Multinational Corporations and Human Rights

Civil Procedure as a Means of Obtaining Transparency

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1. Introduction

On several occasions, multinational corporations have been accused of human rights violations. Examples include the alleged participation of oil companies in the exploitation of forced labour in the construction of an oil pipeline in Burma[1] and the claims made by numerous NGOs about the working conditions of workers involved in the production of clothing in Latin America and South-East Asia.[2]

Transparency is perceived as one of the key factors ensuring that corporations respect human rights.[3] Transparency is the degree to which information is readily available. Transparency entails having access to accurate and relevant information within a reasonable time and at a reasonable cost.

This article explores whether civil procedural rules provide suitable mechanisms for obtaining information from multinationals about human rights policies and allegations of human rights violations. It supplements the accurate and more lengthy contribution by Enneking in this volume. Section 2 explains that most jurisdictions across the globe offer litigants procedural instruments to obtain relevant information. In some jurisdictions these instruments are powerful and effective, while in others their scope is limited. Litigants seeking to file an action against a multinational corporation may be able to take advantage of a wide range of procedural instruments to obtain information in more than one jurisdiction (see Section 4). One serious drawback is that litigation is generally expensive and time-consuming (see Section 5). The conclusion is that civil procedural rules, much like criminal and administrative rules, provide a means of promoting corporate transparency.

2. Access to Information in Civil Litigation

Judicial systems around the world offer litigants various ways of obtaining information from adversaries or non-parties. In principle, the parties to a lawsuit are entitled to have access to relevant information. Principle 16.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure states,

> Generally, the court and each party should have access to relevant an nonprivileged evidence, including testimony of parties and witnesses, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person […][4]

The rules that grant the parties in civil litigation access to information are designed to ensure the just resolution of a wide range of disputes. The aim of these rules is not specifically to encourage multinational corporations to be transparent about human rights policies or allegations of human rights violations. Indeed, only a small number of cases handled by the courts concern the human rights impact of multinational corporations. And even in those cases, only part of the information held by a multinational corporation may be relevant to the issues at hand.

Although procedural rules are not tailor-made to ensure that multinational corporations are transparent, these rules often function as a means of obtaining at least some information about alleged human rights violations. One recent example that is discussed in greater detail by Enneking in this volume involved several cases brought against Royal Dutch Shell by Nigerian farmers that had suffered damages as a result of oil leaks. The case was heard by a Dutch civil court in The Hague in the Netherlands. The plaintiffs made use of the procedural instruments available under Dutch law to try to obtain documents held by Royal Dutch Shell.[5]

Although a litigant is in principle entitled to have access to relevant information, the litigant's procedural rights

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1. *See Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).
2. *See e.g.* Rathner 2001, pp. 443-545, 524 for a discussion of some examples.
3. *See* the so-called Guiding Principles on Human Rights (Ruggie Principles), principle 21. *Also see* Mock 2000-2001, pp. 15-26.
4. ALI/UNIDROIT 2006.
5. The Hague Court, 14 September 2011, LJN BU3538, BU3535 and BU3529.

are neither unconditional nor unlimited. Very broad and nonspecific requests for information are generally rejected as 'fishing expeditions'. Requests for information should be proportional, relevant and not be too burdensome for the party required to produce information. Therefore, most legal systems pose significant limits on the right of access to information. In most jurisdictions, before the court will allow discovery and/or the taking of evidence, parties are required to plead their case with particularity and to adduce sufficient factual information. Similarly, in many jurisdictions, requests for information are required to be specific and the party requesting the information must show good cause. Furthermore, it is widely held that privileged information must remain confidential. Many jurisdictions also protect commercially sensitive information.

3. Differences between Systems and the Availability of Alternative Mechanisms

Some jurisdictions provide a much broader set of instruments to obtain information than other jurisdictions.[6] The US Federal Rules of Civil Procedure, for example, provide a far wider set of discovery rules than most European jurisdictions.[7] In the United States, litigants have an almost unlimited access to documents (electronic and otherwise) and witness testimony during the early stages of litigation. Some European jurisdictions also provide for general access to information before litigation. Good examples include the English pre-action protocols that provide for the exchange of information before litigation and Dutch procedural rules that allow for the pre-action examination of witnesses and experts.[8]

Civil procedure is certainly not the only tool available to encourage corporations to be more transparent about human rights. Beth Stevens has rightly pointed out that civil law, criminal law and administrative law provide ways of enforcing human rights.[9] Augusto Pinochet was arrested in England and held for extradition to Spain to face criminal sanctions. Ferdinand Marcos was sued in civil courts in the United States and Switzerland. Radovan Karadzic was accused by the International Criminal Tribunal for the former Yugoslavia and at the same time sued in a civil court in the United States.

Whether or not civil litigation is an effective means of promoting transparency depends on the particular rules and alternatives in place. Stevens has argued that civil rights actions are more common in the United States than elsewhere for a number of reasons. One of these reasons is the broad scope of the Alien Tort Statute, as described by Enneking in Section 2 of her contribution in this volume. Another reason is the systemic procedural advantages the American civil litigation system offers plaintiffs. American rules on costs and punitive damages certainly do make civil litigation more attractive in the United States than elsewhere.[10] Another advantage is that the American rules on discovery provide a plaintiff with a wide range of procedural instruments for obtaining information. In other jurisdictions, it is more difficult to obtain information from multinational corporations in civil courts.

In many jurisdictions, administrative and criminal litigation may provide a more suitable, alternative method of addressing specific human rights violations. In the Netherlands, for example, the police have many more ways of obtaining information than a litigant in a Dutch civil court. Trafigura (a multinational corporation that was alleged to be involved in a toxic waste dump in the Ivory Coast) came under criminal investigation by the Dutch police in 2006. This led to the confiscation of large amounts of electronic and other data from the company that would certainly not have been obtained in civil litigation in the Netherlands. These data were used in the criminal procedure, which resulted in the imposition of criminal sanctions against the corporation. Dutch prosecutors also provided information obtained during the course of the criminal investigation to the victims of the toxic waste dump, who could use it to bring proceedings in a civil court.[11]

Private law and public law methods of obtaining information should not be considered competing systems. In many instances, a combination of private and public law methods may be worthwhile. For example, in the Netherlands, a common strategy is to rely on the Public Access to Government Information Act and the Personal Data Protection Act to obtain information. Both statutes provide individuals with a cheap and effective means of gathering specific kinds of information. Litigants may combine these methods with civil procedural devices in order to obtain as much information as possible.[12]

4. Transparency and the Advantages of Transnational Litigation

In principle, the procedural mechanisms available to a plaintiff bringing a case against a multinational corporation are no different than those available to any other litigant. One distinctive feature of litigating against a mul-

6. *See e.g.* Chase *et al.* 2007, Chapter 4.
7. Marcus 2012, pp. 165-187.
8. On English law, *see* Practice Direction, Pre-action Conduct, para. 7: Exchanging Information before starting proceedings. On Dutch law, see sections 186-193 and 202-207 Dutch Code of Civil Procedure; Verkerk 2010, p. 229.
9. Stevens 2002, p. 3.
10. Stevens 2002, p. 15.
11. The Hague Court of Appeal, 23 November 2010, LJN BO4912.
12. *See e.g.* Supreme Court of the Netherlands, 29 June 2007, LJN AZ4663, NJ 2007/638 (*Dexia/Steenoven*).

tinational corporation is that it is, by definition, located in a number of different jurisdictions. Each of these jurisdictions may have its own set of procedural rules regarding access to information. Some legal systems include a procedure providing for the gathering of information or the taking of evidence needed for litigation abroad. A litigant that initiates litigation against a multinational corporation may very well be able to 'pick and choose' from a wide range of litigation systems in order to get access to information.

The United States enables the gathering of information or the taking of evidence in the United States in order to assist litigants in foreign tribunals. 28 USC §1782 states:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal […]

In the case *Intel v. AMD*, the US Supreme Court clarified the scope of this provision in the US Code.[13] The US Supreme Court held that §1782 is not limited to materials discoverable in the foreign jurisdiction if located there. Nor is the applicant required to show that US law would allow discovery in domestic litigation analogous to the foreign proceeding. The US Supreme Court held that §1782(a) authorizes, but does not require, a district court to provide discovery and identified the factors that are relevant to the exercise by the district court of its discretion. This case illustrates that §1782 is a powerful tool for obtaining information needed for litigation abroad.

Similarly, in the Netherlands, one may request the court to order the production of documents needed for litigation abroad. In the recent case of *ABN Amro v. Abu Dhabi Islamic Bank*, the Supreme Court of the Netherlands confirmed that the statutory provision that enables document discovery does not require that the requested documents be used for litigation in the Netherlands.[14] If the conditions of the statutory provision are met, victims of human rights violations are entitled to request the production of documents needed for litigation outside of the Netherlands.

This implies that a party engaged in litigation in e.g. France or Japan against a multinational corporation may be able to obtain relevant evidence in the Netherlands or other jurisdictions. Suppose the multinational corporation maintains a back-up of its main server in the United States. The relevant US district court may allow the conduct of a wide-ranging American e-discovery process against the multinational corporation even if discovery of the very same information is not discoverable under French or Japanese law.

A litigant suing a multinational corporation hence has an enormous advantage. Information processed by multinational corporations is often spread throughout a number of countries and could be simultaneously available in each of those. A litigant may be able to rely on more than one procedure (civil or otherwise) to obtain the very same information, thus being able to take another shot at the very same target. Remembering that criminal procedure and administrative legal procedure may also provide ways of obtaining information, a litigant facing a multinational corporation may have multiple tools in various jurisdictions for retrieving the required information.

5. The Cost of the Fact-Finding Process in Civil Litigation

In at least some jurisdictions, broad access to information is available to litigants in civil cases; however, this information is generally not available at a low cost. The rules and practices relating to expenses and fees (and obtaining compensation for these) differ greatly. Nevertheless, it seems reasonable to conclude that, generally speaking, litigation is expensive and time-consuming, particularly if the opposing party has a war chest and is willing to use it. If a multinational corporation is accused of a human rights violation, the corporate reputation and brand are (perceived to be) at risk. An unfavourable ruling in such a case may undo the positive effects of millions spent on advertising. A multinational will therefore generally have a sufficient budget available for litigation. This will certainly also impact the fact-finding processes. In this situation, a multinational corporation has an interest in allocating large amounts of resources to the hiring of technical experts, forensic accountants, information technology specialists and other professionals in order to obtain information. At the same time, it may expend resources to oppose requests for information.

A telling example of how multinational corporations may be willing to expend resources on fact-finding processes is a case dubbed the 'McLibel case'. London-based environmental activists had distributed a pamphlet accusing McDonald's of causing starvation in the third world, deliberately exploiting children, mistreating its employees and other wrongs that could be considered human rights violations. McDonald's filed a libel case against several activists, including Helen Steel and David Morris, claiming all allegations in the pamphlet were false. The main issue in the litigation was whether or not the allegations in the pamphlet were correct. The factual complexity of the litigation procedure was summarized as follows by the European Court of Human Rights:

> The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing lasted 23 days. The factual case the applicants had to prove was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with

13. US Supreme Court, 21 June 2004, 542 US 241 (*Intel corp. v. AMD*).
14. Supreme Court of the Netherlands, 8 June 2012, LJN BV8510.

> a range of scientific questions, such as nutrition, diet, degenerative disease and food safety. Certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The detailed nature and complexity of the factual issues are further illustrated by the length of the judgments of the trial court and the Court of Appeal, which ran in total to over 1,100 pages [...][15]

Steel and Morris, who earned a modest salary and had little financial means, did not receive significant financial support. They acted alone for the bulk of the hearings as they could not afford a lawyer and other professionals to help them prove the allegations in the pamphlet. They were unable to pay for a copy of the transcripts of the trial. In a battle of David versus Goliath, McDonald's spent millions to argue that the factual allegations in the pamphlet were false. Steel and Morris eventually lost the case. Afterwards, the European Court of Human Rights ruled that this 'inequality of arms' had constituted a violation of Article 6 of the European Convention of Human Rights.

Although the McLibel case is exceptional, it illustrates that litigation against a multinational corporation is no easy matter. It requires a fair amount of resources to initiate the litigation, to request the court to order the production of evidence and to resolve possible discovery disputes. Most victims of human rights violations do not have sufficient funds to hire lawyers and other professionals, and certainly do not have the funds to match those of multinational corporations. Although most systems provide some mechanisms to aid parties with limited financial means, these seldom suffice to create a level-playing field. Civil litigation may help to enhance corporate transparency, but only for those who can afford it.

6. Conclusion

Transparency is perceived as a key factor in ensuring that corporations respect human rights. This article discusses the various ways in which civil litigation enhances transparency. The main conclusion is that civil litigation is costly but generally does provide litigants with a wide range of procedural tools to obtain information relevant to a civil action. Civil procedure, like criminal procedure and administrative legal procedure, plays an important role in ensuring and enforcing corporate transparency.

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15. European Court of Human Rights, 15 February 2005, Application No. 68416/01 (*Steel and Morris v. United Kingdom*), §65.