

BOOK REVIEW

Chiara Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (The Netherlands: TMC Asser Press, 2022), 201 pp.

This book contributes to the conceptualization of a complex challenge for states, the corporate world and civil society: how to hold undertakings¹ accountable for adverse transnational impacts resulting from their activities with uncertain intergenerational consequences. Macchi's book adds to her impressive trajectory in the fields of business and human rights (BHR) and climate change litigation. The book offers a well-written, well-structured, concise and rigorous critical legal analysis on the topic, and multiple examples unveil the context and magnitude of the issues at stake. It is certainly an important reference and illustrates how various legal areas are converging on the global sustainable development agenda.

The structure reflects the 'Protect, Respect, Remedy' framework, and expands on emerging research topics. Part I develops Pillar I of the UN Guiding Principles on Business and Human Rights (UNGPs). Macchi analyses crucial legal aspects of the role of states in holding undertakings operating transnationally accountable, and how states can exercise this role beyond borders. It revisits the question of whether home states of undertakings share responsibility when their transnational operations cause adverse impacts. It also claims the adoption of a functionalist approach (or paradigm) to extra-territorial human rights obligations which goes beyond the UNGPs. This paradigm, grounded on a dissenting opinion of the European Court of Human Rights' judgement *Al-Skeini and others v United Kingdom*, investigates the passive and active spheres of the state duty to protect. The active sphere, shaped by the competences defined by international law and by factual circumstances, entails the adoption of domestic acts with extra-territorial implications. Macchi argues that this paradigm also shapes the external reach of the European Union (EU)'s fundamental rights obligations and of the member states when they implement EU law.

Part I further raises two topical issues. Firstly, whether the state duty to tackle climate change can be an obligation under international human rights law. Macchi provides a good overview of some landmark claims brought before courts and OECD National Contact Points. This analysis could be complemented by inquiring how the Paris Agreement re-shapes the content and scope of the duty of states to regulate the conduct of undertakings operating transnationally. In fact, the Paris Agreement acknowledges that climate change is a common concern of humankind and requires states to consider their human rights obligations, notably regarding vulnerable communities, when they address global warming. Secondly, Macchi illustrates the increasing risks for states when investors trigger dispute-settlement mechanisms to challenge state actions (or their policy space) that pursue the implementation of sustainability policies. This has been particularly notorious in some

¹ The concept of undertaking is becoming a standard term that EU law is progressively using to cover any entrepreneurial actor regardless of its legal nature.

arbitration awards grounded on the Energy Treaty Charter. From this overview, it is possible to build a conceptual framework to understand the trends that this phenomenon is displaying as well as the emerging and evolving resistance against these kinds of treaties that limit state options to regulate corporate accountability for adverse impacts on people and ecosystems.

Part II addresses Pillar II of the UNGPs by conducting a solid legal and conceptual analysis of corporate responsibility. Two contributions to the literature are evident. Firstly, it rigorously explains the distinction between the voluntary scheme of corporate social responsibility (CSR) and the concept of human rights due diligence (HRDD), which shapes the scope of complex issues such as the reach of risk assessments. It further shows why the UNGPs do not fully fit in the international normative human rights framework and how they unveil an imbalance in international law because undertakings enjoy extensive rights protection (e.g., investment) while not having clear duties. These imbalances could be corrected by adopting international human rights obligations even if international enforcement mechanisms remain unclear. Secondly, it assesses the layers of corporate responsibility when undertakings can be directly held accountable, when they contribute to human rights abuses, and when their systematically negligent behaviour entails responsibility. Macchi also explains the various meanings of HRDD. It is both a standard of conduct that defines the attribution of responsibility of the undertaking, and a set of processes to verify how undertakings address their own adverse impacts and support their business partners to tackle theirs. This analysis reinforces the need for requiring sustainability due diligence as a permanent process seeking to prevent or mitigate adverse impacts in a timely and reasonable manner.

Part II also discusses two interesting themes that perhaps could be further developed. Firstly, it describes a path from moral condemnation to concrete consequences, which flows through several phases (social activism, divestment, grievance mechanisms and unfair commercial practices). However, the criteria used to connect them are not completely clear, considering their nature and impact. While the first two are essentially social and economic phenomena resulting from the behaviour of stakeholders, civil society actors and investors, respectively, the last two constitute established legal mechanisms that could contribute to the enforcement of mandatory rules on corporate accountability, but they also have a diverse nature, purposes and reach. Secondly, Macchi addresses human rights and environmental due diligence (HREDD) and describes some climate change corporate responsibilities related to emissions, disclosures, self-assessment of vulnerabilities, etc. Then, she assesses national due diligence legislation, the duty of care of the parent corporations, and a previous version of the proposed EU Directive on Corporate Sustainability Due Diligence (CSDD). Macchi takes stock of concepts and determines their pedigree (from a legal positivist perspective), such as the ‘common law concept of the “duty of care”’. Further research could cover, firstly, central concepts such as duty of vigilance, sustainability due diligence, and civil liability in sustainability matters, and, secondly, the relevance of the EU Corporate Sustainability Reporting Directive (CSRD) (EU 2022/2464) for CSDD, which goes beyond ‘transparency’. Particularly, the concept of double materiality adopted by the CSRD connects to Macchi’s assessment of the distinction between CSDD and corporate risk due diligence.

Part III deals with Pillar III of the UNGPs and employs a descriptive methodological approach. It revisits and provides a good summary of the application of the US Alien Tort Claims Act and the challenges of granting jurisdiction to transnational claims before EU courts. It also assesses case law on corporate liability lodged in the UK, The Netherlands and Canada and on climate change. Likewise, this part identifies emerging topics such as the challenges of strategic climate change litigation in terms of attribution, causality and extra-territoriality, its symbolic value, and its potential strategic outcomes. Part III, however, has

two limitations. Firstly, it narrows the analysis of Pillar III to existing obstacles in private international law and legal practice to guarantee access to courts, and omits assessing substantial remedies. Access to justice and access to remedy differ. Macchi focuses on the former, which is, in principle, a responsibility of states and has an eminently enabling function to obtain the sought remedy. Obtaining an effective remedy in turn, is the ultimate goal of Pillar III and, in principle, a responsibility of the allegedly liable undertaking. Secondly, Macchi grounded the analysis on Zerk's concept of foreign direct liability (FDL) defined in 2006, which does not consider important developments that have occurred since then. For instance, the relevance of undertakings operating in global value chains (GVCs) or in networks has increased, and they are not exclusively headquartered in the EU or North America.

Part IV provides a detailed analysis on the future and scope of a BHR binding treaty. This analysis certainly represents a point of departure to enlarge the scope of this proposal towards a multi-dimensional approach to corporate sustainability accountability, without privileging one dimension over another, which seems to be the path the EU legal agenda is following.

Overall, Macchi's in-depth analysis of the UNGPs is certainly an important contribution to the debate on the responsibility of non-state actors regarding the sustainable development agenda. To complement her book, the following points could be further developed in future work.


Firstly, when defining the concept of GVCs and how it differs from the concept of supply chains, Macchi relies on a vision from the UN Conference on Trade and Development (UNCTAD) which has further developed more recently. Defining the nature and scope of GVCs is essential to enable a better understanding of legal topics addressed such as extra-territoriality, transnationality, or the notion of 'collective' responsibility of undertakings to prevent the systemic effects of diffused negligent conducts. Likewise, this analysis is essential to identify the role of investors in shaping or obstructing sustainable behaviour of states and undertakings.

Secondly, although the book deals with the evolving agenda of BHR towards the inclusion of environmental accountability of undertakings, it omits the literature on the multi-dimensional concept of sustainability that is connecting compartmentalized international law. The book reflects a larger phenomenon: the BHR literature has focused on how to enlarge the UNGPs to other legal areas and prominently to climate change litigation. Likewise, on the environmental law side, several normative frameworks omit reference to corporate accountability and focus on state duties. Macchi further claims that a coherent interpretation of the UNGPs cannot exclude environmental and climate change responsibilities. The book, however, limits environmental issues to climate change (litigation), on the basis that climate change is a global threat to human rights. In contrast, the planetary boundaries concept developed by the Stockholm Resilience Center, identifies climate change as one of the nine boundaries *within which humanity can continue to develop and thrive for generations*. Macchi could also have grounded the assessment of environmental issues on the EU Taxonomy (EU 2020/852) approach that defines the criteria for environmentally sustainable economic activities and the six environmental objectives, climate change mitigation and adaptation being only two of them.

Finally, the book highlights the crucial role of social activism and stakeholders in holding undertakings accountable for transnational wrongs and describes the growing role of strategic litigation in climate change. This assessment could be enriched by connecting to the principle of environmental democracy (civic engagement or procedural environmental rights), developed by Principle 10 of the Rio Declaration on the Environment and Development (1992) and by the Aarhus and Escazú conventions. Notably, Macchi's analysis of recent developments on the recognition of the right to a healthy environment

at the level of the UN can be complemented by inquiring into the legal relevance of related environmental rights that connect to Pillar III of the UNGPs and to stakeholder involvement.

The book concludes by stating that the UNGPs are not an end point, but a starting point. Likewise, Macchi's rigorous critical legal analysis of Pillars I and II as well as the introduction of the new dimensions of corporate accountability regarding global warming makes a major contribution to the BHR literature, and is also a good starting point to understand emerging challenges. Presented in an accessible way for academics, policymakers, undertakings and civil society organizations, it also unveils key questions on the convergence between the BHR framework and the global sustainable development agenda.

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