

Post-Westphalia and Its Discontents: Business, Globalization, and Human Rights in Political and Moral Perspective

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ABSTRACT: This article examines the presuppositions and theoretical frameworks of the “new-wave” “Post-Westphalian” approach to international business ethics and compares it to the more philosophically oriented moral theory approach that has predominated in the field. I contrast one author’s Post-Westphalian political approach to the human rights responsibilities of transnational corporations (TNCs) with my own “Fair Share” theory of moral responsibility for human rights. I suggest how the debate about the meaning of corporate human rights “complicity” might be informed by the fair share theory. While I point out that Post-Westphalians and moral philosophers may have fundamental disagreements about basic concepts such as legitimacy, justice, and democratic deliberation, I conclude that the Post-Westphalians have made a major contribution to the expansion of the field by presenting business ethicists with an opportunity to inform and guide debates about the potential future course of transnational governance.

ONE OF THE MOST INNOVATIVE and vital contributions to business ethics scholarship in recent years has been the emergence of a new wave of “Post-Westphalian” scholars, many with intellectual roots on the European continent, who have introduced a fresh political perspective to the field. The editors of a recent special issue of *Business Ethics Quarterly*—Andreas Scherer, Guido Palazzo, and Dirk Matten—have published some of the most path-breaking work in this new genre (Scherer and Palazzo 2007, 2008a, 2008b; Scherer, Palazzo, and Baumann 2006; Palazzo and Scherer 2008; Matten and Crane 2005; Crane, Matten, and Moon 2008). In this special issue they have brought together a number of articles that exemplify both the promise and limitations of their bold and distinctive approach to international business ethics.

My central concern in this article is to elucidate the essential presuppositions and theoretical frameworks of this “new-wave” “Post-Westphalian” worldview and compare it with the more philosophically oriented moral theory approach to globalization that has predominated in the field of international business ethics for over two decades (DeGeorge 1993; Donaldson 1989; Enderle 1999; Donaldson and Dunfee 1999). In particular, I consider the issue of human rights. I will contrast one author’s (Kobrin 2009) Post-Westphalian political approach to the human rights responsibilities of transnational corporations (TNCs) with my own “Fair Share” theory of moral responsibility for human rights (Santoro 2000, 2009). I conclude by addressing the most pressing questions and implications raised by this new-wave Post-Westphalian school for the field of business ethics.

THE POST-WESTPHALIAN CHALLENGE: POWER, LEGITIMACY, AND THE TNC

The new-wave Post-Westphalian scholars draw heavily from the methodologies and paradigms of political science and, as a result, power and legitimacy are at the core of their concerns (Dahl 1998, Bernstein and Cashore 2007). One fundamental paradigm is a Post-Westphalian globalization narrative (Scholte 2005). This narrative has both a power politics dimension and a legitimacy dimension. According to the power narrative, globalization is marked by a general decline in the political power of the nation state (Beck 2000). In particular, nation states are increasingly powerless to control the activities of TNCs (Chandler and Mazlish 2005, Vagts 1970). TNCs, in contrast, are increasing in power (Korten 2001). The TNC of the twenty-first century is a "colossus." The free flow of capital and goods that characterizes the economic aspects of globalization allows TNCs to nimbly structure their international operations to take advantage of the weak, uncoordinated regulatory powers of declining nation-states (Giddens 1990, Irwin 2002). The power of the modern TNC is thus both cause and effect of globalization. It is causative in that TNCs serve as vehicles for the free flow of goods, services, and capital across national borders that constitutes the very essence of economic globalization and that weakens the regulatory power of nation-states. Conversely, it is also an effect of globalization in the sense that the increased power of TNCs results from the weakened condition of the nation-state system.

The new-wave thinkers themselves use the term "Post-Westphalian" to describe the state of the international political economy (Kobrin 2009; Scherer, Palazzo, and Matten 2009). It is worth reflecting on what precisely this term means. The Peace of Westphalia brought an end in 1648 to the Thirty Years' War which created bitterness and terror throughout Germany and the rest of central Europe. Historically, the Peace of Westphalia signaled the dissolution of the Holy Roman Empire and the advent in international law of the European *Staatensystem* or system of modern nation-states. As the historian R. R. Palmer writes:

The diplomats who assembled at Westphalia represented independent powers which recognized no superior or common tie. No one any longer pretended that Europe had any significant unity, religious, political, or other. Statesmen delighted in the absence of any such unity, in which they sensed the menace of "universal monarchy." Europe was understood to consist of a large number of unconnected sovereignties, free and detached atoms, or states, which acted according to their own laws, following their own political interests, forming and dissolving alliances, exchanging embassies and legations, alternating between war and peace, shifting position with a shifting balance of power. (Palmer, Colton, and Kramer 2002: 139)

For modern business scholars the fundamental premise of the Westphalian system is that because nation states maintain a monopoly of power within their jurisdiction and because power politics play out wholly within nation-state systems, corporations insofar as they interact with political powers do so in an attempt to influence policy in a way that will benefit their economic interests (Hillman, Keim, and Schuler 2004;

Braithwaite and Drahos 2000; Windsor 2004). In a Post-Westphalian globalized world, however, the relationship of business to power politics is considerably more multifaceted and complex. Operating in a “regulatory gap” where states can no longer effectively control them, TNCs become political actors inevitably involved, for better or worse, in the making of public policy (Scherer, Palazzo, and Matten 2009). TNCs even assume many of the same public functions and responsibilities—public health, labor rights, security provision—that under the Westphalian system were exclusively the province of nation states (Kaul, Conceição, Le Goulven, and Mendoza 2003; Fort and Schipani 2004). This increased power in turn raises the question of legitimacy (Palazzo and Scherer 2006, Cutler 2001). TNCs wield significant political power in the Post-Westphalian world, but they do so without political legitimacy (Habermas 2001, Norman and Néron 2008).

RECONCILING LEGITIMACY AND JUSTICE: POLITICS AND MORALITY IN A GLOBALIZED WORLD

The Post-Westphalian new-wave thinkers argue that the most pressing concern of business ethicists is to find solutions to fill the TNC legitimacy and accountability gap in the modern globalized political economy. From their point of view, the global post-Westphalian governance system is in an unsatisfactory interim phase between Westphalian nation-state dominated governance and an imagined future where democratic institutions will emerge to control and legitimate TNCs. The current Post-Westphalian system of TNC regulation—consisting as it does of voluntary, weakly enforced, non-hierarchical mechanisms among various non-state actors, including the self-regulatory efforts of TNCs themselves—is, according to the Post-Westphalians, both weak and illegitimate (Bernstein and Cashore 2007, Vogel 2006, Haufier 2001, Collingwood 2006, Spiro 1996). To supersede and supplant this woeful state of affairs, we need, we are told, “new analytical tools . . . to explore the contribution of private actors to public policy . . . new ways of strengthening political communities and making firms democratically accountable.” Indeed, we need no less than a “new understanding of politics” to determine the “new political role of business in global governance” (Scherer, Palazzo, and Matten 2009: 339, emphasis in the original here omitted).

Taking these premises on their face value, a crucial question emerges for the field of business ethics: What is the relationship of the Post-Westphalians’ concern with political legitimacy to questions about morality and justice that more philosophically minded business ethicists have been addressing for over two decades? If the Post-Westphalians are to have a lasting impact on the field of business ethics, and if, conversely, the field of business ethics is to remain relevant to the broader concerns of globalization scholars in other fields, then the political legitimacy of TNCs needs to be understood in relation to fundamental questions of justice and morality (DeGeorge 1993, Donaldson 1989, Enderle 1999, Brenkert 2009). While in this article I will briefly sketch out some preliminary thoughts on how these two schools of thought may be reconciled, this is a task that in my view requires significant attention in the business ethics field in the coming years.

The idea of political legitimacy would seem to imply a moral dimension. Justice has been a central concern of the Western tradition of political philosophy from Plato and Aristotle to Thomas Hobbes and John Locke to John Rawls and Amartya Sen (Rawls 1971, Sen 2009). Only just governments or governments justly formed are legitimate and therefore oblige their citizens to obey them. The idea of political legitimacy thus has embedded within it a moral prerequisite. It is unclear, however, how the legitimacy concerns of the new-wave Post-Westphalians relate to the justice and morality concerns of philosophically oriented business ethicists. There are at least two sets of issues that need to be vetted to determine how these two distinct theoretical approaches might interrelate.

First, although business ethicists working in the realm of moral philosophy may be concerned with the power of TNCs, their concern is with whether that power is being exercised in an ethical manner and not whether the exercise of that power is politically legitimate. For moral philosophers the behavior of a TNC cannot be "legitimate" if such behavior violates moral principles. However, as the discussion about human rights below illustrates, the Post-Westphalians seem to leave open this possibility. Palazzo and Scherer themselves leave little doubt about the sociological sense in which they use the term legitimacy at the outset of their article describing the deliberative pathway to turning TNCs into legitimate political institutions. "Legitimacy," they write, "can be understood as the conformation with social norms, values, and expectations. . . . It is subjectively perceived and ascribed to actions or institutions by social construction" (Palazzo and Scherer 2006: 71; see also Suchman 1995). It is safe to say that this is not a definition of legitimacy that would be shared by most moral philosophers. Clearly, a dialogue needs to happen between Post-Westphalians and more philosophically oriented business ethicists about whether moral legitimacy and political/sociological legitimacy are congruent or at least complementary ideas.

A second reason that congruence may not be easily achieved is that the pathways to achieving legitimacy posited by the new-wave Post-Westphalians may not be grounded in discourse that would be recognizable to moral philosophers (Risse 2004). One of the most deeply-rooted ideas in contemporary political philosophy is the notion that justice is vitally connected to deliberative democratic discussion (Rawls 1971, Benhabib 2006, Dworkin 2006, Ackerman 1980). In contrast, when the Post-Westphalian new-wave business ethicists discuss legitimacy and its relationship to deliberative democratic institutions, they are more likely to invoke Jürgen Habermas (Scherer and Palazzo 2007; Habermas 1996, 2001). Among contemporary political philosophers, however, Habermas occupies an uneasy place in the ongoing discussion of deliberative democracy. Amartya Sen (2009: 335), for example, in comparing Rawls and Habermas writes in an unusually (for Sen) ambiguous and indecisive tone (citations omitted):

Democracy is also given a more directly procedural form in Habermas's exposition than in other approaches to democracy, including Rawls's, even though . . . the apparently sharp contrast between Rawlsian and Habermasian uses of procedural features in the process and outcome of public reasoning may be a little deceptive. However, Habermas

has made a truly definitive contribution in clarifying the broad reach of public reasoning and in particular the dual presence in political discourse of both "moral questions of justice" and "instrumental questions of power and coercion."

Amartya Sen's ambivalence about that place of Habermas in contemporary political philosophy should serve as semaphore that further dialogue needs to take place between Post-Westphalians and moral philosophers about the relationship between the *political* and *sociological* understanding of legitimacy and public deliberation and the *moral* idea of justice and democratic deliberation.

HUMAN RIGHTS IN A POST-WESTPHALIAN, PRE-GLOBAL GOVERNMENT WORLD ORDER

Steven J. Kobrin's contribution to the special issue displays the considerable insights and as well as the inherent limitations of the new-wave Post-Westphalian approach. For Kobrin the central challenge of human rights is to bring some sort of order, legitimacy, and effectiveness to the Post-Westphalian political void (Hurrell 1999, Campbell 2006, Weissbrodt and Kruger 2003). He regards the voluntary, non-binding character of Codes of Conduct such as the United Nations Global Compact and the OECD's "Guidelines for Multinational Enterprises" as an inadequate substitute for holding TNCs responsible for human rights violations under either national or international law (Blumberg 2002, Vazquez 2005, Deva 2004, Human Rights Council 2007, Abbott and Snidal 2000, Cragg 2005).

Kobrin (2009: 361) concedes that "states remain the most important and powerful actors and not likely to cede sovereignty to an international institution to impose human rights obligations on TNCs" (see also Bull 1977). Nevertheless, he hopes that in the future a legitimate transnational institution will evolve with power to enforce hard law human rights obligations directly on TNCs (Kinley and Tadaki 2003–2004). Until a global government emerges, Kobrin argues, the human rights obligations of TNCs should be determined within a multi-actor transnational regime comprised of all the relevant actors, i.e., states, firms, NGOs, and international organizations (Krasner 1982). Such a "hybrid" public/private regime would derive its authority and legitimacy from its transparency and inclusiveness (Dryzek 1999). Kobrin suggests that this regime would be the focus of transnational democratic deliberation which would further enhance its authority (Kobrin 2009, Held 2006, McGrew 2003).

What human rights duties do TNCs owe? How much or how little should one expect from them? For Kobrin the answer to these questions does not emerge from *moral reasoning*. Rather they derive from a legitimate and authoritative *political process*. Kobrin offers no formal analysis of why TNCs should—in a moral sense—have human rights duties. He does at one point offer the view that TNCs have "power, authority, and rights" under international law which "should imply duties, obligations, and liabilities" (Kobrin 2009: 355). But that is as far as he reasons on the question of the source of human rights duties for corporations. The legitimacy and authority of human rights norms for TNC derive from a "transparent, inclusive process involving multiple actors" (Kobrin 2009: 367). Thus for Kobrin—as we ob-

served earlier was the case for Scherer, Palazzo and Matten—the concerns of business ethics—in this case the extent of corporate responsibility for human rights—depend crucially for their resolution on a transnational political process. The human rights responsibilities of TNCs are not based on immutable, transcendent moral principles. They are rather a product of “inclusive” supranational political bargaining. In the next section, I will outline a view of TNC human rights responsibility grounded in moral theory and compare this “Fair Share” theory to the Post-Westphalian political perspective.

HUMAN RIGHTS AS MORAL RIGHTS: A “FAIR SHARE” THEORY OF CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS

Human rights are moral rights of such importance that they impose correlative moral duties on actors that reach beyond a nation’s borders (Shue 1996; Nickel 2007). Among philosophers there is considerable debate about many aspects of human rights: whether there is a sound philosophical basis for claiming that human rights exist (Sen 2009), whether invoking human rights is the best way to protect the interests they are intended to protect (Waldron 2000), and which matters deserve to be on the list of rights that qualify as human rights (Cranston 1973).

Human rights transcend national laws. They exist regardless of whether a particular national government in actuality protects those rights. In fact, human rights were conceived after World War II precisely to draw attention to instances when nation states violate or fail to protect what are thought to be the universal rights of all peoples everywhere in the world (Donnelly 2007). The apartheid laws of South Africa and the Nuremberg Laws of Nazi Germany vividly illustrate the idea that even the formally legitimate, democratically enacted laws of a country lose their presumptive validity when they violate human rights. Although human rights proclamations and treaties are the product of nation states, the very idea that individuals have moral rights separate and distinct from those rights recognized under national laws puts human rights squarely in tension with the Westphalian idea of national sovereignty (Donnelly 2002). Moral principles such as human rights trump all law. It does not matter if that law is a municipal bus ordinance that separates riders by race, a national employment law which prohibits certain races and religions from entering particular professions, or even the “legitimate” enactments of a presumptively benign transnational power of the distant future (Donnelly 2004).

Another essential aspect of human rights as moral rights is that they impose correlative moral duties (Shue 1996, Young 2004). In the case of “positive” rights such as the right to shelter or the right to health care the correlative duty to is to provide that good. So, for example, it has been argued that citizens in poor countries have a human right to hiv/aids drugs and pharmaceutical companies have a correlative duty to make those drugs available at affordable prices (Santoro 2006, Leisinger 2009). In the case of “negative” rights such as the right to organize a trade union or the right to free speech the correlative duty requires the duty holder not to interfere with the exercise of that right (Shue 1996).

In addition to violating human rights directly, it is possible to be “complicit” when a third party violates the human rights of a victim. There are two senses in which the term “complicity” is used in this context. In its strictest construction complicity involves some indirect involvement. When TNCs aid, abet, or otherwise further a human rights violation by another actor they are plainly guilty themselves of a human rights violation. An example of this sort of complicity is the case of internet service providers that censor access to sensitive political websites in China and other countries (Smith 2008).

A second type of complicity arises when TNCs fail to fulfill a duty to remedy a human rights violation, *even when they are neither directly nor indirectly involved*. The Sullivan Principles for TNCs in South Africa involved precisely this meaning of complicity. Companies adhering to the Sullivan Principles were expected not only to fulfill their primary duty to reject apartheid in their own operations. They were also expected to “to eliminate laws and customs that impede social, economic, and political justice” (see Williams 2000). There has been considerable debate about the definition and boundaries of this second type of complicity (Clapham and Jerbi 2001, Clapham 2006, Ratner 2001). For example, John Ruggie, the United Nations Special Representative for business and human rights attempts to draw this line by asserting that TNCs are responsible for human rights violations within their “scope of due diligence” (BHRRC 2008, Ruggie 2007). To be fair and just, however, any such effort to define the extent and limitations of TNC human rights complicity must be determined in a way that accords with principles of morality.

One fundamental moral principle relevant to determining how much we can fairly and justly expect of TNCs when it comes to remedying human violations in which they play no direct or indirect part is that such responsibility is collectively shared. The idea that a right creates individual and collective duties among a variety of moral agents is one that has a firm basis in moral discourse (May 1992). When determining the responsibility of one potentially responsible actor, e.g., the TNC, it is only fair to take into account the relative strengths and weaknesses of other actors, most notably national governments, intergovernmental organizations, and NGOs (Santoro 2000, 2009; Brenkert 2009; Spar and LaMure 2003). Indeed, one of the ironies of the Post-Westphalian approach to human rights is that it provides an opportunity for these other actors to participate in an “inclusive” process to legitimate the determination of TNC responsibility, but the fingers all point in one direction! No mention is made of the human rights responsibilities of the other actors participating in this deliberative process. Indeed, TNCs sometimes have limited power and influence precisely where human rights violations are most concentrated, e.g., in China where the spotlight shines on business responsibility for human rights on a broad range of issues from workers rights and internet freedom to the rights to a fair trial and to practice religion freely (Santoro 2000, 2009; Brenkert 2009). Given the limitations of TNC power, other actors must do their “fair share,” and some limitations need to be placed on how much we can fairly expect of TNCs in remedying human rights violations perpetrated by others.

Three actor-specific “Fair Share” factors incorporate the relevant moral principles for determining when a TNC or any other potentially responsible moral

agent is complicit in a human rights violation in which the agent has no direct or indirect involvement (Santoro 2000, 2009): (1) The first is the relationship of the moral agent to the human rights victims. This factor accords with the principle of benevolence first enunciated by David Hume, i.e., the closer the relationship, the stronger the duty is the duty to help that person (Vanterpool 1988). A parent has a stronger duty, for example, to come to the aid of a child than might a total stranger. (2) The potential effectiveness of the moral agent in promoting human rights is another morally relevant factor because it accords with the Kantian principle that "ought implies can," i.e., a given agent is morally obliged to perform a certain action logically presupposes that the agent can perform it (Zimmerman 1996). We don't expect someone who cannot swim to save a drowning person. Thus, the greater chance of being effective, the stronger the correlative human rights duty. (3) Finally, the greater the capacity to withstand economic retaliation or to absorb the costs of an action, the stronger the correlative duty. This is in accord with the more general moral principle that those in a position of wealth and power have a duty to help those in need (Hsieh 2009).

There is no mathematical formula for allocating responsibility for human rights violations perpetrated by others among various potentially actors who have some ability to remedy that violation. However, only after applying the three "fair share" criteria to *every* potentially responsible actor can we fairly and justly determine the responsibility of any one actor and thereby fairly and justly define the meaning of TNC human rights "complicity."

CONCLUSION

As the foregoing analysis illustrates, there are significant differences in how the new-wave Post-Westphalians and more philosophically oriented moral theorists address international business ethics issues. The Post-Westphalians emphasize politics, governance, process, and legitimacy. They are focused on the big picture and deeply embedded in ongoing debates among lawyers, political scientists, and diplomats about the future course of global governance. The challenge for the Post-Westphalians is to determine how TNCs will govern legitimately or be governed democratically in a world of declining national power. By contrast, more philosophically oriented business ethicists begin with basic and immutable moral principles and ask how they apply to the activities of TNCs. As we saw in the case of human rights, there are crucial differences in how these two approaches would define TNC human rights complicity. For the Post-Westphalians this determination stems from an inclusive process where all relevant actors are represented in the discussion. According to the "fair share" moral theory, by contrast, complicity must be determined by the application of fundamental moral principles.

It is unclear how these two distinct approaches will interact in the future. Since Plato and Aristotle the relationship between power politics and moral philosophy has been at issue. As politics globalizes this ancient question takes on greater complexity and renewed relevance. By introducing this discourse, the new-wave Post-Westphalians have reinvigorated the field of international business ethics and

presented a formidable intellectual challenge. While some might view them as a threat to the primacy of moral theory, in fact the Post-Westphalians present moral philosophers with new opportunities. One of the key objectives of ethical inquiry—and this is certainly true of business ethics—has been to help set a moral standard for legal transformation (Hart 1963, Dworkin 1985, Dunfee 1996, Paine 1994). The Post-Westphalians offer a new twist on this traditional goal of business ethics. They raise the possibility that business ethicists can help to inform and guide transnational governance even in its current nascent and transformational stage (Esty 2006). Thanks to the new-wave Post-Westphalians international business ethics has become a much more complex subject and the stakes have been raised considerably.

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