**Hastings International and Comparative Law Review**

Volume 24
Number 3 *Spring 2001*

Article 1

1-1-2001

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We usually view international law as a set of legal norms generated by sovereign states.[1] According to the conventional story, until the Nuremberg Tribunal, only states possessed rights and obligations under international law, not individuals. In other words, states were the exclusive subjects of international law.[2] After Nuremberg and the emergence of the U.N. international human rights treaties, the conventional story teaches that international law began to recognize individual rights.[3] States, especially major powers like the United States, often resist the development of international legal obligations. Recent developments suggest that while governments may resist the expansion of international law and legal institutions, private individuals and non-governmental organizations[4]

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1. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987). The primary sources of international law are international treaties and conventions, customary practices of states accepted as law and general principles of law common to most legal systems. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993. All three sources result from state practice.

2. In fact, the conventional story omits the reality that crimes like piracy were long regarded as international delicts for which individuals could be punished, and arguably, states were liable for injury to foreign nationals under international law. 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 278, at 565 (Hersch Lauterpacht ed., 6th ed. 1947).

3. Even after Nuremberg, however, international law derived primarily from state practice. *See, e.g.*, GEORG SCHWARZENBERGER, INTERNATIONAL LAW 34-36 (1957); MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 5-6 (1999).

4. NGOs have been particularly effective in developing support for environmental efforts like the Kyoto Protocol. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1997), *reprinted in* 37 I.L.M. 22 [hereinafter Kyoto Protocol]. They have also contributed to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their

acting both internationally and domestically are contributing to the emergence of new international norms. These new international norms confer greater rights and obligations on private individuals and firms, shifting the focus of international law. One dramatic example of this trend is the effort to hold multinational corporations responsible for environmental damage and violations of human rights and labor rights under international law.

Globalization, which has displaced colonialism and then the cold war as the organizing principle of the international system, has reduced the transactional costs of doing business in multiple jurisdictions and, in turn, conferred enormous wealth on multinational corporations. By pressuring states to remove trade barriers, reduce the public sector, and liberalize economic controls, globalization has moved some regulatory authority from popularly elected national representatives to international institutions, which are less democratically accountable.

Globalization's triumph symbolizes the economic, political, military, and cultural supremacy of the United States. To a remarkable degree, the United States has projected its mass culture, language, law, market economy, and democracy onto a good chunk of humanity, which has embraced it with enthusiasm for the most part. In such happy circumstances, one might expect to find the United States bolstering its foreign alliances and the international legal institutions that have secured peace and a global market. Yet, paradoxically, the United States increasingly resists global governance. As a result, the United States now appears more isolated from the international system it has fostered than at any point since it assumed a global role in the first half of the twentieth century.

Consider the U.S. opposition to international institutions and

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Destruction, *opened for signature* Dec. 3, 1997, *reprinted in* 36 I.L.M. 1507 [hereinafter Landmine Convention] and the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 [hereinafter CEDAW]. *See also* Harold Hongju Koh, *Review Essay: Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2658 (1997) (stating that the "constructive role of international law . . . will be greatly enhanced if nongovernmental organizations . . . participate in, influence, and ultimately enforce transnational legal process[es] . . . ."); Julie Mertus, *Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL. 537 (2000); Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393 (1989).

legal initiatives. Over the last two decades, the United States has deployed military forces in Grenada, Libya, Nicaragua, Panama, and Yugoslavia without authorization from the United Nations Security Council, as required by the U.N. Charter.[5] The United States quit UNESCO, failed to pay its U.N. dues in a timely manner, withdrew from the jurisdiction of the International Court of Justice, and refused to comply with the International Court's orders on at least three occasions.[6] Despite protests from foreign governments, and injunctions issued by the International Court, the United States has repeatedly executed foreign nationals without according them the basic right to consult with their consular representatives as required by the Vienna Convention.[7] In addition, the United States has rejected numerous efforts to codify and enforce human rights through international institutions. For example, the United States has failed to ratify the International Convenant on Economic, Social and Cultural Rights,[8] the American Convention on Human Rights,[9] the

5. U.N. CHARTER arts. 2(4), 42 & 51.

6. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 14 (June 27) (finding as a preliminary matter that the I.C.J. has jurisdiction over the United States and over the subject matter of the litigation); Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 392 (Nov. 26). *See also* Case Concerning the Vienna Convention On Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); LaGrand Case (Ger. v. U.S.), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (June 27, 2001).

7. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261. Since 1993, according to Amnesty International U.S.A., the United States has executed twelve foreign nationals who were denied the right to access to their consular representatives. Amnesty Int'l, *Key Topics: Execution of Foreign Nationals by the USA*, *at* http://www.amnesty-usa.org/abolish/ (last visited Sept. 17, 2001). In total, the United States has sentenced at least sixty-five foreign nationals to death without complying with the Vienna Convention. Marcia Coyle, *Are 65 Illegally on Death Row in U.S.?*, THE NAT'L L.J., Apr. 27, 1998, at A16. What makes the U. S. violations of the Vienna Convention particularly offensive to many allies is that the United States is one of the only industrialized democracies to employ capital punishment. According to Amnesty International U.S.A., the United States executed eighty-five people in 2000, and there were another 3,300 people on death row as of January 1, 2001. Moreover, the United States has executed more child offenders and mentally retarded prisoners than any other country. Amnesty Int'l, *supra*, *at* http://www.amnesty-usa.org/abolish/ (last visited Sept. 17, 2001). I am not arguing here that capital punishment violates international law; I am only asserting that it offends foreign governments to the detriment of our foreign relationships.

8. International Convenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (signed on Oct. 5, 1977, but never ratified by the United States).

9. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (signed on June 1, 1977, but never ratified by the United States).

Convention on the Elimination of All Forms of Discrimination Against Women,[10] the Convention on the Rights of the Child,[11] and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines.[12]

Within a six month period, for example, the Bush administration rejected the Kyoto Protocol on global warming,[13] the Comprehensive Nuclear Test Ban Treaty,[14] the Biological Weapons Protocol[15] to enforce the 1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons, which banned such weapons,[16] and the Rome Statute of the International Criminal Court.[17] The Bush administration also signaled its intention to repudiate the Anti-Ballistic Missile Systems Treaty.[18] Further, the administration opposed an international agreement to outlaw small arms trade and criticized an international conference on racism. The United States appears increasingly irrelevant to the development of international legal norms as efforts like the Kyoto Protocol and the International Criminal Court proceed without U.S. participation. Allies have expressed concern about the growing incidence of U.S. unilateralism.[19]

The shrinking influence of the U.S. government on international legal institutions can be contrasted with the expanding efforts of U.S. plaintiffs and attorneys using domestic courts to obtain redress against international delicts. The defendants in these actions may be

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10. CEDAW, *supra* note 4 (signed on July 17, 1980, but never ratified by the United States).

11. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (signed on Feb. 16, 1995, but never ratified by the United States).

12. Landmine Convention, *supra* note 4.

13. Kyoto Protocol, *supra* note 4.

14. Comprehensive Nuclear Test Ban Treaty, *opened for signature* Sept. 24, 1996, S. TREATY DOC. No. 105-28 (1997), *reprinted in* 35 I.L.M. 1439.

15. Biological Weapons Protocol, *available at* http://www.opbw.org (last visited Sept. 17, 2001) (the protocol has not yet been opened for signature).

16. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, *reprinted in* 11 I.L.M. 309.

17. Rome Statute of the International Criminal Court, *adopted* July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999.

18. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.–U.S.S.R., 23 U.S.T. 3435.

19. Thom Shanker, *White House Says the U.S. Is Not a Loner, Just Choosy*, N.Y. TIMES, July 31, 2001, at A1.

states, private individuals, or increasingly multinational corporations. There has been a marked upsurge in actions initiated by individuals to hold multinational corporations accountable under international law, particularly in the United States. Some of these actions concern violations of human rights or exploitation of workers. Other actions focus on environmental damage or damage to the cultural practices and homelands of indigenous populations. Actions to hold multinational companies accountable under international law include Alien Tort Claims filed in U.S. courts for complicity in genocide, slavery and other crimes against humanity; claims brought against banks, insurers and manufacturers that profited from the Holocaust; and claims based on a range of codes and domestic regulations designed to improve compliance with international law and increase transparency.

The large number of suits filed and other domestic actions to hold multinationals accountable represent both a frustration with the limits of traditional international institutions and cooperative regimes and a positive step toward building a new international legal order. Individuals are taking international law into their own hands because states have failed to act. By seeking redress in domestic tribunals, individuals are also seeding domestic legal institutions with international legal principles. Private citizens are becoming the agents for internalizing international law in the domestic legal system and refocusing international law on private actors, including multinational corporations.

There is an ironic symmetry to the U.S. retreat from international legal regimes and the affirmation of international law demonstrated by U.S. courts. Privatization shrinks the public sector while it expands the scope and freedom of private firms. Internationally, the WTO, International Monetary Fund and World Bank have promoted privatization and market liberalization in ways that have benefited U.S. multinational corporations. U.S. multinational corporations often operate outside of U.S. regulation, and U.S. courts have made it easier for multinationals to do so.[20] At

20. U.S. courts applying the principle of international comity have allowed U.S. and foreign multinational corporations to opt out of our legal system. For example, U.S. courts enforce foreign choice-of-law, forum or arbitration clauses in transactional agreements that often frustrate the enforcement of U.S. antitrust and securities laws. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L. L.J. 1 (1991) (arguing that the principle of international comity, which is a uniquely U.S. legal doctrine and not based upon international law, empowers private firms to avoid

the same time, international law is becoming privatized in the sense that increasingly individuals are both the agents and subjects of international law. As the state was once the exclusive subject of international law, the corporation, the state's creation, has now become a primary subject displacing the state's exclusivity in this sphere just as it has displaced state ownership and regulation in the market. U.S. courts, as the principal forum for these cases, have played an equally vital role in the privatization of international law.

The role of domestic courts in vindicating international law illustrates one of the central propositions of Saskia Sassen's keynote address to the conference, which is the source of this symposium issue. Professor Sassen asserted that globalization is embedded in the nation state; that is, globalization occurs at the national level and is in fact subject to national controls.[21] When domestic tribunals assert jurisdiction over multinational companies, they are counter-balancing the impact of globalization with a measure of international law. Courts are asserting that multinationals should not and cannot escape the precepts of the international legal system, which benefits corporations worldwide. Globalization is occurring within the legal system. While we think of globalization as a process of externalizing the internal national economy, there is a concomitant process of internalizing external or international legal norms and standards that facilitates and complements the growth of the multinational.

This symmetry tends to subvert traditional international law doctrine. Traditional international law is often delineated by a set of dichotomies: public versus private international law and municipal versus international law.[22] These dichotomies determine, for example, what party has standing to bring a claim against which party and in what forum under what law. Over the last fifty years, these boundaries have gradually eroded. For example, private international law conventions, like the U.N. Convention on Contracts for the International Sale of Goods (UNCISG),[23] transcend these

U.S. legal jurisdiction and imports public policy and international politics into private law disputes).

21. *See generally* SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 1-26 (1998).

22. *See generally* Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149 (1988) (arguing that the separation of public and private international law is historically contingent and that it has impoverished the practice and theory of international law).

23. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3, *reprinted in* 19

categories. The application of international law to multinational corporations further blurs these traditional boundaries. By empowering private individuals to seek redress against foreign firms for violations of public international law, the law transects these categories. The distinction in international law between what is public and what is private is collapsing.

This geologic shift on the surface of international law is the subject of this volume. This symposium issue of the *Hastings International and Comparative Law Review* is derived from a conference held on February 23-24, 2001, at the University of California, Hastings College of the Law. The conference brought together prominent legal scholars and practitioners from the United States, Europe and Latin America to discuss these legal actions and assess the future for holding multinational corporations responsible under international law. The symposium included panels entitled Multinationals and the Unfinished Legacy of Nuremberg; Litigating the Alien Tort Claims Act; International Labor Rights and Multinational Liability; Indigenous Peoples, Environmental Torts and Cultural Genocide; Codes of Conduct and Transparency; and the Ethical Obligations of Intellectual Property Owners. In addition, Professor Saskia Sassen of the University of Chicago gave a keynote address on "The Globalization of Labor."

The papers in this volume represent a portion of the papers presented at the conference. They address doctrinal and theoretical gaps in the efforts to hold corporations accountable under international law. Why has international law turned its gaze to multinational corporations at this time and in this way? After all, many of the claims against multinational companies arise out of the Holocaust and the Second World War. After more than a half century, why are litigants seeking redress from these corporate giants?

One simple answer to the question is that the companies may be the only tortfeasors still available to provide any compensation. The individual bad actors are often dead, missing, beyond the jurisdictional reach of domestic courts, or unable to satisfy large damage claims. The immortality of the multinational corporate

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I.L.M. 668. UNCISG is a public international treaty that prescribes how domestic courts should determine the governing contract law in contractual disputes involving foreign parties. It cannot be classified as strictly public or private, municipal or international law.

entity, its size, wealth and omnipresence in a variety of jurisdictions make it uniquely attractive as a defendant.

The papers in this volume broadly address two issues. The first set of papers addresses the concept of the multinational's corporate identity. The creation of a separate legal entity to shield the liability of its shareholders raises practical as well as theoretical problems in holding multinationals accountable under national or international law: When and how can parent companies be held liable for wrongs committed by their subsidiaries? How can a domestic court assert jurisdiction over the foreign affiliate of a domestic company? When can a corporation be held liable for complicity in the crimes of a host government? What remedies are appropriate against a multinational corporation? When can courts impose criminal penalties against the corporation, its directors, managers and shareholders, and how does one punish a legal fiction? The second set of papers examines a variety of approaches for holding multinationals accountable. These papers address both the legal strategies for suing multinationals in domestic courts and alternative strategies, such as voluntary codes or disclosure requirements. More generally, these papers consider what it means to incorporate international law into domestic legal systems.

In the first set of papers concerning corporate theory, Professor Phillip Blumberg examines the historical development of the doctrine of limited liability. Professor Blumberg shows that courts have lost sight of the purposes of limited liability and have assumed without serious consideration that parent companies should be protected by it. Professor Blumberg examines the recent trend towards piercing the corporate veil in federal courts, especially where limited liability would defeat federal statutory law. He questions the Supreme Court's recent decisions obstructing this trend and shielding parent companies from liability. Professor Blumberg concludes that we need to increase market and social pressure for greater corporate accountability.

Contrary to the conventional understanding that multinationals are able to escape domestic jurisdiction, Professor William Bratton shows how corporate identity in part facilitates holding companies liable and how the character of multinationals may make them peculiarly susceptible to claims. Professor Bratton addresses the equities of holding a corporation liable for actions by the same company during the Holocaust even though the shareholders, directors, and officers have changed and often the structure, assets, and business have changed as well. He suggests that since the

company has benefited in multiple ways from its special status as a legal entity, it should be expected to pay as if it were the same entity that committed the wrong.

What is the appropriate penalty for a company that engages in egregious violations of human rights? Professor Diane Amann examines the equities and practical problems of imposing criminal punishment on a legal entity. In particular, she questions the idea that a company can be held responsible for acts of its agents. Professor Amann suggests that in some extraordinary cases it may be appropriate to "execute" the corporation by withdrawing its corporate charter and liquidating its assets.

Finally, Professor Andrew Clapham and Scott Jerbi discuss the principle of corporate complicity in human rights abuses. They ask what responsibility a multinational corporation has for monitoring the policies of a host government. Must the corporation merely refrain from participating, or must it also take affirmative measures to prevent crimes like forced labor? Reasoning from various judgments by international and domestic tribunals, they conclude that while international law clearly prohibits multinational corporations from intentionally participating in an international crime, it is uncertain whether corporations may also be held liable for silent complicity in human rights abuses.

In the second set of papers exploring the means for holding multinationals accountable, Professor William Dodge considers the legal issues arising out of cases brought in U.S. courts under the Alien Tort Claims Act. Professor Dodge argues for a broad reading of the statute that is consistent with both the text and the original intent of the first Congress. The principal issue of statutory interpretation is what constitutes a tort in violation of the law of nations. In Dodge's view, that language embraces all violations of international law, not merely those which are universally recognized or regarded as peremptory norms or *jus cogens*.

Professor Michael Ramsey responds to Professor Dodge's assertion that corporations should be held accountable under the Alien Tort Claims Act. Professor Ramsey argues against Professor Dodge's expansive view of the statute. Ramsey cautions that there is a serious risk of judicial interference in the conduct of foreign relations by the political branches. Ramsey challenges Dodge's assertion that the Alien Tort Claims Act could have been intended to apply contemporary international legal norms to multinational corporations. Moreover, Professor Ramsey questions whether U.S.

federal courts have personal or subject matter jurisdiction over foreign multinationals in such cases and whether they can decide such cases without running afoul of the foreign act of state doctrine.

Professor Ugo Mattei and Jeffrey Lena take a critical look at the hegemonic implications of extending U.S. jurisdiction over alien tort claims that arise entirely outside of U.S. territory. Mattei and Lena describe the mechanics of jurisdictional rules and the practical difficulties in bringing these claims and enforcing judgments overseas. They point out that such claims are only economic and enforceable against large companies that have assets and do business in the United States. In their view, the global ambitions of U.S. law fail to respect the jurisdictional limitations accepted by other legal systems.

Professor Beth Stephens discusses several strategies for holding multinationals accountable. She argues that the multinational's home country can more effectively regulate the conduct of multinationals and that the host country cannot be expected to control the multinational in the face of regulatory competition. Professor Stephens traces the development of Alien Tort Claims Act litigation. She points out that other countries have focused more on criminal cases that incorporate claims for damages. She recommends that the United States coordinate its efforts at holding multinational companies responsible with the legal measures undertaken by other domestic legal systems.

One alternative approach to civil or criminal suits is to require multinational corporations to disclose the social, political, and environmental effects of international corporate action. Using the model of Section 14 of the U.S. Securities Exchange Act, Professor Cynthia Williams recommends this regulatory strategy in her paper. Professor Williams argues that the Securities Exchange Commission's statutory authority is sufficient to require publicly held companies to disclose how those companies are dealing with workers' rights, environmental protection, and human rights issues at home and abroad. She also points to empirical evidence that disclosure requirements benefit consumers and investors as well as the corporations.

Another alternative strategy for influencing the conduct of multinational corporations is the adoption of voluntary principles of corporate conduct. Bennett Freeman, Maria Pica and Christopher Camponovo discuss the recent adoption by the United States and the United Kingdom of Voluntary Principles on Security and Human Rights. Freeman, Pica and Camponovo address the principles within

the context of other corporate responsibility initiatives and show why these initiatives may be more effective than domestic litigation. In their view, multinationals are coming to recognize that what is at stake is nothing less than "the social license to operate" in a favorable global business environment.

Halina Ward discusses the concept of global corporate citizenship. Ward argues that there is a "governance deficit" created by the power disparities between developing countries and global corporations. In her view, the equities of the situation demand that the "flipside" of foreign direct investment should be "foreign direct liability" and that the home country of the multinationals should insist that they are subject to the same standards of conduct abroad as they are at home. Ward suggests that the threat of liability could pressure multinational corporations to conform their behavior to international standards. She proposes an international convention to regulate foreign direct investment that would empower developing countries to hold multinational corporations accountable as global citizens.

Professor Patrick Macklem considers the overlap between human rights and environmental issues in the context of efforts by indigenous nations to hold multinational corporations responsible. He focuses first on the efforts by the Awas Tingni of Nicaragua before the Inter-American Court of Human Rights to stop the harvesting of timber in their ancestral rain forest. In this case, the Awas Tingni are asserting universal rights under international law. Professor Macklem contrasts this approach to the efforts by the Kitkatla First Nation of British Columbia to challenge the harvesting of timber on their ancestral lands under the Canadian Constitution. Professor Macklem argues that the Kitkatla's strategy is to assert special rights. Macklem then goes on to compare the legal strategies for asserting universal (undifferentiated) and special (differentiated) rights. While the former appeals to the universality of human rights, the latter derives from a frank acknowledgement of the historical culpability of Europeans for the condition of indigenous nations. He concludes that by asserting their rights, indigenous nations are reconfiguring international law by blurring municipal and international law.

There is a conceptual and practical unity to claims brought for the protection of the environment and claims on behalf of indigenous population groups, and that unity is the theme discussed by Robert Coulter. Mr. Coulter discusses his experience representing the Awas

Tingni in Nicaragua, which prompted a report by the Inter-American Commission on Human Rights critical of the Government of Nicaragua and a case before the Inter-American Court of Human Rights that recently was decided in favor of the Awas Tingni.

Martin Wagner considers still another case study of indigenous people affected by the over-exploitation of their natural resources. Wagner focuses on the U'wa tribe in the Andes mountains of Columbia. He shows that the national government has not been responsive to protecting the legitimate interests of the indigenous population. Wagner notes that while the multinational corporation has profited from the international system, indigenous groups have not been given an equivalent stake under international law. Wagner concludes that international law must fill the void left by national law by according greater respect to the rights and interests of indigenous nations.

Finally, Richard Herz addresses the underlying issue of whether environmental damage and cultural genocide are sufficiently established by the international community to constitute "torts in violation of international law" for purposes of the Alien Tort Claims Act. He argues that the courts which have considered this issue have misunderstood the concept of cultural genocide and failed to acknowledge the considerable development of international environmental law.

These papers represent a significant step forward for the practice and theory of international law applied to multinational corporations. They offer concrete ideas and strategies to practitioners and insight to legal scholars. The reality of globalization demands some countervailing effort to ensure that human rights will be respected by global corporations. This volume maps the efforts that are already taking place and envisions future possibilities for strengthening the emerging international law.