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Criminal and Civil Corporate Liability for human rights abuses in Spain

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This post offers a brief analysis of the existing Spanish regulations in the criminal and in the civil plan. Starting within the criminal proceeding, Criminal proceedings are often characterized by many factual and legal barriers to accessing justice. These include the problem of double criminality; the difficult internal regulatory framework on the structure of the groups of companies, issues of evidence, costs, the lack of specialized lawyers and experts in transnational litigation; limitations that we also have in Spain and that *de facto* hinder the access to justice of the victims. The Spanish legislator introduced the criminal liability of legal persons through the reform promoted by Organic Law 5/2010; a vague regulation that left many points unresolved. Through Organic Law 1/2015 this regulation was amended by introducing article 31 bis, which establishes the duty of administrators to adopt and execute effective models of surveillance and control in order to prevent the commission of different crimes.

However, the law provides that not all crimes included in the criminal code are susceptible to be punished if they are committed by companies. In particular, those related to human rights violations and international crimes such genocide, crimes against humanity or war crimes are excluded, as pointed out by José Elías Esteve Moltó. Criminal proceedings for corporate criminal acts, which are not covered by this regulation, would most likely fail.

In relation to the extraterritorial acts, also from a jurisdictional perspective, the limited application of the principle of universal jurisdiction would most likely constitute an unsurmountable obstacle as we as we have argued elsewhere (in english and in spanish). For this reason, we are of the opinion that, at present, civil proceedings would represent the most promising avenue for victims of corporate human rights violations. The starting point of these civil proceedings are human rights violations, but necessarily adapted to private law figures and specifically translated into tort law causes of actions. In this respect, María Font- Mas, reminds us about the omnipresent obstacles to accessing remedy which are present in these transnational civil proceedings and include the imbalance of power between the parties, the business structure, the lack of availability of class actions, the standing of NGOs, the duration of the proceedings, the costs, evidentiary issues and issues regarding the prescription.

In addition, there may be parallel trials and extrajudicial mechanisms concerning the same facts; before different domestic courts, international arbitration or other non-judicial redress mechanisms like the National Contact Points. Concerning the extraterritorial jurisdiction of Spanish courts, there is no equivalent, in Spain, to the US Alien Tort Claims Act (ATS) which provides that "(t)he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". The concept underlined by this act is simple: there is nothing unusual in the fact that a court can hear civil claims on a special tort, including serious Human Rights violations that occurred outside its territorial jurisdiction.

However, as we have shown in previous articles, the recent case-law in the US has largely restricted the use of the ATS to ground the jurisdiction of US courts in relation to corporate human rights abuses. In Europe, a number of national tribunals have exercised extraterritorial civil jurisdiction and accepted that cases could proceed in their countries on the basis of general principles of tort law, and the tort of negligence in particular, for events which occurred abroad and having tenuous links with the forum state.

Other courts asserted jurisdiction on the ground of the doctrine of *forum necessitatis* . However, this doctrine has not been applied in Spain. The most remarkable aspect of the application of the *forum necessitatis* in other countries has been, in addition to ensuring access to the tribunals for the victims, the emergence of substantial momentum towards consensus on the international civil liability of individuals and companies for the commission of, or participation in, international crimes and consequently it demonstrates the need to implement an "almost universal civil jurisdiction".

As emphasized in recent publications by Maria Chiara Marullo (in relation to the Kiobel III and the Ikebiri case), Francisco Javier Zamora Cabot (in relation to the Vedanta case) and Claire Bright and Nicolas Bueno (in relation to the Vedanta and the Shell cases in the UK and in the Netherlands) various decisions of European courts are opening a new path that could represent a very important advance for the future of transnational litigation in business and human rights. In the aforementioned cases, the courts asserted their jurisdictions both in relation to the acts of the parent companies and of those of the subsidiaries, when there was a connection that allowed the subsidiary to be joined to the proceedings before the state of origin, supporting the existence of a unitary concept of company, acknowledging that the parent makes the decisions and strategies for the entire corporate group which is therefore under its control.

In the context of transnational civil litigation for corporate-related human rights abuses brought before Spanish courts, the jurisdiction of Spanish courts in relation claims against Spanish companies would be based on the Brussels I Recast Regulation, and more specifically Article 4 combined with Article 63: 1 which provides that "For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat; central administration; or principal place of business". These articles recognize the existence of a nexus between the alleged violation and the parent company. In relation to foreign subsidiaries of Spanish companies, the Spanish private international law rules would allow to join the subsidiaries to the proceedings against the parent company.

In this case, the relevant legislation is the Ley Orgánica del Poder Judicial (LOPJ) article 22.ter, since there would be a correlation between the facts and the different defendants that would justify a joint hearing. In other words, the jurisdictional criteria allows for a plurality of defendants to be brought before the home state courts when the case relates to the same facts and to the same causes of actions. Spanish Law acknowledges that treating them separately could lead to incompatible decisions.

Finally, in terms of applicable law, in such type of claims the law of the place where the damage occurred would be applicable under the Rome II Regulation. However, we are of the opinion that Private International Law needs to evolve in order to overcome the persistent obstacles to access to justice and to protect in an effective way the interests of

the victims. According to Axel Marx, Claire Bright, and Jan Wouters, the issue of the applicable law can also constitute a significant barrier to accessing remedy for victims of human rights abuses, and they have called for the introduction of choice-of-law provisions allowing the victims to make a choice between various options for the law governing this type of disputes. Their proposal was included in the recent Draft Report of the European Parliament's Committee on Legal Affairs which contains proposal to amend to amend the Brussels I Recast and the Rome II Regulations.

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