International Protection of Human Rights and Activities of Transnational Corporations

Prof. Dr.Dr. *Fabrizio Marrella* has just published his course entitled "Protection internationale des droits de l'homme et activités des sociétés transnationales/International Protection of Human Rights and Activities of Transnational Corporations", delivered at The Hague Academy of International Law in 2013, as vol. 385, 2016, of the Recueil des cours/Collected Courses (RCADI).

Here is a short abstract:

Since the 1960's the regulation of multinational corporations has become a hot topic in the international agenda. Fifty years later, the negative (or positive) impact of transnational corporations activities on human rights has steadily increased. Economic globalization has largely involved the activities of transnational corporations and such a trend has even been powered by Nation States. Since the end of the Second World War, Governments have liberalised trade and investment flows and more recently, to cut public deficits, they have started the decentralization, outsourcing and privatization of certain classic functions of the State. International Human Rights Law is based on an inter-State matrix where international responsibilities are imposed on Nation-States, not directly on corporations. Therefore, forum shopping and law shopping strategies have been used by some transnational corporations in order to hide behind State sovereignty while benefiting from dogmas of Public International Law denying any international responsibility for them.

In 2011, the UN Human Rights Council unanimously adopted the UN Guiding Principles on Business and Human Rights (UNGPs), which is the first global standard for preventing and addressing the risks of adverse impacts on human rights linked to business activities. The UNGPs encompass three pillars outlining how states and businesses should implement the framework: 1) The state duty to protect human rights; 2) The corporate responsibility to respect human rights and 3) Access to remedy for victims of business-related abuses.

Such a framework clearly identifies different roles and “responsibilities” but does not differentiate situations of “accountability” from those of “legal responsibility”. It makes Corporate Social Responsibility operative through the obligation of “due diligence” and impact evaluations to identify and remedy adverse effects.

All that has implications both for public international law and for private international law. Private international law analysis, in particular, becomes crucial to explore, as it is done in the second part of the course, the legal meaning of the implementation of the third pillar of the UNGPs, i.e. on access to remedies for victims of violations of human rights committed in the context of business activities. If remedies precede rights, it is regrettable that the third pillar turns out to be the weakest one as compared to the other two. Indeed, it becomes evident that the proliferation of international treaties of protection of human rights, international acts, supervisory bodies, laws, initiatives of RSE or doctrinal studies, risk to remain just different forms of political dialogue if they have no effective legal use for victims on the ground.

Further information, including a table of contents and some extracts, is available on the publisher website.

The Applicability of the Alien Tort Statute to Human Rights Violations by Private Corporations

Hannah Dittmers, LL.M. candidate at the University of Michigan (USA) and doctoral candidate at the University of Freiburg (Germany), has just published an interesting paper on recent developments concerning corporate liability under the Alien Tort Statute in the Journal of Science, Humanities and Arts (JOSHA). On April 3rd 2017, the New York Times published an article with the heading: “Supreme Court to Weigh if Firms Can be Sued in Human Rights Cases”. On the

same day, the Supreme Court of the United States had granted the petition for certiorari to consider an issue that now has come before the highest US court already for the second time. The Second Circuit through the case *In re Arab Bank* has again brought the question before the Justices whether private corporations can be sued under the Alien Tort Statute of 1789 (ATS) for aiding and abetting human rights violations that occurred outside the territory of the United States. The Supreme Court is now to provide guidance on the issue that is not uniformly assessed by the US Circuit Courts. The full article is available here.

Book: Human Rights in Business

Just published by Routledge, the book **Human Rights in Business: Removal of Barriers to Access to Justice in the European Union** presensts the final results of the project which received a 2013 Civil Justice Action Grant from the European Commission Directorate General for Justice. The book is edited by Juan José Álvarez Álvarez Rubio and Katerina Yiannibas and includes a long list of reknown contributors from academia, legal practice and civil society. The begining of the official description from the book reads:

> *The capacity to abuse, or in general affect the enjoyment of human, labour and environmental rights has risen with the increased social and economic power that multinational companies wield in the global economy. At the same time, it appears that it is difficult to regulate the activities of multinational companies in such a way that they conform to international human, labour and environmental rights standards. This has partially to do with the organization of companies into groups of separate legal persons, incorporated in different states, as well as with the complexity of the corporate supply chain. Absent a business and human rights treaty, a more coherent legal and policy approach is required.*

It is available for free download as an eBook:

– To download from the book's page on the Routledge website, choose "Other

eBook Options" button for download options.
– To download the free ebook from Amazon, click here.
– To download the free ebook from iTunes, click here.

New publication: Human Rights in Business Removal of Barriers to Access to Justice in the European Union

This new book, edited by Juan José Álvarez Rubio and Katerina Yiannibas, addresses the fact that the increased social and economic power of multinational parties has augmented their capacity to affect human, labour and environmental rights.

The book's publicity reads:

Faced with the challenge of how to effectively access the right to remedy in the European Union for human rights abuses committed by EU companies in non-EU states, a diverse research consortium of academic and legal institutions was formed. The consortium, coordinated by the Globernance Institute for Democratic Governance, became the recipient of a 2013 Civil Justice Action Grant from the European Commission Directorate General for Justice. A mandate was thus issued for research, training and dissemination so as to bring visibility to the challenge posed and moreover, to provide some solutions for the removal of barriers to judicial and non-judicial remedy for victims of business-related human rights abuses in non-EU states. The project commenced in September 2014 and over the course of two years the consortium conducted research along four specific lines in parallel with various training sessions across EU Member States.

The research conducted focused primarily on judicial remedies, both jurisdictional barriers and applicable law barriers; non-judicial remedies, both to company-

based grievance. The results of this research endeavour make up the content of this report whose aim is to provide a scholarly foundation for policy proposals by identifying specific challenges relevant to access to justice in the European Union and to provide recommendations on how to remove legal and practical barriers so as to provide access to remedy for victims of business-related human rights abuses in non-EU states.

More information is available on the Routledge's site.

New Publication in the Oxford Private International Law Series: Human Rights and Private International Law

By James J Fawcett FBA (Professor of Law Emeritus, University of Nottingham), Máire Ní Shúilleabháin (Assistant Professor in Law, University College Dublin) and Sangeeta Shah (Associate Professor of Law, University of Nottingham)
Human Rights and Private International Law is the first title to consider and analyse the numerous English private international law cases discussing human rights concerns arising in the commercial and family law contexts. The right to a fair trial is central to the intersection between human rights and private international law, and is considered in depth along with the right to freedom of expression; the right to respect for private and family life; the right to marry; the right to property; and the prohibition of discrimination on the ground of religion, sex, or nationality.

Focusing on, though not confined to, the human rights set out in the ECHR, the work also examines the rights laid down under the EU Charter of Fundamental Rights and other international human rights instruments.

Written by specialists in both human rights and private international law, this

work examines the impact, both actual and potential, of human rights concerns on private international law, as well as the oft overlooked topic of the impact of private international law on human rights.

Contents

1: Introduction
2: Human rights, private international law, and their interaction
3: The right to a fair trial
4: The right to a fair trial and jurisdiction under the EU rules
5: The right to a fair trial and recognition and enforcement of foreign judgments under the EU rules
6: The right to a fair trial and jurisdiction under national rules
7: The right to a fair trial and recognition and enforcement of foreign judgments under the traditional English rules
8: The right to a fair trial and private international law: concluding remarks
9: The prohibition of discrimination and private international law
10: Freedom of expression and the right to respect for private life: international defamation and invasion of privacy
11: The right to marry, the right to respect for family life, the prohibition on discrimination and international marriage
12: Religious rights and recognition of marriage and extra-judicial divorce
13: Right to respect for family life and the rights of the child: international child abduction
14: Right to respect for private and family life and related rights: parental status
15: The right to property, foreign judgments, and cross-border property disputes
16: Overall conclusions

For further information, see here.

New publication on Kiobel and human rights litigation

Maria Chiara Marullo and Francisco Javier Zamora Cabot have published a paper on "TRANSNATIONAL HUMAN RIGHTS LITIGATIONS. KIOBEL'S TOUCH AND CONCERN: A TEST UNDER CONSTRUCTION."

The abstract reads:

In recent years the international debate on Transnational Human Rights Litigation has mainly focused, although not exclusively, on the role of the Alien Tort Claims Act as a way of redress for serious Human Rights violations. This Act has given the possibility of granting a restorative response to victims, in a Country, such as the United States of America, that assumes the defense of an interest of the International Community as a whole: to guarantee the access to justice to the aforesaid victims. The purpose of this article is to analyze the recent and restrictive position on this Act of the Supreme Court of the United States, in the Kiobel case, and especially when, as a means of modulating the limitative doctrine affirmed there, the Touch and Concern test was introduced. It has generated from its very inception a strong discussion amongst international legal scholars and also great repercussions concerning the practice of the U.S. District and Circuit Courts.

The publication can be downloaded here or through SSRN.

Beaumont and Trimmings on Human Rights and Cross-Border

Surrogacy

Paul Beaumont and *Katarina Trimmings* (Director and Deputy Director of the Centre for Private International Law, University of Aberdeen, respectively) have just published a highly interesting paper on "Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?". The article is the second paper in the Working Paper Series of the Centre for Private International Law (University of Aberdeen) and is now available on the Centre's website here.

The first part of their paper examines the recent decisions of Chambers of the European Court of Human Rights in cases of *Mennesson v. France* (on this case, see the earlier post by *Marta Requejo*), *Labassee v. France* (cf. the earlier post by *F. Mailhé*), and *Paradiso and Campanelli v. Italy*. It then makes some suggestions as to how the Grand Chamber should deal with the *Paradiso and Campanelli* case before analysing the likely consequences of the *Mennesson* and *Labassee* judgments for national authorities in the context of surrogacy. The article then explores whether, following these decisions, there is still a need for an international Convention regulating cross-border surrogacy.

For those interested in recent developments in German case law on cross-border surrogacy, I also recommend an earlier post by *Dina Reis*.

Two New Papers on Business and Human Rights

A short piece on two recently released papers, both accessible in pdf format (first one in Spanish, second in English). Just click on the title.

I reproduce the abstracts by the authors.

F. J. ZAMORA CABOT, Chair Professor of Private International Law, UJI of

Castellon, Spain

Sustainable Development and Multinational Enterprises: A Study of Land Grabbings from a Responsibility Viewpoint

> The international community has adopted sustainable development as one of its priority issues. Multinational corporations can however interfere or render it impossible through land grabbings, a complex phenomenon because on many occasions they reach a prominent role that can be seen, among their different appearances, as a real pathology of the above mentioned development.
>
> After having been previously scrutinized with relation to a comment on the case Mubende-Neuman I entertain no doubt at all that such grabbings more often than not turn out to be diametrically opposed to the various targets that outline sustainable development, as have already been revealed, for instance, by Secretary General of the United Nations Ban Ki- Moon, along his consolidated report over the agenda in this regard after 2015.
>
> I propose in here, then, after an **Introductory Section,** a presentation of the problem following recent cases, showing different conflict situations in selected sectors, **Section 2,** and others under which collective efforts have achieved or are in the process of attaining remedies in terms of justice, **Section 3.** I will put an end to my survey with some final reflections, **Section 4,** within which **I** will raise the relevant activity carried out by the human rights defenders, in this particular case deeply rooted in the communities and the land where they live and the great credit that deserves to us their continued and brave fight all around the world.

N. ZAMBRANA TÉVAR LLM (LSE), PhD (Navarra) Assistant Professor, KIMEP University (Almaty, Kazakhstan)

Can arbitration become the preferred grievance mechanism in conflicts related to business and human rights?

> International law demands that States provide victims of human rights violations with a right to remedy, also in the case of violations of human rights by legal entities. International law also provides some indications as to how State and non-State based dispute resolution mechanisms should be like, in

order to fulfil the human rights standards of the right to remedy. Dispute resolution mechanisms of an initially commercial nature, such as arbitration or mediation, could become very useful grievance mechanisms to provide redress for victims of human rights abuses committed by multinational corporations. Still, there are problems to be solved, such as obtaining consent from the parties involved in the arbitration process. Such consent may be obtained by imitating other dispute resolution mechanisms such as ICSID arbitration.

Working Paper on Business and Human Rights

The Working Paper *The Private International Law Dimension of the Principles. An Introduction*, written by Veerle Van Den Eeckhout is now available on ssrn.

The abstract reads as follows: "In the reports on Business and Human Rights by John Ruggie, "access to remedies" cq "access to justice" appears to be a key element. Rules of Private International Law can be seen as key factors in achieving access to remedies cq access to justice: PIL rules act like hinges that allow doors – granting access to a specific court and to a specific legal norm – to be opened or to be kept closed; thus, as PIL deals with issues of international jurisdiction and applicable law, PIL rules are of paramount importance in determining access to a specific court and access to a specific legal norm. In his Guiding Principles, Ruggie addresses the responsibility of States for issuing suitable legislation and 'access to remedies'; it may be well argued that PIL legislation (rules on jurisdiction and applicable law) and the interpretation of this legislation should also be examined in this context. In this article the focus is on the hypothesis that plaintiffs want to bring an action before a EU Member State court. When focusing on this hypothesis, one can observe that at least some PIL-aspects are covered by rules of PIL of European origin – the regulation of some other aspects is still left to the EU- Member States themselves. To what extent do these rules allow or deny access to remedies cq access to justice? In this article,

some rules and issues of (mainly) European PIL – both jurisdiction and applicable law – that deserve attention from this perspective will be highlighted in an introductory way."

The corresponding Power Point Presentation, presented during the Conference "The Implementation of the UN Principles on Business and uman Rigths in Private International Law" at Lausanne (October 2014) is available here.

Opinion 2/13 of the Court (Full Court). Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

On the Compatibility of the draft agreement with the EU and FEU Treaties: a resounding "no".

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

See the whole text here.