

Non-state Actors, State-Centrism and Human Rights Obligations

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Philip Alston, *Non-state Actors and Human Rights*, New York: Oxford University Press, 2005, ISBN 0199272816, 387 pp., \$60.00 (pb).

Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Oxford: Oxford University Press, 2006, ISBN 0199288461, 613 pp., £30.49 (pb).

Olivier De Schutter (ed.), *Transnational Corporations and Human Rights*, Oxford: Hart, 2006, ISBN 1841136530, 430 pp., £64.00 (hb).

I. INTRODUCTION

Despite its not being an entirely new debate in international law and international relations, the nexus between human rights and non-state actors has become a highly relevant topic of scholarly research, as witnessed by the three works under review, published in 2005 and 2006. When Andrew Clapham published in 1993 *Human Rights in the Private Sphere*, in which he already questioned the public/private divide of human rights law, the book was then categorized as both ‘adventuresome and timely’.¹ Some fifteen years later, an analysis of this topic can no longer be called ‘adventuresome’, but the timeliness remains beyond doubt.

The role that non-state actors play or should play in implementing human rights is indeed still largely under-theorized, while nevertheless being at the forefront of current legal, political, and ethical debates. Amongst increasing literature² on and international attention³ paid to the role of non-state actors and the perceived need to regulate their obligations, in particular in respect of international human rights

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1 H. J. Steiner, ‘Book Review: *Human Rights in the Private Sphere*, by Andrew Clapham’, (1995) 89 AJIL 844.

2 In 2001 a legal journal was even dedicated to this subject, *Non-state Actors and International Law*, published by Martinus Nijhoff. Since 2006 this journal has merged with the *International Law FORUM du droit international* to form a new journal, the *International Community Law Review*. See, on the growing role of non-state actors, W. P. Heere (ed.), *From Government to Governance: The Growing Impact of Non-state Actors on the International and European Legal System* (2004).

3 Since the beginning of the twenty-first century several international instruments have been adopted in an effort to regulate the conduct of non-state actors, and in particular transnational corporations, in the human rights sphere. See, for example, the Commission on Human Rights Sub-commission on the Promotion and Protection of Human Rights, Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12 (2003), and the UN Global Compact, launched on 26 July 2000, containing a set of principles to which corporations can voluntarily adhere. In July 2005 the then UN Secretary-General, Kofi Annan, appointed John G. Ruggie as his Special Representative on the issue of human rights and transnational corporations and other business enterprises.

law, it seems indeed not only useful, but also paramount, for those authors who claim an expansion of these obligations to offer a comprehensive approach on the issue.

The books discussed share the common feature of examining the supposed weakening of the existing classical state-centric approach in international (human rights) law, therefore moving away from the traditional view that under human rights law the individuals hold the rights while only states bear the obligations. Although it becomes apparent that each book of course has its own logic, the concern that the current individual/state or private/public conception in human rights law can no longer be upheld transpires throughout most of the contributions.⁴

As noted by Susan Marks, challenges to state-centrism generally have two dimensions: a normative and a descriptive one. On the one hand, there is an assertion that the state is losing its central place and, on the other, it is also claimed that the state should no longer be considered as the central actor.⁵ In respect of human rights law, many authors thus argue that the factual changes in the international world order must lead to the imposition of international obligations directly onto non-state actors, which should thus be held accountable for violations of these rights alongside states. Of course, even what Alston calls ‘mainstream’ international lawyers cannot ignore the growing role of non-state actors in international law and international relations. As referred to by Alston, several cases indeed seem to prove that the issue needs to be addressed.

Clapham’s *Human Rights Obligations of Non-state Actors* is an impressive and comprehensive overview and analysis of the subject, based on an intriguing and well-researched reinterpretation of the notion of ‘subject’ in international law. The work is divided into 12 chapters, organized in a very systematic way, starting from the basic concepts and theoretical foundations of his argument, to more detailed studies of particular aspects, such as the application of human rights to the United Nations, transnational corporations, and armed opposition groups. The ensuing chapters discuss the human rights obligations of non-state actors in the existing human rights systems and treaties, relevant case law, and the paradoxes when using concepts such as ‘dignity’ and ‘democracy’ in the human rights sphere. The concluding chapter deals with three general recurring concepts of the human rights and non-state actors debate: complicity, complexity, and complementarity.

The appointment followed a request from the former UN Commission on Human Rights (see Human Rights and Transnational Corporations and Other Business Enterprises, Res. 2005/69 (2005)).

- 4 Since human rights are concerned, the UN Human Rights Committee’s General Comment 31 indirectly addresses the public/private divide of human rights. The committee nevertheless emphasizes that the primary obligations remain with the state: ‘The article 2, paragraph 1 obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.’ (Human Rights Committee, General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004)) See on the relation between human rights and the ‘fading’ boundary between public and private in international investment law, G. Van Harten, ‘The Public–Private Distinction in the International Arbitration of Individual Claims against the State’, (2007) 56 *International and Comparative Law Quarterly* 371.
- 5 S. Marks, ‘State-Centrism, International Law, and the Anxieties of Influence’, (2006) 19 *LJIL* 339, at 340.

Alston's and De Schutter's edited books are each a collection of inspiring essays on, respectively, the relation between human rights and non-state actors and the application of human rights to transnational corporations. Alston's book provides a logical and comprehensive overview of human rights and non-state actors, starting with two introductory chapters on theoretical considerations of both the existing and changing international legal framework (part 1). These first introductory chapters by Alston and Reinisch provide a clear introduction to the conceptual challenges posed by shifting and applying human rights obligations to non-state actors. Part 2 then focuses on the application of human rights to non-governmental organizations and international organizations. The third and last part addresses the obligations and status of transnational corporations in four contributions.

De Schutter's volume counts no fewer than 13 chapters on the human rights accountability of transnational corporations. De Schutter first sets out the general principles and the challenges of imposing human rights obligations on transnational corporations, while the other contributions deal with how this responsibility can best be achieved. This latter part is divided along the different possibilities of holding corporations accountable for human rights violations. The structure of *Transnational Corporations and Human Rights* reveals a logical sequel of analyses of the different tools for improving the accountability of corporate actors. Despite potential critiques on the fact that some mechanisms, and their discussion, could in theory be placed in another chapter, the book has the benefit of presenting an all-inclusive approach as to the methods of holding corporations accountable for human rights violations. Part 1 addresses the responsibilities of states in the control of these corporate actors, part 2 deals with self-regulatory instruments, and part 3 discusses the feasibility of imposing direct obligations on corporations under international law, and part 4 finally addresses the possible incentives for socially responsible corporate conduct.

This review essay cannot offer an exhaustive evaluation of all issues addressed in these three books. Instead, we shall centre the discussion on the descriptive and normative dimensions of the debate. We shall start with a synopsis of the rationale behind these works, and the invoked factual necessity of considering changing the normative framework (section 2). Second, we shall turn to the question of subjects in international law, the role of non-state actors in the current international legal framework, and the normative challenges to this system (section 3). This part will also include elements on the reasons why existing international law is seen to be unable to grasp these evolutions. The *contents* of the human rights obligations of non-governmental organizations, international organizations, and transnational corporations will also be included here. It is indeed impossible clearly to divide issues of subjectivity and corresponding international legal obligations, since often the latter will be the consequence of, or limited by, the former. Finally, it is necessary to make a clarification in respect of the references to the two edited books, particularly in view of the fact that De Schutter also contributes to Alston's book. To avoid confusion, the name of the author indicated in parentheses in the text refers to the book in which the contribution we refer to is published.

2. WHY EXPANDING HUMAN RIGHTS OBLIGATIONS TO NON-STATE ACTORS? THE CHANGING INTERNATIONAL LEGAL ORDER

The necessity of undertaking a study of this particular issue is mainly inspired by the changing role of non-state actors, and an alleged lack of accountability for human rights violations by these non-state actors as a consequence of the 'traditional' approach to international law. In respect of transnational corporations, for example, De Schutter points out that those corporations incorporated in EU member states 'may generally be said to benefit from complete impunity when they commit human rights violations abroad', which is because, according to the author, 'international law is classically addressed to states' (Alston, pp. 227, 230).

Alston considers in his introduction that 'the international human rights regime's aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors' (p. 6). To highlight the practical importance of the work, Alston goes on to cite examples of situations in which non-state actor issues have arisen in international human rights law: the question of freedom of speech in a private shopping centre, the administration of territory by the United Nations, the role of private military or security companies in Iraq,⁶ and, finally, transnational corporations which are in the position of a 'dominant actor' (pp. 6 ff.). In the second chapter of Alston's book, Reinisch further discusses the perceived changing framework, and equally isolates, as does Alston, the rise of non-state actors, privatization, and globalization as the underlying causes of that evolution (Alston, pp. 74 ff.). Comparable evolutions are invoked by Wells and Elias with regard to the notion of corporate complicity in human rights violations (Alston, p. 141).

Clapham uses similar facts to highlight the need to increase international focus on the role and obligations of non-state actors. The author identifies as one of the premises of the book the elaboration of 'ideas in order to develop an understanding of the importance of human rights accountability for corporations, international organizations, multilateral development banks, multinational peace-keeping organizations, and even for individuals and their association' (p. 1). Clapham then distinguishes four phenomena which he considers paramount for the understanding of the relevance of the subject: the globalization of the world economy, the privatization of public sectors, the fragmentation of states, and the feminization of international human rights law (pp. 3–4).

These phenomena undeniably have an impact on the state's grip on non-state actors, which has in turn a potential impact on respect for human rights. One of the most tangible effects of the globalization of the world economy is the weakening barriers with which transnational corporations were traditionally faced in

6 See, on the privatization of prison and security services, and the impact on accountability for human rights abuses, N. Roseman, 'The Privatisation of Human Rights Violations – Business Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq', (2005) 5 *Non-state Actors and International Law* 77.

broadening their fields of activity in foreign states. Equally, the role of the state has changed as a consequence of these weakening barriers. Some authors even go as far as claiming that, through globalization, the state and its role in international law are disaggregating, and being replaced by parts of these states, which function within transnational government networks.⁷ However, Clapham rightly points out that globalization does not *ipso facto* result in more human rights violations. Rather, one has to look for new ways in which to hold governments accountable for the new ways in which they act on the international plane (p. 8).

The loosening of the separation between private and public is particularly obvious when looking at the privatization of certain areas in the public sector, which has led to the involvement of non-state entities in functions usually exercised by state organs. Examples of these traditional functions which have been delegated to private companies are, as given by Clapham, water services, prisons, peacekeeping, and shopping areas (p. 11). Privatization is of course, as noted by Clapham, not problematic *in se*, were it not that it often goes hand in hand with flexibility rather than increased accountability (p. 12). Similarly, fragmentation often poses serious questions in respect of the implementation of human rights law, especially during armed conflict and when no government is available to exercise public authority (pp. 12–14). Finally, feminization, a notion in which Clapham includes the feminization of poverty, economic and social discrimination, violence against women in the home, women targeted for rape and sexual abuse during armed conflicts, and the increase of female refugees because of the fears mentioned of abuse and violence, resulted in an enhanced focus on the protection of human rights in the private spheres (pp. 15–18).

But the whole debate is really as luminously summarized by Alston: '[A]nalytical frameworks, even for the realists, have to be expanded to take account of a wider range of actors than states. But do normative frameworks need to be expanded as a result?' (p. 20).

3. SUBJECTS, NON-STATE ACTORS AND THE 'NOT-A-CAT' SYNDROME: CHALLENGING THE NORMATIVE DIMENSION OF STATE-CENTRISM

All the contributions we shall subsequently discuss need to be read in the light of the general framework depicted in the three books' introductory chapters. With a few exceptions, these contributions all back the expansion of human right obligations as a result of this changing international legal framework, which could be seen by some as perhaps too one-sided. However, several contributions in our view (too) easily set aside legal issues, which are nevertheless paramount when dealing with a normative claim. An expansion of the existing human rights obligations of course necessitates a revision or at least a reinterpretation of the existing legal system of subjects in international law. A pure transposition of the existing primary and secondary rules

7 A.-M. Slaughter, 'The Accountability of Government Networks', (2000–1) 8 *Indiana Journal of Global Legal Studies* 347.

from states to corporations, for example, is problematic.⁸ Likewise, a clear protection of the distinction between the (legal) holder of the obligation and the question of jurisdiction, especially in relation to foreign laws such as the Alien Tort Statute (or Alien Tort Claims Act) is paramount. We should not forget that jurisdictional issues are a completely different matter from the responsibility of individuals and corporations for human rights violations. Indeed, as noted by De Schutter, once a court is found to have jurisdiction, this does not necessarily imply responsibility (Alston, p. 274). In addition, as pointed out by Clapham, a too-large focus on issues of jurisdiction has diverted the discussion as to whether non-state actors, in particular corporations, are bound by international law (p. 268). Legal issues, and in particular the notion of subjects in international law, cannot be ignored or overlooked in such a debate.

3.1. Non-state actors in the state-based international legal system

As the titles indicate, the notion of 'non-state actor' is a core concept, but, as rightly pointed out by Alston, it is as such not a useful description, being negative (Alston, p. 3). As a consequence, the exact contents of the notion are still not entirely agreed. Whether international organizations and sub-state entities, for example, need to be placed in this category is not straightforward,⁹ and some even include criminal organizations and religious communities in the notion of non-state actor.¹⁰ Nonetheless, despite telling what they are not, the concept of non-state actor indicates where in the international legal order these non-state actors are to be situated. In a legal system based and centred on states as the primary subjects, it is almost logical and adequate to describe the other actors as such. In that sense, one can of course easily understand that there is no need to define the concept of 'non-state actor' in order to understand that category, since they are, as pointed out by Alston, characterized by the fact that they 'are not states, and can never aspire to be such' (p. 19). However, Alston, in line with the approach taken by him and other authors in his book, considers this an outdated vision of international law, comparing it with the description of other animals as a 'not-a-cat' by his daughter when she was 18 months old (p. 3). Alston's critique is that what he terms 'mainstream international law' is too

8 S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal responsibility', (2001–2) 111 *Yale Law Journal* 443, at 494 ff. Similarly John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, has explicitly decided not to adopt such an approach: 'Some stakeholders believe that the solution lies in a limited list of human rights for which companies would have responsibility, while extending to companies, where they have influence, essentially the same range of responsibilities as States . . . the Special Representative has not adopted this formula.' (Human Rights Council, John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Advance Edited Version, UN Doc. A/HRC/8/5 (2008), para. 6)

9 As has been pointed out by V. Leary, in the 1998 ASIL Annual Meeting a panel was called 'The Accountability of International Organisations to Non-state Actors', somehow implying that international organizations are not to be considered as non-state actors. See remarks by V. Leary, 'Wrap-Up: Non-state Actors and Their Influence on International Law', (1998) 92 *American Society of International Law Proceedings* 380, at 386.

10 See for example the statement by an official from the UN Office on Drugs and Crime to the UN General Assembly's Third Committee, 'Human Trafficking, Smuggling of Migrants, Corruption, Drug-Related Violence Highlighted as Debate Begins on Crime Prevention, International Drug Control', UN Doc. GA/SHC/3848 (2006).

straightforward on the issue of subjects, and divides them into only two categories, states and the rest. Alston equally suggests that the Advisory Opinion on *Reparation for Injuries* of the International Court of Justice (ICJ)¹¹ leaves open the possibility of reconsidering the categories of subjects in international law. Alston's criticism is, of course, not new in international legal scholarship; several authors have previously vigorously opposed the existing concept of subjectivity. Rosalyn Higgins has, for example, argued that the notions of 'subjects' and 'objects' has no 'credible reality' and no 'functional purpose'.¹² More recently, authors have equally advocated that participation in the international legal system be the relevant criterion, instead of relying solely on the existing categories of subjects and objects.¹³

In his contribution Reinisch acknowledges that in traditional international law most non-state actors, with the exception of international organizations, are not subjects of international law, but questions whether human rights obligations are in fact restrictively applicable to states only (Alston, pp. 70–1). Reinisch concludes that in the light of several developments described by him, '[i]t can credibly be asserted that a contemporary reading of human rights instruments shows that non-state actors are also addressees of human rights norms' (p. 72). He nevertheless adds that this should be supplemented by the adoption of legally binding instruments, which, as he admits, has 'a certain feeling of circularity' (ibid.).

Clapham's disapproval of the existing concept of subjects in international law resembles the criticism described in the previous paragraph. Although he does not reconsider the notion of 'non-state actor', Clapham – and this is one of the merits of the book – offers an interesting substitute for the existing framework of 'subjects' (p. 59). The author's approach is principally centred on a reconceptualization of the international legal personality of actors and the capacity to bear obligations under international law. Clapham summarizes this as follows:

We have an international legal order that admits that states are not the only subjects of international law. It is obvious that non-state entities do not enjoy all the competences, privileges, and rights that states enjoy under international law, just as it is clear that states do not have all the rights that individuals have under international law . . . We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity. (pp. 68–9)

Accordingly, the author, similarly to Alston, stays to a certain extent within the current structure of international law, by basing his analysis on a rereading of all relevant international sources on the international legal personality in international law, including the ICJ's opinion in the *Reparations* case.

De Schutter's edited book commences with an interesting overview of the historical evolutions in the codification of the conduct of transnational corporations,

11 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174.

12 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 49. See also on the 'limited value' of these concepts M. Shaw, *International Law* (2003), 232.

13 See for instance R. McCorquodale, 'An Inclusive International Legal System', (2004) 17 LJIL 477. The authors suggest conceptualizing the international legal system as inclusive rather than exclusive of non-state actors.

starting from the 1970s. The author then turns to what he terms the ‘Second Wave of Corporate Responsibility’ (p. 9), which he describes as a ‘revival’ of the question of attributing human rights responsibilities to non-state actors. In line with this evolution, De Schutter tends to explore, in his edited book, ‘the different tools through which the human rights accountability of TNCs may be improved’ (p. 22). As far the normative framework is concerned, De Schutter only very briefly turns to the notion of subjects in international law when describing the contents of the book. He argues that international legal personality flows from the granting of rights and duties to entities. Accordingly, the author suggests that if one should thus impose obligations directly on corporations, then their international legal personality would automatically follow (pp. 33–4). Such a view consequently relies on an already existing acceptance of the capacity of transnational corporations to bear human rights obligations, which is nevertheless to date problematic. Beside these comments, one will inevitably notice that De Schutter’s book does not contain an introductory theoretical framework, especially when compared with the other books under review. On the other hand, the absence of such a theoretical skeleton for the ensuing contributions is consistent with De Schutter’s viewpoint that imposing human rights obligations on corporations poses ‘conceptual difficulties’, but that we should not be the hostage of the too traditional inter-state conception of international law. However, interestingly, we do find such a normative analysis in De Schutter’s contribution to Alston’s volume, which will be discussed in a subsequent section on transnational corporations.

3.2. International organizations

The question of the human rights obligations of international organizations is of particular relevance for the United Nations, the European Union and the Bretton Woods institutions, since these organizations have the strongest potential influence on human rights. At this stage no international organization can be a party to international human rights treaties, as human rights treaties instruments are generally only open to states, with the exclusion of international organizations. The question is, however, whether this precludes the application of basic human rights standards to international organizations. Clapham, in line with his general approach to the question of legal subjectivity, relies on the capacity to enjoy rights and bear international obligations under international law’ (p. 87). In fact, and as already mentioned, this argumentation is not inconsistent with existing international law. The status of international organizations in international law is of course less problematic than that of non-governmental organizations (NGOs), in the sense that they are generally accepted as possessing a certain degree of international legal personality, granting them certain rights and obligations under international law.¹⁴ As opined by the ICJ, ‘[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitution or under agreements to which

¹⁴ H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity* (2003), 992, and J. Klabbers, *An Introduction to International Institutional Law* (2003), 43.

they are parties.¹⁵ The question is, however, which human rights are customary law.

At this stage many internationally recognized human rights standards, such as the prohibition of prolonged arbitrary detention, the prohibition of retroactive penal laws, and the core due process guarantees have without doubt attained customary status in international law.¹⁶ With regard to the Universal Declaration of Human Rights (UDHR), which is formally not a legally binding instrument, several authors have even claimed that the overwhelming majority who voted in favour of it and its continuous affirmation over the years have transformed the rules contained in the UDHR, transformed the declaration (or at least part of it) into customary international law.¹⁷

The United Nations is nevertheless rather reluctant to accept far-reaching human rights obligations as a matter of law. When reading Clapham's fourth chapter, dedicated to the United Nations' human rights obligations, it appears that although the United Nations seems implicitly to accept responsibility in certain cases, a general acceptance by the United Nations of its human rights obligations cannot be inferred from the relevant instruments and practice (pp. 115 ff.). Equally it is unclear from relevant practice whether exceptions could be applicable to certain UN activity. Clapham reminds us, for instance, that the United Nations applies the concept of 'operational necessity' to assess third-party claims (ibid.). It is interesting to note that in its 2006 report submitted to the Human Rights Committee on the Human Rights Situation in Kosovo, UNMIK, the international administration in Kosovo, explained that, while international human rights treaties were a part of the applicable law under *national law*, 'this does not imply that these treaties and conventions are in any way binding on UNMIK. . . . [It] has been the consistent position of UNMIK that treaties and agreements, to which the State Union of Serbia and Montenegro is a party, are not automatically binding on UNMIK. In each case, a specific determination as to the applicability of the principles and provisions must be made.'¹⁸

With regard to international financial institutions, Clapham rightly starts by pointing out that these organizations do not have a competence to address human rights issues under their respective constitutions (p. 142). The World Bank, for instance, was from its inception prohibited from conditioning loans on political or non-economic considerations.¹⁹ Clapham continues with an analysis of several objections raised by François Gianviti, general legal counsel of the International

15 See *Reparation for Injuries*, *supra* note 11, para. 90.

16 See on this T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 94; and American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (1987), para. 702.

17 H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International law', (1995–6) 25 *Georgia Journal of International & Comparative Law* 287, at 322. See also T. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 *AJIL* 46, at 61. See, for a more cautious approach, R. Ergec, *Protection européenne et internationale des droits de l'homme* (2006), 27 and 35.

18 Human Rights Committee, Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999, UN Doc. CCPR/C/UNK//1 (2006), paras. 123–124 (emphasis added).

19 See M. Cogen, 'Human Rights, Prohibition of Political Activities and the Lending-policies of World Bank and International Monetary Fund', in R. S. Chowdhury, E. G. Denters, and P. J. I. M. de Waart (eds.), *The Right to Development in International Law* (1992), 379.

Monetary Fund (IMF), in a presentation on the relation between economic, social, and cultural rights and the IMF. Interestingly, Gianviti reproduces his stance in a contribution to Alston's book, and offers a different and more traditional viewpoint on the issue. Gianviti gives the reader a brief overview of why the IMF cannot, from a (traditional) legal point of view, be considered bound by the International Covenant on Economic, Social and Cultural Rights (ICESCR) (pp. 113 ff.). Of course, Gianviti has the advantage of dealing with economic, social, and cultural rights, as these are not generally acknowledged as being customary law. It is true that the customary status of economic, social, and cultural rights is far more controversial than that of (the majority of) civil and political human rights, or, at least, their customary status has yet to be established. Economic, social, and cultural rights cannot therefore in the quality of customary law bind the IMF. Both Gianviti and Clapham do agree on the fact that the IMF is bound by norms of general international law, but Clapham particularly refutes the idea that economic, social, and cultural rights are not part of customary international law (p. 147).

The most interesting part of Gianviti's argument relates to the indirect effect of the Covenant and the functions of the IMF. Indeed, while on the purely legal technical side it is problematic to argue that international organizations are bound by all human rights norms, Gianviti invites us also to take into consideration the particular functions of the IMF (p. 116). In addition to emphasizing that the IMF is a monetary agency and not a development agency, as substantiated by the IMF constitutive treaty, the author argues that the IMF does indirectly contribute to the objectives of the International Covenant on Economic, Social and Cultural Rights by exercising its functions (p. 132). The author equally places the human rights burden primarily on the shoulders of the contracting states, and rightly reminds us that the states are always in a position to change the IMF's obligations in order to include respect or observance of these rights in the Fund's mandate (p. 138). In that regard, one can equally point to the obligation of states to ensure that the international organizations of which they are members abide by the obligations by which the states are bound.²⁰

3.3. Non-governmental organizations

The book edited by Alston contains an interesting piece by Kamminga on the status and obligations of NGOs in international law. While the book contains four chapters on transnational corporations, it is somehow disappointing that only one chapter addresses NGOs, followed by a chapter on international organizations, which we shall consider subsequently. One of the reasons for the rather meagre attention to the role of NGOs in the human rights sphere could be that the factual phenomena described earlier as reasons to engage in a review of the existing system do not apply to NGOs, or that these do not entail a change in the NGO–human rights balance. The increasing role of NGOs in current international law and international relations is nevertheless beyond doubt, as evidenced by their evolving input in the drafting

20 See for instance *Matthews v. United Kingdom*, Application No. 24833/94, 18 February 1999, ECHR, Rec. 1999-I, paras. 31–35.

of conventions.²¹ As Kamminga rightly notes, while some of the concerns raised in that regard ‘belong to the realm of political science only’, this evolution nevertheless has important legal implications (p. 94).

After an attempt to define NGOs, Kamminga turns to the question of whether NGOs enjoy an international legal personality terms of traditional criteria: treaty-making capacity, capacity to bring international claims, and liability under international law. Interestingly, the conclusion reached by Kamminga reflects what Alston himself has described – and criticized for that matter – as a ‘response of mainstream international law’ on the issue (Alston, p. 19). Kamminga concludes that despite several small developments there does not seem to be a trend towards granting NGOs either treaty-making capacity, accountability under international law, or rights and obligations under international law (p. 109). Kamminga adds that the extent of the developments he has nevertheless identified ‘should not be exaggerated’, since the formal status of NGOs under international law is still, according to him, ‘extremely weak’. The author adds that if and when NGOs are in fact permitted to participate in international law, this participation strengthens rather than weakens the inter-state system (pp. 109–10).

Regrettably, Clapham does not explicitly tackle non-governmental organizations, although he briefly addresses the International Committee of the Red Cross in his chapter dealing with the general aspects of the book (p. 76).

3.4. Transnational corporations

The responsibility of transnational corporations for human rights violations holds a significant position in the three books discussed here because of the important role of corporations in the changed international order. Out of a total of eight chapters, Alston’s edited volume counts as many as four chapters on this particular issue. De Schutter’s book is entirely dedicated to it, and Clapham equally devotes an important part of his book to this aspect.

Despite the controversial status of corporations under international law, Clapham starts by noting that the responsibility of corporations under international human rights law ‘is nearer than is usually imagined’ (p. 270). In the same line, Steinhardt offers an optimistic view on a new emerging *lex mercatoria* in demonstrating that the new human rights corporate movement in fact consists of four different regimes: a market-based regime, under which corporations compete for consumers and investors by conforming to international human rights standards; a regime of domestic regulation; a regime of civil liability, exemplified by the Alien Tort Claims Act in the United States; and, finally, a regime of international regulation (Alston, pp. 178–9). A typology of the accountability mechanisms available to hold corporations responsible for human rights violations is given by De Schutter (Alston, p. 227). The author starts his analysis of the topic by reviewing the responsibility of individuals in international law, state responsibility in respect of individuals in their jurisdiction, the absence of an obligation on home states to control the activities of their nationals abroad, and the obligation on home states to regulate the

21 See for instance A. Boyle and C. Chinkin, *The Making of international law* (2007), in particular ch. 2.

conduct of corporations operating within their national territory (pp. 230–40). The options analysed by De Schutter are in fact similar but not identical to the structure of his edited book, and reflect an interesting division of possible accountability mechanisms. We shall subsequently address the responsibility of both the host and the home state, followed by an overview of the possibility of imposing direct obligations on corporations and the question of self-regulation and ‘soft law’.

3.4.1. *Indirect obligations: impunity and (home and host) state responsibility*

Once more – and, as already alluded to, this might be even more obvious in respect of transnational corporations – the alleged impunity to human rights violations by states is the main cause advanced to support the necessity of extending human rights obligations to transnational corporations. It is nevertheless in this situation that the link between corporations and states is crucial, since the impunity itself is often attributable to the host state. The alleged impunity from which transnational corporations benefit in foreign countries can be traced back either to local governments’ unwillingness to protect human rights or to their inability to ensure that protection effectively (Clapham, p. 238; Alston, pp. 170, 227, and 238). As equally acknowledged by De Schutter, the problem of host state responsibility is not the existence of the international legal obligation resting upon that state to ensure full implementation of human rights in its territory, but the incentives the states may have to respect these obligations (Alston, p. 237).

The unwillingness or inability of states to protect human rights in their territory does not, however, amount to a ‘legal void’ as claimed by De Schutter (Alston, p. 239). Rather, this proves both the existence of these obligations and the need to ensure that states respect their international obligations by enhancing compliance mechanisms such as the Human Rights Committee. Of course, the lack of automatic enforcement mechanisms in international law often stands in the way of an effective implementation of human rights law, but we nevertheless question whether this can be solved by transposing state obligations to corporations. In his 2008 report the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises adopted a similar position, by confirming the primary responsibility of states. The Special Representative adopted ‘the state duty to protect’ as the first principle of his framework to address the responsibility of corporations in human rights violations.²²

In respect of bilateral investment treaties (BITs), the perceived impunity relates to the potentially conflicting obligations of the host state under human rights law and the BIT, and the ‘unwillingness’ of host states to take up human rights protection of their own nationals.²³ Suda’s contribution analyses this in reference to expropriation clauses and the absence of clear human rights clauses contained in BITs (De Schutter, p. 73). The author nevertheless fails to convince the reader of the

²² See Ruggie, *supra* note 8, paras. 50 ff.

²³ See, on the potential negative implications of the Alien Tort Statute on foreign investments, G. C. Hufbauer and N. K. Mitrokostas, ‘International Implications of the Alien Tort Statute’, (2004) 7 *Journal of International Economic Law* 245.

need to adjust the existing system. Indeed, the relation between BITs and general international law can be resolved by the application of principles on the conflict of international legal norms. Moreover, when the host state is in breach of its human rights obligations because of conflicting investment obligations, it seems obvious that this cannot from a legal point of view be attributable to the corporation which made the investment. Moreover, the BIT is a treaty concluded between two states to which the company is not and cannot be a party. The corporation cannot therefore be held accountable for a violation by the host state of its human rights obligations as a consequence of the signature of a treaty with another state. The situation is different if we turn to the contract between the host state and the foreign company, but this is then domestic rather than international law.

Similar analyses are made by Chu Yun Juliana Nam in respect of export processing zones (De Schutter, p. 161) and by Piquer in respect of the North American Free Trade Agreement (NAFTA) (p. 183). The potential difficulties a state might face when confronted with these conflicting obligations, as pointed out by these authors, can in our view only lead to a reinforcement of the host state obligations. These case studies prove that there is an imperative need to reinforce the existing obligations of states, and to provide adequate mechanisms for redress. An interesting instrument to stop this 'race to the bottom' or 'social dumping' is the North American Agreement on Labour Cooperation, as discussed by Piquer (*ibid.*). Within existing legal state obligations the mentioned agreement contains an obligation for states to adopt legislation to provide for high labour standards. The author nevertheless concludes that the effective consequences on the rights of workers following the adoption of the Agreement on Labour Cooperation concluded in the NAFTA are far from clear.

On the absence of the home state's responsibility for the actions of its nationals abroad, one can be quite brief. To date, no such obligation exists under the international law on state responsibility. A state's responsibility can only be established when one of its organs acting in its capacity breaches a rule of international law.²⁴ In accordance with the same Draft Articles on State Responsibility,²⁵ one could argue that, when a corporation is directed or controlled by a state in carrying out its conduct, the home state can be held responsible (Clapham, p. 239). However, this is more a question of attribution of conduct, than of imposing a primary obligation on the corporation as an actor. Despite some authors' viewing home state responsibility as 'desirable' and a counterpart to diplomatic protection (De Schutter, in Alston, p. 237), the absence of such an obligation in the *lex lata* is the logical consequence of the fact that the state cannot control the activities of its nationals. Admitting the contrary would not only allow an objective responsibility regime for the state; it would in addition put an obligation on a state which runs contrary to every notion of both agency and attribution under national and international law. However, under criminal law, states can indeed decide to sue corporations of their nationality for activities abroad, based on the active nationality principle. This

24 Report of the International Law Commission, 53rd session (2001), Draft articles on Responsibility of States for Internationally Wrongful Acts, G. A. Off. Recs, Suppl. No. 10 (A/56/10), Ch. IV, Art. 4, para. 1.

25 *Ibid.*, Art. 8.

would thus be limited to human rights violations which could be considered as crimes under the national law of the corporations, but practice shows that states are usually reluctant to accept a broad application of the active nationality principle, even for individuals.²⁶

3.4.2. *The contents of corporate responsibility: how to hold corporations directly responsible for human rights violations*

Besides the general question of whether an international corporation can be the bearer of human rights obligations, transnational corporations present an additional challenge in respect of applying human rights law. Unlike international organizations, it is generally admitted that corporations do not, in principle, have international legal personality.²⁷ Corporations cannot therefore be seen as having rights and duties under international law, nor can such obligations be imposed on them without granting them a (limited) status under international law. However, strangely enough, the question of whether or not this lack of international legal personality poses a problem in order to ensure that corporations could be held accountable for violations of international law is not dealt with by many authors, who seem to presuppose that either such a (limited) personality exists, or that it is not problematic. Although several authors touch on the issue, only a few deal with it (e.g. Reinisch, in Alston, p. 69).

Steinhardt identifies two categories of conduct which can engage the corporation's civil liability: *per se* wrongs, by which he means conduct requiring no state action as a matter of law, for example crimes such as genocide, war crimes, and slavery; and contextual wrongs, namely conduct that is sufficiently state-like or state-related to trigger liability for human rights violations (Alston, pp. 197–8). This difference mainly reflects the necessary, but too often blurred, distinction that needs to be maintained between international crimes and other violations of international (human rights) law. We shall first deal with the question of directly imposing obligations on corporations under general international law, followed by the specific question of whether international criminal obligations, already imposed on individuals, can be transferred to corporations.

Direct 'civil' responsibility for corporations under international law. Several authors claim that international corporations are already subject to some obligations under international law, drawing on experiences from the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law and the UN Convention on the Suppression of the Financing of Terrorism (see e.g. Clapham, pp. 247–50).²⁸ However, these treaties do not impose obligations directly on corporations. Rather, they impose obligations on states to take measures to ensure the liability of legal persons engaged in the prohibited activities. These direct corporate obligations are therefore domestic rather than international.²⁹ Equally, Weissbrodt and Kruger,

26 See V. Lowe, 'Jurisdiction', in M. Evans (ed.), *International Law* (2006), 247.

27 I. Brownlie, *Principles of Public International Law* (2003), 65.

28 See also Ratner, *supra* note 8, at 477 ff.

29 See, for a similar conclusion, H. R. Bornstein, 'The Alien Tort Claims Act in 2007: Resolving the Delicate Balance between Judicial and Legislative Authority', (2007) 82 *Indiana Law Journal* 1007, at 1077, 1092.

along with others (Wilson, in De Schutter, p. 52), in our view, erroneously derive from such legal instruments as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that the conduct of international corporations may be regulated by international law (Alston, p. 329). We can, however, join the authors in saying that the conduct of the corporations is *regulated* by an international instrument. However, the international legal obligation under the treaty rests on the state, which, according to the Convention, needs to adopt national measures to make bribery a criminal offence.³⁰ The corporate liability is thus in our view purely domestic.

A second recurrent argument to back the assertion that corporations can violate human rights law is the US Alien Tort Statute (ATS), often referred to as the Alien Tort Claims Act (ATCA).³¹ Clapham, for instance, points out that the *Shell* case brought under the ATS implicitly accepted that corporations could be held responsible for complicity in human rights violations which cannot be categorized as crimes under international law (pp. 263–4). The act does not, however, directly impose obligations under international law on corporations, as it merely converts a violation of international law into a domestic tort (Wells and Elias, in Alston, p. 153).³² Hence the ATS, as a US domestic instrument, only gives jurisdiction and a purely national tort-based cause of action to US courts for violations of international law.³³ The ATS, therefore, cannot, as some authors claim, be viewed either as transferring a responsibility under international law for human rights violations to corporations, or as providing a responsibility for home states (Wilson, in De Schutter, p. 43).

It is interesting to note that lawsuits against corporations in fact followed the *Kadić v. Karadžić* judgment in which the US Court of Appeals for the Second Circuit allowed a suit against an individual acting in a private capacity.³⁴ However, the circumstances were obviously different as Karadžić was sued for genocide, war crimes, and crimes against humanity – all considered to be crimes for which *individual* responsibility is generally accepted under international (criminal) law. There is however, a clear difference between individual and corporate liability and between criminal liability and ‘civil’ or ‘tortious’ liability (Clapham, p. 261).

In line with his viewpoint that a corporation can by itself be held responsible for human rights violations, Clapham assesses the mechanisms which could be envisaged in order to judge the complicity of corporations in human rights violations by states. Clapham turns to the existing rules on the attribution of conduct under the ILC Draft Articles on State Responsibility. This analogy suggested by Clapham is indeed theoretically sound, but needs to be read in conjunction with the assumption

30 Art. 3 of the OECD Conventions, as cited by D. Weissbrodt and M. Kruger, ‘Human Rights Responsibilities of Businesses as Non-state Actors’, in P. Alston (ed.), *Non-state Actors and Human Rights* (2005), 314, 329, n. 72.

31 One has to bear in mind that the ATS is a national instrument, which in addition is subject to much criticism in the United States itself. See, for the official US position on the ATS, J. B. Bellinger III, ‘Enforcing Human Rights in US Courts and Abroad: The Alien Tort Statute and Other Approaches’ (2008), The 2008 Jonathan I. Charney Lecture in International Law, available at www.state.gov/s/l/rls/103506.htm. See also A. Ketchel, ‘Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act’, (2007) 32 *Yale Journal of International Law* 191.

32 See also the decision of the US Supreme Court in the case *Sosa v. Alvarez-Machain*, 542 U.S. (2004), 23 ff.

33 Ibid.

34 See Bornstein, *supra* note 29, at 1077, 1087.

that corporations directly bear such an obligation or, to use Clapham's words, have the capacity to bear such an obligation. Suggestions that corporations can be held liable when they are complicit in the violation of human rights, even though they cannot be held directly responsible for human rights violations (Wilson, in De Schutter, p. 60), are indeed contrary to the basic principle that a (legal) person can only be complicit in a violation if that violation would be wrongful if committed by that person. This fundamental rule is moreover included in Article 16 of the ILC Draft Articles on State Responsibility.

Several contributions in De Schutter's edited work address either directly or indirectly the question of corporate responsibility for complicity in human rights violations. Tofalo, for instance, analyses different forms of complicity (De Schutter, p. 335). A contribution by Papaioannou equally deals solely with complicity in human rights abuses without, however, offering a legal approach to the notion of complicity (p. 263). The author provides a rather factual but nevertheless interesting overview of the findings of the UN Panel of Experts on the illegal exploitation of natural resources in the Democratic Republic of the Congo. It should, however, be highlighted that the author, along with the Panel of Experts, frequently refers to the OECD Guidelines to assess the conduct of foreign corporations, although these Guidelines remain to date a non-binding instrument.

Nevertheless, an often overlooked problem in this debate is that, even if international law were to allow the imposition of human rights obligations directly on states, the invoked impunity as a consequence of the lack of effective enforcement will not necessarily be remedied, and the answer to the challenges raised earlier would thus be ineffective.³⁵ Such direct obligations should thus be accompanied by enforcement mechanisms, but two important hurdles need to be overcome. First, if states are called upon to ensure such an implementation, either as a host or as a home state, the problems of unwillingness and incapacity will not be countered. Second, if an independent 'state-less' mechanism is established, states will obviously lose control over the implementation of the direct obligations of corporations,³⁶ and it is questionable whether this would be an adequate response to the problem.

Extending criminal responsibility to corporations. When looking at the issue of criminal responsibility of corporations under international law, the conclusion obviously is that there is at least a lot of reluctance to accept this expansion. The criminal liability of legal persons was not, for example, included in the final text of the Rome Statute, despite its inclusion in Article 23 of the preliminary draft.³⁷ An analysis of the exclusion of corporate responsibility contained in the draft Statute for the International Criminal Court at the Rome Conference is brought by Clapham, who was legal adviser and delegate for the Solomon Islands. Although Clapham informs us that the reason behind the rejection of the inclusion of corporations was not the 'theoretical issue of the subjectivity of corporations' (p. 246), the non-inclusion of corporate

35 See, for a similar critique, C. M. Vazquez, 'Direct vs. Indirect Obligations of Corporations under International Law', (2004–5) 43 *Columbia Journal of Transnational Law* 927.

36 *Ibid.*

37 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Part I: Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998).

responsibility in the Rome Statute nevertheless demonstrates that, regardless of the reasons behind such a rejection, there is no general acceptance of corporate criminal responsibility in international law. This does not mean, however, that such an evolution cannot be envisaged. In their well-researched contribution, Wells and Elias argue that it 'is not such an imaginative leap to conceive a corporation as the subject of international law' (Alston, p. 155). When looking at criminal responsibility under international law, we do agree with the authors that extending individual criminal responsibility to corporations would indeed, as such, not be overly imaginative. It is in fact very similar to the extension of the criminal responsibility of individuals to corporations in several national legal systems. This development would not, however, create a complete international legal personality for corporations, just as individual criminal responsibility under international law did not generate a full international legal personality for individuals under international law. An interesting overview of the criminal liability of corporations under national law and the emergence of the idea in international law is given by Chiomenti (De Schutter, p. 287).

Based on the fact that such corporate criminal responsibility exists, Wells and Elias further analyse the notion of corporate complicity in human rights violations (Alston, p. 141). After identifying the evolutions behind the emergence of corporate responsibility, the authors turn to the main question – namely, what legal avenues are possible for holding corporations accountable for human rights violations, and in particular whether this would be feasible through the notion of complicity. Wells and Elias engage in an extensive and sound discussion and analysis of the different types of criminal accountability which exist on the national level. Where the authors cannot, however, be followed, is in their attempt to transpose national legal criminal accountability mechanisms to human rights violations by transnational corporations. Indeed, human rights violations cannot as such always be qualified as crimes, and such violations do not automatically amount to an international crime. The international legal system in general is fundamentally different from national legal systems, especially in respect of corporations. A corporation's legal personality in the national legal order differs substantially from that in the international legal order. The authors do concede that the legal personality of corporations is difficult to pin down (Alston, p. 70).

3.4.3. *Soft obligations*

Every reader of these books will be stunned by the large quantity of non-binding instruments, or so-called 'soft law'. For instance, Steinhardt's fourth regime of the *lex mercatoria* – the regime of international regulation – provides the reader with an overview of existing non-binding instruments, such as the UN Global Compact, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, and so forth (Alston, pp. 202–12). Similarly, Weissbrodt and Kruger analyse the international responsibility of corporations in the drafting process of the UN Sub-commission Resolution on the Norms of Responsibilities of Transnational Corporations and Other Businesses with regard to Human Rights, of which Weissbrodt was one of the

drafters (Alston, pp. 328 ff.). Several contributions in De Schutter's book are also entirely dedicated to soft law instruments and self-regulatory mechanisms.

Reinisch acknowledges in his contribution, after noting the 'decreasing relevance of the legal quality of the standards invoked', that '[a]pparently, it is becoming less and less important whether the human right standards sought to be enforced are legally binding or not' (Alston, p. 69). However, as has previously been rightly pointed out by several scholars,³⁸ 'soft law' is not binding under international law and cannot therefore be interpreted as an acceptance of corporate human rights obligations, even if these can be seen as evidence of 'desired behaviour'.³⁹ When one appraises the quality of the obligations of corporations as non-state actors, one cannot help noticing that there is to date no international legally binding instrument which directly imposes obligations on corporations. It is nevertheless remarkable that many authors rely on these non-binding standards, codes of conduct, and other non-binding norms to demonstrate an evolution in the acceptance of the international responsibility of transnational corporations for violations of human rights obligations. Contrary to what some authors claim (Wells and Elias, in Alston, p. 151, and De Schutter, in De Schutter, p. 11), the norms cannot therefore be seen as a restatement of existing international human rights law. Equally, it is questionable whether these soft instruments can be considered as evolving norms of customary international law, although they can of course result in future changes in the law (Chiamenti, in De Schutter, p. 298, and Gelfand, *ibid.*, p. 333).

4. CONCLUSION

As has already been said, international lawyers can no longer ignore the increasing role of non-state actors. Several cases demonstrate that the human rights situation in certain countries needs to be addressed, mainly as a consequence of the changing role of states and non-state actors in international law. The question is only how to address these challenges from a normative perspective, and this raises the central question of whether, instead of incessantly trying to expand human rights obligations, we should not reinforce the existing mechanisms. Indeed, while clear responsibilities exist for states to ensure that human rights are respected throughout their territory, it has to be asked whether we should not focus on a reinforcement of these obligations instead of creating new mechanisms in which the problem of effective enforcement will inevitably resurface. Perhaps the solution to the problem, which everyone acknowledges or needs to acknowledge, lies within the current international legal framework.

A critical analysis of the three books reveals both the weight and the inherent limits of the subject. All three books offer a captivating view of the way in which this should or could be addressed, and surely contribute to the ongoing debate. I have no hesitation in recommending them to anyone interested in the role of non-state actors

38 See for instance P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 AJIL 413; J. Klabbers, 'The Undesirability of Soft Law', (1998) 67 *Nordic Journal of International Law* 381.

39 See Ratner, *supra* note 8, at 486.

in human rights law, although they would perhaps be appreciated most by scholars with knowledge of international (human rights) law. Each book is nevertheless very different from the others, regardless of the many common features depicted above. The differences lie in the fact that Clapham's book is a monograph, while the two others are edited volumes. Clapham's book offers the most comprehensive overview of the human rights obligations of non-state actors by providing the reader with a well-researched conceptual framework to tackle the concerns described by the author. The edited works by Alston and De Schutter are nevertheless equally interesting, as they both contain a selection of remarkable contributions on the topic. Alston's book offers the advantage of covering all elements of the debate by means of a very logical approach, containing contributions on the more theoretical aspects of the debate and on the various proclivities to imposing human rights obligations on non-state actors. De Schutter's book, on the other hand, contains contributions solely on the topic of corporations – the most important challenge the international community is facing. Any reader interested in the role of corporations in human rights law will thus find a broad and almost exhaustive analysis of the human rights responsibilities of transnational corporations.