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Critical Reflection

following KOFF Dealing with the Past and Business & Peace Roundtable

Milestone or pitfall?

Criminal law and the accountability of transnational companies

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Transnational companies are influential actors in the globalized and interconnected economic and social world. However, their effective position of power stands in contradiction to their poorly defined legal responsibility, especially when it comes to gross violations of human rights or environmental damages. Although there is wide belief that companies are very crucial players, the path to a unified position on the form of their responsibility is filled with hurdles. In particular, there is no general consensus that legal obligations are the appropriate tool to ensure that private companies respect human rights and environmental standards. It might be argued that significant progress has already been achieved through the establishment of codes of conduct and other important initiatives which exist on a voluntary basis.[2]

In order to contribute to this debate the roundtable "Milestone or pitfall? Criminal law and the accountability of transnational companies" particularly focused on the legal mechanisms regarding the responsibility of transnational companies. Co-organized by the swisspeace programs "Dealing with the Past", "Business and Peace" and ASK (Arbeitsgruppe Schweiz Kolumbien), the roundtable formed part of the "KOFF Dealing with the Past Roundtables", which aim at providing a platform for Swiss state and non-state actors for joint learning processes and strategy development in the course of dealing with the legacy of gross human rights violations.

The purpose of the roundtable was to examine current tendencies for improving the developments under national and international law when transnational companies are involved in human rights violations. In post-conflict and fragile situations, transnational companies are important actors with regards to a dealing with the past process. Two inputs were given by Alirio Uribe, human rights advocate in the law firm José Alvear Restrepo (CAJAR) in Colombia, and by François Membrez, advocate and vice-president of TRIAL in Geneva, Switzerland. While Alirio Uribe drew attention particularly to the legal situation in Latin America and at the international level, François Membrez explored ways in which to fill the gaps in the current legal

[1] Andrina Frey wrote her Masters degree thesis at the Center for European and International Studies, University of Basel, on the topic of the responsibility of transnational corporations: "Holding Transnational Corporations Liable. The Responsibility of TNCs under Criminal Law for Gross Human Rights Violations in Conflict Zones" (May 2012). The opinions expressed are solely the responsibility of the author.

[2] For example: OECD Guidelines for Multinational Enterprises. *See* 2011 Edition at http://www.oecd.org/dataoecd/43/29/48004323.pdf (last visited: June 11, 2012); The United Nations Global Compact. *See* at http://www.unglobalcompact.org/ (last visited: June 11, 2012).

framework in Switzerland. They both considered the current legal mechanisms and standards as insufficient for effective protection – which will be exemplified below – when transnational companies are involved in serious violations of human rights as perpetrators or accomplices.

In the ensuing discussion special attention was paid to the role of law in general and the related question of the advantages and disadvantages of legal mechanisms in the process of coming to terms with the past. Part of the debate was the issue regarding the apparently missing 'mental element' *(mens rea*) of companies, which is one aspect specifically related to criminal law. A final discussion dealt with the actual legal possibilities at the national and international level under civil and criminal law. The Peruvian case of Xstrata Tintaya, a subsidiary of the mining giant Xstrata based in Switzerland, served as an example for discussion.[3]

In general terms, it became clear that legal instruments cannot be seen as the only approach necessary for ensuring accountability for gross human rights violations, but rather that they serve as an important and indispensable complement to other tools, including public acknowledgment or reparation and compensation.

So far the possibilities of holding transnational companies liable under national or international criminal law are very weak. Attempts to establish clear legal obligations have been rejected not only by companies but also by several states, who considered such obligations to be interference with national sovereignty. The issue of the responsibility of companies does not arise in respect to individual actors who are acting unlawfully in their capacity as employees; in this regard the law is clear in most states. Rather, difficulties arise when attempting to hold the company criminally responsible as a legal person. As François Membrez pointed out, there is still now an application of the principle *societas delinquere non potest* (corporations cannot commit crimes). Attempts to establish a feasible corporate responsibility have – with few exceptions in different nation-states[4] – failed so far. Although the discussions to establish a corporate responsibility have been held intensively, for example regarding the UN Draft Norms[5] as well as during the establishment of the International Criminal Court[6], no consensus has been achieved.

At the international level, the appointment of John Ruggie as "Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" has given the debate about the responsibilities of transnational companies a strong impetus.[7] Aware of the controversy concerning legal instruments – not least because of the experiences gained through the failed UN Draft Norms in 2003 – Ruggie has taken a different approach. The main objective of his research, which

[3] The civil society in Espinar, Peru, has brought a civil suit to court on April 10, 2012. They are demanding that the Peruvian state protects their citizens' rights which have been infringed because of the pollution thought to be caused by the mining company Xstrata Tintaya. *See* original statement of claim in Spanish: http://www.multiwatch.ch/cm_data/Zivilklage_Originaldokument_auf_Spanisch.pdf.

[4] For example, Finland and Canada allow the criminal responsibility for legal persons.

[5] The United Nations first attempted to establish binding international rules to govern the activities of transnationals in the 1970s. Human rights did not feature in this initiative. See UN Intergovernmental Working Group on a Code of Conduct, Draft UN Code of Conduct on Transnational Corporations, UN Doc. E/1990/94 (June 12, 1990).

[6] CLAPHAM, ANDREW, The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in: Kamminga, Menno T./Zia-Zarifi, Saman (ed.), Liability of Multinational Corporations Under International Law, The Hague 2000, pp. 139-195.

[7] To keep the issue of human rights and corporations on its agenda after the rejection of the Draft Norms in 2003, the Human Rights Commission requested the appointment of a Special Representative of the Secretary-General.

resulted in the "Protect, Respect and Remedy Framework and Guiding Principles"[8], was to draw on existing human rights law but not to address the duties to companies directly. According to Ruggie's Framework the primary responsibility remains with national governments.

However, this requires that nation-states meet the expectations effectively and implement Ruggie's Guiding Principles into their domestic laws. There is broad consensus that the primary responsibility lies with the host governments since the companies concerned operate within their jurisdiction. However, difficulties arise especially if the host state is unwilling or unable to fulfill its duty to protect. Particularly in developing or conflict-affected countries, the state is often not in a position to protect human rights and the environment from harmful actions of transnational companies. Therefore, some scholars and NGOs request that countries, in which these companies have their headquarters, have an obligation as well – countries such as Switzerland.[9] In order to meet these requirements, François Membrez was commissioned by a coalition of Swiss NGOs to explore which amendments would be necessary in Swiss legislation to guarantee full protection.[10]

The Swiss criminal law – like most criminal laws – applies to individuals only. The only exception is Art. 102 of the Criminal Code which foresees criminal liability of companies.[11] Prosecution, however, can only be conducted if the responsible individual cannot be identified or if it is a specifically defined economic offense (para. 2). Human rights abuses and environmental violations are not covered by Art. 102 (2) of the Criminal Code. Therefore, one of François Membrez's propositions would be to expand Art. 102 (2) to serious violations of human rights and of the environment, i.e. genocide and crimes against humanity, war crimes, murder and manslaughter, endangerment of public health etc. In addition, the sentence, which is quite low when compared internationally, could be raised from a 5 million to 50 million Swiss francs fine. However, in my opinion the implementation of these proposals cannot be expected to happen soon. There seem to be too many crucial parties involved with varied and specific interests which might be considered to be incompatible.

Although John Ruggie re-launched the debate regarding the responsibility of companies, the changes towards new strategies in legal issues develop very slowly. Particularly in criminal law, propositions to implement legal changes are often dismissed by referring to the missing 'mental element' (*mens rea*) of legal persons, such as companies. However, as different scholars and for example the jurisdiction of the Interna-

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[8] RUGGIE, JOHN, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (April 7, 2008).

[9] *See* SCHUTTER, OLIVIER DE, Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations, available at http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.; Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted on September 28, 2011, *see at* http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf (last visited: June 11, 2012). *See also* http://www.rechtohnegrenzen.ch/de (last visited: June 11, 2012).

[10] Full report: MEMBREZ, FRANÇOIS, Etude juridique, Les remèdes juridiques face aux violations des droits humains et aux atteintes à l'environnement commises par les filiales des entreprises suisses, Mandat de la campagne «Droit sans frontières», achevé en février 2012. *See at* http://www.rechtohnegrenzen.ch/media/medialibrary/2012/03/etude_membrez_def.pdf. (last visited: May 3, 2012).

[11] Art. 102 StGB: 1 Wird in einem Unternehmen in Ausübung geschäftlicher Verrichtung im Rahmen des Unternehmenszwecks ein Verbrechen oder Vergehen begangen und kann diese Tat wegen mangelhafter Organisation des Unternehmens keiner bestimmten natürlichen Person zugerechnet werden, so wird das Verbrechen oder Vergehen dem Unternehmen zugerechnet.

tional Criminal Tribunal for the former Yugoslavia (ICTY) show[12], it seems perfectly conceivable that this – very important under criminal law – prerequisite could be adapted to or re-interpreted in regard to legal persons as collective actors. In my opinion it is no longer uncontested that collective actors should be seen as moral and therefore responsible actors. What a company does, for which damage or injustice it has to take responsibility, cannot be reduced to the actions of its employees. The liability cannot be divided completely and charged to the individual. Companies have plans and individual employees form their intentions in accordance with these plans. If we confine the judgement and application of guilt and penalty to the employees, there arises an imbalance between the liability and the injustice that has occurred. Therefore, I think that the negation of a responsibility gap results from the inability to see that a joint action cannot simply be reduced to the partial actions of individuals.[13]

From today's perspective, it would be misguided to believe that companies are voluntarily willing to take on full legal responsibility or even to demand more legal regulations. In his input, Alirio Uribe strongly supported the opinion that soft law and voluntary principles are important but not enough in order to guarantee respect for human rights. Rather, he advocated that transnational companies should be subjected to binding rules and international control.

In order to protect themselves from differing national standards and from externally imposed obligations it is conceivable that companies might start to opt for treaty obligations at the international level themselves. Meanwhile, and in accordance with John Ruggie's Guiding Principles, the current purpose may not primarily be the creation of new international law obligations but the elaboration of the implications of existing standards and practices for states and companies. The main task is to identify where the current regime falls short and how it should be improved.

Depending on which actors the focus is on – directly on the company itself, the home state or host state – different approaches are being discussed regarding the development of existing standards. To date, no international forum, such as the *ad hoc* tribunals for Rwanda or the former Yugoslavia, or the International Criminal Court has jurisdiction to prosecute companies as legal persons.[14] However, the recognition of the importance of corporate responsibility by states and the implementation of liability instruments in their domestic legal systems might prepare the ground for an amendment to the Rome Statute[15] to expand the jurisdiction of the ICC to include companies. Alternatively, and in accordance with Alirio Uribe's proposal, the establishment of an International Economic Court could be evaluated. Like others, Alirio Uribe even argues that until such changes occur the international community could think about applying the principle of universal jurisdiction and the extraterritorial responsibility of the transnational company and its representatives,

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[12] In the cases handled at the *ad hoc* tribunals regarding complicity it is stated that aiding and abetting does not require that the accused shares exactly the same criminal intent as the principal or even the desire that the crime occur. The accused does not have to be explicitly informed on every specific crime that was intended or was actually committed, but he or she needs at least to know that one of several possible crimes might be committed. *See e.g. Simic* (ICTY Appeals Chamber), 28 November 2006, at § 86. *See also* RAMASASTRY, ANITA/THOMPSON, ROBERT C., Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law, Norway 2006. Available at http://www.fafo.no/pub/rapp/536/536.pdf (last visited: June 11, 2012).

[13] *See* LEISINGER, KLAUS M., Unternehmerische Verantwortung heute: Eine Bestandesaufnahme, in: Pfleiderer, Georg/Seele, Peter (ed.), Wirtschaftsethik kontrovers, Positionen aus Theorie und Praxis, Zürich 2012, pp. 33-55, at p. 36 f. Further reading: NEUHÄUSER, CHRISTIAN, Unternehmen als moralische Akteure, Berlin 2011.

[14] INTERNATIONAL COMMISSION OF JURISTS, Corporate Complicity and Legal Accountability: Criminal Law and International Crimes, Volume 2, Geneva 2008, p. 6.

[15] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, reprinted in 37 I.L.M. 999 (1998), entered into force on 1 July 2002.

both in the countries where the companies have their headquarters or in those countries where the crimes have been committed.[16]

In my view, Ruggie's Framework is an important step in rethinking corporate responsibility. In the long term it can promote dialogue, simplify the development of common standards and prepare the ground for a consistent strategy. One of the most remarkable achievements is that a change in political climate is promoted; that companies evade their responsibilities when involved in gross human rights violations should politically no longer be accepted. For the establishment of legal obligations, however, the Ruggie Framework may be less useful as had initially been expected. Some scholars believe that it may even be obstructive for the formation of international legal commitments, at least in the short and medium term.[17] Therefore, the legal discourse shifts to the level of national governments for now. If we want legal instruments, then the states are required to take action.

[16] One important approach in this regard is the concept of extraterritorial state obligation which seeks to strengthen the duty of the home states to protect individuals against violations committed by TNCs abroad. The essence of the idea is that home states of TNCs should use their control and sphere of influence to prevent private human rights violations in other countries through appropriate regulations. *See* SCHUTTER, OLIVIER DE, Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations.

[17] WETTSTEIN, FLORIAN, oral presentation at the symposium organized by „Recht ohne Grenzen" on March 20, 2012.

Critical reflections

In its *critical reflection* publications, swisspeace and its guest speakers critically reflect on topics addressed at roundtables. They both make a note of the arguments put forward during the roundtables and carry on the discussion in order to encourage further debates.