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David Scheffer

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The Growing Relevance and Enforceability of Corporate Human Rights Responsibility

David Scheffer*

¶1 On October 24-25, 2007, the Center for International Human Rights of Northwestern University School of Law, in collaboration with the Katholieke Universiteit Leuven Faculty of Law (Belgium), convened the *Symposium on Corporate Human Rights Responsibility: Its Growing Relevance and Enforceability*.¹ The event drew an impressive cast of practitioners and scholars to examine the human rights prong of corporate social responsibility, which in the terminological construct of the United Nations Global Compact² also consists of three additional fields of focus: labor, environment, and corruption. The normative and judicial developments in recent years associated with the discipline of corporate human rights responsibility have been nothing short of astonishing, and yet there remains a vast gap between the academic and legal communities on the one hand, and much of the multinational corporate world on the other hand. The common purpose of the Northwestern Law Symposium and of this issue of the *Northwestern Journal on International Human Rights* has been to help bridge that gap and establish pragmatic and scholarly understandings of how multinational corporations should manage their operations so as to comply with international human rights norms and thus avoid costly litigation and assaults on their reputation that can only be detrimental to long-term profitability.

¶2 One of the symposium's distinguished academic speakers, Professor Steven R. Ratner, who is Professor of Law at the University of Michigan Law School, noted in his remarks that scholars are still searching for a theoretical framework within which to guide the development of corporate human rights responsibility.³ Some scholars work towards an expansive binding normative framework, while others are skeptical of the imposition of duties and seek voluntary mechanisms of performance. Professor Ratner proposes five areas of inquiry: 1) International law must consider the possibility of duties falling on multinational corporations and that state responsibility alone is not sufficient to protect human rights. 2) International law already has accepted regulatory frameworks for some forms of corporate misconduct, including in the realms of corruption and the environment. What liabilities should a corporation be responsible for? 3) Multinational corporations are different from states and how the former are dealt with likely will be discovered somewhere between individual criminal liability and state responsibility. 4)

* Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights, Northwestern University School of Law.

¹ Streaming video of the Symposium is available at <http://www.law.northwestern.edu/humanrights/symposiumhr.html>.

² See United Nations Global Compact, www.unglobalcompact.org (last visited May 9, 2008) for the Compact's official documentation, including its ten principles and governing framework.

³ See generally Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

How do we properly understand a multinational corporation's relationship with the host government—as an agent or perhaps as an accomplice? What are the corporation's levels of responsibility to employees, customers, and the community at large with respect to human rights protection? Should the focus be on direct violations of international human rights law and not on establishing duties to promote such legal principles? 5) What is the proper prescription of law and remedies for corporate human rights responsibilities? Should there be voluntary codes, treaties, national laws, or various forms of soft law? Professor Ratner astutely advises that lawyers and corporate officials need to understand content before settling on form, and that task will not be easy to accomplish in the near term.

¶3 This issue of the Journal presents five outstanding articles, three of which are authored by speakers (Jan Wouters, Doug Cassel, and Caroline Kaeb) at the Symposium. The first article is authored by Emeka Duruigbo, Assistant Professor of Law, Thurgood Marshall School of Law, Texas Southern University. In his article, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, Duruigbo traces the controversy surrounding the legal status of corporations in international law and further analyzes critically whether international law should directly regulate corporations. The article argues that the international legal system as a state-centric system has undergone some changes towards imposing obligations on non-state actors, particularly individuals but also corporations, for international crimes. However, Duruigbo examines the relevant skepticism with regard to the integration of multinational corporations into the international legal system and the imposition of direct responsibilities for human rights violations. Noting that “conceptual challenges have long stood in the way of this fundamental change in the structure of international law,” Duruigbo poses the question whether the problem should not be addressed at the national level with states regulating the behavior of corporations operating in their respective territories. Duruigbo follows the model advanced by Professor Gerard Ruggie, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,⁴ and offers two complementary options: first, give home and host countries the chance to regulate and adjudicate corporate human rights abuses through extraterritorial jurisdiction and development of democratic accountability structures; and second, watch corporate abuses and expose them to international regulation when an intolerable level, in other words, a “tipping point,” is reached. Duruigbo concludes with the rhetorical question: “[H]ow far are we from the tipping point?”

¶4 The second article, *Corporate Human Rights Responsibility: A European Perspective*, is authored by Jan Wouters and Leen Chanet. Jan Wouters is Professor of International Law and International Organizations and Director of the Centre for Global Governance Studies at Katholieke Universiteit Leuven Faculty of Law. Leen Chanet is Research Collaborator at the Institute of International Law and Junior Member of the Leuven Centre for Global Governance Studies of Katholieke Universiteit Leuven. The article provides a European perspective on corporate human rights responsibility with the

⁴ John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Protect Respect and Remedy: a Framework for Business and Human Rights, delivered to the Human Rights Council*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

aim of assessing the effectiveness of Europe's corporate social responsibility policy in the field of human rights.

¶15 Wouters and Chanet advocate a mixed regulatory framework that moves beyond the divide between a voluntary and regulatory approach. The model employs the 'business case' for corporate responsibility, namely that profit-maximization will stimulate socially responsible business, but joined with regulatory measures to address the worst cases of human rights violations. They analyze to what extent the European Union's corporate social responsibility policy implements such a hybrid framework and conclude that the European Commission, as the motor of the European Union's policy, has embraced a completely voluntary corporate social responsibility approach. In contrast, the European Parliament has consistently supported a hybrid approach along the lines suggested by Wouters and Chanet.

¶16 Despite the European Commission's stance against a mixed corporate social responsibility framework, Wouters and Chanet demonstrate that there have been initiatives by the European Union and a number of its Member States that have introduced regulatory elements of a corporate social responsibility framework. They point to particular information policies for the benefit of consumers, investors, and workers, as well as reporting requirements. However, they lament that no progress has been registered with regard to verification and monitoring. An effective sanctions mechanism remains elusive. Wouters and Chanet conclude that foreign direct liability cases against corporations domiciled in the European Union have rarely been initiated and when such cases do arise, they have been subsequently dismissed or settled. With respect to criminal prosecution against corporations or corporate officials, Wouters and Chanet point out that there does not yet exist any relevant European Union instrument to enforce. Against this backdrop, they conclude that the European Union's approach to corporate human rights responsibility so far has largely failed.

¶17 The third article, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, is authored by Douglass Cassel. Cassel is the Lilly Endowment Professor of Law and Director of the Center for Civil and Human Rights at the University of Notre Dame Law School. In his article, Cassel seeks to define the scope of liability of multinational corporations and their executives for aiding and abetting human rights violations committed by third parties, in particular the government or military of the host foreign state. He identifies the multilayer debate surrounding corporate aiding and abetting liability of human rights violations by mapping and discussing the uncertainties in international and U.S. Alien Tort Statute law. In particular, Cassel elaborates on the standards for corporate aiding and abetting of foreign human rights violations under international criminal law and under the Alien Tort Statute, with particular reference to U.S. federal common law. He emphasizes that even if the U.S. Supreme Court in the future clarifies the scope of corporate liability for aiding and abetting under the Alien Tort Statute, uncertainty would remain regarding the civil or criminal liability multinational corporations might face in other domestic jurisdictions, and under which standards.

¶18 Cassel identifies principles of international law that the Supreme Court should bear in mind if it undertakes to clarify standards of corporate aiding and abetting in a future case. These principles include: first, corporate executives have long been prosecuted before international criminal tribunals; second, international criminal law has long

recognized aiding and abetting responsibility; and third, civil liability of corporations which aid and abet violations of international law is widely acknowledged. Therefore, Cassel concludes, international law widely accepts corporate liability for aiding and abetting violations of international criminal law. He emphasizes that such liability, in terms of individual criminal liability, is also confirmed by the practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and it is found in the statutory framework of the International Criminal Court.

¶9 The fourth article, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, is authored by Caroline Kaeb. Kaeb, a German lawyer, is Research Associate at Northwestern University School of Law and a PhD candidate at the University of Trento, Italy. In her article, Kaeb presents case studies about corporate human rights performance in the extractive and manufacturing industries in various country contexts. She addresses liability risks of multinational corporations in both the extractive and manufacturing sectors that are closely related to policy parameters. For this purpose, Kaeb sheds light on the dynamics underlying contemporary business practices in host countries and elaborates upon the sector-specific patterns of human rights problems. Her case studies explore human rights violations related to business activities in terms of the local political situation and corporate structures of the parent-subsidiary relationship. She concludes by laying out patterns regarding human rights problems and liability risks for multinational corporations in the extractive and manufacturing industries. Her core observation pertains to the sector-specific patterns of human rights problems with (1) human rights abuses in the extractive industries mainly involving gross violations of human rights committed by security forces and government authorities in the local political context of the host state, and (2) human rights abuses in the manufacturing sector primarily occurring within the corporate production and supply chain, and mostly pertaining to the situation in the workplace. Kaeb concludes that these sector-specific patterns in human rights abuses might translate into a sectoral divide with regard to the domestic adjudication of a particular case depending on the civil or criminal nature of the domestic liability systems.

¶10 The fifth and final article, *Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay*, is authored by Vivian Lee, a second-year law student and *Journal* staff member. Lee's article examines the role the Equator Principles played in an Argentinean NGO's campaign against the financing of the Orion Paper Pulp Mill Project. The Principles constitute a set of voluntary commitments to socially responsible investment practices that have been adopted by thirty-three private financial institutions. Lee concludes that despite their voluntary, non-binding nature, the Principles (and other similar voluntary commitments) still have a significant role to play in promoting corporate human rights responsibility.

¶11 These articles demonstrate the complexity and promise of issues within the realm of corporate human rights responsibility. They provide exceptionally useful guidance for the challenges ahead. Lawyers and corporate officials would be well advised to absorb the lessons offered within this issue of the *Journal*.