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Editorial

Accountability of Multinational Corporations for Human Rights Abuses

Cedric Ryngaert*

1. Introduction

Overseas activities of multinational corporations have created employment and wealth in the Global South. However, they have also had adverse effects on human rights and the environment. This has led to calls for increased corporate accountability in a globalized world, epitomized by the adoption of the UN Guiding Principles on Business and Human Rights (2011).[1] This special issue of the *Utrecht Law Review*, an outcome of a conference organized by Ucall, the Utrecht Centre for Accountability and Liability Law, in May 2017,[2] combines a number of contributions on diverse aspects of corporate accountability. Obviously, the field of corporate social responsibility, including its legal accountability dimension, is vast. Inevitably, the special issue had to be selective in terms of substantive focus. We decided to concentrate on accountability seeds that have already been planted in actual legal practice, even if these seeds have not yet fully budded. The contributions to this special issue are primarily doctrinal, in the sense that they engage with how legal tools and techniques may be interpreted or reinterpreted with a view to bringing about corporate accountability in a transnational context. Rather than contemplating a complete overhaul of the legal accountability system, they point out the possibilities under existing law. At the same time, they identify the accountability limitations as they follow from the legal practice observed, while making recommendations on how to overcome them, to the extent feasible within the current legal system and legal mindset.

2. Liability

For lawyers, legal liability is the best-known aspect of the broader concept of accountability. Liability means that a person is legally responsible for something, in our case a multinational corporation that is legally responsible for harm done to individuals. Lawyers will typically be concerned with civil or tort liability.[3] Such liability could be established by a court on the basis of a lawsuit initiated by the injured party (the victim) against the tortfeasor. The court may grant damages to the injured party. Civil-liability claims are relatively straightforward in a purely domestic context. Complications arise, however, if the claim has a transnational or extraterritorial dimension. This will normally be the case for claims concerning multinational corporations'

* Professor of Public International Law, Utrecht University School of Law, The Netherlands. The Utrecht Centre for Accountability and Liability Law (Ucall) is one of the five research programmes of the Utrecht University School of Law. It consists of a group of researchers who have together set out to conduct multidisciplinary research on the boundaries of accountability and liability in the Netherlands, in Europe, and beyond. The research which resulted in this publication has been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230—UNIJURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No 016.135.322). Email: C.M.J.Ryngaert@uu.nl.

1 UN High Commissioner of Human Rights, 'Guiding Principles on Business and Human Rights', HR/PUB/11/04 (2011).

2 Another result is a volume forthcoming with Routledge, provisionally titled *Accountability for Violations of Human Rights*, edited by L. Enneking, I. Giesen, F. Kristen, L. Roorda, C. Ryngaert & A. Schaap.

3 Note that persons may also be held criminally liable for their transgressions. However, practice regarding criminal liability of multinational corporations in respect of overseas misconduct is very scarce. That being said, the Routledge volume, mentioned in note 2, contains three contributions highlighting the potential of domestic criminal law to hold multinationals liable.

misconduct. Doctrinally, such complications primarily pertain to issues of jurisdiction and the scope of a parent corporation's duty of care regarding the operations of its overseas subsidiary.

3. Jurisdiction

This special issue features two contributions on transnational civil-liability claims against multinational corporations, and both of them concentrate on the preliminary issue of jurisdiction. The importance of jurisdiction should not be underestimated, as a court can only deal with the merits of a liability claim if it has the right to hear the case in the first place. In that sense, jurisdiction has an 'inaugural' capacity.[4] Ekaterina Aristova discusses how in particular English courts have addressed the question of jurisdiction in transnational tort cases, bearing in mind that such cases have so far largely been filed in England.[5] Aristova, who focuses on parent-subsidiary relationships, shows the potential of suing an English-incorporated parent corporation before English courts for violations of a duty of care which they may have in respect of the harm-causing activities of their foreign subsidiaries. However, her detailed overview of relevant English court judgments shows that jurisdiction is not a shoe-in. English courts may notably tie the existence of jurisdiction over the parent corporation to the establishment of a *prima facie* case regarding its substantive liability, or put differently, even at the jurisdictional stage, the claimant may already need to prove somehow that the parent violated its duty of care *vis-à-vis* its subsidiary. Ultimately, Aristova has some doubts regarding the true added value of case-specific and context-specific tort litigation when it comes to fundamentally changing corporate conduct. Still, she appears to appreciate the remedial capacity of tort litigation. On that basis she calls on the doctrine of private international law – which governs the exercise of jurisdiction in transnational tort cases – to question its perceived value neutrality, and to take on a more regulatory role, possibly via internationally uniform rules on jurisdiction.

Apart from voicing some concern over the more radical reformist potential of tort law, Aristova also mentions concerns over corporate home states unlawfully interfering in the domestic affairs of host states when establishing their jurisdiction in transnational liability cases. The international law of jurisdiction is indeed traditionally concerned with delimiting regulatory spheres between territorial sovereigns, and ensuring that one state does not trample on the sovereign prerogatives of another. Is the relaxation of 'pure' territoriality as a consequence of allowing jurisdiction to be established in the home state, regardless of extraterritorial effects, still in keeping with the principles of jurisdiction? This is a question unravelled by Rachel Chambers.[6] Chambers acknowledges the objections that home-state jurisdiction may infringe on host-state exclusive jurisdiction, and may smack of imperialism and neo-colonialism. However, she questions their validity insofar as such objections are typically made *on behalf of*, rather than *by* host states. She also notes that they lose power to the extent that the alleged abuses develop into violations of international human rights law, regarding the impermissibility of which there is (or there is supposed to be) international consensus, and to the extent that the home-state court, after establishing jurisdiction, proceeds to the application of host-state law rather than home-state law *per* applicable rules of private international law on the *lex loci delicti*. Eventually, she sees merit in applying the principle of jurisdictional reasonableness, and suggests to evaluate claims of jurisdictional overreach on a case-by-case basis.

4. Investment law

It is to be conceded that, compared to host-state jurisdiction, home-state jurisdiction represents only a second-best option. For reasons related to evidence, language, and local reconciliation and community-building and rebuilding, improving the access for victims to host-state courts in relation to misconduct that

4 See for a theorization of the inaugural capacity of jurisdiction: S. Dorsett & S. McVeigh, *Jurisdiction* (2013).

5 E. Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction', (2018) 14 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.444, pp. 6-21.

6 R. Chambers, 'An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct. Jurisdictional dilemma raised/created by the use of the extraterritorial techniques, (2018) 14 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.435, pp. 22-39.

has taken place on host-state territory should be a key goal of the corporate accountability movement. This applies even if host-state courts may not always be reasonably accessible to victims, because of capacity problems and corruption. Yulia Levashova points out, however, that the availability of local legal recourse may also be hampered by international investment agreements, which ironically are precisely propagated by the very states whose courts may hear transnational civil-liability claims.[7] These investment agreements may protect the rights of foreign investors to such an extent that the host state is seriously restricted in carrying out human rights policies which may affect the value of the investment. Nonetheless, Levashova draws attention to the recent trend to impose obligations on investors – who are often multinational corporations – under international investment law proper. She notes that states have included corporate social responsibility provisions in recent international investment agreements. She also notes that at least one international investment tribunal has assessed the obligations of investors under human rights treaties in the context of a counterclaim filed by the state against the investor. Furthermore, she highlights that multiple tribunals have taken into account the conduct of the investor – which could include conduct that violated human rights – when deciding whether the state's liability is engaged for violations of the investment standard that guarantees investors fair and equitable treatment. It remains that victims of human rights violations themselves have no direct access to an international investment tribunal, but may possibly be able to invoke human rights obligations as laid down in investment treaties before the host state's domestic courts. At the same time, there is the possibility that in future victims may have direct access to an international arbitral tribunal which may specifically deal with corporate human rights abuses.[8]

Litigation is an important corporate accountability avenue, as it may allow victims to have access to courts or other dispute-settlement mechanisms with a view to holding corporations liable for human rights abuses. It is, however, just one avenue among many. The other three contributions to the special issue have highlighted the potential of complementary *regulatory* initiatives: public procurement, trade regulation, and multi-stakeholder or private banking regulation.

5. Procurement

In developed countries, public procurement, i.e. the purchase of goods and services by governments, is a sizable economic activity. In OECD countries, it represents approximately 12% of overall economic activity, and in the Netherlands even 20.2%.[9] This creates opportunities for governments to use public procurement requirements to realize broader policy objectives, such as the protection of human rights. Myrthe Vogel has analysed to what extent tender-based public procurement, given its inherent characteristics, can effectively promote human rights.[10] She argues that, on the basis of the currently applicable principles of public procurement, it would be entirely valid to utilize 'the best level of human rights compliance' as a selection criterion in the competition for government contracts. Moreover, public procurement allows for the imposition of concrete and feasible human rights obligations as part of the contract between the government and the economic operator. However, Vogel has serious doubts about the actual enforcement of human rights compliance during the execution phase, i.e. after the contract has been awarded. Admittedly, the government can invoke standard contractual remedies against the non-compliant operator, e.g. termination of contract. Yet in reality the government will not be strongly motivated to do so, as after termination of the contract it may have to award a new contract. This not only comes with additional costs, but in addition, the contract will be carried out much later than originally foreseen, which may in turn hamper governmental activity and lead to complaints of the public. While competitors who were not selected could also enforce compliance with contractual principles, Vogel points out that expectations from this accountability avenue

7 Y. Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law', (2018) 14 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.441, pp. 40-55.

8 See K. Yiannibas, 'The effectiveness of international arbitration to provide remedy for business-related human rights abuses', forthcoming in the Routledge volume mentioned in note 2, supra.

9 OECD, 'Government at a Glance 2017' (2017), <http://www.oecd.org/gov/govataglance.htm> (accessed 10 May 2018), p. 172.

10 M. Vogel, 'The Added Value of Tender-Based Public Procurement as an Instrument to Promote Human Rights Compliance: What Impact May Be Expected from the Instrument?', (2018) 14 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.442, pp. 56-69.

should not be too high either. Competitors will ordinarily only act in their own interest, and not in the interest of victims of human rights abuses; moreover, they may not be aware of non-compliance in the first place. Still, Vogel is not defeatist. Instead, she calls on governments to more proactively enforce human rights requirements, and emphasizes the need for education and for third-party compliance monitoring. Also, she recommends that the procurement execution phase be made more transparent, so that competitors are more aware of potential compliance problems, which may in turn allow them to take enforcement action or enforcement accountability action.

6. Trade measures

Governments may not only influence corporate human rights compliance via public procurement requirements, but also via trade measures. Aleydis Nissen submits that states and the European Union may want to ban imports of goods which have been produced in substandard conditions, particularly in cases of child labour.[11] From a corporate accountability perspective, an import ban could pressure corporations into complying with higher labour standards when producing goods overseas. Nissen argues that such a trade-restrictive measure may well be in keeping with requirements of the World Trade Organization (WTO) insofar as labour exploitation offends the 'public morality' of citizens of the importing state, who may want to avoid association, as citizens-consumers, with human rights abuses committed in the context of an overseas production process.[12] While Nissen believes that the WTO's public morality exception could indeed be convincingly invoked regarding child labour, this is far less certain in respect of other labour standards, e.g. the freedom of association. Citizens may be less likely to be morally offended by violations of such standards, and if they are, they may not change their consumption patterns accordingly – a phenomenon which Nissen characterizes as the 'attitude-behaviour gap'. This means that trade-restrictive measures targeting imported goods on the basis of the latter's production processes involving violations of labour standards, may not withstand the test of WTO compatibility. In any event, even if labour standards rise to the level of international law, e.g. because they are included in widely ratified conventions of the International Labour Organization, states may want to be cautious when attempting to improve corporate human rights compliance via trade restrictions. Poorly designed restrictions could well be considered as protectionist and could impede developing countries' rights to development which they may want to pursue by means of their comparative labour advantages. The nuclear option of trade bans should arguably be opted for only in cases of the most egregious violations of labour law.

7. Private regulation

Finally, states could assume a 'softer' role in regulating overseas corporate conduct by facilitating and participating in sectoral multi-stakeholder dialogues that could result in private self-regulation by corporations. Benjamin Thompson illustrates this technique by describing and evaluating the 2016 Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, which involved the banking sector, the Government, trade unions, and NGOs – the first of its kind.[13] This Agreement requires banks to have in place a policy commitment to respect human rights in their financial activities, to carry out due diligence, to set up client engagement procedures, and to enable remediation. Thompson welcomes this initiative, as, being owned by the industry, it may have more corporate legitimacy and may therefore be more effective than top-down state regulation in bringing about changes in corporate conduct.

11 A. Nissen, 'Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labour?', (2018) 14 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.436, pp. 70-83.

12 Technically speaking, for the importation of goods, such a measure could be justified on the basis of the general exceptions of Article XX GATT, in particular *littera* (a), which does not provide for a territorial limitation of public morality concerns. The WTO Panel and Appellate Body famously considered public morality concerns regarding extraterritorial process and production methods as, in principle, justifiable under Art. XX(a) GATT in the *EC-Seal Products* case: WTO Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (22 May 2014), WT/DS400, WT/DS401.

13 B. Thompson, 'The Dutch Banking Sector Agreement on Human Rights: An Exercise in Regulation, Experimentation or Advocacy?', (2018) 14 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.440, pp. 84-107.

At the same time, he warns that on its own, the global effectiveness of such a national initiative will be limited. Accordingly, it is hoped that other banks outside the Netherlands will set up similar initiatives. Moreover, one has to make sure that such initiatives are not mere window-dressing aimed at appeasing the concerns of the public without effecting real change. Instead, benchmarks may have to be developed to measure improvements in banks' human rights performance. Third-party audits and enhanced transparency requirements may enable the public to hold banks accountable (although not before a court of law) for their compliance with human rights.

8. Concluding remarks

The accountability tools discussed in this special issue are by no means exhaustive. Nor are they mutually exclusive. Instead, they should be considered as complementary. Ultimately, only a smart mix of tailor-made public and private regulatory measures combined with creative interpretations of general liability and jurisdictional norms, can cast a wide corporate accountability net, and hopefully lead to lasting, human rights-friendly changes in overseas corporate activities.