

Book Review

Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (London: Routledge, 2014) pp xxxvii + 422.

With natural gas exploration on the increase in a number of Sub-Saharan African countries, this book comes at the ideal time, as it posits a solution for extraction-related human rights impunity by transnational corporations (TNCs). Penelope Simons and Audrey Macklin's *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* attempts to do three things: (i) highlight the potential human rights impact of Global North companies' extraction in the Global South; (ii) note the national, regional, and international instruments and mechanisms designed to ensure human rights compliance by corporate entities, and their failures; and (iii) suggest the regulation of companies by countries in the Global North in which they are domiciled (i.e. home states).

Drawing on their experience as members of the Harker Mission, the authors bring to light the devastating effects of Canadian extraction company—Talisman Energy Inc.'s—activities in Sudan on the Sudanese people. The Harker Mission was established by a Canadian minister for fact-finding in Sudan, and to inform the Canadian government on Talisman's activities in that country. The Harker Report, produced by the Harker Mission, called on Talisman to acknowledge the 'destructive impact of oil extraction'.¹ In this book, Simons and Macklin take the reader on an enlightening and harrowing storytelling journey into the nature of human rights violations using Talisman as an example. They set out efforts made by civil society and governments to bring Talisman's complicity in the violations in Sudan to an end.

In Chapter 2, the authors note that the end to Talisman's operations in Sudan, and therefore its complicity in human rights violations, came not from civil society or the Canadian government but rather from the US Congress' move to prevent NYSE trading in Sudanese gas and oil. Simons and Macklin find this to be an indicator of effective corporate regulation by home states in the Global North. The authors then speak to the governance gap that exists despite the development of numerous transnational initiatives.

Simons and Macklin elaborate on the governance gap which allows for the continued impunity of TNCs involved in, or benefitting from, human rights violations in Chapter 3 and note what business and human rights practitioners from the Global South bemoan—the voluntary nature of UN and non-UN measures. Among the instruments discussed are the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the Equator Principles, and the OECD Guidelines of Multilateral Enterprises. The authors,

¹ Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014) 51.

however, omit discussion of National Action Plans: national policy-like instruments drafted by national governments, encouraged by the UN Working Group on Business and Human Rights, to limit the adverse human rights impact of TNCs. This is a significant omission in light of the fact that a number of countries in the Global North have drafted these instruments and a number of countries in the Global South are in the beginning stages of the drafting process. A discussion on the utility of these instruments and the process undertaken for drafting them would not only have been welcome but is necessary in light of the facts that: (i) these are the instruments envisaged to operationalize the UNGPs by the UN Working Group; and (ii) these are home state policies currently applicable to TNCs. Simons and Macklin are of the view that the transnational initiatives listed above 'are not capable individually, or collectively of preventing corporations from violating human rights when operating in weak governance zones or of assuring accountability or recompense to victims of such violations and are therefore not a sufficient response to the governance gap'.² The value of this chapter cannot be gainsaid. First, and most importantly, it meaningfully highlights the weakness and possible strengths of these mechanisms to address corporations' human rights violations. Second, the chapter serves as a 'crash course' on the mechanisms designed to ensure corporate compliance and their failures to both the business and human rights novice and expert.

Having given the reader reasons why the governance gap exists internationally, regionally, and nationally (in Chapter 4), the authors go to great lengths, in the fifth chapter, to show that the regulation of TNCs by their home states is not only a right of the latter but a responsibility, stating that '[in] addition to their governance capacity home states also bear a moral responsibility to take steps to prevent their corporate nationals from violating human rights or becoming complicit in human rights abuses in other countries in which they operate'.³ Simons and Macklin direct the reader to examples where countries in the Global North have regulated or attempted to regulate TNC's practices in host states by means of incentive, coercive, or facilitative mechanisms. Incentive mechanisms motivate corporations operating in weak governance zones to prevent, avoid, or mitigate detrimental human rights impact; coercive or prescriptive mechanisms are legal mechanisms that are used to discourage or prevent corporate activities in weak governance zones or sanction certain types of corporate activities; and facilitative measures are those which do not directly speak to human rights but restrict legal performance indirectly and thus influence a corporation's activities vis-à-vis human rights.⁴

By highlighting the various ways that countries in the Global North can control TNCs domiciled within their geographic jurisdictions the authors present a possible solution to the dearth and futility of regulation and policy that exist nationally, regionally, and internationally. For the authors 'unregulated foreign investment by the extractive industries has never delivered on the promise of economic prosperity ... and the resource curse has not been broken'.⁵ This sentiment cannot be disputed; it is a fact and the

² Ibid, 176.

³ Ibid, 181.

⁴ Ibid, 188, 203, and 211.

⁵ Ibid, 272.

overarching idea and strength of the book. Regulation by home states, the authors argue, should comprise of five components: (i) the reservation of home state public support for corporations that cause or are complicit in human rights violations in weak governance zones; (ii) the creation of an independent agency to conduct human rights impact assessments and monitoring; (iii) public disclosure of the independent agency's findings; (iv) statutory cause of action to allow private actors to sue corporate citizens; and (v) the leveraging and complementing of existing mechanisms.⁶ One weakness in the authors' suggestion of home state regulation is similar to that posited by the authors themselves in relation to an internationally-binding instrument on business and human rights: a lack of consensus.⁷ While the suggestion made by the authors in the book is a valuable one deserving not only of a thorough read and analysis, it is also one that requires implementation by every country in the world to ensure redress. Failing which, corporations may forum shop for a regulation-free home jurisdiction as Chevron did in Ecuador with regards to adjudication.⁸ The other weakness is the 'unwillingness of home states to exercise their regulatory power'.⁹ Without a willingness to regulate the suggestion fails at its foundation because without it, regulation will not occur and, if it does, implementation will not occur. Evidence of this is garnered from the US Supreme Court's decision regarding the Alien Torts Claim Statute in *Kiobel*.¹⁰

To their credit the authors begin the book by rightfully pointing out that the problem of TNC impunity must be tackled on a variety of jurisdictional and normative planes.¹¹ Home state regulation, provided it meets and considers the concerns highlighted above, is a valuable tool in the toolbox for corporate human rights compliance and this book is an invaluable assembly instruction for that end and thus contributes to the academic and practical discussions on business and human rights.

Nomonde NYEMBE
Attorney, Centre for Applied Legal Studies
University of the Witwatersrand

⁶ Ibid, 278.

⁷ Ibid, 18.

⁸ Ibid, 256–9.

⁹ Ibid, 19.

¹⁰ See generally, Meetal Jain and Bonita Meyersfeld, 'Lessons from *Kiobel v Royal Dutch Petroleum Company*: Developing Homegrown Lawyering Strategies around Corporate Accountability' (2014) SAJHR 430.

¹¹ Ibid, 20.