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The Framing of International Adjudication for Corporate Misconduct

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International courts and arbitral tribunals, the mechanisms we identify with international adjudication as binding third-party dispute settlement, do not have a universal and fixed meaning. In today's increasingly diverse landscape of international adjudication, these mechanisms are described and classified according to different and often competing frames that stem from lawyers' assumptions and views about international courts and arbitral tribunals.[1] The meaning of these mechanisms is framed in terms of, inter alia, lawyers' expertise in a specialized regime (such as trade law, human rights law, or environmental law) and, more broadly, their background in domestic legal systems.

A discussion about international jurisdiction for corporate misconduct, either as a jurisdiction using existing mechanisms or through the creation of new mechanisms, requires that we understand these frames. The frames lawyers use to understand international courts and arbitral tribunals condition how they are structured and institutionalized, and what criteria are used to determine whether these mechanisms are, for example, legitimate, working for the public interest, and effective. Thus, recognizing and identifying these frames should precede any discussion about an international jurisdiction for corporate misconduct.

In this brief contribution, we review a number of the proposals for an international jurisdiction for corporate misconduct that have been put forward in a recent *Harvard International Law Journal* online symposium ("ILJ online symposium") and draw attention to the possible frames that may shape their analysis.[2] We begin by looking at

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[1] We understand frames as the predispositions (or principles of organization) that delimit our perception of the real. *See generally* ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE (1974).

[2] We speak only in terms of "frames" due to the limited scope of this contribution. We have not engaged with similar ideas such as "interpretive communities," "structural bias," "expertise", or "unreliable

one of the most widely shared frames: the background of international lawyers as domestic lawyers. Subsequently, we consider the frames that stem from specialized international legal regimes and take the example of investment arbitration and its influence on proposals for arbitral tribunals for corporate misconduct. Further, we review the effect of these frames on non-juridical mechanisms including the complex sanctions-regime that already exists for corporate misconduct. We conclude with a call for moving beyond these existing frames in order to open space for self-reflection and new thinking.[3]

1. THINKING IN TERMS OF THE DOMESTIC CONTEXT

Proposals for an international court to address corporate misconduct may be framed with presumptions and perceptions from the domestic legal training that forms the basic legal education of most international lawyers.[4] This background serves the longstanding assumption that the international legal system should contain the judicial branch that is characteristic of domestic systems.[5] Thus, according to this view, international courts form an innate part of the international legal system, and the domestic judiciary is a benchmark for its international counterpart.

The rise of specialized international legal regimes, self-contained and fragmented,[6] has challenged the idea of a hierarchical system of international courts with the International Court of Justice ("ICJ") analogous to a domestic supreme court. Yet this has not been followed by inquiries into the internal structure and practices of international courts as traditionally conceived in terms of analogy to the domestic context.[7] Debating the relevance of this sort of analogy could contribute to creative thinking. In that sense, it opens the possibility of considering the various challenges and practices specific to the

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narration." For a recent overview, *see* Matthew Windsor, *Narrative Kill or Capture: Unreliable Narration in International Law*, 28 LEIDEN J. INT'L L. 743 (2015).

[3] The need for innovation and new thinking has been noted by several contributors to the ILJ online symposium. *See, e.g.*, Ana Maria Mondragón, *Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice*, HARVARD INT'L L. J. ONLINE (July 7, 2016) and Angel Gabriel Cabrera Silva, *Legal Innovations for Corporate Accountability under International Law: A Critique*, HARVARD INT'L L. J. ONLINE (July 7, 2016).

[4] *See, e.g.*, JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 152−53 (2014).

[5] *See* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. 1, 1−2 (2007).

[6] *See* UN International Law Commission*, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (Apr. 13, 2006).

[7] For a discussion on this method of inquiry, *see* Mikael Rask Madsen, *Sociological Approaches to International Courts*, in Cesare P. R. Romano, Karen J. Alter & Chrisanthi Avgerou, eds., OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION (2014).

implementation of an international jurisdiction for corporate misconduct on its own terms.

Recognizing the differences between international courts and domestic courts also opens room for a discussion on the increased significance of domestic jurisdictions in constraining transnational corporate misconduct. If international courts are distinct as to structure and practices from their domestic counterparts, each with their specific rationalities, then it is easier to see domestic and international mechanisms as complementary rather than in perpetual struggle for authority and hegemony. Thinking in terms of complementarity is all the more important as, for example, domestic and European legal instruments increasingly require companies to respect human rights in the course of their activities and their supply chains. As a result, corporate misconduct can increasingly be brought before domestic civil and criminal courts.[8]

Thus, in an increasingly globalized world, are international courts not simply one key piece amongst others in the creation of a new era of global corporate accountability? From this perspective, international and domestic mechanisms each have a reasonable claim to authority. This dismissal of hegemony and recognition of complementarity, leads to a complex series of possible judicial configurations. Action may be taken by domestic courts at the host state or home state level,[9] and at the international level by existing or new mechanisms. To address the complexity of these possible configurations, we need to move away from ready-made solutions that are imported from existing frames.

2. THINKING IN TERMS OF SPECIALIZATION

Discussions about international jurisdiction are also framed by specialized international legal regimes. These specializations, such as trade law or human rights law, lead to an understanding of international courts and arbitral tribunals as they are implemented in a specialized regime. As a result, although the term "court" appears to retain a general and objective meaning, it means very different things when it is assimilated to, for instance, the International Criminal Court or the International Tribunal for the Law of the Sea, as they prioritize distinct concerns.

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[8] *See, e.g.*, U.K. Modern Slavery Act 2015 (c. 30), art. 54; Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information (L330/1); Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (L119/1)

[9] In the ILJ online symposium, *see, e.g.*, Gabriela Quijano, *Where Can Victims of Corporate Human Rights Atrocities Turn for Justice?*, HARVARD INT'L L. J. ONLINE (July 7, 2016).

Take the example of international arbitration and investment arbitration. The perceived success of investment arbitration, at least in terms of case-load and effectiveness, has seen it advanced frequently in this Symposium as a model or tool for arbitrating corporate misconduct. Yet this approach by analogy risks putting forward or giving precedence to the specialization of investment arbitration as a "best practice" although arbitration in this specialization is structured to pursue objectives different from corporate misconduct.

Thinking along specialized frames aligns the design of an eventual arbitral tribunal for corporate misconduct with that of a system designed for the significantly different purpose of investment protection. This framing risks inhibiting the conception of international arbitration for corporate misconduct in new terms or at least terms aligned with concerns raised by corporate misconduct. For instance, considerations of statist consent are important in investment arbitration, but these considerations may obfuscate a rethink of alternative means of conceiving consent in a post-Westphalian international arbitration turned to victims of corporate misconduct.[10]

Along similar lines, criticisms of arbitration that refer nearly exclusively to the inadequacies and shortcomings of investment arbitration on the grounds that it lacks of legitimacy and public accountability[11] run the risk of framing the possible structure and practices of international arbitration in terms exclusively developed by the investment context. By equating investment arbitration with international arbitration more generally, these criticisms, paradoxically, serve to frame international arbitration in terms of the very investment regime they criticize. This confusion limits the possibilities of international arbitration to those developed in the investment context.

3. THINKING BEYOND ADJUDICATION?

The same caution with analogic thinking to the domestic legal system can be extended more broadly to the perceived need for international jurisdiction in the first place—the topic of the ILJ online symposium. If analogies to the domestic context require that we envision some form of international jurisdiction, then existing non-judicial means to address corporate misconduct are necessarily perceived as insufficient and incomplete. As a result, the achievements of non-judicial mechanisms can lose their luster in the process.

The United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises have created impetus for the development of

[10] See the various approaches to obtaining consent suggested in the ILJ online symposium by Juan Pablo Calderón-Meza, *Arbitration for Human Rights: Seeking Civil Redress for Corporate Atrocity Crimes*, HARVARD INT'L L. J. ONLINE (July 7, 2016).

[11] In the ILJ online symposium, *see* Amb. David Scheffer, *Corporate Liability under the Rome Statute*, HARVARD INT'L L. J. ONLINE (July 7, 2016).

non-judicial mechanisms. These mechanisms are being developed by private and public entities, at the domestic or international level. They are opening new avenues of redress for victims whose human rights were adversely impacted by corporate misconduct.

For example, a number of companies have developed grievance mechanisms as a means to identify potential and actual adverse impacts on human rights and means of redress for victims. Similarly, the OECD National Contact Points offer stakeholders and members of civil society a means to resolve human rights based conflicts between affected communities and companies. Admittedly, these mechanisms are still in development; the perceived requirement for international jurisdiction, however, could take attention away from their continued development and articulation with existing international and domestic judicial mechanisms.

Besides, a focus on a single international jurisdiction mechanism may overshadow the complex sanctions-regime that already exists for corporate misconduct. These sanctions can be reputational (when misconduct affects a company's reputation), they can be operational (when the continuation of a project is put in jeopardy because some fundamental rights of local communities have not been respected), and they can be financial (when the multilateral development banks and private banks withdraw funding for a project found to be non-compliant with human rights). This sanctions-regime deserves more scrutiny. It could be more amenable and adaptable to the complexities of corporate misconduct than international jurisdiction, and it could be further accompanied by the development of more accessible remedies for victims of corporate misconduct than judicial proceedings.

AFTERWORD

This contribution has sought to query how decisions about the internal structure and practices of international mechanisms for corporate misconduct could be framed by lawyers according to the terms of domestic legal systems or specialized legal regimes. Emphasizing frames raises a new set of questions and places a different focus on the question formulated in the ILJ online symposium. Instead of speaking in terms of the possibility of international adjudication for corporate misconduct, we suggest speaking in terms of its possibility but according to which frame.

Our observations and questions are not meant to close the door to international courts or arbitral tribunals as jurisdictions for corporate misconduct. However, if we consider action against corporate misconduct to be a legitimate pursuit, then we need to move

beyond discussions confined solely to the creation of these mechanisms in order to critically engage with how international adjudication is described and re-described.[12]

In particular, focus should be placed on the assumptions and background beliefs behind the terms "international court" and "international arbitration":[13] What should these terms mean in the context of corporate misconduct, and what do these meanings entail? Discussions should not be limited to narratives that portray the mere act of creation, in this case an international court or arbitral tribunal for corporate misconduct, as the means to normalize complicated tensions among competing frames. Identifying the multiple frames that can be used to describe international courts and tribunals provides a map of consensus and dissensus. This map allows us to reveal current assumptions and existing boundaries so that we may knowingly account for them or move beyond them when debating the development of international jurisdiction for corporate misconduct.

[12] On this process in international law, *see, e.g.*, Koskenniemi, *supra* note 5, at 7.

[13] On changes in the meaning of international adjudication from the perspective of its paraphernalia, *see* Daniel Litwin, *Stained Glass Windows in the Peace Palace: Constructing International Adjudication's Identity*, in OBJECTS OF INTERNATIONAL LAW, Jessie Hohmann & Daniel Joyce, eds. (forthcoming 2016).