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# Editorial

## BUSINESS AND HUMAN RIGHTS: TAKING STOCK OF TRENDS IN INTERNATIONAL GOVERNANCE AND DOMESTIC LITIGATION\*

Danielle Anne Pamplona\*\*

Franz Christian Ebert\*\*\*

### 1 THE CONTEXT

Ensuring that business actors observe rather than violate human rights in the course of their operations remains a major challenge of our time. With budgets oftentimes exceeding those of smaller states,<sup>1</sup> multinational corporations can have a profound and multifold impact on local populations. While holding considerable potential for contributing to the realization of human rights,<sup>2</sup> their activities continue to produce significant adverse impacts in this regard,<sup>3</sup> which tend to be particularly pronounced in the Global South.<sup>4</sup> This includes widely publicized disasters, such as the collapse of the Rana Plaza building and its garment factories in Dhaka, Bangladesh, which killed more than 1000 workers in 2013,<sup>5</sup> or the 2015 Fundão tailings dam collapse in Brazil, causing 19 casualties in addition to substantial environmental damage.<sup>6</sup> Questions such as how to ensure respect for labor rights in global supply chains<sup>7</sup> or how to avoid human rights violations of indigenous

<sup>1</sup> See, e.g., the examples provided by BELINCHÓN, Fernando and MOYNIHAN, Ruqayyah. 25 Giant Companies That Are Bigger Than Entire Countries, available at: <https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7#walt-disneys-takings-exceeded-bulgarias-gdp-11>, accessed on Nov 30, 2019.

<sup>2</sup> A number of companies have set up specific programs in this regard, e.g. offering professional training on sustainability for school teachers or tackling gender discrimination among their employees. See the examples on the website of Pacto Global. Rede Brasil, available at <https://www.pactoglobal.org.br/solucao/5>, accessed on Nov 30, 2019.

<sup>3</sup> This concerns civil and political rights as well as economic, social and cultural rights. See further, NOLAN, Justine, and TAYLOR, Luke. Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy? *Journal of Business Ethics*, vol. 87, n. 2, pp. 433-451, 2009.

<sup>4</sup> See, e.g., DIXON, Chris J., DRAKAKIS-SMITH, David and WATTS, H. Doug. Multinational Corporations and the Third World, Routledge, 2012; WEINSTEIN, Franklin B., Multinational Corporations and the Third World: the Case of Japan and Southeast Asia. *International Organisation*, vol. 30, n. 3, pp. 373-404, 1976.

<sup>5</sup> See SIDDIQUI, Javed and UDDIN, Shahzad. Human rights disasters, corporate accountability and the state. Lessons learned from Rana Plaza. *Accounting, Auditing & Accountability Journal*. vol. 29, n. 4, pp. 679-704, 2016.

<sup>6</sup> This was the world's biggest disaster involving a tailings dam and the Brazilian industrial disaster with the greatest environmental impact: around 32 million cubic meter of tailings were dumped into the environment. For relevant data, see the websites of Instituto Humanitas Unisinos, available at: <http://www.ihu.unisinos.br/78-noticias/575851-infografico-tragedia-de-mariana-entenda-os-impactos-ambientais-causados-pelo-desastre>, accessed on Nov 30, 2019, and Jornal da Unicamp, available at: <https://www.unicamp.br/unicamp/ju/noticias/2018/09/12/o-desastre-ambiental>, accessed on Nov 30, 2019.

<sup>7</sup> See in this regard COMPA, Lance. Corporate Social Responsibility and Workers' Rights. *Comparative Labor Law & Policy Journal*, vol. 30, n. 1, pp. 1-10, 2008; MOSLEY, Layna. Workers' Rights in Global Value Chains: Possibilities for Protection and for Peril. *New Political*

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peoples<sup>8</sup> and local communities<sup>9</sup> in the context of the extraction of natural resources have garnered the attention of activists, human rights institutions and scholars alike.<sup>10</sup> In this vein, human rights-related conduct by corporations also presents major challenges for the projects of transformative constitutionalism, which have emerged in Latin America and other regions.<sup>11</sup>

The present symposium explores the complicated relationship between human rights and business actors from a legal perspective. It thereby adds to a rapidly growing body of literature,<sup>12</sup> which has given rise to a multidisciplinary debate connecting academic strands ranging from business studies and ethics to sociology, anthropology and the law.<sup>13</sup> The six contributions in this symposium explore different aspects of international governance related to business and human rights and examine efforts to hold corporations accountable for human rights issues through domestic litigation. In the following, we briefly contextualize the contributions and provide an overview of their content.

## 2 EXPLORING THE POTENTIAL OF INTERNATIONAL GOVERNANCE INSTRUMENTS RELATING TO BUSINESS AND HUMAN RIGHTS

In the last decades, problems relating to the conduct of multinational and other corporations have led to the adoption of a plethora of regulatory arrangements beyond the State designed to prevent or address adverse social impacts caused by them. Since 2011, the main international standard of reference consists of the United Nations Guiding Principles on Business and Human Rights<sup>14</sup> whose three pillars deal with the states' duty to protect human rights, corporations' responsibility to respect them, and the access to redress mechanisms for victims, respectively.<sup>15</sup> This adds to earlier standards for the conduct of business actors

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*Economy*, vol. 22, n. 2, pp. 153-168, 2017.

<sup>8</sup> See, e.g., SCHILLING-VACAFLOR, Almut. Norm Contestation and (Non-)Compliance: The Right to Prior Consultation and FPIC in the Extractive Industries. In: FEICHTNER, Isabelle, KRAJEWSKI, Markus and ROESCH, Ricarda (eds.). *Human Rights in the Extractive Industries. Interdisciplinary Studies in Human Rights*, Springer, Cham, pp. 311-337, 2019.

<sup>9</sup> See, e.g., FRYNAS, Jędrzej George, The Oil Industry in Nigeria: Conflict between Oil Companies and Local People. In: FRYNASM, Jędrzej George and PEGG, Scott (eds.). *Transnational Corporations and Human Rights*, Palgrave, Basingstoke et al., pp. 99-114, 2003.

<sup>10</sup> See, e.g., JOSEPH, Sarah. Protracted Lawfare: The tale of Chevron Texaco in the Amazon. *Journal of Human Rights and the Environment*, vol. 3, n. 2, pp. 70-91, 2012; POWELL, Stephen Joseph. Coal and Gold, Hard and Cold: Using Trade Agreements to Resolve Human Rights Violations in the Caribbean Colombia Mineral Extraction Industry. *Intercultural Human Rights Law Review*, vol. 10, pp. 55-68, 2015; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Indigenous Peoples, Afro-Descendent Communities, and Natural Resources. Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Washington, 2015, available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2016/048.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/048.asp), accessed on Nov 30, 2019.

<sup>11</sup> See, e.g., GÓNGORA MERA, Manuel Eduardo. El Constitucionalismo Interamericano y la Fragmentación del Derecho Internacional. Posicionando al ICCAL en el Debate sobre Colisiones de Regímenes Normativos. In: *El Constitucionalismo Transformador en América Latina y el Derecho Económico Internacional. De la Tensión al Diálogo*, Universidad Nacional Autónoma de México, Mexico City, pp. 33-57, 2018. See on transformative constitutionalism in Latin America in general the contributions in VON BOGDANDY, Armin, FERRER MAC-GREGOR, Eduardo, MORALES ANTONIAZZI, Mariela, PIOVESAN, Flávia and SOLEY, Ximena (eds.). *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford University Press, Oxford, 2017. On transformative constitutionalism outside Latin America see, e.g., Christiansen, Eric C. Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice, *Journal of Gender, Race & Justice*, vol. 13, n. 3, pp. 575-614, 2010.

<sup>12</sup> This is exemplified by the inauguration of the Business and Human Rights Journal in 2016.

<sup>13</sup> See, e.g., SANTORO, Michael A., Business and Human Rights in Historical Perspective. *Journal of Human Rights*, vol. 14, pp. 155-161, 2015.

<sup>14</sup> The Guiding Principles are based on a report by the Special Representative of the UN Secretary-General for Business and Human Rights, John Ruggie, which had been submitted to the Human Rights Council three years earlier. The implementation of the Guiding Principles is to be facilitated, among others, by a Working Group on Business and Human Rights which, being composed of five independent experts, is tasked with the promotion of these Principles, through dissemination, capacity building and similar activities. See ADDO, Michael K. The Reality of the United Nations Guiding Principles on Business and Human Rights. *Human Rights Law Review*, vol. 14, pp. 133-147, 2014.

<sup>15</sup> See further on the content and meaning of the principles FRETAS, Ana Rachel, PAMPLONA, Danielle Anne. Os Princípios

adopted under the auspices of international organizations, in particular the OECD Guidelines for Multinational Enterprises,<sup>16</sup> the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,<sup>17</sup> and the United Nations Global Compact.<sup>18</sup> In addition, a multitude of private governance instruments has emerged, such as codes of conduct at the company<sup>19</sup> or industry level,<sup>20</sup> multi-stakeholder initiatives<sup>21</sup> as well as international framework agreements concluded between companies and global union federations.<sup>22</sup>

The uncertain fate of the negotiations on the envisaged business and human rights treaty<sup>23</sup> highlights the need to better understand the potential of the existing governance instruments in the area of business and human rights. One aspect of relevance pertains to the precise reach and content of the requirements

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Orientadores das Nações Unidas sobre Empresas e Direitos Humanos: houve avanços? In: BENACCHIO, Marcelo (ed.). *A Sustentabilidade da Relação entre Empresas Transnacionais e Direitos Humanos*, Editora CRV, Curitiba, pp. 147-168, 2016.

<sup>16</sup> Adopted in 1976, the Guidelines have been containing a dedicated chapter on human rights since 2011. Importantly, these Guidelines involve the creation of National Contact Points which can deal with submissions from civil society concerning companies that are based on the country's territory. See OECD Guidelines for Multinational Enterprises 2011 Edition, Part II, available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>, accessed on Nov 30, 2019, and further RUGGIE, John Gerard and NELSON, Tamaryn. *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges*. *Brown Journal of World Affairs*, vol. 22, n. 1, pp. 99-128, 2015.

<sup>17</sup> Adopted in 1977 and most recently amended in 2017, the Declaration focuses on issues pertaining to labor and social concerns. Its implementation framework involves, among others, the creation of national tripartite focal points, dialogue between companies and trade unions and an interpretation procedure but lacks a mechanism for submissions by affected parties. See at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf), accessed on Nov 30, 2019, and further ČERNIČ, Jernej Letnar. *The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Revisited: Is There a Need for Its Reform?* *European Yearbook of International Economic Law*, Springer, Berlin/Heidelberg, 2019, advanced view, available at: [https://link.springer.com/chapter/10.1007/8165\\_2019\\_30](https://link.springer.com/chapter/10.1007/8165_2019_30), accessed on Nov 30, 2019.

<sup>18</sup> Launched in 2000 by the UN Director General, the Global Compact commits participant companies to abide by ten principles relating to human rights, labour standards, environmental protection and the fight against corruption; see at: <https://www.unglobalcompact.org/what-is-gc/mission/principles>, accessed on Nov 30, 2019. Apart from capacity building projects and dialogue mechanisms, this initiative involves the submission of reports and comes with a complaint mechanism that can result in the withdrawal of participant status; see e.g. WESCHKA, Marion. *Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?* *Heidelberg Journal of International Law*, vol. 66, pp. 625-661, 2006.

<sup>19</sup> See, e.g., WAWRYK, Alex. *Regulating Transnational Corporations through Corporate Codes of Conduct*. In: FRYNAS, Jędrzej George and PEGG, Scott, *Transnational Corporations and Human Rights*, Palgrave, Basingstoke et al., pp. 53-78, 60, 2003; and for a historical perspective CHANCE, Steven K. *Codes of Conduct for Multinational Corporations*. *The Business Lawyer*, vol. 33, n. 3, pp. 1799-1820, 1978.

<sup>20</sup> See, e.g., the Environmental Stewardship Program of the American Petroleum Institute. See at: <https://www.api.org/oil-and-natural-gas/environment/environmental-performance/environmental-stewardship>, accessed on Nov 30, 2019. Similarly, a number of financial institutions have endorsed the Equator Principles, which provide standards for due diligence and monitoring in the area of project finance. See, e.g., RIEGNER, Michael. *The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective*. *Transnational Legal Theory*, vol. 5, n. 3, pp. 489-510, 2014.

<sup>21</sup> Examples are Social Accountability International and the Ethical Trading Initiative; see at <http://www.sa-intl.org/> and <https://www.ethicaltrade.org>, respectively, accessed on Nov 30, 2019. Some NGOs also monitor the implementation of such codes, such as the Fair Labor Association or the Fair Wear Foundation. See TER HAAR, Beryl & KEUNE, Maarten. *One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh*. *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 30, n. 1, pp. 5-26, 8, 2014.

<sup>22</sup> See DEHNEN, Veronika and PRIES, Ludger. *International Framework Agreements: A thread in the web of transnational labour regulation*. *European Journal of Industrial Relations*, vol. 20, n. 4, pp. 335-350, 2014. Most of the companies involved are based in Europe. See KRAUSE, Rüdiger. *The Promotion of Labour Standards Through International Framework Agreements*. In: GÖTTI, Henner (ed.). *Labour Standards in International Economic Law*, Springer, Cham, pp. 319-339, 322-323, 2018.

<sup>23</sup> The negotiation process began with Ecuador and South Africa presenting a draft resolution to the Human Rights Council that would allow the creation of an open-ended Intergovernmental working group to draft a treaty on business and human rights. Meanwhile five sessions have been held, with a revised zero draft having been presented in July 2019. On the negotiation process see SUÁREZ FRANCO, Ana María and FYFE, Daniel. *Voluntary vs. Binding: Civil Society's Claim for a Binding Instrument*. In: ČERNIČ, Jernej Letnar and CARRILLO-SANTARELLI, Nicolás (eds.). *The Future of Business and Human Rights. Theoretical and Practical Considerations for a UN Treaty*, Intersentia, Cambridge et al., pp. 139-159, 2018. On the rationale behind the proposed treaty see SIMONS, Penelope. *The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises Moving Forward Strategically*. In DEVA, Surya and BILCHITZ, David (eds.). *Building a Treaty on Business and Human Rights. Context and Contours*, Cambridge University Press, Cambridge, pp. 48-78, 2019.

under these instruments with regard to specific business sectors and groups of actors. **Humberto Cantú Rivera** provides insights in this regard by addressing human rights issues relating to private security companies, whose activities have affected local populations in the context of natural resource extraction projects,<sup>24</sup> among others.<sup>25</sup> After laying out the relevant international framework, the author provides an in-depth analysis of the State obligations with regard to business activities in conflict areas. He also examines the responsibility of private security companies with regard to human rights matters under relevant international soft law instruments. The author then scrutinizes the obligations incumbent on the State to adjust the domestic legal and institutional framework to avoid adverse impacts by the aforesaid actors and concludes by highlighting the dynamic nature of the law in this area.

Furthermore, a need persists to fathom out in more depth how the international instruments in the area of business and human rights interact with countries' legal and institutional frameworks<sup>26</sup> and to which extent these instruments translate into concrete action at the domestic level.<sup>27</sup> With regard to the UN Guiding Principles on Business and Human Rights a debate has notably emerged about the potential and shortcomings of the National Business and Human Rights Action Plans, which have, among others, been requested by the UN Human Rights Council.<sup>28</sup> **Judith Schönsteiner** furthers our understanding of this subject by providing an in-depth analysis of the Chilean National Action Plan (NAP) on Business and Human Rights and its institutional setting. Based on a brief review of the relevant international instruments and the NAP's adoption process, she examines the NAP's main content, pointing to a number of deficiencies in this regard. The author subsequently analyses the NAP's institutional framework, identifying a lack of institutional coherence that may create obstacles for the NAP's implementation in practice. Schönsteiner then critically examines the experiences so far with the NAP's implementation. While highlighting some positive aspects, in particular concerning the stakeholder participation in the NAP's preparatory process, she points to a number of steps that would be required for Chile to fully live to its commitments under the UN Guiding Principles.

A key controversy in the field of business and human rights relates to the potential of private governance instruments to help prevent or address human rights violations in global supply chains. A number of critics have highlighted limitations in the design of these mechanisms<sup>29</sup> while others point to a rather mixed human rights impact on the ground.<sup>30</sup> In this context, **Nicolas Carillo Santarelli analyses the potential**

<sup>24</sup> See SZABLOWSKIA, David and CAMPBELL, Bonnie. Struggles over extractive governance: Power, discourse, violence, and legality. *The Extractive Industries and Society*, vol. 6, n. 3, pp. 635-641, 639, 2019.

<sup>25</sup> See, e.g., KONTOS, Alexis P. Private Security Guards: Privatized Force and State Responsibility under International Human Rights Law. *Non-State Actors and International Law*, vol. 4, n. 2, pp. 199-238, 202-204, 2004.

<sup>26</sup> For example, the Colombian Constitutional Court has relied on the UN Guiding Principles on a number of occasions; see CORREA HENAO, Magdalena and ROA ROA, Jorge Ernesto. Derechos Humanos, Responsabilidad Social Empresarial y Principios Ruggie en la Jurisprudencia Constitucional Colombiana. In: MARTÍNEZ, Julián Toledano (ed.). *Derechos Humanos y la actividad empresarial en Colombia: Implicaciones para el Estado Social de Derecho*, Universidad Externado de Colombia, Bogotá, pp. 151-194, 2019.

<sup>27</sup> See in this regard, e.g., GLINSKI, Carola. The Ruggie Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards through Mutual Impact and Learning. *Nordic Journal of Human Rights*, vol. 35, n. 1, pp. 15-34, 2017; HILL, Christina and LILLYWHITE, Serena. The United Nations' Protect, Respect and Remedy' Framework: Six Years on and What Impact Has It Had? *The Extractive Industries and Society*, vol. 2, n. 1, pp. 4-6, 2015.

<sup>28</sup> See, e.g., METHVEN O'BRIEN, Claire, MEHRA, Amol, BLACKWELL, Sara and POULSEN-HANSEN, Cathrine Bloch. National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool. *Business and Human Rights Journal*, vol. 1, n. 1, pp. 117-126, 119-120, 2015.

<sup>29</sup> Perceived limitations include "the selective content, lack of monitoring appliances and implementation mechanisms"; YIANNAROS, Andreas, NYOMBI, Chrispas and LEWIS, Rhidian. Corporate Personality, Human Rights and Multinational Corporations. *International Company and Commercial Law Review*, vol. 27, n. 7, pp. 234-251, 243, 2016.

<sup>30</sup> With regard to workplace-related human rights, see EGELS-ZANDÉN, Niklas and LINDHOLM, Henrik. Do Codes of Conduct Improve Worker Rights in Supply Chains? A Study of Fair Wear Foundation. *Journal of Cleaner Production*, vol. 107, pp. 31-40, 2015; HOANG, Dong and JONES, Bryn. Why Do Corporate Codes of Conduct Fail? Women Workers and Clothing Supply Chains in Vietnam. *Global Social Policy*, vol. 12, n. 1, pp. 67-85, 2012; KIM, Jee Young. The Politics of Code Enforcement and Implementation in Vietnam's Apparel and Footwear Factories. *World Development*, vol. 45, pp. 286-295, 2013; LOCKE, Richard M., QIN, Fei and BRAUSE, Alberto. Does Monitoring Improve Labor Standards? Lessons from Nike. *Industrial and Labor Relations Review*, vol.

of company codes of conducts and reflects on their role within the broader international governance framework with regard to business and human rights. Based on a brief description of the relevant mechanisms, the author assesses possible benefits and structural limitations of those instruments. He highlights factors that determine the effectiveness of company codes of conduct and argues that they can complement but not replace other regulatory arrangements. Carillo Santarelli then reflects on options to increase their credibility of company codes of conduct, to foster synergetic interactions between them and other relevant governance instruments, and to help to avoid that such codes of conduct are mainly used as a device of window dressing.

### 3 THE POTENTIAL OF DOMESTIC LITIGATION FOR HUMAN RIGHTS ACCOUNTABILITY OF BUSINESS ACTORS

Domestic courts remain a vital – indeed in many cases the only –<sup>31</sup> forum for holding business actors legally accountable for human rights violations. Recent years have seen several legislative innovations in this regard. Notably, the French *Loi sur le devoir de vigilance* of 2017<sup>32</sup> requires certain French companies to prepare, disclose, and implement a “*plan de vigilance*”<sup>33</sup> and a popular initiative for a similar law was at the time of writing pending in Switzerland.<sup>34</sup> Tort law cases against multinational companies involving violations by their subsidiaries or in their supply chain have been filed in a number of jurisdictions, including before US,<sup>35</sup> UK,<sup>36</sup> Canadian,<sup>37</sup> Dutch<sup>38</sup> and German courts<sup>39</sup>, albeit so far with limited results in term of substantial re-

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61, n. 1, pp. 3-31, 2007. For similar findings regarding certain multi-stakeholder initiatives see e.g., BARRIENTOS, Stephanie and SMITH, Sally. Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production System. *Third World Quarterly*, vol. 28, n. 4, pp. 713-729, 2007; SHEEHY, Benedict. Understanding CSR: An Empirical Study of Private Regulation. *Monash University Law Review*, vol. 38, n. 2, pp. 103-127, 117-119, 2012.

<sup>31</sup> While corporate officials can be brought before the International Criminal Court (ICC), its jurisdiction under the Rome Statue does not extend to legal persons such as corporations; see on this KALECK, Wolfgang and SAAGE-MAASS, Miriam. Corporate Accountability for Human Rights Violations Amounting to International Crimes the Status Quo and Its Challenges. *Journal of International Criminal Justice*, vol. 8, pp. 699-724, 710, 2010. On the difficulties with trying corporate officials for human rights violations before the ICC see, e.g., WHEELER, Caleb H. Re-Examining Corporate Liability at the International Criminal Court through the Lens of the Article 15 Communication against Chiquita Brands International. *Melbourne Journal of International Law*, vol. 19, n. 1, pp. 369-388, 2018.

<sup>32</sup> On the underlying rationale see MAVOUNGOU, Larios, Les pouvoirs privés économiques à l'épreuve de la loi française sur le devoir de vigilance. *Revue internationale de droit économique*, vol. XXIII, n. 1, pp. 49-62, 2019.

<sup>33</sup> As Cossart, Chaplier and Beau de Lomenie explain, this applies to “companies incorporated or registered in France for two consecutive fiscal years that either employ at least 5,000 people themselves and through their French subsidiaries, or employ at least 10,000 people themselves and through their subsidiaries located in France and abroad”; COSSART, Sandra, CHAPLIER, Jérôme and BEAU DE LOMENIE, Tiphaine. The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All. *Business and Human Rights Journal*, vol. 2, n. 2, pp. 317–323, 320, 2017.

<sup>34</sup> For a legal analysis of the law proposed by the popular initiative and the parliamentary counter-proposal see WERRO, Franz. The Swiss Responsible Business Initiative and the Counter-Proposal, *Journal of European Tort Law*, vol. 10, n. 2, pp. 166–182, 2019. For a chronology and outlook of the initiative see at: <https://www.humanrights.ch/fr/droits-humains-suisse/interieure/initiatives-parlement/multinationales-responsables/initiative-multinationales-responsables-chronologie>, accessed on Nov 30, 2019.

<sup>35</sup> See, e.g., SALAZAR, Claudia T. Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act. *Journal of Civil Rights and Economic Development*, vol. 19, n. 1, pp. 111-157, 2004.

<sup>36</sup> See in this regard HOPKINS, Samantha. Vedanta Resources plc and Another v Lungowe and Others. *Northern Ireland Legal Quarterly*, vol. 70, n. 3, pp. 371-375, 374, 2019.

<sup>37</sup> See LAUZON, Jolane T. Araya v. Nevsun Resources: Remedies for Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad. *Quebec Journal of International Law*, vol. 31, n. 1, pp. 143-169, 2018.

<sup>38</sup> See DE GROOT, Cees. The ‘Shell Nigeria Issue’: Judgments by the Court of Appeal of The Hague, The Netherlands. *European Company Law*, vol. 13, n. 3, pp. 98-104, 2016.

<sup>39</sup> See WESCHE, Philipp and SAAGE-MAASS, Miriam. Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK. *Human Rights Law Review*, vol. 16, n. 2, pp. 370–385, 2016.

dress for the victims concerned.<sup>40</sup> Increasingly, scholars and practitioners are also exploring the potential of criminal law,<sup>41</sup> consumer and competition law,<sup>42</sup> among others.

Several recent court decisions merit reflection with regard to their implications for human rights-related corporate accountability. In particular, the United States' Alien Tort Statute (ATS) – for many years a major vehicle for holding corporate actors accountable for human rights violations committed outside US territory –<sup>43</sup> has seen its potential narrowed by several US Supreme Court decisions, establishing, among others, a “presumption against extraterritorial application”<sup>44</sup> and excluding foreign companies from its scope.<sup>45</sup> Meanwhile, the UK Supreme Court ruled in a decision of 2019 that UK companies can have a duty of care vis-à-vis the stakeholders of their foreign subsidiaries and that UK courts can be competent to hear cases alleging a breach thereof.<sup>46</sup>

Against this backdrop, **Patricia Almeida de Moraes and Danielle Anne Pamplona** explore the background and rulings of two key domestic law cases for Business and Human Rights Scholars, namely the Kiobel case, decided by the US Supreme Court, and the Vedanta case, handed down by the UK Supreme Court. Both decisions concern the admissibility of claims against corporations in these countries relating to actions carried out abroad by their subsidiaries. In this sense, the text explores the results from Kiobel and explains the reasons for which it has been received by business and human rights community as a setback, which contrasts with the potentially more promising results of the ruling in Vedanta. However, as much as Vedanta may be perceived as an important step forward, it is not unlikely that corporations will be adjusting their business structures in order to not fall within the decision's scope in the future.

A key challenge for domestic courts consists of allocating responsibility to corporations for human rights violations in their supply chain.<sup>47</sup> This includes questions about the duty of care that corporations have under domestic law vis-à-vis their suppliers and about the degree of influence that is required in this

<sup>40</sup> See, e.g., ENNEKING, Liesbeth F. H. Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria. In: FEICHTNER, Isabell, KRAJEWSKI, Markus and RÖSCH, Ricarda (eds.). *Human Rights in the Extractive Industries*, Springer, Cham, pp. 511-551, 549-550, 2019.

<sup>41</sup> See, e.g., MÜLLER-HOFF, Claudia. Unternehmen als Täter – internationale Perspektiven und Herausforderungen für das deutsche Straf- und Prozessrecht. In: KRAJEWSKI, Markus, OEHM, Franziska, SAAGE-MASS, Miriam (eds.). *Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen, Interdisziplinäre Studien zu Menschenrechten*, Springer, Berlin/Heidelberg, pp. 223-246, 2018.

<sup>42</sup> See RÜHMKORF, Andreas. *Corporate social responsibility, private law and global supply chains*, Edward Elgar, Cheltenham, pp. 126-163, 2015. In Germany, a group of NGOs has relied on German competition law to hold the retailer Lidl to account for making false statements about the observance of labour standards in its supply chains, leading the company to retract the relevant statements. See MÜLLER-HOFF, Claudia. Making Corporations Respond to the Damage They Cause: Strategic Approaches to Compensation and Corporate Accountability. Brot für die Welt, Misereor, ECCHR, p. 19, undated.

<sup>43</sup> See, e.g., CLEVELAND, Sarah H. The Alien Tort Statute, Civil Society, and Corporate Responsibility. *Rutgers Law Review*, vol. 56, n. 4, pp. 971-988, 2004.

<sup>44</sup> Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659; 569 U.S., 2013. See further, e.g., SEIBERT-FOHR, Anja. Transnational Labour Litigation: The Ups and Downs Under the Alien Tort Statute. In: GÖTTI, Henner (ed.). *Labour Standards in International Economic Law*, Springer, Cham, pp. 341-354, 351, 2018.

<sup>45</sup> Jesner v Arab Bank 138 S Ct 1386, 1407, 2018. See further DODGE, William S. Corporate Liability Under the US Alien Tort Statute: A Comment on Jesner v Arab Bank. *Business and Human Rights Journal*, vol. 4, n. 1, pp. 131-137, 2019. A number of other options for filing human rights-related lawsuits against US companies under US law exist under US tort law, which are however more complex than those under the ATS and have yet to be fully explored. See in this regard REIMANN, Mathias. Unternehmenshaftung für Menschenrechtsverletzungen in den USA jenseits des Alien Tort Claims Act. In: KRAJEWSKI, Markus et al. (eds.). *Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen, Interdisziplinäre Studien zu Menschenrechten*, Springer, Berlin/Heidelberg, pp. 101-145, 2018.

<sup>46</sup> Vedanta Resources plc and Another v Lungowe and Others, UKSC 20, 2019. This will, however, highly depend on the control the parent company exercises on the subsidiary. For discussion of this and further case law see SANGER, Andrew. Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach? *American Journal of International Law Unbound*, vol. 113, pp. 4-9, 5-7.

<sup>47</sup> Concerning the significant technical and practical barriers that remain in this regard see ULFBECK, Vibe and EHLERS, Andreas. Tort Law, Corporate Groups and Supply Chain Liability for Workers' Injuries: The Concept of Vicarious Liability. *European Company Law*, vol. 13, n. 5, pp. 167-174, 173-174, 2016; CABRELLI, David. Liability for the Violation of Human Rights and Labour Standards in Global Supply Chains: A Common Law Perspective. *Journal of European Tort Law*, vol. 10, n. 2, pp. 108-129, 113-117, 2019.



regard.<sup>48</sup> **Laura Germano Matos and João Luis Nogueira Matias** contribute to this debate by **providing insights from the Brazilian judicial practice**. Focusing on three cases studies, they analyze the criteria that Brazilian labor courts have employed to establish liability of textile companies for breaches of workers' rights by their suppliers. Seven criteria are identified that have – in the absence of specific guidance in the Brazilian legislature – mostly been elaborated by the courts through interpretation. The authors show that these criteria correspond largely to the concept of sphere of influence that is embodied in several international instruments dealing with business and human rights. In the view of the authors, this strengthens the role of due diligence by buyer companies for their supply chain and highlights their indirect co-responsibility for the labor conditions of the workers that are part of their production processes.

Finally, the question arises to which extent domestic litigation can serve as a means for tackling broader challenges such as the climate impact of corporate actors<sup>49</sup> and the multiple human rights effects this can entail.<sup>50</sup> In this regard, **Daniel Iglesias Márquez** explores the reach of corporations' obligations to address adverse human rights effects stemming from the greenhouse gas emissions caused by – or directly related to – their activities. The author first surveys instances of domestic litigation where adverse climate impacts caused by business actors were at stake. Subsequently, he provides an in-depth examination of four cases from the Philippines, the Netherlands, France, and Germany, respectively, involving a nexus between human rights and climate matters. This above analysis is then placed in the context of the international *acquis* concerning human rights due diligence to be carried out by corporate actors. The author concludes by emphasizing the need to refine corporate due diligence practices in light of these international standards and to devise more comprehensive measures to prevent and remedy adverse human rights impacts caused by their greenhouse gas emissions.

<sup>48</sup> See, e.g., ROIT, Peter and ULFBECK, Vibe. Supply Chain Liability of Multinational Corporations? *European Review of Private Law*, vol. 23, n. 3, pp. 415-436, 2015; TERWINDT, Carolijn, LEADER, Sheldon, YILMAZ-VASTARDIS, Anil and WRIGHT, Jane. Supply Chain Liability: Pushing the Boundaries of the Common Law? *Journal of European Tort Law*, vol. 8, n. 3, pp. 261-296, 2017.

<sup>49</sup> See in general AVERCHENKOVA, Alina, CRICK, Florence, KOCORNIK-MINA, Adriana, LECK, Hayley and SURMINSKI, Swenja. Multinational and Large National Corporations and Climate Adaptation: Are We Asking the Right Questions? A Review of Current Knowledge and a New Research Perspective. *Wiley Independent Reviews: Climate Change*, vol. 7, n. 4, pp. 517-536; CLARKE, Thomas, Developing Global Institutional Frameworks for Corporate Sustainability in the Context of Climate Change: The Impact upon Corporate Policy and Practice. In: SALES, Arnaud (ed.). *Corporate Social Responsibility and Corporate Change. Ethical Economy*, vol. 57, pp. 161-175, 2019.

<sup>50</sup> See, e.g., SECK, Sara L. and SLATTERY, Michael. Business, Human Rights and the IBA Climate Justice Report. *Journal of Energy & Natural Resources Law*, vol. 34, n. 1, pp. 75-85, 2016.

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