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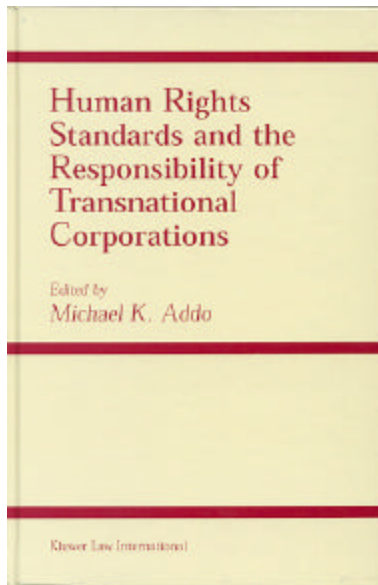
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Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations within the International Human Rights Fence

By Robert McCorquodale

A review of **Human Rights Standards and the Responsibility of Transnational Corporations** edited by Michael K. Addo. The Hague: Kluwer Law International, 1999. 384pp.

The social responsibility of business is to increase its profits.

—Milton Friedman, quoted at p.49

Markets... cannot fairly allocate public goods, or foster social accountability in the use of resources or democracy at the workplace, or meet social and individual needs that cannot be expressed in the form of purchasing power, or balance the needs of present and future generations.

—Steven Lukes, quoted at p.350

The tension, evidenced in these two statements, between the roles of corporations to increase profits for the benefit of shareholders or to act in a way that is beneficial to the community generally—and whether these are alternative roles—is a feature of the debates about the effects of globalization. In a world where more than half of the top 100 economies are corporations and where an increasing amount of investment is private, including in areas formerly in public ownership, it is vital that investigations occur into the effect of the activities of transnational corporations on individuals and communities, particularly on their human rights. This edited book on Human Rights Standards and the Responsibility of Transnational Corporations is part of a growing literature about the interaction between transnational corporations and human rights.

This book arose out of a conference at the University of Exeter in September 1998 and the diversity of speakers at the conference is reflected in the chapters in this book. The 28 authors (including joint authors) are a mix of human rights and environmental activists, executives of corporations and lawyers, as well as others with practical and intellectual engagement with these issues over many years. As in most books of this kind, there is a great diversity in the quality of the chapters, from excellent, analytical and contextual chapters advancing clear and coherent arguments, to short polemics offering limited engagement with broader issues. The book is divided into seven sections: introduction, policy issues, regulation, application, issues of doctrine, globalization and case

studies. Whether these sections are necessary or appropriate is uncertain, as many chapters could have been placed in different sections (and it is difficult to understand why some are included) without causing any incoherence. By dividing the book in this way it leads to questions such as: are environmental issues only an interesting case study or are they an essential policy issue inextricably linked to human rights? Is it possible to separate application of human rights standards to transnational corporations from globalization issues? Should only legal doctrinal issues be considered?

This difficulty in categorizing the chapters is a reflection of the difficulty in addressing the issue of human rights standards and the responsibility of transnational corporations (TNCs). There are so many issues and divergent arguments that can be dealt with. Yet there are two key matters that must be addressed first: what are the applicable human rights standards and what are the applicable legal and non-legal determinants of responsibility? Only after these matters are clarified can it be decided whether a corporation can be held responsible for human rights violations and the practical means to address this responsibility.

Human Rights Standards

Most chapters in this book assume (usually implicitly) that there are clear international human rights standards that are uncontested and normative. It is certainly the case that human rights are now an established part of international law with a defined content of human rights, many of which are clear and precise, and with an institutional structure, including supervisory mechanisms to check the compliance of States to their legal obligations. The two main general human rights treaties are the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966), though there are many others. In fact, every State has ratified at least one treaty containing legal obligations to protect human rights. This is an extraordinary position, unimaginable only a few decades ago. Indeed, governments have accepted, despite what they may say to their domestic audiences, that 'the promotion and protection of all human rights is a legitimate concern of the international community' (Vienna Declaration and Programme of Action (paragraph 4), adopted by consensus at the United Nations World Conference on Human Rights, 1993). So how a government treats those in its territory is no longer a matter only for that government, but is, rather, a legitimate concern of all members of the international community.

However, these human rights standards are not uncontested. While a critique of human rights goes beyond the scope of this review, it is important to recognize that there is a significant debate about the nature and universality of human rights. This debate includes the issues of whether human rights are culturally determined/relative and whether there is a hierarchy of rights. Whilst there is now persuasive evidence that certain core concepts are found in each society, such as a desire to protect life, to protect against inhuman and degrading treatment and to give access to the means of subsistence, these concepts are rarely expressed in human rights terms and there is a significant diversity in how these concepts are applied by each society. Some account must therefore be taken of cultural issues in the application of human rights, without undermining the appropriate protection of everyone's human rights.

One effective way that this account can be taken is through consideration of the limitations on human rights. Nearly all human rights have limitations on their exercise, either to protect the rights of others (e.g. one person's right to freedom of expression can be limited by another's right to privacy) or the general interests of the community (e.g. a right to freedom of assembly might be limited by the needs of public order in a community). However, great care must be taken in determining what are real, appropriate and necessary limitations in relation to cultural issues, as the loudest voices proclaiming cultural relativism are usually authoritarian governments or patriarchal groups with their own view of "culture," while the voices of the people being oppressed are rarely heard.

Similarly, different groups have contrasting ideas as to which rights deserve priority over other rights. A common approach to human rights standards has been to categorize them in terms of "generations". This approach refers to civil and political rights (e.g. right to life, right to freedom from torture, right to freedom of expression) as "first generation" rights; economic, social and cultural rights (e.g. right to education, right to form trade unions, right to cultural life) as "second generation" rights; and group or collective rights (e.g. right of freedom from genocide, right of self-determination, right to a clean environment) as "third generation" rights. This is an inappropriate and misleading approach as it gives more importance to some rights over others, in that it presumes that a "first generation" right must be achieved before a "second generation" right. The reality is that rights are interdependent and all require government action and resource allocation. For example, the right to an adequate standard of living is inextricably linked to the right to life and for a person denied education, access to medical care and shelter, the existence of a right of privacy is not essential at that point. For the oppressed, the most important right is the right of which they are being denied. It should also be recalled that international human rights standards are only minimum standards agreed by governments, which were only prepared to agree to general international principles at the lowest common level.

Thus to assume that human rights standards are uncontested or straightforward in their application is not accurate and does not assist those TNCs that may want to apply human rights standards. Yet very few authors in this book (with the exceptions of excellent chapters by Jungk and Skogly) deal well with the issue of cultural relativism or consider rights beyond a few civil and political rights (or consider - wrongly - that globalization automatically means economic rights for all). There are real and practical implications that arise when considering human rights standards for TNCs. For example, if a TNC decides to adopt the Universal Declaration of Human Rights (UDHR) as its standard to measure its human rights compliance, it needs to be aware that this may not be an appropriate standard today. The UDHR is not a legally binding treaty, it was concluded in 1948 and therefore does not address many human rights now protected under later treaties (such as the right of self-determination and the rights of children), and its terms do not allow for the same consideration of cultural and other aspects as do more recent documents. TNCs should be made aware that the minimum human rights standards that they should adopt are those set out in the two International Human Rights Covenants of 1966, as clarified both by later human rights treaties (such as the Convention on Elimination of Discrimination Against Women and the Convention on the Rights of the Child) and by the interpretation of these treaties by international human rights supervisory bodies (including the United Nations Human Rights Committee and the European Court of Human Rights).

Similarly, if a TNC wishes to adopt a human rights approach to its business activities, then an important consideration will be cultural concerns in applying any human rights standard. Claims that seek to limit human rights application due to cultural issues should be properly investigated through using information from reputable international and non-governmental organizations. In particular, human rights standards by TNCs must be applied equally and without discrimination (as, for example, women's rights are often ignored) wherever the TNC is operating and all possible action must be taken to ensure that those rights are applied and not bypassed for the sake of appeasing authoritarian governments. As O'Reilly and Tickell note (p.277), human rights should be an absolute about which TNCs must not compromise, in the same way airlines should not compromise on passenger safety. Only in the context of such clear human rights standards can any effective responsibility of TNCs be evaluated.

Applicable Determinants of Responsibility

In order to decide if TNCs are responsible for violations of human rights standards, the factors that determine responsibility should be clarified. There needs to be clarity over which entity is responsible and under which regulatory system. In these aspects, the book offers some definite and helpful insights. Parkinson offers a useful examination of what a corporate entity is by refuting the model (which is accepted too often by British and US corporate institutions) of the corporation as owned by, and operated for the benefit of, its shareholders. Rather, he prefers the organizational model, where corporations owe obligations to their participants (including their employees and other stakeholders) that are not limited to contractual obligations and have obligations to third parties and society in general arising out of the fact that they are powerful social actors (p.56).

In the best chapter in the book, Dine, whilst cleverly analyzing company law and labor rights, offers an excellent summary of the various corporate entity theories. She agrees with Parkinson about the inappropriateness of contractual and shareholder/ownership theories. She shows that, even in the UK and USA, there is now a move by the courts towards a "multi-fiduciary" model, where the other stakeholders in the corporation (such as creditors, suppliers, employees and consumers), and not just the shareholders, have interests that must be taken into account by directors. She indicates how ineffective shareholders are in safeguarding the public interest, which can have an effect on corporate governance. She demonstrates that the model suggested by Bottomley of a "constitutionalism" approach is both consistent with the history of TNCs (with the early global corporations, such as the Dutch East India Company and the Newfoundland Company, being granted charters as a delegation of powers by the monarch) and with the appropriate public interest in the activities of TNCs. This model of corporate constitutionalism has 'three key features: the idea of dual decision making, which recognizes the different roles of the board of directors and the general meeting of shareholders in corporate life; the idea of deliberative decision making, which seeks to ensure that corporate decisions are made on the basis of an open and genuine consideration of all relevant issues; and the idea of a separation of powers, which aims to make corporate decision making power diffuse and accountable' (p.229).

These strong theoretical approaches to defining a corporation reduce the strength of the argument concerning the legal separateness of entities within a TNC, which usually means that only one entity in a TNC's corporate structure has any legal responsibility for an action. Instead,

economic, moral and social factors also bear on the responsibility of TNCs in relation to their separate parts. Even the legal separateness can be overcome by applying accepted legal doctrine. As Meeran notes, the traditional responsibility in tort law of manufacturers for defective products could be applied to TNCs, as 'the proximity of a TNC to overseas employees of its subsidiaries is usually closer than that of a manufacturer to consumers of its products'. Further, if a TNC is regarded 'as a conglomerate of units of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, supervision and finance... [if] injuries result from negligence in respect of the parent company functions, then the parent company should be liable' (p.170).

Addo himself takes this responsibility issue one step further by arguing that, if corporations have rights, then they must have responsibilities. His surprising chapter on corporations as victims of human rights violations relies on some cases, particularly before the European Court of Human Rights, that have allowed corporations to bring claims for violations of rights, such as the right to freedom of expression and the right to privacy, even to the extent of that Court rejecting a claim brought by shareholders alone as the corporation itself was the real victim of the government's action. Addo concludes from this that while corporations can now appreciate the value of human rights as a system of protection, it also means that corporations, if they wish to claim rights, must also accept the duties and responsibilities that arise as a consequence. However, the rights that corporations have are not human rights as such but legal rights arising from the created legal person of a corporation, which is then given limited access to some parts of the human rights legal system. Not all rights would be applicable, such as the right to life, and, in any event, the concepts behind human rights, such as the need to uphold human dignity, cannot be applied to corporations. Indeed, as Lord Denning, a famous British judge, once eloquently stated: 'A corporation... has no body to be kicked or soul to be damned' (*British Steel v. Granada TV* [1981] AC 1096, 1127).

Having established the foundations for the potential responsibility of a TNC for actions by it and its subsidiaries, there are a variety of methods, legal and non-legal, on which to base any responsibility determinations. The main methods that do not directly involve the law are moral and social pressure, and self-regulation. A number of the authors in the book show, through their own experiences and case studies, the efforts of groups to force TNCs to accept that they have social responsibilities to protect human rights. They comment on the expectations of society for the social responsibility of corporations and the requirement for corporations to become increasingly more responsive to public interest pressure groups.

Public pressure clearly does have an impact on the actions of TNCs, despite the evidence that there is no significant impact on the share price or dividends of TNCs publicly accused of human rights violations (Zadek p.70). Whether that pressure is in the streets or in shareholder meetings of TNCs, moral pressure and poor publicity has forced some TNCs to take account of human rights. Allegations of complicity in human rights violations by TNCs, often because they have closed their eyes to human rights violations by governments with whom they deal or through their economic support of these governments, creates negative publicity and can affect the general public reputation of corporations. For example, in a study of labor practices of TNCs, it was found that 'once the news media published accounts of the systematic labor violations occurring abroad, there was no economically sound way [TNCs] could go about business as usual and still profit from their name

recognition' (L. Ayoub, 11 *DePaul Business Law Journal* 395). This publicity and pressure has particular impact for those TNCs that have a recognizable corporate logo or brand.

But this pressure is limited in two ways: it is only likely seriously to affect those TNCs whose products or services are direct to the public; and it tends to be only effective where the pressure comes from consumers in developed States against TNCs based in developed States, though acting elsewhere, often after a high profile campaign. Thus while opportunities for enhanced human rights protection can emerge from public pressure, particularly by consumers, so far this pressure (and the resultant impact) has been piecemeal and inconsistent and of limited long-term impact in developing States.

Nevertheless there has been some effect from this pressure, as is evidenced by the growth in corporate codes of ethical conduct (57% of the largest UK companies had established codes by 1998 [p.109]), by the reactions of TNCs, such as Shell, to consumer boycotts and by the rise of ethical corporations, such as the Co-Operative Bank and the Body Shop. This is an excellent step forward and, if these codes were put into daily practice at all levels in every TNC that has such a code, then something effective would be done for the protection of human rights worldwide. Indeed, some authors conclude that self-regulation by corporations, monitored by pressure groups, is the most appropriate way forward, as the standards set by a corporation or an industry could exceed those established by other regulatory means.

Self-regulation is to be strongly encouraged as a means to establish both best practice and industry norms. Some major TNCs have been very active in establishing clear and verifiable codes of ethical conduct. But self-regulation is not legally binding, the standards and review of compliance vary enormously and the codes will often be ignored in a competitive environment, particularly when profits are at risk. As Addo notes in his introduction, 'in general, only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so' (p.11). For example, contrary to industry codes of conduct, US-based chemical companies have been shown to be exporting pesticides banned in the US to developing States, by altering production techniques and changing production sites to avoid strict US labeling laws. In addition, the (unlabelled) pesticide containers have subsequently been reused to carry drinking water in developing States (see J. Colopy, 13 *UCLA Journal of Environmental Law and Policy* 167). The added difficulty is that most self-regulation of human rights or other social issue areas is limited to those TNCs that produce products or services direct to consumers in developed States and by TNCs based in developed States (even if their headquarters are legally in some tax haven). The codes are often vague and open to different interpretations by different managers around the world.

The consequence of this inadequacy has been that a great deal of the debate about the responsibility of transnational corporations for human rights violations had been concerned with the need for legal regulation. Much of Human Rights Standards and the Responsibility of Transnational Corporations focuses on this aspect. Because of the nature of TNCs, in that they operate in many States, the main concern has been to create international legal obligations directly binding on TNCs. Most of the international documents that have been developed remain non-binding in law, with a number of guidelines, codes, declarations and resolutions by international and regional bodies (including ones since the date of publication of the book). For example, the Secretary-General of the

United Nations launched the Global Compact in 1999, which deals with the interaction between corporations and human rights, labor and the environment. There are nine principles in this compact, with the first two expressed as follows:

The Secretary-General asked world business to:

- ◆ Principle 1: Support and respect the protection of international human rights within their sphere of influence; and
- ◆ Principle 2: Make sure their own corporations are not complicit in human rights abuses.

These are important goals that all corporations should follow and it is vital that the United Nations be involved in these initiatives. However, the authors generally, and rightly, criticize all these efforts as being ineffective and stronger in words than practical action.

Accordingly, there is considerable space devoted to the need for international law to regulate TNCs. For example, Jägers neatly sets out the legal status of TNCs under international law and shows how they have some international legal personality, but that this is limited to investment contracts with governments where the contract is subject to international arbitration. She hints at the possibility that international law could allow for increased legal personality (and hence increased rights and responsibilities) for TNCs by noting that Higgins (now a judge of the International Court of Justice) has said that international law is formed by the needs of the international community and should encompass all participants in the international community (p.267). Thus it is possible for the international community to include TNCs as having international responsibilities, in a similar way that States decided to make themselves responsible for violations of human rights. For the present, there are only piecemeal possibilities for attributing international legal responsibility to TNCs for human rights violations. For example, if the (limited) international legal personality that TNCs have is equated to that of individuals (as the corporation is a created legal person), then TNCs may have the obligations that international law traditionally places on individuals, such as prohibitions on piracy and slavery. Claims may be able to be made against the directors of TNCs, in their individual capacity, for breaches of international crimes, including torture. In addition, complaints might be able to be made to international human rights supervisory bodies about activities of corporations if they cause widespread and systemic violations of human rights. Indeed, as Meeran shows in his chapter, there is a rapidly increasing number of national legal cases being brought against TNCs based on breaches of international human rights law (though only where international law is able to found a claim in that national law). This expansion of cases must be a concern to any alert TNC.

It is at this point that the book largely ceases its investigations. Some of its authors offer excellent analyses on the responsibilities of TNCs for human rights violations. There is much comment on the need to change the minds of corporations to ensure that they understand that they have responsibilities for the protection of human rights. However, other than a few comments on the role of States (such as by Skogly), the book does not consider sufficiently the next level of responsibility that is relevant: that of the State. It is through the prism of the State that effective legal regulation of the responsibilities of TNCs for protecting human rights could occur.

The Role of the State

States alone, in the form of governments and other State institutions, have obligations under international human rights law. The “State” must adopt legislation or other measures to “ensure” or “realize” the rights in the human rights treaty or under general (customary) international law. The State is generally responsible under international law for all breaches of human rights obligations within its jurisdiction, even when the violation of human rights is by a non-State actor, such as a corporation, if the State should have adopted legislation or taken other measures to ensure compliance with the State's international human rights obligations. Only rarely has this obligation on States been modified, such as the creation of individual responsibility for war crimes and crimes against humanity under the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and as proposed under the Statute of the International Criminal Court. However, it is States that must agree to these treaties and States that still have primary obligations of compliance with the provisions of treaties. This State-based framework means that it is up to States to ensure that they act to make TNCs responsible for violations of international human rights law.

The relevant States that could regulate the activities of TNCs are the host State, being the State in which the activities of the TNC occur, and the home State, being the State in which the parent corporation of the TNC is incorporated. International human rights law obliges the host State to adopt constitutional, legislative, judicial, administrative and other measures to ensure that human rights on its territory are protected, no matter who the perpetrator may be. However, many States are unwilling or unable to comply with these responsibilities, either because of their desire to attract private investment or their inequality of power with that of a TNC. For example, the Australian-based TNC, BHP, clearly influenced the making of laws in Papua New Guinea that protected its investment in its operations there despite being responsible for widespread environmental damage. So strong was its influence that the government of Papua New Guinea even passed laws to assist, and to protect from legal challenge, BHP's activities in PNG, with these laws largely drafted by BHP itself. Even if a government is prepared to act, it may be faced with a subsidiary of a TNC that has become worthless, as with Union Carbide in Bhopal. Thus it is vital that the international community offer support to these host States to enable them to act against TNCs that violate human rights in the State's territory.

The home State is usually a developed State and therefore it should have the power and resources to act against a TNC that is violating human rights. But if the action is by a subsidiary of the TNC acting in another State, then many home States feel restrained from acting so as not to interfere in the sovereignty of the other State. This restraint is not sound in practice or principle. In practice, many States place legal requirements (as well as political pressure) on corporations when operating in other States, such as the Sullivan Principles applied to those US corporations operating in apartheid South Africa. The principles of international human rights law mean that the rights of humans must be placed above the interests of States. As noted above, the Vienna Declaration and Programme of Action (1993), agreed to by all States, stated that ‘the promotion and protection of all human rights is a legitimate concern of the international community.’ Thus a State's sovereignty can no longer be an excuse for a home State not to act where a clear human rights violation occurs by its TNC. This would include violations of rights concerning most forms of non-discrimination, freedom from torture, freedom from genocide and the right of self-determination.

It is therefore certainly possible to extend the international human rights obligations placed on States to encompass actions by TNCs and persons managing TNCs. Despite the practical and legal difficulties involved, it is expected that, in the next few years, there will be an increase in regulation of TNCs by States, and by the international community generally, in relation to human rights matters. It is this deeper level of determining responsibility that will affect all TNCs in the twenty-first century.

Conclusions

Overall, this book offers a disparate range of views on how to ensure that corporations accept responsibility for any of their actions that impact on the protection of human rights. There is no dissenting voice in the book, which is a surprise, although perhaps consistent with the tide of affairs in this area. However, there is no consensus as to the effect of this tide. Whilst some see an increasing weight being given to human rights issues in corporate decision-making, Forbes concludes that 'there seems little cause for optimism about the potential for change in the behavior of large companies in relation to human rights issues' (p.130). Indeed O'Reilly and Tickell point out that 'we have yet to be convinced that, if forced to choose between human rights and profits, companies would choose the former' (p.274). It is this last aspect—the need to show that human rights issues make economic sense—that requires more investigation.

In a world where TNCs have vast influence around the world on a range of issues from economic priorities to cultural fashion (see N. Klein, *No Logo* (2000)), it is vital that the enormously powerful TNCs are made responsible for their actions that contribute to violations of human rights. Whilst non-legal measures must be given credence and support, any effective enforcement of this responsibility requires a multifarious approach in which TNCs are not only brought within the parameters of international law, but also that governments act nationally to make TNCs accountable for their activities, no matter where these activities occur. There is a need for transparency, accountability, compliance and enforcement of all TNC activities affecting human rights. This book constitutes a step towards that goal.

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