

Putting Business and Human Rights in Context

by Anthony P. Ewing¹

Book Review:

***Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms*, edited by Lara Blecher, Nancy Kaymar Stafford and Gretchen C. Bellamy (American Bar Association, 2014).**

Three years on from the unanimous endorsement by the UN Human Rights Council of the Guiding Principles on Business and Human Rights,² as stakeholders struggle to understand what the “corporate responsibility to respect human rights”³ means in practice and what states can do to protect against human rights abuse caused by companies, key questions framing the business and human rights discussion include:

- ***How international law applies to state regulation of corporate conduct and to corporate responsibilities for human rights impacts.*** Efforts to regulate the extra-territorial conduct of companies and to define what companies must do to meet their responsibilities under the UN Guiding Principles inevitably trigger unresolved legal debates over the content and application of international law.
- ***Whether mandatory or voluntary measures are most likely to prevent and address adverse human rights impacts caused by, or connected to, business operations.*** The Human Rights Council’s decision⁴ to restart efforts to elaborate a legally binding treaty on business and human rights highlights ongoing tension between so-called soft and hard law approaches.
- ***Which litigation and regulation strategies offer the best prospect of justice for victims of human rights abuse.*** In the wake of last year’s U.S. Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*,⁵ human rights advocates are questioning the future of the Alien Tort Statute (ATS)⁶ as a tool for corporate accountability and are exploring alternative litigation and regulation strategies.

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² John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,” UN doc. A/HRC/17/31 (21 March 2011). (UN Guiding Principles)

³ Section II, UN Guiding Principles.

⁴ UN Human Rights Council, “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,” UN doc. A/HRC/26/L.22 (20 June 2014).

⁵ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. ___, 133 S. Ct. 1659 (April 17, 2013).

⁶ Alien Tort Statute, 28 USCS §1350 (2005).

Corporate Responsibility for Human Rights Impacts is a timely contribution from the American Bar Association that illuminates these issues, surveys the current legal landscape surrounding business and human rights, and offers indications of where the field may be headed.

The American Bar Association has endorsed the UN Guiding Principles and urged governments, the private sector and the legal community to integrate them into their respective operations and practices.⁷ While this edited collection of essays takes its title from the “adverse human rights impacts” language of the Guiding Principles,⁸ the contributors do not limit their analyses of current business and human rights issues to the scope of the UN Guiding Principles. The Guiding Principles are a landmark development shaping the legal context for, and stakeholder expectations of, corporate conduct, but they are not the last word. A strength of this book is the ability of the authors to place the UN Guiding Principles in the context of legal developments more broadly.

Law scholars and teachers, as well as practitioners, will find something of interest in this volume. Lawyers today increasingly face questions about corporate responsibility for human rights impacts, whether advising companies in-house or in private practice, as advocates representing victims of human rights abuse, or as policymakers regulating corporate activity.

Part I sets out the current legal context with chapters addressing the direct application of international law to corporations (Justine Nolan – Chapter 1, Ralph G. Steinhardt – Chapter 2); considering the UN Guiding Principles through the lens of international human rights law (Robert McCorquodale – Chapter 3) and informed by “Third World” approaches to international law (TWAAIL) and feminist analysis (Penelope Simons – Chapter 4); and surveying recent examples of labor rights provisions in trade and investment agreements (Jeffery S. Vogt – Chapter 5). Vogt, notably, concludes that bilateral investment treaties with labour rights provisions have created the least, if any, positive human rights benefits.

Is the legal context for corporate responsibility best described as a “current patchwork-quilt system of human rights protection”⁹ or is it something more comprehensive? While Steinhardt argues that corporations are not immune from international legal standards - evidence of international law recognizing the direct legal responsibilities of multi-national corporations is found in treaties, customary international law and general principles of law; Nolan distinguishes “softer” notions of responsibility, like the corporate responsibility to respect human rights contained in the Guiding Principles, from legal accountability, arguing that international human rights law does not attribute any direct responsibility to corporations for human rights. Nolan would seek more forms of legal accountability. “Corporate

⁷ See generally,

http://www.americanbar.org/groups/human_rights/projects/business_and_human_rights.html.

⁸ See, e.g., Principle 11, UN Guiding Principles.

⁹ Nolan, p. 25.

responsibilities need to be grounded in and linked directly to international legal human rights standards and not be dependent on a society's ever-changing expectations," she concludes.¹⁰

Part II examines existing tools – policy, legislation and litigation – for holding companies accountable for their human rights impacts. Neil A.F. Popović (Chapter 8) contributes a chapter on the future of transnational environmental litigation against corporations, pointing to non-ATS legal strategies as a possible way forward. Chapters by Beth Stephens (Chapter 6) and Paul Hoffman (Chapter 7), respectively, offer a concise history of Alien Tort Statute jurisprudence highlighting unresolved issues post-*Kiobel*; and an insider's interpretation of the *Kiobel* decision posing key questions for future litigation. In *Kiobel*, a unanimous decision with two concurrences, the Court dismissed the case alleging corporate complicity in human rights abuses abroad, holding that ATS claims are subject to a presumption against extra-territoriality, which can only be overcome if the claim "touches and concerns the territory of the U.S." with sufficient force. Hoffman, who argued *Kiobel* before the Supreme Court as plaintiffs' counsel, asks, "Is *Kiobel* about geography . . . or is it about a broader concept of connection to the United States and its interests?" He speculates whether Justice Kennedy's concurrence asserting that "the presumption against extraterritorial application may require some further elaboration and explanation," leaves room in future cases "for the Kennedy of *Sosa*¹¹ (rejecting arguments that would have relegated the ATS to history) to reconcile with the Kennedy of *Kiobel*."¹² Whether or not ATS litigation survives as an effective tool, Stephens concludes that ATS cases have had "a remarkable impact – on individuals and on the global movement for accountability."¹³

Erika George (Chapter 9) provides a detailed survey of recent and proposed legislation mandating corporate disclosure of measures taken to address human rights impacts, such as the conflict minerals provisions of the Dodd-Frank Act¹⁴ and the California Transparency in Supply Chains Act,¹⁵ concluding that growing interest in transparency among consumers and investors may "signal a shift toward the creation of monitoring mechanisms to ensure that corporations meet their responsibility to respect human rights."¹⁶

Alongside legal developments in the United States, *Corporate Responsibility for Human Rights Impacts* includes helpful comparative perspectives on non-U.S. corporate accountability litigation and regulation, including synopses of key

¹⁰ Nolan, p. 25.

¹¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa*, the first modern ATS case to reach the Supreme Court, held that the Alien Tort Statute may provide a cause of action for limited violations of fundamental human rights with "definite content and widespread acceptance."

¹² Hoffman, p. 210.

¹³ Stephens, p. 198.

¹⁴ §1502, The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁵ Cal. Civ. Code § 1714.43 (2012).

¹⁶ George, p. 299.

transnational cases in other jurisdictions.¹⁷ In the United Kingdom, for example, cases against national companies seeking damages for human rights impacts abroad have been brought as tort claims alleging a breach of the company's duty of care. (Rachel Chambers and Katherine Tyler– Chapter 10) (Shubha Srinivasan– Chapter 11) Traditional obstacles for transnational litigation, such as *forum non conveniens* and piercing the corporate veil, have recently been overcome in UK courts, though recent changes to legal aid cost recovery provisions pose a threat to this kind of litigation. According to Chambers and Tyler, “transnational limitations on extraterritorial jurisdiction are being chipped away.”¹⁸

Part III looks to the future with chapters on foreign direct liability litigation (Peter Muchlinski and Virginia Rouas – Chapter 12), labour rights (Sheldon Leader – Chapter 13), financial institutions (Mary Dowell-Jones – Chapter 14), “B Corporations” (Andrew Kassoy and Nathan Gilbert – Chapter 15), and (Sarah A. Altshuler – Chapter 16).

Muchlinski and Rouas survey the rise of foreign direct-liability litigation – seeking tort liability of the parent company for acts of overseas subsidiaries, not just in common law jurisdictions like the United States and the United Kingdom, but in civil law countries such as France, Belgium and the Netherlands, as well as in developing countries like India. They speculate whether the due diligence required by the UN Guiding Principles might lead to the creation of a duty of care that could form the basis of future legal actions against companies.

Another theme is the need to rationalize distinct branches of law. Leader argues for greater coherence among labor law, corporate law and investment law; while the newly conceived “B Corporation” (or “benefit corporation”) addresses the need for a new corporate form that elevates the pursuit of general public benefit to the same status as financial value creation. Kassoy and Gilbert note that so-called “constituency statutes,” which allow directors to consider interests beyond just those of shareholders, are now available in some thirty-one U.S. state jurisdictions.

Dowell-Jones issues a provocative challenge to human rights lawyers to apply the UN Guiding Principles to the full range of financial sector products and services, key operational issues at financial services firms, and the overarching regulatory architecture of the global financial system. She argues that to meet their responsibility to respect human rights financial institutions must move beyond a narrow focus on project finance due diligence, socially responsible investing and corporate responsibility reporting; and consider more human rights risks than just those of the businesses in other sectors with which banks have commercial relationships.

¹⁷ These cases include: *Cape plc* (1997) (asbestos-related health claims by South African employees against a UK company); *Total* (2002) (cases in France and Belgium arising from alleged complicity with security forces in Myanmar); *Trafigura* (2006) (lawsuit against the UK subsidiary of a Dutch company arising from toxic waste disposal in Côté d'Ivoire); *Monterrico* (2008) (lawsuit against a UK mining company arising from its response to protests at its Peruvian copper mine).

¹⁸ Chambers and Tyler, p. 329.

One chapter I will assign my law students is Altshuller's "An Attorney's Perspective on Corporate Social Responsibility and Corporate Philanthropy." Altshuller distinguishes corporate responsibility from philanthropy or mere compliance and describes clearly the role of counsel today helping clients to understand fluid stakeholder expectations for managing human rights impacts.

Collectively, these essays demonstrate the dynamism of international and domestic law, corporate practices, and stakeholder expectations of corporate conduct, inter-related elements that compose the field known as "business and human rights." The editors of *Corporate Responsibility for Human Rights Impacts* have assembled valuable contributions for business and human rights scholars, teachers, students, advocates and practitioners who want to understand the legal underpinnings of corporate responsibility for human rights, key legal issues today in business and human rights scholarship and practice, and where we might be headed tomorrow.