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## Human Rights and Delaware Corporate Law

David Millon

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## Human Rights and Delaware Corporate Law

*David Millon\**

*Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.*

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### I. INTRODUCTION

Under the United States ("U.S.") federal system, most business corporations are formed pursuant to a state's corporation statute. Because a business need not be headquartered or even do business in the state in which it is incorporated, corporations are free to choose the legal regime that their managers prefer. For most of the largest corporations, the jurisdiction of choice is Delaware.<sup>1</sup> This state's corporation statute and common law therefore govern questions of internal affairs—including governance structures and procedures—and corporate purpose.

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1. Nearly two-thirds of Fortune 500 corporations are incorporated in Delaware. *About Agency*, DEL. DEP'T STATE, DIVISION CORP. (Jan. 19, 2011, 8:17 AM), <http://www.corp.delaware.gov/aboutagency.shtml>.

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U.S. securities law, though complex and intricate, is primarily concerned with disclosure requirements and other mechanisms designed to facilitate shareholders' exercise of substantive rights defined by state law regimes such as voting and trading rights.<sup>2</sup> Federal law does not play an important role in the definition of corporate purpose.

The question of corporate purpose is of potentially great importance to the implementation of human rights norms. A "shareholder primacy" conception of corporate purpose prioritizes the interests of shareholders over those of other constituencies that are affected by corporate activity.<sup>3</sup> As understood today, this ordinarily is taken to mean that corporations should maximize profits in order to maximize share prices.<sup>4</sup> That objective encourages corporations to minimize their costs of doing business, which can result in the sacrifice of non-shareholder considerations where trade-off questions are presented.<sup>5</sup> For example, it may be in the interests of the shareholders that a corporation close a plant that is losing money, even though workers will lose their jobs and the impact on a local community will be devastating.<sup>6</sup> A corporation may use a manufacturing process that harms the environment because cleaner technology would be more expensive with no corresponding increase in profits. With respect to human rights concerns, a corporation doing business in a developing country may disregard the harmful effects of its operations on local populations because it saves money by doing so. Or, a corporation may enlist the aid of a local government to pacify local communities that interfere with its business objectives.

In contrast, a corporate social responsibility ("CSR") conception of corporate purpose acknowledges the relevance of the full range of stakeholder interests that are affected by corporate activity.<sup>7</sup> According to this view, even though a business corporation must generate profits to survive, corporate management should take into account not only the interests of shareholders in a reasonable return on their investments, but also those of employees, creditors, local communities, and consumers.<sup>8</sup> Environmental values are also relevant.<sup>9</sup> Certainly CSR embraces the notion that human rights norms should be part of corporate management's calculus as it evaluates the costs and benefits of corporate activity.

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2. See Jill E. Fisch, *The Transamerica Case*, in *THE ICONIC CASES IN CORPORATE LAW* 46, 46 (Jonathan R. Macey ed., 2008).

3. See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277-78 (1998).

4. See STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 417 (2002).

5. See Smith, *supra* note 3, at 279; see also BAINBRIDGE, *supra* note 4, at 420-21.

6. See, e.g., BAINBRIDGE, *supra* note 4, at 421-22.

7. Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 64 (2010).

8. *Id.*

9. See *id.* at 64-65.

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In appropriate cases, management may need to forego profits for the sake of these competing values.<sup>10</sup>

It is often assumed that Delaware corporation law mandates a shareholder primacy conception of corporate purpose.<sup>11</sup> To that extent, Delaware law would therefore treat human rights considerations as irrelevant except in those cases where observance would enhance the corporation's profitability. In this Article, I argue that this reading of Delaware law is incorrect; the law does not mandate shareholder primacy. It is also the case, though, that Delaware has not endorsed a CSR conception of corporate purpose, at least not as an explicit, general proposition.<sup>12</sup> Rather, by formulating management's duty as running to "the corporation and its shareholders" rather than to the shareholders alone, Delaware law creates space within which management's responsibility to the corporate enterprise—understood to mean something other than simply the shareholders—can be interpreted as allowing or even requiring consideration of non-shareholder interests.<sup>13</sup> Procedurally, Delaware law also makes it very hard for shareholders to hold management accountable for operational or strategic decisions that favor non-shareholder interests.<sup>14</sup> So, both as a practical and as a legal matter, there is discretion for corporate management to take human rights norms into consideration where it deems it appropriate to do so.

But can more be said than that? Is there an affirmative duty to observe human rights norms? This Article considers two avenues through which corporate law could be said to require attention to the impact of corporate activity on human rights. One is the developing law concerning the board of directors' risk management responsibilities. Possible human rights violations by a corporation, its subsidiaries, or independent contractors with which it is closely related can present both legal and reputational risks that management must attend to in order to discharge its fiduciary obligations. The other is the corporate law requirement that corporations act within the boundaries of the law. As international law moves toward recognition of a corporate duty to respect human rights, corporations may well find themselves subject to its prescriptions.

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10. *Id.* at 64.

11. See, e.g., BAINBRIDGE, *supra* note 4, at 419-21; see also ROBERT CHARLES CLARK, CORPORATE LAW 17-19, 677-81 (1986); see also Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440-41 (2001); see also Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991).

12. David Ronnegard & Craig Smith, *Corporate Social Responsibility and the Legitimacy of the Shareholder Primacy Norm: A Rawlsian Analysis* 9 (INSEAD Working Paper No. 2010/01/ISIC, 2010), available at [http://www.erin.eu.nl/portal/page/portal/ERIM/Content\\_Area/Documents/ESW-2009-232-ORG](http://www.erin.eu.nl/portal/page/portal/ERIM/Content_Area/Documents/ESW-2009-232-ORG).

13. *Id.* at 9-10.

14. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 861-62 (2005).

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## II. THE MYTH OF SHAREHOLDER PRIMACY

It is commonly asserted that Delaware corporate law mandates a shareholder primacy conception of management's responsibility.<sup>15</sup> This means that the company is supposed to be managed with the financial interests of shareholders primarily in mind. The shareholders' assumed interest in wealth maximization is not to be sacrificed for non-shareholder considerations, such as human rights or environmental concerns. This notion of management's duty in turn implies a particular conception of corporate purpose, which is, first and foremost, to maximize profits for shareholders.<sup>16</sup>

The assumption that Delaware law requires shareholder primacy is wrong.<sup>17</sup> Certainly, a business corporation must generate profits if it is to survive. Investors will not contribute capital unless an acceptable rate of return is achieved. Nevertheless, it has long been clear that management owes its fiduciary duties of care and loyalty not to the shareholders alone but rather to "the corporation and its shareholders."<sup>18</sup> Although the Delaware judiciary has done little to illuminate the meaning of this distinction,<sup>19</sup> at least it is clear that the interests of "the corporation" cannot be equated with those of the shareholders;<sup>20</sup> otherwise the formulation would be redundant. What this expression does do is acknowledge the shareholders' special status as residual claimants; they are traditionally referred to as the firm's owners, although the accuracy as well as the utility of this terminology has been questioned.<sup>21</sup> At the same time, the definition also emphasizes that management is not simply the agent of the shareholders charged with maximizing their wealth. Instead, management is also responsible for the well-being of the corporation as an entity or an on-going enterprise. As such, management must attend to the full range of considerations that determine

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15. See, e.g., BAINBRIDGE, *supra* note 4, at 419-21; see also CLARK, *supra* note 11, at 17-19, 677-81; Hansmann & Kraakman, *supra* note 11, at 440-41; see also Macey, *supra* note 11, at 23.

16. Notice that shareholder primacy here refers to the relative weight to be accorded to shareholder versus non-shareholder interests, but does not imply primacy as to governance authority. As between managers, shareholders, or other corporate constituencies, management has responsibility for governance with shareholders exercising only very limited powers of control. The recent "shareholder empowerment" movement in the United States aims to redress that balance. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005). For a powerful critique of the shareholder empowerment agenda that is not based on CSR values, see William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010).

17. See generally Elhauge, *supra* note 14, at 763-75; Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002).

18. See, e.g., *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939); see also *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).

19. See, e.g., *Guth*, 2 A.2d at 238; see also *Mills Acquisition Co.*, 559 A.2d at 1280; *Aronson*, 473 A.2d at 811.

20. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

21. See Stout, *supra* note 17, at 1190-92.

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the corporation's success. From this it seems reasonable to infer that a range of stakeholder interests is implicated.

The Delaware judiciary has not elaborated on these questions except in the crucial case of the hostile takeover.<sup>22</sup> This context is especially important because there is a high probability of conflict between the shareholders' interest in unimpeded access to hostile tender offers (because of the inevitable substantial premium over the market price of the corporation's shares) and the interests of non-shareholders such as employees and creditors in opposing a transaction that is likely to result in cost-cutting measures and much higher leverage. Addressing this question in the important *Unocal* case, the Delaware Supreme Court stated that, in responding to the threat of a hostile takeover, the target corporation's management is supposed to evaluate "its effect on the corporate enterprise."<sup>23</sup> More specifically, in addition to possible harms to shareholders, relevant considerations may include "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally) . . . ."<sup>24</sup>

The underlying idea is that corporate management possesses the authority to determine the corporation's future, even if that means thwarting the shareholders' desire for an immediate profit. To yield to their demands would, in effect, mean ceding to the shareholders the authority to decide the corporation's fate. That would offend the basic principle of Delaware's corporate governance model, according to which the corporation is to be managed not by the shareholders but instead "by or under the direction of a board of directors . . . ."<sup>25</sup> The Delaware Supreme Court made this point clearly in the *Time/Warner* case, in which it held that a target company's management may resist a hostile bid that would threaten management's plans for the corporation's future, however attractive the bid might be to the corporation's shareholders.<sup>26</sup>

22. See, e.g., *id.* at 1203-04.

23. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

24. *Id.* In a similar vein, forty-one states have adopted so-called constituency or stakeholder statutes. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 39 (1992). These statutes expressly authorize the board of directors to consider non-shareholder interests, which are typically expressed in the form of a list including employees, customers, suppliers, creditors, and local communities. They also typically include a provision allowing the board to prioritize the shareholders' long-term financial interests over enhancement of share price in the short-term. While some statutes are limited to the hostile takeover context, most are not. These statutes are important because they represent deliberate rejection of the shareholder primacy conception of corporate purpose and managerial responsibility. For a list of the statutes, see Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 833 nn.77-78 (2003). For discussion, see David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992). Delaware has not enacted one of these statutes, but Delaware's common law of fiduciary duty as articulated in the *Unocal* case embraces an essentially similar approach. ISS GOVERNANCE SERVICES, U.S. PROXY VOTING MANUAL ch. 4. (2007).

25. DEL. CODE ANN. tit. 8, § 141(a) (2010).

26. *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989). For discussion, see Lyman

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Only in special cases does the board's duty change from a responsibility for the well-being of the entity as a whole to one of obtaining the best deal possible for the shareholders alone.<sup>27</sup> When management has chosen to cede its managerial discretion to chart the corporation's future by agreeing to a transfer of control or to the corporation's break-up and dissolution, its duty changes from one that embraces the corporate enterprise as well as the shareholders to one that requires that the board enter into a transaction that will maximize the value of the corporation's shares, without regard to potentially conflicting non-shareholder considerations.<sup>28</sup> Only in those special cases, which management is free to avoid if it chooses to retain its managerial authority,<sup>29</sup> must management focus solely on shareholder interests. That is the extent of shareholder primacy under Delaware law.<sup>30</sup>

The *Dodge v. Ford* case, decided by the Michigan Supreme Court case in 1919, is often cited as the classic statement of a general proposition that corporate management may not subordinate shareholder financial interests to non-shareholder considerations.<sup>31</sup> In that case, Henry Ford refused to allow the corporation to declare a special dividend—despite a huge holding of cash and a massive accounting surplus—because he preferred to pursue policies designed to benefit employees and consumers.<sup>32</sup> In an oft-quoted passage, the court declared that,

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend . . . to other purposes.<sup>33</sup>

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Johnson & David Millon, *The Case Beyond Time*, 45 BUS. LAW. 2105 (1990).

27. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985); see also Johnson & Millon, *supra* note 26, at 2105.

28. *Revlon*, 506 A.2d at 182; *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1994).

29. See Johnson & Millon, *supra* note 26.

30. The Delaware Supreme Court has stated that directors are obligated "to attempt, within the law, to maximize the long-run interests of the corporation's stockholders." *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. 1986). A long-run orientation, however, allows—or even requires—management to take non-shareholder interests into account in order to ensure the corporation's long-run sustainability. For discussion, see David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523 (2011). In the recent *eBay* case, the Delaware Court of Chancery stated that the duties of directors "include acting to promote the value of the corporation for the benefit of its stockholders." *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010). This formulation—which explicitly indicates that management's duties extend beyond promotion of shareholder value—is a far cry from a rule requiring short-term profit maximization.

31. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

32. *Id.* at 671.

33. *Id.* at 684.

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Even this passage, however, defines the duty to maximize profits as primary rather than exclusive.<sup>34</sup> In any event, the opinion has had little influence on U.S. corporate law.<sup>35</sup> As a statement of Michigan law, it is not binding authority in Delaware. Nor has it exerted persuasive effect. Delaware courts have cited the decision only once in the last thirty years, and for an altogether different proposition (concerning oppression of minority shareholders by a controlling shareholder).<sup>36</sup>

Not only does Delaware's specification of management's duty decline to privilege shareholder interests over all others, but further, as a practical matter, shareholders lack the ability to insist that management accord primacy to them.<sup>37</sup> It is extremely difficult to mount legal challenges to management's exercise of its authority based on its failure to maximize share values. Under the well-known "business judgment rule," the judiciary will not second-guess strategic and operational decisions as long as they are based on sufficient information, not subject to conflict of interest, and made in good faith.<sup>38</sup> Of special importance is courts' willingness to defer to managerial judgment about the corporation's long-run best interests. A broad range of decisions that seemingly sacrifice short-term shareholder profits for the sake of non-shareholder considerations can be plausibly justified by reference to the corporation's long-run well-being. So, for example, employment policies that seem costly in the short term can be said to improve worker morale and productivity over a longer time horizon.<sup>39</sup> Charitable expenditures or decisions to forego profitable but unsavory business opportunities may enhance the corporation's "good will" among consumers, despite the immediate negative impact on profits.<sup>40</sup> When management appeals to long-run corporate benefits to justify a policy beneficial to non-shareholders, courts do not require a demonstration of actual future gains.<sup>41</sup>

Other legal mechanisms are no more effective than fiduciary duty law at rendering management directly accountable to shareholders. It is highly unusual for shareholders to replace an incumbent board of directors via the annual election. Even with ownership of shares of the largest companies increasingly concentrated in the hands of large institutional investors, collective action costs

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34. See *id.* at 684 (stating that "an incidental humanitarian expenditure of corporate funds for the benefit of the employees" is permissible). For discussion, see Elhauge, *supra* note 14, at 772-75.

35. Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, in *THE ICONIC CASES OF CORPORATE LAW* 1, 3 (Jonathan R. Macey ed., 2008).

36. *Id.* at 4.

37. See Elhauge, *supra* note 14; Stout, *supra* note 17.

38. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

39. James Fieser, *Business Ethics*, U. TENN. MARTIN, <http://www.utm.edu/staff/jfieser/vita/research/Busbook.htm> (last visited Feb. 24, 2012).

40. See generally Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191 (2002).

41. See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (upholding directors' refusal to play nighttime baseball games because of concerns about community well-being).



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remain extremely high and the presumption in favor of the status quo remains extremely difficult to overcome. The threat of a hostile takeover via tender offer is also of limited effect because the Delaware courts have allowed target company managers generous leeway in deploying effective defensive measures. In particular, the important *Time/Warner* decision endorses management's authority to determine the corporation's future where its existing business strategy would not accommodate an unwelcome change of control.<sup>42</sup>

What all this means is that Delaware corporate law is not based on a shareholder primacy conception of management's responsibility. Further, as a practical matter, none of the potentially available accountability mechanisms—fiduciary duties enforceable by derivative actions, voting rights, or the threat of a hostile takeover—is potent enough to compel management to privilege shareholder interests. Accordingly, transnational companies incorporated in Delaware—or some other state<sup>43</sup>—have broad freedom to pursue policies that temper the quest for profits with other considerations, such as human rights or environmental concerns.<sup>44</sup> Nothing in current law *mandates* such behavior,<sup>45</sup> but management's authority to cultivate the corporation's long-term well-being provides ample space for more than mere profit maximization.<sup>46</sup> Shareholders who might object face formidable doctrinal and practical obstacles.

### III. HUMAN RIGHTS AND RISK MANAGEMENT

#### A. *The Board of Directors' Risk Management Responsibility*

All corporations must have in place effective systems for collecting, aggregating, and summarizing information about the business' financial performance. A business that cannot accurately keep track of revenue and expenses is not likely to last very long. It is also necessary to establish systems for monitoring and evaluating the performance of the corporation's employees.

Important as such systems are, they do not exhaust the range of management's monitoring responsibilities. A number of laws impose increasingly stiff criminal and civil financial penalties on corporations for the

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42. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (“The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders. Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.”). *Id.* at 1155.

43. The absence of a commitment to shareholder primacy is typical of the corporation law of other states besides Delaware. Moreover, as noted above, forty-one states have enacted statutes that expressly authorize corporate management to take non-shareholder interests into consideration. *See Orts, supra* note 24.

44. *See Lin, supra* note 7, at 64.

45. *Ronnegard & Smith, supra* note 12, at 10.

46. *BAINBRIDGE, supra* note 4, at 417-18.

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wrongdoing of their employees, including lower-level employees.<sup>47</sup> These costs can easily run into the tens or hundreds of millions of dollars.<sup>48</sup> Yet in a large corporation with many offices and employees, senior management is likely to find it very difficult to detect and prevent activities that are organizationally, as well as geographically, distant. The magnitude of this risk has therefore led courts to endorse the establishment of systems for uncovering employee wrongdoing and reporting that information to management.

In the important *Caremark* case, decided in 1996, the Delaware Court of Chancery held that the board of directors' "obligation to be reasonably informed concerning the corporation" requires that it assure itself that

information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.<sup>49</sup>

The Delaware Supreme Court has since endorsed this requirement.<sup>50</sup> Negligent failure to establish such systems can amount to a violation of the duty of care, while deliberate disregard may constitute a breach of the duty of loyalty based on bad faith.<sup>51</sup>

*B. Legal Risk*

The leading Delaware cases have involved violations of U.S. law committed by employees working in the United States.<sup>52</sup> In *Caremark*, for example, a health care corporation agreed to pay civil and criminal fines totaling \$250 million to settle investigations into alleged violations of the federal Anti-Referral Payments Law.<sup>53</sup> Certainly the same consideration—the possibility of massive corporate liability—applies to U.S. companies operating abroad that commit violations of

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47. See generally KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed. 1992).

48. E.g., *KPMG to Pay \$456 Million for Criminal Violations*, IRS (Aug. 29, 2005), <http://www.irs.gov/newsroom/article/0,,id=146999,00.html>.

49. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

50. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

51. *Id.*

52. See *In re Caremark*, 698 A.2d at 970; *Paramount Commc'n., Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985).

53. *In re Caremark*, 698 A.2d at 960-61. *Stone v. Ritter* involved alleged violations of anti-money-laundering regulations committed by employees of a bank with branches in the southeastern United States. See *Stone ex rel. AmSouth Bancorporation*, 911 A.2d at 370.

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U.S. law, such as the federal anti-bribery law.<sup>54</sup> State-law tort claims are also possible.<sup>55</sup>

U.S. companies doing business abroad must also be aware of the risk of financial penalties imposed for violations of the local law of the country in which they are operating. There is no theoretical reason why corporations that commit human rights violations in a particular country cannot be prosecuted for violating that country's law. In fact, there may be political reasons why such prosecutions do not occur. Developing countries may be hungry for foreign investment. Local officials may also be complicit in the alleged wrongdoing. Nevertheless, there have been some dramatic examples of successful prosecution based on domestic law. Recently, for example, an Ecuadorean court entered a \$9 billion judgment against Chevron based on illnesses caused by environmental degradation.<sup>56</sup> In 2009, Pfizer paid approximately \$75 million to settle a lawsuit filed in Nigeria alleging that it illegally tested an experimental drug during a meningitis epidemic.<sup>57</sup> Even in light of the practical difficulties involved in collecting foreign judgments, effective risk management certainly requires awareness and evaluation of possible judgment and settlement costs, not to mention legal fees and, as discussed below, potential reputational harm. Further, corporate executives can also face personal criminal or civil liability, as in the case of eight Union Carbide executives convicted of criminal negligence by an Indian court in the wake of the Bhopal disaster.<sup>58</sup> Cases like this can involve corporate expenditures for defense expenses,<sup>59</sup> as well as indemnification for judgment or settlement payments.<sup>60</sup>

Boards of directors need also be aware of litigation risk arising out of violations of international human rights norms. In *Filártiga v. Peña-Irala*,<sup>61</sup> decided in 1980, the Second Circuit held that the Alien Tort Statute ("ATS")<sup>62</sup> conferred jurisdiction on the federal courts to hear tort claims brought by aliens

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54. Federal Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3; *see* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

55. *See, e.g., Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

56. Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES, Feb. 14, 2011, at A4, available at <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html>.

57. Joe Stephens, *Pfizer Reaches Settlement Agreement in Notorious Nigerian Drug Trial*, WASH. POST, Apr. 4, 2009, at A3. Another lawsuit filed in the Southern District of New York arising out of the same activities was recently settled, even though (as explained below) it was subject to dismissal in light of the Second Circuit's decision in the *Kiobel* case. *See Pfizer Lawsuit (re Nigeria)*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/PfizerlawsuitreNigeria> (last updated Feb. 28, 2012).

58. Lydia Polgreen & Hari Kumar, *8 Former Executives Guilty in '84 Bhopal Chemical Leak*, N.Y. TIMES, June 7, 2010, at A8.

59. *See* DEL. CODE ANN. tit. 8, § 145(e) (2010).

60. *See* tit. 8, § 145(a)-(c).

61. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

62. 28 U.S.C. § 1350 (2006).

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based on violations of international human rights norms.<sup>63</sup> As a vehicle for enforcement of customary international law, federal jurisdiction under the ATS is limited to well-defined and broadly accepted norms, and thus proscribes only the most atrocious forms of human rights abuse, such as genocide, slavery, and war crimes.<sup>64</sup> For that reason, the ATS is not likely to be an effective mechanism for policing conduct that raises legitimate human rights concerns but does not rise to the level of requisite level of heinousness.

It is also questionable whether corporations can be sued under the ATS. Until recently, it was broadly assumed that corporations were subject to suit, but the issue is no longer so clear. Following *Filártiga*, a number of cases have been brought against corporations.<sup>65</sup> Some resulted in high-profile settlements, including Unocal Corp.'s settlement of ATS and state law claims alleging human rights atrocities in connection with pipeline construction in Burma,<sup>66</sup> and Royal Dutch Petroleum Co. and Shell Transport and Trading Co. Ltd.'s settlement of claims arising out of the Nigerian government's violent suppression of protests against large-scale petroleum extraction operations.<sup>67</sup> Several courts have rejected claims that corporations or other juridical entities are not subject to civil liability,<sup>68</sup> and a number of other cases have simply taken that question for granted.<sup>69</sup> However, in the *Kiobel* case, decided in September 2010 in a sharply split decision, the Second Circuit held that corporations may not be sued under the statute.<sup>70</sup> Then, in July 2011, the D.C. Circuit and the Seventh Circuit, both addressing the issue directly, reached the opposite conclusion,<sup>71</sup> the latter in an opinion authored by Judge Posner.

63. *Filártiga*, 630 F.2d at 887-90.

64. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004) (“[A] single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”).

65. *See infra* notes 66-71 and accompanying text.

66. Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135 (2005).

67. Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL INSIGHT (Sept. 9, 2009), <http://www.asil.org/files/insight090909pdf.pdf>.

68. *See, e.g.*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 747 (D. Md. 2010); *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 229, 255 (S.D.N.Y. 2009); *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009).

69. *See, e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 193 (2d Cir. 2009); *Sarei v. Rio Tinto, P.L.C.*, 487 F.3d 1193 (9th Cir. 2007); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

70. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 471 (2011). Judge Leval, though concurring in the judgment dismissing the complaint, sharply disagreed with the majority's position on the question of whether corporations were exempt from suit. Shortly before the Second Circuit issued its opinion in *Kiobel*, a district court in California reached the same conclusion on the question of corporate liability. *See Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1116-18 (C.D. Cal. 2010).

71. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011).

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So, at least until the U.S. Supreme Court decides otherwise or Congress repeals the statute, management of U.S. corporations must still be attentive to the possibility that their companies will be sued for human rights violations outside of the Second Circuit. This risk is not just a matter of accounting for substantial legal defense expenses and potentially large settlements or judgments; in the words of an attorney who advises clients on such matters, human rights cases “are also costly in terms of the damage caused to companies’ reputations both by initial allegations of poor human rights practices and by lingering perceptions that companies are indifferent to such accusations.”<sup>72</sup> Because of the magnitude of these potential costs, the board of directors, in discharging its duty of care, cannot be content to simply draft policies or codes of conduct that mandate regard for human rights. The board must also ensure that systems exist for collection and transmission upstream of information about possible violations. This should include information about the human rights performance of foreign divisions and subsidiaries, as well as independent contractors such as security firms. Claims alleging aiding and abetting or based on agency or veil-piercing theories may also be possible. In addition to the establishment of internal systems, the board’s duty of care may also mandate the engagement of external auditors to evaluate periodically the effectiveness of the corporation’s monitoring and reporting systems, as well as collecting information on the company’s human rights performance to complement the company’s own internal reporting system.

### C. Reputational Risk

Legal risk—whether based on potential claims of violations of U.S., foreign, or international law—is not the whole story. U.S. companies that perpetrate human rights violations in other countries must also be attentive to reputational or public relations risks, even where conduct does not generate litigation. A number of energetic non-governmental organizations (“NGOs”) and other activists are committed to the investigation and exposure of human rights problems. They play important roles in uncovering and publicizing activities that otherwise might not receive the notice of anyone other than the people immediately affected.<sup>73</sup>

Sometimes these actors sponsor litigation on behalf of victims of human rights violations, but they do not need to file lawsuits to be effective. Public exposure through various media outlets can also create costly problems for transnational corporations. Amnesty International, for example, despite its

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72. Sarah A. Altschuller, *Proactive Management of Legal Risk*, 1 CSR J., no. 1, Mar. 2008, at 8.

73. The mainstream media can also play a role by publicizing the results of NGO investigations. For example, the New York Times reported prominently on a small Indian NGO’s discovery of pesticide in Coca-Cola and Pepsi soft drinks. Amelia Gentleman, *For 2 Giants of Soft Drinks, a Crisis in a Crucial Market*, N.Y. TIMES, Aug. 23, 2006, at C3, available at <http://www.nytimes.com/2006/08/23/business/worldbusiness/23place.html?pagewanted=all>.

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historic focus on state-sponsored human rights violations, recognizes that transnational corporations also can be responsible for abuses—especially where local governments fail to protect their citizens—and is publicizing corporate human rights violations and campaigning for global standards on business and human rights.<sup>74</sup> Its mission is

to conduct research and generate action to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated.

Our members and supporters exert influence on governments, political bodies, companies and intergovernmental groups.

Activists take up human rights issues by mobilizing public pressure through mass demonstrations, vigils and direct lobbying as well as online and offline campaigning.<sup>75</sup>

Technology may also make it possible for activists with very limited resources to make a difference. The example of a Californian named Amit Srivastava is instructive.<sup>76</sup> Working alone, Srivastava has created a website for the collection of information about Coca-Cola's public health and environmental offenses in India and serves as a resource for activists around the world. His site also provides a coordination point for otherwise dispersed and disconnected local protesters in India. His speeches to college students in the United States and Europe have resulted in a number of colleges banning Coke products. Srivastava has organized a "fax action" campaign that resulted in over 9,000 faxes being sent to Coca-Cola headquarters.<sup>77</sup> Even a determined individual apparently can have an impact on public opinion.

Greater transparency resulting from the work of NGOs and other activists is important because it facilitates corporate accountability to public opinion. These actors typically rely heavily on private donations, so they must pursue agendas that resonate significantly with community values. In this way, these actors act as conduits for the views of a larger public constituency. If a corporation is shown to be engaged in human rights abuses, the harm to its reputation can have significant financial consequences if consumers refuse to buy its products. Thus, risk management extends beyond avoidance of litigation to the broader challenge

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74. *Business and Human Rights*, AMNESTY INT'L, <http://www.amnesty.org/en/business-and-human-rights> (last visited Feb. 26, 2012).

75. *About Amnesty*, AMNESTY INT'L: EUR. INSTITUTIONS OFF., <http://www.amnesty.eu/en/about-amnesty> (last visited Feb. 26, 2012).

76. Steve Stecklow, *How a Global Web of Activists Gives Coke Problems in India*, WALL ST. J., June 7, 2005, at A1.

77. *Id.*

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of avoiding behavior that is likely to be condemned in the court of public opinion.

The Nike case exemplifies the power of consumers to put effective pressure on companies to behave in a socially responsible manner.<sup>78</sup> When it came to light in the early 1990s that Nike relied on child labor to manufacture many of its products, NGO- and student-organized boycotts and demonstrations targeted its retail outlets.<sup>79</sup> As a result of this major public relations disaster, Nike adopted a code of conduct in 1992 for its suppliers that mandates observance of basic labor, health, and safety standards. Although monitoring of compliance has proved to be difficult, it is clear that Nike is very concerned about its public image and devotes substantial resources to its image's enhancement.<sup>80</sup> This example also points out that U.S. corporations cannot employ locally-incorporated subsidiaries or independent contractors to insulate themselves from being held accountable for their activities. Critics will not accept such distinctions if a single corporation, like Nike, can be deemed to be ultimately responsible for the activities in question.

### D. Pressure from Investors

Pressure to avoid public relations disasters can also come from investors. Reputational risk, like litigation risk, is a matter of financial concern to corporate management because shareholders increasingly factor these costs into their decisions about whether to invest in particular companies.<sup>81</sup> This is true not just of "socially responsible" investment funds for which human rights issues have always been highly relevant. Mainstream institutional shareholders, concerned primarily about investment return, are also taking an increasingly broad view of risk and are now routinely including so-called "environmental, social, and governance" ("ESG") metrics into their investment decisions.<sup>82</sup> Most notable in this regard is the United Nations ("U.N.") Principles for Responsible Investment ("PRI").<sup>83</sup> Signatories commit to "incorporate ESG issues into investment analysis and decision-making processes . . . be active owners and incorporate ESG issues into our ownership policies and practices . . . [and] seek appropriate

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78. See Richard M. Locke, *The Promise and Perils of Globalization: The Case of Nike*, (MIT Indus. Performance Ctr., Working Paper No. 02-007, 2002), available at <http://mitsloan.mit.edu/50th/pdf/nikepaper.pdf>.

79. *Id.* at 9, 14-15.

80. *Id.* at 15-18.

81. See Ryan Nakashima & Michael Liedtke, *Murdoch Returns to News Corp. Worries in US*, BUSINESSWEEK (July 20, 2011, 7:02 PM), <http://www.businessweek.com/ap/financialnews/D9OJLT702.htm>.

82. Jeremy Lovell, *Alternative Investment Funds Increasingly Embracing ESG – US SIF*, ENVTL. FIN. (Oct. 27, 2011), <http://www.environmental-finance.com/news/view/2079>.

83. PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/principles> (last visited Feb. 25, 2012).

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disclosure on ESG issues by the entities in which we invest.”<sup>84</sup> By agreeing to these principles, large institutional shareholders and other investors undertake to evaluate their investment decisions according to long-term criteria that expressly recognize the relevance of a range of stakeholder concerns for the financial success of their portfolio companies.<sup>85</sup> To date, 245 asset owners, 543 investment managers, and 156 professional service providers have signed on.<sup>86</sup> U.S. institutions include the AFL-CIO, CalPERS, CalSTRS, TIAA-CREF, and the Connecticut, Illinois, Los Angeles County, Maryland, New York State and New York City pension funds.<sup>87</sup>

Transnational corporations increasingly are attempting to formalize attention to social responsibility concerns. A recent study shows that sixty-five percent of S&P 100 and twenty-eight percent of S&P 500 companies have board committees dedicated to social responsibility.<sup>88</sup> For example, H.J. Heinz Co.’s Corporate Social Responsibility Committee consists of three independent directors.<sup>89</sup> The committee’s charter provides that its role is “oversight of the Company’s attention to issues of social responsibility and the Company’s policies, practices, and progress on social, technical, employment, charitable, political, environmental, and other matters of significance to the Company’s performance, business activities, or reputation as a global corporate citizen” and mandates a wide range of specific monitoring and reporting functions.<sup>90</sup> Other examples among well-known companies include AT&T, Alcoa, Coca-Cola, Ford Motor Co., GE, McDonald’s, Procter & Gamble, and Wal-Mart.<sup>91</sup> As board attention to social responsibility increases, observers have questioned the extent to which this phenomenon is driven primarily by marketing and public relations concerns, rather than systematic risk management or strategic planning.<sup>92</sup> Even so, it is evident that the largest companies increasingly find it necessary to create formal structures through which management can monitor social responsibility issues.

Not surprisingly, law firms are beginning to provide advice on how to manage reputational as well as legal risks. At least one U.S. firm now has a

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84. *Id.*

85. *Id.*

86. *Signatories to the Principles for Responsible Investment*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/signatories> (last visited Feb. 25, 2012).

87. *Signatories to the Principles for Responsible Investment*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/signatories/index.php?country=USA> (last visited Feb. 25, 2012).

88. CALVERT ASSET MGMT. CO., INC. & CORP. LIBR., BOARD OVERSIGHT OF ENVIRONMENTAL AND SOCIAL ISSUES: AN ANALYSIS OF CURRENT NORTH AMERICAN PRACTICE 11, 14 (2010) [hereinafter BOARD OVERSIGHT].

89. See *Corporate Social Responsibility Committee Charter*, HEINZ (Jan. 19, 2011), <http://www.heinz.com/our-company/corporate-governance/charters/corporate-social-responsibility-committee-charter.aspx>.

90. *Id.*

91. BOARD OVERSIGHT, *supra* note 88, at 22-24.

92. *Id.* at 4.



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dedicated CSR practice group that advises transnational corporations. Foley Hoag states, “[b]usinesses participating in the global marketplace are increasingly held to higher standards of social, environmental and ethical accountability; and unresponsive companies risk damage to their reputations, brand image and competitiveness.”<sup>93</sup> This firm offers advice aimed at proactively addressing potential reputational risk issues, including region- and country-specific analyses, standard setting, and, importantly, establishment of both internal and external monitoring systems.<sup>94</sup> Given the growing importance of these services, it seems likely that other firms will follow suit in this area.

IV. OPERATING WITHIN THE LIMITS OF LAW

A. *The Legal Limits on Corporate Power*

It has always been clearly understood that, however the corporate objective might be defined, it must be pursued within the bounds of applicable law. Thus, for example, the American Law Institute’s Principles of Corporate Governance state that, “in the conduct of its business . . . [a corporation is] obliged, to the same extent as a natural person, to act within the boundaries set by law.”<sup>95</sup> The Delaware statute authorizes the formation of corporations “to conduct or promote any lawful business or purposes.”<sup>96</sup> Even the most strident proponents of shareholder primacy acknowledge these obligations.<sup>97</sup>

As a doctrine of corporate law, this principle is clear enough. Less often considered is its practical significance. Obviously, violations of law—referring here to law other than corporate law—may subject a corporation to liability, civil or criminal, according to the terms of the law in question. Such violations also violate the corporate law principle that requires operating within the bounds of the law, and as such have consequences under corporate law itself.

Under corporate law, illegal activities are deemed to be beyond the “capacity or power” of the corporation.<sup>98</sup> This principle is a corollary of the principle referred to above, according to which the power conferred by the state on the corporate entity extends only to acts within the limits of the law.<sup>99</sup> In older parlance, this principle was termed the *ultra vires* problem, and a good deal of

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93. *Corporate Social Responsibility*, FOLEY HOAG, <http://www.foleyhoag.com/Services/Corporate-Social-Responsibility/description.aspx> (last visited Feb. 25, 2012).

94. *Id.*

95. PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(1) (2005).

96. DEL. CODE ANN. tit. 8, § 101(b) (2010). *See, e.g.*, Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986) (requiring directors to act “within the law” in serving the interests of stockholders).

97. *See, e.g.*, Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at SM17.

98. tit. 8, § 124.

99. *Id.* § 101(b). *See, e.g.*, Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986).

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learning was devoted to the legal significance of business transactions that were beyond the powers of the corporation as defined in the state corporation statute and the individual corporation's articles of incorporation.<sup>100</sup> Today most of that law is obsolete, mostly because business corporations typically state their purpose and define their powers in entirely open-ended form.<sup>101</sup> So, for example, the certificate of incorporation of General Motors Co. simply states that, "[t]he purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware."<sup>102</sup> Thus, whether a particular contract or investment is beyond a corporation's lawful purpose or powers is a question that no longer arises.<sup>103</sup>

The exception to this general statement would be illegal activity. This can still be *ultra vires* because no corporation has the power to act outside the limits of the law. As to acts that corporations are not empowered to perform, the Delaware statute provides for three possible remedies.<sup>104</sup> A shareholder may obtain an injunction seeking to stop the acts in question.<sup>105</sup> Or, the corporation itself, acting through a shareholder or other legal representative, may seek compensation for any "loss or damage" resulting from the unauthorized act of an officer or director.<sup>106</sup> So, for example, if a corporation engages in activity that results in criminal or civil prosecution, the individuals responsible for the wrongdoing could be held personally liable for judgment or settlement payments paid by the corporation. Presumably, if the board of directors itself authorized the acts in question or failed to exercise its oversight responsibility, the board could be held liable as well.<sup>107</sup> Finally, the state attorney general may seek an injunction or, no doubt in an extreme case, dissolution of the corporation.<sup>108</sup>

100. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 209 (1990).

101. See *id.* at 212, 218-19.

102. GENERAL MOTORS, RESTATED CERTIFICATE OF INCORPORATION OF GENERAL MOTORS COMPANY (2012), available at [http://investor.gm.com/corporate-governance/docs/Restated\\_Cert\\_of\\_Inc.\\_12\\_10\\_10.pdf](http://investor.gm.com/corporate-governance/docs/Restated_Cert_of_Inc._12_10_10.pdf). Similar formulations are used by corporations organized under the laws of other states. For example, the IBM Corp. certificate reads, "The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized and to exercise powers granted under the Business Corporation Law of the State of New York . . . ." IBM, CERTIFICATE OF INCORPORATION OF INTERNATIONAL BUSINESS MACHINES CORPORATION (2012), available at <http://www.ibm.com/investor/pdf/certificateofincorporation.pdf>. Corporations that actually attempt to define their purposes and powers in more specific terms typically use language that is so broad and all-encompassing as to impose no meaningful limitations. See, e.g., GENERAL ELECTRIC, CERTIFICATE OF INCORPORATION OF GENERAL ELECTRIC COMPANY (2012), available at [http://www.ge.com/pdf/company/governance/certification/ge\\_certificate\\_of\\_incorporation.pdf](http://www.ge.com/pdf/company/governance/certification/ge_certificate_of_incorporation.pdf).

103. See Millon, *supra* note 100, at 212.

104. See DEL. CODE ANN. tit. 8, § 124 (1)-(3) (2010).

105. *Id.* § 124(1).

106. *Id.* § 124(2).

107. *Id.* § 102(b)(7), which authorizes corporations to exempt directors (but not officers) from monetary damages for certain breaches of fiduciary duty, expressly precludes exculpation for liability based on "a knowing violation of law." Intentional failure to act in the face of "a known duty to act" also cannot be exculpated. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

108. tit. 8, § 124(3).

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Violations of international human rights law—like other violations of applicable local, state, or federal law—could trigger any of these responses. There would seem to be little serious doubt about whether international law is “law” in the same sense that domestic U.S. local, state, and federal law is. The prevailing contemporary view is that customary international law is part of federal common law.<sup>109</sup> If that is so, it would seem clear that the general requirement that corporations “act within the boundaries set by law”<sup>110</sup> would embrace international law as it has been incorporated into U.S. domestic law. And the Supremacy Clause of the U.S. Constitution<sup>111</sup> would presumably deny to the Delaware legislature and courts the authority to redefine “law” for purposes of this statutory provision in a way that excluded customary international law. An attempt to do so would amount to an authorization to violate U.S. federal law insofar as it has incorporated international human rights law.

At the moment, it appears that corporate liability for human rights violations—as opposed to state or individual liability—has yet to attain the status of a rule of customary international law.<sup>112</sup> Although the law may be evolving in the direction of expanding notions of responsibility for human rights offenses to include private business corporations, one can point only to “soft law” developments at this time. There are, however, several notable instances that suggest that international law is in the process of developing a customary rule of corporate liability for human rights abuses.

### B. “Soft Law” Developments

The International Labour Organization (“ILO”) is a U.N. agency that functions on a “tripartite” basis, bringing together representatives of government, employers, and workers to formulate and oversee international labor standards.<sup>113</sup> Initially in 1977 and as revised in 2000 and 2006, the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>114</sup> presents a number of recommendations that governments, employers’

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109. See RESTATEMENT (THIRD) FOREIGN REL. L. U.S. § 115 cmt. e (1987) (“any rule of customary international law . . . is federal law”); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900); Louis Henkin, *International Law as the Law in the United States*, 82 MICH. L. REV. 1555, 1560-62 (1984).

110. PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(1) (2005).

111. U.S. CONST. art. VI, cl. 2.

112. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (Acknowledging that customary international law has not yet embraced the principle of corporate liability, Professor Ratner presents a thorough and thoughtful argument in favor of corporate responsibility for human rights violations.).

113. *About the ILO*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Feb. 10, 2012).

114. Int’l Labour Office [ILO], *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf).

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and workers' organizations, and multinational business corporations are invited to observe on a voluntary basis. These recommendations cover a wide range of employment matters, including equality of opportunity without regard to race, sex, religion, or national origin; abolition of child labor; workplace health and safety; and job security.<sup>115</sup> Although voluntary, if taken seriously these recommendations would address a number of important ways in which corporations can infringe basic human rights in the employment context.

The Organisation for Economic Co-operation and Development ("OECD") includes thirty-four member states, among them many of the world's most economically developed countries.<sup>116</sup> The Guidelines for Multinational Enterprises, originally promulgated in 1976 and revised periodically since then (most recently in 2000),<sup>117</sup> are recommendations from the member states to multinational corporations providing "voluntary principles and standards for responsible business conduct."<sup>118</sup> In addition to more specific pronouncements on employment, the environment, anti-bribery, and other matters, the Guidelines call on corporations to "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."<sup>119</sup>

Most recently, a U.N. project has generated significant attention. In June 2011, the U.N. Human Rights Council unanimously endorsed a new set of Guiding Principles for Business and Human Rights submitted by John Ruggie, Special Representative of the U.N. Secretary-General, after extensive consultations with a wide range of stakeholders.<sup>120</sup> The principles include the "State duty to protect against human rights abuses by third parties" and the corporate responsibility to respect human rights, which means a duty "to avoid infringing on the [human] rights of others and to address adverse [human rights] impacts" they may cause or contribute to. This responsibility applies "across a business enterprise's activities and through its relationships with third parties associated with those activities," and also embraces separately incorporated but

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115. *Id.*; see also *Topics*, INT'L LABOUR ORG., <http://www.ilo.org/global/topics/lang--en/index.htm> (last visited Feb. 10, 2012).

116. *Members and Partners*, ORG. FOR ECON. COOPERATION & DEV., [http://www.oecd.org/document/25/0,3746,en\\_36734052\\_36761800\\_36999961\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/25/0,3746,en_36734052_36761800_36999961_1_1_1_1,00.html) (last visited Feb. 10, 2012).

117. ORG. FOR ECON. CO-OPERATION & DEV., DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

118. *Id.* at 9.

119. *Id.* at 14.

120. U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [hereinafter *Guiding Principles on Business*]; Press Release, United Nations Human Rights Office of the High Comm'r, *New Guiding Principles on Business and Human Rights Endorsed By the UN Human Rights Council*, available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>.

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related entities within corporate groups.<sup>121</sup> It also includes a duty of remediation.<sup>122</sup> State governments would be required to provide effective enforcement mechanisms to hold corporate violators responsible for their actions. Because this initiative is broadly prescriptive, its potential significance extends beyond the U.N. Global Compact,<sup>123</sup> which is based on voluntary agreement to the Compact's ten principles in the area of human rights,<sup>124</sup> labor, the environment, and anti-corruption.

In these and other developments, observers see substantial indications or instances of a corporate duty to respect human rights in existing international law, even if it cannot yet be said that international law clearly imposes such a duty as a general proposition.<sup>125</sup> If and when these “soft law” developments crystallize into “hard law,” Delaware corporate law—which requires that corporations act within the bounds of the law—would itself mandate observance of international human rights principles.

### V. CONCLUSION

Delaware law does not require that companies incorporated in that state respect international human rights norms. Nor, however, does corporate law preclude them from doing so. The idea that corporations must maximize profits for the benefit of shareholders and disregard competing non-shareholder interests that impede achievement of that objective—often referred to as the shareholder primacy conception of corporate purpose—is not in fact a legal obligation. Instead, corporate law allows management broad leeway to pursue the long-term best interests of the corporation as an entity, and to take into account in doing so the well-being of its stakeholders, non-shareholders as well as shareholders. This discretion would include the authority to observe human rights norms even where doing so has the effect of reducing profits. Shareholders who object to such policies face virtually insurmountable doctrinal and practical obstacles should

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121. Draft, U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 12, U.N. Doc. A/HRC/\_\_\_ (Nov. 22, 2010), available at <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>.

122. *Guiding Principles on Business*, *supra* note 120.

123. UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/index.html> (last visited Feb. 9, 2012).

124. Principles 1 and 2 provide that “[b]usinesses should support and respect the protection of internationally proclaimed human rights; and . . . make sure that they are not complicit in human rights abuses.” *About Us*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html> (last updated Mar. 16, 2006).

125. See generally Ratner, *supra* note 112, at 475-88; David S. Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901 (2003); Larissa van den Herik & Jernej Lernerčič, *Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT’L CRIM. JUST. 725, 733-37 (2010).

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they wish to insist that management privilege their interests over those of all of the corporation's other constituencies.

Although corporate law does not demand regard for human rights in express terms, this Article has explored two avenues through which corporate law may indirectly impose such a requirement. The first is the developing law governing management's risk management responsibilities. Corporations that infringe human rights may be subject to suit not only in the United States under the Alien Tort Statute (at least in jurisdictions other than the Second Circuit), but also abroad under domestic human rights laws. Such cases can involve significant legal fees as well as potentially large judgment or settlement payments. Human rights abuses, when publicized, can also generate significant reputational costs, including consumer boycotts and disinvestment by shareholders. Responsible management of these kinds of risks thus obligates corporate leadership to implement effective information gathering and reporting systems to ensure that the corporation's employees, subsidiaries, and independent contractors do not engage in potentially costly misconduct.

The other vehicle for finding a responsibility to respect human rights in Delaware corporate law is not yet clearly established. Corporate law requires companies to pursue their objectives without committing violations of other bodies of law. Although a corporate duty to respect human rights is not yet established under international law, there are many indications that the law is developing in that direction. Once such a duty is established, Delaware corporations arguably will be required to comply with it, just as they are required to comply with the full range of applicable local, state, and federal law.