

Gro Nystuen, Andreas Føllesdal and Ola Mestad (eds), **Human Rights, Corporate Complicity and Disinvestment**, Cambridge: Cambridge University Press, 2011, 290 pp, £55.00 hb.

The rise and rise of the most visible manifestation of globalisation, transnational corporations, continues to confront our established categories of law and political theory. In this book of ten chapters, authors grapple with the challenge from the perspective of a new entrant on the global scene: the sovereign wealth fund. The entity under particular scrutiny is the Norwegian Pension Fund, which is not only the second largest sovereign wealth fund in the world (at around USD 450 billion) but is subject to ethical investing guidelines and supervision by a Council of Ethics, which possesses the authority to recommend disinvestment. In this sense, the publisher's description of the book, and partly the book title itself, are misleading. It is not a 'thorough introduction' to corporate social responsibility but instead a relatively-focused, carefully-mediated and interdisciplinary reflection on human rights and corporate complicity in the context of the Norwegian Pension Fund.

The merits of the book are fourfold. First, it uses the emergence of sovereign wealth funds as an opportunity to ask a range of broad questions about the *investment* arm of corporate responsibility, often, over-shadowed by debates on the responsibility of the corporate *entity* and its *executives*. The second is showcasing of the Norwegian Pension Fund and its ethical scaffolding – particularly in chapters by Nystuen, Chesterman, Mestad and Chapman – sending a message that this *ad hoc* but potentially powerful body, the Council of Ethics, deserves critical scholarly attention, in much the same way we have seen with other international quasi-judicial bodies that monitor global economic non-state actors, such as the World Bank Inspection Panel and the Contact Points for the OECD Guidelines on Multinational Enterprises. Like the Inspection Panel, the Council of Ethics has developed a jurisprudential mode of reasoning while its effects have been at times politically dramatic: its most renowned recommendation required disinvestment in Wal-Mart on account of breaches of international labour rights, which triggered vocal protests by the US government.

The third is the interpolation of scholars of international law and political philosophy throughout the book (together with one consciously multi-disciplinary chapter) such that the reader is continually exposed to both the legal and ethical sides of the relevant question at hand. The fourth is that as the book progresses, and this cross-disciplinary conversation grows, certain assumptions are peeled away, revealing a greater than imagined gap between the demands of ethical investment, on one hand, and the current state of international law, and even the ethical guidelines of the Norwegian Pension Fund, on the other.

The book also contains some weaknesses. The foremost of these is the Introduction, which is devoted to describing the book's contents and the role of the Council of Ethics (only to be repeated in the following two chapters). Beyond a brief discussion of normative legal frameworks, the book is not empirically, legally and contextually situated; it introduces neither the context of institutional investment and the rich history of disinvestment nor, and most importantly, the various legal and ethical puzzles that the publication sets out to

address – these are only hinted at in a perfunctory half page at the end of the chapter and no concluding chapter is provided.

Instead, the readers are left to themselves to discover the empirical mosaic and theoretical conundrums as the book proceeds. This requires some patience. The volume is inductively structured, beginning with thick description and some critical analysis of the Pension Fund and Council before moving out to ask what is complicity, what consequences flow from it, and whether investors can be complicit, particularly if they are a state – as is the case with Sovereign Wealth Funds. The advantage of this structure is that the reader has a concrete idea of disinvestment in mind as they chart the thickening ethical and legal forest; but the disadvantage is the lack of signposting: the reader is left to find their own way through the trees. If one prefers to proceed in a more deductive manner, the book could easily be read backwards, beginning with the last chapter.

The second weakness in the book is the approach employed at times by some of the legal writers. It is surprising how many blanket assertions of customary, treaty or national law are made (mostly on the conservative side of the ledger) without sufficient attention to legal methodology or opposing views: a particular position is branded *de lege ferenda* and the discussion moves on. On balance, the authors of the philosophical chapters are more careful with their reasoning, locating the relevant dilemma, building up an argument, and sifting through different views. The result is that their conclusions are often more convincing, whatever their colour.

So, what does the book tell us? First of all, do investors have duties to avoid complicity in human rights violations? The answer from the ethicists is a qualified yes. Kutz puts the issue in sharp relief when he says, ‘The right question to ask, is can we regard ourselves as living ethically when we ask our corporate agents to gain profit at the expense of the vulnerable, or to share in the corruption of power, simply for own gain’ (73). Building on Kutz’s work, Ingierd and Syse offers a fine-grained analysis of different grounds for extending responsibility – from consequentialist principles of causality through to the enhanced ‘role responsibility’ of institutional investors on account of ‘special’ moral obligations that they acquire through investment and the ‘attitudinal’ signals they send. They conclude that it is ‘reasonable’ to assert that institutional investors carry negative obligations to avoid moral harm and positive (but weaker) obligations to ensure some measure of basic justice (182). But such duties are contingent upon the contextualised degree of causal and role responsibility.

Føllesdal, a member of the Council of Ethics, reaches the same conclusion on negative obligations for investors by grounding his analysis in social contractarianism and taking a departure point in normative legitimacy theory: institutions with coercive powers must be ‘justified to all’ on an equal basis (138). He argues that we, and particular institutional investors, are ‘co-authors’ of the ‘Global Basic Structure’ – the intertwining of political and economic institutions and rules – and therefore must share responsibility for any harm to ‘vital interests’ this structure creates. Curiously, he doesn’t consider whether investors would also possess positive obligations, particularly in circumstances that might meet his test for attributing responsibility – that is, where an investor secures a monetary benefit by not intervening to prevent violations by a third party.

The answer from the lawyers is simply no. Nystuen and Chesterman dismiss the idea that investors or corporations *currently* possess obligations under international law, although both note that the situation could change in the future. Nystuen concludes that she, and the Council of Ethics which she leads, 'has placed itself among those who find that corporations, under the current regime of international human rights law, are not bound by human rights instruments' (21). Whereas Nystuen briefly considers opposing views, she fails to fully consider whether some corporations may be responsible for violations of some customary international law norms, particularly in light of emerging state practice and a range of soft law instruments which she (or Chesterman) do not cite.

More problematic is Demeyere's perfunctory dismissal of the idea that States may carry their human rights treaty obligations into global investment decisions. His statement that 'current international law' does not hold Sovereign Wealth Funds 'responsible for the actions or omissions of foreign private corporations in which they invest' is a recurrent theme throughout the chapter. He may be right for many cases of state investment but the reasoning is rickety: he does not properly engage with the primary human rights treaties in the area (most of which contain no territorial limitation and on the contrary set out positive extraterritorial obligations) and the development of the obligation to protect in human rights jurisprudence. His statements that a 'state does not have any responsibility as a matter of human rights law for acts committed on the territory of another states', or that states are required to act with due diligence to prevent human rights violations under their jurisdiction is *de lege ferenda*, flies in the face of a long line of international jurisprudence leading up to the International Court of Justice. (See for example, *Democratic Republic of Congo (DRC) v Uganda* (2005) ICJ Reports 26; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports 136; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (1949) ICJ Reports 4; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Reports 43; *Ilaşcu v Moldova and Russia* Application No 48787/99 Judgment of 8 July 2004 ECtHR.)

The second issue is the thorny question of establishing complicity, particularly when a corporation or investor is not the principal actor behind an alleged human rights violation. Here, the ethical and legal chapters come slightly closer in their analysis. Ingierd and Syse highlight the challenge of the long chains of causation and the principal-agent problem, since it is fund managers and corporations that are closer to the commission of harm. But, together with Kutz, they find indirect complicity of investors can be established if they 'reasonably ought to know that their acts contribute to harm' (166). Mestad, also a member of the Council of Ethics, takes a legal approach by systematically revealing the complexity of establishing corporate complicity *in fact*, noting long supply chains, complex forms of shareholding and structure, and varying arrangements with host states. Interestingly, he points out that joint venture arrangements may carry a higher degree of complicity since all parties possess a veto power over key decisions.

However, Mestad is cautious in extending complicity beyond a company's sphere of 'control' to a broader 'sphere of influence', as envisaged in the UN

Global Compact, on the grounds that it is too 'vague' and 'could cover all types of impact' (105). In the following chapter, Gasser with Müller and Thurman are of the same opinion – pointing to the absence of the phrase 'sphere of influence' in international and comparative law. However, they concede that it might be present in other legal concepts such as the duty of care in torts. This functional acknowledgement is welcome, but it is unfortunate that all of these authors do not look more closely at the burgeoning literature on human rights and torts and the use of different proximity tests that mediate the divide between control and influence. Even more surprising is that they do not consider the loosening of the control test for states by the International Court of Justice towards a standard of 'decisive influence' and, even more broadly, 'due diligence'.

The third question is how the Norwegian investment guidelines and Council of Ethics stand in relation to these ethical and legal perspectives. The lawyers largely welcome the fact that they represent an advance on the current state of international law, as they see it. Three particular features are notable. Nystuen points out that the Council is able to apply international human rights standards, including those contained in treaties, directly to corporate conduct. The Council is then excused from exacting standards of complicity: corporate control over a situation is not required, only 'knowledge of the breaches' and an 'opportunity to prevent them'. Lastly, the Council need only establish that there is an 'unacceptable risk' that breaches will continue in the future, making the guidelines a flexible and forward-looking instrument.

The ethicists in the volume are more ambivalent: Kutz concludes that 'giving ethical complicity its full, warranted scope would go far beyond the screening criteria of the Pension Fund'. He is particularly critical that the guidelines are not backwards-looking since investments continue in corporations which have unethically created wealth in the past. Ingierd and Syse argue, as does Chesterman, that ethics would point in the 'direction of active ownership strategies, instead of more passive screening and divestment strategies' (174). Indeed, the Pension Fund has been criticised for passiveness in ensuring corporations strive to respect and advance human rights. In some cases, it has used its shareholding to vote against board proposals for more progressive policies within a corporation, for example on climate change and the environment. Thus, at times in the book, one wonders whether the Norwegians have created a Council of Law instead of a Council of Ethics.

Finally, has the Council made a difference through divestment? This question is not only relevant from the perspective of political science and international relations; it is intimately related to ethics and law. If the effect is minimal, was causation really established in the first place? Føllesdal takes up an even more difficult question when he asks whether ethical arguments are diluted by the fact that upon divestment, another investor will simply fill the capital gap: human rights are not advanced and all the dis-investor is left with is 'amoral self-indulgence' (152). He argues that there are non-instrumental reasons that compel divestment because we have 'stronger reasons to object to rules that would allow others to bring those harms about than rules that allow someone to fail to alleviate harm committed by others' (153).

But there may also be instrumental reasons. The editors do not introduce the evidence here but it has been suggested that the Council's decisions have resulted in concentrated material impacts in discrete cases, captured the attention of other corporations who risk disinvestment and are concerned with reputational effects, developed jurisprudence on corporate responsibility and contributed to norm acculturation as institutional investors start to factor in human rights considerations. One must also be alert to the negative effects. Chesterman acknowledges that the Council risks creating the 'artifice of a trial in which a company's conduct is examined and judged without serious consequences', resulting in the 'illusion of accountability' and a waning of 'demand for actual change' (63).

Economic globalisation has fragmented and transformed State sovereignty, facilitating what some call a new age of neo-medievalism, a phenomenon where 'overlapping authorities crisscrossing loyalties' co-exist in a global or universal society (H. Bull, *The Anarchical Society* (Basingstoke: Palgrave, 2002) 246). Ethical investment guidelines and the creation of the Norwegian Council of Ethics represent both a response to and an example of such neo-medievalism. The authors in the book highlight the potential contribution of this new institution but ultimately note that addressing corporate complicity for human rights violations will require much more ambitious forms of regulation, even if it is difficult to see, today, how they will emerge.

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Adrian Vermeule, The System of the Constitution, New York: Oxford University Press, 2012, 220 pp, hb £22.50.

In *The System of the Constitution*, Vermeule outlines a new way of analysing constitutional systems. According to this new method, the constitutional system is said to consist of two levels of aggregation, individual-institutional and institutional-system, comprised of people and institutions and also 'propositions of fact, morality or law' (24). The analysis is developed through complex systems theory, a method that will be unfamiliar to many European scholars, who associate systems theory with autopoiesis. This approach is applied in order to reveal the limitations of traditional ways of examining the constitutional arrangements of the United States, allowing the author to position his version of systems analysis as a method that is not subject to such limitations.

Systems theory is an ambiguous term. It encompasses a variety of approaches including autopoiesis, complexity theory and general systems theory. The meaning of systems analysis as relating to complexity theory is only implicit in the book. Vermeule makes reference to 'emergent properties' (3), the importance of 'interaction' (8), how the system is 'not reducible' to its parts (8), and 'selection

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