

# THE CLARION



## The IHRC Journal of Human Rights

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from the editors

Welcome back to The Clarion! After a hiatus, we are pleased to provide you with the most recent edition. In addition to pieces on the upcoming *Jesner* case on October 11, 2017 at the U.S. Supreme Court and a book review about the memoirs of a Chinese human rights lawyer, we have a special mini issue-within-an-issue focusing on the Human Right to Water (denoted by a blue border).

The Human Right to Water is of critical importance—almost as critical as water is itself to life, and the articles in the mini-issue provide interesting insights into the overarching concerns facing so many around the world.

We encourage all of our members to get involved in the work of the committee, through programming, policy or writing! We have the Year-in-Review coming up and the return of the much-missed e-brief over this membership year, and we can use all of your help to make it possible.

-The Editors

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# THE RIGHT TO WATER: PRIVATIZATION AND PARTICIPATION

Aleydis Nissen<sup>1</sup>

The business of water can effectively threaten the right to water. The profit-oriented agenda of private corporations may lead to a situation in which affordable, sustainably-managed water is not equally accessible to all.

States are not exempt from their international obligations relating to the right to water if water provision is outsourced to private corporations. This is, amongst others, described in the General Comment No. 15 on the Right to Water of the U.N. Committee on Economic, Social and Cultural Rights.<sup>2</sup> This Committee's new General Comment No. 24 on State Obligations in the Context of Business Activities also highlights that states should ensure user participation.<sup>3</sup> In reality, however, national governments seem to struggle with reconciling the realization of the right to water and their economic interests.

While citizens have managed to effectively reverse harmful water privatization at the local level, their remote connection to national governments seems to present a major hurdle.<sup>4</sup>

In two curious cases, the water movement was, nevertheless, able to set some changes in motion at the national level and the supranational level in

Europe. These cases are perhaps isolated because they were facilitated by direct democracy mechanisms. It concerns citizen initiatives in Slovenia and the European Union, a regional organization which enjoys the powers that are conferred by its member states.

This article describes these initiatives and questions to which extent citizen participation is, in fact, ensured by Slovenia and the E.U.

## Bottom-Up Mechanisms

First, grassroots activists relied on 'the European Citizen's Initiative', a direct democracy mechanism which was introduced in the E.U. in 2011, to mobilize 1.8 million E.U. citizens to reclaim the right to water.<sup>5</sup> Following this initiative, the European Commission adopted a formal Communication in 2014. This Communication promised a structured dialogue between stakeholders in order to improve the transparency and accountability of private water providers also stressed that more and better information in relation to water quality and services would be given to citizens in order to facilitate their participation in water management decisions.<sup>6</sup>

Second, as a result of a citizen initiative, Slovenia became the first E.U. member state with a constitutional right to drinking water in November 2016.<sup>7</sup> The amendment was introduced by more than thirty thousand Slovenian citizens and supported by a two-third majority in Slovenia's National Assembly, as required by a direct democracy mechanism which is embedded in article 168 of the

<sup>1</sup> Aleydis Nissen is a PhD candidate and graduate tutor funded by the Department of Law of Cardiff University. Her research focuses on international business and human rights.

<sup>2</sup> U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) on the Right to Water (International Covenant on Economic, Social and Cultural Rights, art. 11 and 12, Dec. 16, 1966, 993 U.N.T.S. 3), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), 2, 12. See also G.A. Res 15/9 U.N. Doc. A/RES/15/9 (Oct. 6, 2010); G.A. Res 64/292 U.N. Doc. A/RES/64/292 (Aug. 3, 2010).

<sup>3</sup> U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations in the Context of Business Activities, U.N. Doc E/C.12/GC/24 (Aug. 10, 2017), 21-22. See also U.N. Committee on the Rights of the Child, General Comment No. 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights, U.N. Doc CRC/C/GC/16 (Apr. 17, 2013), 1, 15 and 22.

<sup>4</sup> Municipalities worldwide – from Paris to Jakarta - are in the process of returning to publicly democratically-controlled

water resources thanks to citizen movements. See EMANUELE LOBINA, SATOKO KISHIMOTO & OLIVIER PETIJEAN, AN END TO THE STRUGGLE? 7 (2014); Corporate Europe Observatory and Transnational initiative, Water Remunicipalisation Tracker, <http://www.remunicipalisation.org> (last visited Jan.11, 2017); JAKARTA RESIDENTS RECLAIM THEIR WATER, in OUR PUBLIC WATER FUTURE, THE GLOBAL EXPERIENCE WITH REMUNICIPALISATION 40-49 Irfan Zamzami & Nila Ardhianie 2015).

<sup>5</sup> Consolidated Version of the Treaty on the European Union art. 11(4), Oct. 26, 2012 O.J. (C 326); European Parliament and Council Regulation 211/2011, 2011 O.J. (L 65) 1.

<sup>6</sup> Communication for the Commission on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!", COM (2014) 177 final (Mar. 19, 2014) 9-10 (hereinafter COM (2014) 177).

<sup>7</sup> Dušan Trušnovec, Pika na i. Voda je v Ustavi! (Nov. 25, 2016), <http://voda.svoboda.si/voda-v-ustavo/pika-na-i-voda-je-v-ustavi>.

Slovenian Constitution.<sup>8</sup> The amended article 70a of the Slovenian Constitution now stresses the importance of the protection of water resources against privatization by stating “the supply of the population with drinking water and water for household use shall be ensured by the state and on a not-for-profit basis.” The Prime Minister confirmed that this amendment aimed to protect Slovenian water from international corporations and from third states.<sup>9</sup>

### **Is Participation Taken Seriously at Home?**

Despite these initiatives, the European Commission and the Slovenian government seem to have not taken participation of all people and communities in relation to the right to water seriously. On the one hand, the European Commission supported water privatization in Greece and Portugal, two E.U. member states that were hit hard by the 2008 financial crisis.<sup>10</sup> In doing so, both the outcomes of local participatory referenda and the promises that were made in the above described Communication have largely been ignored.<sup>11</sup> On the other hand, in at least one case, the European Court of Human Rights has declared admissible an application of a Roma

family directed against Slovenia for not providing access to drinkable water.<sup>12</sup> While this case is still pending at the time of writing, it is well-known that Roma have often faced difficulties to be included in the Slovenian society.

### **And What about Participation Abroad?**

These observations give rise to the following question. If the European Commission and the Slovenian authorities are reluctant to secure participation of vulnerable people and communities in the realization of their right to water at home, will they be willing to include rights holders in the development programs that cover the right to water wherein they act as donor states?<sup>13</sup>

Meaningful consultation in developing states, where diseases associated with the lack of and unequal access to drinking water are often widespread, should take all barriers to engagement into consideration, including those that vulnerable and marginalized groups face.<sup>14</sup> Individuals and communities must be participants in their own development according to the U.N. Declaration on Human Rights and the Treaty on Economic, Social

<sup>8</sup> USTAVA REPUBLIKE SLOVENIJE [CONSTITUTION OF THE REPUBLIC OF SLOVENIA] Dec. 23, 1991, Uradni list RS, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13 (amended 2016), 168.

<sup>9</sup> Agence France-Presse in Ljubljana, Slovenia adds water to constitution as fundamental right for all, the Guardian, November 18, 2017. There is indeed some evidence that suggests third states were on the lookout to privatize Slovenian water resources. Eg LIDIJA GLOBEVNIK, MARKET SECTOR SCAN OF WATER MANAGEMENT OF SLOVENIA (2013). This market sector scan was commissioned by the Embassy of the Netherlands in Slovenia.

<sup>10</sup> Letter from Água é de todos et al. to Olli Rehn, Vice-President of the European Commission and member of the Commission responsible for Economic and Monetary Affairs and the Euro (May 15, 2015) available at <https://www.tni.org/en/article/ec-stop-imposing-privatisation-water#sept26>; Letter from Commission (Directorate General of Economic and Financial Affairs) to Mrs Zanzanaini (September 26, 2012) available at <https://www.tni.org/en/article/ec-stop-imposing-privatisation-water#sept26>.

<sup>11</sup> COM (2014) 177; European Federation of Public Service Unions, Victory for democracy, Suez must listen to the people of Thessaloniki!, <http://www.epsu.org/article/victory-democracy-suez-must-listen-people-thessaloniki> (last visited Feb. 3, 2017).

<sup>12</sup> Banko Hudorović and Aleks Hudorović v. Slovenia, App.

No. 24816/14 and 25140/14 available at <http://hudoc.echr.coe.int/eng?i=001-154290>. See Eva Brems and David Valeska, Written submissions to Banko Hudorović and Aleks Hudorović v. Slovenia, App. No. 24816/14 and 25140/14 (Sept. 9, 2015), <http://www.hrc.ugent.be/wp-content/uploads/2015/09/Hudorovic---and-Novak-v.-Slovenia.pdf>.

<sup>13</sup> WHO, Drinking Water (November, 2016), <http://www.who.int/mediacentre/factsheets/fs391/en/> (last visited Feb. 27, 2017).

<sup>14</sup> An amendment proposed to limit the scope of state obligations relating to the realization of the right to water to their own territory was rejected by states in the discussion of the 2016 Annual Resolution on the Right to Water and Sanitation of the Special Rapporteur (G.A. Res 33/10 Annex U.N. Doc. A/HRC/RES/33/10 (Oct. 5, 2016)). (See The Global Initiative for Economic, Social and Cultural Rights, Economic, Social and Cultural Rights at the 33rd session of the U.N. Human Rights Council (October 13, 2016), <http://globalinitiative-escr.org/economic-social-and-cultural-rights-at-the-33rd-session-of-the-un-human-rights-council/> (last visited Feb. 27, 2017). The European committed in its Communication COM (2014) 177 following the citizen’s initiative that it would advocate universal access to safe drinking water and sanitation as a priority area. The Commission also said that it would stimulate innovative approaches for development assistance, such as public-public partnerships.

and Cultural Rights.<sup>15</sup> They should be able to pursue development with free consent. This right also includes access to transparent information in a timely manner.

Unfortunately, there is a considerable lack of transparency regarding the protection of the right to water in development cooperation programs in which Slovenia and other E.U. member states are involved.<sup>16</sup> The interests of corporations from donor states can therefore easily be prioritized over the interest of local stakeholders in development dialogues. This risk is real because corporations from donor states have a lot to gain. They can, for example, use development programs as gateways to extend their supply chains and markets. In addition, they might use their involvement in development programs for marketing purposes at home.<sup>17</sup> Such practices are wide-spread and well-established. To give but one example, a recent article in Harvard Business Review presented water privatization by *Western* corporations in developing states as a case of laudable social entrepreneurship.<sup>18</sup>

### Conclusion

It was stressed in this article that water privatization can have a devastating impact on the human right to water. Citizens in Slovenia and the E.U. successfully managed to get attention for their right to water thanks to participatory democracy mechanisms. Nevertheless, the right to water of vulnerable people and groups seem to be a worrisome issue in Slovenia and other E.U. member states. This finding raises questions regarding development programs that cover the right to water. There is a considerable risk that such programs might prioritize promoting the interests of the corporations from donor countries over those of local right-holders.

## WORK WITH THE INTERNATIONAL HUMAN RIGHTS COMMITTEE!

We are looking for volunteers to help with:

- Human Rights Programming
- Writing for The Clarion, The Year-in-Review, and our other publications
- Proposing and commenting on ABA Policy Initiatives
- Participating in Rule of Law efforts on behalf of the Section
- Managing Communications on social media for the committee
- Identifying and engaging new members of the committee, the section and the ABA from around the world!

If you are interested in any of these areas, contact the IHRC Chairs at [inthumrights@gmail.com](mailto:inthumrights@gmail.com)!

<sup>15</sup> International Covenant on Economic, Social and Cultural Rights, art. 1(1) and 1(2), Dec. 16, 1966, 993 U.N.T.S. 3; G.A. Res 41/128 Annex art. 2(3), U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

<sup>16</sup> U.N. Special Rapporteur on Extreme Poverty and Human Rights, Report from the Special Rapporteur on Extreme Poverty and Human Rights to the Human Rights Council, U.N. Doc. A/HRC/32/31 (Apr. 28, 2016) 6.

<sup>17</sup> E.g. Suez, Promoting Access to Water and Sanitation,

<http://www.suez-environnement.com/water/challenges/promoting-access-water-sanitation/> (last visited Jan. 10, 2017). See Roel Nieuwenkamp, CSR is Dead! What's Next?, OECD INSIGHTS (Jan. 22, 2016), <http://oecdinsights.org/2016/01/22/2016-csr-is-dead-whats-next>.

<sup>18</sup> Aldo Musacchio and Eric Werker, Mapping Frontier Economies, HBR ,40, 46 (2016).

# THE GENDERED IMPACTS OF THE COMMERCIALISATION OF WATER IN HARARE: A CASE STUDY OF HATCLIFFE EXTENSION AND HOPLEY FARM

Bellinda Chinowawa<sup>19</sup>

On gaining independence in 1980, the government of Zimbabwe was faced with deep class, race, and gender inequalities, including access to water for domestic use by the African population. Colonial water laws emphasized the use of water for commercial agriculture and provision of water services to the territory's European settler population and largely ignored the need for water for domestic and productive purposes in African communities.<sup>20</sup> Thus, at independence, a key challenge for the new country was to reform its dysfunctional laws and eliminate racially-based patterns of distribution of both land and water.

With the rise of the Washington consensus in the 1990s and the attendant neo-liberal economic discourse, the country attempted to address these historical imbalances through the adoption of the Integrated Water Resources Management (IWRM) policy as advocated by multilateral lending institutions. IWRM attempted to balance calls for participatory natural resource management with the view of water as an economic good as codified in the Dublin Principles.<sup>21</sup> However, in doing so, human rights standards were not incorporated and the user-pays principle was adopted without due consideration to the situation of poor water users,<sup>22</sup> leading to the replacement of supply management systems with demand-based systems.<sup>23</sup> This resulted

in water being allocated for the highest economic returns to industry and commercial agriculture, while water for domestic uses was given minimal attention despite the increase in the pace of urbanization in Zimbabwe. Thus, between 1990 and 2008, access to urban water supply in Zimbabwe decreased from 97% to 60%, while 75% of rural hand pumps became non-functional.<sup>24</sup> This has been compounded by a protracted political and economic crisis which has led to a breakdown of the rule of law and that of public water and sanitation infrastructure, leading to a major cholera outbreak in 2008, and routine typhoid outbreaks from 2010 to date.

The situation is particularly dire for the residents of Hopley Farm and Hatcliffe Extension who are survivors of the 2005 mass forced evictions, known as Operation Murambatsvina (Drive out Filth) conducted ostensibly to clear urban slums but in reality it was retaliation against the urban poor for voting for the opposition during the 2005 parliamentary elections. Due to the failure of government to provide adequate potable water, residents of these areas have had to resort to alternative water sources such as boreholes, shallow wells and harvesting rain water. In Hatcliffe Extension particularly pits and gullies left uncovered by gold panners are also used by residents as a source of water, despite the obvious health hazards.

## Gendered Impact of this state of affairs

UNICEF estimates that in Africa, people spend 40 billion hours every year walking to collect water.<sup>25</sup> In the context of the two communities above, women are responsible for fetching, storing and managing the household's water supply. They are disproportionately burdened due to their reproductive and sociological roles which result in them bearing the greater burden of household chores.<sup>26</sup> The scarcity of water in these communities

<sup>19</sup> Bellinda Chinowawa is a Senior Projects Lawyer with Zimbabwe Lawyers for Human Rights.

<sup>20</sup> Anne Hellum, Patricia Kameri-Mbote & Barbara van Koppen, *Water is life: women's human rights in national and local water governance in Southern and Eastern Africa* (2015), p.7

<sup>21</sup> Principle No. 4 of the Dublin Principles states that Water has an economic value in all its competing uses and should be recognized as an economic good

<sup>22</sup> C Y Manjengwa, *An Analysis Of The Impact Of Perennial Water Problems On Time And Economic Affordability For*

*Women Working Outside The Home In Chitungwiza, Zimbabwe*, 2015

<sup>23</sup> *Water is Life* p.12

<sup>24</sup> Zimbabwe's National Water Policy, 2012.

<sup>25</sup> *Water for Women*,

[http://www.unwater.org/fileadmin/user\\_upload/worldwaterday2015/docs/Water%20For%20Women.pdf](http://www.unwater.org/fileadmin/user_upload/worldwaterday2015/docs/Water%20For%20Women.pdf)

(last visited Feb 3, 2017).

<sup>26</sup> See Report by the High Level Panel of Experts on food security and Nutrition, Committee on World Food Security (CFS), 25 May 2015; Report of the Special Rapporteur on

interacts with pre-existing social disadvantages and serves to reinforce deep gender and economic inequalities. Thus, poor and elderly women, single mothers and child-headed households are pushed to the margins and have to continuously navigate treacherous terrain in order to obtain water. To illustrate, women perceived as belonging to political parties other than the ruling ZANU- PF are at a further disadvantage as they face reprisals on account of their political activism, which routinely manifests in the blocking of access to community wells.<sup>27</sup> At Hopley Farm, women's health is also placed at risk as the only council-run clinic is situated in an old farm house, with no running water and woefully inadequate sanitation facilities.<sup>28</sup> The clinic is not equipped to deal with maternal and new-born care services, resulting in a high number of home deliveries, in which women have reported using dirty water to clean themselves and their babies, potentially exposing them to life-threatening infections.<sup>29</sup>

In response, humanitarian agencies have intervened through the sinking of boreholes. However, before establishing these community boreholes, there were no consultations with the residents in the area, nor were any efforts made to ensure that engineering and planning designs took the needs of elderly, disabled and visually impaired into consideration.<sup>30</sup> Thus, conflicts over borehole water are a common phenomenon in all these areas, with men largely instigating them due to their unwillingness to wait in line to fetch the water and the fact that they fetch water in large containers for re-sale, unlike the women who largely seek water for domestic use.<sup>31</sup> To add to these challenges, the poor drainage and sanitary sewer facilities in Harare as a whole have exposed these erstwhile safe boreholes to contamination and the quality of water is highly questionable.

Adequate Housing, Raquel Rolnik, A/HRC/19/53, 26 December 2011

<sup>27</sup> Interview with residents of Hopley Farm

<sup>28</sup> Amnesty International, No chance to live - Newborn deaths at Hopley settlement, p.5

<http://reliefweb.int/report/zimbabwe/zimbabwe-no-chance-live-newborn-deaths-hopley-settlement> last visited 4 March 2017

<sup>29</sup> Ibid

## Outline of the Legal Framework

As noted by the International Covenant on Economic, Social and Cultural Rights (ICESCR), the human right to water is both a right in and of itself and a condition for the realization of other rights.<sup>32</sup> The hardships faced by households in these communities serve to deny them of several other rights. Section 77 of the Constitution of Zimbabwe entitles every person to safe, clean and potable water and enjoins the State to progressively realise the right to water. At the regional level, Article 15 of the Maputo Protocol obliges contracting states to take all appropriate measures to 'provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food'. Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) stipulates that States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to [...] water supply". Similarly under General Comment 15, the CESCR sets forth the scope of the tripartite framework of state obligations to respect, protect, and to fulfil the right the water.<sup>33</sup>

While it is clear that there is no ambiguity as to the scope of governmental obligations, there is disconnect between the state's legal obligations and the lived realities of the women in these settlements. Mindful that women are not a homogenous group, the proposals below for a possible way out of this predicament are best suited for women in the peri-urban communities described above where authorities have largely been non-responsive.

## Increasing participation of women in water governance to promote accountability

Development discourse recognises that strengthening the processes of participation – that is the ways in which poor people exercise voice through deliberation, consultation and/or mobilisation can effect institutional change and good

<sup>30</sup> Water is Life p. 370

<sup>31</sup> Water is Life, p. 371

<sup>32</sup> Water Is Life, p. 3

<sup>33</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, available at: <http://www.refworld.org/docid/4538838d11.html> (last visit 6 March 2017)

governance.<sup>34</sup> The right to participation is enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 7 and 14 (2) of CEDAW. The Constitution of Zimbabwe also enjoins the state to promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men.<sup>35</sup> Presently, in Hopley and Hatcliffe women's participation in social and economic discourse on local water governance is negatively affected by the highly violent political climate in which water and sanitation have become an arena of political contestation between the main political parties.<sup>36</sup>

Thus, as a first step toward fostering accountability, it is necessary to depoliticize the discourse and empower women to become claimants of rights as opposed to passive beneficiaries of development. This can be done by pursuing a rights literacy initiative in order to apprise women of their constitutionally guaranteed rights in order to give them the confidence to enforce their rights and demand accountability from state actors. As things stand, women have not grounded their demands for water in rights language and appear to believe that they are at the mercy of the state. Grounding the discourse in rights language will diminish political contestations and empower women to voice their concerns. The extent to which women will be able to hold policy makers to account depends on knowledge of their rights and entitlements. As they become aware of the obligations of duty bearers, this will have self-agency and the ability to assert their rights with policy makers as well as in the communities they live in, in cases where they are side-lined on account of their socio-economic status or political views.

## Conclusion

Against a backdrop of decades of governmental neglect and indifference only an engaged citizenry, participating meaningfully, can spur governmental action towards the realisation of the right to water. This is particularly true for the communities of

Hatcliffe Extension and Hopley Farm Harare, Zimbabwe, who are being re-victimised after having once been victims of mass forced evictions. When women are empowered with the knowledge to assert and demand their rights, they will be able to transform their status from that of beneficiaries of development to its rightful and legitimate claimants.<sup>37</sup>

<sup>34</sup>John Gaventa, Exploring Citizenship Participation and Accountability  
[https://www.researchgate.net/profile/John\\_Gaventa/publication/249500357\\_Introduction\\_Exploring\\_citizenship\\_participation\\_and\\_accountability/links/5539ff550cf226723aba3f34/Introduction-Exploring-citizenship-participation-and-accountability.pdf](https://www.researchgate.net/profile/John_Gaventa/publication/249500357_Introduction_Exploring_citizenship_participation_and_accountability/links/5539ff550cf226723aba3f34/Introduction-Exploring-citizenship-participation-and-accountability.pdf) last visit, 4 March 2017

<sup>35</sup> Section 17 (1) (a) of the Constitution of Zimbabwe

<sup>36</sup> Water is Life p.371

<sup>37</sup> Cornwall, A, Beneficiary, Consumer, Citizen: Perspectives on Participation for Poverty Reduction p.7



# THE HUMAN RIGHT TO WATER: A RESOLUTION OF THE YOUNG LAWYERS DIVISION

*[Editor's Note: This resolution was adopted by the ABA Young Lawyers Division and is now the official policy of that Division. We present the text of the Resolution & Report for two reasons: First, we want to commend and highlight a position taken by the YLD, whose commitment to the intellectual life, membership growth and political future of the ABA is often overlooked; second, we hope that seeing this work encourages our own members to create policy Resolutions & Reports through the Section's International Human Rights Committee or through any Committee or Division of which you are a part. Our own R&R on the Arms Trade Treaty was adopted last January as ABA Policy. It is our hope that this resolution will also be adopted in the future.]*

## AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION

### ENVIRONMENT, ENERGY AND RESOURCES COMMITTEE

### RESOLUTION AND REPORT TO THE ASSEMBLY OF THE YOUNG LAWYERS DIVISION

#### RESOLUTION

RESOLVED, that the American Bar Association adopt a policy recognizing that every human being has the fundamental right to safe, clean, affordable water, and

RESOLVED, that the American Bar Association urges all federal, state, territorial, and local legislative bodies adopt laws and policies recognizing that every human being has the fundamental right to safe, clean, affordable water, and

FURTHER RESOLVED, that the American Bar Association works to support state and local legislation to protect access to safe, clean, affordable drinking water.

#### REPORT

Water is essential to *life, liberty and the pursuit of happiness*.<sup>38</sup> Water nourishes our bodies, it fuels our economy, and its long-term equitable management maintains peaceful relations. Today, 884 million people do not have access to improved sources of drinking water, and 2.5 billion lack access to improved sanitation facilities.<sup>39</sup> These water challenges are not faced by developing countries alone. The drinking water crisis in Flint, Michigan exposed the vulnerability of developed countries to water crises when insufficient resources are committed to water and water infrastructure. Acknowledging a human right to water will command the attention of our elected leaders and draw attention to the need to guarantee the availability of water to meet our current and future needs.

#### WATER SUSTAINS LIFE, TRADE AND SECURITY

Water is fundamental to our human existence, prosperity, and security. Without water, human beings die within three days. Water flows through an elaborate and complex hydrologic cycle that feeds our crops and generates our food supply, fills our rivers and aquifers, sustains wildlife, and supports innovation and economic growth. Many of the products that we use on a daily basis—from cars fueled by gasoline to computers to medical instruments—require water at some point in their manufacturing, use or disposal.

Water scarcity and polluted waterways breed conflict, poverty, and economic uncertainty. Water contaminated with bacteria and worms infect people with water-borne diseases that prevent them from going to school and work. Sickness increases healthcare bills and reduces income, threatening the economic stability of families. Wells located outside of communities means children, primarily young girls and women, spend their day walking to

<sup>38</sup> Declaration of Independence.

<sup>39</sup> United Nations Children's Fund and World Health Organization, Progress on Drinking Water and Sanitation: Special Focus on Sanitation (2008).

retrieve drinking water rather than in school. This perpetuates gender inequality and reduces the future earning potential of women. Exposure to toxic chemicals, like lead in Flint, can cause long-term health problems and cost communities millions of dollars in litigation, environmental remediation, and future healthcare expenses.<sup>40</sup> Too much, too little, and too polluted water all pose significant risks to human survival and prosperity.

### **FEDERAL, STATE, LOCAL LEGISLATURES: HUMAN RIGHT TO WATER**

Recognizing a human right to safe, clean, affordable water supports governments' existing role in providing water services. Institutionalizing a human right to safe, clean, affordable drinking water explicitly acknowledges a responsibility and authority already exercised by federal, state, and local governments.

What kind of commitment is the government making in recognizing the human right to water? In acknowledging the human right to water, the government is making three commitments:

1. To ensure a safe and sufficient amount of drinking water for personal and domestic uses<sup>41</sup>
2. To ensure adequate access to sanitation
3. To be effective stewards of water used for drinking water.

Fulfilling these commitments will ensure that the most basic needs of humans are met and that our economy remains vibrant and our domestic security strong. Without access to water or sanitation, humans cannot be full, contributing members of society.

#### ***To ensure a safe and sufficient amount of drinking water for personal and domestic uses***

Each member of a community should receive safe, clean drinking water. Governments should oversee the safe and sustainable operation of drinking water treatment and distribution systems. Drinking water treatment facilities treat source waters to meet scientifically set drinking water standards. These

treated waters are then distributed to homes to fulfill domestic needs.

Costs incurred for operating these drinking water treatment facilities are generated by users and supplemented with state and federal funding. However, if adequately calculated, our municipal water rates and tariffs should recuperate almost 100% of the costs incurred for treating and distributing drinking water. Governments can spur innovation in drinking water treatment and distribution by investing in new technologies and exploring new practices that reduce costs and increase efficiencies, thereby reducing the cost of maintenance and operation.

#### ***To ensure adequate access to sanitation***

Untreated wastewater poses a significant threat to our waterways. Therefore, governments are responsible for overseeing the effective operation of wastewater treatment plans. This includes establishing clear discharge standards that prevent the discharge of dangerous chemicals or bacteria and prevent the discharged water from altering the water quality of the discharged to waterway.

Costs incurred for operating these wastewater treatment facilities are shouldered by users and supplemented with state and federal funding. However, if adequately calculated, our municipal sewer rates and tariffs should recuperate almost 100% of the costs incurred for collecting and treating wastewater. Governments can reduce costs and increase efficiencies by exploring the application of technologies and practices that create value from waste. For example, the addition of an anaerobic digester to a wastewater treatment plant can allow a wastewater treatment plant to generate sufficient energy to operate off the grid as well as reduce the volume of solid waste remaining at the end of the treatment process, thereby reducing the cost of maintenance and operation.

#### ***To be effective stewards of water used for drinking water***

Governments are responsible for monitoring water quality of all waterways used as source for drinking

<sup>40</sup> "Flint Water Crisis May Cost the City \$400 Million in Long-Term Social Costs," Josh Sanburn, TIME (8 August 2016), available at <http://time.com/4441471/flint-water-lead-poisoning-costs/>.

<sup>41</sup> <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>

water. This responsibility requires the setting of water quality standards, the establishment of registration and reporting requirements for all parties discharging into these designated waterways, and the enforcement of set water quality standards. The minimum requirements protect the water quality of waterways used as source waters for drinking water treatment facilities and require accountability on the part of water users.

### **ABA: HUMAN RIGHT TO WATER**

The ABA is a champion for reforms that promote the public interest and should adopt a policy recognizing that every human being has the fundamental right to safe, clean, affordable water.<sup>42</sup>

The ABA has adopted resolutions recommending that local, state, and federal governments adopt legislation to further a policy goal. For example, in 2015, the ABA adopted Resolution 105, which urged “legislative bodies and governmental agencies to enact comprehensive laws that prohibit, unless otherwise exempted, the possession, sale, breeding, import, or transfer of dangerous wild animals, in order to protect public safety and health, and to ensure the humane treatment and welfare of such animals.”<sup>43</sup> And in 2013, the ABA adopted Resolution 100 which urges “legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog laws based on behavior and to repeal any breed discriminatory or breed specific provisions.”<sup>44</sup>

Related resolutions have focused on wetlands, climate change, and marine resources. Revised Report 101 urges “federal, state, territorial and tribal governments, when considering and approving legislation, regulations and policies, to preserve and enhance the benefits that people derive from ecosystems, with due regard for economic, human and social impacts.”<sup>45</sup> Revised Report 109 urges “the United States government to take a

leadership role in addressing the issue of climate change through legal, policy, financial and educational mechanisms and to engage in active international discussions to address climate change, and urging Congress to enact and the President to sign appropriate climate change legislation.”<sup>46</sup> Revised Report 101A encourages “Congress and the President to take specific legislative, regulatory and other actions necessary to improve the structure of our country’s domestic management and regulation of its marine resources in order to better protect the integrity of its marine ecosystems and to ensure ecologically sustainable use and development of its marine resources.”<sup>47</sup>

The ABA itself has a commitment, reaffirmed in Resolution 105, “to sustainable development and defines sustainable development as the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.”<sup>48</sup> A key aspect of sustainable development is the guarantee of safe, clean, and affordable drinking water.

By adopting this policy, the ABA will motivate governments to prioritize water and facilitate innovation in water technology and practice.

### **CONCLUSION**

Water has yet to be elevated as a national or international priority. Yet, access to drinking water and sanitation are essential to the growth of our economy, the protection of our national security, and the achievement of the Sustainable Development Goals worldwide. The ABA should adopt a policy recognizing the right to safe, clean, affordable water and encourage federal, state, and local governments to also recognize the right to safe, clean, affordable water.

<sup>42</sup> <http://www.americanbar.org/advocacy.html>

<sup>43</sup> Memorandum for the 2015 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates (Mar. 10, 2015).

<sup>44</sup> Memorandum for the 2012 Annual Meeting of the American Bar Association and Meeting of the House of Delegates (Aug. 29, 2012).

<sup>45</sup> Memorandum for the 2008 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates (Feb. 29, 2008).

<sup>46</sup> *Id.*

<sup>47</sup> Memorandum for the 2005 Annual Meeting of the American Bar Association and Meeting of the House of Delegates (Sept. 23, 2005).

<sup>48</sup> Memorandum for the 2013 Annual Meeting of the American Bar Association and Meeting of the House of Delegates (Sept. 19, 2013).

# JESNER V. ARAB BANK AND THE UN GUIDING PRINCIPLES ON BUSINESS ON HUMAN RIGHTS

John F. Sherman, III<sup>1</sup>

The Alien Tort Statute, 28 U.S.C. s. 1350 (“ATS”), permits aliens to bring civil tort suits in U.S. courts for violations “of the law of nations.” The asserted immunity of corporations from international legal liability, and the asserted burdens that such liability would place on business, are now back before the U.S. Supreme Court in *Jesner v. Arab Bank, PLC*, Docket No. 16-499, which is scheduled for oral argument on October 11, 2017.

In 2013, in *Kiobel v. Royal Dutch Petrol. Co.*, 133 S.Ct. 1659 (2013), the Supreme Court had avoided ruling on these questions, since it decided that the ATS claim in that case could not overcome the presumption against extraterritoriality. This time, in *Jesner*, the petitioners, who are victims of terrorist bombings and attacks, are suing the respondent Arab Bank, a multinational corporation based in Jordan, under the ATS. A jury found that the bank had knowingly used its New York branch as a clearinghouse to facilitate the financing of such actions, including the establishment of accounts used to make so-called ‘martyrdom’ payments to the families of terrorists killed in these activities.

The District Court ultimately overturned the verdict and dismissed the claim on the ground that corporations are not subject to suit under the ATS. The Second Circuit affirmed.<sup>2</sup>

In its brief, the bank cites the United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”)<sup>3</sup> for the proposition that international law does not recognize corporate liability for human rights abuses.<sup>4</sup> Petitioners cite the Guiding Principles for the opposite conclusion.<sup>5</sup> In addition, the U.S. Chamber of Commerce and others filed an amicus brief arguing that such liability, if allowed, would impose unwarranted costs on U.S. businesses operating abroad.<sup>6</sup> Similar arguments had been raised, but not reached, in *Kiobel*. As in *Kiobel*, the Guiding Principles remain highly relevant in *Jesner*. First, their background and content show that international law does not preclude corporate responsibility for violations of human rights. Second, their widespread uptake helps to show that the existence of potential ATS liability benefits businesses abroad much more than it burdens them.

## What are the Guiding Principles?

According to the UN High Commissioner for Human Rights, the Guiding Principles are “the global authoritative standard, providing a blueprint for the steps all States and businesses should take to uphold human rights.”<sup>7</sup> They were authored by Harvard Kennedy School Professor John G. Ruggie,

<sup>1</sup> The author was senior legal advisor to the core UN mandate team of Harvard Kennedy School Professor John Ruggie, the UN Special Representative on Business and Human Rights, and helped him shape and draft the UN Guiding Principles on Business and Human Rights. He is currently general counsel and senior advisor to Shift, an independent nonprofit organization that is the leading center of business and human rights expertise. He is also a senior program fellow at the Corporate Responsibility Initiative of the Center for Business and Government at the Harvard Kennedy School. The author wishes to express his thanks to Rachel Davis, Shift’s managing director, for her insights. This article states the author’s views only and not necessarily those of any institution he is affiliated with. Web links to sources cited were accessed on August 25, 2017.

<sup>2</sup> The complex and lengthy procedural history of the appeal is summarized in the Petitioner’s brief, available at <http://www.scotusblog.com/wp-content/uploads/2017/06/16-499-ts-brief-for-petitioners.pdf>.

<sup>3</sup> UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and

Remedy Framework” (2011), available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>4</sup> *Jesner v. Arab Bank, PLC*, Docket No. 16-499, Brief of respondent Arab Bank, PLC, filed August 21, 2017, to be posted at <http://www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/>.

<sup>5</sup> *Jesner v. Arab Bank, PLC*, Docket No. 16-499, Brief of petitioners Joseph Jesner, et al, filed June 20, 2017, available at <http://www.scotusblog.com/wp-content/uploads/2017/06/16-499-ts-brief-for-petitioners.pdf>.

<sup>6</sup> *Jesner v. Arab Bank, PLC*, Docket No. 16-499, Brief for the Chamber of Commerce of The United States of America, et al, in support of neither party (June 27, 2017), available at <http://www.scotusblog.com/wp-content/uploads/2017/07/16-499-ac-Chamber-of-Commerce-et-al-ISO-Neither-Party.pdf>.

<sup>7</sup> Zeid Ra’ad Al Hussein, Ethical pursuit of prosperity (2015), Law Society Gazette, available at <https://www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle>.

whom then-UN Secretary General Kofi Anan had appointed in 2005 as his Special Representative on Business and Human Rights to break a logjam at the UN over the respective responsibilities of States and businesses regarding human rights. The UN Human Rights Council unanimously endorsed the Guiding Principles in 2011, following six years of multi-stakeholder consultation, pilot projects, and research. This was the first time that the Council and its predecessor had addressed the subject of business and human rights, accepted normative language written by an external expert that the States themselves did not draft, and unanimously endorsed an international set of standards.<sup>8</sup>

The Guiding Principles comprise 31 principles, each with detailed commentary, based on three interdependent pillars: “The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.”<sup>9</sup>

The uptake of the Guiding Principles has been swift and widespread. They are reflected or incorporated in laws and regulations, government policy developments, international standard setting

bodies, public commitments by businesses, and judicial and public advocacy by civil society, as well as the International Bar Association.<sup>10</sup> To date, approximately 18 countries, including the United States, have published National Action Plans to implement the Guiding Principles, and another 34 are in the works.<sup>11</sup>

This uptake includes the enactment, or legislative consideration of, mandatory human rights due diligence laws, including: the enactment of the French “Plan of Vigilance” Law in 2017, which applies to the largest French companies, their subsidiaries and suppliers and requires them to conduct human rights due diligence;<sup>12</sup> the Dutch Parliament’s 2017 passage of a bill requiring companies selling to Dutch end-use customers to exercise a duty of care to keep child labour out of their supply chains;<sup>13</sup> and the UK’s 2017 joint Parliamentary report recommending that legislation be adopted requiring all companies, including parent companies, to prevent human rights abuses, on pain of civil and criminal penalties similar to those imposed for bribery offenses.<sup>14</sup>

In addition, States have enacted requirements that companies disclose their human rights performance. Examples include the 2015 UK Modern Slavery Act,<sup>15</sup> the 2014 European Parliament’s Directive on Disclosure of Nonfinancial and Diversity Information,<sup>16</sup> the 2012 California Transparency in Supply Chain Act of

<sup>8</sup> John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton, 2013).

<sup>9</sup> UN Human Rights Council, Introduction by the Special Representative to the Guiding Principles, A/HRC/17/31, par 6 (2011), available at

[http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

<sup>10</sup> IBA Practical Guide on Business and Human Rights for Business Lawyers (2016), available at

<http://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx>.

<sup>11</sup> See the guide to National Action Plans on the Business and Human Rights Resource Center, National Action Plans, available at <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>.

<sup>12</sup> See the articles collected on the French law on the Business and Human Rights Resource Center, available at <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains>.

<sup>13</sup> India Committee of the Netherlands, Netherlands: Parliament adopts child labour due diligence law for companies; Senate approval pending (2017), available at <https://business-humanrights.org/en/netherlands-parliament-adopts-child-labour-due-diligence-law-for-companies-senate-approval-pending>.

<sup>14</sup> House of Lords, House of Commons, Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting corporate responsibility and ensuring accountability* (2017), available at <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

<sup>15</sup> UK Modern Slavery Act 2015, c. 30, Part 6, Section 54 (4) and (5), available at <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

<sup>16</sup> Directive 2014/95/EU (2014), available at [https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en).

2010,<sup>17</sup> and the 2015 U.S. Federal Acquisition Regulation, ‘Combatting Trafficking in Persons.’<sup>18</sup> These laws effectively push the same expectations into business-to-business relationships, requiring their suppliers and other partners to respect human rights in accordance with the Guiding Principles. For example, even FIFA, which is the governing body of world football, the world’s largest and richest sport, is moving to require its business partners and suppliers to comply with the Guiding Principles, including in future FIFA World Cup tournaments.<sup>19</sup> This requirement has the potential of enormous knock-on effect on all entities doing business with football associations worldwide.

### **What do the background and content of Guiding Principles teach us about the asserted corporate immunity for violation of the international human rights standards?**

In 2012, Prof. Ruggie had joined others in filing an amicus brief in *Kiobel* that reviewed the evidence he considered on this subject.<sup>20</sup> The brief stated that he had advised the Human Rights Council that human rights treaties do not generally impose duties directly on corporations. However, he also advised the Council that customary international law, emerging practice and expert opinion increasingly suggest that corporations may be held liable for gross human rights violations. He identified an “expanding web of potential corporate liability for international crimes” resulting in an increasing number of domestic jurisdictions where corporations can be charged for international crimes and be subject to civil liability. As a result, Guiding Principle 23(c) advises business enterprises to treat the risk of being complicit in gross human rights abuses as a matter of legal compliance. His position

was characterized incorrectly by Shell’s counsel in oral argument, but the issue was never reached.<sup>21</sup> The Court in *Jesner* now can consider the issue squarely.

### **What do the context and uptake of the Guiding Principles teach us about the asserted unreasonable burdens that ATS liability would place on business abroad?**

The widespread and rapid convergence on the Guiding Principles as a global standard also rebuts the argument that corporate ATS liability, if recognized, would impose an undue burden on business. Responsible businesses have a strong internal reasons to manage their human rights risks, litigation risks aside.<sup>22</sup> These reasons include:

- The status of human rights as a strategic risk for companies, and a matter for close attention by corporate boards in the exercise of their fiduciary duty;
- The reputational loss from involvement in human rights harm, which often forms a very large percentage of a company’s market capitalization, could affect important relationships not only with consumers, but also with business partners, lenders, and investors. This may also reduce the company’s ability to recruit and retain employees;
- The need to respond to increased pressures for accurate reporting on human rights performance from investors, shareholders, workers, and civil society organizations;
- The reduced access to capital markets, as investors and lenders increasingly face complaints when projects they finance are

<sup>17</sup> Cal. Civ. Code s. 1714.43 (2010), available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0651-0700/sb\\_657\\_bill\\_20100930\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.pdf).

<sup>18</sup> Combatting Trafficking in Persons, etc., FAR Subpart 22.17 and Part 52 (2012), available at

<https://www.acquisition.gov/far/html/Subpart%2022.17.html>.

<sup>19</sup> John G. Ruggie, “For the Game. For the World.” FIFA and Human Rights (2016), available at <https://www.hks.harvard.edu/centers/mrcbg/programs/crri/research/reports/report68>.

<sup>20</sup> *Kiobel v. Royal Dutch Petroleum Co*, Supreme Court Docket No. 10-1491, Brief Amici Curiae of Former UN Special Representative for Business and Human Rights, Professor John Ruggie, et al, (2012), available at

[https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/10-1491\\_neutralamicufmrnspecialrepetal.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamicufmrnspecialrepetal.authcheckdam.pdf).

<sup>21</sup> John G. Ruggie, *Kiobel and Corporate Social Responsibility* (2012), available at [https://sites.hks.harvard.edu/mrcbg/CSRI/KIOBEL\\_AND\\_CORPORATE\\_SOCIAL\\_RESPONSIBILITY%20\(3\).pdf](https://sites.hks.harvard.edu/mrcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf).

<sup>22</sup> Shift, *Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Strategy* (2016), a paper commissioned by the Business and Sustainable Development Commission, available at <https://www.shiftproject.org/resources/publications/business-human-rights-sustainable-development-coherent-strategy/>.

seen to run roughshod over local communities and then consider ruling out investments based on human rights risks; and

- The large costs of lost productivity, lost opportunities, and management distraction resulting from projects affected by conflict with local communities arising out of human rights impacts; for example, human rights-related delay costs for a USD \$3-5 billion capital expenditure project in the mining industry has been calculated to be USD \$20 million per week.

Companies that conduct human rights due diligence are less likely to become involved in human rights harm and incur the losses described above. And even if they are accused of involvement in such harm, they will be better able to defend themselves. As the Special Representative noted in his 2010 Report, “in Alien Tort Statute and similar suits, proof that the company took every reasonable step to avoid involvement in the alleged violation can only count in its favour.”<sup>23</sup>

At the same time, however, responsible companies that attempt to manage their human rights will be at a competitive disadvantage from businesses that do not conduct human rights due diligence, but can nevertheless escape accountability by assuming a corporate form. In 2010, no less an authority on corporate law practice than Martin Lipton, the founding partner of Wachtel, Lipton, Rosen & Katz, applauded the Guiding Principles for mobilizing “the U.N.’s unique position to assure a level playing field, calling on every corporation around the world — regardless of size, location, or line of business, and whether public or private — to declare its business interest in preventing violations of human rights.”<sup>24</sup> Legal accountability for corporations that do not

manage their human rights risks helps to maintain a level playing field for corporations that do.

In short, the background and content of Guiding Principles show that international law does not immunize corporations from accountability for human rights harm. Moreover, their context and uptake show that legal liability for corporations does not impose an undue burden on responsible businesses, which already have a strong interest in managing their human rights risks. They are entitled to compete on a level playing field.

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<sup>23</sup> Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27 (2010), par 86, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

<sup>24</sup> Martin Lipton and Kevin S. Schwartz, Guiding Corporate Social Responsibility: A United Nations Blueprint to Promote Human Rights, Wachtel Lipton, Rosen & Katz (2010), available at <https://business-humanrights.org/sites/default/files/media/documents/ruggie/wachtel-lipton-rosen-katz-guiding-corporate-social-responsibility-24-nov-2010.pdf>.

## BOOK REVIEW

### TESTED CONVICTIONS: MEMOIRS OF AN ADVOCATE IN CHINA

Reviewed by Aida Moreu Romero<sup>25</sup>

Gao Zhisheng's book, "Unwavering Convictions: Gao Zhisheng's Ten-Year Torture and Faith In China's Future" is the hard proof that reality can catch up with and indeed surpass the inventions of fiction. The horrifying world described in 1949 by George Orwell in his dystopian masterpiece 1984 appears as a mirror of the reality of contemporary China as portrayed by attorney Gao. "Old Gao", as he describes himself in the book, sets forth the horror of having suffered five abductions that he describes as instigated by the Chinese Communist Party, and imprisonment for some ten years, all for the sole reason of being an outstanding lawyer in defense of human rights, rights that have been denied to him even as he had advocated them for his clients.

Gao's account of his experience implies that the situation of political rights in China remains unchanged since the Tiananmen Square Massacre. Gao's work lays out a distressing vision, namely that the regime suppresses dissent by using secret police; history is rewritten in the interest of those in power; and corruption governs all stages of the system. Such an echo of the ultimately unsuccessful Soviet Union in Gao's view can only be destroyed from within. Indeed, Gao predicts that the regime will implode in the recourse of 2017.

The book is a profoundly human testimony of a political dissident, who feels pity for his oppressors and who thinks deeply about every aspect of the hell apparently built especially for him. He shows decisive belief in his personal values, not accepting what he identifies as the extortion of the Chinese Government, which continues to torture him until he might agree not to tell the world what he observes to be happening in China. However, the author does not yield, even with his family in danger: he bears

years of repression with dignity and peace. He does not rebel (although he never desists), not even in the most extreme situations. For that reason, he may be considered as the Chinese Gandhi of our times.

Through the years of imprisonment, Old Gao assesses the *modus operandi* of the authorities, illustrating with extraordinary detail, the overarching climate of mistrust created in China, similar to the society described in "1984", in which the Big Brother controls even the rebellion. In the China presented in the book, even the officials with moral principles necessarily become corrupted in light of their need of self-defense. The book describes a totalitarian regime founded on ignorance of the population, absence of civil responsibility and lack of conscience. Gao's work reports that bribes govern every position in the Chinese government. In it, officials are characterized as "brainless zombies", demonstrating depravation, degeneration and lack of morality. They are reported to deem dissidents as "domestic anti-China forces", and the Government is declared at war against them, as though they comprised a terrorist group. Not only the dissident is considered as terrorist, but also the dissident's entire family is at risk.

The author describes a China in which the Government mobilizes hundreds of thousands of soldiers, just for political meetings, as if at war; in which there are more prisons than universities, and the major breach of discipline is "illegal religions", with the meaning of all religions.

In his accounts of his five abductions, Gao reports torture and blackmail with the aim of convincing him not to write about China's reality. He recounts the promises of the Chinese Communist Party of a luxurious life, in any position that he would choose, or even without working at all, with a privileged salary up to the amount he would request, all for the prize of silence. He describes how he bore the use of electric shock torture, the prohibition of shower for weeks, the prohibition to go to the bathroom, lack of heat during the winter combined with no blankets, humidity and extreme heat during the summer, harassment of every kind, blows, etc.

<sup>25</sup> Aida Moreu Romero, Doble Grado en Derecho Contabilidad y Finanzas, Universidad Pablo de Olavide (Spain); European Masters in Law and Economics through the University of Bologna (Italy), Erasmus University of Rotterdam (The

Netherlands) and University of Hamburg (Germany). Legal Intern (sponsor: US-Spain Chamber of Commerce), Zuber Lawler & Del Duca LLP, Los Angeles 2016-2017.



During his imprisonment, Gao recounts three solid years in solitary confinement, observed by four cameras and a microphone, measures reserved only for political prisoners and not the common criminals. He notes that they were specially used for Falun Gong practitioners, deemed threats to the regime because of their extensive number.

The imprisonment recounted by Gao is indeed a consistent violation of human rights. It came with discrimination and abuse, with lugubrious and insalubrious conditions of the cells. They did not have ventilation, or any other air condition. There was no opportunity to work or study in prison. Books were also banned, except for those praising the Government. Water provided to the prisoners was not potable. Medical treatment was denied. The right to write and receive letters was denied, and especially remarkable was the torture of giving hope to the author regarding the possibility to visit the dentist or his family that was never true.

In light of these inhuman conditions and harassment via loudspeakers, Gao tried to commit suicide, and the Shaya prison reacted by cutting his rights even more, and strengthening the broadcast of communist propaganda. The compulsory recital of sentences such as: “I am grateful to the Government and Party” and “I support the leadership of the Party” were daily duty for all political prisoners. Gao reports the future of those who refused to pronounce those words.

Besides recounting the horror of the infliction of absolute terror to ensure absolute obedience, already unsuccessful in 1794 with Robespierre, Old Gao shows a special sense of humor that brings light into the dark of the book, and remains with endless and tireless hope of the world knowing what real China is. Gao’s ultimate goal is for the world to see what he has viewed not only in the corruption of the regime, but also in the souls of his fellow Chinese.

With an indirect but tangible message of optimism, Gao invites universal human rights supporters, in China and all over the world, to listen to his cry and to step forward in the face of what he sees as the already declining regime. In his view, just as slavery ended by the rebellion of slaves, autocracy ends by peaceful opposition of the population.

*Unwavering Convictions: Gao Zhisheng’s Ten-Year Torture and Faith In China’s Future by Gao Zhisheng, Published by the ABA Section of*

*International Law and Carolina Academic Press (2017). Copies can be purchased at: <https://shop.americanbar.org/ebus/store.aspx?term=“Unwavering+Convictions%3a+Gao+Zhisheng’s+Ten-Year+Torture+and+Faith+in+China’s+Future.”>*