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**REVIEW**

*of* Alexandra Gatto *Multinational Enterprises and Human Rights: Obligations under EU and International Law* (Edward Elgar, 2011)

**HOLDING YOUR OWN TO ACCOUNT: EU POLICY CONCERNING ITS MNEs ABROAD**

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Alexandra Gatto's thesis wants to answer one question: how can the European Union (EU) "ensure that EU-based Multinational Enterprises (MNEs) respect human rights when operating in third countries?" (p.vii) This question is as salient as ever today, with increasing clarity that economic development needs to be embedded in broader societal values. Human rights breaches, complicity in government violence but also the detrimental effect of supply chains on local labor standards have put a magnifying glass to both negative and positive obligations for MNEs limiting those negative impacts. However, international law has been grappling with a way to conceptualize such obligations within its own confines and is confronted by a somewhat disabling doctrinal tradition, 'weak' governance in host countries and less than willing policy-makers.

It is against this background that Gatto has produced a broad scoped account of the developments in international law, through multi-stakeholder initiatives, and within the European Union (EU) concerning corporate human rights obligations. After arguing for a conception of 'limited corporate obligations under international law and a subsequent expansive set of corporate human rights obligations, the core of Gatto's argument concerns the ECs engagement in the field to date. As a self-referred 'normative' power, the EU should be a leader in the global human rights movement. Through in-depth analysis of EU Treaty Law, Regulations, and Directives Gatto however provides for convincing criticism of the extent to which the EC has utilized its competences. In practice thus there is much talk but only small practical benefits. Commendably this work thus is more than (yet) another argument on the possibilities of qualifying MNEs as holders of human rights obligation under international law. Her interest spans wider to include the legal opportunities of indirect measures under EU law of internal and external policy to ensure the human rights obligations of MNEs.

The book is made up of 4 parts, the last being the conclusion. Part I provides general outline of the topic, containing chapters that provide a theoretical framework, MNEs as addressees of international law, and MNEs and human rights law. Part II and III represent the core of the book, the EUs law and policy concerning the human rights obligations of MNEs. These parts respectively take up the MNE-human rights relations within the EU as well as the way in which the relation plays out in the EUs external policy. In my opinion the innovative work is done in Part II and III, therefore I will focus on these and only shortly comment on Part I.

Gatto opens her book with a long (45 pages) chapter outlining her theoretical framework and some of the legal and conceptual issues such a framework has to

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capture. The chapter suffers somewhat under the amount of issues introduced. In summary, however, Gatto gives good reasons that the complex nature of the issue of human rights obligations of MNEs multilevel and complimentary approaches. Her framework therefore includes non-binding measures, binding legal instruments, and complementary in applying direct as well as indirect (through EC internal market or commercial policy, or external policy geared at host states) measures. Lastly, MNEs should be ascribed human rights obligations according to the theory of indivisibility of human rights. This means that MNEs hold obligations or should be regulated in such a way that they contribute to all types of human rights. Following UN Special Representative John Ruggie's, Gatto specifies human rights into duties to respect, promote, protect and support. This is not the clearest part of the chapter, however I do not think that too much weighs on it in the end, due to Gatto's further developments in the book.

The subsequent 2 chapters develop the general international approaches to MNE human rights obligations. Chapter 2 touches on the 'obligatory' topic of the evolution of the concept of 'subject' and legal personality under international law since the Second World War. Topically, Gatto sketches the congruence between the progressive increase of corporate rights and the 'conservatism' concerning their obligations. Chapter 3 extends on the analysis by introducing two ways in which international human rights law has developed. These are discussed with an eye on applying these as 'models' for developing an account of corporate obligations. Gatto accounts for the increased focus on horizontal application of human rights law, i.e. the state responsibility to ensure human rights within its territory. Cases concerning investment projects that impede on indigenous people's tribal lands are one such recent novelty. The second development consists of the emergence of the individual on the international legal scene. Especially under criminal law and humanitarian law, individuals have come within the scope of international law. Neither of these 'models' are directly applicable to the MNE however since it cannot be easily conceptualized as either a state-like entity or an individual. Up to date therefore, on the one hand, somewhat creative solutions stretching either the notion of state obligations or international criminal responsibility have been used to capture corporate human rights obligations. On the other hand, 'soft' law approaches have been used to determine more precisely how MNEs could be taken as holders of obligations under international law, culminating in, at least in Gatto's view, the UN Norms. In these two developments, Gatto sees a 'limited personality' for MNEs appearing – although this is not explicitly specified.

The core the book concerns a critical analysis of indirect corporate human rights obligations through efforts by the EC. Part II delves into the ways the EC has applied internal policy measures to pursue this goal. Part III accounts for the ECs external policy measure to strengthen host states capacity to ensure respect for human rights by MNEs.

The salience of this topic is clear: the EU has positioned itself as a 'normative' power that seeks to create a value-based system of global governance. Its role in embedding MNEs into societal values such as human rights can be seen as a test-case of this self-proclaimed power. Gatto concludes that the EC has not lived up to the hype. As she argues in light of internal measures, "there do not seem to be many obstacles to directly imposing human rights obligations upon European MNEs and applying them extraterritorially to European companies [...]." (p. 132) The fact that MNEs are recognized as subjects of EU law, that they are conceptualized as economic units

(instead of the more diffuse concept of a legal unit), and that the EU has applied competition law extraterritorially already supports this claim. Chapter 5 neatly shows that the EC has not fully explored the opportunities that are legally within its reach by way of analysis of competences such as common commercial policy and company law, social policy and public procurement. Take the inclusion of social concerns in public procurement. The EC could make respect for human rights through the supply chain a condition of contracting. Such an approach flies in the face of the accepted doctrine of economic advantage as the sole basis for assigning contracts and might raise worries of discriminatory policy and protectionism. But while ECJ rulings allow for non-discriminatory social concern-inclusion and the leeway provided under the WTO's Plurilateral Government Procurement Agreement (GPA) the EC has held on to a restrictive interpretation of their policy space.

One important caveat is in place. The powers of the EC are 'conferred' powers; severely limiting the legal basis for ascribing the EC general powers over human rights.<sup>1</sup> In other words, the EC itself does not have the competence to legislate directly on human rights. But Gatto convincingly shows however that there is enough of a legal basis within the EC's competences to ensure compliance with human rights within and by its own institutions.

The third part of Gatto's argument brings us to the legal basis and application of EC competences in its external relations. Here too, the EC has ample space to draw on implied powers. More so, however, than in the case of the European Common Market-policies, an argument of coherence can be made that policy should ensure MNE human rights compliance. As Gatto deduces from European Treaty law in light of Article 6 of the Treaty on European Union (TEU), all EC external policy should contribute to the respect for human rights (p. 200-201).

In this sphere the EC has two main approaches at hand to ensure respect for human rights by MNEs. The first measure is the use of a human rights clause in external agreements. These clauses introduce conditionality requiring a host state to commitment ('respect' for) to human rights within its territory. The EC also applies non-regulatory instruments, from incentivizing human rights policies in third countries to strengthening civil society. The question is however to what extent these two types of instruments effectively apply to the human rights obligations of MNEs. In chapter 8 Gatto discusses initiatives under these instruments and notes that notwithstanding the recognition of the importance of MNEs respecting human rights, none of these initiatives explicitly address MNEs. The concept of indirect approaches to corporate human rights obligations turns out somewhat empty – the fact that an improved host state's human rights record most probably also implies that corporate human rights breaches will be minimized is neither here nor there.

As an alternative route, the Common Commercial Policy (CCP) allows the EC to introduce unilateral trade measure to further human rights. Through the Generalized System of Preferences (GPS), an enabling clause that provides an exemption of the Most Favorite Nation-clause of the GATT, the EC has offered preferential trade arrangements and capacity building to incentivize developing

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<sup>1</sup> Opinion 2/94 on the possible accession of the EC to the European Court of Human Rights (ECHR) provides the background for this caveat. Accession would imply the "entry of the Community into a distinct international institutional system, as well as integration of all the ECHR provisions into the Community legal order." (p. 115) Such constitutional change can only be brought about by a Treaty amendment.

countries to ensure human rights. Tariff reductions and tax exemptions are offered to developing country in exchange to ratifications of human rights and labor standard treaties under this policy. The GSP is a potent incentive mechanism even though it suffers from some implementation and monitoring. Crucially however, Gatto notes, also in the case of the GSP the EC has not centered its attention on MNEs as such. Yet again thus, improvements of MNEs human rights records are expected to automatically follow those of the host country in which they operate.

Gatto's in-depth account of the potential and the shortcomings of EC policies, show some crucial weaknesses in the current role of the EC in furthering human rights globally. The oddity with this analysis is that the initiatives discussed, in Gatto's own words, do not (or barely) pay attention to the inclusion of human rights obligations of MNEs. The main actor, the MNE, is largely missing in action in the core parts of the argument. It is not surprising then that in her conclusions Gatto's recommendations aim at an improved focus on the issue of corporate human rights obligations. The problem within the EU does not concern a lack of legal possibilities, as Article 6 of the TEU confirms, but a lack of political will. Such unwilling attitude is exemplified by the limited use of competences and in the Corporate Social Responsibility (CSR)-program of the EC. To be complemented on its efforts in getting multiple stakeholders involved, the EC went off track in picking favorites with its Business Alliance for CSR-initiative and opting for a merely voluntary market based CSR-model. Gatto urges the EC therefore to develop its laws in sync with the evolving consensus in international law that human rights obligations of MNEs have to be secured. Secondly, she recommends the EC to utilize the legal competence it possesses to extend its policing powers to promote MNE obligations in third countries.

To conclude I want to make three critical observations. The first concerns the up-to-date-ness of the argument. Gatto book is based on her PhD that was submitted in 2007. There is thus a 4-year gap between the thesis and the current publication, in which a dynamic field as the one under scrutiny are bound to have taken place. The fact is however that very little to almost no updating has been done for the current publication. Did the implementation of the Lisbon Treaty change any relevant aspects of EC policy? And the Cotonou Agreement has seen revisions in 2005 and 2010 – Gatto's references end in the year 2000. Gatto urges the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB) (p.158) to rigorously include social and environmental values in their project assessments. The EIB for instance, under its 2009 'EIB Statement of Environmental and Social Principles and Standards' follows 3 Environmental and Social Principles to assess projects for financing.<sup>2</sup> Similarly, the secondary literature latest reference is a forthcoming article (published in 2007) and there are only 13 references to sources dating after 2005. This does not disqualify Gatto's account but it does leave the reader wonder about what has come ever since she wrote up her account.

Second, a question left unaddressed concerns the reasons that the EC could possibly have to limit its actions towards specifying human rights obligations of MNEs. Besides potential conflict between the EC and member-states on competences and overarching interference in third countries, little probing into such considerations is offered. The EC might have good reasons to further going regulations – directly and indirectly. The availability of legal opportunities does not make for good or feasible

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<sup>2</sup> See [http://www.eib.org/attachments/strategies/eib\\_statement\\_esps\\_en.pdf](http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf).

regulations (yet). Gatto's argument therefore remains nothing more but also nothing less than a formal-legal argument that convincingly shows that there are few legal obstacles to the EC competences to further MNEs human rights obligations.

Of course, the disciplinary rationale of law expectedly seeks out legal argument. However, thirdly, the book could have benefited from a more specific analysis of how a more focused engagement with MNEs can play a constitutive role in the development of a state and the ensuring of human rights. Such an argument would look into the very specific issues pertaining to the corporate presence within a country. This comment connects to the conceptual foundations presented in part I of the thesis. Gatto holds strong to the idea of indivisibility of human rights and a gradational approach in ascribing them to companies, while at the same time she develops a differentiated register of types of obligations (from respect to promote) that should be promoted through both voluntary and legal means.<sup>3</sup>

Although commendable, such an expansive and rigorous account of human rights might not be most practicable in improving the ECs internal and external relations to promote human rights obligations of MNEs – nor does Gatto's core argument seemingly need it. In the conclusion of part I, Gatto builds this expansive set of human rights obligations on a notion of 'limited corporate personality' under international law. Potentially overreaching on this limited fundament, she ascribes MNEs both negative and positive duties to respect, protect, fulfill, support, and promote human rights albeit according to a 'sliding scale' (p. 96; which I reckon is equal to the 'principle of graduation' (p.vii)), which makes the 'scope and intensity' of the duty dependent on the right at hand, the capacity to impact, the exercise of governmental authority by the MNE and the presence or absence of fault. Throughout the book Gatto apparently loosens up on this rigid framework when she specifically addresses harm/violation or development/poverty abatement potentials of MNEs. Her 'principle of gradation' for instance is made dependent on the 'distance to the victim,' the latter notion normally being associated with negative duties of harm.

Despite the commendable doctrine of the 'indivisibility' of human rights, the two broad categories of duties simply translate into very different policy measures and legal adjustments. A more differentiated approach will be more successful in practice since it allows for a better alignment of initiatives and specific human rights goals, and seeking out complementary approaches to make means connect to the desired end.

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<sup>3</sup> On p.188 Gatto seemingly lashes out against voluntary approaches that lack convincing monitoring and enforcement measures since they are necessarily harmless to companies and of no help to workers and communities. For someone who contends to support a 'mixed-bag' approach to MNE obligations it is a surprising critique that does not sit well either with the important transitional and indirect value in civil liability procedures these voluntary means can have according to the author herself (p.99 and 188 for instance).