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The Corporate Keepers of International Law

By Jay Butler[*]

Abstract

In transborder environmental protection, territorial disputes, internet governance, anticorruption, international human rights, and humanitarian law, private businesses are increasingly supporting the implementation and enforcement of international law. This Article analyzes the various ways that corporate decision making contributes to this phenomenon, and assesses its prospects for enhancing international law's existing enforcement paradigms. In doing so, the Article opens new ground for scholarly and policy consideration of the proper role of corporations in the global legal order.

I. Introduction

Airbnb is not a state.[1] As such, the homestay bookings company is not bound by international law concerning the legal status of the Occupied Palestinian Territory.[2] In fact, U.S. law explicitly encourages the company and other American businesses to operate there.[3] Yet, when Airbnb removed all listings in the disputed area from its website in November 2018,[4] its decision potentially helped enforce international law declaring the settlements to be illegal,[5] including a UN Human Rights Council resolution "call[ing] upon business

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[1] *Company Overview of Airbnb, Inc.*, BLOOMBERG, *at* https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=115705393.

[2] *See, e.g.*, East Timor (Port. v. Austl.), 1995 ICJ Rep. 90, paras. 26–29 (June 30) [hereinafter *Portugal v. Australia*]; Western Sahara, Advisory Opinion, 1975 ICJ Rep. 12, paras. 126–27 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 ICJ Rep. 16, paras.124–27 (June 21). ICJ reports are available at http://www.icj-cij.org. *See also* Antonio Cassese, International Law in a Divided World 103 (1986).

[3] *See* 50 U.S.C. § 4607.

[4] *Listings in Disputed Regions*, Airbnb: Newsroom (Nov. 19, 2018), *at* https://press.airbnb.com/listings-in-disputed-regions (announcing Airbnb's decision to "remove listings in Israeli settlements in the occupied West Bank . . .").

[5] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, para. 120 (July 9) ("The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."); SC Res. 2334 (Dec. 23, 2016) (stating the Security Council "[r]eaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law"). *See also* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 83–86 (1990).

enterprises . . . to avoid contributing to the establishment or maintenance of Israeli settlements" and announcing the publication of a database of companies doing business there.[6]

States have an international law duty not to allow economic relations that recognize the authority of an illegal occupant.[7] By delisting properties in the Occupied Palestinian Territories, Airbnb implemented a small part of that international obligation. The company's delisting decision also had the potential to reduce the economic viability of the settlements and signaled to its customers that the settlements are legally questionable.[8] Importantly, Airbnb did not act in response to a U.S. government prohibition on doing business in the Occupied Palestinian Territories. It instead voluntarily refrained from such conduct, thus furthering a result preferred by international law.

In justifying its decision, Airbnb noted that it had always sought to "operate in this area as allowed by law," but that its consultations with international experts had revealed that "many in the global community . . . believe companies should not profit on lands where people have been displaced" and that the settlements "are at the core of the dispute between Israelis and Palestinians."[9] The company declared its support for "a framework . . . where the entire global community is aligned."[10] Airbnb thus looked to the international community rather than to domestic law for guidance.

Airbnb later reversed the delisting, but even this backtracking affirmed the centrality of international law to the company's decision making.[11] Groups that criticized Airbnb and sued the company argued that it had focused only on the Occupied Palestinian Territories.[12] In response, the company adopted a policy of allowing listings in all internationally disputed territories but donating the profits from those listings to humanitarian aid projects.[13]

This Article focuses on decisions by businesses to conform their operations and policies to international law in the absence of a clear domestic instruction so to do. Depriving actors of the economic gains of unlawful conduct is a common international enforcement tool, one that often requires corporations (as well as states) to impose economic sanctions on violators.[14] It has historically been far less common, however, for businesses to enforce international sanctions—or to implement or enforce international rules more

[6] Human Rights Council Res. 31/36, para. 13, UN Doc. A/HRC/RES/31/36 (Mar. 24, 2016).

[7] Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 ICJ Rep. 16, para.124 (June 21) (noting that the duty of nonrecognition "impose[s] upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory").

[8] Human Rights Watch, *Bed and Breakfast on Stolen Land: Tourist Rental Listing in West Bank Settlements*, 46–47 (Nov. 2018), *available at* https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_0.pdf (asserting that "[s]ettlement businesses depend on and benefit from the Israeli military authorities' unlawful confiscation of Palestinian land and other resources and contribute to the well-being and growth of settlements").

[9] *Listing in Disputed Regions*, *supra* note 4.

[10] *Id.*

[11] Julia Jacobs, *Airbnb Reverses Policy Banning Listings in Israeli Settlements in West Bank*, N.Y. TIMES (Apr. 9, 2019), *at* https://www.nytimes.com/2019/04/09/world/middleeast/airbnb-israel-west-bank.html.

[12] *Id.*

[13] *Update on Listings in Disputed Regions*, AIRBNB: NEWSROOM (Apr. 9, 2019), *at* https://press.airbnb.com/update-listings-disputed-regions.

[14] MALCOLM N. SHAW, INTERNATIONAL LAW 1242–51 (7th ed. 2014)

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generally—without first being required to do so by their home state.[15] This reticence is now eroding, with private firms increasingly acting as what this Article labels as the "corporate keepers" of international law.

Airbnb is not the only company that has sidestepped the preferences of its home state and taken action to support international legal and policy objectives. The Paris Agreement on climate change requires state parties to submit "nationally determined contributions" to reducing global greenhouse gas emissions.[16] Each state is expected to adopt domestic regulations to ensure that these emissions reductions are attained.[17] The United States initially set emissions targets as required by the Paris Agreement. After the 2016 election, however, President Trump withdrew these commitments and announced a decision to withdraw the United States from the treaty.[18]

Instead of embracing these domestic policy shifts, dozens of American companies—many acting under the banner of the "We Are Still In" and "America's Pledge" campaigns[19]—publicly pledged to continue reducing emissions in an effort to meet the United States' treaty commitments.[20] As the executive secretary of the United Nations Framework Convention on Climate Change recently observed, there is "considerable momentum in the private sector" because "[t]he Paris Agreement provided the signal and unleashed a willingness to take action."[21]

The corporate keepers phenomenon encompasses a broad range of business activities and decisions in support of international law. Significantly, these activities and decisions are often

[15] An important exception is business support for the boycott of apartheid South Africa and the adoption of the Sullivan Principles by companies that chose to continue operations in the country but not to abide by its racist laws and policies. *See Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 LM 1496 (1985); S. Prakash Sethi & Oliver F. Williams, *Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct–Lessons Learned and Unlearned*, 105 BUS. & SOC'Y REV. 169, 170, 195–96 (2002); *see also* Kishanthi Parella, *Improving Social Compliance in Supply Chains*, 95 NOTRE DAME. L. REV. 727 (2019) (examining why corporations might comply with nonbinding international legal institutions, including reputation and legitimacy).

[16] Paris Agreement, Art. 4(2), Dec. 12, 2015, TIAS No. 16-1104 ("Each party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.").

[17] *Id.* ("Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.").

[18] White House Press Release, President Trump Announces U.S. Withdrawal from the Paris Climate Accord (June 1, 2017), *at* https://www.whitehouse.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord; White House Press Release, Fact Sheet: U.S. Reports its 2025 Emissions Target to the UNFCCC (Mar. 31, 2015), *available at* https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc.

[19] We are Still In, *About*, *at* https://www.wearestillin.com/about; America's Pledge, *About America's Pledge*, *at* https://www.americaspledgeonclimate.com/about.

[20] David Francis, *Cities, States and Companies Vow to Stick to the Paris Climate Agreement*, FOR. POL'Y (June 2, 2017), *at* https://foreignpolicy.com/2017/06/02/cities-states-and-companies-vow-to-stick-to-the-paris-climate-agreement; Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), *at* https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html; *see also All Things Considered: Mars Incorporated Criticizes Trump's Decision to Leave Paris Climate Accord,* NPR (June 1, 2017), *at* https://www.npr.org/2017/06/01/531099035/mars-incorporated-criticizes-trumps-decision-to-leave-paris-climate-accordMars; *Reducing Greenhouse Gas Emissions*, WALMART, *at* https://corporate.walmart.com/global-responsibility/sustainability/sustainability-in-our-operations/reducing-greenhouse-gas-emissions.

[21] Patricia Espinosa, *Foreword*, *in* Oil & Gas Climate Initiative, *A Report from the Oil and Gas Climate Initiative* (Sept. 2018), *available at* https://oilandgasclimateinitiative.com/wp-content/uploads/2018/09/OGCI_Report_2018.pdf.

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not required by the company's state of nationality. One important contribution of this Article is to develop a typology to identify and categorize these diverse examples.

In some instances—such as the Airbnb and Paris Agreement examples—the firm gives effect to an international legal obligation that its home state has expressly rejected, failed to implement, or carried out inadequately. I refer to this category of corporate keeping as "extending" international law. In other instances, which I label as "enforcing," the corporation moves beyond its own conduct to encourage other actors to whom an international legal rule is addressed to give effect to the rule. A third variant of corporate keeping, which I refer to as "exporting," arises when businesses pressure or even sanction public or private actors in other countries in conformity with the home state's understanding of what international law requires.[22]

In addition to its obvious practical significance, the rise of corporate keepers has at least three theoretical implications. First, a company's decision to give effect to international law turns the conventional account of international lawmaking on its head. Usually, states consent to treaties and then adopt domestic measures to make them binding on companies incorporated or doing business there.[23] Scholars have analyzed this process of implementation and examined corporate involvement in international norms already incorporated into domestic law.[24] Other work has traced how corporations influence the drafting and content of international rules.[25] However, a company's choice to extend, enforce, or export international law in the absence of a concomitant domestic legal obligation has received far less attention.[26]

[22] *See generally* Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 391–98 (2000) (distinguishing among compliance, implementation, and effectiveness as different kinds of action in support of international law and analyzing state actions consistent with each concept).

[23] *See* Shima Baradaran, Michael Findley, Daniel Nielson & J. C. Sharman, *Does International Law Matter?*, 97 MINN. L. REV. 743, 762 (2013) (noting that "governments play a vital role in formal compliance with international law by enacting and enforcing domestic laws that implement international agreements"); Carlos Manuel Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 930 (2005) (observing that "[i]nternational law, as it exists today, includes norms that address the conduct of corporations and other non-state actors but, with very few exceptions, the norms do so by imposing an obligation *on states* to regulate non-state actors," such that "for the most part, international law regulates such non-states actors indirectly").

[24] *See* Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 67 (2013) (observing that "'[p]ersuasion' treaties anticipate domestic implementation through regulation of private actors"); Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1591, 1650–62 (2011) (describing enforcement by companies of international legal obligations to which their home states have already subscribed, but also hinting at the possibility of "forum shopping" between national and international legal orders); Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 172 (2009) (asserting that to make transnational law, businesses "can enlist powerful states to create international public law," "independently create transnational private legal orders," or "export their internal standards globally through decentralized processes of diffusion," but not discussing the adoption of international law rather than domestic law as represented by the sort of choice made by Airbnb); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 146 (2005) (asserting that "[j]ust as the state is turning more and more to private actors to fulfill the domestic functions of government, private actors are increasingly fulfilling its foreign affairs functions as well").

[25] Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742 (2018); Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016).

[26] For notable exceptions, see Ashley Deeks, *A New Tool for Tech Companies: International Law*, LAWFARE (May 30, 2019), *at* https://www.lawfareblog.com/new-tool-tech-companies-international-law; Natasha A. Affolder, *The Private Life of Environmental Treaties*, 103 AJIL 510 (2009).

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Second, the corporate keepers phenomenon problematizes standard narratives about the relationship among business, states, and international law. Since the 1970s, scholars have characterized the size, wealth, and influence of global multinational corporations as a threat to state authority and state sovereignty.[27] According to this view, governments are unable or unwilling to regulate large business conglomerates whose operations transcend the state.[28] The inadequacy of domestic regulation has become increasingly pernicious due to the rise of privatization and companies structured as horizontally integrated, global supply chains.[29] International law, according to this account, must fill the regulatory gap. In the examples described above, however, companies reject state decisions to abjure treaties or the decisions of international organizations. Such actions reveal the potential for corporations not to transcend the state or to evade regulation, but instead to pursue an alternate regime that is consistent with international law.

Third, the corporate keepers phenomenon may contribute to closing international law's pervasive enforcement gaps. These gaps have long been derided by scholars as key weaknesses of the international legal order.[30] To the extent that businesses' decisions giving effect to international legal norms provide opportunities to close or narrow these gaps, they may be worth encouraging.

At the same time, this Article cautions against wholeheartedly embracing corporations as the keepers of international law. Such actions may compound the perceived illegitimacy and democratic deficiencies of decision-making processes that appear to underpin the current populist wave against international law.[31] Nor can one overlook the fact that corporations have, both historically and contemporaneously, committed significant violations of international law and were central to the catastrophic imperialism of various Western states.[32] Yet even acknowledging these concerns, a review of recent business behavior reveals a wide range

[27] *See, e.g.*, Detlev F. Vagts, *The Governance of the Multinational*, 23 WISC. INT'L L.J. 525, 528 (2005) (asserting that "[t]he multinational enterprise presents challenges for the world economy and the world polity, particularly for states hosting multinationals that have their base somewhere else," and that "[i]n some quarters, the multinational became an all-purpose scapegoat, blamed for all sorts of ills . . ."); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 784, 786 (arguing that "[t]he opportunities for TNC participation in international law enforcement appear remote," and that "one must conclude that TNC compliance with public international law would be unlikely in the absence of a formal law enforcement system"); RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971).

[28] *See, e.g.,* John Ruggie (Special Representative of the Secretary-General), Protect, Respect and Remedy: A Framework for Business and Human Rights, para. 14, UN Doc. A/HRC/8/5 (Apr. 7, 2008) (observing that "States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment").

[29] *See* Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains*, *in* CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak eds., 2017); Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 784 (2014); Dickinson, *supra* note 24, at 151–52.

[30] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[31] Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795, 814–15 (2017).

[32] STEVEN PRESS, ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE'S SCRAMBLE FOR AFRICA (2017); Julia Adams & Steven Pincus, *Imperial States in the Age of Discovery*, *in* THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL 333–48 (Kimberly J. Morgan & Ann Shola Orloff eds., 2017); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 37 (1999).

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of examples of corporations contributing in potentially constructive ways to carrying out international law.

To advance these arguments, the Article proceeds along the following path. Part II discusses international law's enforcement puzzle. It reviews direct and indirect means of enforcement by state and nonstate actors and explains their widely recognized inadequacy. Part III constructs a model of different types of business decisions favoring adherence to international law. Part IV applies that model to a broad range of issue areas in which corporations have adopted policies that support international law. Part V offers a normative evaluation of these developments, weighing arguments for and against corporate keepers of international law and how the international system might better mobilize corporations to apply and advance international law. A brief conclusion follows.

II. International Law's Enforcement Conundrum

The ambitions of international law to regulate the exercise of global power and ensure a peaceful world order are severely constrained by the inability to enforce its commands.[33] With each new global crisis, from the wars in Yemen and Syria to illegal annexation of territory by Russia in Crimea, what is on full display is not the inapplicability of international law, but the limits of its capacity. The international legal system has, so far, been unable to constrain such excesses, and enforcement challenges persist.[34]

This Part begins by sketching four classical approaches to understanding international law enforcement. It then explains why these approaches have not brought about widespread compliance and why a broader perspective is needed.

State-Based Enforcement of International Law

The foundation of international legal obligation is state consent.[35] Prevailing notions of sovereignty dictate that a state must first agree to an international legal obligation in order to be bound by it. Although state consent underpins international law's content, the principal means of sanctioning violations still depend on state power.[36] Indeed, though a state may agree to a legal rule in the abstract, the application of the rule in an unfavorable way or to a matter of particular national interest may not attract the same sort of support. When this disjunct between law in the abstract and law in operation is reached, the international legal

[33] Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823, 1826 (2002) (arguing that "compliance is one of the most central questions in international law"); Lori Fisler Damrosch, *Enforcing International Law Through Non-forcible Measures*, 269 Recueil des Cours 9, 19 (1997) (observing that "[a] fundamental (and frequent) criticism of international law is the weakness of mechanisms for enforcement").

[34] *See generally* Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance 18–19, 229 (2003); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1398–99 (1999).

[35] Restatement (Third) of the Foreign Rel. L. U.S., pt. 1, ch. 1, intro. note (1987) ("Modern international law is rooted in acceptance by states which constitute the system. Specific rules of law also depend on state acceptance."); *cf.* Andrew T. Guzman, *Against Consent*, 52 Va. J. Int'l L. 747 (2012) (challenging the normative desirability of maintaining consent as the basis of international legal obligation).

[36] Hans Morgenthau, Politics Among Nations 270 (2d ed. 1954) ("There can be no more primitive and no weaker system of law enforcement than [international law]; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation.").

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system has traditionally relied on state power to bridge that gap. However, the results have not always been favorable.

International law has historically been enforced via four main mechanisms, each of which persists today.[37] First, a state may enforce international legal obligations through self-help. This may come in the form of self-defense in the face of an armed attack. In less extreme circumstances, a state may take countermeasures against an internationally unlawful act perpetrated by another state, engaging in conduct that would itself be wrongful but for the other state's previous unlawful conduct. Or a state may deploy what are known as retorsions, entirely lawful but unfriendly acts adopted in response to conduct from another state which the state implementing the retorsion finds objectionable. Alternatively, a state may exercise so-called diplomatic protection, through which it lobbies to enforce the rights of one its nationals allegedly wronged by another state.[38] The resort to self-help also extends to certain international institutions. The World Trade Organization (WTO), for example, explicitly provides for enforcement through self-help, whereby a state can adopt trade measures authorized by the WTO Dispute Settlement Body in response to an uncorrected violation of WTO law.[39]

The efficacy of self-help is tested, however, where there is a significant economic or military power imbalance against the enforcing state and in favor of the violating state. Such an imbalance renders self-help impractical, since the enforcing state's sanctioning attempts may have little impact and may even end up rebounding to its detriment. Moreover, the wronged state may also find that seeking a remedy for a particular legal violation is not worth jeopardizing its relationship with the lawbreaking state and so forgo self-enforcement entirely.[40]

A second approach to international law enforcement involves collective action by a coalition of states. Regional organizations like the North Atlantic Treaty Organization, the African Union, the Organization of American States, and the European Union (EU) are explicitly designed to assist members to enforce their international rights when violated either by those within the group or outside of it. But this sort of enforcement, although benefitting from strength in numbers, is bounded by the group decision-making processes, the interests of its leading members, and the collective organizational interests such that mobilizing meaningful action may prove difficult.[41]

Third, states may have recourse to international institutions such as the UN Security Council or the International Court of Justice (ICJ).[42] Yet, each of these institutions has limitations. The Council's ineffectiveness has long been recognized when the interests of a permanent, veto-holding member are at stake.[43] These concerns apply not only when a

[37] *See generally* Damrosch, *supra* note 33

[38] Shaw, *supra* note 14, at 793–99, 1128–34.

[39] *See* Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the* WTO, 30 U. Pa. J. Int'l L. 1133, 1141–43 (2009); Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. Ill. L. Rev. 319 (2008).

[40] Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 Yale L.J. 252, 341–42 (2011) (asserting that "[i]t is no secret that powerful states are often offered special treatment under international law").

[41] Shaw, *supra* note 14, at 1287–95.

[42] José E. Alvarez, International Organizations as Law-makers (2005).

[43] Saira Mohamed, *Shame in the Security Council*, 90 Wash. U. L. Rev. 1191, 1199–201 (2013); Stefan Talmon, *The Security Council as World Legislature*, 99 AJIL 175, 192–93 (2005).

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permanent member is itself the lawbreaker, but also when the lawbreaker is an ally of a permanent member and when a permanent member disagrees as to the means of enforcement or is hesitant about the precedent it may set. The Council's ability to act as an effective enforcer of international law is significantly circumscribed by these considerations.

The ICJ is also constrained in several important ways. First, the Court relies on state consent for its jurisdiction; many international disputes are never adjudicated because one or more states refuse to submit the matter to the Court.[44] Relatedly, the Court cannot pronounce upon a claim that impinges upon the rights of an absent third-party state.[45] Even when the Court has jurisdiction and issued a decision on the merits, its judgment may be ignored as merely exhortatory or treated as without domestic legal effect.[46]

A fourth enforcement mechanism involves states mandating in domestic law that their corporate nationals and citizens act to carry out particular international obligations.[47] However, this method of enforcement relies on the state serving as intermediary and agreeing to adopt such domestic measures. When the state disagrees with the international norm or rule at issue, it may not act as a legal bridge for domestic implementation. It is in such situations—where the state has refrained from ordering its nationals to comply with international law—that the corporate keepers phenomenon arises.

A common theme that links these four enforcement paradigms is their focus on state institutions. Disaffection with these institutions has lead scholars, policymakers, and activists in recent years to cast a broader net in seeking out alternative actors and mechanisms to enforce international law.

Alternative Means and Actors

A variety of other mechanisms complement the enforcement of international law by states. Lawsuits in national courts are one alternative. Such suits are often initiated by private parties seeking to adjudicate international law claims. From the Alien Tort Statute to litigation over the awards of investment tribunals, national courts have been important vehicles for enforcing international obligations.[48]

However, the potential of national courts has been curtailed in recent years due to fears that judges may act in ways that are contrary to the executive branch in the sphere of foreign

[44] Statute of the International Court of Justice, Art. 36; SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005 (2006).

[45] Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. & U.S..), 1954 ICJ Rep. 19, 32–33 (June 15); *see also Portugal v. Australia*, *supra* note 2, at 104, para. 34.

[46] *See* Medellín v. Texas, 128 S.Ct. 1346 (2008) (refusing to give effect to ICJ judgment requiring the United States to review and reconsider death sentences imposed in violation of the Vienna Convention on Consular Relations); *see also* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 646 (2008).

[47] *See* Durkee, *supra* note 24, at 64 (defining persuasion treaties as those that "require states to persuade third parties to do something different, through regulatory or other means").

[48] *See, e.g.*, Rebecca J. Hamilton, Jesner v. Arab Bank, 112 AJIL 720 (2018); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1470 (2014); Ralph G. Steinhardt, Kiobel *and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AJIL 841 (2013). *See also* Stephan, *supra* note 24, at 1655–56 (suggesting that "[p]erhaps no development over the last thirty years has contributed more to the privatization of the production of international law in the United States than the emergence of the ATS as a basis for litigation in federal courts.").

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relations.[49] Moreover, although the ICJ has acknowledged that national courts can be important vehicles for enforcing international law, it has also affirmed that domestic litigation against sovereign states and criminal prosecutions of high-level foreign officials may themselves violate international law.[50]

A different way to promote enforcement involves nonstate actors as direct duty bearers of international obligations. For example, the International Committee of the Red Cross has held ceremonies welcoming commitments by insurgent groups that agree to comply with the Geneva Conventions.[51] Such events grant a degree of legitimacy to nonstate actors, particularly those aspiring to governance roles in their own state or in the formation of a new state, in exchange for committing to the strictures of international law. Conversely, the failure of nonstate groups to abide by international obligations has been cited as a reason to oppose their bids for statehood.[52]

Another approach to enforcement focuses less on the actors involved and more on the means of ensuring their compliance. Such methods, which Bob Scott and Paul Stephan label as "informal enforcement,"[53] are designed to cultivate an internal attitude that leads actors to choose compliance without the necessity of an external threat. Informal enforcement is often relied on by liberal scholars to refute realist critiques of international law's lack of formal or direct enforcement authority.[54] Ryan Goodman and Derek Jinks, for example, argue that an acculturation model encourages decision makers to be naturally inclined to comply with international law.[55] Goodman and Jinks apply the model to states, but acknowledge that it may apply to private actors like corporations as well.[56]

Reputation is a crucial component of informal enforcement.[57] A bad reputation makes other states less willing to work with the lawbreaking state in the future. It may also have tangible financial consequences, such as the unwillingness of private firms to do business with or lend to the lawbreaking state.[58] Scholars have suggested that a consistent pattern

[49] Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); Stephan, *supra* note 24, at 1612–16.

[50] Jurisdictional Immunities of the State (Ger. v. It.), 2012 ICJ Rep. 99, para. 139 (Feb. 3); Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ Rep. 3, para. 78 (Feb. 14).

[51] Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107 (2012).

[52] *See* Fionnuala Ní Aoláin, *States, Almost States, Non-state Actors and the Geneva Conventions: Palestinian President Abbas's Attempt to Join the Club*, JUST SECURITY (Apr. 2, 2014), *at* https://www.justsecurity.org/8777/states-states-non-state-actors-geneva-conventions.

[53] ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 10 (2006) (observing that "[i]nformal enforcement occurs when one or more actors (perhaps states, but also firms, nongovernmental organizations, political parties, and others) imposes costs on a rule-breaker in the absence of centralized coordination and control").

[54] *See, e.g.*, Koh, *supra* note 34, at 1409–10.

[55] RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013)

[56] *Id.* at 39 n.1 (2013) (acknowledging that their focus is on states and national governments, their analysis "would apply to a broad range of organizational entities including subnational governments, IGOs, NGOs, multinational corporations, and armed opposition groups").

[57] *Id.* at 112–13; Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 549 (2006).

[58] MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 76 (2008) (asserting that "[i]n deciding what to do, policymakers take into consideration how violating the rule will affect their state's reputation as trustworthy and law-abiding"). *Cf.* Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 254 (2009) (challenging the actual influence of reputation on decisionmaking and instead asserting that "[i]n many circumstances, the reputation of the state is unconnected with the actions of government leaders").

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of lawbreaking results in a state becoming an international rogue whose participation in the international legal system can be severely curtailed.[59]

The difficulty with reputation and other forms of indirect enforcement is twofold. First, a state may not care much about its reputation. It may be that the state has so long been known as a lawbreaker that it cares little about its reputation for compliance. North Korea arguably falls into this category. As the Trump administration recently discovered, it is difficult to trust the commitments offered by such a state, which incurs little additional cost for breaking yet another promise.[60]

A further concern relates to the challenge of relying on reputation against a state that is usually law abiding. Louis Henkin famously asserted that most states abide by international law most of the time.[61] Yet, many states choose to violate international commitments on matters of particular national concern, such as Japan's whaling program, Russia's annexation of Crimea, or China's incursions in the South China Sea.[62] Reputation may not adequately constrain these violations, because a single incident of wrongdoing may not diminish the state's overall status as a law abider and even a law enforcer. The practice of the United States is also relevant to this debate. Scholars have suggested that the country sometimes breaks international law because it considers that an opposing interpretation reflects a better view of the international system as a whole.[63] A final difficulty with mobilizing reputation against a state that is usually law abiding is that other governments may be unwilling to jeopardize their otherwise good relationship with the violating state or risk driving it into the status of a persistent lawbreaker.

III. Modeling Corporate Keepers

The previous Part reviewed four traditional paradigms for state enforcement of international law, a range of alternative enforcement mechanisms, and the prevailing dissatisfaction with these accounts. This Part considers a different mode of enforcement. It develops a typology to analyze the various ways that corporations act to support international law. It articulates ideal types for categorizing the nature of and motivation processes behind these behaviors.[64] As with most ideal types, the typology does not map perfectly onto reality.

[59] *See, e.g.*, Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 Geo. L.J. 257, 286–88, 302–06 (2011).

[60] Krishnadev Calamur, *No One Knows What Kim Jong Un Promised Trump*, Atlantic (July 2, 2018), *at* https://www.theatlantic.com/international/archive/2018/07/north-korea-nuclear/564287; Ellen Nakashima & Joby Warrick, *North Korea Working to Conceal Key Aspects of Its Nuclear Program, U.S. Officials Say*, Wash. Post. (June 30, 2018), *at* https://www.washingtonpost.com/world/national-security/north-korea-working-to-conceal-key-aspects-of-its-nuclear-program-us-officials-say/2018/06/30/deba64fa-7c82-11e8-93cc-6d3beccdd7a3_story.html.

[61] *See* Louis Henkin, How Nations Behave 47 (2d ed. 1979).

[62] *See* Whaling in the Antarctic (Austl. v. Japan), 2014 ICJ Rep. 226, para. 247 (Mar. 31); GA Res. 74/17, Problem of Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as Well as Parts of the Black Sea and the Sea of Azov (Dec. 9, 2019); The South China Sea Arbitration (Phil. v. China), Award, para. 1203 (July 12, 2016).

[63] W. Reisman, *The United States and International Institutions*, 41 Survival: Global Pol. & Strategy 62 (1999).

[64] Max Weber, "*Objectivity" in Social Science and Social Policy*, *in* The Methodology of the Social Sciences 90 (Edward A. Shils & Henry A. Finch eds. and trans., 1949) (defining the ideal type as an analytical tool of sociological methodology).

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Consequently, one may characterize certain aspects of corporate behavior as falling more along an overlapping spectrum than as fitting perfectly into one type or another.

Extending, Enforcing, Exporting

Corporate mobilization in support of international law may be divided into three separate categories—which I label as "extending," "enforcing," and "exporting"—that can be arrayed along a continuum starting with extending, moving next to enforcing, and finally to exporting. At each stage, the corporation expands its commitment to the international rule, beginning with its own conduct, then turning to other actors regulated by the rule, and finally to pressuring or even punishing rule violators.

Extending, as defined here, involves a company's decision to adopt an international legal rule to guide its actions or policies. As previously noted, international law generally binds corporations by virtue of a domestic legal mandate.[65] A company's decision, in the absence of such a mandate, to adopt an international rule is therefore potentially significant. The choice is noteworthy not only because it strengthens the international legal system by expanding the actors who behave in line with its precepts, but also because it enhances international law's authority to guide the behavior of similarly situated actors (for example, if one company's policy later becomes an industry standard).

Enforcing captures instances in which the company moves beyond merely adopting an international law standard for itself. The company also seeks, through its conduct, to more actively pursue an international norm or objective on behalf of the actors to whom the norm or objective is actually addressed.

Exporting involves a decision to punish other actors for violating an international law rule or to use company policies as a means to help persuade another actor to alter its illegal conduct. Whether or not the action is successful,[66] exporting sees the company initiating punitive action against another actor's noncompliance with international law.

Motivations and Communication Processes

I next consider the motivations and communication processes that underlie these three types of corporate keeping. Corporate support for international law may occur through external and/or internal motivation. External motivations for corporate decision making involve arguments that characterize the company's action as required by a particular interpretation of international law or instances when actors threaten a sanction (whether reputational or financial) if the company does not alter its conduct to support international law. External motivations involve the sort of straightforward command between sovereign and subject that we often associate with positive law.[67]

Internal motivations, in contrast, involve more subtle processes of persuasion and internalization that convince companies that a course of action indicated by international law ought

[65] José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 Santa Clara J. Int'l L. 1 (2011); John H. Knox, *Horizontal Human Rights Law*, 102 AJIL 1 (2008).

[66] Hathaway & Shapiro, *supra* note 40, at 276, 348–49.

[67] H.L.A. Hart, The Concept of Law (3d ed. 2012).

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to be followed without the direction or instruction of outside actors.[68] Internal motivations may be framed according to the company's quest for profit (for example, that the firm sees potential revenue from pursuing new lines of international law-aligned business or appealing to a new customer base).[69] But they may also involve adopting international rules in ways that would seem to work against, or at least not motivated entirely by, financial incentives. These external and internal motivations for corporate keeping are, in turn, generated and cultivated through external and internal communication processes whereby international law shapes the behavior of companies even in the absence of a state intermediary to implement its instructions via domestic regulation.[70]

External communication processes often involve a statement of legality from an international institution that is widely viewed as authoritative and legitimate. This statement identifies some purportedly illegal practice that the international institution seeks to correct and argues that the company should change its business practices to constrain that illegality. Such statements are sometimes followed by nongovernmental organization (NGOs) or civil society pressure, or negative publicity that invokes the international institution's statement of legality to add heft to critiques of the company's conduct. However, the company's state of nationality, perhaps for reasons of national interest or because it interprets international law differently, declines to adopt a domestic regulation mandating that the company shift its behavior to conform with the institution's view of what international law requires. The company then chooses to alter its conduct in line with the international institution's statement of legality rather than the views of the state and, in so doing, becomes a corporate keeper of international law.

External communication processes may occur directly, as when the UN Human Rights Council identified the conduct of businesses operating in the Occupied Palestinian Territories as legally objectionable,[71] or when NGOs criticized those same companies using an international law yardstick.[72] Such communication processes may also shape corporate behavior indirectly by influencing consumer, shareholder or managerial preferences.[73]

One of the most important recent innovations in enhancing external communication processes has been the adoption of the UN Guiding Principles on Business and Human

[68] *Id.* (discussing contract law and the choice of parties to subscribe voluntarily to the law's ordering of relationships).

[69] *See, e.g.*, *All Things Considered*, NPR, *supra* note 20 (when asked whether Mars, Inc. was committing to abide by the Paris Agreement "as a point of principle, or is renewable energy—does it check out now economically for Mars?," its vice president for corporate affairs, Andy Pharoah, replied that, "Yeah it makes economic sense for us now. And also, you've got to think that in the future, carbon is going to have an economic price to it," and that "[c]ustomers send signals.").

[70] *See* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101, 105–08 (1981) (observing that "lawmaking or the prescribing of policy as authoritative for a community is a process of communication," noting that "prescriptive or lawmaking communications . . . carry simultaneously three coordinate communication flows" and describing these flows as "the policy content, the authority signal and the control intention").

[71] HRC Res. 31/36, *supra* note 6, para. 13.

[72] Human Rights Watch, *supra* note 8.

[73] *See* Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 888 (2018) (charting the significant influence that a company's affinity with certain principles may play in structuring consumer preferences).

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Rights.[74] Formulated by John Ruggie in his capacity as the special representative of the secretary-general on human rights and transnational corporations and other business enterprises and endorsed by the UN Human Rights Council in 2011, the Guiding Principles adopt a protect-respect-remedy framework to reconcile state sovereignty and responsibility for achieving human rights with the significant and growing influence of corporations.[75] The Ruggie framework envisages states as the sole entities responsible for safeguarding human rights within the international system, but also suggests that corporations take an active role in ensuring that their own conduct and operations do not undermine human rights.[76]

Because of the widespread support they received from states, business leaders, and activists and the capacious applicability of human rights to a wide variety of international challenges, the Guiding Principles have provided the basis for international institutions to invoke quasi-legal arguments seeking to command corporations even though the principles were originally intended to be nonbinding. In the Airbnb example, the UN Human Rights Council cited the Guiding Principles to support its direction to companies not to do business in the Occupied Palestinian Territories because doing so makes them complicit in an illegal occupation.[77]

In the absence of domestic implementation of legislation, however, the UN Human Rights Council had no way to compel businesses to cease operating there. Yet, the prominent NGO, Human Rights Watch, published a report invoking this supposed prohibition to castigate Airbnb's continued listing of properties in the Occupied Palestinian Territories.[78] The company then announced its decision to drop such listings.[79]

Turning to internal communication processes, a company's embrace of international law may arise even in the absence of a statement from an international institution that the company is obligated to act or is complicit in a violation of the law. Instead, the company's management believes that international law presents a favorable standard for conduct and seeks to carry out its objectives, either with respect to the company's own conduct (extension) or that of other actors (enforcement and export). This dynamic is illustrated by the American companies that have rallied in support of the Paris Agreement's goal of reducing greenhouse gas emissions.[80]

One potential objection to this account is that it treats corporate decisions to adopt international law as consequential even if they are motivated by profit or other business objectives rather than expressly identified as carrying out an international edict. Under prevailing theories of customary international law, for example, an actor's motivation matters (to show

[74] John Ruggie (Special Representative of the Secretary-General), Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles].

[75] Human Rights Council Res. 17/4, UN Doc. A/HRC/RES/17/4 (July 6, 2011).

[76] Guiding Principles, *supra* note 74, at prins. 11, 13.

[77] Human Rights Council Res. 31/36, *supra* note 6, para 13.

[78] Human Rights Watch, *supra* note 8.

[79] This does not imply that external communication processes are always effective. For example, another target of the Human Rights Watch report, Booking.com, continues to list properties in the Occupied Territories. Tovah Lazaroff, *Human Rights Watch Calls on Booking.com to Follow Airbnb Settler Boycott*, JERUSALEM POST (Nov. 20, 2018), *at* https://www.jpost.com/Israel-News/Human-Rights-Watch-calls-on-bookingcom-to-follow-Airbnb-settler-boycott-572387.

[80] Note 20 *supra*.

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opinio juris) just as much as its actions (to prove state practice).[81] Yet states regularly communicate that an action is taken to advance a particular objective, although they may also be pursuing other goals. Indeed, the fact that a state is acting out of self-interest in abiding by international law does not negate the possibility that it is also acting out of a sense of legal obligation.[82] A similar conclusion applies to corporations whose choice of international law is motivated in whole or in part by profit.

The argument advanced here is not that a corporation must manifest fidelity to the law or act out of a sense of obligation alone to be a keeper of international law. To the contrary, choosing international law may have substantial private benefits for a company. Such a choice may, for example, respond to the preferences of a firm's consumers or shareholders or bolster a corporation's standing in the eyes of the public.[83] The choice may also allow a company to exploit international rules that are more advantageous than domestic regulations.[84]

Limits on Corporations Choosing International Law

Corporations interested in serving as the keepers of international law face two key constraints. First, they owe a fiduciary obligation to their shareholders to maximize profits. Second, domestic law does not always permit, and sometimes expressly prohibits, a company from adopting or enforcing an international legal norm.[85] This section addresses each constraint in turn.

Choosing international law means that the corporation is deciding to adopt an additional legal standard that might not otherwise be applicable. Complying with law is often understood to be costly, and so the expense of voluntarily following a regulation may well be seen as a waste of corporate resources. Moreover, by proceeding in such a manner, the company may be giving up a business opportunity that another company may exploit. In the Airbnb example, for instance, the company chose to forego doing business in a certain place even though U.S. law did not mandate such an outcome and even though its competitors may have filled the gap left by the company's withdrawal.

Ordinarily, companies must act in the best interests of their shareholders. As such, the company will need to demonstrate some tangible benefit to the firm that outweighs the cost of implementing international law. In some areas, say where shareholders themselves support the decision or where the company's choices will attract negative or positive publicity,

[81] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 772–76, 788–90 (2001).

[82] *See* JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 124–25 (2015).

[83] Kevin Crowley & Eric Roston, *Chevron Aligns Strategy With Paris Deal But Won't Cap Output*, BLOOMBERG (Feb. 7, 2019), *at* https://www.bloomberg.com/news/articles/2019-02-07/chevron-pledges-alignment-with-paris-accord-but-won-t-cap-output (reporting that "Chevron Corp. vowed to cut greenhouse gas emissions in alignment with the Paris Accord on climate change, potentially averting a shareholder rebellion at its annual general meeting"); Jay Cassano, *Shareholders Can't Force Pharmaceutical Company to Prove Drugs Aren't Used for Executions*, INT'L BUS. TIMES (Aug. 8, 2017), *at* http://www.ibtimes.com/political-capital/shareholders-cant-force-pharmaceutical-company-prove-drugs-arent-used-executions (describing shareholders pressure to ensure that Cardinal Health's products are not used in lethal injections).

[84] On the choice of international law over more stringent domestic law regimes by nongovernmental actors in the context of tobacco control, see, Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 HARV. INT'L L.J. 433 (2016); Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383 (2016).

[85] *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

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making this case may be relatively straightforward. Yet, in other instances, the corporation's management will need to explain the reputational harm of continuing an existing business practice or the reputational benefit of acting in a manner in line with international law or inducing other actors to do so. Where the company's customers clearly agree with the goals of a particular international law rule, the profit calculus is fairly clear and justifiable on this basis. However, in other instances, say where the company serves institutions or markets that do not care so much as to compliance with international law, it will be less apparent.

Companies must also think carefully about managing their external relationships. Choosing to comply with international law on a particular matter may, for example, annoy government officials of the company's home state or those of countries where it does or hopes to do business. These risks are exacerbated by the fact that companies generally do not balance wider social interests as do governments. For example, although President Trump was widely criticized for his refusal to condemn Saudi Arabia's killing of Jamal Khashoggi outright, his realist appraisal of the contracts and jobs dependent on the United States' relationship with Saudi Arabia reflects the sort of balancing that public officials often undertake.[86] That said, if the corporate keeping becomes more pervasive, companies may themselves become more reticent of adopting international law-conforming policies which may adversely impact national economies.

IV. Corporate Keepers in Practice

The Article next considers a wide range of examples in different issue areas to highlight the growing prevalence and significance of corporations acting as the keepers of international law. The discussion is neither intended to be exhaustive—similar dynamics may exist in other areas—nor is it intended to obscure other areas in which businesses act to undermine international law or defeat its objectives.[87] However, critiques of corporate power and influence would be incomplete without also considering the potential benefits of corporations to act as keepers of international law.

Some of the examples discussed below reveal companies justifying their actions as reflecting a sense of fidelity to a particular international legal rule. In others, however, such manifestations of motivation are more ambiguous. Yet, these latter instances should not be entirely discounted as outside the model of corporate keeping. Corporations, like states, are complex entities subject to a variety of different influences that orient their decision making. The argument presented here is that international law would seem to play some part in such choices, even if international law is not the only or even most important element.

[86] Sonam Sheth & John Haltiwanger, "*POTUS Sided with a Brutal Dictator Over CIA? Shocking": Trump Widely Bashed for Siding with Saudi Arabia Over Jamal Khashoggi's Killing*, Bus. Insider (Nov. 20, 2018), *at* https://www.businessinsider.com/trump-standing-with-saudi-arabia-jamal-khashoggi-experts-react-2018-11

[87] Other scholars have discussed that subject at length. *See, e.g.*, Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 Case W. Res. J. Int'l L. 49 (2018); James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. Int'l L. & Pol. 121 (2014); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 Conn. J. Int'l L. 1 (2003); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int'l L. 45, 48–49 (2002); Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 Hastings Int'l & Comp. L. Rev. 339 (2001).

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Pharmaceutical Companies and the Death Penalty

For several decades now, the United States has had a tortuous legal relationship with capital punishment. From the declared unconstitutionality of the death penalty in *Furman v. Georgia*, to the practice's reinstatement in *Gregg v. Georgia*, to its limitation to adults based on a controversial reading of comparative and international law in *Roper v. Simmons*, to increasing media attention today on wrongful convictions and the significant racial prejudice that permeates sentencing, the punitive practice has been the source of much controversy.[88]

This jurisprudential difficulty has been compounded as international law has progressively moved to curtail the use of capital punishment, leaving the United States and other retentionist states as outliers. Indeed, most countries and many recent international instruments explicitly outlaw the use of the death penalty.[89] Furthermore, many European states refuse to extradite criminal defendants facing a possible capital sentence to the United States, and various NGOs and pressure groups consistently highlight the practice's faults as a means of securing its end.[90] Moreover, the U.S. Supreme Court has recently refused to follow directions from the ICJ to review and reconsider death sentences handed down in contravention of defendants' right to consular representation.[91]

These controversies have also influenced the conduct of some corporations. Pharmaceutical companies that manufacture drugs used in executions in the United States have refused to supply state authorities with these essential chemicals.[92] The culmination of this resistance process came in May 2016 when all twenty-five companies approved by the U.S. Food and Drug Administration to manufacture the drugs adopted a policy prohibiting their use in executions.[93] One of the largest manufacturers, Pfizer, issued a statement explaining that "[g]overnment purchasing entities must certify that products they purchase or otherwise acquire are used only for medically prescribed patient care and not for any penal

[88] Roper v. Simmons, 543 U.S. 551 (2005); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[89] *See, e.g.*, UN Secretary-General, Question of the Death Penalty, para. 4, UN Doc. A/HRC/39/19 (Sept. 14, 2018) (noting that "[s]ome 170 States have abolished or introduced a moratorium on the death penalty either in law or in practice, or have suspended executions for more than 10 years"); UN Comm'n Hum. Rts., The Question of the Death Penalty, para. 5, UN Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005) (the Commission "[c]alls upon all States that still maintain the death penalty: To abolish the death penalty completely and, in the meantime, to establish a moratorium on executions . . ."); GA Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1 (Dec. 15, 1989).

[90] *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 259 et seq. (3d ed. 2002)

[91] Vázquez, *supra* note 23, at 646 .

[92] Rob Crilly, *U.S. Capital Punishment in Crisis as Pfizer Blocks Drugs from Use in Lethal Injections*, TELEGRAPH (May 14, 2016), *at* https://www.telegraph.co.uk/news/2016/05/14/pfizer-blocking-use-of-its-drugs-for-lethal-injections; Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), *at* https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html; *see also* James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215 (2015); Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427 (2015); Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN J. WORLD AFF. 27 (2014).

[93] Eckholm, *supra* note 92

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purposes."[94] Several companies also sued state correctional authorities to enjoin the use of their drugs in executions.[95] Reacting to these events, the UN high commissioner for human rights observed that the embargo represented "companies playing an active role in furthering the trend towards ending use of the death penalty," and were evidence of a broader trend of "[b]usinesses, across many industries, [helping to] prevent human rights violations from occurring."[96]

Pharmaceutical manufacturers have offered differing rationales for their decision not to allow the use of their drugs for lethal injections. Some have explicitly declared their opposition to the death penalty.[97] Others have pointed to a fear of sanctions from national or regional governments that oppose the practice,[98] or a fear of liability if an execution procedure is botched.[99] Still other companies have argued that allowing their products to be used for carrying out death sentences is contrary to the mission of businesses committed to preserving life.[100] These decisions have taken place against a backdrop of significant pressure from various human rights NGOs determined to embarrass and shame companies whose drugs are used in executions.[101]

[94] Pfizer, Inc., *Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment* (Apr. 2016), *available at* https://www.pfizer.com/sites/default/files/b2b/GlobalPolicyPaperLethalInjection.pdf.

[95] *See, e.g.*, Emily Wax-Thibodeaux, *Nebraska's First Lethal Injection May Be Halted After a German Drugmaker Files Lawsuit*, WASH. POST (Aug. 9, 2018), *at* https://www.washingtonpost.com/news/post-nation/wp/2018/08/09/nebraskas-first-ever-lethal-injection-may-be-halted-after-a-german-drugmaker-files-a-lawsuit; Steve Gorman & Andrew Hay, *Nevada Execution Blocked After Drugmaker Protests Use of Its Sedative*, REUTERS (July 11, 2018), *at* https://www.reuters.com/article/us-nevada-execution/nevada-execution-blocked-after-drugmaker-protests-use-of-its-sedative-idUSKBN1K10Z3; Ed Pilkington, *Arkansas Executions: Health Giant Sues State as Federal Judge Issues Injunction*, GUARDIAN (Apr. 15, 2017), *at* https://www.theguardian.com/world/2017/apr/15/arkansas-executions-mckesson-sues-lethal-injection.

[96] UN Human Rights Office of the High Comm'r Press Release, UN Human Rights Chief Welcomes Pfizer Decision to Bar Use of its Drugs for Executions (May 19, 2016), *at* https://news.un.org/en/story/2016/05/529632-un-human-rights-chief-welcomes-pfizers-decision-bar-use-its-drugs-executions.

[97] Lundbeck, *Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse* (July 1, 2011), *at* https://investor.lundbeck.com/news-releases/news-release-details/lundbeck-overhauls-pentobarbital-distribution-program-restrict; Open Letter from David J. Nicholl et al., to Ulf Wiinberg, Chief Exec. Of Lundbeck Pharm., Response from Lundbeck (June 9, 2011), 377 LANCET 2079 (2011), *at* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(11)60843-X/fulltext; Sten Stovall, *Lundbeck "Horrified" at Drug Execution Use*, WALL ST. J. (June 8, 2011), *at* https://www.wsj.com/articles/SB10001424052702304259304576373020954841208.

[98] Josh Sanburn, *The Hidden Hand Squeezing Texas' Supply of Execution Drugs*, TIME (Aug. 7, 2013), *at* http://nation.time.com/2013/08/07/the-hidden-hand-squeezing-texas-supply-of-execution-drugs; Hospira, *Statement from Hospira Regarding Its Halt of Production of Pentothal (Sodium Thiopental)* (Jan. 21, 2011), *available at* https://files.deathpenaltyinfo.org/legacy/documents/HospiraJan2011.pdf (stating that "Italy's intent is that we control the product all the way to the ultimate end user to prevent use in capital punishment" and that "we cannot take the risk that we will be held liable by the Italian authorities if the product is diverted for use in capital punishment").

[99] Ciara Linnane, *Akorn Calls for Halt on Use of its Drugs in Lethal Injections*, MARKETWATCH (Mar. 4, 2015), *at* https://www.marketwatch.com/story/akorn-calls-for-halt-on-use-of-its-drugs-in-lethal-injections-2015-03-04; Assoc. Press, *Family Sues in Protracted Ohio Execution*, N.Y. TIMES (Jan. 25, 2014), *at* https://www.nytimes.com/2014/01/26/us/family-sues-in-protracted-ohio-execution.html.

[100] *Pharmaceutical Products and Lethal Injection*, FRESENIUS KABI, *at* https://www.fresenius-kabi.com/us/pharmaceutical-products-and-lethal-injection (declaring that "[w]hile Fresenius Kabi takes no position on capital punishment, the use of our products for lethal injection is contrary both to our mission and to the FDA-approved indications for, and labelling of, our products"); Abbvie, *Statement of Opposition to Use of Abbvie Products in Lethal Injections for Capital Punishment*, *available at* https://www.abbvie.com/content/dam/abbvie-dotcom/uploads/PDFs/statement-of-opposition-to-capital-punishment.pdf.

[101] Gibson & Lain, *supra* note 92.

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International legal processes lie at the heart of the companies' collective response. First, many of the pharmaceutical firms in question are based in or operate principally from Europe and are thus subject to EU regulations expressly banning the export of products for use in torture, including drugs used for lethal injections.[102]

Second, a less well-known, parallel process of voluntary, quasi-legal international ordering under the auspices of the Organisation for Economic Co-operation and Development (OECD) has also arisen in the last few years.[103] This process has been used by activists to remedy gaps in the system not covered by the EU regulation; particularly with regard to distribution systems that may not involve direct sale for use in capital punishment but which still enable drugs to be used eventually for such a purpose or where the drugs are not manufactured in Europe and are therefore outside the scope of the relevant EU regulation, which applies to exports.[104]

The OECD Guidelines for Multinational Enterprises are a nonbinding set of principles first promulgated by the organization in 1976 and updated in 2011 to include human rights obligations in line with the Ruggie's Guiding Principles discussed earlier.[105] The Guidelines include a grievance process for filing complaints with a National Contact Point (NCP) of any OECD member state challenging business practices that allegedly fall short of the Guidelines.[106]

In 2015, the Dutch pharmaceutical company Mylan found itself under scrutiny from this grievance process. A Dutch attorney, Bart Stapert, lodged a complaint with the Netherlands NCP alleging that Mylan's lax distribution controls had allowed the drug rocuronium bromide to be used in U.S. executions in violation of international human rights law.[107] The NCP facilitated a dialogue between Mylan and Stapert, but largely agreed with Stapert's allegations.[108] In 2016, it recommended that Mylan "work with distributors, human rights organisations and others to prevent rocuronium bromide and other medicines being used in lethal injections."[109] Mylan swiftly revised its distribution controls, and the NCP acknowledged the next year that "[t]he restrictions on the distribution of products that could be used for lethal injections are formalized in Mylan's distribution policy and

[102] *See* European Commission Regulation 1352/2011, 2011 OJ (L 338/31); European Commission, Regulation 1236/2005, 2005 OJ (L 200), *repealed by* Regulation 2019/125, OJ (L 30/1).

[103] OECD, *National Contact Points for the OECD Guidelines for Multinational Enterprises*, *at* http://www.oecd.org/investment/mne/ncps.htm.

[104] Complaint to the Netherlands National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, Bart Stapert v. Mylan, (Mar. 3, 2015), *at* https://complaints.oecdwatch.org/cases/Case_355.

[105] OECD, *OECD Guidelines for Multinational Enterprises* (2011 ed.), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf.

[106] *Id.* at 71. The composition of NCPs is often drawn from a cross-section of government officials, independent experts, and business representatives.

[107] Complaint to the Netherlands National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, *supra* note 104.

[108] Initial Assessment of National Contact Point, Bart Stapert v. Mylan (July 17, 2015), *at* https://www.oecdguidelines.nl/notifications/documents/publication/2015/07/17/inititial-assessment-stapert-mylan.

[109] Final Statement of National Contact Point, Bart Stapert v. Mylan (Apr. 11, 2016), *at* https://www.oecdguidelines.nl/documents/publication/2016/4/11/bart-stapert-attorney-vs-mylan.

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are fully implemented with all customers."[110] Mylan also applied the new restrictive protocols to other drugs when it learned that state authorities in the United States were using them for executions.[111]

Mylan had suffered tangible financial harm the year before the initiation of the OECD complaint. In 2014, a German firm withdrew a seventy million dollar investment in the company after rocuronium bromide that Mylan manufactured was used in an Alabama execution.[112] Seen in this light, the company's quick shift in policy suggests that the NCP consultation process served as a catalyst for reforms that effectively implemented an emerging international law prohibition against the death penalty by denying U.S. prison authorities access to drugs needed to carry out lethal injections.

One of the earliest businesses to decide not to supply a drug used in executions, Lundbeck, explained its move as a manifestation of the company's agreement with an emerging prohibition on the death penalty under international human rights law. If a second or third or, as with Pfizer, even the twenty-fifth business that manufactures a drug used in lethal injections also takes this same decision not to supply it to correctional institutions, but justifies that conduct as aligning with say "best practice" in the industry, we need not entirely dismiss the influence of international law in the decision-making process of these later-moving companies nor discount their actions as unrelated to enforcing the norm that guided the first company's decision. In this scenario, international law supplied the standard around which these companies chose to coalesce, even if they declared their action to be dictated by a form of peer pressure or the company's values rather than by a sense of legal obligation.

Internet Governance and Technology Firms

The Internet Corporation for Assigned Names and Numbers (ICANN) is a California nonprofit corporation whose activities are central to the operation and maintenance of the internet.[113] First established in 1998, ICANN administers the Domain Name System which allows individuals to navigate the internet and find websites without having to type in IP addresses.[114] Most websites end in a so-called generic Top-Level Domain, or gTLD, such as ".com"; ".org"; or ".edu." In 2005, ICANN began to consider expanding the list of approved gTLDs, a process that culminated in 2012 with the first round of applications by individuals and organizations seeking to administer the new gTLDs.[115]

[110] Evaluation of the Final Statement of 11 April 2016 of National Contact Point, Bart Stapert v. Mylan, (Sept. 27, 2017), *at* https://www.oecdguidelines.nl/documents/publication/2017/09/27/evaluation-final-statement-stapert-vs-mylan.

[111] *Id.*

[112] *Drug Maker Mylan Takes $70 Million Hit in Battle Over Lethal Injection*, NBC NEWS (Feb. 27, 2014), *at* https://www.nbcnews.com/storyline/lethal-injection/drug-maker-mylan-takes-70-million-hit-battle-over-lethal-n230051.

[113] Matthias Hartwig, *ICANN—Governance by Technical Necessity*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW 575, 581–82 (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds., 2010).

[114] Kal Raustiala, Editorial Comment, *Governing the Internet*, 110 AJIL 491, 491–93 (2016); Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317, 349 (2015).

[115] *About the Program*, ICANN: NEW GENERIC TOP-LEVEL DOMAINS, *at* https://newgtlds.icann.org/en/about/program; Adamantia Rachovitsa, *International Law and the Global Public Interest: ICANN's Independent Objector as a Mechanism of Responsive Global Governance*, *in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS 342, 342–43 (James Summers & Alex Gough eds., 2018).

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To facilitate public input in this process, ICANN allowed anyone to lodge an objection to an application on a variety of grounds, including what it termed the "limited public interest objection."[116] The company also appointed an independent objector to raise concerns as to the appropriateness of new domain names. Notably, ICANN explicitly adopted "international principles of law" concerning morality and public order as the standard for conducting this evaluation, and it appointed a prominent international lawyer, Alain Pellet, as its first independent objector.[117]

ICANN is hardly alone among private sector entities in choosing international law as a standard to regulate their conduct.[118] For example, Google recently withdrew from a project to assist the U.S. Department of Defense to create artificial intelligence for drone targeting and shortly thereafter promulgated a set of principles that promised "we will not design or deploy AI in . . . [t]echnologies that gather or use information for surveillance violating international accepted norms" or, "[t]echnologies whose purpose contravenes widely accepted principles of international law and human rights."[119]

Other technology companies are adopting similar policies: Facebook Vice President of Policy Richard Allan recently noted that, in deciding on matters of privacy and freedom of expression, the company is "not bound by international human rights laws that countries have signed on to," but that it does "look for guidance in documents like Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which set standards for when it is appropriate to place restrictions on freedom of expression."[120] And, a number of prominent internet companies, including Google, Facebook, Nokia, Microsoft, Telefonica, and Vodafone, have signed on to the Global Network Initiative.[121] As part of this initiative, these companies have committed to uphold freedom of expression and privacy according to "internationally recognized laws and standards" and "internationally recognized human rights," including those codified in "the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights."[122]

Yet, these companies have not merely extended international law as a guidepost for their own conduct, but also limited the ability of states to utilize their technologies to contravene international law.[123] For example, Microsoft has previously declined to make sales to

[116] Rachovitsa, *supra* note 115.

[117] Explanatory Memorandum, *Morality and Public Order Objection Considerations in New gTLDs*, ICANN: NEW GTLD PROGRAM (Oct. 29, 2008), *available at* https://archive.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf (affirming that "[s]trings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law," including UN human rights conventions and intellectual property treaties).

[118] *See* Deeks, *supra* note 26.

[119] Google AI, *Artificial Intelligence at Google: Our Principles*, at https://ai.google/principles; Sundar Pichai, CEO, *AI at Google: Our Principles*, GOOGLE: THE KEYWORD (June 7, 2018), *at* https://blog.google/technology/ai/ai-principles.

[120] Richard Allan, *Hard Questions: Where Do We Draw the Line on Free Expression?*, FACEBOOK: NEWSROOM (Aug. 9, 2018), *at* https://newsroom.fb.com/news/2018/08/hard-questions-free-expression.

[121] Glob. Network Initiative, *Our Members*, *at* https://globalnetworkinitiative.org/#home-menu.

[122] Glob. Network Initiative, *The GNI Principles*, *at* https://globalnetworkinitiative.org/gni-principles.

[123] Dina Bass, *Almost Everyone Involved in Facial Recognition Sees Problems*, BLOOMBERG (Dec. 12, 2018), *at* https://www.bloomberg.com/news/articles/2018-12-12/almost-everyone-involved-in-facial-recognition-sees-problems.

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government actors when it was concerned that such technologies might be used to violate human rights.[124] The company also previously charged the FBI hundreds of thousands of dollars for access to user data in criminal investigations, but began to object to such requests in 2013 when the U.S. government requested data stored by Microsoft oversees.[125] The company claimed that an international legal procedure, a request made through a Mutual Legal Assistance Treaty, should instead have been followed and so rejected the government's order.[126] Justifying its decision, the company made clear that, "U.S. privacy interests are satisfied. *But international law says* that we are not allowed to engage in police searches and seizures in foreign lands without the consent and knowledge of the foreign government."[127]

As government become increasingly dependent on technology supplied by private firms for the tasks of governance, these developments are not without consequence for constructing a further pressure point to push state actors toward acting in line with international law.

International Environmental Law

The environment is a prime example of the potential and necessity of international legal coordination to tackle a shared problem. However, it may not always be in a state's short-term political interest to act in a manner that is compatible with international environmental law; complying with the requirements set out therein may add to the expense of the project or delay the work in a manner that political officials find unacceptable, and the harms may not be manifested for many years. States may therefore defect from an international legal obligation when the short-term payoff is tangible economic improvement. As such, the environment is a crucial example of where corporate action in support of international law may be constructive.

One legal rule in this context is that a state must undertake an environmental impact assessment when there is a risk of transboundary harm from a proposed development project. The International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities affirms this rule and the ICJ pronounced in *Pulp Mills* that conducting an environmental impact assessment now constitutes "a requirement under general international law" that "in recent years has gained so much acceptance among States . . . ."[128]

Financial institutions have themselves undertaken to enforce this requirement through codifying their lending practices in the so-called Equator Principles.[129] This voluntary set of norms, to which over ninety companies have subscribed, requires that a country seeking financing for a development project "conduct an Assessment process to address, to the

[124] Deeks, *supra* note 26.

[125] Kevin Collier & Frank Berkman, *Hacked Emails Show What Microsoft Charges the FBI for User Data*, DAILY DOT (Mar. 20, 2014), *at* https://www.dailydot.com/news/microsoft-compliance-emails-fbi-ditu.

[126] In the Matter of a Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corporation, Brief for Appellant, 2d Cir., at 33, 51, Dec. 8, 2014, No. 14-2985-cv.

[127] In the Matter of a Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corporation, Oral Argument, at 15, Transcript, SDNY, July 31, 2014, Case 1:13-mj-02814-UA, Doc. 93 (emphasis added)

[128] Int'l Law Comm'n, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Art. 7 (2001), *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf; Case Concerning Pulp Mills on the River Uruguay, (Arg. v. Uru.), 2010 ICJ Rep. 14, para. 204 (Apr. 20).

[129] Equator Principles Ass'n, *The Equator Principles*, prin. 2 (June 2013), *available at* https://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf.

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[financial institution's] satisfaction, the relevant environmental and social risks and impacts of the proposed project . . . ."[130]

Moreover, in the example of the Paris Agreement, which was outlined in the introduction, corporations have also positioned themselves to accomplish the ends of the agreement despite a change of course from the current U.S. administration. Indeed, many of the companies that have since publicly announced emissions reductions targets in line with the U.S. national target adopted under the Obama administration have justified their actions according to a sense of fidelity to the Paris Agreement and a desire to see it enforced.[131]

The treaty is structured in an open way, such that states may decide for themselves what constitutes an obtainable target for reducing emissions.[132] However, the treaty anticipates that once a state announces its target, the target will only be revised upward toward stricter emissions controls.[133]

Thus, the campaign to coordinate emissions reductions so as to hit the U.S. national target is not merely an aspirational endeavor to accomplish an abstract objective like benefiting the environment. Instead, it is a conscious and deliberate effort to see that the United States satisfies its binding international legal commitment.[134] The campaign and the business pledges made under its auspices therefore constitute measures to enforce this aspect of the Paris Agreement.

Arms Trade

When the UN Security Council adopts an arms embargo against a state or private actor that is committing grave human rights abuses, the Council enforces international law by prohibiting the sale of weapons to the sanctioned entity.[135] Commentators may disagree as to the appropriateness of that course of action or its effectiveness. Indeed, in one case, an international jurist went so far as to argue that an embargo might itself constitute a breach of a peremptory norm because it deprived the weaker party to a conflict of access to weapons to resist the stronger aggressor.[136] Notwithstanding these concerns, the Council's adoption of the embargo, and states' domestic legislation ordering their corporate nationals not to sell

[130] *Id.*; *see also* John P. Williams, *"International Best Practice" in Mining: Who Decides and How—and How Does it Impact Law Development?*, 39 GEO. J. INT'L L. 693, 697–98 (2008).

[131] *See, e.g.*, HP, *HP Policy Position: Climate Action* (2017), *available at* http://h20195.www2.hp.com/V2/getpdf.aspx/c05320887.pdf ("HP signed the 'We are Still In' open letter to the international communities and parties to the Paris Agreement committing to remain actively engaged as part of the global effort to hold warming to below 2 degrees Celsius . . . .").

[132] Paris Agreement, *supra* note 16, at Art. 4(2), (9).

[133] *Id.* Art. 4(3), (11). *Cf.* John Schwartz, *Debate Over Paris Climate Deal Could Turn on a Single Phrase*, N.Y. Times (May 2, 2017), *at* https://www.nytimes.com/2017/05/02/climate/trump-paris-climate-accord.html.

[134] We Are Still In, *"We Are Still In" Declaration*, (June 5, 2017), *at* https://www.wearestillin.com/we-are-still-declaration (declaring that "[w]e, the undersigned . . . are joining forces for the first time to declare that we will continue to support climate action to meet the Paris Agreement" and contending that "the actors that will provide the leadership necessary to meet our Paris commitment are found in city halls, state capitals, colleges and universities, investors and businesses").

[135] Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L. Q. 55, 62, 77–79 (1994).

[136] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Order, Provisional Measures, 1993 ICJ Rep. 325, 441, para. 102 (Sept. 13) (sep. op., Lauterpacht, J.).

weapons to the entities identified by the Council, are both actions to enforce international law.[137] The motivations for carrying out the embargo may vary. States may implement the Council's instruction because of a sense of obedience, because they independently agree that human rights abusers ought not to receive weapons that allow them to commit further violations, or because it is in their national interest not to disobey the Council.[138]

If a group of weapons manufacturers or arms traders themselves observed the unlawful actions of militants and decided collectively not to sell arms to such groups without waiting for the direction of their own national governments or a decision of the Security Council, the result would arguably be the same. Applying the analysis in Part II, these companies might make their own evaluation of the lawfulness of the practices (internal motivation) or decide not to sell arms in reaction to an explicit statement from, say, the UN high commissioner for human rights accusing the companies of complicity in the abuses and calling on them to halt sales (external motivation). Such a statement would not have any binding legal force with respect to the companies' actions, but it might be sufficient to induce a change of corporate policy for various reasons, such as a desire to act in a lawful fashion or concern that it may lose other contracts because of the resulting negative publicity.

In either case, so long as the purported breach of international law figures into the company's decision to halt its sales to the lawbreaker in some way, we may say that the company discharges an action within the extend-enforce-export paradigm. We might categorize the company's action as extending if the company does not directly sell to the alleged lawbreaker. We may understand the company's behavior as enforcing if the company works to ensure (either through stricter management of onward distribution chains or through coordinated industry-wide action) that other businesses do not sell weapons to the lawbreaker so as to support the norm that lawbreakers ought not to be able to buy weapons to advance their unlawful ends. And, exporting might take place if the company takes further action to punish the breach by, say, also refusing to do business with states that support the lawbreaker. These categories are imperfect and may not fully capture the range and scope of corporate behavior in this sphere. Yet, charting these mechanisms and the communication processes through which the motivations of corporate behavior are constructed is crucial to ordering the conversation in this area.

The UN Arms Trade Treaty expressly contemplates an enforcement role for business.[139] The treaty requires states to bear the primary obligation for ensuring that weapons not be exported if there is a significant risk that such arms "could be used to commit or facilitate a serious violation of international humanitarian law" or be used to "commit or facilitate a serious violation of international human rights law . . . ."[140] However, the treaty's preamble also affirms the critical importance of the private sector, by "recognizing the voluntary and

[137] W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86 (1998)

[138] ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS (2011).

[139] GA Res. 69/49, The Arms Trade Treaty (Dec. 24, 2014).

[140] *Id.* Arts. 7, 14.

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active role that . . .industry can play in raising awareness of the object and purpose of this treaty, and in supporting its implementation . . . ."[141]

In the above hypothetical of a privately initiated arms embargo, companies would undertake action collectively to support international law, but the decision-making process would be quite different than when states act pursuant to a treaty obligation. We may inquire as to whether it is appropriate to encourage such an alternative decision-making process, but it suffices here to observe that this scenario evinces that choices by business entities may constitute an act whose outcome parallels that of other actions we regularly label as measures of enforcement.

The global banking giant, HSBC, recently announced that it would not fund any further investment in the weapons manufacturer Elbit because of the bank's growing concern that Elbit had manufactured and sold illegal cluster munitions to actors implicated in significant human rights violations.[142] The bank is not an arms trader itself, but it nevertheless noted that it "strongly supports observance of international human rights principles as they apply to business" and expressed its opposition to Elbit's sale of cluster bombs (weapons often criticized for causing indiscriminate civilian deaths contrary to international humanitarian law).[143] As such, the bank acted to enforce an international law prohibition on the sale of weapons used to commit human rights and humanitarian abuses by cutting off funding for such transactions.

International Investment

Companies may also project support for international law through their investment decisions. A recent prominent example concerns the murder of Jamal Khashoggi. When Saudi Arabian agents murdered the journalist and activist in the Saudi embassy in Istanbul on October 2, 2018, the international outcry that followed was widespread and swift.[144] The killing arguably violated several rules of customary international law—the prohibition on extraterritorial enforcement, the requirement that diplomatic premises be used for lawful purposes, and the ban on arbitrary killing and torture.[145] Government officials have responded to

[141] *Id.*, pmbl. A treaty's preamble is not merely a collection of aspirational statements, but is instead expressly understood to possess significance for the agreement's interpretation. Vienna Convention on the Law of Treaties, Art. 31(2), Jan. 27, 1980, 1155 UNTS 243 (noting the "general rule of interpretation" that "the context for the purpose of interpretation of a treaty shall comprise . . . the text, including its preamble . . .").

[142] Tovah Lazaroff, *HSBC Tells "Post": "We Divested from Elbit Over Cluster Bombs, Not BDS,"* Jerusalem Post (Jan. 2, 2019), *at* https://www.jpost.com/BDS-THREAT/HSBC-tells-Post-We-divested-from-Elbit-over-clusters-bombs-not-BDS-576175.

[143] Avraham Gold & Tovah Lazaroff, *Citing Human Rights, HSBC Bank Divests from Israeli Arms Developer Elbit*, Jerusalem Post (Dec. 27, 2018), *at* https://www.jpost.com/Arab-Israeli-Conflict/HSBC-bank-decides-to-divest-from-Israeli-defense-contractor-Elbit-575632; Lazaroff, supra note 142.

[144] Natasha Turak, *The Khashoggi Fallout: A Timeline of Events*, CNBC (Nov. 22, 2018), *at* https://www.cnbc.com/2018/11/22/the-khashoggi-fallout-a-timeline-of-events.html.

[145] Saphora Smith, Aziz Akyavas & F. Brinley Bruton, *Khashoggi Was Strangled or Suffocated and Body Dismembered, Turkish Prosecutor Says*, NBC News (Nov. 4, 2018), *at* https://www.nbcnews.com/news/world/khashoggi-was-strangled-or-suffocated-body-dismembered-turkish-prosecutor-says-n931026 (reporting of statement by U.S. Secretary of State Mike Pompeo that the Khashoggi killing "violates the norms of international law"); Steven Ratner, *The Khashoggi Murder: How Mohammed bin Salman Underestimated International Law*, Lawfare (Oct. 22, 2018), *at* https://www.lawfareblog.com/khashoggi-murder-how-mohammed-bin-salman-underestimated-international-law.

the incident by threatening a variety of sanctions, but corporations have also registered their disapproval of the violations.[146]

The first target of corporate action was a massive boycott of the Saudi Future Investment Initiative organized by Crown Prince Mohammad bin Salman. Billed as a "Davos in the Desert," the conference was to showcase Saudi Arabia's Vision 2030 project to diversify its economy beyond the oil industry and to elicit new investment to support that venture.[147] Instead, more than a hundred firms that had agreed to participate, pulled out in protest.[148]

Notably, even as President Trump defended the crown prince and claimed that sanctions against Saudi Arabia would risk U.S. defense contracts and American jobs, a significant number of U.S. companies refused to participate in the conference and others moved to limit or sever commercial ties with the country.[149] According to the chair of the UN Working Group on Business and Human Rights, Dante Pesce, the business pullout in response to Khashoggi's murder "underlines how companies can use their leverage to address human rights."[150]

The situation was particularly fraught for Uber. The ride-sharing app's CEO, Dara Khosrowshahi, was appointed in 2017 in the wake of multiple scandals over the company's business practices. Khosrowshahi almost immediately declared Uber's new policy—"We do the right thing. Period."—and later reflected that "doing the right thing became an incredibly important norm for the company."[151] Faced with the sort of stark and heinous violations of international law raised by the Khashoggi incident, the company's decision to boycott the Saudi investment summit may be understood as the realization of this mission statement.[152] Uber did not explicitly declare that it was acting because it felt obligated by international law,

[146] *See, e.g.*, Council of the EU Press Release, Declaration by the High Representative on Behalf of the European Union on the Recent Developments on the Case of Saudi Journalist Jamal Khashoggi, Press Release 588/18 (Oct. 20, 2018), *available at* https://www.consilium.europa.eu/en/press/press-releases/2018/10/20/declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-recent-developments-on-the-case-of-saudi-journalist-jamal-khashoggi/pdf (describing the incident as a "shocking violation of the 1963 Vienna Convention on Consular Relations and particularly its Article 55")

[147] Saphora Smith & Reuters, *"Davos in the Desert": Business Leaders Pull out of Saudi Conference After Khashoggi Disappearance*, NBC NEWS (Oct. 15, 2018), *at* https://www.nbcnews.com/news/world/davos-desert-business-leaders-pull-out-saudi-conference-after-khashoggi-n920066.

[148] Patrick Wintour, *Saudi Summit in Crisis as Khashoggi Case Prompts Mass Withdrawals*, GUARDIAN (Oct. 13, 2018), *at* https://www.theguardian.com/world/2018/oct/12/saudi-arabia-fii-conference-withdrawal-jamal-khashoggi.

[149] Mark Landler, *In Extraordinary Statement, Trump Stands with Saudis Despite Khashoggi Killing*, N.Y. TIMES (Nov. 20 2018), *at* https://www.nytimes.com/2018/11/20/world/middleeast/trump-saudi-khashoggi.html; David Choi, *Trump Says "We Have a Tremendous Order" with Saudi Arabia, Doesn't Want to Cancel Defense Contracts "As Retribution" for Jamal Khashoggi's Death*, BUS. INSIDER (Oct. 19, 2018), *at* https://www.businessinsider.com/trump-reaction-jamal-khashoggi-death-saudi-arabia-defense-contract-2018-10. *But see* Richard Branson, *My Statement on the Kingdom of Saudi Arabia*, VIRGIN (Oct. 11, 2018), *at* https://www.virgin.com/richard-branson/my-statement-kingdom-saudi-arabia ("What has reportedly happened in Turkey around the disappearance of journalist Jamal Khashoggi, if proved true, would clearly change the ability of any of us in the West to do business with the Saudi Government.").

[150] *UN Rights Experts Stand with Businesses Protesting Saudi Journalist's Disappearance*, UN NEWS (Oct. 19, 2018), *at* https://news.un.org/en/story/2018/10/1023652.

[151] Dana Rubinstein, *Uber CEO: "Doing the Right Thing" is Uber's New "Norm,"* POLITICO (Sept. 5, 2018), *at* https://www.politico.com/states/new-york/albany/story/2018/09/05/uber-ceo-doing-the-right-thing-is-ubers-new-norm-594079; Tony West, *Turning the Lights On*, UBER: NEWSROOM (May 15, 2018), *at* https://www.uber.com/newsroom/turning-the-lights-on.

[152] *Khashoggi Case Drives Growing Exodus from Saudi Business Ventures*, FIN. TIMES (Oct. 12, 2018), *at* https://www.ft.com/content/507f2c24-cd0a-11e8-b276-b9069bde0956.

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but it seems clear from the context that international law provided the standard for determining "the right thing."[153]

The ideal types of corporate support for international law—extending, enforcing, exporting—may be applied to the examples above as follows. One may see the instances discussed under the rubric of internet governance as extending because the companies at issue have merely adopted international norms as the standard to guide their own conduct with respect to regulating internet activities, infrastructure, and the rights of online users. Corporate efforts to accomplish the United States' Nationally Determined Contribution under the Paris Agreement may be categorized as enforcing because these companies have adapted their behavior with the explicit objective of achieving a target said to apply to the relevant state actor. Finally, we may see Airbnb's original delisting decision as an act extending international law because it attempted to decrease the profitability of another actor's purportedly illegal conduct.[154]

Some of the examples above may, however, be said to fall within more than one type. For example, banks' commitment through the Equator Principles not to make loans for large infrastructure projects unless the state recipient of the loan has complied with international environmental law's requirement that an impact assessment be conducted before construction may be characterized as extending insofar as the banks may be said to recognize an obligation not to be complicit in or aid and abet breaches of the law. But it may be understood as exporting to the extent that it punishes a state that fails to comply with international environmental law by denying it a loan. Similarly, the death penalty example may be categorized as both extending (since the companies are said to have an obligation not to be complicit in human rights violations) and enforcing (because they prevented, for a short time, the United States from undertaking executions since the localities in question could not procure the chemicals necessary for their execution protocols due to the companies' actions).

As with most ideal types, the application of these categories to real world examples will not always be exact. However, the typology provides a useful framework for understanding the different ways in which companies act to support international law.

V. The Normativity of Corporate Keepers

Having reviewed and categorized the diverse examples of how private businesses are acting as the corporate keepers of international law, this Part turns to normative implications. It assesses the arguments for and against corporate keeping, and then considers how international institutions might induce companies to give effect to international law in ways that enhance the benefits of the phenomenon while minimizing its downsides.

[153] Uber's decision to pull out of the conference was not without controversy. Indeed, one of its major investors expressed its displeasure with Khosrowshahi's decision not to attend. CEO of Mangrove Capital Partners, Mark Tulszcz tweeted, "When a CEO confuses his role . . . No upside for @Uber" and later commented that "personally [a CEO] can do what they want, but should NOT use their position to express personal opinions." Natasha Lomas, *Saudi Ally Calls for Uber Boycott Over Response to Khashoggi's Vanishing*, Tech Crunch (Oct. 15, 2018), *at* https://techcrunch.com/2018/10/15/saudi-ally-calls-for-uber-boycott-over-response-to-khashoggis-vanishing. Yet, having already announced the company's commitment to doing the right thing, Saudi Arabia's breach of international law through the Khashoggi incident seemed to demand a response if the new mission statement was to be thought credible.

[154] *Listings in Disputed Regions*, *supra* note 4

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Advantages

As previously explained, the international legal system's existing enforcement mechanisms have several well-known limitations and gaps. Corporations that choose to align their actions and policies with international law may help to overcome those limitations and close those gaps. These advantages are likely to vary, however, with the content of an international rule and the actors to whom it is directed.

A fairly straightforward illustration of corporate keeping's benefits involves a treaty that seeks to modify the behavior of companies by requiring each state party to adopt legislation to regulate private firms incorporated in its territory. It would be entirely lawful for a corporation headquartered in such a state that had not (or had not yet) enacted the necessary implementing measures to continue the behavior targeted by the treaty—even if its directors and officers were aware that the international instrument seeks to regulate or outlaw that behavior. In this situation, a company's decision to voluntarily comply with international law would prevent government opposition or inertia from frustrating the treaty's objectives. Corporate keeping would, in other words, allow the firm to circumvent a blockage in the treaty implementation process. If similar blockages existed in other state parties, the decision by one or a few firms to choose international law could create a bandwagon effect among other companies, significantly improving the treaty's effectiveness.

The foregoing example should be viewed against the background of economic sanctions as a vital tool of international enforcement. Sanctions allow states and international institutions to punish breaches of international law without resorting to military force. They can also be quite effective in targeting decisionmakers in positions of power or authority.[155] Economic sanctions sometimes require companies to respond to internationally unlawful conduct by refraining from doing business in or with another country or with particular individuals. A well-known example is of a bank freezing the accounts of a suspected terrorist in response to a directive from a Security Council sanctions committee.[156]

However, the application of economic sanctions to corporations usually depends on the actions of a government intermediary. In particular, the company's state of nationality must first adopt the sanctions before the measure binds the company. The notion that corporations might undertake a more active role in enforcing international law may be viewed as an extension of this process, but without the intervention of a state authority. In effect, private businesses become direct agents of the international legal system in carrying out economic sanctions.

Enforcement by private firms may also have the salutary effect of making economic sanctions more focused and targeted. Some state-imposed sanctions seek to coerce compliance by targeting whole populations, often with serious consequences.[157] The adverse effects of such measures make enforcement something of an extraordinary action. For corporations, in contrast, giving effect to international law may simply require the company to cease doing

[155] Sanctions are not, however, uncontroversial. For further discussion, see, for example, August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic* Sanctions, 95 AJIL 851 (2001); Reisman & Stevick, *supra* note 137; SHAW, *supra* note 14, at 1242–51.

[156] *See* Joined Cases C-402/05 P & C-415/05 P (Kadi v. Council of EU), 2008 ECRI-6351 (Oct. 28).

[157] Reisman & Stevick, *supra* note 137

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business with particular public or private actors that have been identified as international law violators.

The normativity of corporations circumventing state intermediaries depends on one's perspective. International officials may favor this sidestepping as a way to overcome a key obstacle to enforcing international law. States supporting a majority position, too, may favor deputizing private firms in this manner. In contrast, states that disagree with imposing economic sanctions will likely object quite strenuously.

The arguments in favor of corporate enforcement may also depend on the nature of the international rule at issue and the generality of its acceptance. Seen from one perspective, the international system provides a mechanism for tackling common problems, allowing states to coordinate their behavior and to set a minimum baseline of conduct for all of humanity. If progress toward achieving such common goals is the measure of the international system's success, then corporate enforcement furthering that objective ought to be encouraged. This is especially so for legal norms that have been codified in widely ratified multilateral treaties or have long been settled as a matter of customary international law.

It is also worth recalling that the international system already utilizes a vast array of NGOs to help convince states and their publics to comply with international law.[158] From Amnesty International to the Red Cross to Médecins sans Frontières, various NGOs already partner with international organizations to raise awareness as to the suffering endured in ongoing conflicts but also to seek to ensure that states comply with international humanitarian and human rights law.[159] The notion of corporations utilizing the business choices they make and the structuring of their operations so as to implement international law would constitute a further means of expanding the universe of enforcers. The impact may well be to increase both the visibility of the rule as well as the incentives for adherence among states.

Viewed from this vantage point, the idea of corporate keepers is simply a further expansion of the universe of nonstate enforcers, reflecting the fact that the international legal system has already moved well beyond the exclusive reliance on states as enforcement agents.

Objections

One overarching objection to corporations enforcing international law is that such actions are contrary to the fundamental order of the international legal system itself. Corporations are neither the authors of international norms nor the primary audience for their application. Instead, international legal obligations are mandated by and for states and only reach corporations to the extent that states themselves have implemented such obligations in their domestic legal systems and made them applicable to private companies. On this account, process matters and the authority of decisionmakers is important even if the results achieved are similar or identical.

We might also be concerned that in changing the enforcer or broadening the range of actors understood to act as enforcers, the norms that do get enforced will shift. International law often involves a balancing of rights and obligations rather than an explicit hierarchy and so enabling corporations to make such choices may well lead to the prioritization of certain

[158] Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996).
[159] *Id.*

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norms (say the right to property) over others. This is a significant concern, but it is also one shared with the current state system, where powerful states can often dictate the balance in terms of when and how international law is enforced in a manner that is best suited to their own interest.

Allowing corporations to strike that balance without states and international organizations acting as intermediaries may lead to the prioritization of certain legal norms (such as property rights) over others (the interests of indigenous communities, for example). For this reason, corporate keeping might be limited to the enforcement of international legal obligations that do not require such balancing or with respect to which an international institution has already identified the appropriate balance to be struck.

Yet even in situations where there appears to be an objectively correct interpretation of international law, one may question whether corporations are well positioned to act as enforcers. A recent example illustrates this point. When Russia absorbed Crimea (then a province of the Ukraine), most Western states, the UN General Assembly, and many commentators decried the move as an unlawful military action contrary to the UN Charter's ban on the use of force and the principle of territorial integrity.[160] Russia countered that its decision, which followed a plebiscite that overwhelmingly supported union with Russia, was consistent with the longstanding international law principle of self-determination of peoples.[161]

To many observers, Russia's position was a conceit intended to cloak naked aggression with a veneer of legality. Nevertheless, a private firm deciding whether to do business in Crimea arguably faced a choice between competing international law principles. In fact, the reaction of businesses varied. Some, like Airbnb, swiftly responded, removing listings in the Russian-controlled territory from its website. Others, such as Expedia, continued operations in the region until U.S. President Barack Obama directed them to stop doing business there.[162]

A third objection relates to the legacy of colonialism. If allowing corporate keeping results mainly in companies of the Global North being deputized to enforce international law against states of the global South, neocolonialism concerns will be especially pronounced. The insights of Third World Approaches to International Law (TWAIL) scholars underscore these concerns, highlighting the myriad ways that the international system continues to promote colonialist domination.[163] As B. S. Chimni has warned, "there is growing international lawmaking by the non-state actor that often assumes the form of soft law but yet constrains policy space available to developing countries."[164] Unless properly constrained, corporate enforcement risks compounding these apprehensions.

Lack of accountability comprises a fourth area of concern with corporate keeping. International organizations have long been criticized as suffering from a democracy deficit

[160] *See* Anne Peters, *Crimea: Does "The West" Now Pay the Price for Kosovo?*, EJIL:*Talk!* (Apr. 22, 2014), *at* http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo.

[161] President of Russia Press Release, Telephone Conversation with U.S. President Barack Obama (Mar. 17, 2014), *at* http://eng.kremlin.ru/news/6881 ("Regarding the March 16 referendum in Crimea, Mr. Putin said that the decision to hold the referendum was in line with international law and the UN Charter, and was also in line with the precedent set by Kosovo.").

[162] Sari Bashi, *If the U.S. Government Won't Act, Airbnb Will*, For. Pol'y (Nov. 27, 2018), *at* https://foreignpolicy.com/2018/11/27/if-the-u-s-government-wont-act-airbnb-will-west-bank-settlements-rentals-occupation-israel-palestinians-netanyahu.

[163] *See generally* B. S. Chimni, International Law and World Order (2017)

[164] *Id.* at 509

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that makes them insufficiently responsive to the concerns of the individuals and firms whose activities they purport to govern.[165] This critique applies with even greater force to multinational corporations. The key studies, reports, and resolutions of international institutions are available online and most meetings are open to the public. In contrast, the decision-making processes and decisions of private companies are often confidential by design and lack even rudimentary mechanisms for transparency or public scrutiny.[166] This raises serious concerns, especially when corporations can choose among competing interpretations of international law or have discretion as to the modalities of implementing a settled international legal norms.

Mobilizing and Managing Corporate Enforcement

Speaking in 2018 before the American Society of International Law Annual Meeting, a former ICJ judge, Sir Christopher Greenwood, pointed to a "disturbing fragility" in international law.[167] He noted that the international legal system is generally reflective of the weak and fractious state of international society, but rather than urging that international institutions take a more active role in global affairs, he instead endorsed the ICJ's use of procedural devices to absent itself from intervening in many important contemporary issues, such as nuclear disarmament and the annexation of territory.[168] Sir Christopher cautioned international lawyers to adopt a "sense of proportion" and seek only to improve the working methods and rules of the international legal system from the sidelines.[169] Such self-improvement and sustained rehabilitation would allow international law "to have a fresh start . . . that helps to revive and develop our legal system," which might eventually "inspire enough trust in states that they may wish to make use of us . . . ."[170] Until then, argued Sir Christopher, scholars and activists ought not to expect more from the international legal system than the system can deliver.[171]

This Part seeks to overcome such reticence by asking a key question—how can the international legal system further mobilize corporations to act on its behalf while, at the same time, addressing the concerns raised about the practice? A comprehensive answer to this challenging question is beyond the scope of this Article. However, several lines of inquiry appear promising.

An initial consideration relates to the scope of corporate keeping. At this early stage in the phenomenon's evolution, companies should be encouraged to enforce international rules that are clear, categorical, and widely supported by a broad cross-section of states. Legal norms that

[165] *See* Charles R. Majinge, *The Concept of Global Governance in Public International Law: Addressing Democratic Deficit and Enhancing Accountability in the Decision-making Process of the African Union*, 3 J. AFR. & INT'L L. 1 (2010); ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM (2004); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996).

[166] Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQ. L. 125, 140, 153 (2014).

[167] Sir Christopher Greenwood, 2018 ASIL Assembly Keynote (Apr. 6, 2018), *available at* https://www.youtube.com/watch?v=_NzoGnbNCVs.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

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are contested, ambiguous, or require the exercise of discretion should generally be avoided, at least until states and international organizations have clarified the content of the norms. The Airbnb example is telling in this regard. The company's initial decision to remove listings in the Occupied Palestinian Territory was replaced by a more comprehensive and less contentious policy that applies to all annexed or internationally contested regions.[172]

A second issue concerns transparency. We might encourage corporations to expressly indicate—perhaps in filings with securities exchanges or other official documents—that they are adopting policies to enforce international law. Such indications could identify the source of the obligation (a treaty, a resolution of the UN Security Council, or international custom, for example) and the position of the home state vis-à-vis the obligation, much in the way that firms giving effect to the Paris Agreement on climate change have done.[173]

A third consideration might be labeled as bandwagoning. What are other businesses and civil society groups doing to enforce a particular international law obligation? Recall that in the Airbnb example, the UN Human Rights Council and a network of NGOs came together to publish a list of companies doing business in the Occupied Palestinian Territory and to pressure such companies to halt operations there. Widespread adoption of other international enforcement policies—in particular those supported by governments and nonstate actors in developing countries—would bolster the legitimacy of a particular instance of corporate keeping. At the same time, the relative isolation of a state ought not to be the sole grounds for a business determination to enforce an international proscription.

A fourth factor concerns effectiveness. Some companies may care about international law and know their customers do as well. However, this is not the same as making a meaningful contribution to enforcement. The generalities with which declarations of fidelity to international law can be made may have the opposite effect—perpetuating cheap talk that does little to help overcome the international system's many enforcement challenges. One way to address these concerns is with corporate impact statements, which explain the expected efficacy of international enforcement efforts much in the way that environmental impact statements attempt to predict future harm to the environment.[174]

VI. Conclusion

This Article has explored one of the most vexing problems within the current schema of international law—the system's challenges with enforcing its commands. It has analyzed how we might refashion the system into one that responds more effectively to challenges through expanding the range of actors deputized to enforce the system's rules to include corporations.

Corporations already extend, enforce, and export international law in significant ways that deserve further exploration. This assertion is not to deny the wrongs that corporations have done and continue to do, but merely to shine light on the constructive actions that they have undertaken to buttress the effectiveness of international obligations.

As such, this Article is more the opening of a conversation than the final word. Many questions about corporate motivation and the true extent and import of the identified

[172] *Update on Listings in Disputed Regions*, *supra* note 13

[173] Note 19 *supra*.

[174] *See* Neil Craik, The International Law of Environmental Impact Assessment: Process, Substance and Integration 59–62 (2008)

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phenomenon remain unresolved. Though potential benefits and drawbacks of corporate support have been sketched, extended discussion is necessary as to the outcome of this weighing exercise. Do the benefits of business involvement in the enforcement schema of international law outweigh the costs? And, perhaps most importantly, how should we decide?

This Article's invitation to consider corporate support for international law is therefore not without controversy, but it does provide a potential avenue for improving state compliance.

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