

Book Review

David Karp, *Responsibility for Human Rights, Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014) pp 218.

As discussions about developing international legal rules to enhance the accountability of corporations for human rights violations, perhaps in the form of a business and human rights treaty, are unfolding, David Karp proposes to take a step back in his 2014 book, *Responsibility for Human Rights, Transnational Corporations in Imperfect States*. ‘Activists’ have been focusing on how to hold corporations to account for human rights violations but this, Karp warns, is ‘premature’.¹ Instead, he suggests, we ought to ask first whether it is even appropriate to assign human rights responsibility to non-state actors, specifically corporations. The book, located in the field of international political theory, then proceeds to answer this question and, rather controversially given the victim-orientated inclination in the business and human rights field, concludes that in many circumstances corporations cannot be said to bear such responsibility.

Karp’s book is organized in seven chapters. Chapter 1 introduces the topic and the main points discussed in the book. Using practical examples, Chapter 2 explains why ‘it is worth thinking and writing about’² the responsibility of corporations for human rights. Chapters 3 and 4 successively reject the ‘legalistic theory’ and the ‘universal theory’ as bases to justify assigning human rights responsibility to corporations. Chapter 5 then moves on to test the ‘capacity approach’, and Chapter 6 finally embraces the ‘publicness approach’ to responsibility for human rights. Chapter 7 provides a brief conclusion.

The legalistic theory is initially defined in the introduction as a theory according to which ‘states and international institutions can simply create new international law that assigns legal human rights obligations to transnational corporations, or can provide interpretations of existing international law showing that TNCs already have such obligations’.³ However in Chapter 3, which is dedicated to testing this theory, Karp focuses his argument on the narrow example of an authoritarian host state who asks a transnational corporation with a supposedly non-authoritarian home state for information which, if provided, would lead to serious human rights violations. Karp has picked a classic business and human rights dilemma, and assesses whether home state extraterritorial human rights-orientated regulation would provide an appropriate solution to the dilemma. He considers that for human rights responsibility to be validly assigned to the corporation, and in order to respect the fundamental principle of legality, human rights rules must unequivocally require the corporation to act in a certain way

¹ David Jason Karp, *Responsibility for Human Rights, Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014) 37.

² *Ibid*, 16.

³ *Ibid*, 3.

with no room for discretion.⁴ Short of this, he argues, it is inappropriate to impose human rights obligations on corporations. Unsurprisingly, having set such a high threshold and used an almost unsolvable business and human rights dilemma, he concludes that simply creating law to impose obligations on corporations is not theoretically sound.⁵ Going further, he criticizes the idea that the corporation should simply follow rules set by their non-authoritarian Western home state and ignore those set by the authoritarian host state on the basis of a perceived superiority of the former. This way out of the dilemma, he rightly points out, does not pass the rule of law test.⁶

Karp's critique of the legalistic approach certainly provides food for thought for an international lawyer with a business and human rights agenda. It would be challenging indeed if it really were conceptually impossible to create suitable law to unilaterally assign human rights responsibility to corporations. But Karp's analysis is in turn open for criticism.

First, he focuses on whether or not the corporation in this scenario can be said to have human rights responsibility such that a particular conduct would be indisputably required. Karp opposes 'to require' and 'to permit', and argues that only the former is acceptable, but omits other, more nuanced possibilities such as 'to recommend' and 'to encourage'. Breach of such responsibility may take different forms and may not necessarily lead to legal responsibility but possibly to softer forms of accountability.

Second, the chosen scenario opposes the law of the host state, which requires the corporation to violate human rights by providing the information, and the law of the home state which has extraterritorial reach and requires the corporation not to violate human rights while operating in the host state. This places the corporation in a situation 'where they will be punished regardless of what they do', which goes against the principles of legality.⁷ Karp convincingly makes a point of principle here. Yet in practice a clash between the law of two sovereign states is a common occurrence both within and outside the area of human rights. Unfortunately for legal certainty such problems cannot always be solved, which may place companies and individuals in insecure situations. This does not mean, however, that states should renounce their right and sometimes their duty to legislate and assert adjudicative jurisdiction. Moreover, while Karp compellingly uses extraterritorial domestic law as an example, this type of law is clearly distinct from international law. The clash between two sovereign states' irreconcilable laws creates uncertainty. International legal standards, such as the UN Guiding Principles on Business and Human Rights,⁸ although not hard law and without a solid enforcement mechanism, are not fraught with the same difficulties.

Karp's rejection of the universalist approach in Chapter 4 is thought-provoking. He separates human rights responsibility into three strands, responsibility to protect and to provide for human rights, responsibility to refrain from harming human rights, and responsibility to respect human rights. By separating the 'do no harm' principle from the

⁴ Ibid, 54.

⁵ Ibid, 57.

⁶ Ibid, 58.

⁷ Ibid, 59.

⁸ UN Doc A/HRC/17/31.

responsibility to respect human rights, Karp challenges Professor Ruggie's formulation of the corporate responsibility to respect, which the Guiding Principles define as 'do no harm'.⁹ Only the 'do no harm' principle is truly universal, Karp argues. Hence the universalist approach is not a satisfactory basis for a sound theory of corporate human rights responsibility because it only covers one strand. The responsibility to respect which 'activates an inner sphere of moral judgement, and ... requires a higher threshold of moral agency',¹⁰ is not universal. Some, but by no means all, corporations will be able to pass that threshold and be assigned responsibility to respect human rights. Moreover, unlike the Guiding Principles which only place a legal duty to protect human rights on states, Karp considers that from a theoretical perspective such responsibility may fall on non-state actors.¹¹ He further suggests that assigning human rights responsibility to corporations means placing on them the responsibility to protect and to provide for others' rights. Indeed, 'without this element, human rights responsibility would be indistinguishable from the general and universal responsibility not to cause harm to others ...'.¹² This is a key part of Karp's theory. He is not developing a theory about why corporations should do no harm because he considers that this is a given. Instead, he is elaborating a theory of responsibility which justifies assigning responsibility to protect and to provide for human rights on corporations. This point informs the rest of the book.

In Chapter 5 Karp discards the capacity approach, which contends that those who have the capacity most effectively to do so bear a *prima facie* responsibility, on two grounds. First, the capacity approach is rejected because assigning responsibility to corporations 'who can' would place too heavy a burden on them. The responsibility to protect and to provide for human rights is extremely demanding and may 'completely subsume the other values, ends and projects' of the corporation.¹³ Second, the capacity approach does not clearly assign responsibility for human rights and may justify assigning other forms of responsibility such as criminal and tort liability.¹⁴

Finally, in Chapter 6, Karp embraces the 'publicness approach' according to which 'relevantly public but not relevantly private agents can justifiably be assigned human rights responsibility'.¹⁵ 'Public' in this context needs to be distinguished from the state. Corporations, even privately owned, can be said to be relevantly public when they provide collective goods such as security, health, and education, but also when they take on specific roles, particularly in areas of weak governance. By voluntarily taking on political roles in certain contexts, corporations accept responsibility for human rights. Taken to its extreme, Karp's conclusion might be damaging for the protection of human rights in the sense that, as he acknowledges, corporations may abandon or redesign their CSR policies so as not to be seen as having endorsed a role that will translate into human rights responsibility.¹⁶

⁹ Ibid, Guiding Principle 11.

¹⁰ Karp, note 2, 63–64.

¹¹ Ibid, 87.

¹² Ibid, 89.

¹³ Ibid, 113–44.

¹⁴ Ibid, 112–13.

¹⁵ Ibid, 116.

¹⁶ Ibid, 157.

To some extent Karp is going against the leading view in the field of business and human rights, which is that corporations' involvement in human rights violations ought to be systematically publicized, addressed, redressed, and ideally prevented. While there are discussions in the legal sphere about whether companies have human rights obligations under international law, or whether their actions can entail international criminal liability, all seem to agree on the premise, which is that something must be done to address the accountability gap. Karp's view is more nuanced. Perhaps thankfully, however, his theory is also narrow and the book's main contributions are to thoroughly explore the theoretical aspects and provide a critique of a very specific form of responsibility. Karp focuses on the responsibility to protect and to provide for human rights, without questioning the universal validity of the 'do no harm' principle. Moreover, he carefully distinguishes responsibility for human rights from other forms of responsibility. While unsatisfactory from a theoretical point of view,¹⁷ criminal and tort liability do not depend on whether the corporation is relevantly public or not, and can be acceptable albeit imperfect ways to remedy human rights violations.

As it delves into theoretical questions around the responsibility of corporations for human rights violations, Karp's book will make for an interesting read primarily for those interested in human rights theories. The book will also be of interest to business and law scholars who wish to take a step back and reflect on some of the fundamental issues that arise in the field of business and human rights.

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¹⁷ See, e.g., Beth Stephens, 'Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?' (1997) 60 *Albany Law Review* 579, 603.