25th IVR World Congress

LAW SCIENCE AND TECHNOLOGY

Frankfurt am Main

15–20 August 2011

Paper Series

No. 014 / 2012

Series B

Human Rights, Democracy; Internet / intellectual property, Globalization

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Stakeholder Jurisprudence: The New Way in Human Rights †

URN: urn:nbn:de:hebis:30:3-248721

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Stakeholder Jurisprudence: The New Way in Human Rights†

Abstract: Making use of United Nations (U.N.) materials and documents, Anja Matwijkiw and Bronik Matwijkiw argue that the organization – in 2004 – converted to a stakeholder jurisprudence for human rights. However, references to "stakeholders" may both be made in the context of narrow stakeholder theory and broad stakeholder theory. Since the U.N. does not specify its commitment by naming the theory it credits for its conversion, the authors of the article embark on a comparative analysis, so as to be able to try the two frameworks for fit. The hypothesis is that it is the philosophy and methodology of broad stakeholder theory that best matches the norms and strategies of the U.N. While this is the case, certain challenges nevertheless present themselves. As a consequence of these, the U.N. has to – as a minimum – take things under renewed consideration.
Keywords: stakeholder theory, human rights, jurisprudence, international law, United Nations

I. From Stakeholder Terminology to Stakeholder Theory

Concerning human rights and the United Nations (U.N.), it is indisputable that the organization has instituted a New Way in general jurisprudence, construed as a set of criteria for officially correct interpretation of the relevant parts of international law.[1] Historically speaking, it is also indisputable that the New Way can be traced back to former Secretary-General Kofi A. Annan's 2004-Report to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.[2] Rather than simply talk about human right-holders and corresponding duty-bearers in terms of individuals, groups, peoples, countries and states, Annan refers expressly to "stakeholders".[3] Furthermore, it appears that stakeholders are differentiated on the basis of "interests" and "goals" which, in turn, establish "constituencies".[4] For example, European Christians and Arabic Muslims may belong to the same (stakeholder) constituency through the

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The two authors would like to thank, respectively, Indiana University-Bloomington and Southeast Missouri State University for funding towards participation in IVR's 25th World Congress, Goethe Universität, Frankfurt am Main, Germany, 15-20 August 2011.
[1] In addition to standard international human rights law, the relevant parts encompass international humanitarian law, international criminal law, and customary international law.
[2] Kofi A. Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (23 August, 2004).
[3] Annan (note 2), 6-9.
[4] Idem.

fact that they both perceive the realization of non-discriminatory practices in the political domain as important. Consequently, status as stakeholders is independent of culture, nationality and religion, and for that matter, all other characteristics that can be used to describe the European Christians and Arabic Muslims, who have a common stake in the kind of equality in question. It follows that the stakeholder terminology, in one sense, functions as an analogy to the way in which human rights already apply under the auspices of the U.N., namely irrespective of contingent facts, such as culture, nationality and religion. However, a dis-analogy arises on account of the stakeholder terminology's transformative potential in so far as the implied interests may go beyond those that are protected by the existing body of international human rights norms. As a matter of right, an increase in equality may be the goal and, for this reason, the implied change may also create a mismatch with representative democracy, as well as any other form of government that is currently covered by the articles that specify the *conditio sine qua non* for participatory politics.[5] Talk about stakeholders, therefore, may be a way of transcending the status quo and, at the same time, raising the bar. That granted, stakeholders are not necessarily gaining a direct advantage for themselves. As it happens, stakeholders may be change-facilitators for others because without "their progress", our own security in terms of fully recognized and protected rights could be threatened. What is more, there are different opinions about the legitimacy of interests and, by extension, about stakeholders. This goes to show, of course, that the use of the stakeholder terminology is not neutral. Instead, it is determined by theory. Here it should be noted that two main types can be distinguished, respectively narrow and broad stakeholder theory.

Given that Annan and his administration updated the conceptual framework of the U.N. by adopting the stakeholder terminology without stating anything about a narrow or broad affiliation, the organization's application is naïve to the extent that the narrow/broad distinction reflects a difference of substance. Notwithstanding, the U.N. appears to borrow primarily from the methodology and philosophy of broad stakeholder theory.[6]

[5] According to the International Covenant on Civil and Political Rights, direct democracy is also an option. In either case, the right to vote is restricted to citizens, whereas advocates of an increase in equality may argue that, inter alia, permanent and tax-paying legal residents should also be included. See the International Covenant on Civil and Political Rights [ICCPR], U.N. Doc. A/6316 (December 16, 1966), at article 25(a).

[6] In particular, consideration of those who are "affected" by a given state of affairs and the need to accomplish "balance" are key elements of broad stakeholder theory. See Annan (note 2), 7, 9, 14. See also text infra at *III. Broad Stakeholder theory*.

In the opinion of the two authors of this article, the above hypothesis is empirically verifiable on the basis of a comparison of, on the one hand, the two kinds of stakeholder theory and, on the other hand, the norms of the U.N.

While the New Way can be shown to match the main premises of broad stakeholder theory, certain challenges remain. Some of these are internal. Others are external, although these too are bound to have consequences for the U.N.'s image. For example, it is a fact that broad stakeholder theorists – in 2010 – took steps towards value minimalism. The U.N., therefore, has to engage in critical reflection that aims at asking crucial questions, such as whether the organization should choose another jurisprudence path. After all, stakeholder theory functions as a set of guidelines or, borrowing the vocabulary of Lon L. Fuller, direction posts. The additional fact that Annan's successor as Secretary-General, Ban Ki-Moon, talks more frequently and elaborately about stakeholders than he himself did during his leadership, makes the need for answers rather pressing.[7]

But, first things first. Before presenting the possible reasons for a discontinuation of the U.N.'s stakeholder way, an account of the two theoretical outlooks is necessary. As for this, it should be emphasized that both narrow and broad stakeholder theory was designed, developed and defended in the context of business management, with a particular view to recommending effective strategies for the purpose of accomplishing the mission of a given firm or corporation. Furthermore, because broad stakeholder theory is, at least in part, advanced as an alternative to its narrow counterpart, it makes sense to begin with the various assumptions that enlighten and guide narrow stakeholder theory and, thereafter, proceed to broad stakeholder theory while highlighting those components that create the most contrast.

II. Narrow Stakeholder Theory

Typically, narrow stakeholder theorists subscribe to the classical model of Corporate Social Responsibility (CSR). Therefore, like Milton Friedman, narrow stakeholder theorists take a radical "market-based approach".[8] This precludes a "public good" defense of market regulation because such a strategy violates the separation of business and government which, in turn, is the axiomatic premise for laissez-faire capitalism as opposed to socialism as an instance of

[7] Ban Ki-Moon makes reference to, inter alia, "a broad range of stakeholders", "international stakeholders", "a multi-stakeholder framework", "concerned stakeholders", "major stakeholders", "relevant stakeholders", and so forth. See Ban Ki-Moon, *the United Nations Mission in Sudan*, U.N.Doc. S/2009/545 (October 21, 2009), 35, 38; *Twenty-Third Progress Report on The United Nations Mission in Liberia*, U.N.Doc. S/2001/497, 17, 24, 33, 73.

[8] R. Edward Freeman et al, *Stakeholder Theory: The State of the Art*, 2010, 29.

totalitarianism.[9] As a consequence, the pursuit of profit cannot be immoral. To the contrary, it is a measure for failed state prevention. If private for-profit businesses, be they small firms or large corporations, are not allowed to compete with each other, the implied loss of freedom translates into oppression and tyranny (cf. socialism as an instance of totalitarianism). Another consequence consists in the incommensurability of freedom and welfare, meaning that the ideal political system presents itself as the so-called minimal state that functions to "protect our freedom both from the enemies outside our gates and from our fellow-citizens…[and to] preserve law and order", in addition to maintaining the marketplace.[10] Although the marketplace is internally directed by four impersonal forces, namely the freedom to rank-order wants so as to establish preferences, the freedom to bargain and contract without intervention, the freedom to buy and/or sell products or services at a price that is negotiated and settled by the parties to the transaction, and the freedom to pursue one's own self-interest as an individual, the underlying structure restricts participation in that same marketplace, in accordance with affordability.

It follows that recognition and, ipso facto, status as stakeholders is reserved for people with monetary interests at stake. That granted, it is important to stress that there are primary and secondary stakeholders. Within the constituency of traditional market participants, owners of stock or shares are ascribed primacy in comparison to everybody else because the continued survival of a business depends on their investment.[11] Given that the assumption is that the means of production are privately owned (cf. capitalism), it is also true to say that stockholders are the parties with the most at stake. For this reason, they are owed more consideration than all other stakeholders, be they internal (e.g., workers and their salary) or external ones (e.g., consumers who are assumed to have access to alternatives in a marketplace that bans monopolies).

As agents for stockholders, managers are cut off from any conceivable conflicts of interest. On the premises of narrow stakeholder theory, CSR boils down to a fiduciary obligation to conduct the affairs of the business in accordance with the desire of the stockholders which, following Friedman, "typically is to make as much money as possible".[12] That which is necessary for this goal is also that which is fair or just. For example, if profit-maximization entails maximization of productivity and efficiency and, with this, rationalization of the production

[9] Milton Friedman, *Capitalism and Freedom [CF]*, 40th ed. 1992, 133, 140; The Social Responsibility of Business Is to Increase Its Profits, New York Times Magazine, September 13, 1970, (reprinted) in Joseph R. DesJardins and John J. McCall, *Contemporary Issues in Business Ethics [CIBE]*, 2005, 7-11.
[10] Friedman (note 9) [*CF*], 2.
[11] Abe J. Zakhem et al, *Stakeholder Theory: Essential Readings in Ethical Leadership and Management*, 2008, 9.
[12] Friedman (note 9) [*CIBE*], 3, 8.

mode, then this strategic measure should be implemented regardless of the consequences to blue-collar employees and their (alleged) "rights" to work, to unionize, to collective bargaining, to strike, etc. Such socialist norms undermine the fabric of a free society by forcing businesses to associate and assemble with third parties they would have preferred *not* to engage in discussion and conflict-resolution with, if they had had a choice. Even if critics enter social utility as a stake in the narrow entitlement equation, managers continue to be bound by their internal and exclusive constituency. After all, managers are hired by the business and not the government. This does not mean that public officials are encouraged to impose utilitarianism as a measurement for businesses. As a position that makes sacrificing the rights of individuals both permissible and required, utilitarianism is just as totalitarian as socialism. This is one reason why narrow stakeholder theory dismisses a public good defense of market regulation. Another has to do with the belief that an aggressive growth and expansion philosophy, however short-term, will in fact benefit the majority of citizens, inter alia, through private job creation (cf. the so-called trickle-down effect).

In the process of putting business interests above all other claims to consideration, managers have to, however, accept three "rules of the game", that is, for "Doing Business as Usual" (cf. profit-maximization).[13] First, they should obey the law of the state. Second, they should avoid fraud and deception. And, third, managers are expected to respect ethical customs. That said, some commentators object that the players are given mixed signals. The theoretical dynamics are such that managers, *in addition to* the duty to avoid fraud and deception, can be said to have a "responsibility to 'push the envelope' of legality in pursuit of profits".[14] It follows that business scandals are failed attempts to secure a monetary gain in a way that falls *within* narrowly construed legal margins. As a consequence of the implied pressure to "get it right", pushing the envelope manifests itself as a matter of risk assessment and cost-benefit analysis *rather than* a matter of ethics. That said, if "Everybody is doing it" as a matter of business practice, no (moral) crime has been committed.

Although the narrow for-profit paradigm is consistent with legal positivism, there is an in-built tension. Respect for the law and "pushing the envelope of legality" are mutually exclusive on the premises of the general jurisprudence position in question. Furthermore, judges are more likely than not to protect risk-takers because of the strict hands-off policy that follows in the

[13] Friedman (note 9) [*CF*], 27.
[14] DesJardins and McCall (note 9) [*CIBE*], 21.

wake of the separation of business and government, as endorsed by narrow stakeholder theory. Since a penumbra-ruling will be a question of making new law rather than following the law that is, positivist-minded judges can hardly be said to have an incentive to, as it were, inflict an opinion that discords with the ideological climate.

To further protect against undue interference, morality imputes distinctions that not only translate into relativism (cf. respect for customs), but also subjectivism.[15] Applied to the marketplace, the two positions entail that "There should not be any censorship of preferences". To allow some preferences and not others is tantamount to withholding freedom of thought and, more generally speaking, autonomy from individuals or groups of individuals with whom the powerful rulers happen to disagree.

No matter how much a representative democracy preaches inclusiveness, it cannot rival the marketplace. This functions as a strategy for emancipation in terms of self-determination.[16] In this way, the marketplace is a testimony *for* plurality and *against* uniformity. However different, each individual is in a position to pursue *what he most wants*, whereas talk about needs is for arrogant politicians, who issue decrees that are (allegedly) "ethically justified" by paternalism. The last-mentioned position not only clashes with relativism and subjectivism whereby needs are treated as subcategories of wants; it is also in conflict with classical liberalism as a way that maximizes freedom as long as actions do not inflict harm on other people or deprive them of their equal freedom. That granted, the two restrictions, which summarize the traditional Principle of Individual Responsibility, are pushed toward an extreme pro-autonomy notion in so far as ethics violations, in the final analysis, amount to instances of freedom-deprivation, that is, to either interference with the perception of harm – for me (cf. subjectivism) or to interference with the perception of harm – for us (cf. relativism).[17] The point is that it is inappropriate, if not offensive, to purport to know what is in the best interest of others. Furthermore, it is equally offensive to make others financially responsible for oneself or for extensions of oneself (cf. family), to make strangers pay for, say, one's healthcare through mandatory taxation. By definition, therefore, non-paying consumers must be disqualified from any stakeholder constituency. What is more, mandatory taxation violates the marketplace strategy for interaction and transaction, viz. voluntary cooperation.[18] After this, the worst-off are advised to make (better) use of the same

[15] Friedman (note 9) [*CIBE*], 10.
[16] Friedman (note 9) [*CF*], 21.
[17] Ibid., at 3.
[18] Ibid., at 13, 33.

opportunity that everybody else relies on, namely open competition on the basis of skills. On the premises of narrow stakeholder theory, the marketplace is a meritocracy that, therefore, will pay monetary compensation in accordance with desert, as measured either on the basis of risk or effort.

With self-sufficiency as the logical corollary to self-determination, the destiny of economic and social rights is determined beforehand, *with the exception of* claims that translate into market freedoms. Philosophically and methodologically, narrow stakeholder theory is geared towards the kind of rights-analysis that emphasizes discretionary powers, thereby equating rights *stricto sensu* with status as, borrowing the words of Herbert L.A. Hart, a "small-scale sovereign".[19] Exercising his power, the small-scale sovereign in effect controls the correlative duties which, analytically speaking, are prior to the rights (cf. the correlativity thesis).[20] In the event of scarcity, however, there is no freedom to choose to have one's right fulfilled by enforcing the duty to render aid and assistance. Even if the resources are available here and now at time T, the circumstances may change tomorrow.[21] To talk about "freedom from want" as a matter of right is simply nonsense. As a general premise, it holds that economics determine ethics, that is, which rights can exist in reality (cf. economic realism).

In the light of this, Friedman's position can be classified as libertarianism for the following reasons. First, wrong-doing is tantamount to interference with the freedom of others since there is no objective standard for harm (or related concepts, i.e., need and best interest), a fact which can also be extended to utilitarianism and which therefore makes it, if possible, even more inexcusable to violate the rights of stockholders for generalized consideration. Besides market freedoms, the rights-terminology is limited to civil/political rights and, even more narrowly for basic rights, to life, liberty and security as negative rights *on condition* that the arrangement is the outcome of voluntary corporation. The point is that meta-rights to negotiate the terms for transaction in accordance with preferences and with a mutual benefit in mind *must always* be accommodated.[22] Consequently, the separation of law and morality is sharp and significant.

[19] Herbert L. A. Hart, Bentham on Legal Rights, in *Oxford Essays in Jurisprudence,* 1973, 192.
[20] The correlativity thesis alone says that "In order for A to have a claim-right, there must – as a logically necessary condition – exist at least one other person or party, B, who has a duty toward A". See Joel Feinberg, *Social Philosophy*, 1973, 61.
[21] Ibid., 84-97.
[22] Milton Friedman and Rose D. Friedman, *Free to Choose: A Personal Statement,* 1979, xv, 3.
Making a mutual benefit the goal of a transaction is not inconsistent with the pursuit of rational self-interest as a market force. It is, per Adam Smith's words, "my own gain" that motivates the action of each party in the marketplace. While there, the individual is not alone, though. Being two instead of one, the assumption is that no

Second, even if (market and civil/political) rights translate into a compatriot version of the concentric-circle conception, meaning that it is nationality that ultimately sanctions the rights in question (cf. legal positivism), the state or government has no jurisdiction over the assets that belong to individual citizens. A redistribution of resources is wrong. Consequently, the issue of freedom versus welfare boils down to a dichotomy between justice (= a capitalist free society) and injustice (= a socialist welfare state). Within the minimal state, the arrangement coincides with the program of privatization, deregulation and decentralization (with the exception of laws that maintain the free marketplace). Regarding inter-state affairs, the commitment may be either to self-defense in the event of an attack or to a preemptive strike. National Security is not necessarily consistent with peace although this is the ultimate goal because only peace is conducive to "our continued survival, being who we are". Whether "they", that is, the enemy also secure their post-conflict existence is not our concern or, perhaps more to the point, "our business". The point is that dominion and imperialist conquest is consistent with the narrow paradigm.

III. Broad Stakeholder Theory

Whether the adversarial zero-sum game is played within politics or business, exponents of broad stakeholder theory criticize it as being counterproductive from the point of view of pragmatism, arguing that diplomatic conflict-resolution offers a long-term protective measure by minimizing, if not eliminating, threats to social viability through revenge-taking, which then calls for retaliation, *in principium ad infinitum* (thereby creating a perpetual state of war).[23] For the same reason, broad stakeholder theory emphasizes compromise, just as it presupposes a notion of interdependency.[24] At the level of idealism, interdependency also functions to explain why all interests are, at least as a starting point, treated as equal and, consequently, deserving of the same consideration. In this way, CSR or, to broaden the application scope, the responsibility of leadership in general consists, first and foremost, in the duty to balance the different interests of the different stakeholder constituencies, with a specific view to benefiting everybody.[25] However, in the event of a conflict, external stakeholders may present themselves as the primary ones, although they have no monetary interests at stake. The rationale for this owes, in part, to the

exchange, that is interaction in the form of transaction, will take place until both parties are satisfied.
[23] R. Edward Freeman, *Strategic Management: A Stakeholder Approach [SM]*, 1984), 19.
[24] Ibid., at 58, 75.
[25] Ibid., at 53, 57.
Note that the benefit is expressed in terms of need-satisfaction. See ibid., at 75.

definition of the single most central concept, namely that of stakeholders. According to the premises of the broad stakeholder theory, it holds that anyone who affects or is affected by the activities of X, be it a business or a large-scale social entity, such as a nation state, qualifies as a stakeholder.[26] But, because the legitimacy of the implied interests is measured by their importance which, in turn, is rank-ordered by basicness from the point of view of humanity (cf. humanism), the idea and indeed ideology of granting virtually unrestricted freedom *in return for* an absence of security in the form of recognition and protection of economic/social human rights to, among other things, nutritious food, unpolluted water and adequate clothing should be dismissed. Using the logic of extensionality for an account of basic (human) needs, broad stakeholder theorists can also show that while non-basic (cultural and/or individual) needs – just like basic needs – may assume certain absolutist features, only the last-mentioned count as invariant facts genetically speaking, meaning that the ultimate source of the needs in question is universal and objective necessities, as opposed to wants (cf. cultural needs) or special conditions for functioning (cf. individual needs).[27] Furthermore, advocates of broad stakeholder theory endorse a distinction between, on the one hand, conventional and individual morality, and, on the other hand, morality proper. More precisely, they argue that in order to be deemed ethical, relativism and subjectivism and, for that matter, utilitarianism must not jeopardize conformity with the fundamental principles that help generate human rights on the basis of an assumption of the intrinsic value or worth of humanity simpliciter, i.e., humanity as a concept that is unmediated by rationality and autonomy. In addition to the Harm Principle, the broad stakeholder theory lists the Respect Principle, which prescribes that "You should treat others as ends, and not merely as means".[28] As a consequence, the weight-scales are, once again, tilted in favor of welfare, a fair minimum wage, non-exploitative practices, etc., although such measures do not have to be at the expense of freedom. As alluded to earlier, the nature of the relationship between economic/social human rights and civil/political human rights is complex. Welfare affects freedom, but freedom also affects welfare to the extent that this is causally connected with outcomes. For example, the system may obstruct choices that would otherwise promote an

[26] Ibid., at 25.
[27] David Wiggins, *Needs, Values, Truth*, 1998, 10.
[28] William M. Evan & R. Edward Freeman, A Stakeholder Theory of the Modern Corporation: Kantian Capitalism, in *Ethical Theory and Business*, 3rd ed. 1988, 100-103.
Note that while the Harm Principle is adopted from John Stuart Mill, the Respect Principle overlaps with Immanuel Kant's, Principle of Humanity. See John Stuart Mill, On Liberty, in *On Liberty and Other Essays*, ed. John Gray, 1991, 104-128; Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. and trans. Mary Gregor, 1998, 36-38

individual's social/economic security. That granted, serious challenges remain in the marketplace where affordability prevails as the narrow access criterion. In the case of the media and election campaigns, having to pay money for broadcasting time (disrespectfully) cancels the rights of poor candidates. Yet another challenge, which draws on the link between freedom and recognizing others as ends in their own right, pertains to a strict law and order society. On the premises of broad stakeholder theory, this is inseparable from a failed state by virtue of restricting freedom too much. However, such a conclusion imputes no de-emphasis on welfare as a justice issue. Accusations of state-sanctioned terrorism would be denied by liberals and libertarians outside the domain of life, liberty and security as traditionally interpreted, but the existence of a class society that implements a strategy of economic violence would suffice as counterproof. Given that the harm is inflicted by the structures of society, the Principle of Individual Responsibility is inadequate for the same reason. The Principle of State Responsibility should also be made to matter. Broadening the premise of interdependency to the global state of affairs, transnational duties present themselves whenever a given nation state is unable and/or unwilling to respond to the fair demands of its own citizenry. If one of the building blocks that comprise the international society collapses, the relevant state failure may adversely affect everybody else. As far as rights are concerned, however, these require appropriate intentions. Therefore, in the process of rendering aid and assistance, the leadership has to accommodate Neil MacCormick's Modern Version of the Interest Theory of Rights whereby the concept of a benefit is not a sufficient condition to constitute a claim-right. After this, it holds that the object of a right must also promote the good of the intended beneficiary as an end. Therefore, in addition to harm-avoidance, rights-recognition incorporates respect.[29] Whether it is practically possible to fulfill the correlative duties in the real world is something that depends on the circumstances, but this consideration is *post facto*. It cannot affect rights-recognition. The broader point is that references to economic realism are not driven by logic but instead by ideology.[30] For the same reason, the

[29] Neil MacCormick, *Legal Right and Social Democracy*, 1982, 154-166.

[30] The Modern Interest Theory of Rights not only refutes the analytical correlativity thesis but also the doctrine that rights, for their existence, depend on the practical possibility of their fulfillment. Narrow stakeholder theory proceeds *as if* there is a synthesis between the two views, more precisely, *as if* the analytical correlativity thesis commits theorists to economic realism. In turn, the alleged synthesis constitutes the basis for the distinction between civil/political rights and economic/social rights in terms of negative and positive rights. Realists and liberals/libertarians alike either preclude economic/social rights or make these secondary *because* they are positive whereas civil/political rights are real or primary *because* they are negative. Logically, however, this is untenable. It does not make sense to argue that duties are prior to rights. If anything, rights are reasons for duties as consequences.

incommensurability hypothesis that follows, that it is not possible to secure both freedom and welfare, can be dispelled as a narrow anti-humanitarian myth.

The criteria that underpin broad stakeholder theorists' approach preclude totalitarianism, welfare-oppressive versions of capitalism and unethical forms of socialism. The latter is to say that if the object of social/economic human rights is not provided for the right reason, i.e., for the sake of the right-holders themselves, welfare reduces to a form of degradation of the value of humanity. At the same time, belonging among the most important cum basic rights, it is impermissible to not provide the object of social/economic human rights to others *unless* those others participate in the decision.[31] On the one hand, therefore, the premise is that all stakeholders have inalienable rights, thereby making the implicit social contract consistent with natural law theory. On the other hand, however, that same conclusion is counteracted by a notion of balanced judgment which is consistent with authorizing (self-regarding) basic rights-violations, thereby creating a serious theoretical tension.

IV. From Business Management to International Law

The link between the different types of stakeholder theory and business management is thought-provoking for a number of reasons. Besides the controversies that appear in the course of analysis and which arguably point to deep-rooted philosophical and methodological differences, some commentators may argue that the adoption of a framework that derives from the for-profit domain misfires in the case of a not-for-profit organization like the U.N. which – according to its own mission statement – works to promote "peace and security for mankind".[32] Setting that aside for the moment, the next question is whether the premises that best match the declared human rights, goals and strategies of the U.N. fall under narrow or, alternatively, broad stakeholder theory. This is important. Unless cognizant of the correct interpretation of international law, U.N. managers cannot be expected to conduct the affairs of the global partnership in the way that they should while acting in their professional capacity. However, while the U.N.'s commitment can only be identified indirectly, the organization can nevertheless be shown to be taking sides in a sufficiently unambiguous and convincing manner to substantiate the claim that the New Way

[31] William M. Evan and R. Edward Freeman, A Stakeholder Theory of the Modern Corporation: Kantian Capitalism, in *Ethical Theory and Business*, ed. T. Beauchamp and N. Bowie, 4th ed., 1993, 75-93, reprinted in DesJardins and McCall (note 9) [*CIBE*], 76-84, at 79.

[32] Memorandum on G.A. Res. 177 (II), *The Charter and Judgment of the Nűrnberg Tribunal: History and Analysis [CJNT]*, U.N. Doc. A/CN.4/5 (March 3,1949), 11.

constitutes a broad stakeholder jurisprudence, if only in a rudimentary form, subject to further conceptual and normative evolution in the future.

Transferring the narrow/broad comparison to the U.N., the following points warrant attention. First, the relevant body of norms is consistent with both capitalism and socialism, or a combination of these (cf. mixed market economy) according to the parts of the group-right to self-determination whereby all peoples may "freely pursue their economic, social [and cultural] development" and, furthermore, "freely dispose of their natural wealth and resources".[33]

That granted, some individual rights imply certain political-economic principles, inter alia, the right to own property and not to be arbitrarily deprived of it; the right to work and to be free to choose employment; to enjoy trade union protection against a powerful employer, private or public; and to be protected against unemployment or its consequences. Consequently, international law tests negative to laissez-faire economics. It contains not only limitations precluding government from invading civil/political rights, but positive obligations for government to promote economic/social rights, a broad cum comprehensive conception in other words. Citing article 22 of the Universal Declaration of Human Rights, the realization of economic/social rights is "indispensable" for the dignity of the human person and the free development of his personality.[34] Furthermore, just like customary international law (cf. the Universal Declaration of Human Rights), international treaty law (cf. the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)) presupposes the doctrine of interdependency and, expressis verbis, links dignity with membership of "the human family".[35] While speciesism is inconsistent with the philosophy of Immanuel Kant, it is still correct to say that credentials-checking for basic rights in terms of human rights entails the Respect Principle, as advanced by the Modern Interest Theory of Rights. Furthermore, regarding basic needs, prominent legal scholars argue that these are reasons why the implicit social contract applies to international law, in addition to national law.[36] That said, some rights founded on basic needs belong to the class of civil/political rights and *not* economic/social rights. This is true of, for example, the right not to be tortured. To subject terrorists to water boarding may be an effective interrogation method that serves the common

[33] The International Covenant on Economic, Social and Cultural Rights [ICESCR], U.N. Doc. A/6316 (December 16, 1966), at article 1(1)(2).
[34] The Universal Declaration of Human Rights [UDHR], U.N. Doc A/810 (1948), 71.
[35] ICCPR (note 5), at Preamble; ICESCR (note 33), at Preamble.
[36] Louis Henkin et al, *Human Rights*, 1999, 285.

good, but such a utilitarian argument ignores the stake in humanity simpliciter which is what matters pertaining to justice at the level of rights-recognition.

Notwithstanding, international law makes room for utilitarianism, in addition to the idea of individual human rights. Social utility, however, cannot trump dignity because social utility, again expressis verbis, merely restricts the "exercise of rights".[37] The time that philosophers have devoted to the task of resolving the "conflict" could have been saved if they had realized the Ultimate Logical Implication of the analysis of rights, namely the distinction between rights-recognition and rights-protection, which the broad stakeholder theory relies upon. From the point of view of rights-recognition, utilitarianism misses the mark. On a more positive note, utilitarianism is a tool for the promotion of the modern welfare state. Consequently, it is unwarranted to argue that there is no benefit for the individual under that type of teleological ethics simply because the collective state of affairs is not accomplished for the sake of *that particular individual*.

As it happens, international hard law reconfirms the unconditional basic rights-conception whereby rights-recognition and rights-protection must be separated in the case of economic/social rights. Under the ICESCR, the existence of these rights is *not* mediated by real-world facts about resources and fulfillment. This does not mean that the U.N. is legally or ethically unconcerned about whether the right-holders receive the goods which the rights entitle them to. To the contrary, the notion of duties plays a central role in conjunction with rights-protection through its promissory language on behalf of the states parties. The ICESCR states that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[38]

The steps in question cover all aspects of rights-protection, from implementation into national law, to enforcement in national as well as international law, and fulfillment. Aiming at full realization, furthermore, social/economic rights *generate obligations* to provide individuals with the substance of the relevant rights in accordance with the circumstances. If the goal, that is,

[37] ICCPR (note 5), at articles 21 and 22(2).
Note that the rights not to be subjected to torture, genocide and slavery are exempt. See ibid., at article 4(2).
[38] ICESCR (note 33), at article 2(1).

rights-fulfillment, cannot be realized here and now at time T (and the assumption is that it cannot in many places), human rights generate – in the second instance – obligations to try to create, step by step and through specific programs, the conditions whereby it *becomes possible* (in the future) to give people that to which the rights are rights. It is these instrumental meta-obligations which are intrinsic to the ICESCR's notion of programmatic obligations.[39]

The synthesis of civil/political and economic/social rights is something that pushes towards a double-aspect notion of peace, security and justice. In stakeholder terms, the law combines narrow freedom and broad welfare. At the same time, the Bifurcation Principle that conceptually separates civil/political rights and economic/social rights is a uniquely narrow feature. Furthermore, the measures of protection that accompany economic/social rights are comparatively weak. Therefore, there is a certain liberal and realist bias in force. It is not strong enough, though, to challenge the holistic philosophy of the U.N. With the Millennium Development Goals, there is even more reason to downplay the narrow features as a legacy from the Cold War era, meaning that the U.N. is now clearly geared towards the objective of remedying any remaining imbalance in practice.[40]

The U.N.'s strategies constitute another testing stone. It appears that the leap from business management to international law requires methodological adjustments. E.g., the U.N. does not approach their constituency with a view to dividends on stock or profit-maximization. Furthermore, as a not-for-profit organization, the stakeholders that first and foremost deserve consideration are the victims of serious human rights violations, the worst-off in other words. Regarding these, jus cogens crimes make a narrow analogy to customer satisfaction both superfluous and offensive. The U.N. simply cannot provide the remedies for restoration unless, of course, it is able to un-do the original situation – something which is not in the organization's power. That said, the emphasis on prevention as a strategy can be described as a kind of compromise. For example, while it is not possible to bring human beings back from the dead, the loss of life can be avoided through security-enhancing measures, thereby protecting a priceless stake.

Interestingly enough, Annan, mixes traditional and modern views in a fashion that does not upset the organization's amicable policy, which constitutes another broad feature. To the extent that he reports on the assumption that the U.N. exists to promote peace and security and that

[39] Theodor Meron, *Human Rights in International Law*, 1984, 209.
[40] Note that he Millennium Development Goals highlight the right to not live in extreme poverty. See Annan, *We The Peoples: The Role of the United Nations in the 21st. Century*, 2000.

justice is instrumental for peace and justice, the view is traditional. By viewing economic inequities as "root causes" of the failed state, however, Annan makes it hold that a stakeholder deal is void, perhaps even fraudulent, without protection of economic/social rights.[41] By virtue of the Great Emphasis he puts on these, Annan must be said to have socialized the mission with a progressive brush stroke that goes beyond the (broad) interdependency clause for rights. However, while economic/social rights should be accommodated as constants in the justice equation, no politically radical strategies for change are proposed, that is, ones that would actually tilt the weight-scales between wealthy and poor countries. To accomplish this, Annan would have had to, as a minimum, address the fact that, according to international law, cooperation is based "upon the principle of mutual benefit".[42] Therefore, if the requirement – on behalf of richer states – is that there is something monetary "in it" for us, rendering aid and assistance reduces to a narrow business deal. Rather than a revolutionary approach, Annan could have restricted the meaning of "mutual benefit" to "protection of reciprocal stakes" and, consequently, avoided the risk of capitalist greed in those post-conflict situations that typically give rise to marketplace bargaining involving profit in return for humanity. Checks-and-balances and, for the purpose of regulating the exchange or transaction in accordance with moral principles, income limits for financial institutions or private contractors who operate in post-conflict situations would have been a requirement, though. To take advantage of humanitarian aid and assistance is to contradict that same effort.

V. Challenges for Stakeholder Jurisprudence

On comparison, broad stakeholder theory receives a higher compatibility score with the U.N. than the narrow alternative. The application of the stakeholder terminology (cf. talk about stakeholders), therefore, calls for a philosophy and a methodology of a specific kind. More precisely, it calls for ideas that are anchored in humanism and universalism and strategies that put pragmatism in the service of idealism, meaning that business, law, government, politics, etc. should use human rights ethics as a measurement for legitimacy.

As a general jurisprudence parameter for international law, broad stakeholder theory entails, inter alia, that so-called realpolitik should be banned. According to M. Cherif Bassiouni, realpolitik is first and foremost characterized as a willingness to sacrifice justice for the sake of

[41] Annan (note 2), 3.
[42] ICCPR (note 5), at article 1(2).

promoting peace, an approach that narrow stakeholder theorists embrace.[43] Besides the (pragmatic) ineffectiveness cum impossibility of securing long-term peace without justice, the reasoning also draws on (idealistic) morality because accountability for past state failure is a goal by analogy to a Kantian imperative. It follows that "justice must be done" has to be accommodated as a non-negotiable constant in the post-conflict equation. That granted, the equation does contain some variables, first and foremost, the preferences of victims. Once again, however, the pull of the argument is more about idealism than pragmatism. Morally speaking, it is important to prevent secondary victimization, which would be the outcome in the event that the reasonable demands of victims are ignored. It should be added that the category of "reasonable demands" may include subjective and/or relative preferences, which still comply with the requirements of humanism and universalism. Furthermore, given that international law allows certain loopholes that make fairness practically impossible, the U.N. comes under an obligation to close these. If biologists like Frans de Waal are correct that fairness and empathy come naturally for primates (human as well as non-human), the existing law has to be deemed a somewhat backwards technology which the organization must bring up to date, up to the relevant evolutionary stage that is.[44] Finally, the interdependency of economic systems in a global context should result in more than appeals to international solidarity.[45] A "conscience of mankind" forum like the U.N. would not be able to deliver broad stakeholder responses to reality unless the membership is pre-committed as regards those values that bind at the level of humanity, dignity, respect, etc.

Because a prior and voluntary surrender of national sovereignty, in the form of ratification or accession to a treaty, is not a requirement for the broad notion of bindingness, customary international law can be ascribed status as law proper and therefore there is no sharp or significant distinction between law and morality, in contradistinction to the premises of legal positivism. At the same time, it is true that the normal practice of states, the traditional source of customary international law, is not something which per se can secure morality. Even if all states adhere to, for example, norm N as a legal fact, N may still be wrong as a moral norm. After this,

[43] M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, in *Law and Contemporary Problems*, 1996, 9, 11-13; Searching for Justice in the World of Realpolitik, in *Pace International Law Review*, 2000, 213, 214; Combating Impunity for International Crimes, in *University of Colorado Law Review*, 2000, 409.
[44] Frans de Waal, *The Age of Empathy: Nature's Lessons for a Kinder Society*, 2009.
[45] For appeals to international solidarity, see Henkin et al (note 36), 284-286; Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, 2011, 16, 740.

the link between broad stakeholder theory and natural law means that the normal practice of states must give way to morality, to justice in other words.

Unfortunately, recent developments in broad stakeholder theory put the credibility of the U.N.'s new jurisprudence parameter at a serious risk. While it remains true that the conceptual and normative framework contains an internal tension by virtue of the fact that it allows the individual to agree to a zero-protection situation, the recent developments in question qualify as clear instances of selling out to the other side.[46] Certainly, according to James A. Stieb, broad stakeholder theory is "more libertarian and free-market than is often thought".[47] As a consequence, it is bound to push the future of international law in a certain direction.

The problem is that the "father of (broad) stakeholder theory", namely R. Edward Freeman set out – in 2010 – to correct "misunderstandings and misuses of stakeholder theory".[48] One of these consists in the absence of a distinction between comprehensive moral doctrine and stakeholder theory. In other words, it is incorrect (after all) to interpret broad stakeholder theory as synonymous with a program of principled management. In this manner, Freeman indisputably broadens the distance between stakeholder theory and the mission of the U.N., namely to promote peace and security *through* justice, through recognition and protection of civil/political as well as economic/social human rights. Furthermore, stakeholder theory, so Freeman insists, "contains no requirement that the law be changed… to practice it [stakeholder theory]" for there is apparently enough of a fit between the two spheres to make this superfluous.[49] It follows that stakeholder theorists – in 2010 – are deliberately choosing to follow a pragmatic agenda, away from any affiliation with reformists. In addition, stakeholder theory anno 2010 presupposes "a system of voluntary exchange for individuals within a capitalist economy", a fact that makes it absurd to even consider other systems because "it is decidedly not a form of socialism".[50]

Needless to say, the above-mentioned recent developments cannot but create so much common ground with the narrow version that the distinction between them seems to disappear.

In the light of this, the question of whether the U.N. should discontinue any affiliation presents itself, especially since Annan's successor as Secretary-General of the U.N., Ban Ki-Moon talks more frequently and elaborately about stakeholders.[51]

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[46] For the internal tension that stems from authorizing (self-regarding) basic rights-violations, see text infra at 8.
[47] James A. Stieb, Assessing Freeman's Stakeholder Theory, in *Journal of Business Ethics*, 2009, 401-414.
[48] Freeman et al (note 8), 226.
[49] Ibid., at 222-230.
[50] Ibid., at 230.
[51] See note 7.

Weighing the pros and cons is a process that may lead to two outcomes. Either the U.N. chooses to reject stakeholder theory, arguing that too much is at stake for the organization. For example, justice defined as a concept of right that is not necessarily determined by legally codified norms has historically functioned as a platform for substantial and positive change.[52] Therefore, it does not make sense for U.N. justice managers to accept set-backs to their own ethics-enhancing methodology. Alternatively, the organization decides to separate stakeholder theory and business management theory, so as to be able to build on the original framework, which Freeman outlined in 1984. After all, this was the one that inspired Annan to apply the stakeholder terminology in the first place.[53]

Even in the event that the U.N. decides to build on the original framework, the organization is well-advised to, in one sense, begin with the beginning, that is, to make an assessment of the terminology of stakeholders. The transition from Annan to Ki-Moon is really one from what might be described as a ”tacit conversion”, with few and scattered pieces of evidence that subsequently have to be inserted into a theoretical mould to try for fit, to a much more “officially confirmed jurisprudence parameter”. However, that which Ki-Moon has embraced with enthusiasm, namely the stakeholder terminology, remains “naked” as far as its substance and implications are concerned. This is to say that no philosophical reflections appear to accompany it.

That granted, a “common tongue” removes a traditional human rights obstacle, namely that the values that unite or separate constituencies drown in misconceptions about the values themselves. For example, the assumption has too often been that it is because “we” are different from “them” in respect to features like gender, religion, ethnicity, etc., that it is either difficult or impossible to come to share values. (Human rights, therefore, exist to grant everybody the freedom to subscribe to values of their own choice as individuals, groups, peoples, countries and states.) The stakeholder terminology, however, reverses that logic in the sense that it is now made to hold that constituencies are established on the basis of *values that are shared* by stakeholders of different gender, religion, ethnicity, etc. (The terminology of stakeholders, therefore, presupposes the justice of the standard distribution of human rights, but focuses attention on a communality of values.) In and of itself, this fact de-dramatizes the traditional controversy pertaining to cross-cultural and transnational responsibilities. While it is true that the U.N. has a

[52] This was made a premise for the International Military Tribunal at Nűrnberg. See Memorandum (note 32), 43.
[53] If this were not the case, Annan would not have set key elements of broad stakeholder theory into play. See note 6.

reputation for being a carrier of Western values, it is equally true that the cornerstones of a global consensus and community have already been inserted into the foundation in the form of basic needs. If human rights are extended to preferences for fulfillment of these needs, diversity will still not pose a threat to humanity. Even the U.N.'s talk about "freedom from want" is anchored in common interests.[54] It is not until want is disconnected from fundamental freedom and welfare that values come into conflict. The question is if the human rights-terminology should be discontinued at this point because there simply is not enough at stake to warrant its application? To those who may maintain that "This is all an instance of the Emperor's new clothes", the answer is: not on broad stakeholder premises whereby a stake imputes no sharp or significant distinction between self and others. By definition, a stake presupposes that we are "in it" together. X-values affect or is affected by Y-values, and vice versa. Under stakeholder jurisprudence, pure subjectivism and relativism do not exist for the same reason. This raises another question, viz., should it be mandatory for individuals and groups to practice conformity with their own declared values, not for the purpose of avoiding an accusation of hypocrisy, but because of the relationship with others. If the X-constituency thinks nothing much of their "own" values and therefore neglects these, it follows that that same constituency thinks nothing much of those other stakeholders who are affected in the process, which is a humiliation of course. For the same reason, autonomy and heteronomy have to be re-thought so as to reflect the (invariant) interdependency. Furthermore, a strong de-emphasis on national sovereignty entails that, per Annan, "displaced persons and refugees" and indeed stateless persons, who have been victimized in the process of political tyranny or war, qualifies as stakeholders solely on account of the way they think things should be, in essence, the best resolution to a conflict that they are affected by. If stakeholders are oriented toward agency (cf. affect) rather than a passive entitlement (cf. affected by), the assumption is that their mindset is proactive and geared toward a win-win situation, again on account of interdependency. In the case of the world-wide recession, this may have far-reaching implications, some of which could potentially revolutionize the U.N.'s policy of adjudication. For example, Afghanistan continues to rank 173 on the Global Index after decades of failure. This does not raise the traditional question of the political will. Instead, it raises the question of whether the U.N. is actually aware of the wrongdoing it is allowing, according to broad stakeholder jurisprudence?

[54] UDHR, note 34, at Preamble.

Perhaps what is most needed is an update of the education of professional justice managers so that they are made familiar with the challenges that they are in fact facing as a consequence of having converted to talk about stakeholders?

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