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Launch of the Report of the International Commission of Jurists

Corporate Complicity & Legal Accountability

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Professor Cees van Dam

Independent legal consultant, London

Visiting Professor King's College London

Honorary Professor, Utrecht University

Ladies and gentlemen!

Trade has been globalised, justice not yet.

The Report of the International Commission of Jurists on Corporate Complicity & Legal Accountability provides guidance as to how the role of justice in world trade can be strengthened.

We needed the current financial crisis to rethink the way the banking sector is regulated. Causes of the financial crisis were an emphasis on short term profits, greed, and a lack of social responsibility. But these shortcomings are also affecting the sustainability of world trade in general. In fact, we are talking about the same problem: a lack of proper global regulation. Be it with one difference: western countries suffer from the financial crisis whereas they generally benefit from companies abusing human rights.

Combating human rights abuses by companies is, of course, in the very first place about justice to the victims of human rights abuse. But some people will listen more carefully if you frame the problem slightly differently if you say that business and human rights is about correcting market failures. Not only vertical market failures between companies and the victims of human rights abuse. But also horizontal market failures between companies. Combating human rights abuses is also about creating a level playing field and fair competition.

I had the privilege and pleasure to advise the ICJ Panel on this most important topic. My focus will be on Volume 3 about Civil Remedies, in common law terms 'tort law', in continental terms 'non-contractual liability'. For ease of reference I will mainly use the term tort law.

Due care

It is most remarkable that the international community has developed a legal framework for international crimes but that there are no

international tort law rules. Tort law is national law. However, the fundamental requirement for liability in tort in almost all jurisdictions is lack of due care. In this sense the due care standard has universal features. Simply put, the general rule is that if you do not take due care with regard to someone else's legitimate interests, you are running a serious risk of being liable for the consequential damage. This applies to the man on the Clapham omnibus as well as to multinational corporations and their directors.

Each country has its own way of framing due care in legal terms. England has its duty of care and breach of duty, France its *faute* and Germany the *unerlaubte Handlung* with its requirements *Tatbestand*, *Rechtswidrigkeit*, and *Verschulden*.

The challenge of the ICJ report was to look through these formal differences and to focus on the standard of care that is in fact required by the legal systems. Avoiding legal terminology also makes it easier to clarify to a company how it can avoid entering a zone of legal risk. Companies generally prefer to be advised in terms of risk. And due care has everything to do with risk, more precisely with risk management.

The ICJ report mentions four elements for liability in tort: harm, causation, knowledge and lack of care.

- **Harm:** was harm inflicted to a legitimate interest of the victim? In cases of human rights abuse this requirement will generally not cause problems.
- **Causation:** did the company's conduct contribute to the infliction of the harm (abuse of human rights)? It is important to know that a company cannot only actively contribute to the abuse but also by not acting where it should have acted.

- **Knowledge:** did the company know or would a prudent company in the same circumstances have known that its conduct posed a risk of harm to the victim?
- **Lack of care:** Considering this risk did the company take the precautionary measures a prudent company would have taken in order to prevent the risk from materialising?

I will focus on the latter two requirements: knowledge and lack of care. These can be taken together as 'due care'. Let us first look at the knowledge requirement.

Knowledge

Knowledge is about knowledge of the risk. What risk are we talking about? The ICJ report focuses on the most serious human rights abuses, particularly international crimes (crimes against humanity, slavery, and torture). It goes without saying that the due care rule also applies when the risk is less serious such as in cases of environmental damage. The risks are not only that the company itself causes the abuses but that it is involved in abuses by its business relations such as subsidiaries, suppliers, customers and business partners (governments).

It is important to stress that knowledge is not about what a company knows about the risk of human rights abuse but what a prudent acting company should not have known about it.

This means that a company will generally need to carry out a risk assessment. Many companies do this already for other business purposes. But risk assessments ought to include involvement in human rights abuses through business relations.

For example, a company may not always know that somewhere in the supply chain products are manufactured by child labour. But this is no excuse. The relevant question is whether a prudent company should have known about it.

A second example: a company that enters into a contract with another company to dispose of toxic waste needs to ensure that the processing company is properly equipped for the job and that it will dispose of the waste according to national and international standards. The more toxic the waste, the more thorough the risk assessment ought to be. The sole fact that the processing company is fully licensed may not be sufficient to conclude that the risk is acceptable.

Lack of care

Once the risk is assessed, it needs to be established what measures ought to be taken to prevent the risk from materialising or to reduce its impact. The bigger the risk, the more and the more expensive precautionary measures are required. When we are talking about gross human rights abuses, the stakes are high and it will generally be required to act with the highest care to prevent such abuses from happening.

For a parent company this may imply instructing its subsidiary to avoid involvement in human rights abuses. Sometimes the ultimate measure will be to refrain from doing business with certain business partners. For example, a manufacturer ought to refrain from doing business with suppliers using child labour or forced labour. And a company cannot dispose of

toxic waste by passing it on to a company that is not sufficiently equipped for the task.

In practice, assessing precautionary measures means answering difficult questions. The report could not but give general guidelines.

UN Special Representative John Ruggie

You may have noticed that the approach of the ICJ Report regarding due care strongly links with John Ruggie's call for due diligence by companies to respect human rights.

Although John Ruggie's work does not focus on legal binding rules, his work will inevitably have impact on these rules, particularly in the area of due care. The same goes for other soft law rules such as the OECD Guidelines. In this respect, there is no clear line to draw between binding rules of care and voluntary rules of care. The concepts are mutually influencing each other.

One of the reasons for this is that we may know something about what is required from companies on the basis of the general principles of tort law as set out in the ICJ Report. But we hardly know for sure yet what this will mean in legal practice. Even the dozens of cases under the Alien Tort Statute hardly give guidance in this respect. Moreover, this is a dynamic area of the law in which the standard of due care will evolve with the opinions in society. What was accepted as proper behaviour yesterday can be considered to be negligent behaviour today.

Apart from establishing due care there are other issues that needs to be addressed in order to improve the effectiveness of civil remedies. The ICJ report calls for rethinking the topics of parental liability for subsidiaries, limitation of claims, jurisdiction and applicable law of which Claes already addressed some. I will leave that for the discussion.

Closing remarks

It is pivotal that governments provide for effective remedies for victims of human rights abuse by companies. Such remedies are also important to redress market failures and to internalise costs of products and services that are currently being externalised at the expense of the health and income of workers, the youth and education of children and the environment. Tort law cannot provide the remedies on its own. Regulation, particularly global regulation, is also needed.

Since the 19th century companies in the western world have been gradually obliged to internalise the costs of health and safety of their employees and since the 20th century also their environmental costs. An author like Charles Dickens, who lived part of his life next door in Doughty Street, was at the cradle of this development, with novels in which he depicted the newly mechanized society in which children and adults were caged and enslaved, with no personal freedom until their spirit was broken.

These novels still hold true for the position of many people in the 21st century. The ICJ Report is not only an important guide for companies to know how to avoid getting into legal trouble but also, it is to be hoped, a guide for companies to contribute their part to a slightly better world.