

# Introduction

This book has been three years in the making and was only possible through the incredible generosity of the authors. It is a testament to the kindness, dedication, and conviction of the business and human rights community that these authors, all of whom are extremely busy and in high demand in their field, did not think twice about contributing chapters to this publication. This commitment involved donating their precious time and resources, which all of them did patiently and without complaint. It also involved negotiating moving deadlines as a result of protracted U.S. Supreme Court cases. The result of this kindness, patience, and generosity is a fascinating collection of perspectives on the key developments and trends in business and human rights law.

Part I sets the international legal context of the business and human rights arena, with Justine Nolan and Ralph Steinhardt trading opposing arguments on the direct applicability of international law to corporations. Robert McCorquodale then offers a critique of the United Nations Framework and Guiding Principles on business and human rights, explaining some of the dilemmas raised by each of the three pillars of the framework. Penelope Simons applies a Third World Approach to International Law (TWAIL) analysis along with feminist critiques of international law to assess the approach of the UN special representative on business and human rights in the development of his Policy Framework and Guiding Principles, and the importance of international law as part of an overall strategy for regulating the human rights impacts of transnational corporations. Jeffrey Vogt concludes the section by describing how trade and investment treaties have developed in their attempts to address the labor violations stemming from multinational business practices in a globalizing economy.

Part II explores domestic policy, legislation, and litigation in the United States and United Kingdom focusing on corporate accountability for human rights. Beth Stephens begins this section with a historical look at the U.S. Alien Tort Statute (ATS) and how it has developed into a tool for corporate accountability. Paul Hoffman and Neil Popović then describe the trajectory of case law against corporations under the ATS, including the recently concluded *Kiobel* litigation, and other relevant U.S. statutes, focusing, respectively, on social and environmental aspects of the cases. Erika George concludes an overview of the U.S. context with an account of developments in U.S. legislation, such as the conflict minerals provision of the Dodd-Frank Act and the California Supply Chain Transparency Act, and likely trends resulting from these developments. By way of comparison, Rachel

Chambers and Katherine Tyler present the UK policy, legislation, and litigation trends in corporate accountability for human rights, flagging the concern of imminent procedural changes in the United Kingdom that could severely curtail further case law in this area. Shubhaa Srinivasan then elaborates on the development of litigation in the United Kingdom against corporations for human rights abuses abroad and challenges typically faced by victim litigants in bringing legal action.

Part III of the book anticipates future developments in corporate accountability for human rights. In building on the analysis of the prior six authors, Peter Muchlinski and Virginie Rouas question whether civil or common law systems are better disposed to accommodate business and human rights litigation by comparing U.S., English, and developing European and Indian case law. Sheldon Leader goes on to suggest that lawyers can better balance different areas of law when performing legal analyses. Mary Dowell-Jones presents a practical example of this balance of laws argument with an analysis of how the financial industry impacts human rights and what the financial crisis suggests about necessary regulatory reform in this industry. Andrew Kassov and Nathan Gilbert then present a further example of how a better legal balance might be struck with a case study of their organization's initiative to reform corporate law to better align social and environmental considerations with the incentives set by financial markets, or as they put it, to "bake social and environmental considerations into the DNA of a company." Finally, Sarah Altschuller explains how to integrate human rights into legal practice by distinguishing corporate social responsibility (CSR) from corporate philanthropy and explaining why and how CSR is an important tool for attorneys in advising clients.

Despite this eclectic array of perspectives, certain themes and questions emerge. For instance: How will lawyers and courts deal with the thorny issue of extraterritoriality in transnational litigation brought against companies for human rights abuses abroad? The *Kiobel* case in the United States, addressed in so many chapters, has stipulated a "presumption against extraterritoriality" in Alien Tort Statute cases, but clarification of a sufficient nexus with the United States has yet to be determined. As this book went to press, the Supreme Court issued a decision that clarifies limitations on the exercise of personal jurisdiction over foreign parent corporations sued in U.S. courts for extraterritorial torts, although it is too soon to know the full implications of the decision. (*Daimler AG. v. Bauman et al.*, 571 U.S. \_\_\_\_ (2014).) As Justice Sotomayor stated in her concurring opinion in that case, the process chosen by the Court's approach may "shift the risk of loss from multinational corporations to the individuals harmed by their actions." (Slip op. at p. 18.) The UN Guiding Principles, which are also discussed in many of the chapters, offer a noncommittal voice on extraterritoriality but are rapidly developing into a soft law reference, cited in established international standards such as the Organization of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and the updated International Finance Corporation (IFC)

Performance Standards. The European Union has also cited the UN Guiding Principles in its latest CSR strategy, and many national governments are recognizing the need to regulate in the area of business and human rights, as a number of the authors have shown through their analyses of recent policy and statutory developments in the United States, United Kingdom, and European Union.

Inevitably, certain choices must be made in compiling a volume such as this. Though examples of legal developments in corporate accountability for human rights in developing countries are discussed in many chapters, the focus of the book is clearly on developments in the United States and United Kingdom. This decision does not mean to suggest that significant developments are absent in other countries; it merely reflects that the bulk of developments in this area of law to date have occurred in the United States and United Kingdom. This concentration of efforts will surely shift and disperse in the coming years, as suggested in Muchlinski and Rouas's chapter. We would like to emphasize that we hope this book will inspire discussions involving a variety of perspectives, and though the emphasis of this book may be on human rights, we encourage authors with alternative specialties to respond loudly and prolifically to the contents of this volume.

Regardless of one's perspective, this book demonstrates that business and human rights law is a dynamic, rich field that is prompting both legal and business innovations in the pursuit of human rights. We look forward to tracking these developments and hope that this collection of writings will allow a variety of readers to do the same.

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