

Enforcing the Legal Principle of Duty of Care in Corporate Human Rights Violations and Environmental Damage Cases in Developing Countries

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Corporate accountability for human rights violations in international legal systems has proven to be a watershed. This is because there are inadequacies in the existing accountability mechanisms as well as several other legal problems and factual obstacles that hinder the enforcement of human rights law and international criminal law. This is also attributed to the problematic issues that persist, particularly with respect to the following: corporate criminal liability, the extraterritorial application of law, the attribution of criminal actions to specific agents, the requirements of accountability, the difficulties of extraterritorial investigations, and obtaining sufficient evidence for human rights violations. This article examines corporate accountability in the concept of the principle of duty of care. It is argued that the duty of care principle will help breach the gap in corporate liability for human rights abuses and environmental damages. Furthermore, the article analyses the definition of accountability, the mechanism of accountability, and the components of accountability are extensively discussed. It is also observed that the legal concept of corporate accountability should include responsibility, answerability, blameworthiness, liability and sanctions. Therefore, this article examines the key elements that are required for establishing accountability for non-state actors. A diagram is used to explain the components of the various forms of accountability and how accountability creates a legal duty of care for non-state actors, such as corporations.

Keywords: *Accountability, Corporate, Human Rights, International Law, Duty of Care, Environmental Damages, Courts, Government, Judiciary and Society*

Introduction

Koppell perceives five different dimensions of accountability: transparency, liability, controllability, responsibility and responsiveness. Each of these factors forms the practical concepts of accountability.¹ What is clear from the explanation by Koppell is that accountability is indeed an inclusive concept and includes different branches. In order to establish accountability and effective remedy, all

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¹Koppell (2006).

the branches must be addressed. As explained above, the concept of accountability has provided some indication of this notion. However, such an explanation makes it difficult to establish empirically whether a corporation or corporate officials can be subject to accountability for a corporation's misconduct in relation to business operations under international law. This is because the different elements of accountability need widespread operationalisation to establish liability for the corporation's misconduct. After all, the different fundamentals of accountability cannot be measured along the same scale. For example, transparency may not carry the same effect as liability for human rights violations. Likewise, the difference between a corporation and its officials makes it difficult to pinpoint the level of liability of either the corporation's or the official's misconduct in the course of the business operation.

Some dimensions, such as transparency², are mechanisms for accountability but not indicative of it; others, such as responsiveness, are evaluative instead of representing the analytical dimension of accountability. Arguably, international criminal law accountability possesses elements of transparency, but this does not constitute accountability. One cannot incorporate transparency into the core aspect of accountability, such as liability and remedy, because liability and remedy arise as a result of one's misconduct, i.e. a corporation's or a corporation official's or a corporation's subsidiary and supply chain. Hence, accountability is an evaluation of corporate operations and their implications but not an analytical concept view of corporate accountability under international law. This also means that accountability should be based on the outcome of the evaluation of corporate business operations, which has a significant impact on human rights and the environment, and not on an analytical view of corporate activities. Viewing accountability in this conceptual premise will help to positively qualify the state of affairs of the corporation³, such as regulating the conduct of a corporation's activities based on its economic output, control, relationship with its subsidiaries, and impact it has on human rights and the environment. This could be the basis for establishing effective accountability and remedy for victims of human rights abuses.

These conceptual premises are closely connected to responsiveness, in the sense of the responsibility of the corporation and its officials in directing business operations, as well as the willingness of the corporation to act in a fair, honest, just, transparent and equitable way. Following this explanation of accountability, the notion of responsibility in this dimension will enable corporations to respect human rights and the environment because it will be assumed that the corporation owes a duty of care, which gives rise to liability and remedy. This is because the liability and remedy arise through corporate conduct, such as the exercise of its control over business operations and working procedures. However, there needs to be a general agreement about the acceptable standard for corporately accountable behaviour and the difference from role to role, time to time, and place to place.⁴

²Transparency, in a business or liability context, is honesty and openness.

³*Duck v Peacock* [1949] 1 All ER 318.

⁴Fisher (2016).

It is vital to stress that in a legal definition of accountability, the main components are liability, remedy, and enforcement. These elements are crucial aspects of accountability and should not be exchanged for a less regulatory approach to accountability for human rights violations and environmental damages. The exemplification of corporate accountability in a legal and conceptual definition of accountability should be closely linked with corporate business operations. Still, it should be wider when it comes to imposing accountability on corporations, as this will enable courts to find liability and the control that the corporation exercises in its business operations.⁵ Corporate accountability should have a relationship with the impact of the corporation's business operations on society. The responsibility derived from this relationship gives rise to a duty of care not to cause harm. Hence, if the components of corporate accountability include liability, remedy, and enforcement, then the question is what is the scope of accountability? How does the definition of accountability aid corporate responsibility and sanctions in practice?

To answer these questions, it is vital to first look back at the definitions of accountability in duty of care, which help explain and justify conduct and sanctions. This implies a relationship between the state, corporate entities, and a forum, such as a tribunal, court, or society.⁶ Also, the answer could be found in the roots of the etymological and historical definition of accountability that is related to specific social relations.⁷ In this ideological concept, accountability will be seen as the relationship between actors, such as governments and corporations, and a forum, i.e. a judicial system, society, or the international community. Viewing accountability as a relationship gives rise to obligations to explain and justify one's conduct. Moreover, the forum will have the mandate to pose questions and pass judgment on corporate human rights abuse cases. Indeed, the corporation may face criminal or civil sanctions, specifically where it is found that a duty of care is owed.

This theoretical definition incorporates different actors, such as individuals, and situations in which corporate officials are involved in human rights violations. The forum in this rationale refers to the relationship between the domestic and international judicial systems. The actor is the corporation, and this can have the nature of a principal-agent relation, with the judicial system acting as the principal. Observing accountability in this ideology permits defining whether the implication of a sanction is a constructive element of accountability.⁸ It also allows identifying different levels of accountability for all the actors involved. This is crucial because effective accountability, sanctions, and remedies should in theory be based on the type and nature of accountability imposed on a particular actor through the actor's duty of care. This is purely due to the fact that accountability could fail on theoretical and practical interpretations if the essential elements are not taken into consideration when deciding whether an actor could be held accountable for its conduct or not.

⁵Nartey (2021).

⁶Pollitt (2003).

⁷Shafritz (2018).

⁸Schillemans & Busuioc (2015).

Furthermore, transparency is about being understandable as well as being open and honest in all communications, transactions and operations. Accountability and transparency go hand-in-hand and involve being aware of who one is accountable to,⁹ the important pieces of information, and how information can be communicated most effectively.¹⁰ Transparency is about shedding light on rules, plans, processes and actions. It ensures that public officials, civil servants, managers, board members and businessmen act visibly and understandably and report on their activities. Additionally, it allows the general public to hold them accountable. It is the surest way of guarding against corruption and helps increase accountability in corporate business activities.¹¹ Transparency and accountability are considered critical not only to the workings of business and government, but also to the success of commercial enterprises, including in the agriculture sector. Through the practice of internationally established standards of corporate governance, private and state-owned enterprises can support robust foreign investment in agribusiness, along with economic growth.¹² The present article raises the possibility that transparency in the concept of accountability refers specifically to the substantive and administrative procedures through which institutions perform their functions, and whether they are documented and accessible, and where the government and publicly held companies are concerned, open to public scrutiny. Therefore, this article examines the key elements that are required for establishing accountability for non-state actors. A diagram is used to explain the components of the various forms of accountability and how accountability creates a legal duty of care for non-state actors, such as corporations. The article is split into four sections, the first section examines the theoretical definition of accountability, the second part observes the legal components of accountability, the third analysis of international law accountability for multinational corporations' human rights violations across different jurisdictions and the fourth concludes on the intersection of corporate accountability and society.

Theoretical Definition of Corporate Accountability and Duty of Care

Accountability pertains to the relationship between citizens and government officials or, in the commercial context, shareholders and boards of directors along with a sense of obligation and a public service ethos among officials and the power of citizens or shareholders to sanction, impose costs, or remove officials for unsatisfactory performance or actions.¹³ This idea is associated with transparency. In this understanding, the concept of transparency in this view might involve two distinct stages: answerability and enforcement. Answerability refers to the

⁹Armstrong (2005).

¹⁰Vaccaro & Madsen (2009).

¹¹USAID (2013).

¹²Marrewijk (2003).

¹³Crane, Matten, Glozer & Spence (2019).

obligation of the government, its agencies and public officials to provide information about their decisions and actions and to justify them to the public and those institutions of accountability tasked with providing oversight. Enforcement suggests that the public or the institution responsible for accountability can sanction the offending party or remedy the contravening behaviour. This means that, for one to achieve accountability, transparency should exist as a facilitated procedure for corporate responsibility.

Florini, for example, expresses that ‘put simply, transparency is the opposite of secrecy. Secrecy means deliberately hiding your actions; transparency means deliberately revealing them.’¹⁴ This is a pretty effective definition, except for the suggestion that transparency is always intentionally offered. Types of involuntary or imposed transparency undoubtedly exist. In addition, ‘some definitions go further than merely contrasting transparency with secrecy and refer to it as the opposite of privacy. A crudely administered regime of transparency can damage privacy, but this is not usually the ostensible intent behind its introduction. The overwhelming weight of the use of the word transparency is not to indicate that it throws light into legitimate privacy, but that it exposes the kind of secrecy that is ‘detrimental to society’.¹⁵ ‘In fact, the particular value of transparency is its ability to reveal corrupt practices and show citizens how they can limit the damaging effects of corruption in their own lives.’¹⁶ Florini sums up the relationship between transparency and privacy by saying, ‘transparency is not about eliminating privacy. It is about giving us the power to hold accountable those who would violate it.’¹⁷ Bosshard contributed to the debate by stating that the phrase ‘sunshine is the best disinfectant’ elegantly captures the cleansing potential of a regime of transparency, without yet explaining quite how that might work.¹⁸

These definitions suggest that transparency is used in a context where conduct requires clear, honest, obvious, explicit, unambiguous, unequivocal and responsible action. However, what is not clear in this definition is where transparency could give rise to legal responsibility and liability. In this definition, what is possible is that transparency as an element of business accountability does give rise to a legal duty. The legal duty of transparency as an element of business accountability can be noted in the UK government passing the Modern Slavery Act of 2015, the first piece of UK legislation focusing on the prevention and prosecution of modern slavery and the protection of victims.

After much debate, the government included a provision on transparency in the supply chain.¹⁹ The new transparency in supply chains provision in the Modern Slavery Act aims to stop slavery lurking in many supply chains. Increased transparency in the supply chains will push forced labour up the corporate agenda, but there are concerns it does not go far enough. Nonetheless, what is seen in this approach is that the UK recognised transparency as a legal tool to force

¹⁴Florin (2000).

¹⁵*Ibid.*

¹⁶Kolstad & Wiig (2009).

¹⁷Sturges (2007).

¹⁸Bosshard (2005).

¹⁹Modern Slavery Act 2015.

corporations to respect human rights standards and adhere to international law. This suggests that the concept of transparency as an element of business accountability can be enforced in a court of law only where a statute explicitly demands transparency.²⁰ The Bribery Act of 2010 is legislation of great significance for companies incorporated in or carrying on business in the UK. It presents heightened liability risks for companies, directors and individuals. To avoid corporate liability for bribery, companies must make sure that they have strong, up-to-date and effective anti-bribery policies and systems as transparency mechanisms.

The Bribery Act 2010, unlike previous legislation, places strict liability upon companies for failure to prevent active bribery. The only defence is that the company had adequate procedures designed to prevent persons associated with it from undertaking bribery.²¹ The Foreign Corrupt Practices Act (FCPA) 1977²² prohibits US citizens, permanent residents, public and private US companies and certain non-US individuals and entities from bribing foreign government officials in order to obtain a business advantage (*15 USC. §§ 78dd-1, et seq.*). Under some circumstances, the FCPA's jurisdiction extends to non-US individuals and companies, such as those who use the US capital markets or those who use the US communications or banking networks in furtherance of improper payment schemes. Taken together, these acts suggest that greater emphasis is placed on the corporation to act in a transparent manner in its business operations. Therefore, the theory that transparency as an element of business accountability gives rise to a legal duty of care.

Transparency is a concept that is applied to 'international organisations, states, private corporations, civil society organisations,'²³ and individuals. Regulations for transparency abound at all these levels, and the technology by which transparency can be enforced is hard to avoid. Businesses can no longer easily conceal their misconduct or offer misleading estimates of their business output when records and data can reveal corporation business activities. The components of transparency are as follows:²⁴

1. 'Adoption of openness in public and private sector governance. This encompasses a broad view of what transparency means, including both a mentality and a system or set of systems.'²⁵ A state's own disclosure structures are sometimes referred to as domestic transparency.²⁶ 'They are essentially directed towards permitting broad public knowledge of the actions of those who hold power, but also for purposes of crime detection and law enforcement.'²⁷

²⁰Nartey (2022).

²¹Bribery Act 2010.

²²The Foreign Corrupt Practices Act of 1977.

²³Sturges (2007).

²⁴*Ibid.*

²⁵Bushman & Smith (2003).

²⁶Relly & Sabharwal (2009).

²⁷*Ibid.*

2. 'A more limited procedural transparency can be identified in some usage of the word. In this sense, the simple existence of a set of provisions for making public, or allowing access to, details of the functioning of some or all of the activities of an organisation, is referred to as transparency.'²⁸
3. 'Radical transparency, which is a management method by which almost all the decision making in an organisation is carried out publicly. The exceptions to transparency in such a system are matters such as personal privacy or the security of systems. It is regarded as more appropriate in working environments based on the internet or intranets that do not suffer from the potential for the transmission of errors inherent in oral communication. It connects directly with the open source movement, which embodies the spirit of radical transparency.'²⁹
4. The potential for systemic or total transparency in which the actions of absolutely everyone is exposed to the eye of interested parties. This idea is based on the existing capacity for deep surveillance that can provide detail about the life of anyone, in the interests of effective administration and policing, and to the private sector, for purposes of more accurately targeted business activity, to the state itself so that its policy can be monitored internationally. It is sometimes referred to as imposed transparency.³⁰ Although the meanings of transparency 'set out above undoubtedly have some negative connotations, it is chiefly used in a strongly positive way'³¹ to find liability for government and business misconduct.

Accountability arises when the essential elements derived from the notion of accountability are met, such as liability, remedy and enforcement. A tribunal and court can hold an actor accountable for its conduct. Therefore, the consequences that flow from these elements are also determined by transparency, international standards and international norms. Hence, under wider moral and legal obligations, the tribunal or court must exercise extensive discretion to impose accountability on an actor, with an enforcement procedure either at the domestic or international level. This could include freezing company assets through consensus with the home state government or the state in which the corporation's headquarters is located but only if it is established that a duty of care is owed, and was breached.

The sanction of fines or seizure of property should be imposed by an execution order issued by the court either at the domestic or international level. The fact that the sanction provided for the violation of international and human rights law is a fine or imprisonment of a corporate official at the discretion of the court, does not render it inapplicable to a corporate human rights violation. Corporate officials may also be subject to liability for any violation of human rights law and standards under the theory that they failed to prevent the violation by neglecting to control the misconduct of those subject to their control. Under

²⁸*Ibid.*

²⁹Sturges (2007).

³⁰Bertot, Jaeger & Grimes (2010).

³¹Sturges (2007).

this concept of liability, a corporate official is liable based on his/her responsible relation to the human rights violation regardless of whether he/she has any knowledge of the misconduct.³² Similarly, the duty of care should provide that the penalty for a violation of human rights may be read in conjunction with a general legal rule of remedy under tort law that allows the imposition of a fine, and the fine may be imposed on the corporation in civil and tort law.

Lastly, even an exercise of voluntary instruction such as stages of corporate report writing constitute a practical element of accountability. Also, this article concurs with Mulgan³³ and Strom³⁴ that sanctions form the main part of a practical element of accountability and on a broader spectrum are part of the conceptual component of accountability. Therefore, effective sanction and effective remedy should be the core element of accountability in a legal proceeding involving a state and a non-state actor. It is argued here that a tribunal or court has a moral and legal obligation to apply the conceptualisation of the practical element of accountability. The present study raises the possibility that the practical element of accountability should be a legal theory that is used to extend accountability to situations where a corporation has no hands-on supervision of the subsidiary's conduct, but, have direct or indirect control over the business operations.

Legal Components of Accountability

It is now important to look at what is meant by the component of accountability and how this is linked with the corporate obligations that give rise to a duty of care. *Diagram 1* illustrates this concept by demonstrating how the various elements contained in the notion of practical corporate accountability ought to work in a broader concept to impose a legal duty of care on the corporation. The rationale behind this is that the components of accountability describe a relationship between a duty holder and a person or corporation to whom a duty is owed. It describes the capacity to demand that a person or corporation give reasons to justify their behaviour and the capacity to impose a sanction if they fail to give reasons, or if their performance falls below the reasonable man standard. The components of accountability involve three key elements. The first is 'delimitation of responsibility', defining over what, whom and how duty holders are responsible for their actions. The second is 'answerability', the obligation for duty holders to inform about and explain their actions. Accountability as answerability aims at creating transparency. It relies on information dissemination and the establishment of adequate monitoring and oversight mechanisms. The third is 'enforcement', or the capacity to subject power to the threat of sanctions or disciplinary actions. Legal and regulatory sanctions are at the core of enforcing accountability in the components described in this article. Following this

³²Owen (1985).

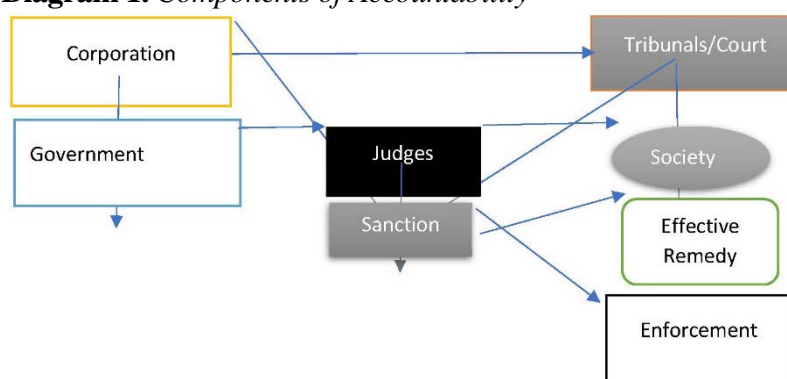
³³*Ibid.*

³⁴Strøm (2000).

explanation, **Diagram 1** lays out the obligations derived from the concept of accountability as:

1. Accountability by mandating;
2. Clear standards and legal duties that must be met by duty holders;
3. Requirements for effective accountability relationships;
4. Legal requirements for transparency and information disclosure;
5. Legal and formal institutions and mechanisms to hold duty holders to account; and
6. Legally established and effective sanctions for those who are not accountable

Diagram 1. Components of Accountability



The Link between Government and Corporations

The link between government and corporations shows the law and regulation aspect of the corporation's duty of care; the company law, the government trade policy, as well as the business influence on the government by personal conduct and lobbying, forming trade unions, political action committees and large investments of the corporation. Breaking this down, the link between government and business is required for the welfare of the economy and the State. This link, which is established through government laws and regulations, establishes accountability. The corporation must be accountable to the government for its business operations through regulations and the state's corporate law. Likewise, the link also means that the government is responsible for shaping business practices through both the implementation of rules and regulations directly. This indicates that the link between government and corporations creates two dimensions of accountability: the government regulatory mechanism for human rights conducts and the corporation's duty not to violate human rights.

Therefore, the government must establish laws and rules that dictate what the business can and cannot do, such as implementing or enacting legislation that will either control or monitor some aspects of corporate business activities or enable courts to hold the corporation accountable for misconduct under some form of binding regulation. This could be either through environmental protection law, a

labour commission, the implementation of conventions³⁵ and treaties³⁶ into domestic law or a governmental department for corporate human rights violations. However, it should be noted that this is just an illustrative view of binding regulations that are required to enforce human rights standards at the domestic level. This will allow governmental bodies to implement the law and monitor its application to businesses. The link between the government and businesses is legal regulations, enforcement, and the ability of the State to hold corporations accountable for human rights violations within its jurisdiction. The link establishes a corporate duty of care to the government, with the corporation's duty arising under this link to respect human rights standards both at the international and national levels. It, therefore, follows that the corporation's international business operation gives rise to a duty of the corporation to respect international human rights law.

The corporation should be liable, where it is at fault, for causing the claimant's injury or damaging the environment during the course of its business operations, unless there is a compelling human rights reason not to hold it liable. This doctrine is a core aspect of the duty of care principle, which Lord Wilberforce set out in *Anns v Merton London Borough Council*³⁷ as a two-stage test for the existence of a duty of care. The reasoning behind the recommendation of the common law approach of duty of care is that the test created the standard of duty of care, which undoubtedly can be applied in the international arena through the concepts of the General Principle of Law and Positive Law.³⁸ Thus, the question should be, is there a sufficient relationship of proximity and foreseeability? If so, a *prima facie* duty of care should exist. Are there any considerations which could reduce or limit the scope of corporate liability?

The Link between Corporations and Society

This type of link establishes the responsibility of the corporation in the society in which it carries out its business activities. A corporation is part of a system that is affected by and affects other elements in society.³⁹ Corporate business operations are connected to or form part of society so that where the corporation violates human rights and the environment, a duty of care is owed in law to that society. Therefore, corporations need to work within the rules and

³⁵UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.; United Nations, Treaty Series, vol. 999, p. 171; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965; United Nations, Treaty Series, vol. 660, p. 195; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966; United Nations, Treaty Series, vol. 993, p. 3; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966; United Nations, Treaty Series, vol. 993, p. 3.

³⁶UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³⁷*Anns v Merton London Borough Council* [1978] A.C. 728.

³⁸Campbell (2005).

³⁹Balachandran (2011).

regulations of society, as well as within international law and norms, in pursuit of economic goals to benefit both the corporation and society. This link demonstrates the practical accountability for corporate business activities on society, and so there exists a reputable presumption of a duty of care for the corporation not to cause harm to society and the environment. This also means that corporations should be accountable to their stakeholders⁴⁰ in order to achieve improved economic, environmental, and human rights standards.⁴¹ Thus, the corporation can be liable for a corporate act that may either harm society or destroy the environment, regardless of whether it is caused by a corporate official, supply chain or subsidiary if a duty of care is established.

The Link between the Judicial System, Government, and Corporations

Society influences law and so the law is a reflection of society. Therefore, the government is accountable to society through the judicial system and the law of the state, known as the doctrine of separation of power,⁴² while a corporation is accountable to society either through the government or its judicial system. Of course, it is adequate that the doctrine of separation of powers is based on the acceptance of the constitutional doctrine of the separation of powers which is typically found in Western societies. Under the General Principle of Law (The appropriate answer depends on the nature or subject of the principle in question. However, whether a fundamental principle of justice rises to the level of a ‘General Principle of International Law’ can best, though not exclusively, be determined by its existence in the national laws of ‘civilised nations’).⁴³ and international law the separation of power is recognised by most judicial systems and can be applied in the concept of corporate liability here. This concept establishes an absolute duty of care for all the actors expressed in *Diagram 1* above. Hence, the link between corporations, the judicial system and society can be explained as a system of accountability for the corporation from the stakeholders’ point of view, the government, and the judicial system in cases of corporate misconduct.

The Practical Extent of Accountability

Diagram 1 illustrates the practical link between the components in the concept of corporate accountability that give rise to a duty of care. This chapter has broadened the concept of accountability from a restrictive concept of liability to a wider one. Also, as shown in *Diagram 1*, this study argues that the principle of corporate accountability extends to the various components in the chain of liability, such as the government, the judiciary and society, and not only to the

⁴⁰Bandsuch et al (2008).

⁴¹McBarnet (2009).

⁴²Vile (2012).

⁴³Arend & Beck (2014).

corporation's business stakeholders. Therefore, the assumption is that where the court can establish a relationship and control, it can be inferred that corporate accountability exists through the duty of care it owes to the government, the judicial system, and society. The government and society in the chain can seek to hold the corporation accountable for its misconduct, specifically, where there is a substantial violation of human rights and environmental damage.

This further supports the fact that the corporation and corporate officials will have some relationship with and a degree of control over the corporation's business operations. Therefore, the degree of the relationship and control constitutes the guiding mind of the corporation.⁴⁴ As a result, there is a presumption that a corporation should be held accountable to the government and society that suffered from its business misconduct, including human rights violations⁴⁵ and environmental damages.⁴⁶ This is because it can be inferred that the corporation has an unwritten obligation to act in a manner that benefits society as a whole and not the contrary. Likewise, the corporation has an obligation to be accountable to its stakeholders. In other words, one's government and society arguably fall under the stakeholder definition. Thus, where it can be assumed that a corporation owes a duty of care to the government and society, there must be effective sanction and remedy.

As a practical observation, the link also shows how corporations have a duty of care. *Diagram 1* shows the interaction between the concept of accountability, the procedure of accountability and the mechanism which society could rely on to hold a corporation accountable for its actions. The theoretical concept deriving from this diagram is that corporate accountability is a step-by-step process. The corporation can be called to account for its misconduct at each stage. The concept of practical corporate accountability is an inclusive concept, which requires the corporation to be accountable to various actors with legal and moral obligations.

The first theoretical question regarding *Diagram 1* is: what is the relationship between the actors and to whom is one made accountable to? This question is addressed by *Diagram 1* with the connection between each actor. This question regarding the diagram also yields a procedural query about the type of tribunal or court to which the actor is obliged to render account. The second theoretical question asks: who should the corporation be made accountable to? Is the corporation obliged to appear before the tribunal or court of either the host or home state? In this rationale, the corporation's relationships to society make it clear who the corporation is to be made accountable to the government, judiciary, judicial bodies, and any appropriate tribunal or court. In practice, however, this has proven to be a more complex question to answer. Therefore, the correct way to do this is to follow the argument in a systematic approach to accountability that ensures corporations and other actors know to whom they are accountable. This systematic approach will also allow victims of corporate misconduct to address their problems to a specific body on the link of corporate accountability, such as a

⁴⁴*Tesco Supermarkets Ltd v Natrass* [1971] UKHL.

⁴⁵Clapham & Jerbi (2000).

⁴⁶Werther & Chandler (2010).

tribunal or court. Therefore, knowing whom to account to is part of the concept behind *Diagram 1*. Likewise, *Diagram 1* perfectly suggests the systematic approach to accountability in terms of knowing your role as an actor. *Diagram 1* can be used to develop a cohesive accountability system which will ensure corporate conduct is checked and accounted for.

By applying this concept to corporate accountability, it can be argued that, in light of the above-mentioned, the primary aims pursued in corporate accountability should closely conform to the notion of legal accountability, which meets the changing sociological circumstances on the domestic and international scenes. Therefore, a rebuttable presumption arises already on the basis of the *de facto* influential position the corporation has in a domestic legal system and society. The actor, such as a corporation, is subject to the applicable legal obligations with regard to the promotion of community interests, such as the protection of human rights, the environment, and the core labour and social standards. This, furthermore, is part of its business relationship with the government and society. The position this article shall adopt in conjunction with *Diagram 1* above is that there is a presumption that a corporation is legally accountable to the government and society in the way it carries out its business operations due to corporations owing a duty of care to society. This approach will ensure that the imposition of accountability by the state through the domestic civil legal system, which has the capacity to enforce treaty or customary international law, is a result of the interaction between the State, society, and corporations. Therefore, there is a *prima facie* case that the corporation is subject to domestic law, international law and human rights law, as well as other human rights treaties, and is obliged to be held accountable for its misconduct.

The final question related to *Diagram 1* concerns itself with the type and level of liability required, and the type of transparency and cooperation required to establish a corporate duty of care. This particular question relates to corporate business operations, corporate conduct in society, and corporate dealings with the government. This accountability should be in the form of providing information about corporate financial relations, the procedure of corporate operations, programmes, risk assessment, environmental risk assessment, the economic impact on the livelihood of the people and trades, and steps taken to ensure the company adheres to human rights law: this is termed 'pragmatic accountability.'⁴⁷ In business operations, the corporation should be obligated to provide information about its conduct when it is asked or required to do so, either by the authorising domestic or international bodies. However, it should be noted that corporations may have a 'right to silence' under domestic law, international law, and human rights law.⁴⁸

The last question regarding *Diagram 1* is why is the corporation obliged to render account to the appropriate authority (i.e. the domestic court, tribunal or international court)?⁴⁹ This particular question is linked to the nature of the relationship between the corporation, the government, society, and the tribunal or

⁴⁷Sinclair (1995).

⁴⁸O'Reilly (1994).

⁴⁹Blowfield & Murray (2008).

court. This obligation arises from the relationship between the corporation and the country it operates in.⁵⁰ This also means that where the corporation is engaged in business misconduct, it is obliged to be accountable to that host state court or any judicial body created for the purposes of regulating corporate conduct (through referral). If this is not possible, then there must be an international mechanism to hold the corporation accountable for its misconduct.

The connection between the corporation, the government, the judicial system, and society gives rise to accountability. There are several possible explanations for this. Corporations are part of society. This establishes a special relationship between the corporation and society through the business operation. Therefore, the corporation can be held accountable where its actions have violated domestic or international law and human rights law in the country in which it operates. Similarly, the relationship between the corporation, the government, the judicial system and society gives rise to an effective, appropriate remedy, and sanction for the victims whose rights have been violated.

Therefore, the links establish that corporate accountability includes liability, which constitutes legal accountability because legal accountability is a formalisation of social relations.⁵¹ Corporate social relations is a blanket term for interactions between businesses, governments, people, groups, or organisations. Corporate social relationships are composed of an immense number of business operations and environmental interactions that create a climate for the exchange of goods and services in the global economy. *Diagram 1* has an element of social relations to prove this. Thus, the suggestion in this particular section of accountability is clear on the established relationship between the corporation and the other actors such as the government and society. This relationship has created the legal concept of accountability. However, the question is how *Diagram 1* can plot accountability so that corporations can be held accountable for their actions in a host state's judicial system or an international tribunal or court.

Plotting Accountability

Understanding *Diagram 1* requires a mapping exercise. This is done by plotting accountability that closely matches *Diagram 1*. This procedure is the relationship between the corporation, the government, the judicial system, and society. This is a dichotomous exercise that must follow a rationale of either/or.⁵² Therefore, in following *Diagram 1*, the main question that needs to be asked when plotting accountability is whether the corporation in question qualifies for legal corporate accountability (i.e. duty of care) or whether there is something else, such as the participation of other entities (supply chain/subsidiaries) or the

⁵⁰Moran (1996).

⁵¹Friedman (1985).

⁵²Sartori (1970).

responsibility of another entity. The next question concerns itself with the type of accountability. **Diagram 2** below illustrates this view in a hierarchical order.

Diagram 2. *Plotting Corporate Accountability*



This is important in establishing liability for corporate human rights violations because having a strong accountability structure is paramount to the success of finding responsibility for any corporate human rights abuse. Accountability needs a structured hierarchy to establish internal and external control of the business operation. A hierarchical accountability allows lawyers and the court to identify the chain of human rights abuses and serves as a reference point for decision-making. Thus, without a hierarchy, corporate liability for human rights abuses cannot effectively hold its business and subsidiary accountable. Lastly, in the most basic sense, a well-run business functions like the human body. The head instructs the various body parts on how to move and react in unison to perform the simplest of tasks. The notion of establishing corporate liability follows this idea, with the hierarchical decision-making flowing from the top (the head of the corporation) down to the employees who perform various tasks. Accountability is responsible for making the decisions that allow the corporation to function efficiently to achieve company objectives liable for human rights abuses.

The theoretical conception behind **Diagram 2** is that accountability takes the form of social relations and business operations. **Diagram 1** and **Diagram 2** show that corporate accountability may have both horizontal and vertical interactions. Therefore, the concept of accountability is derived from the corporate relationship. This relationship forms the foundation of legal accountability and the basis for analysing the nexus between corporate conduct, government, and society. Hence, as explained above, the concept confirms that accountability exists when

corporations, government and society operate within social relations. It is argued in this article that where social relations exist, it does not matter whether there are other elements that aid or give rise to misconduct of the corporation or 'human rights violations'.⁵³ The corporation should be accountable to society through the government and judicial system.⁵⁴ This is based on the principle of separation of power.⁵⁵ However, corporations can also be held accountable through both the government and the judicial system. Therefore, the social relationship is an approach which allows society or the State to build accountability mechanisms which establish a duty of care to hold corporations liable for their misconduct.

Analysis of International Law Accountability for Multinational Corporations' Human Rights Violations across Different Jurisdictions

The International Criminal Court (ICC) demonstrates the international community's attempt to create an architecture of international criminal accountability through an international mechanism that presents an opportunity to enforce human rights by imposing a legal duty on those who violate human rights. However, many actors continue to violate human rights in spite of the fact that their actions will not be met with impunity. These actors include governments, governmental institutions, and non-state actors like MNCs.⁵⁶ However, the ICC's jurisdiction must be submitted to; it is not automatic. So, a country can essentially 'opt out'. However, as a matter of history, the evidence does not easily support such a legal concept. What may be clear from this development is that the duties of states, the international community, and non-governmental organisations (NGOs) are indeterminate.⁵⁷

Corporate liability has been introduced in most jurisdictions enabling courts to 'sanction corporate entities for their criminal acts, but there is also a general trend in most countries towards bringing corporate entities to justice for their human rights violations or the criminal acts of their business officers.'⁵⁸ In those countries where there is no corporate liability per se, there is either quasi-criminal liability or the introduction of corporate criminal liability being considered. A notable exception is Germany, where the strong feeling is that imposing corporate criminal liability would go against the basic principles of the German Criminal Code.⁵⁹ Nevertheless, Germany's regulators have taken robust regulatory action against various German companies as a result of their criminal conduct, imposing large fines which have caused significant reputational damage. Arguably, this has been as effective as any criminal sanction.⁶⁰

⁵³ *R v White* [1910] 2 KB 124.

⁵⁴ Peters (2016).

⁵⁵ Gwyn (1965).

⁵⁶ Kelly (2011).

⁵⁷ Hillemanns (2003).

⁵⁸ Clifford Chance (2016).

⁵⁹ The German Criminal Code (2008).

⁶⁰ *Ibid.*

In all jurisdictions where the concept of corporate or quasi-corporate criminal liability exists, with the exception of the UK and the Netherlands, is a relatively new concept.⁶¹ 'France was the first European country to introduce the concept of corporate criminal liability in 1994 followed by Belgium in 1999, Italy in 2001, Poland in 2003, Romania in 2006 and Luxembourg and Spain in 2010. In the Czech Republic, an act creating corporate criminal liability became law as of 1 January 2012.'⁶² 'Even in the UK, 'where criminal liability for corporate entities has existed for decades, many offences focusing on corporate criminal liability have been created in recent years. In the Netherlands, only fiscal offences could be brought against corporate entities until 1976.'⁶³

In Belgium, except for offences of strict liability, a corporate entity can avoid criminal liability altogether by proving that it exercised proper due diligence in the hiring or supervising of the person that committed the offence and that the offence was not the consequence of defective internal systems and controls. In Germany, a corporate entity's owned or representative can be held liable within the regulatory context if they fail to take adequate supervisory measures to prevent a breach of duty by an employee. However, this is a defence for the owner and the representatives to show that they had taken adequate preventative measures.⁶⁴ In Italy, the corporate entity has an affirmative defence if it can show that it had in place and effectively implemented adequate management systems and controls. Likewise, in Spain, corporate entities will not be criminally liable if they enforce appropriate supervision policies over their employees.⁶⁵ In Poland, the corporate entity is only liable if it failed to exercise due diligence in hiring or supervising the offender or if the corporate entity's representatives failed to exercise due diligence in preventing the commission of an offence. In Romania, the corporation is only liable if the commission of the offence is due to the corporation's lack of supervision or control.⁶⁶

In some jurisdictions, measures taken by a corporate entity to prevent the commission of offences may be mitigating factors upon sentence. For example, in Italy, a fine imposed on a corporate entity will be reduced by 50% if, prior to trial, a corporation adopted necessary and preventative internal systems and controls.⁶⁷ Even where it is not an express defence, or it is not taken into account expressly as a mitigating factor, the adequacy of a corporate entity's processes and procedures is likely to be relevant both to regulators, prosecutors and courts in determining whether to prosecute and, if prosecuted, in deciding what penalty to apply. In France, the existence of adequate compliance procedures and control systems may be taken into account by the courts in considering the context of the offending, even though compliance procedures do not constitute an affirmative defence.⁶⁸ The importance placed on adequate legal systems and controls by applicable

⁶¹Gobert & Pascal (2011).

⁶²https://www.britishchamber.cz/data/1364207437484European_Technical_Bulletin.pdf

⁶³Simpson (2002).

⁶⁴*Ibid.*

⁶⁵*Ibid.*

⁶⁶*Ibid.*

⁶⁷*Ibid.*

⁶⁸*Ibid.*

legislation, and more broadly by prosecuting authorities and courts, demonstrates the importance of an effective corporate accountability system at the corporate, domestic and international levels.

On the other hand, the work of other states, international institutions and NGOs since the 1980s has yielded an impressive body of treaties, conventions, self-regulatory mechanisms, judicial opinions and doctrines on corporate accountability.⁶⁹ Even though there is a need for coherent codification of international accountability for corporate human rights violations, domestic courts, international courts and hybrid tribunals for international crime have created significant case law that elaborates the substantive norms of human rights accountability.⁷⁰ However, these findings cannot be extrapolated to all corporate human rights violations due to the fact that the mechanism, while of great variety and now quite active, only works with full vigour and regularity.

Examples of this include the Alien Tort Statute,⁷¹ *Kiobel v. Royal Dutch Petroleum*,⁷² and *Sosa v. Alvarez-Machain*.⁷³ This approach, while similar to the European states' criminal liability mechanism, has the potential to leave corporate accountability inconsistent and, in many ways, exceptional. In order to accelerate the prospects for corporate human rights accountability needs, national and international community decision-makers ought to take action based on developments that date back to Nuremberg⁷⁴ and the European states' concept of corporate criminal liability. The burden of enforcing international and human rights laws and promoting corporate human rights accountability should remain partly on governments and the international community, including international courts and tribunals, but not necessarily on treaties. The international community, international courts, and domestic courts should also seek to codify human rights violations and develop strategies, enforcement and remedies through the tort and civil law mechanism.

However, there are other possible explanations for the argument of corporate accountability dating back to Nuremberg in 1945 and 1946.⁷⁵ Two possible reasons that can be observed in this study in addition to the international corporate accountability doctrine are explained here. The first is that a domestic court, through a judicial panel implementing international norms, must include corporate obligations, the duty of care, and definitions of remedies from treaties as well as a universal jurisdiction⁷⁶ that will allow international human rights violations to be heard in both the domestic judicial system and an international court. It must also be made clear that this will require states' willingness in addition to a meaningful sanctions process against the corporations involved. The second is that

⁶⁹Ruggie (2013).

⁷⁰Ahmed & De Jesús Butler (2006).

⁷¹The Alien Tort Statute (28 USC. § 1350; ATS).

⁷²*Kiobel v. Royal Dutch Petroleum*, No. 10–1491 (US Apr. 17, 2013) and *Morrison v. National Australia Bank*, 561 US (2010).

⁷³*Sosa v. Alvarez-Machain*, 542 US 692.

⁷⁴Taylor & Chase (1993).

⁷⁵Skinner (2008).

⁷⁶Schachter (1991).

international law, through treaties on human rights and crimes against humanity, must permit the application of universal jurisdiction in tort law and should require states to extradite corporate officials or bring proceedings against corporations for human rights abuses committed abroad. Nonetheless, this article acknowledges that the application of universal jurisdiction⁷⁷ can be problematic in domestic courts. This study reinforces the notion that international human rights law should have universal application.⁷⁸ This will pave the way to a greater emphasis on activating the international mechanism in those situations where domestic courts cannot or will not function effectively.

In addition, regarding MNCs' human rights accountability, this article advocates for corporate liability based purely on the current principle of tort and civil law accountability that has its liability and enforcement through negligence and the eggshell skull rule. The present study raises the possibility that tort and civil law will provide a better mechanism for corporation human rights violations than criminal law, because the tort and civil law may shift the burden of proof to the corporation. However, there is not much distinction between liability under tort law and criminal law, as their liability in legal principle coexists.⁷⁹ Nevertheless, this article favours the tort and civil law system, because the requirement of intention and burden of proof is less substantial than criminal law. Therefore, in principle, the concept of MNCs' accountability for human rights abuses should be a discrete subject that must consist of the four interrelated bodies of law: tort and civil law, international criminal law,⁸⁰ humanitarian law,⁸¹ and human rights law.⁸² Paying too much attention to only one or two of these bodies of law, to clarify a legal concept, will miss the full picture of accountability and remedy for victims under international law and human rights abuses committed in either the host or home state.

In relation to corporate liability, no uniform regulation exists at the international level. Some countries, such as Germany, do not provide for corporate liability at all, while other countries do have this provision, such as Switzerland. However, in the case of Switzerland, existing regulations have yet to be put into practice.⁸³ Although some countries have successfully provided civil remedies for human rights violations caused by corporations, including the UK, the US and the Netherlands,⁸⁴ this list remains limited. Consequently, in a broad analysis of corporate accountability, it is contested that corporate accountability does not exist and, even where it is present, is ineffective and lacks coherence.⁸⁵ The current concept of corporate accountability is outdated, unrealistic and does not conform to the current expansion of the global economy. Therefore, there is a need for a concept of corporate accountability which implements a notion of social relations.

⁷⁷Bassiouni (2001).

⁷⁸Jayawickrama (2002).

⁷⁹Kadish, Schulhofer & Barkow (2016).

⁸⁰Estevez Sanchez De Rojas (2003).

⁸¹Newalsing (2008).

⁸²Sieghart (1983).

⁸³Art. 102 Schweizerisches Strafgesetzbuch, BBl. 2002 (Schweizerisches Gesetzesblatt).

⁸⁴Maduna (2003).

⁸⁵Ratner (2001).

This means moving the legal notion of corporate personality and impunity to a duty of care not to harm one's neighbour.

It is possible, therefore, that the examinations of liability for human rights violations by MNCs can be looked for in international human rights law, international humanitarian law, and international criminal law. This article will suggest future research in this area as this will help measure MNCs' accountability in the obligations arising from these bodies of law. Having said that, this book will limit this part of the study to only international human rights law accountability as this notion is to develop corporate accountability and remedy through tort and civil law by applying the tort of negligence as the foundation to establish corporate liability for human rights abuses.

Conclusion

Emerging findings from this article thus far state that corporations should be held accountable to the different players in the environments in which they operate, such as governments, judicial systems and society. It is also clear that the government, the corporation, society, and the court are key actors in what has been termed 'the concept of accountability'. However, it has also been found that for the corporation to be held accountable, it must meet the legal relationship laid down in *Diagram 1* and *Diagram 2*; there must be a social relationship between the government, the corporation and society.⁸⁶ Thus, if these relationships are established, there is accountability and there must be a legal implication resulting from this accountability. Lastly, it was also observed that where accountability exists, there must be sanctions and effective remedies for victims who have suffered through the duty of care principle. This is because of the particular act arising from corporate business practice or corporate officials' conduct connected to the business purpose.

Furthermore, corporate accountability for human rights violations in international legal systems has proven to be a watershed. This is because there are inadequacies in the existing accountability mechanisms as well as several other legal problems and factual obstacles that hinder the enforcement of human rights law and international criminal law.⁸⁷ This is also attributed to the problematic issues that persist, particularly with respect to the following: corporate criminal liability, the extraterritorial application of the law, the attribution of criminal actions to specific agents, the requirements of accountability, the difficulties of extraterritorial investigations, and obtaining sufficient evidence for human rights violations.⁸⁸ Hence, looking at corporate accountability in this concept of the duty of care will help to breach the gap that has existed in corporate liability for human rights abuses and environmental damages.

⁸⁶Farkas (2014).

⁸⁷Kaleck & Saage-Maaß (2010).

⁸⁸Simons & Macklin (2014).

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