Leora Bilsky, *The Holocaust, Corporations, and the Law. Unfinished Business*. Ann Arbor: University of Michigan Press, 2017, 256 pp., ISBN: 9780472073610, \$ 75.00.

Debates about appropriate remedies feature prominently in the field of business and human rights, and in the on-going negotiation at the United Nations for a business and human rights treaty. In this context, Leora Bilsky's fascinating book, *The Holocaust, Corporations, and the Law. Unfinished Business*, focuses on legal settlements, a mechanism that has attracted little attention among business and human rights scholars. As a case study, she uses the claims filed in the 1990s in the United States against Swiss banks and German companies on behalf of Holocaust survivors, which resulted in unprecedented settlements of USD 1.25 billion and USD 5 billion respectively. Whereas many scholars and commentators consider corporate actors evaded responsibility by settling the lawsuits, Bilsky defends a different position: settlements actually empower victims and advance norm creation on corporate accountability. Settlements do not deny justice, she argues, and they are not second-best either. Instead, the central thesis of the book is that 'transnational class action settlement offers a new mode of accountability that adequately addresses the bureaucratic nature of business involvement in atrocities' (p. 4). In convincingly defending this thesis, she makes an important contribution to business and human rights scholarship. The book makes for a particularly interesting read in light of the 2018 US Supreme Court decision in *Jesner v. Arab Bank* which ruled out all Alien Tort Statute (ATS) claims against foreign companies, thus limiting opportunities for business and human rights litigation. Since some of the transnational Holocaust litigation (THL) claims were brought under the ATS against European companies, if initiated today, they would be dismissed and there would be no settlement to discuss. Furthermore, the outcome of *Jesner* invites scholars and practitioners to look beyond litigation for appropriate remedies, one of which, Bilsky contends, is settlement.

The book is divided in eight chapters. Chapter 1 explains why criminal trials are ill-suited to address corporate accountability, thus laying the ground for alternative mechanisms to establish responsibility for human rights violations.

Chapter 2 introduces the main features of THL and presents it as a hybrid legal tool at the intersection of two fields: international criminal law, and American structural reform litigation. International criminal law, in theory best adapted to deal with complicity in genocide and other crimes of that nature, has failed to provide a remedy for victims because establishing corporate criminal responsibility, particularly intent, has proved challenging. Structural reform litigation, as used in the United States in the 1950s and 1960s to advance desegregation, is a useful tool to hold large, bureaucratic organizations

to account but is mostly forward-looking. It is about reform, not reparation. THL shares many common features with structural reform litigation but differs from it in a significant way. It was aimed at, and succeeded in, securing monetary compensation. Claims against Swiss banks were brought by Holocaust survivors who were denied access to accounts of dead or disappeared relatives in the name of banking secrecy. Claims against German companies focused on the use of slave labour. Faced with the prospect of reputation damage and high litigation costs, German companies eventually signed the Berlin Accords in 2000 with the plaintiffs, and eight 'interested states' (Germany, the United States, Israel, Poland, Russia, the Ukraine, the Czech Republic, and Belarus). The Accord ends litigation and makes clear the companies do not accept any legal responsibility. In exchange, the companies and the German government agreed to pay DEM 10 billion to a specially created German foundation, 'Responsibility, Remembrance and the Future'. Unsurprisingly, both series of claims led to criticism, no less because some viewed them as being 'about the money', and thus as 'a cynical manipulation of the memory of the Holocaust' (p. 36). It is indeed challenging to reconcile the quest for monetary compensation for individuals, even a large number of individuals, and the public goals that lie at the heart of both international criminal law and structural reform litigation.

In Chapter 3 Bilsky addresses that paradox. She invites the reader to 'rethink settlement' and to acknowledge its public function. THL was not simply a private endeavour and, she insists, should not be framed as a missed opportunity to create an international norm on corporate responsibility for gross human rights violations. Settlement advanced the public good by contributing to fact-finding, novel historical research, and democratic deliberation and participation. On norm creation, she notes it would be unrealistic and even undesirable to expect a clear norm on corporate responsibility to emerge out of litigation. She contends that the settlement advanced the cause of corporate accountability in 'creative ways', by 'speaking the language' corporations understand (p. 73). In that sense, the settlement contributed to norm creation. Chapters 4 and 5 further explore that point, though from different perspectives.

Chapter 4 focuses on one of the biggest criticisms of transnational human rights litigation, namely the legitimacy of foreign courts to address facts that occurred in a different country. It builds on Harold Koh's work on transnational litigation and exposes its inability to justify claims against corporate defendants. In Koh's theory, foreign countries can legitimately provide a forum for litigating human rights claims because such claims rely on universally agreed-upon international norms. Bilsky suggests his norm-based theory 'fails to account for the particular challenges posed by corporate wrongdoing' (p. 79),

an area where, precisely, clear and widely accepted international norms are lacking. Chapter 5 then goes on to develop a process-oriented approach to corporate liability for human rights violations. Transnational litigation against corporations is legitimate, Bilsky argues, not because it relies on a clear norm, but because it 'can create a process correcting the democratic deficit at a global level' (p. 89).

Chapter 6 focuses on an issue that will particularly speak to business and human rights legal scholars, whether we can talk about accountability when the defendant corporations have consistently portrayed their payments as humanitarian in nature, thus accepting no legal responsibility in the process. Bilsky calls for a more nuanced reading: 'payments for past injustice should not be understood in binary terms as either legal or humanitarian, but rather as falling along a spectrum' (p. 115). She concludes that the Swiss settlement 'produced narratives of accountability similar to those produced by courts adjudicating legal liability' (p. 118), by relying for example on historical research. By contrast, the German settlement 'can be characterized as a denial of responsibility' (p. 118). In doing so, she solidifies one of the book's arguments which is that we need to move from the question of 'whether or not settlement' to 'what kind of settlements' (p. 115).

The final two chapters touch upon another question, that of the relationship between law and historical inquiry. Chapter 7 opens with the statement that historians have frequently criticized how legal processes, particularly criminal trials, produce inaccurate historical narratives. In a criminal trial, facts are relevant to the extent that they demonstrate guilt or innocence, which can lead to imprecision, even errors. By contrast, THL settlement led corporations to open their archives, triggering the production of invaluable historical research that better reflected the historical truth. Chapter 8 zooms in on the commissions that conducted such research and concludes that 'from a normative perspective, the findings of the historical commissions should be considered a gold mine for researchers trying to understand the motivations and *modus operandi* of corporations in relation to repressive regimes' (p. 164). In short, they should be used to inform the development of corporate responsibility legal regimes.

Bilsky's book is a must-read for the growing community of business and human rights scholars and teachers. It provides a narrative on THL, an often forgotten part of business and human rights legal historical development. It touches upon issues that will be familiar to those in the business and human rights legal space, for example jurisdictional problems. The book encourages readers to view settlement as a form of remedy in its own right, not as second-best and certainly not as a disappointing outcome for victims. This position is

thought-provoking but not entirely convincing. Bilsky argues that settlements are an acceptable form of remedy because beyond providing actual compensation for victims, they also fulfil public functions, particularly norm creation. She proposes that THL settlement 'did provide creative ways of fashioning a mode of corporate accountability that reflects the complexity of corporate involvement in atrocities' (p. 73). It is hard to fully adhere to that argument. Undoubtedly, THL contributed to advancing what one may call the corporate accountability ideal. As the book's subtitle suggests, it was 'unfinished business' from the post-WWII era and as such it is important that it finally got addressed. Yet Bilsky concedes in her final chapter that the findings of the historical commissions that emerged from THL are little known and have so far been underexplored. In other words, settlement has the potential to achieve more than what it is perhaps known for, but it has not yet done so.

The book also cultivates ambiguity about the value of THL as a case study, and the extent to which what we learn from this peculiar part of legal history is of relevance for other cases. On the one hand Bilsky insists that THL should not be considered a model that can be reproduced 'in future legal struggles for corporate liability for human rights abuses' (p. 87). On the other hand, she uses THL to draw general conclusions on the suitability of settlement as a way to enhance corporate accountability. In truth, many factors make THL settlement unique. It concerns the Holocaust, one of the worst historical violations of rights. It gathered thousands of claimants against European corporations directly involved in human rights abuse in Europe. By contrast, the most pressing current business and human rights legal issues concern multinational corporations based in the Global North who become associated with human rights violations in the Global South through their subsidiaries and their supply chains. Those violations can be serious but they are of a different nature and scale. Thus it remains unclear how the process and outcome of THL settlement can contribute to solving issues that are simply very different. In this context, Bilsky's call for legal scholars and practitioners searching for ways to strengthen corporate accountability for human rights violations to look for inspiration in the findings of the historical commissions is opportune.

Nadia Bernaz

Associate Professor of Law, Wageningen University

nadia.bernaz@wur.nl