulation*, 16:3 *ANN. REV. POL. SCI.* 261, 270 (Dec. 30, 2007).

161. *But see* Ian Maitland, *The Limits of Business Self-Regulation*, 27 *CAL. MGMT. REV.*, 132, 132–33 (1985) (arguing that self-regulation is ineffective because profit maximization is often at odds with compliance, thus compromising the validity).

162. KEVIN T. JACKSON, *BUILDING REPUTATIONAL CAPITAL* 38 (Oxford Univ. Press 2004) (“The idea is that the law [of soft law] resides in the actual judgment given, not in any crisp preexisting formulation in a statute or case precedent.”). A major task that companies face is accurately forecasting what these non-legal and unelected accountability-holders may be expecting from them. Whereas the authoritative sources of law applied and enforced by courts of law are generally recognized by members of the legal community, it remains unclear precisely what sources of “soft law” are applied by accountability-holders. Consider the adage that the job of judges is to prophesize what courts will do. See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 457–58 (1897).

163. From this standpoint, the rise of global governance raises questions about the legitimacy of the actors attempting to hold transnational firms

and does not employ any hard sanctions that can be administered following non-compliance.<sup>164</sup> Accountability means that actors can ensure that other actors follow standards, and that actors may apply sanctions for non-compliance with those standards.<sup>165</sup> In the context of global economic governance, civil regulations that bear upon firms' moral deportment arguably represent the strongest form of soft law sanctions, because firms' reputations are one of their most valuable assets.<sup>166</sup>

## 2. Components of Soft Law Accountability

The process of corporate soft law accountability involves a triad of elements.<sup>167</sup> First, soft law accountability presupposes the existence of civil regulations that hold companies accountable; compliance is expected.<sup>168</sup> Like the rule of law maxim saying that the law must be knowable—for example, that it must be published so that citizens are aware of the rights and responsibilities given or imposed upon them by law—civil regulations must also be matters of common knowledge.<sup>169</sup> Second, soft law accountability demands that enforcement agents possess relevant information about firms'

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accountable. The theory of rent seeking proceeds from the hypothesis that the priority of typical bureaucrats are to advance their own self-interest. Consequently, if restraints of accountability and election are removed, bureaucrats become owners of rents, with the power to potentially raise these rents at the expense of those for whom the resources are supposed to benefit. United Nations institutions provide substantial income for the politicians and bureaucrats that control them, and that the objectives for which they were set up are absorbing ever smaller portions of their internal budgets. *See generally* ROSEMARY RIGHTER, *UTOPIA LOST: THE UNITED NATIONS AND THE WORLD ORDER* 56–63 (1995).

164. *See* Cyrus Mehri, Andrea Giampetro-Meyer & Michael B. Runnels, *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness*, 9 *FORDHAM J. CORP. & FIN. L.* 395, 400–01 (2004).

165. *See* Ruth W. Grant & Robert O. Keohane, *supra* note 153, at 29.

166. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 *J. L. & ECON.* 757, 758–59 (1993) (noting that the majority of falling stock price in the wake of corporate malfeasance, whether proven or not, is attributable to reputational loss whereas anticipated legal sanctions, including fines and damage awards, comprise as little as 6.5% of the decline in share value).

167. *See generally* Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 *MICH. J. INT'L L.* 1121, 1123–24 (2003) (illustrating the power dimensions of accountability demands).

168. *See id.* at 1123.

169. *See id.*

actions to evaluate compliance with applicable civil regulations.<sup>170</sup> On the one hand, firms must be aware of expectations before they can be held accountable for them.<sup>171</sup> On the other hand, enforcement agents must know by what standards to render an assessment of business conduct.<sup>172</sup> Because accurate information is vital, at least some transparency and dialogue among stakeholders appears to be a prerequisite for soft law accountability.<sup>173</sup> Third, soft law accountability requires incentives for compliance.<sup>174</sup> Enforcement agents must be able to impose informal sanctions or rewards. To be sure, no worldwide government, democratic or otherwise, exists to provide wholesale regulation.<sup>175</sup> Demands for corporate accountability are therefore decentralized and diffused.<sup>176</sup>

### 3. Enforcement from Informal Evaluation

Whereas the concept of legal accountability derives its central meaning from the notion of the rule of law, the concept of soft law accountability may be understood in terms of market participants' informal evaluations of business conduct. For example, individual investors and mutual funds may cease investing in companies with objectionable practices or policies.<sup>177</sup> Some pension funds shun securities of certain

170. See *id.* at 1124 (discussing the need of information in order to effectively hold one accountable).

171. See Alasdair B. Ross, *Reputation: Risk of Risks*, ECONOMIST INTELLIGENT UNIT, December 2005, at 1, 11.

172. See *id.* at 4-5.

173. See generally Pamela Stapleton & David Woodward, *Stakeholder Reporting: The Role of Intermediaries*, 114 BUS. & SOC'Y REV. 183, 184 (2009) (noting the important role of dialogue with and among stakeholders).

174. See Keohane, *supra* note 167, at 1123-24 (arguing that the notion of accountability involves both the sharing of information regarding actions, decisions, or behavior of some kind and the exercise of sanctions).

175. See PIERRE ROSANVALLON, DEMOCRACY PAST AND FUTURE 192-93 (Samuel Moyn ed., 2006) (noting that a diffraction of conventional modes of representative democracy and a widespread suspicion of politics are occurring across the planet). Such developments increase the number of political players, diffusing political legitimacy. "We are moving bit by bit to more disseminated forms of civil democracy," an "indirect democracy," created by "whole congeries of efforts—through informal social movements but institutions too—intended to compensate for the erosion of trust by institutionalizing distrust." *Id.* at 235-238. Indirect democracy is engaged in the deployment of "mechanisms of oversight, the creation of independent institutions, and the formation of powers of rejection." *Id.* at 239.

176. Jackson, *supra* note 85, at 244.

177. See, e.g., Samuel B. Graves & Sandra A. Waddock, *Institutional*

companies on the basis of criteria determined by the pension funds' beneficiaries.<sup>178</sup> Investors may require higher interest rates on corporate bonds.<sup>179</sup> Customers may decline to purchase products produced by firms struck by negative publicity stemming from human rights violations, unfair labor practices, or environmental violations.<sup>180</sup> Some consumers are willing to incur added costs, like the cost of traveling farther, to punish retailers whose conduct they find egregiously unfair.<sup>181</sup> Those in employment markets may select among competing job offers on the basis of the prospective employer's publicity and reputation.<sup>182</sup>

Business partners and associates comprise another type of forum for the evaluation of conduct.<sup>183</sup> This forum functions as a peer-driven accountability network powered by the process of business partners' reciprocal appraisals.<sup>184</sup> Institutional lenders, for instance, use caution in scrutinizing their borrowers' creditworthiness as well as that of their partners' borrowers.<sup>185</sup> Business enterprises rated low by their peers are less likely to find willing business partners among them.<sup>186</sup> These businesses find themselves in a strategic disadvantage and therefore tend to stagnate.<sup>187</sup>

Next is the legendary "court of public opinion."<sup>188</sup> Members of civil society penalize business enterprises by spreading

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*Owners and Corporate Social Performance*, 37 ACAD. MGMT. J. 1034, 1034 (1994). See also Kristin Friedery, *Core Innovation Collaboration Success Stories*, CORE CATALYST, (August 19, 2011, 9:32 AM), <http://corecolorado.org/success-stories?mode=PostView&bmi=680022>.

178. See R. Bruce Hutton, Louis D'Antonio & Tommi Johnsen, *Socially Responsible Investing: Growing Issues and New Opportunities*, 37 BUS. & SOC'Y. 281, 287-88 (1998).

179. Layna Mosley, GLOBAL CAPITAL AND NATIONAL GOVERNMENTS 18 (2003).

180. See Deborah Spar, *The Spotlight and the Bottom line*, 77 FOREIGN AFF. 7, 9 (1998).

181. See Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735-36 (1986).

182. JACKSON, *supra* note 162, at 13.

183. Grant & Keohane, *supra* 153.

184. *Id.* at 35 ("When standards are not legalized, we would expect accountability to operate chiefly through reputation and peer pressures, rather than in more formal ways.").

185. JACKSON, *supra* note 162, at 13.

186. *Id.* at 14.

187. *Id.*

188. *Id.* at 36.

negative publicity.<sup>189</sup> Legislators, jurists, regulators, fiscal watchdogs, newscasters, competitors, licensing bureaus, rating agencies, and markets all decree informal judgments about the reputations of market participants.<sup>190</sup> In fact, such judgments seem to constitute a type of “soft power,” which has been characterized as the ability to shape the preferences of others.<sup>191</sup> Companies with tarnished names find it hard to establish relationships, assert authority, or attract loyalty from others.<sup>192</sup>

#### 4. Dispersed Networks of Accountability

Accountability in global economic governance is multifaceted and decentralized. Global companies operate within networks of continuous relationships.<sup>193</sup> Firms are linked with their customers, suppliers, and rivals through strategic alliances.<sup>194</sup> When companies enter into arrangements with parties like government regulators and special interest groups, they are establishing “soft law networks.”<sup>195</sup> These soft law networks form channels of accountability which are divided by and cover a range of topical areas.<sup>196</sup> On the other hand,

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189. STEVEN HERZ ET AL., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 14 (Jonathan Sohn ed. 2007) (“Reputation risk is the current and prospective impact on earnings and capital arising from negative public opinion.”).

190. For an example of a newscaster making an informal judgment about Nike’s reputation, see Simon Birch, *How activism forced Nike to change its ethical game*, GREENLIVING BLOG (July 6, 2012), <http://www.guardian.co.uk/environment/green-living-blog/2012/jul/06/activism-nike>.

191. JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 5 (2004).

192. Tammy Higginbotham, *Unethical Behaviors and Their Effect on Small Business*, YAHOO! VOICES (Oct. 3, 2010), <http://voices.yahoo.com/unethical-behaviors-their-effect-small-business-6904236.html>.

193. HAKAN HAKANSSON & IVAN SNEHOTA, DEVELOPING RELATIONSHIPS IN BUSINESS NETWORKS 10 (Hakan Hakansson & Ivan Snehota eds., Routledge, 1995).

194. See Nye, *supra* note 191.

195. See D. Daniel Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37, 97 (defining “soft law networks” as means by which information can be shared and cooperation can be facilitated).

196. See, e.g., *id.* at 53 (“Though the discussions have shifted to less contentious topics within the antitrust and international trade interface, market access issues remain one of the core difficulties that arise in this interface. The ability of antitrust institutions to address issues that interface with other areas of law has become increasingly relevant in a globalized world

relationships involving international organizations typically establish sequences of accountability.<sup>197</sup> In addition, multiple intersecting accountability relationships exist when different groups of market participants with potentially diverse interests set out to hold other agents accountable for their behaviors.<sup>198</sup>

Within the contemporary business environment, companies confront many and frequently incompatible accountability demands.<sup>199</sup> Sometimes it is not enough to satisfy the demands of shareholders and credit markets.<sup>200</sup> Merely complying with legal rules is often insufficient because the law typically trails behind quickly evolving social norms.<sup>201</sup> Businesses must remain mindful of their constituencies'—peers, media, and advocacy groups—reactions to their actions.<sup>202</sup>

### C. CONCEPT OF RULE OF LAW

In the interest of gaining a philosophical perspective, it is necessary to distinguish two methods of framework analysis. One method involves discussing the actual working arrangements that constitute global economic governance from the perspective of practitioners.<sup>203</sup> The second method involves

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economy. Shortcomings of antitrust in addressing the effects of trade distortions threaten to limit the potential gains of trade liberalization.”).

197. See Keohane, *supra* note 167, at 1124 (noting that in a common accountability sequence, an agent will be authorized by a given accountability relationship but yet another such relationship will restrict it; for example, the International Accounting Standards Board holds companies responsible for accounting practices, yet it is itself accountable to the entities granting authority to it, namely the G-7 Finance Ministers and Central Bank Governors and the International Organization of Securities Commissions).

198. See, e.g., Stephanie A. Barbosa, Note, *Implementation of the DOHA Declaration: Its Impact on American Pharmaceuticals*, 36 RUTGERS L.J. 205, 207–211 (2004) (citing Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994)) (giving the example that the WTO and the Trade-Related Aspects of Intellectual Property Rights Agreement both attempt to hold multinational pharmaceutical companies accountable, yet shareholders of the pharmaceutical companies also hold firms accountable).

199. See Ross, *supra* note 171, at 11-13.

200. See *id.* at 7-8.

201. See Carol & Buchholtz, *supra* note 140, at 41.

202. See Jackson, *supra* note 162, at 109 (providing examples about how U.S. West was criticized for by gay-rights advocates when it contributed to the Boy Scouts of America and how Dayton-Hudson was criticized for supporting Planned Parenthood).

203. For an example of a work discussing the actual working arrangements that constitute global economic governance, see MAKING GLOBAL TRADE

abstracting from existing arrangements and theorizing about the idea of global economic governance as an order.<sup>204</sup> Abstracting in this context is similar to abstracting from the existing international legal system and theorizing about the concept of international law.<sup>205</sup>

While the actual global governance schemes discussed in the preceding section represent contingent political and commercial arrangements, this section of the article is geared toward abstracting these contingent features in order to examine the presuppositions of global governance as an idea. In particular, the concern is how that idea relates to the concept of the rule of law.

While global governance may indeed possess numerous beneficial features—among them is the promotion of more responsible competitiveness across global markets<sup>206</sup>—questions remain about its capabilities to protect and promote the international rule of law, which presupposes some deeper authoritativeness. It is therefore necessary to clarify the concept of international rule of law and discuss the significance of that idea as it pertains to the moral authority of global governance régimes.

The legitimacy of traditional international law and emergent approaches to global governance may be analyzed from a variety of standpoints on a theoretical level.<sup>207</sup> As a threshold matter, determining whether to regard law in instrumental or non-instrumental terms, or in some combination of the two, must be made.<sup>208</sup>

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GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES (Carolyn Deere Birkbeck ed., 2011).

204. See generally DAVID LEWIS, COUNTERFACTUALS 84 (Blackwell Publishers & Harv. Univ. Press 1973) (“Ordinary language permits the paraphrase: there are many ways things could have been besides the way they actually are.”).

205. See Nardin, *supra* note 26, at 389.

206. See Zadek & McIlivray, *supra* note 19.

207. See APPROACHES TO GLOBAL GOVERNANCE THEORY (Martin Hewson & Timothy J. Sinclair eds., State Univ. of N.Y. Press, 1999) (identifying three approaches: (1) the use of global governance as a way to enhance the work of international organizations, (2) a revision of regime theory, and (3) a normative approach).

208. See Anne-Marie Slaughter & Steven R. Ratner, *Symposium on Method in International Law: The Method Is the Message*, 93 AM. J. INT'L L., 410, 410 (1999) (noting that one way of addressing international law questions is the instrumentalist versus non-instrumentalist approach).



### 1. Instrumental Versus Non-Instrumental Viewpoints of Law

The non-instrumental conception of law holds that the content of law is, in some sense, given; that law is immanent; that the process of law-making is not a matter of creation but one of discovery; that law is not the product of human will; that law has a kind of autonomy and internal integrity; and that law is, in some sense, objectively determined.<sup>209</sup>

By contrast, the instrumental view of law holds that law is an instrumental process determined by non-legal factors, and its legitimacy comes from its ability to serve social purposes.<sup>210</sup> This instrumental conception of law is labeled as “pragmatism.”<sup>211</sup>

One source of skepticism toward the concept of an international rule of law that is also a potential source of optimism toward global governance comes from scholars who view the concept of law in strictly instrumental terms.<sup>212</sup> Whether one is considering a domestic or international context, all that law can ever amount to is policy.<sup>213</sup> The instrumental view conceives of the nature of law as simply a decision process rather than a coherent system of rules.<sup>214</sup> To the extent that law engages rules, it does so only to promote the utilitarian objective of generating desired outcomes.<sup>215</sup> The authority of such norms stems from their effectiveness in realizing such

209. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 11 (Cambridge University Press, 2006).

210. Brian Tamanaha, *On the Instrumental View of Law in American Legal Culture* 4 (St. John's Univ. Sch. of Law Legal Studies, Research Paper Series Paper No. 08-0143, Aug. 2011).

211. See RONALD M. DWORKIN, *LAW'S EMPIRE* 152 (Harvard Univ. Press, 1986). See also KEVIN T. JACKSON, *CHARTING GLOBAL RESPONSIBILITIES: LEGAL PHILOSOPHY AND HUMAN RIGHTS* (Univ. Press of Am., 1994) (applying the pragmatist conception of law to the international context).

212. Hent Kalmo, *How Comparable Are Legal Concepts? The Case of Causation*, XI *JURIDICA INTERNATIONAL* 45, 52 (2006) (listing Basil Markesinis as a scholar adopting an openly instrumental view of legal vocabulary).

213. Allen Buchanan, *Democracy and the Commitment to International Law*, 34 *GA. J. INT'L & COMP. L.* 305, 306–308 (2006) (noting that some states only use the instrumental theory of international law when such use is to their advantage).

214. Kalmo, *supra* note 212 (noting that Basil Markesinis claims that tort law concepts are words to help phrase decisions).

215. See, e.g., JOHN STUART MILL, *UTILITARIANISM* (Hackett Publishing Company 2001).

outcomes.<sup>216</sup>

By contrast, non-instrumental norms are those which ought to be respected for their own sake, apart from some desired result.<sup>217</sup> An example of a non-instrumental norm at the heart of the rule of law and human rights is one prescribing that because citizens are related to each other as moral equals, they have a right to be treated as equals.<sup>218</sup> Likewise, the familiar requirements of the rule of law such as *nullum crimen, nulla poena sine praevia lege poenali* that serve as restraints on arbitrariness, limiting what authorities can do and how they go about doing it, are all of a non-instrumental character.<sup>219</sup>

The existence of non-instrumental norms is what enables a distinction between just and unjust uses of force or coercion. While non-instrumental norms are similar to moral principles,<sup>220</sup> they are nevertheless internal to law.

## 2. Radical Skepticism

Another view, skeptical of the rule of law maxim, comes from postmodernist portrayals of law.<sup>221</sup> Radical skeptics of law reject the notion of law as a coherent foundation for human coordination and collaboration.<sup>222</sup> For instance, “[r]ights discourse is internally inconsistent, vacuous, or circular. Legal

216. *See id.*

217. Richard Arneson, *Egalitarianism*, *STANFORD ENCYC. PHIL.* (Edward N. Zalta ed., Spring 2009), available at <http://plato.stanford.edu/archives/spr2009/entries/egalitarianism/>.

218. *See* RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (Harvard Univ. Press 1977).

219. *See* Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law* 14 *UCLA J. INT'L L. & FOREIGN AFF.* 77, 109-110 (Spring 2009) (“[P]rocedural and substantive justice are connected and not separate... this still allows that fair procedures have values intrinsic to them - for example, a procedure having the value of impartiality by giving all an equal chance to present their case”) (quoting John Rawls, *POLITICAL LIBERALISM* 421-23 (1993)).

220. *See* RICHARD MADSEN & TRACY B. STRONG, *THE MANY AND THE ONE: RELIGIOUS AND SECULAR PERSPECTIVES ON ETHICAL PLURALISM IN THE MODERN WORLD* 118 (Princeton Univ. Press 2003) (“A non-instrumental conception of . . . norms as commonly agreed upon moral principles is surely possible.”).

221. *See, e.g.*, Thomas Diez & Jill Steans, *A Useful Dialogue? Habermas and International Relations*, 31 *REV. INT'L STUD.* 127 (2005) (noting that the Habermas-style ethical model of dialogue and mutual recognition could support collaborative governance).

222. *See, e.g.*, Duncan Kennedy, *Legal Education as Training for Heirarchy*, in *THE POLITICS OF LAW*, 40, 48 (David Kairys ed., Pantheon ed., 1982).

thought can generate equally plausible rights justifications for almost any result.”<sup>223</sup> Also, legal principles are both logically incoherent and normatively unattractive.<sup>224</sup> Challenging the very idea of rule of law, John Hasnas writes:

I refer to the *myth* of the rule of law because, to the extent this phrase suggests a society in which all are governed by neutral rules . . . there is no such thing. As a myth, however, the concept of the rule of law is both powerful and dangerous. Its power derives from its great emotive appeal. The rule of law suggests an absence of arbitrariness, an absence of the worst abuses of tyranny.

Because the law is made up of contradictory rules that can generate any conclusion, what conclusion one finds will be determined by what conclusion one looks for, i.e., by the hypothesis one decides to test. This will invariably be the one that intuitively “feels” right, the one that is most congruent with one’s antecedent, underlying political and moral beliefs. Thus, legal conclusions are always determined by the normative assumptions of the decision maker.<sup>225</sup>

It should be noted in response to the radical skeptics that any world view denying the possibility of objective moral truth within the context of domestic legal orders cannot, *a fortiori*, serve to justify an international rule of law.<sup>226</sup> That is because the rule of law presupposes deliberative procedures for rendering decisions that establish obligations in the context of some legally ordered community.<sup>227</sup> In this sense the rule of law applied to the global realm makes sense only if certain universal ideas are assumed: Kant’s concept of a human person

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223. *Id.*

224. See Larry Alexander & Emily Sherwin, *DEMISTIFYING LEGAL REASONING* 95-98 (Cambridge Univ. Press 2008).

225. John Hasnas, *The Myth of the Rule of Law*, 199 WIS. L. REV. 199, 201 (1995).

226. See Gary Born, *A New Generation of International Adjudication*, 61 DUKE L. REV. 775, 789 (citing Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 904 (2005)) (responding to skeptics and defending independent tribunals and quasi-judicial review bodies as mechanisms of the international rule of law).

227. *Id.*

as a member of a universal legal and moral community, and the notion of a cosmopolitan democracy.<sup>228</sup>

The more general and abstract norms become, the more indeterminate their application will be.<sup>229</sup> If one assumes that the rule of law requires certainty, predictability, consistency, and non-contradiction, then the unavoidable dependence of global governance régimes on general and abstract norms for setting out sustainability guidelines and human rights standards seems to call the rule of law into question. Is it therefore illusory to attempt to associate global governance with the rule of law? If one is committed to an ideal like the rule of law, there must be continual effort to separate authentic from inauthentic and legitimate from illegitimate.<sup>230</sup> In actuality, there is no final attainment of the rule of law, whether in advanced domestic legal systems or in emerging global governance régimes. Analogously, there is no final accomplishment of practical rationality for human persons. Instead, the notions of practical rationality and rule of law are both regulative ideals that need to be continuously tracked.<sup>231</sup>

In this regard, radical legal skeptics cling to a constitutive conception of rule of law.<sup>232</sup> On this account, the rule of law is simply a characteristic patterned upon existing epistemological imperfections in legal orders, whether from rules or decision makers, the skeptics choose to criticize. The radical skeptics of law flatly deny the possibility of a legal system with the capability of rooting out the imperfections and correcting them. The conception advanced in this article is regulative, not constitutive. This means that the rule of law is understood as a

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228. See DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARD COSMOPOLITAN DEMOCRACY* 119–20 (Princeton Univ. Press, 2008).

229. See BENJAMIN GREENWOOD GREGG, *COPING IN POLITICS WITH INDETERMINATE NORMS: A THEORY OF ENLIGHTENED LOCALISM* 28 (SUNY Press, 2003) (“Because of their abstract character, norms are incapable of specifying what to do in every contingency and must be defined in terms of the occasions of their application; this is their core ambiguity.”).

230. *Contra* Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1124 (1997) (discussing the “impossibility of distinguishing legitimate from illegitimate legal rules”).

231. See Michael Sean Quinn, *Symposium on Taking Legal Argument Seriously: Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT. L. REV. 655, 775 (arguing that regulative ideals are involved in the concept of rule of law).

232. JOHN BRIGHAM, *MATERIAL LAW: A JURISPRUDENCE OF WHAT'S REAL* (Temple University Press 2009).

regulative principle mandating that global governance institutions and actors seek to make the standards arising from global governance schemes increasingly clear, consistent, fair, reasonable, and to maintain such public standards with intensifying commitments. From the standpoint of the regulative conception, any contradictions or inconsistencies that might be detected and seized upon by the radical skeptics would only serve as further inducements for pursuing the rule of law, as incentives for making the ideal more of a reality.

### 3. Implied Components of Legality

The rise of global economic governance syndicates leads to questions like whether and to what extent such régimes, particularly those that are “enforced” by sporadic and vicious “naming and shaming” campaigns of self-appointed activists who may deploy unscrupulous “dirty” political tactics, can reasonably be said to embody the rule of law, and what this might suggest in terms of their legal and moral authority.<sup>233</sup>

Reference to the fundamental presuppositions of legality is illuminating. Basic implied elements constitute the “internal morality” of law or “the morality that makes law possible.”<sup>234</sup> Some implied elements include the existence of rules as opposed to ad hoc declarations, publicity, non-retroactivity, understandability, non-contradiction, capability of compliance, temporal constancy, and congruence between official behavior and rules.<sup>235</sup> This underscores key questions raised earlier: to what extent do global business civil regulations at play in global governance mechanisms display a fidelity to such non-instrumental and unwritten characteristics of legality? Are civil regulations dominated by instrumental objectives in promoting liberal policies?

Another feature of the rule of law that warrants discussion

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233. A central concern of legal philosophers since the middle of the twentieth century has been the nature of the rule of law. Arguably one reason for this concern was the rise and decline of totalitarian governments. Following the demise of Nazism, philosophers of law put their theories of law to test, in the famous Hart-Fuller debates, for example, with questions like whether the Hitler’s regime could meaningfully be deemed a legal system. See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957). See also Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957).

234. See LON L. FULLER, *THE MORALITY OF LAW* 39 (Yale Univ. Press 1964).

235. See *id.* (discussing implied elements which constitute the internal morality of law).

is its implied concern for the well-being of citizens standing in special relation to whomever undertakes to govern them. The rule of law ordains that citizens stand in relation to one another as members of a community.<sup>236</sup> This is called the “community of principle.”<sup>237</sup>

A community of citizens situated under a rule of law enjoys entitlements to pursue their freely chosen ends without interference, save when needed to restrain them from interference with each other’s freedom.<sup>238</sup>

#### 4. “Publicness”

It is important to address the relationship between the rule of law and the multiplicity of “publics” relevant to the idea of a common public justification. In collaborative governance, a substantial part of the process of rulemaking connected with human rights standards is remote from any strictly democratic process.<sup>239</sup> The ideas of the rule of law and human rights, however, presuppose the existence of some group of persons—some public—in whose name the law stands. According to the rule of law, legal norms must be representative of the entire society and be addressed to issues of concern to society per se, rather than merely pertaining to matters of personal interest to people or groups that create the rules.<sup>240</sup>

Because “publicness” is related to the democratic process of law-making,<sup>241</sup> there are limits to this being realized at the international level. There is no global democracy in place on earth, after all.<sup>242</sup> Although collaborative governance tends to

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236. Dworkin, *supra* note 211, at 211.

237. *Id.*

238. Todd J. Zywicki, *The Rule of Law, Freedom and Prosperity* 3 (George Mason Sch. of Law, Law and Econ. Working Paper Series, Working Paper No. 02-20).

239. See Jan Aart Scholte, *Civil Society and Democracy in Global Governance* 12 (CSGR Working Paper No. 65/01, 2001) (“Governance of global spaces is not only different, but also lacks democratic legitimacy.”).

240. See Jeremy Waldron, *Can There be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 700 (2009).

241. Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law* 79, 85 (N.Y. Univ. Pub. Law and Legal Theory Working Papers, Working Paper No. 256, 2011), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1260&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1260&context=nyu_plltwp).

242. See Boris Kagarlitsky, *Global Democracy Through National Democracy*, BUILDING GLOBAL DEMOCRACY, <http://www.buildingglobaldemocracy.org/content/east-europe-and-central-asia> (last visited Oct. 4, 2012) (noting that “no global democratic political process

extend the range of actors involved in formulating rules, there appears to be no immediate likelihood that transnational collaborative governance will institute processes that closely resemble democratic procedures within states.<sup>243</sup>

As more and more sector-based and non-state agents assume roles in collaborative governance régimes, the question of whether such parties are authentic representatives of “the public” carrying authority over human rights matters naturally arises. This in turn raises the question of whether a purportedly “public” entity is really a genuine representative of a relevant public. It also raises the question of whether it makes sense to speak of a decision, along with the rules and principles upon which it is rendered, as standing in the name of an entire community, speaking to that entire community when it may in fact be addressed to a narrower group.<sup>244</sup>

##### 5. The Concept of a Regulative Principle

Kant’s concept of a regulative principle or ideal helps clarify the meaning of rule of law in the global governance context.<sup>245</sup> In *Critique of Pure Reason*, Kant set forth to establish what we know and how we can know it.<sup>246</sup> Kant demonstrated the way society’s observation of the world must be bound together and organized on the basis of certain basic ideas and concepts.<sup>247</sup> These basic concepts, such as the idea of cause and effect, shape people’s knowledge and understanding. Kant argued that some ideals are unattainable but still serve key functions.<sup>248</sup> Among such ideas are those of truth, goodness, and beauty.<sup>249</sup> People’s efforts to approach such ideals exert a profound influence on their actions, and people’s regard for them plays a vital role in the way people accept some

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can develop unless it is based on serious democratic change at the national and local levels.”).

243. Robert Dahl, *Can International Organizations be Democratic? A Skeptic’s View*, 19 DEMOCRACY’S EDGES 19–36 (Ian Shapiro & Casiano Hacker-Cordon eds., Cambridge Univ. Press 1999).

244. See Benedict Kingsbury, *International Law as Inter-Public Law*, in NOMOS XLIX: MORAL UNIVERSALISM AD PLURALISM 174 (Henry R. Richardson & Melissa S. Williams eds., N.Y. Univ. Press, 2009).

245. Immanuel Kant, CRITIQUE OF PURE REASON (Norman Kemp Smith trans., 1929).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

views and reject others.<sup>250</sup>

Kant sets forth the notion of a regulative principle, which as an ideal is a specific, singular concept that exemplifies the perfection of some action, process, or object.<sup>251</sup> For instance, an ideal legal order would be fair,<sup>252</sup> treat all citizens as equals,<sup>253</sup> and resolve disputes<sup>254</sup> in an objective and enlightened way. It is not possible for a regulative principle to actually be realized in the course of actual events.<sup>255</sup> Consequently, critics of Kant's philosophy attack it for laying emphasis upon states of affairs that are inaccessible or unattainable.<sup>256</sup> However, such a charge does not appreciate the role that ideas play in constituting the possibility of understanding reality in the first place.

A principle is considered regulative rather than constitutive when it is unachievable but is able to guide, balance, and mediate people's actions in practical matters. A regulative principle constitutes an ideal to aim for, by which people are put in a position to measure their progress.<sup>257</sup> By

250. George Miller, *Reading Revolutions: Intellectual History: Emerson's Optimism*, available at [http://hua.umf.maine.edu/Reading\\_Revolutions/Emerson.html](http://hua.umf.maine.edu/Reading_Revolutions/Emerson.html) (last visited Oct. 9, 2012) ("Our only access to truth, goodness, or to life itself, is through our own understanding and our own judgments.").

251. *Id.*

252. John Tasioulas, *International Law and the Limits of Fairness*, 13:4 EUR. J. INT'L L. 993 (2002).

253. See Douglas J. Amy, *Government as the Champion of Justice, Equality, Freedom, and Security*, GOVERNMENT IS GOOD, <http://www.governmentisgood.com/articles.php?aid=12&p=1> (last visited Oct. 10, 2012).

254. See Robert S. Done, *Resolving Conflict Within the Organization: Creating "Win-Win" Solutions with Mediation*, SOC'Y INDUS. & ORG. PSYCHOL., INC., available at <http://www.siop.org/tip/backissues/tipjan99/3Done.aspx> (last visited Oct. 10, 2012) (noting that although litigation, which relies on the legal order to resolve disputes, is common today, other methods of dispute resolution may also be useful).

255. Garth Kemerling, *Kant: Experience and Reality*, THE PHILOSOPHY PAGES, <http://www.philosophypages.com/hy/5g.htm> (last modified Nov. 12, 2011) ("The absence of any formal justification for these notions makes it impossible for us to claim that we know them to be true, but it can in no way diminish the depth fo [sic] our belief that they are.").

256. See, e.g., Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 IOWA J. CORP. L. 469, 500 (2004) (criticizing Kant's notion of fairness because "as general critics of Kant have long noted, it may not be possible to show how fairness itself is universally binding, in and of itself, on all conscientious people.").

257. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* A674/B702 (Norman Kemp Smith trans., St. Martin's Press 1929) (arguing that regulative



contrast, constitutive principles dictate how things must be and come about from people's insight into their essential nature.<sup>258</sup>

Within the ideal realm, Kant contends that separate ideals do not necessarily contradict one another.<sup>259</sup> Thus, people may go in pursuit of multiple ideals negotiated alongside each other. Because, however, people do not live in an ideal realm, conflicts among ideals arise.<sup>260</sup>

#### 6. Received View of Rule of Law

The problem of reaching an adequate account of the rule of law is among the most important issues that global governance and international law must address.

Among the various interpretations of the rule of law, the more widely accepted interpretations range across the so-called "thin" versus "thick" spectrum, accompanied also by the "rule-by-law" idea.<sup>261</sup> At one end of the spectrum, the "thin" or "formal" conception holds that the rule of law possesses only some minimal formal characteristics like the requirements that law must be publicly declared, have only prospective application, and be imbued with the attributes of generality, equality, and a reasonable degree of certainty or predictability.<sup>262</sup> Beyond that, except for sharing an opposition to the arbitrary exercise of power, "thin" conceptions do not

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principles come into play in reconciling conflicts that come up for reason with themselves, and that regulative principles stem from people's interests in gaining a certain possible perfection).

258. For further development of the regulative-constitutive distinction, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 178 (1995) (explaining how some rules, like those of the game of chess, not only regulate the activity but also function to constitute it).

259. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1797).

260. See NICOLAS RESCHER, *ETHICAL IDEALISM* 125 (1987) (arguing that an ideal constitutes a "component within a system, which makes it possible to strike a reasonable balance between the different and potentially discordant values.").

261. See generally Robert, J. Barro, *Rule of Law, Democracy, and Economic Performance*, INDEX OF ECONOMIC FREEDOM, available at <http://www.geser.net/Barro.pdf> (providing an example of another account, one asserting that the rule of law constitutes a set of ideals that protect political arrangements like democracy or promote economic arrangements like free market capitalism).

262. See generally Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice* (June 7, 2007) (unpublished note) (on file with author), available at <http://www.law.yale.edu/documents/pdf/LawJournals/ringer.pdf>.

attribute any particular requirements regarding the content of law.<sup>263</sup> At the other end of the spectrum, “thick” or “substantive” conceptions deem the rule of law to entail protections for individual rights and to incorporate substantive considerations of justice.<sup>264</sup> Under the “rule-by-law” conception, the idea of the rule of law stands in contrast to the discretionary rule of men which is associated with abuse of power by government officials.<sup>265</sup>

Regarding the thin and thick distinction, it may be helpful to understand it in the way that mathematics treats dimensions. The multidimensional character of the rule of law can be acknowledged, noting that the thicker conceptions differ from the thinner ones by virtue of additional “coordinates” being added. As one moves to a “higher” (“thicker”) dimension, the “lower” (“thinner”) dimensions remain intact. This is another way of expressing the point that “[s]ubstantive theories are typically built on the back of formal ones.”<sup>266</sup> In making comparisons amongst the various candidate conceptions, it is good to remember that the admonition that a “common critique of those who claim to articulate ‘thin’ theories is that substantive elements have been included by stealth.”<sup>267</sup>

This article contends that a rule of law obtains only where actions, including not only those acts of sovereign states and their agents but also those of diverse economic actors in international institutions, are constrained by the regulative idea of law.

This raises the challenging question of what law is.<sup>268</sup> For

263. *See generally id.*

264. *See generally id.*

265. *See* BRIAN TAMANAHA, *supra* note 14 (“Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”) (quoting FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 80 (1994)).

266. Simon Chesterman, *An International Rule of Law?* 56 *AM. J. COMP. L.* 331, 341 (2008) (citing Randall Peerenboom, *Varieties of Rule of Law*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE US* 1, 5–6 (Randall Peerenboom ed., 2004)).

267. *Id.* (citing Peerenboom’s suggestion that the thin versus thick conceptions may be visualized as concentric circles, with the inner circle containing core components of a thin rule of law and itself embedded within a thick rule of law framework).

268. David Howarth, *On the Question, “What Is Law?”* 6:3 *RES PUBLICA* 259 (2000).

the instant purpose, it is useful to clarify the function of international law. First, international law's function is to attain an end state which is desired by those whose conduct is placed under the authority of law.<sup>269</sup> Second, international law functions to bring about justice within a wide array of instances of human, state, and institutional interaction.<sup>270</sup> One persistent threat is the detachment of this key function of international law from the non-instrumental concept of law and the tendency to instead view law purely as an instrument for policy, used to impose the will of the more powerful components of the international order (whether sovereign states, powerful multinational corporations, the ultra-rich, and so on).<sup>271</sup> Third, international law functions to resolve transnational political,<sup>272</sup> economic,<sup>273</sup> and social conflicts.<sup>274</sup> It does this by establishing coherent boundaries as to what conduct people, states, and institutions can come to expect from one another.<sup>275</sup> In this way, international law continually evolves by providing ways to establish a state of equilibrium in response to deviations from the norms that have been established.

The rule of law is guaranteed in the international context only if those harmed by noncompliance possess some means of redress against those who have broken the rules.<sup>276</sup> Here the

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269. See Inaamul Haque & Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law* 27 B.C. INT'L & COMP. L. REV. 219, 239 (2004) ("The future of international law depends upon the allegiance it commands from those subject to it.").

270. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399 (1999) (noting that one phase of the transnational legal process is "institutional interaction whereby global norms of international human rights law are debated, *interpreted*, and ultimately *internalized* by domestic legal systems.").

271. See, e.g., Bruce Upbin, *The 147 Companies That Control Everything*, FORBES, Oct. 22, 2011, <http://www.forbes.com/sites/bruceupbin/2011/10/22/the-147-companies-that-control-everything/>.

272. Eric Brahm, *International Law, BEYOND INTRACTABILITY*, available at <http://www.beyondintractability.org/bi-essay/international-law> (last visited Oct. 10, 2012) (noting that the Inter-American Court of Rights has been an important moral voice, especially when Latin American states struggled with political transitions).

273. U.N. Charter art. 1, para. 3.

274. *Id.*

275. See, e.g., U.N. Charter art. 2.

276. *What Is Reparation?*, REDRESS, <http://www.redress.org/what-is-reparation/what-is-reparation> (last visited Oct. 10, 2012) (explaining that reparation, an obligation of a wrongdoing party to redress the damage caused to an injured party, is a form of redress and applies in the context of

violation of law is considered an abuse of power.<sup>277</sup> While the “vertical” sovereign abuse of power has traditionally been a central focus of rule of law conceptions, the idea of the rule of law can be expanded to encompass other “horizontal” abuses of power as well.<sup>278</sup> After all, in civil matters, one party sues another private party and the gravamen of complaint is that the other private party, as a co-equal citizen, has broken the law.<sup>279</sup>

This way of thinking avoids the problem of granting a monopoly to states to handle the enforcement of law. Whereas the idea of separation of powers has proved an effective balance to over-concentration of sovereign power, expanding the rule of law to other forms of governance provides new avenues for separation of power to gain currency in the global context.<sup>280</sup>

Rule of law is an end state of affairs where law as a system of norms is deployed in a way that justifies its existence and authority over a community of persons.<sup>281</sup> The rule of law is opposed to arbitrary use of power, regardless of whether that power is state or non-state.<sup>282</sup> It entails that some measure of certainty obtains in society, whether in the short or long term. A system of general norms enables people to foresee how they will interact, or chose not to interact, with other citizens and with institutions public and private.

The discussion so far reflects that rule of law is not an all-

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international law).

277. See, e.g., *Guantanamo Bay: An Abuse of Power and a Violation of Human Rights*, PEACES OF THE WORLD, <http://peacesoftheworld.org/north-america/guantanamo-bay-an-abuse-of-power-and-a-violation-of-human-rights/> (last visited Oct. 10, 2012).

278. John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 1 (2008).

279. See, e.g., Joe Burns, *Copyright Questions and Answers*, HTML GOODIES, <http://www.htmlgoodies.com/beyond/reference/article.php/3472671/Copyright-Questions-and-Answers.htm> (last visited Oct. 10, 2012) (using copyright violations as one example of when a civil lawsuit may be brought against a defendant alleged to have broken the law).

280. *Separation of Powers in a Global Context*, in JUDGES, TRANSITION AND HUMAN RIGHTS: ESSAYS IN MEMORY OF STEPHEN LIVINGSTONE (John Morison, Kieran McEvoy & Gordon Anthony eds. 2007).

281. John Gardner, *Law and Morality*, 3, available at <http://users.ox.ac.uk/~lawf0081/pdfs/lawmoralityedited.pdf> (“Law makes moral claims, and when it makes those claims sincerely it has moral aims, and when it succeeds in those aims it is morally justified law.”).

282. See READINGS IN THE PHILOSOPHY OF LAW 20 (Keith Culver ed., Broadview Press, Ltd., 1999) (maintaining that rule of law curbs forms of arbitrary power).

or-nothing idea.<sup>283</sup> Moreover, emerging global governance devices, like public-private collaboration, that blur traditional distinctions sanctified under “hard” public international law categorizations are not in themselves necessarily “good” or “bad” things.<sup>284</sup> In each case it becomes important to scrutinize questions about whether a collaborative governance arrangement becomes a form of “corporatocracy,”<sup>285</sup> whether checks and balances exist within the collaborative relationship to restrain despotism in private and non-governmental forms,<sup>286</sup> whether the collaboration is a convenient shield for deflecting responsibility or passing off blame to the another party,<sup>287</sup> whether NGOs (who often posture themselves as critics of other institutions) that are parties to the syndicate are themselves being held accountable,<sup>288</sup> and whether a collaborative governance scheme is a front for “crony capitalism.”<sup>289</sup>

## II. GLOBAL ECONOMIC GOVERNANCE AND HUMAN RIGHTS

A close examination of the correlation between business

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283. See generally Thomas G. Weiss & Ramesh Thakur, *GLOBAL GOVERNANCE AND THE UN: AN UNFINISHED JOURNEY* (Ind. Univ. Press 2010).

284. *Id.* at 6 (saying that global governance can be “good, bad, or indifferent”).

285. See generally Charles P. Oman, *Policy Competition for Foreign Direct Investment* (April 1999), available at <http://www.oecd.org/investment/guidelinesformultinationallenterprises/2089936.pdf> (discussing how corporations pit one government against another in location decisions, shedding light on the idea that some governments appear to be dominated by powerful corporations).

286. See, e.g., James Madison, *FEDERALIST* No. 51 (arguing that those who make law and those who enforce it should be separated in order to provide a check against law creators advancing their own agendas).

287. See, e.g., Nora Barrows-Friedman, *Campaigners strategize refugee return during South America visit*, *JEWS FOR JUSTICE FOR PALESTINIANS* (May 6, 2012), <http://jffjp.com/?p=31467> (saying that a Palestinian “partner for peace” allows Israel to deflect any criticism through a combination of blaming Palestinians for not doing enough and pointing to the ongoing “peace process” charade).

288. Mallen Baker, *The accountability of NGOs*, *MALLENBAKER.NET* (Nov. 16, 2003), [http://www.mallenbaker.net/csr/page.php?Story\\_ID=1136](http://www.mallenbaker.net/csr/page.php?Story_ID=1136).

289. See Vladimir Gelman, *Russia’s crony capitalism: the swing of the pendulum*, *OD RUSSIA* (Nov. 14, 2011), <http://www.opendemocracy.net/od-russia/vladimir-gelman/russia%E2%80%99s-crony-capitalism-swing-of-pendulum>; see also ROY MEDVEDEV, *POST-SOVIET RUSSIA* (George Shriver trans., 2000) (offering a useful historical view of the economic and political problems in Russia since August 1991).

and human rights in global economic governance is of vital importance. Human rights are of precious worth because they allow people to exercise free choice, safeguard their own interests, and safeguard those of others.<sup>290</sup>

Human rights are at the heart of the United Nation's efforts.<sup>291</sup> They occupy center stage in the creation of company codes of conduct and constitute lodestars for civil society in rendering their interpretations of transnational enterprises' responsibilities.<sup>292</sup> There is a deep connection between the rule of law and human rights.<sup>293</sup> Preserving and advancing human rights is one of the most basic obligations underlying the rule of law in both domestic and international contexts. Human rights provide a normative foundation for democratic governments around the world.<sup>294</sup>

Today, transnational business enterprises are drivers of economic development at the local, regional, and global levels.<sup>295</sup> The decisions rendered by corporations impact the welfare of people in numerous countries across the developing world, often in ways that are commensurate with or even greater than national governments.<sup>296</sup> Indeed "there are few if any internationally recognized human rights that business cannot impact—or be perceived to impact—in some manner."<sup>297</sup>

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290. See TOM CAMPBELL, *RIGHTS: A CRITICAL INTRODUCTION* 4 (2006) (noting that "rights offer security through a system of social and political entitlements" and "provide a basis for setting standards that apply to everyone in all societies and to every government, thus holding out the prospect of universal justice.").

291. U.N. Human Rights Council, Rep. of the Working Grp. on the Issue of Human Rights and Transnational Corp. and Other Bus. Enter., U.N. DOC. A/HRC/20/29 (Apr. 10, 2012).

292. See, e.g., U.N. Secretary-General, *Promotion and Protection of All Human Rights Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. DOC. A/HRC/815 (April 7, 2008).

293. Gary L. McDowell & Stephen B. Presser, *Foreword: Human Rights, The Rule of Law, And National Sovereignty*, 2 NW. U. J. INT'L HUM. RTS. 1 (2004).

294. See generally John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2009).

295. JOHN MADELEY, *BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD'S POOR* (Palgrave Macmillan, 1999).

296. See generally *id.*

297. See, e.g., U.N. Secretary-General, *Promotion and Protection of All Human Rights Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. DOC. A/HRC/815 (April 7, 2008).

## A. INSTRUMENTAL JUSTIFICATIONS FOR HUMAN RIGHTS

Human rights discourse implicates the normative logic of the dyad of right and wrong. The inquiry behind that discourse aims at whether or not some value or principle is being upheld. When a framework for human rights is engaged, as when voluntary codes are instituted, human rights will trump outcome-aimed considerations.<sup>298</sup> While an assertion could be made that human welfare will be improved by conduct violating rights of particular people affected by such conduct, this state of affairs cannot prevail when moral status is extended to human rights. The non-instrumental normative logic of human rights trumps the instrumental logic of consequentialism. Naturally, situations arise in which human rights, values, and principles diverge from other considerations taken to be important to business, such as profitability, efficiency, or sustainability objectives.

Wherever human rights obligations are at issue, although they are often contestable in the sense that there may be no consensus on whether some action or activity is in line with respect for human rights, the rights themselves are not subject to negotiations and trade-offs.

In the global context, rights discourse is sometimes perceived as the product of a parochial western culture out of sync with the wants and hopes of the bulk of the people on the planet.<sup>299</sup> In the West, a rights-oriented discourse must confront skepticism that rights have not always advanced progressive aims.<sup>300</sup>

As a result, a major challenge faces businesses concerning the pursuit of human rights standards. Sometimes this concern is veiled by the apparent eagerness with which firms inject human rights rhetoric into their codes of conduct and annual reports.<sup>301</sup> Some scholars contend that, despite all of the sanctimonious rhetoric about social responsibility and sustainability, corporate human rights commitments are narrowly bound by instrumental aims that effectively curb

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298. See Tom Campbell, *A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations*, 16 BUS. ETHICS Q. 255, 256 (2006) (citing RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 269 (1978)).

299. TOM CAMPBELL, *supra* note 290, at 10.

300. *Id.*

301. See, e.g., IBM, *2011 Corporate Responsibility Summary*, available at [http://www.ibm.com/ibm/responsibility/2011/bin/downloads/IBM\\_Corp\\_Responsibility\\_Report\\_2011.pdf](http://www.ibm.com/ibm/responsibility/2011/bin/downloads/IBM_Corp_Responsibility_Report_2011.pdf) (last visited Oct. 11, 2012).

external stakeholder interests in order to fortify the power of large business enterprises.<sup>302</sup>

On the one hand, transnational enterprises have become accustomed to maneuvering within the various constraints imposed by rule of law and to performing in locales where governments hold them to human rights standards.<sup>303</sup> To be sure, being situated within a secure legal environment generally improves an enterprise's ability to successfully conduct business.<sup>304</sup> On the other hand, proposals to hold firms directly accountable for human rights violations in legal tribunals, as has been put forward by the United Nations Draft Norms, is typically opposed by industry associations such as the International Chamber of Commerce and the International Organization of Employers.<sup>305</sup> Additionally, nation-states tend to restrict their commitments to human rights when they lend their support to investment and trade agreements that instead privilege respect for corporate rights.<sup>306</sup> One noteworthy illustration of this dynamic can be found in stabilization agreements in which a transnational corporation and a government stipulate that the state will not make any changes in its laws that would elevate operating costs of the enterprise over the duration of a projected business project.<sup>307</sup>

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302. See Subhabrata B. Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly*, 34 CRITICAL SOC. 51–79 (2008).

303. Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting Is Knowledge*, 10 NW. U. J. INT'L HUM. RTS. 119, 119 (2011).

304. See generally, Anthony D'Amato, *Are Human Rights Good for International Business?* 1 NW. J. INT'L L. & BUS. 22 (1979).

305. Int'l Chamber of Commerce [IOC] and Int'l Org. of Employees [IOE], *Joint Views of the IOE and ICC on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights,"* (arguing that the draft norms would undermine human rights, the business sector of society, and the right to development).

306. See Daniel Aguirre, *Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation*, 42 CAL. W. INT'L L.J. 123, 145 (2011).

307. See Andrea Shemberg, *Stabilisation Clauses and Human Rights: A Research Paper Conducted for the IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights* 10 (May 27, 2009), [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p\\_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf) (examining whether stabilization clauses impact a state's ability to keep its human rights obligations, and finding that "some stabilization clauses can be used to limit a state's action to implement new social and environmental legislation to long-term investments"); Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus*



An illustration of an instrumental justification of profit maximization<sup>308</sup> for the human rights responsibilities of business is the United Nations Global Compact, which proposes ten principles that responsible companies should observe.<sup>309</sup> Yet, a pronounced theme throughout the Global Compact Office's commentary on those principles is the strategic advantage to be obtained from enhancing corporate reputation through observance of the principles, in the absence of any acknowledgement of the intrinsic moral value of corporate social responsibility.<sup>310</sup>

Adopting such a non-normative approach to the Global Compact suggests that an instrumental profit maximization justification is sufficient to establish the moral norms that ought to direct corporate conduct to respect human rights. Only by showing the instrumental value of the Compact's principles could one hope to convince companies to endorse the initiative and work toward the fulfillment of its requirements.

Another illustration of instrumental justification for human rights appears in reports of John R. Ruggie, the Special Representative of the Secretary General of the United Nations.<sup>311</sup> These reports lay out the groundwork for the

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*Contract Interpretation*, 31TEX. INT'L L.J. 215, 243 (1996) (indicating that such clauses are designed to set up a contractual mechanism of allocating the financial effect of political risk to the state enterprise).

308. See SONIA LABATT & RODNEY WHITE, ENVTL FIN. 301-08 (2002), (discussing the instrumentally-based justification of profit maximization as a central driver for socially responsible investment); United Nations Environment Program Finance Initiative (UNEPFI), *Show Me the Money 4* (2006), available at [http://www.unepfi.org/fileadmin/documents/show\\_me\\_the\\_money.pdf](http://www.unepfi.org/fileadmin/documents/show_me_the_money.pdf) (noting that the "first — and arguably for investors the most important — reason to integrate [SRI] issues is, simply, to make more money."); Hal Brill, Jack Brill & Cliff Feingenbaum, *INVESTING WITH YOUR VALUES: MAKING MONEY AND MAKING A DIFFERENCE* (New Society Publishers, 1999) (arguing that the area of retail marketing provides further substantiation for the inclination to market SRI funds with an eye toward reducing risk coupled with the objective of generating returns that will outperform the market).

309. See *Ten Principles*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Oct. 3, 2012).

310. See *id.*

311. Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SC/A/934 (Jul. 28, 2005) (explaining that John Ruggie was appointed by Kofi Annan, then Secretary General of the United Nations, to address questions concerning the human rights responsibilities of corporations with a view to formulating recommendations for consideration and adoption by the UN).

proposed UN framework to identify human rights responsibilities of transnational corporations and other business enterprises.<sup>312</sup> One fundamental element of the framework is the principle that corporations have a responsibility to respect human rights in their operations whether compelled to do so by law or its enforcement.<sup>313</sup> The proposed framework carries with it clear and significant implications for public policy and the strategic management of corporations doing business in global markets.<sup>314</sup> It is particularly noteworthy that in setting forth his proposals, Ruggie nowhere appeals to or links his counsels to moral values or any ethical frame of reference.<sup>315</sup>

Wesley Cragg puts the matter squarely as follows:

[I]n advancing his proposals, the SRSG nowhere attempts to justify his recommendations by suggesting or arguing that the corporate responsibility to respect human rights is an ethical or moral responsibility and should be recognized as such by corporations themselves. Neither is there any attempt in the reports emerging from the work of the SRSG to explain or justify this aspect of the proposed Framework.<sup>316</sup>

Ruggie asserts that the responsibility to respect human rights is grounded upon the social expectation associated with “a company’s social license to operate.”<sup>317</sup> Neglecting to live up to such a social expectation may “subject companies to the courts of public opinion . . . and occasionally to charges in actual courts.”<sup>318</sup> Failing to respect human rights could impose risks that might impact operations, harm companies’ reputations, and, by implication, negatively affect their bottom lines.

Ruggie characterizes his approach to enunciating the

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312. U.N. Special Representative of the Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. DOC. A/HRC/8/5 (April 7, 2011) [hereinafter *Protect, Respect and Remedy*].

313. *Id.*

314. *Id.*

315. *Id.*

316. Wesley Cragg, *Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework*, 22 BUS. ETHICS Q. 9, 10 (2012).

317. *Protect, Respect and Remedy*, *supra* note 312.

318. *Id.*

recommended framework as “principled pragmatism.”<sup>319</sup> He does not specify just what this allusion to pragmatism might mean.<sup>320</sup> Yet, the way he justifies the advices points to an underlying assumption that only by tying respect for human rights to bottom line and profit maximization concerns could business leaders in today’s world be reasonably expected to ratify and give effect to the proposed framework.

An instrumental profit maximization justification for business responsibility toward human rights is, from an epistemological point of view, a moral justification grounded in instrumental thinking. This sort of instrumental rationality is, at the same time, premised upon a consequentialist logic that restricts global governance’s concern for human rights and principles such as those in the Global Compact to the instrumental role they play in business management. On the assumption that the purpose of shareholder-owned corporations is to maximize profits, then, if human rights are to exert an influence in management decision making, it must be because they can pave the way to firms’ maximizing profits.

### 1. Instrumental View of CSR

The logic of the instrumental case for human rights can be discerned to underlie an earlier and more general articulation of an instrumental case for CSR that developed beginning in the 1990s.<sup>321</sup> Instrumental CSR stresses the value of corporate responsibility as a means of furthering the financial interests of a company.<sup>322</sup> It is backed by the idea that responsible business conduct makes economic sense.<sup>323</sup> According to the so-called “friendship” image of the relation between economics and

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319. *Id.*, ¶¶ 4-15. See also Nicola Jägers & Willem van Genugten, *Corporations and Human Rights: Moving Beyond ‘Principled Pragmatism’ to ‘Ruggie-Plus’* (March 1, 2011), available at <http://ssrn.com/abstract=1844203>.

320. *Protect, Respect and Remedy*, *supra* note 312.

321. See Lynn S. Paine, *Does Ethics Pay?* 10 BUS. ETHICS Q. 319 (2000) (noting the launching of “ethics programs, value initiatives, and community involvement activities” as evidence of the growing belief, during this period, that “ethics pays”); see generally DAVID VOGEL, *supra* note 5 (providing an analysis of the CSR movement and indicating that while the idea of CSR was not novel, the current global interest in the area was unprecedented); Gond, Palazzo & Basu, *supra* note 18, at 57–86.

322. See Ron Robins, *Does Corporate Social Responsibility Increase Profits?*, BUS. ETHICS (May 12, 2011), <http://business-ethics.com/2011/05/12/does-corporate-social-responsibility-increase-profits/> (saying that most company executives believe CSR can improve profits).

323. *Id.*

ethics, being ethical and attaining financial success are deemed to go hand in hand rather than remaining at a distance as contradictory ideals.<sup>324</sup> The model is grounded on the premise that a convergence can be identified between economic and social values.<sup>325</sup> The objective is to elucidate a plausible economic rationale behind “doing the right thing.”<sup>326</sup>

There are two guises which the economic justification for CSR typically assumes: the negative and the positive business cases.<sup>327</sup> The negative facet of the business case stresses the destructive potential that irresponsible business practices may unleash, causing diminution of economic value.<sup>328</sup> It runs on the assumption that irresponsible practices will sooner or later be both uncovered and condemned by those stakeholder groups of firms that are necessary for firms’ financial successes.<sup>329</sup> Accordingly, corporate rectitude is viewed as promoting the objectives of risk management. Corporations that do the right thing are relieved from being obliged to pay large fines, forfeiting revenue, or suffering reputational penalties when malfeasance comes to light.<sup>330</sup> Ethical conduct can also forestall more rigid and costly regulations from being imposed.<sup>331</sup> Moreover, building a culture of integrity and fair dealing cuts down on coordination, transaction, and monitoring costs.<sup>332</sup>

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324. See Paine, *supra* note 321, at 319.

325. Joe Lawless, *Why Should Your Business Should [sic] Care About Corporate Social Responsibility*, TRIPLEPUNDIT (Sept. 20, 2011), <http://www.triplepundit.com/2011/09/business-care-about-corporate-social-responsibility/> (“Business can be both profitable and socially responsible.”).

326. Nicole Stempak, *Doing the Right Thing: The Best Risk Prevention*, BUSINESSFINANCE (June 16, 2011), <http://businessfinancemag.com/article/doing-right-thing-best-risk-prevention-0616> (“[E]thical conduct can be ingrained into the way they do business—and that can have an impact on the bottom line.”).

327. Paine, *supra* note 321, at 319; *see generally* JACKSON, *supra* note 162.

328. Paine, *supra* note 321, at 319 (indicating that the “negative aspect stresses risk management and cost avoidance.”).

329. Stacy Zeiger, *Effects of a Lack of Ethics on a Business Environment*, CHRON, <http://smallbusiness.chron.com/effects-lack-ethics-business-environment-23332.html> (last visited Oct. 10, 2012) (discussing the potential effects of irresponsible practices on small businesses).

330. *The Importance of Being Ethical*, INC., <http://www.inc.com/articles/2000/11/14278.html> (last visited Oct. 4, 2012).

331. See JACKSON, *supra* note 162, at 15; Paine, *supra* note 321, at 320.

332. See UNITED STATES INTERNATIONAL TRADE ADMINISTRATION, BUSINESS ETHICS: A MANUAL FOR MANAGING A RESPONSIBLE BUSINESS ENTERPRISE IN EMERGING MARKET ECONOMIES 23 (2004) (“By providing employees clear guidelines on how to conduct day-to-day business in compliance with laws and ethics through a business ethics program, the RBE

Instead, it promotes cooperation, eases conflict, and fosters processes of contracting.<sup>333</sup>

By contrast, the positive side of the business case stresses CSR's ability to contribute benefits.<sup>334</sup> Thus, ethical business conduct thwarts reputational costs and produces tangible reputational benefits.<sup>335</sup> A reputation based on responsibility, reliability, and trust may help firms attract and retain talent in the employment market, generate repeat business, reduce the cost of capital, solidify customer loyalty, magnify advertising impact, strengthen bargaining power, and boost investor confidence.<sup>336</sup> Finally, a corporate culture of integrity often stimulates enhanced productivity and unleashes creativity and innovation within firms' workforces.<sup>337</sup>

Research on the business case for corporate responsibility divides into two streams: empirical and normative.<sup>338</sup> Empirical research purporting to buttress the business case strives to prove positive correlations between responsible business conduct and financial success.<sup>339</sup> One meta study set out to demonstrate statistical linkages between corporate social performance and corporate financial performance.<sup>340</sup> Incorporating data across various industries and study contexts, the study concluded that "corporate virtue in the form of social responsibility and, to a lesser extent, environmental responsibility is likely to pay off."<sup>341</sup>

This is not to say that empirical research establishing positive connections between corporate responsibility and

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[responsible business enterprise] can reduce transaction costs.").

333. See Paine, *supra* note 321, at 320.

334. See generally Jackson, *supra* note 162; LRN, *Ethics and Compliance Risk Management: Improving Business Performance and Fostering a Strong Ethical Culture Through a Sustainable Process*, at 2, available at <http://www.ethics.org/files/u5/LRNRiskManagement.pdf>.

335. LRN, *Ethics and Compliance Risk Management: Improving Business Performance and Fostering a Strong Ethical Culture Through a Sustainable Process*, at 2, available at <http://www.ethics.org/files/u5/LRNRiskManagement.pdf>.

336. See JACKSON, *supra* note 162, at 12–15.

337. *Id.* at 129.

338. See Marc T. Jones, *Disrobing the Emperor: Mainstream CSR Research and Corporate Hegemony* (Aug. 2008), available at <http://www.crrconference.org/downloads/jones.pdf> (last visited Oct. 10, 2012).

339. Robert C. McMurrian & Erika Matulich, *Building Customer Value and Profitability with Business Ethics*, 4 J. BUS. & ECON. RES. 11 (2006).

340. Mark Orlitzky, Frank L. Schmidt, & Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-analysis*, 24 ORG. STUD. 403 (2003).

341. *Id.*

financial performance is free from attack by skeptics. Some skeptics are quick to highlight difficulties associated with the operationalization of social and financial performance, which may call for a qualification of findings.<sup>342</sup> Further studies raise critical concerns over measurement limitations inherent in attempts to gain quantitative confirmation relative to corporations' pursuits of socially responsibility behaviors.<sup>343</sup>

In light of such questions, Lynn S. Paine offers this assessment of the status of the business case:

While ethics and economics are mutually supportive in many respects, the economic case for corporate ethics goes only so far. It is wishful thinking to suppose otherwise. Even when cast in general tendencies rather than axiomatic truths, the case leaves wide berth for divergence between what is good and what is profitable.<sup>344</sup>

Even empirical studies supporting the business case may be predicated upon their own normative assumptions.<sup>345</sup> In the eyes of David Vogel, the supposedly empirical assertion that some companies attain financial reward as a consequence of their responsible conduct lends little comfort to proponents of CSR: "The reason they have placed so much importance on 'proving' that CSR pays, is because they want to demonstrate, first, that behaving more responsibly is in the self-interest of all firms, and second, that CSR always makes business sense."<sup>346</sup>

Thus, in Vogel's estimation, advocates of CSR set out to tout economic success as the *raison d'être* for business enterprises to commit themselves to a path of corporate social responsibility.<sup>347</sup> Yet, taking such a normative angle in order to prop up the instrumentalist rationale for CSR meets with some disapproval from the standpoint of moral philosophy.<sup>348</sup> Paine

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342. *Id.* at 403 (citing, among other studies, Wood and Jones's finding that clear causal patterns in this area have been elusive).

343. See Sandra A. Waddock & Samuel B. Graves, *The Corporate Social Performance-Financial Performance Link*, 18 STRATEGIC MGMT. J. 303, 304 (1997) (noting that CSP is difficult to measure because it "is a multi-dimensional construct with behaviors ranging across a wide variety of inputs."). See generally DAVID VOGEL, *supra* note 5, at 29–33.

344. Paine, *supra* note 321, at 324–25.

345. DAVID VOGEL, *supra* note 5.

346. *Id.* at 34.

347. *Id.*

348. See, e.g., Paine, *supra* note 321.

questions the underlying logic of instrumentalist justification by framing the terms of debate as follows: assuming that businesses operate responsibly based purely on the instrumentalist explanation that ethics is profitable, what would logically follow if it turns out that ethics does not pay after all?<sup>349</sup> The crux of the matter may be stated as follows:

The intellectual currents propelling the “ethics pays” argument conceal a dangerous undertow. On the surface, ethics appears to be gaining importance as a basis for reasoning and justification. At a deeper level, however, it is being undermined. For implicit in the appeal to economics as a justification for ethics is acceptance of economics as the more authoritative rationale. Rather than being a domain of rationality capable of challenging economics, ethics is conceived only as a tool of economics.<sup>350</sup>

## 2. Instrumental Reasoning within the Human Rights Milieu

The business case mode of justification has been transferred from the CSR discourse into the human rights domain. The UN Framework which now serves as the focal point in the business and human rights debate is emblematic of this trend.<sup>351</sup>

Indeed, the heightened public sensitivity toward corporate misdeeds combined with readily available and shared information have raised the stakes for corporations to engage in irresponsible activity. This may be particularly so with regard to “moral felonies,” occurrences of severe malfeasance connected with basic human rights.<sup>352</sup>

The long-term reputational ramifications of a company being associated with acute human rights violations can be substantial and protracted. For example, Shell continues to pay the price for complying with the Nigerian government in its execution of Ken Saro-Wiwa and nine other opponents of the

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349. *See id.* at 327.

350. *See id.* at 327.

351. *Protect, Respect and Remedy, supra* note 312.

352. *See JACKSON supra* note 162, at 151, 166-67 (noting that corporations are held to high moral standards, and providing a guide for evaluating good and bad behavior).

Nigerian government's military régime.<sup>353</sup>

Companies heavily invested in their brands are mindful of such hazards. For example, Apple's advocacy for better work conditions at its Chinese subcontractor's plants is illustrative. Following mounting public backlash from highly publicized reports of employee suicides and dismal working conditions at the workshops of its supplier, Foxconn, Apple joined the Fair Labor Association.<sup>354</sup> Apple asked the Fair Labor Association to investigate Foxconn's factories engaged in manufacturing Apple merchandise.<sup>355</sup> As a result of the investigation, Foxconn pledged to pursue demonstrable goals concerning improved pay and work conditions at its facilities.<sup>356</sup> The concord is widely regarded as having contributed to a positive and enduring makeover of the manufacturing scene in China.<sup>357</sup>

A centering of discourse regarding the appropriateness and limitations of instrumental logic in the field of business and human rights is called for in the current academic climate wherein views are moving away from the traditional assumption that, from both a legal and political perspective, the protection of human rights is an exclusive concern of governments.<sup>358</sup> Corporations are no longer considered immune from shouldering direct human rights obligations, save what was prescribed by law.<sup>359</sup> Indeed, not only was human rights discourse largely absent from ascriptions of CSR, the field of CSR was itself traditionally conceived of as being mainly addressed to voluntary business behavior.<sup>360</sup> In other words,

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353. CHRISTOPHER L. AVERY, *BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE* 7 (2000).

354. *Apple Joins Fair Labor Association*, PRNEWswire (Jan. 13, 2012).

355. Don Reisinger, *Apple Launches Fair Labor Inspections of Foxconn*, CNET (Feb. 23, 2012, 5:44 AM PST), [http://news.cnet.com/8301-13506\\_3-57376431-17/apple-launches-fair-labor-inspections-of-foxconn/](http://news.cnet.com/8301-13506_3-57376431-17/apple-launches-fair-labor-inspections-of-foxconn/).

356. See JACKSON *supra* note 162, at 151, 166-67 (noting that corporations are held to high moral standards, and providing a guide for evaluating good and bad behavior).

357. Charles Duhigg & Steven Greenhouse, *Electronic Giant Vowing Reforms in China Plants*, N.Y. TIMES, March 29, 2012, at A1.

358. See, e.g., *Promoting Peace & Protecting Human Rights: Business Operations in Conflict Zones*, UNITED STATES INSTITUTE OF PEACE INTERNATIONAL NETWORK FOR ECONOMICS AND CONFLICTS (Jan. 8, 2012), <http://inec.usip.org/blog/2012/jan/08/promoting-peace-protecting-human-rights-business-operations-conflict-zones> (“[C]ompanies can proactively build peace and protect human rights . . .”).

359. See *id.*

360. Comm'n of the European Comtys., *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social*



CSR was thought of as being the responsibility that companies assume on voluntary bases beyond mere legal compliance.<sup>361</sup> By contrast, human rights comprise the most elemental moral entitlements of human beings,<sup>362</sup> and are therefore correlative to equally fundamental moral obligations. Such a fundamental moral imperative attached to human rights is discordant with the sort of discretionary approach to responsibility that has been characteristic of conventional accounts of CSR.<sup>363</sup> It is only recently that CSR discourse has transitioned beyond a voluntaristic paradigm.<sup>364</sup> Consequently, human rights are coming to occupy a more pronounced position in CSR.<sup>365</sup>

The apparent normative disconnect between an understanding of human rights as basic moral imperatives and an alternative understanding of CSR as a voluntary and discretionary undertaking has accentuated the allure of instrumental justifications for corporate responsibility toward human rights. A substitution of the non-instrumentally grounded vocabulary of moral obligation with that of the instrumentally-based language of economic incentives has tended to perpetuate corporate approaches to human rights questions without abandoning the presumptions of voluntariness. The dominant assumption has been that companies neglecting to undertake human rights commitments voluntarily will do so to their own financial peril.<sup>366</sup>

Despite the prevalent use of instrumental logic to frame

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*Responsibility*, March 22, 2006, at 2.

361. Florian Wettstein & Sandra Waddock, *Voluntary or Mandatory: That Is (Not) the Question*, 6:3 ZEITSCHRIFT FÜR WIRTSCHAFTS-UND UNTERNEHMENSETHIK 304, 304 (2005) (referencing the “traditional” view of CSR as a voluntary affair for businesses).

362. John Tasioulas, *The Moral Reality of Human Rights*, UNESCO POVERTY PROJECT PHILOSOPHY SEMINAR (March 2003), available at <http://www.c3mundos.org/files/Tasioulas%20%282004%29%20The%20Moral%20Reality%20of%20Human%20Rights.pdf>.

363. See generally Wettstein & Waddock, *supra* note 361.

364. See European Comm’n, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, October 25, 2011, at 4 (noting that the change in strategy resulted from public distrust of corporate entities following the economic crisis).

365. See generally Geoffrey Chandler, *The Evolution of the Business and Human Rights Debate*, in BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 22–32 (Rory Sullivan ed., 2003); Geoffrey Chandler Keynote Address: Crafting a Human Rights Agenda for Business in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 39–45 (M. K. Addo ed., 1999).

366. See Higginbotham, *supra* note 192.

voluntaristic and discretionary explanations for corporate human rights responsibility, it is especially within the context of human rights that the defects of instrumental justifications for CSR can be clearly discerned.

### 3. Cracks in Foundations of Negative Business Case for Human Rights

A negative business case for business responsibility to respect human rights emphasizes the anticipated negative public repercussions from corporate contraventions of human rights and, accordingly, the reputational damage and adverse bearing on a firm's social license to function that result from it.

The reasoning behind the negative business case argument is predicated upon the idea of moral blame.<sup>367</sup> If customers did not assign any blame to organizations for malfeasance, no reason would exist for customers to discontinue patronizing organizations' products or services. Absent any ascription of culpability, firms would not be in positions to sustain any reputational harm. Absent any imputation of moral wrongdoing by investors, they would have no motive to cease investing in it. The various costs and risks flowing from irresponsible business conduct only come about for companies when companies are deemed blameworthy for something. The logic underpinning the negative business case for responsibility to respect human rights assumes the presence of some moral blame, which is enunciated and disseminated informally by way of the "court of public opinion" in the global context.<sup>368</sup>

Blame is ordinarily accompanied by moral indignation. Society typically impugns moral actors, whether people or organizations, if it thinks that their acts or omissions can be properly categorized as unethical and if it believes their offenses toward moral actors' conduct are warranted.<sup>369</sup> Moral blame involves treating the moral agent targeted for blame as having a reason to act ethically but yet failing to do so.<sup>370</sup>

367. *The business of business is responsible business*, UNIVERSITY OF STELLENBOSCH BUSINESS SCHOOL (Dec. 1, 2011), <http://www.usb.ac.za/NewsAndEvents/FullNewsItem.aspx?NewsItem=3801&RefFunctionality=inthenews> (noting that responsibility is often associated with apportioning blame).

368. See *Protect, Respect and Remedy*, *supra* 312.

369. See Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543-571 (1983) (discussing how people assess the culpability or blameworthiness of an actor).

370. BERNARD WILLIAMS, *MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS* 42 (1995).

Society assigns blame to moral agents when it thinks that they should have acted differently.<sup>371</sup> In this way, blameworthiness presupposes logically prior and non-instrumental responsibility. That is because society does not lay blame for conduct that is simply discretionary.<sup>372</sup> In other words, laying blame amounts to a characteristic response within an ethical system for an actor's failure to satisfy some moral obligation.<sup>373</sup>

In terms of logical inference then, it is a moral justification rather than an economic one that carries the day for prescription of business conduct.<sup>374</sup> Correspondingly, businesses shoulder duties to respect human rights not due to anticipated reputational risks of non-compliance or to any projected cost savings, but instead because they carry a moral obligation to do so. Therefore, to proffer an instrumentally-oriented business case for such an obligation is, normatively speaking, beside the point. The ground of moral obligations is non-instrumental. Such obligations ought to be satisfied independently of any calculations of financial returns. In other words, even if the business case argument were to somehow collapse, the obligations would still need to be followed. In the final analysis, the business case argument gets swallowed up by the very moral presuppositions upon which it stands.<sup>375</sup>

Arguably, this is the situation regarding human rights. As Kant, John Stuart Mill and Onora O'Neill contend, obligations that correlate to rights amount to perfect obligations.<sup>376</sup> Perfect obligations are determinate in reference to both their addressees and to their duty-holders.<sup>377</sup> They specify exactly what is owed.<sup>378</sup> As situated within the sphere of justice, as

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371. *Id.*

372. *See id.* at 177.

373. *Id.*

374. *See* PETER ULRICH, INTEGRATIVE ECONOMIC ETHICS: FOUNDATIONS OF A CIVILIZED MARKET ECONOMY 106 (2008) (noting that the safeguarding of moral rights is more important than the safeguarding of economic agents' private interests in the employment of their resources in a way that is most efficient for them).

375. *See* Andrew C. Khourmy, *Blameworthiness and Wrongness*, 45 VALUE INQUIRY 135–146 (2011) (urging the rejection of the assumption that blameworthiness presupposes wrongfulness).

376. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 77 (M. Gregor trans., Cambridge Univ. Press 1996); MILL, *supra* note 215, at 47; ONORA O'NEILL, *TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING* 128–41 (Cambridge Univ. Press 1996).

377. O'Neill, *supra* note 376, at 129–30, 147.

378. *Id.*

opposed to the realm of utility, perfect obligations can be demanded by correlative rights-holders and are consequently morally owed by the respective duty-bearers.<sup>379</sup> Therefore, carrying these kinds of obligations is something that arises independently of any anticipated economic payoff that might ensue from satisfying these obligations.

A critic might allege that the negative business case for human rights responsibility need not assume that any deeper moral obligations exist. Instead, it only needs to take into account the perception of such obligations for business. Here the source of blame rests upon descriptive social expectations held concerning the human rights conduct of business. “[B]roader scope of the responsibility to respect is defined by social expectations—as part of what is sometimes called a company’s social license to operate.”<sup>380</sup>

However, even if blame is pegged upon social expectations instead of moral obligation, ultimately instrumental business case arguments seek to shore up a case for human rights responsibility. Doing so means equating responsibility as a moral category with social expectations. The normative logic underlying this argument is that the human rights responsibilities of business are defined by and justified with reference to social expectations. Not meeting these expectations, then, is a failure to meet a moral responsibility and, from this perspective, is the source for justified moral blame.<sup>381</sup> Blame presupposes at least the assumption by the originator that blame is warranted.<sup>382</sup> Thus, any argument that instrumentalizes blame as a normative force for regulating behavior logically assumes that some justification for blame exists in the first place.<sup>383</sup>

Thus, the problem is not so much that the business case argument bypasses morality but that it leans on a conventional

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379. *Id.* at 128.

380. *Protect, Respect and Remedy*, *supra* note 312, ¶ 54.

381. See Smith, *supra* note 369, at 543–571 (discussing how people assess the culpability or blameworthiness of an actor); BERNARD WILLIAMS, MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 42 (1995).

382. See Smith, *supra* note 381, at 543–571 (discussing how people assess the culpability or blameworthiness of an actor); BERNARD WILLIAMS, MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 42 (1995).

383. See Smith, *supra* note 381, at 543–571 (discussing how people assess the culpability or blameworthiness of an actor); BERNARD WILLIAMS, MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 42 (1995).

or positivist conception of morality.<sup>384</sup> While social expectations may serve as general guides for moral conduct and may provide rough indications of morality, they do not on their own constitute reliable justificatory bases for morality.<sup>385</sup> The widespread acceptance of the institution of slavery in the antebellum United States illustrates how social expectations are not necessarily congruent with, and indeed can sharply diverge from, human rights standards.<sup>386</sup> Generally, the descriptive logic of social expectations (“is”) is an insufficient basis from which to derive normative prescriptions of ethics (“ought”).<sup>387</sup> To do so is to commit the naturalistic fallacy.<sup>388</sup> Instead, the legitimacy of social expectations must be secured on the basis of normative logic itself, and is thereby still subject to further ethical scrutiny. In summary, the reason for the criticism of instrumental business case reasoning is that its logical foundation is formed from a faulty understanding of morally justified responsibility.

Alternatively, a critic might allege that society can conveniently eliminate all references to moral responsibility from the business case scenario such that respecting human rights are reduced to a “business consideration” assessed

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384. See Andreas Georg Scherer and Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective*, 32(4) ACAD. MGMT. REV. 1096, 1099 (2007) (critiquing positivist portrayals of corporate responsibility).

385. See generally O’Neill, *supra* note 375, at 187 (describing how virtues like justice and fairness may be imbedded in social traditions and culture, and how they may alternatively be perverted by cultures of corruption).

386. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 L.N.T.S. 253, *entered into force* Mar. 9, 1927.

387. DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge ed., 2nd ed. 1978) (“In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, ’tis necessary that it shou’d be observ’d and explain’d; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.”).

388. See generally G. E. MOORE, PRINCIPIA ETHICA 10 (Cambridge Univ. Press 1959) (describing the “naturalistic fallacy” as the tendency of philosophers to think that when they name other properties they were actually defining good that those properties, in fact, were simply not “other” but absolutely and entirely the same with goodness).

entirely by its bottom line impact.<sup>389</sup> However, if respecting human rights is a non-moral choice made on a functionalist basis and dictated solely by financial payoff, then the logic of such a variety of business cases turns out to be circular, tantamount to constructing a business case for selling goods and services, that is, for doing business itself.

#### 4. Assessment of Positive Business Case for Human Rights

The positive business case emphasizes the reputational advantages, stepped-up sales, or enhanced productivity resulting from corporations pursuing responsible conduct.

Considered within the context of global economic governance and human rights, this argument is suspect. Whereas the negative business case revolves around assigning blame, the positive business case revolves around granting acclaim.<sup>390</sup> In the same way that blameworthiness assumes some prior violation of moral duty, praiseworthiness assumes some prior achievement beyond moral duty.<sup>391</sup> Normally, society does not extend commendation to people or companies merely for satisfying their obligations,<sup>392</sup> unless there was little trust for those people or companies in the first place. This suggests that, from a moral point of view, tribute rests within the realms of the supererogatory and what is ethically discretionary.<sup>393</sup>

Framing a positive business case for human rights would imply that for corporations to respect human rights is above and beyond the call of duty. However, this assertion rests on the assumption that there is no fundamental moral obligation

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389. *But see* James Fieser, *Do Businesses Have Moral Obligations Beyond What the Law Requires?*, 15 J. BUS. ETHICS 457 (1996) (criticizing the view that morality in business can be derived from the profit motivation).

390. *See generally* O'Neill, *supra* note 376, at 209 (providing an example of praiseworthy action by describing how "saints and heroes are admired because they fulfill quite ordinary ethical requirements, but do so with superabundance").

391. *See generally id.*

392. *See id.* ("It is hard to see how institutions could achieve superabundant justice: justice is a matter of what is due, and going beyond justice is not more just.")

393. Sandra Waddock & Neil Smith, *Relationships: The Real Challenge of Corporate Global Citizenship*, 105(1) BUS. AND SOC'Y REVIEW 47, 47-62 ("Too much of the time, when we think about . . . corporate responsibility, we think about it as a discretionary responsibility.")

for businesses to do so.<sup>394</sup> Implicitly, the positive business case situates respect for human rights within the realm of supererogation rather than within the realm of what is morally owed.<sup>395</sup> In other words, it presupposes that respecting human rights is discretionary rather than obligatory.<sup>396</sup>

Taking that stance on the responsibility to respect contradicts the nature of human rights as basic moral entitlements of human beings. Human rights protect the most fundamental freedoms that define autonomy of intentional, moral persons.<sup>397</sup> Human rights are possessed by humans simply by virtue of being human.<sup>398</sup> Understood as moral entitlements, human rights are commonly acknowledged as universal and equal rights.<sup>399</sup> In other words, all humans ought to enjoy them regardless of who those humans are, where those humans come from, or what those humans believe. Human rights define and protect the fundamental equality of all human beings in terms of moral worth and their dignity as moral persons.<sup>400</sup> However, respect for people's dignity and thus for their most basic human rights is owed to all people unconditionally.<sup>401</sup> Respect for human rights is a matter of justice rather than one of beneficence.<sup>402</sup>

Simply meeting the most fundamental obligations of justice warrants no praise. Rather, the fulfillment of such

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394. See O'Neill, *supra* note 376, at 209 ("It is hard to see how institutions could achieve superabundant justice: justice is a matter of what is due, and going beyond justice is not more just.").

395. *Id.* at 206 (supererogatory conduct is "action that exceeds the demands of duty, yet is ethically admirable"); Kant, *supra* note 376, at 42, 52 (supererogation permits some latitude for free choice).

396. See Kevin T. Jackson, *Global Distributive Justice and the Corporate Duty to Aid*, 12 J. BUS. ETHICS 547 (1993) (arguing that even a multinational corporation's obligation to provide assistance to those deprived of basic rights, understood by some scholars to fall within the domain of the supererogatory, can be properly interpreted as a *prima facie* moral obligation of international justice).

397. See generally Tom Campbell, *Moral Dimensions of Human Rights*, in HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS 12 (Tom Campbell & Seumas Miller eds., 2004) (describing the nature and function of human rights).

398. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 1 (Cornell Univ. Press 2003); JAMES GRIFFIN, ON HUMAN RIGHTS 2 (Oxford Univ. Press 2008).

399. Campbell, *supra* note 397.

400. Griffin, *supra* note 398, at 31–33.

401. *Id.* at 31–33.

402. Mill, *supra* note 376, at 59.

obligations is a basic expectation addressed broadly to all participants in the global governance arena, and applies *a fortiori* to business enterprises because of their extensive power, influence, and economic resources.<sup>403</sup> Arguing for a positive business case for the responsibility to respect human rights confuses categories of normative logic and signals a potential threat to the very concept of human rights. Implying that respecting human rights is a praiseworthy endeavor obscures the fundamental nature of human rights as ethical imperatives and relegates them to the province of benevolence or moral discretion.<sup>404</sup>

##### 5. Responsibilities of Collaborative Governance Régimes for Human Rights

Correlative to any basic right are three kinds of duties: the duty to avoid depriving, the duty to protect from deprivation, and the duty to aid the deprived.<sup>405</sup> Alternatively stated in a way that is concordant with the language of contemporary global governance initiatives, this triad of obligations could be referred to as the duty to respect human rights, the duty to protect human rights, and the duty to realize human rights where they have been violated or never been fulfilled. For a right to be fully respected, all three of these duties must be satisfied.<sup>406</sup> Therefore, the question naturally arises as to just whose duty it is to respect, protect, and realize basic rights.

Of the three types of duty, the duty to respect human rights appears to be the least controversial. Because it prescribes a universal duty, all moral actors are equally obligated by it.<sup>407</sup> In other words, the duty not to violate human rights holds for all equally, in the same degree, and it holds for all times. However, it is harder to reckon with the other two kinds of duties. Both require some positive action and are accordingly particular rather than universal. They obligate some, but not all, moral actors at varying degrees and times. This means that respecting rights entails some division of

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403. See O'Neill, *supra* note 376, at 209 ("It is hard to see how institutions could achieve superabundant justice: justice is a matter of what is due, and going beyond justice is not more just.").

404. *Id.* at 206.

405. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 52 (Princeton Univ. Press 1996).

406. *Id.* at 53.

407. See generally Griffin, *supra* note 398, at 101 (implying that human rights impose universal duties by referring to them as "doubly universal").



moral labor.<sup>408</sup> It necessitates a fusion of different actors and institutions joining forces to add their respective contributions to the governance mix. In the global economic governance context, this means that determinations need to be made about how obligations differ between nation-states, intergovernmental organizations, business enterprises, NGOs, and other elements of civil society.<sup>409</sup> Each element of civil society is unable to accomplish it alone, but elements can pool their capabilities within targeted collaborative undertakings. The ideal of satisfying human rights in all their normative features remains a challenging collective undertaking for economic participants.

In the context of global economic governance, particularly in light of the variant forms of collaborative governance discussed in section one of this article, corporate responsibility stands in need of being re-imagined as global collaborative responsibility.<sup>410</sup> An interpretation of global collaborative responsibility looks beyond effects of the solitary activities of economic participants and considers the peculiar power and influence that can be achieved from collaboration with fellow actors and institutions as a criterion of international legal and moral responsibility.<sup>411</sup> In this connection, Kenneth Goodpaster contends that “even if a company does not have a *categorical* responsibility, a responsibility to resolve the moral challenge *on its own*, it can still have a *qualified* responsibility to make an effort—or to *participate* in the efforts of others in seeking a collaborative resolution.”<sup>412</sup> He posits that “[t]he significance of a given threat to human dignity or justice in the community

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408. Shue, *supra* note 405.

409. See THOMAS DONALSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 73–75 (Oxford Univ. Press 1989) (setting out a scheme for dividing responsibilities between governments, corporations, and private individuals).

410. David Held & Anthony McGrew, *The Great Globalization Debate: An Introduction*, in *THE GLOBAL TRANSFORMATION READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* 1, 7 (David Held & Anthony McGrew eds., Polity Press 2000) (globalization poses a challenge for “territorial principle of modern social and political organization”). See also, Virginia Held, *Can a Random Collection of Individuals Be Morally Responsible?* 67 *J. PHIL.* 471 (1970) (arguing that under some conditions even a random assembly of moral agents can be held responsible for failure to act as a group).

411. See generally Kenneth E. Goodpaster, *Corporate Responsibility and Its Constituents*, in *THE OXFORD HANDBOOK OF BUSINESS ETHICS* 126, 126–27 (George G. Brenkert & Tom L. Beauchamp eds., Oxford Univ. Press 2010) (describing three distinct levels of responsibility: individual, corporate, and societal).

412. *Id.* at 147.

might raise our reasonable expectations of a corporation's responsibility, even if we acknowledge that, in the end, we are dealing with a *qualified* responsibility."<sup>413</sup>

A variety of views treat both the foundations of qualified positive responsibility and the outer boundaries of qualified positive responsibility. Scholars hailing from disciplines of law,<sup>414</sup> moral and political philosophy,<sup>415</sup> and business ethics<sup>416</sup> approach the question from the standpoints of social connection,<sup>417</sup> Rawlsian duty of aid,<sup>418</sup> corporate duty of assistance,<sup>419</sup> or the margins of property rights.<sup>420</sup> A common contention is that fair apportionment of responsibility<sup>421</sup> rises in proportion to an agent's abilities,<sup>422</sup> capacities,<sup>423</sup> power,<sup>424</sup>

413. *Id.*

414. See David Bilchitz, *Do Corporations Have Positive Fundamental Rights Obligations?* 57 THEORIA 1 (2010); Justine Nolan & Luke Taylor *Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?* 87 J. BUS. ETHICS 433 (2009); Stephan Wood, *The Case for Leverage-Based Corporate Human Rights Responsibility*, 22 BUS. ETHICS Q. 63 (2012).

415. See Michael Green, *Institutional Responsibility for Moral Problems*, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS? 117 (A. Kuper ed., Routledge 2005); David Miller, *Distributing Responsibilities*, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS? 95 (A. Kuper ed., Routledge 2005).

416. MICHAEL SANTORO, PROFITS AND PRINCIPLES: GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA (Cornell Univ. Press 2000); MICHAEL SANTORO, CHINA 2020: HOW WESTERN BUSINESS CAN – AND SHOULD – INFLUENCE SOCIAL AND POLITICAL CHANGE IN THE COMING DECADE (Cornell Univ. Press 2009); Nien-hê Hsieh, *The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance*, 14 BUS. ETHICS Q. 643 (2004).

417. See Iris Young, *From Guilt to Solidarity: Sweatshops and Political Responsibility*, 50 DISSENT 39 (2003); Iris Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365 (2004); Iris Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y 102 (2006).

418. See Hsieh, *supra* note 416, at 643.

419. See Wood, *supra* note 414.

420. See Bilchitz, *supra* note 414.

421. See Santoro, *Profits and Principles*, *supra* note 416, at 154–55 (“[H]uman rights duties should be allocated according to three factors: relationship effectiveness, and capacity... When these three factors are taken into account, the duties that can be fairly allocated to come actors... are not only different from those assigned to other actors ... but they may also be, as a practical matter, more onerous as well.”); Santoro, *China 2020*, *supra* note 416, at 17 (describing the “fair share” theory of corporate human rights responsibilities).

422. Florian Wettstein, *Beyond Voluntariness, Beyond CSR: Making a Case for Human Rights and Justice* 114 BUS. & SOC'Y REV. 125 (2009).

423. Miller, *supra* note 415; Tom Campbell, *supra* note 298.

424. See HANS JONAS, THE IMPERATIVE OF RESPONSIBILITY: IN SEARCH OF

clout,<sup>425</sup> or potential for effectuating positive influence.<sup>426</sup>

In his writing of the recent Guiding Principles, Ruggie modified his former position opposing non-causal human rights responsibility.<sup>427</sup> His modified position states: “The responsibility to respect human rights requires that business enterprises . . . Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed* to those impacts.”<sup>428</sup>

Consequently, if corporate human rights responsibility is interpreted to advance farther than just the negative sphere of respecting human rights and to encompass positive features founded on power or influence, then a need arises to address the potential of a business case for corporations’ proactive engagement for the protection and realization of human rights. According to instrumentalist reasoning, corporations that passively respect and actively engage in the protection and realization of human rights might be positioned to earn goodwill from the public and customer bases, which could translate into economic benefits.<sup>429</sup>

However, the question is what counts as “above and beyond” when it comes to corporations’ responsibilities in the protection and realization of human rights? If corporations have qualified positive human rights obligations and their obligations therefore extend beyond the negative realm of doing no harm, then the instrumental argument regarding those circumstances fails on the same conceptual grounds as was

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AN ETHICS FOR THE TECHNOLOGICAL AGE 92–93 (Univ. Chicago Press 1984); Stephen Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights*, 19 BUS. ETHICS Q. 349, 350 (2009); Young, *From Guilt to Solidarity. Sweatshops and Political Responsibility*, *supra* note 417, at 43; Young, *Responsibility and Global Labor Justice*, *supra* note 417, at 381.

425. Wood, *supra* note 414.

426. See generally Santoro, *supra* note 416, at 143 (“If a corporation cannot make a positive impact by performing an action, then it makes little sense to say that it is morally required to do so.”).

427. U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. DOC. A/HRC/17/31 (March 21, 2011).

428. *Id.*, ¶ 13 (emphasis added).

429. See generally O’Neill, *supra* note 376, at 50 n.25 (describing instrumental reasoning “such as the claim that those who seek some end must, if rational, seek or take what they believe to be a means that contributes to that end.”).

outlined in the preceding sections.

Advancing an instrumental argument for human rights responsibilities of corporations is per se problematic. A more plausible option, therefore, is to base such responsibilities on non-instrumental moral grounds.<sup>430</sup> This, however, implies an extension of corporate responsibility beyond the mere respect of human rights. As such, a non-instrumental moral alternative to the instrumental business case argument fundamentally challenges the UN Framework's rigid division of responsibility between corporation and state.

## B. NON-INSTRUMENTAL JUSTIFICATIONS FOR HUMAN RIGHTS

Standing alongside the notion of the rule of law as a non-instrumental regulative ideal is the concept of human rights justifiable on non-instrumental moral grounds.

### 1. Common Public Justification

In the context of collaborative governance régimes, there are various ways in which human rights figure into decision-making. Two common forms of such justification are contractualist<sup>431</sup> and functionalist<sup>432</sup> approaches. The differences in approaches to human rights stem from alternative forms of justification. Such differences in justifying theories, in turn, significantly influence the way that human rights are applied in specific situations where they compete with other standards.

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430. See, e.g., Dennis Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS Q. 371 (2010); Cragg, *supra* note 316.

431. See generally Griffin, *supra* note 398, at 78-79 (describing the narrow contractarian justification as geared toward satisfying human rights specifically within frameworks shaped to meet the expectations of participants agreeing to a mutual exchange of commitments; criticizing the contractarian justification's inconsistency and fragmentation).

432. L. Amede Obiora, *Reconstituted Consonants: The Reach of a "Common Core" Analogy in Human Rights*, 21 HASTINGS INT'L & COMP. L. REV. 921, 945 (1998). A functionalist justification takes the particular purpose of an organization to establish the parameters of its moral responsibility vis à vis human rights. Whereas common public justification is expansive, functionalist justification is more narrowly circumscribed. An actor is seen to be responsible across a narrower spectrum of people, and with regard to each person it is responsible for a narrower slice of interests. As applied to for-profit corporations, a functionalist justificatory frame of reference endorses the traditional shareholder conception, whereby a firm's interests are narrowly focused on the interests of its shareholders.

The form of justification of human rights most closely associated with the conception of rule of law that was elaborated in section one of this article is what may be termed common public justification.<sup>433</sup> Compared to other forms of justification, this approach extends the widest scope and assigns the most substantial prima facie weighting to human rights. Human rights are taken to guide and constrain from abuses of power all varieties of actors that comprise civil society: governments, intergovernmental organizations, business enterprises, NGOs, private associations, and individuals. Their responsibility holds wherever they are situated, and attaches to local, national, and international levels of activity across all sectors.

Within the frame of reference of a common public justification, responsibility extends to anyone that may be affected by actors' conduct. The actor is responsible for taking into account all of the rights of those affected. This means, for example, that a company is responsible not just for respecting the human rights of its shareholders and employees, but also for respecting the human rights of its consumers, suppliers, and other stakeholders. Likewise, an intergovernmental organization is under the conception of public common justification, responsible not just for respecting the rights of manufacturers of member states that stand to gain when it fulfills its mandate in promoting global trade, but also for respecting other human rights of people impacted by goods and services in markets opened by those trade agreements.

It is necessary to take into account the challenging interpretive matter of determining the proper scope of and also of balancing and weighting such rights when they conflict with each other and with other considerations.<sup>434</sup>

## 2. Human Rights as Higher Law

It has been known from antiquity that there exists a law higher than written human decrees.<sup>435</sup>

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433. Meintjes, *supra* note 28, at 83.

434. JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS (Univ. of Cal. Press 1987).

435. SOPHOCLES, ANTIGONE, lines 453–57; WILLIAM EBENSTEIN, GREAT POLITICAL THINKERS: FROM PLATO TO THE PRESENT 133 (Harcourt College Publishers 2000) (quoting Marcus Tullius Cicero in the *Republic*: “There will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.”).

The idea of an unseen higher law remains at the foundation of the modern concept of rights. John Locke maintained that even in a state of nature, there is a law recognized by all people which is implanted in human reason.<sup>436</sup> Such a law of nature engenders natural rights discernible by all rational beings.<sup>437</sup> Such a conception designates rights that are taken to be independent of and prior to rights established by particular political arrangements.

In the realm of international law, the notion of an unwritten higher law has been vital. For instance, during the Nazi war crimes trials at Nuremberg, jurisdictional limitations precluded prosecuting the crimes pursuant to the laws of the various participating nation-states.<sup>438</sup> Accordingly, the indictments referenced “crimes against humanity.”<sup>439</sup>

Recourse to the idea of a higher moral law has been central to many civil rights cases throughout American history. Martin Luther King, Jr.’s famous “Letter from Birmingham Jail” decried the persistence of racial prejudice from extant law:

A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal law and natural law.<sup>440</sup>

For Aquinas, natural law is that part of the eternal law of the Creator that is presented to human reason.<sup>441</sup> Society is guided by a rational apprehension of the eternal law which is

436. See generally O’Neill, *supra* note 376, at 140 (“Locke ...[began] not with rights but with Natural Law or duty, and discuss[ed] justice and virtue in tandem.”).

437. See, e.g., THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (“We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”).

438. See generally Philippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOB. STUD. L. REV. 501, 504 (2007) (stating that the Nuremberg courts only had jurisdiction over crimes against humanity, war crimes, and crimes against the peace).

439. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (Cambridge Univ. Press 2009).

440. Martin Luther King, Jr., “Letter From a Birmingham Jail,” (Apr. 16, 1963); THOMAS AQUINAS, *SUMMA THEOLOGICA*, I-II Q. 95, art. 2 (“[E]very human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.”).

441. Griffin, *supra* note 398, at 9.

imprinted as precepts, rules of behavior, or broad principles of natural law.<sup>442</sup> Because humans are autonomous beings, they must choose to observe the law of nature through their own acts of free will.<sup>443</sup> Natural law is a product of unaided reason.<sup>444</sup> Human laws are positive laws that are, or should be, derived from natural law.<sup>445</sup> It is the correlation between higher unwritten law and written norms, such as those constituting public international law and human rights, that establishes the moral legitimacy of those written norms.<sup>446</sup>

The normative principles of human rights connected to fundamental aspects of human well-being guide practical reason.<sup>447</sup> They also inform moral deliberation about how people, governments, business enterprises, and other organizations should act.<sup>448</sup> Logically speaking, such foundational principles of practical reflection entail norms that lead elements of society to pursue some options, while requiring that others be abandoned.<sup>449</sup> Drawing upon a conception of a higher moral law provides a means of calling attention to objective principles of right action for business.

Both the concept of human rights and the notion of the rule of law are ultimately moral ideas. Despite the inclinations of some people toward ethical relativism, these ideas are grounded in objective morality. They both insist that there are limits on the ways in which governments, business enterprises, and individuals can pursue their chosen objectives.

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442. *Id.*

443. EDWARD W. YOUNKINS, CHAMPIONS OF A FREE SOCIETY: IDEAS OF CAPITALISM'S PHILOSOPHERS AND ECONOMISTS 72 (Lexington Books 2008) ("Because men are autonomous beings they must choose to observe the law of nature through acts of free will.").

444. *Id.*

445. Aquinas, *supra* note 440 ("Now both these conditions are verified of human law: since it is both something ordained to an end; and is a rule or measure ruled or measured by a higher measure. And this higher measure is twofold, viz. the Divine law and the natural law.").

446. See, e.g., David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 931 (2003).

447. For a general discussion of the normative and theoretical foundations of human rights, see HUMAN RIGHTS: POLITICS AND PRACTICE 11–25 (Michael Goodhart ed., Oxford Univ. Press 2009).

448. See, e.g., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 427, para. 14.

449. O'Neill, *supra* note 376, at 36 ("Actual norms and traditions ... can indeed guide action.").

Some would argue that using human rights language to account for broad moral principles of corporate governance is unnecessary.<sup>450</sup> While it may not be absolutely necessary to employ the vocabulary of rights, it seems reasonable and efficacious to do so. One properly speaks of an employee's right to not be discriminated against by her company on the basis of her gender.<sup>451</sup> One can accurately describe a garment subcontractor's trafficking in human slavery as a violation of human rights.<sup>452</sup> All individuals, from whatever communities they are drawn, are bound to respect these human rights because of their virtue for humanity rather than because of the individuals' membership in a particular domestic or international legal order.<sup>453</sup>

As Aristotle and other thinkers have endeavored to show, the nature of human beings is rational.<sup>454</sup> It is with regard to distinctive human nature that people are endowed with a profound, robust, and inherent moral agency, equality, and dignity. Each of these ideas is considered below.

### 3. Agency

As rational agents, human beings are uniquely equipped to make choices and decisions that are illuminated by moral deliberation.<sup>455</sup> Because of this, human beings are rightly held accountable for their choices and conduct.<sup>456</sup>

Exercising moral agency mandates that human beings have freedom to make choices consistent with values of their free choice.<sup>457</sup> In other words, moral agency bestows moral autonomy, the ability to make decisions predicated on moral

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450. Jackson, *supra* note 85, at 150.

451. See SWARN LATA SHARMA, GENDER DISCRIMINATION AND HUMAN RIGHTS 60–62 (K.K. Publications 2000).

452. See generally ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 186 (Oxford Univ. Press 2009).

453. See generally Griffin, *supra* note 398, at 101 (implying that human rights impose universal duties by referring to them as “doubly universal”).

454. See generally, ARISTOTLE, NICOMACHEAN ETHICS, Book 1, Chapter 7.

455. See J. N. Hooker, *Moral Implications of Rational Choice Theories* (July 2011), available at <http://ba.gsia.cmu.edu/jnh/rationalChoiceTheoriesPost.pdf>.

456. James Griffin, *Human Rights: Whose Duties?*, in HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS 31, 31-43 (Tom Campbell & Seumas Miller eds., Kluwer 2004).

457. ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 6, 13 (Univ. Chi. Press 1996); ALAN GEWIRTH, REASONS AND MORALITY 30–32 (Univ. Chi. Press 1978).



reflection.

Without the freedom required by choice, moral agency is impeded. Carving out space in which moral agency can take shape is a primary human interest and a central moral value. Making sure that moral agents are free from arbitrary constraint that would inhibit the exercise of moral agency is an important moral objective. Society needs human rights to shield the freedom necessary to pursue chosen goals.<sup>458</sup> This is a universal human need shared equally by all. Human rights values and principles thereby define and protect interests that all humans share.<sup>459</sup>

#### 4. Equality

Moral agency is something that all humans have in common, and what all humans need to exercise their agency is equally shared.<sup>460</sup> Moral equality stems from humans' ability to deliberate and choose how they want to live. Disregarding the fact that as moral agents all humans are created equal leads to impositions of arbitrary constraints inhibiting the ability of people to lead lives of their own choice. This amounts to a form of unfair discrimination against them.<sup>461</sup> The impact of discrimination is to arbitrarily constrain the ability of those discriminated against to direct their lives as they choose.<sup>462</sup> There is a strong linkage between the regulative idea of human rights with the regulative idea of the rule of law: both ideas are squarely opposed to morally arbitrary conduct towards human beings.

#### 5. Dignity

The logic of moral agency implies dignity.<sup>463</sup> Moral agency carries no value unless people are free to express what that agency confers.<sup>464</sup> To recognize autonomy means treating those

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458. See, e.g., *Preamble to Charter of Human Rights and Responsibilities Act*, No. 43/2006 (Victoria 2006).

459. Gewirth, *THE COMMUNITY OF RIGHTS*, *supra* note 457, at 9.

460. Griffin, *supra* note 398, at 32–33 (discussing the nature of human agency).

461. *Id.* at 33 (“[O]thers must not forcibly stop one from pursuing what one sees as a worthwhile life.”).

462. *Id.*

463. See Griffin, *supra* note 456, at 31–33 (discussing the connection between human rights and dignity).

464. See Garth Kemerling, *Kant: The Moral Order*, PHILOSOPHY PAGES, <http://www.philosophypages.com/hy/5i.htm> (last modified Nov. 12, 2011).

whose freedom and autonomy is respected with dignity.<sup>465</sup> Owing to people's shared status as moral agents able to orient their lives in line with values of their own choosing, people are all equally worthy of being extended respect and dignity.<sup>466</sup>

#### 6. Intrinsic Versus Instrumental Value of Human Rights

Human rights carry instrumental and intrinsic value in the sense that their respect paves a path of freedom that lets people do things they otherwise could not do.<sup>467</sup> Respect for human rights guarantees equal and fair access to education, employment, medical care, and recreation.<sup>468</sup> Human rights establish an economic, legal, political, and social atmosphere in which people can live by values of their own choice unhampered by arbitrary barriers. Thus people all have the same interest in making sure human rights are secured.

Human rights are intrinsically valuable because they affirm that people are equal in moral status to one another and worthy of equal treatment on all matters bearing on their capacity to exercise moral judgment.

#### 7. Protecting Human Rights within Global Economic Governance Schemes

Respecting human rights does not necessitate institutionalizing them solely through "hard" international law backed up by formal enforcement.<sup>469</sup> There is no inherent contradiction in proposing decentralized, informal arrangements wherein values upon which human rights are based (freedom, equality, and dignity) are entrenched in transnational governance syndicates in ways that do not trigger traditional coercive and centralized modes of formal protection.

Concerning the responsibility of participants in transnational governance régimes, whether corporations,

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465. Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC (May 28, 2008), <http://pinker.wjh.harvard.edu/articles/media/The%20Stupidity%20of%20Dignity.htm> (arguing that dignity is merely another application of the principle of autonomy).

466. See Griffin, *supra* note 456, at 31–33.

467. O'Neill, *supra* note 376, at 188 (discussing instrumental justifications for human rights).

468. See, e.g., International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 *entered into force* Jan. 3, 1976.

469. Donnelly, *supra* note 398, at 164–166 (discussing the choice of means of enforcing international human rights objectives).

NGOs, governments, or civil society actors, it is at the point where some protection, formal or informal, is called for that the obligation to extend protective efforts arise.<sup>470</sup> For this to come about, a right must be ensconced in some system of norms.<sup>471</sup> Whereas previously it was normally supposed that such a system of norms could only take the form of formal rules promulgated and enforced by states, either in a “vertical” fashion in relation to their own citizens or in a “horizontal” fashion in relation to members of the international community at large, today’s global governance through “soft law” provides alternative configurations for systematizing norms for human rights.<sup>472</sup>

Because human rights safeguard core and overriding moral values and institutionalize their respect, protection and promotion are priorities not only for nation-states but also for economic actors at national and international levels. It follows that where the ability to directly advance respect for human rights and where the ability to indirectly secure or assist in securing their respect exists, there exists also an obligation to do so. Because institutionalizing respect for human rights is so basic, where the ability to institutionalize that respect exists, exerting that ability is also a primary moral obligation.

The purpose of human rights is at root in harmony with the purpose of the rule of law, properly understood as establishing conditions under which human dignity, freedom, and equality will flourish.<sup>473</sup> Far from what might be supposed from the seemingly “voluntary” character of many commitments to global civil regulations by business enterprises, the obligations flowing from the existence of human rights are not voluntary. Where they are in jeopardy, human rights must be entrenched not only in centralized and formal coercive systems of “hard” rules of international law, but

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470. *Contra* Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12:1 HUM. RTS. L. REV. 1, 31 (2012) (asserting that “every state with the capacity to effectively influence genocidal actors has an obligation to take all means reasonably available to prevent genocide as soon as they become aware of a serious risk that the crime will be committed.”).

471. Kevin Jackson, *Normative Systemization for Integrating Human Rights Into International Business*, 78 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 111, 112 (2001).

472. Donnelly, *supra* note 398, at 164–166 (discussing the choice of means of enforcing international human rights objectives).

473. *Id.* at 166–68 (discussing the purposes of international human rights policies).

even more importantly in decentralized and informal systems of “soft” norms of economic governance régimes. Regardless, the rule of law ideal which underwrites these respective normative systems demands that the norms be binding and overriding in their essential characters.

It is impossible to provide definitive resolution for what is a permanent issue of disputation: the precise scope and extent of human rights obligations for business.<sup>474</sup> It can, however, be said with certainty that a shift is occurring away from the view that states are the only actors having binding obligations to honor and preserve the human rights of global citizens.<sup>475</sup> As well, it is widely acknowledged that business enterprises have an obligation to obey international law in its variant forms, both traditional and emergent.<sup>476</sup> Because human rights go to the very heart of the international rule of law, it follows that corporations shoulder responsibilities for upholding such standards. Moreover, as stated in the Universal Declaration of Human Rights, a widespread responsibility rests with all people and all components of society to uphold respect for human rights.<sup>477</sup>

Because corporations, intergovernmental organizations, and organs of civil society have human rights obligations, their allegiance to the international rule of law will mandate a commitment to institutionalization of human rights practices

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474. For treatment of this issue, see HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS (Tom Campbell & Seumas Miller eds., 2004).

475. See David Horton, *Illuminating the Path of Aliens' Judicial Recourse: Preventing Another Bowoto v. Chevron by Congressional Legislation*, 10:1 APPALACHIAN J. L. 27, 45 (2010) (asserting that the passage of the Bowoto Alien Tort Claims Against American Corporations Extracting Natural Resource Act of 2009 “could essentially transform multinational corporations into responsible members of the community by forcing them to show a commitment to human rights, or else be sued.”).

476. See, e.g., Larry Cata Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance* 107 (2012), available at [http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012\\_FromInstitutionalMisalignments.pdf](http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012_FromInstitutionalMisalignments.pdf).

477. Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“[A]s a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”).

and principles to the extent they are capable of doing so.

#### 8. Impacting Public Discussion and Deliberation

Following from the principle that with power comes responsibility,<sup>478</sup> the collaborative power of economic actors should be channeled to shape public policy to foster fulfillment of human rights obligations. Corporations should encourage governments with whom they engage and interact to fulfill their obligations under the rule of law, especially in connection with institutionalizing protection for human rights. This obligation must of necessity mean support for implanting in institutional frameworks the requirement that NGOs, IGOs, and companies themselves respect and protect human rights wherever they are doing business.

In line with the rule of law's opposition to arbitrary exercise of power, this should not be conceived of as a merely discretionary obligation.<sup>479</sup> The obligation exists whether acted on or not. However, it is clear that by its very nature the obligation must be self-imposed and in that sense voluntary. It is not an obligation that can be imposed exclusively by means of "hard" international legal instrumentalities, even though hard law can be deployed, for example, to delimit the power of corporations to influence public policy by imposing restrictions on advertising and by curbing contributions to political parties and candidates.

Especially in developing and underdeveloped regions of the globe, the activities of corporations may exert more direct bearing on overall human well-being than their populations' respective governments.<sup>480</sup> Even where strong and stable government is the order of the day, corporations, with their financial resources and access to technology and science, are equipped to produce products whose potential impacts governments do not have the wherewithal to assess and

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478. Keith Davis, *Can Business Afford to Ignore Social Responsibilities?* 2 CAL. MGMT. REV. 70 (1960).

479. Waddock & Smith, *supra* note 393, at 47–62 ("Too much of the time, when we think about . . . corporate responsibility, we think about it as a discretionary responsibility.").

480. *Corporate Accountability*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/campaigns/demand-dignity/issues/corporations-human-rights-and-poverty> (last visited Oct. 11, 2012) ("Yet all too often, human rights are abused as corporations exploit weak and poorly enforced domestic regulation and the lack of international accountability mechanisms to devastating effect in developing countries.").

regulate.<sup>481</sup> So too, in international counsels, corporate access to knowledge and information with its implications for economic development makes corporate involvement in shaping international policies and institutions manifest.

#### 9. Responsibility for Institutionalization

Referring back to the idea of international rule of law developed over the course of this article, the institutionalization of human rights protections under the guidance of rule of law requires several things. It must be possible in theory and practice to implant human rights protections in the form of rules or principles that carry a reasonable measure of clarity and definitiveness in business management systems. Pursuant to the rule of law demand for publicity, implementations of the rules must be monitored to ascertain compliance and findings transmitted in publicly accessible documents. Pursuant to the rule of law demand for transparency, the reports must be subject to verification. Unless these conditions are met, it is not possible to establish whether respect for the rights in question has been institutionalized and whether a business enterprise's human rights obligations are being satisfied.

As was illustrated in the overview section on global governance régimes, there is evidence that a groundwork upon which many of these conditions may be established already exists in one form or another.<sup>482</sup> Management systems are being developed and refined to allow training, monitoring, reporting and auditing.<sup>483</sup> The Global Reporting Initiative has developed reasonably transparent monitoring and reporting systems.<sup>484</sup> AccountAbility, Social Accountability International, Transparency International, and other public, private, and

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481. Harold James, *The Ethics of Business Life: Some Historical Reflections*, in RETHINKING BUSINESS MANAGEMENT 19 (James R. Stoner, Jr. & Samuel Gregg eds., Witherspoon Inst. 2008).

482. See, e.g., Grant & Keohane, *supra* note 153 (addressing hard law forms of accountability); Keohane, *supra* note 167 (discussing soft law forms of accountability).

483. See *Reporting Framework Overview*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx> (last visited Oct. 4, 2012); see, e.g., *About SAI*, SOCIAL ACCOUNTABILITY INTERNATIONAL, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=472> (last visited Oct. 4, 2012).

484. See *Reporting Framework Overview*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx> (last visited Oct. 4, 2012).

voluntary sector organizations are creating sophisticated management systems for infusing ethical standards into organizations and for monitoring, reporting and auditing the implementation of such standards.<sup>485</sup> Access to these systems and training programs means that companies today are able to institutionalize protection of human rights in their operations.

Still needed, however, is acknowledgement that the obligation to institutionalize protection for human rights expands beyond nation-states to private companies and the host of institutions and organizations playing a part in governing how business is conducted globally. It has been argued that, first, power bestows responsibility and second, that such power also draws into the transnational governance equation the fundamental requirements of the rule of law. Both of these moral principles attach not only to states but also to private sector, for-profit enterprises, and other global participants.

### III. CONCLUSION

Global economic governance régimes today presuppose the rule of law as a regulative ideal and human rights as non-instrumental moral principles. Although the rule of law is not an all-or-nothing concept, the regulative ideal requires that global governance institutions should manifest the antithesis of any arbitrary exercise of power and should strive to embody reasonable degrees of certainty, coherence, and transparency. Regarding human rights, the regulative ideal requires that participants in governance régimes strive to institutionalize respect and protection for such rights.

On the regulative conception, any conflicts or apparent contradictions uncovered by skeptics will serve as incentives for renewed efforts in pursuit of the rule of law. The rule of law, properly understood as a regulative ideal, remains regardless of the directions taken by power politics and international relations.

Understanding the international rule of law as a regulative ideal means that the contradictions and conflicts addressed by skeptics regarding law and new governance initiatives serve not as justification for across-the-board nihilism, but instead as a rallying call for renewed efforts in pursuit of realizing the

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485. See, e.g., *About SAI*, SOCIAL ACCOUNTABILITY INTERNATIONAL, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=472> (last visited Oct. 4, 2012).

moral idea of rule of law in international economic relations.

It makes sense both from theoretical and practical perspectives to orient one's thinking about global economic governance with a focus on the rule of law and human rights. In the context of a rapidly globalizing economy, the justification of responsible business conduct across borders and cultures is more and more becoming a pressing practical concern. Within such a landscape, the universal foundations of the rule of law and human rights render them precious normative ideals given the ongoing struggles to identify a common ground amongst the different legal, cultural and moral traditions in the world today.

This article has argued that the non-instrumental and universal justifiability of human rights and the rule of law provide a more stable epistemological platform for global economic governance than instrumental approaches are able to provide. Although disagreements persist concerning the precise scope and weight to be accorded to human rights in particular cases, the status of human rights as an objective moral ideal provides a basis upon which practical discussion of global responsibilities is made possible. This is especially crucial to debates about the shared responsibilities of participants in global governance initiatives. It makes sense for nation-states, intergovernmental organizations, and transnational corporations to invoke the discourse of rule of law and human rights when deliberating their joint and several responsibilities. After all, the demand for universal justification both empowers and constrains corresponding legal and moral obligations of economic actors on the international stage.

Humans possess the ability to learn and to change their basic operating assumptions when necessity and logic call for it. Through their trust in the authority of moral ideals and the will for change, it is possible to move toward a world that takes the non-instrumental moral character of international human rights seriously. Even though attaining a complete realization of the ideal of a cosmopolitan world order committed to the rule of law "always remains a pious wish, still we are certainly not deceiving ourselves in adopting the maxim of working incessantly towards it."<sup>486</sup> Advancement of global economic governance régimes toward a closer approximation of the ideals of rule of law and human rights is surely preferable to ceding

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486. Kant, *supra* note 376, at 161.



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affairs to domination by partisan interests of power players in a world order adverse to such ideals.