How the European Court of Human Rights evaded the Business and Human Rights Debate in *Özel v. Turkey*

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ABSTRACT

The judgment of the European Court of Human Rights (ECtHR) in Özel v. Turkey is consistent with its established case law on interferences with European Convention on Human Rights and Fundamental Freedoms in which private actors are involved.[1] By delineating the obligation of states to protect their people against human rights violations by private actors, the Court's jurisprudence has contributed to the global debate on business and human rights. Nevertheless, the judgment in Özel v. Turkey is disappointing in that the Court decided not to discuss the actual impact of human rights on companies. In times of vigorous and divisive debates about the role of international law in ensuring respect for human rights by companies, the ECtHR should not dodge controversies but lead the way.

I. INTRODUCTION

The first proposals to impose binding human rights obligations on companies under international law date back to 1948.[2] An attempt in 2003 was nearly successful, but the United Nations Human Rights Council (HRC) eventually did not endorse the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the 'UN Norms'),[3] and those civil society actors and states in favour of greater obligations were ultimately disappointed. That feeling only worsened when in 2011 the HRC endorsed the UN Framework and Guiding Principles on Business and Human Rights (UNGPs)[4] drafted by Special Rapporteur, John Ruggie.

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1 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5.

2 One of the provisions of the 1948 Havana Charter for an International Trade Organisation was devoted to fair labour standards, but the Charter never entered into force.

3 United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (UN Norms), E/CN.4/Sub.2/2003/12/Rev.2, 2003.

4 Human Rights Council (HRC), 'Guiding Principles on Business and Human Rights: Implementing

While the UN Norms imposed direct human rights obligations on companies and established a non-judicial enforcement mechanism,[5] companies only have a moral responsibility to respect human rights according the UNGPs,[6] and are charged with no duty to protect and enforce those rights. The debate over companies' human rights obligations continued, however, and it was only a matter of time before a new attempt would be launched.

Indeed, in June 2014 the HRC adopted a resolution to establish an open-ended intergovernmental working group for the elaboration of a legally binding instrument on business and human rights (Resolution 26/9).[7] Yet, the following day another resolution was adopted in which the HRC underscored the importance of the UNGPs (Resolution 26/22).[8] While the latter resolution was adopted without a vote, fourteen countries voted against Resolution 26/9 and thirteen abstained. It is not only the discordance within the HRC which is important here, but also the fact that the United States of America, certain members of the European Union and Japan were amongst the 'no' voters.

As this voting pattern suggests, those campaigning for greater obligations in the business and human rights debate have met with significant opposition. One can safely assume that the international human rights system will not impose human rights duties on companies any time soon. Nonetheless, the adoption of the UNGPs is a positive step, albeit a minor one, and within the framework of the UNGPs, all actors should contribute to ensuring that companies can effectively be held accountable for human rights violations. Even though such accountability can only materialise at the domestic legal level, international judicial bodies, such as the ECtHR, have a vital role to play, because they are the ones who can create consistency and coherence across domestic legal systems regarding the specific duties of companies and their judicial enforcement.

This article argues that the ECtHR should have used the opportunity offered by *Özel v. Turkey*[9] to give guidance on some concrete controversies within the business and human rights debate. The facts of the case and the Court's judgment are briefly summarised in Part II. Thereafter, the judgment is analysed from a business and human rights perspective (Part III). This analysis demonstrates how another opportunity was missed to confirm that companies must respect human rights, and discusses how corporate accountability can or should be enforced.

the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31, 21 March 2011, as endorsed by the HRC, Resolution 17/4, 16 June 2011.

5 Companies had an obligation to report and periodically evaluate their operations, and there would be periodic monitoring and verification by the UN and by other international and national bodies; UN Norms 15-18 (see footnote 2).

6 Principle 11 of the UNGPs.

7 HRC, Resolution 26/9, A/HRC/RES/26/9, 26 June 2014.

8 HRC, Resolution 26/22, A/HRC/RES/26/22, 27 June 2014.

9 ECtHR, *M. Özel and Others v. Turkey,* App. 14350/05, 15245/05 and 16051/05, 17 November 2015.

II. ÖZEL V. TURKEY: PRINCIPAL FACTS AND JUDGMENT

In August 1999 the city of Izmit and the surrounding area in Turkey's Marmara Region were struck by an earthquake with a magnitude of 7.4 on the Richter scale. Notwithstanding the fact that special building requirements had been applied because of the area's classification as a 'major risk zone', several apartment buildings collapsed. The applicants in *Özel v. Turkey* are direct victims and relatives of people who died. Expert reports established that the buildings had several construction deficiencies. For instance, the incorrect use of sand and sea gravel had reduced the strength of the concrete and eroded the iron pillars. The buildings also exceeded the number of floors allowed, whilst the foundations were not readjusted to account for the additional floors.

In September 1999, a Turkish prosecutor indicted three associates and two scientists working at the construction company which had built the apartments. The Court of Cassation confirmed the conviction of one associate and, partial conviction, of one scientist in February 2007. The criminal proceedings against the other suspects had to be abandoned due to the expiry of the limitation period. The company itself was held civilly liable and was ordered to pay a small amount of damages. No authorisation was given to prosecute the government officials who had failed to enforce the building regulations.

In its judgment, the ECtHR reiterated that the positive obligations of states under Article 2 of the European Convention (to protect the right of every person to his or her life) apply to all activities, whether public or not, that are capable of endangering life, including natural catastrophes.[10] Although the claim under the substantive limb of Article 2 (i.e. the state's direct obligation to protect the lives of its citizens) was held to be inadmissible, the Court noted that states must adopt measures that strengthen their capacity to respond to lethal and unexpected natural disasters, such as regulations on spatial planning.[11]

The Court went on to find that Turkey had violated the procedural limb of Article 2, which inter alia obliges states to prevent any appearance of tolerance of illegal acts or of collusion in such acts.[12] The court noted that in order to comply therewith, state authorities had to establish the circumstances in which the disaster occurred, investigate whether there were deficiencies in (the implementation of) the regulatory framework, and identify all state actors who may be implicated in the chain of events.[13]

The Court held that in this case the refusal to authorise the prosecution of authorities raised fundamental concerns.[14] Moreover, the criminal proceedings against the five individual suspects were delayed and became statute-barred in respect of the three suspects.[15] Neither did the civil proceedings provide an effective remedy to state's violations, because they took over twelve years and only limited damages were awarded.[16]

10 *Ibid.*, para. 170.

11 *Ibid.*, paras 173-174.

12 *Ibid.*, para. 187.

13 *Ibid.*, para. 189.

14 *Ibid.*, para. 198.

15 *Ibid.*, para. 193.

16 *Ibid.*, para. 199.

III. THE MISSING BUSINESS KEY

From the perspective of the international framework on business and human rights, the judgment in *Özel v. Turkey* conforms with the prevailing 'duty to protect' approach codified in the UNGPs. According to this approach, states are obliged to adopt and implement a regulatory framework that regulates corporate behaviour (preventative), and remedies must be available in case of non-compliance (remedial). Companies may have a *moral* responsibility to respect human rights, but their *legal* duties can only be grounded in national laws and be enforced by domestic courts.

From a legal point of view, there is nothing wrong with this approach. However, without stepping into the sensitive question of whether companies have legally binding and enforceable duties under international law, the ECtHR could play its part in crystallising corporate accountability for human rights at the domestic level. More specifically, in *Özel v. Turkey* the Court could have discussed two issues: whether corporate conduct can 'violate human rights' and how corporate accountability can or should be enforced in domestic courts.

a) Human Rights Violations by Companies

The very practice of speaking of human rights violations when the conduct of 'private actors',[17] such as companies, is at stake, clashes with the traditional idea that human rights protect individuals against the state. However, human rights bodies, including the ECtHR, have frequently faced situations where the actual breach originated with the conduct of a private actor. The easy way out has been to circumvent this private element, and hold the state responsible for failing to comply with its obligation to protect human rights.[18] This solution is entirely legitimate under international law, because currently no international human rights body has jurisdiction over private actors except one.[19] Although some institutions have taken a further step by alerting companies to their responsibilities.[20] In contrast, in *Özel v. Turkey* the ECtHR declined to reprove the private actor involved, or even mention its responsibility. Instead, the Court judged the entire case in light of the state's shortcomings.

The European Convention[21] was written and signed by states, and no private actors can ever be brought before the ECtHR. Nevertheless, there was no obstacle before the Court expressly stating that the state's international responsibility was vicarious, in that the actual human rights violation was perpetrated by a company. Admittedly, in the case of *Özel v. Turkey* both private actors and authorities were at fault, so that the state's

17 'Private actor' includes not only companies but all non-state actors, whether legal or natural persons.

18 See e.g. Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the Obligation to Protect', *Human Rights Law Review* 9, (2009): 225-56.

19 The exception being the International Criminal Court, which has jurisdiction over individuals but not over legal entities, such as companies. See also HRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', A/HRC/4/35, 19 February 2007.

20 See e.g. UN Committee on Economic, Social and Cultural Rights, 'General Comment 12 on the Right to Adequate Food', E/C.12/1999/5, 12 May 1999.

21 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5.

responsibility was not merely vicarious.

Reproving the company as a human rights abuser changes little in terms of practical outcome. However, one of the reasons why the international legal framework on business and human rights remains obscure and subject to heated debate is because few authoritative bodies have ruled on the concrete human rights duties that companies should bear within the domestic legal system.[22] As the 'duty to protect' approach imposes a tremendous responsibility on states in relation to increasingly powerful companies, international human rights bodies should create a level playing field by specifying which duties companies bear. Accordingly, this is not a plea for international judicially enforceable legal duties for companies, but a call upon human rights bodies, such as the ECtHR, to specify the duties of companies, instead of merely contemplating them through the obligation to protect.[23]

b) Corporate Accountability through Judicial Remedies

One of the most topical issues in the business and human rights debate relates to the judicial enforcement of corporate accountability for human rights.[24] Such enforcement can take a variety of forms, and the question is whether particular circumstances require particular judicial remedies. In *Özel v. Turkey* the ECtHR could have given guidance on the three imponderable remedies regarding the judicial enforcement of human rights violations by companies. Such guidance is indispensable, because one should be wary of unjustifiable unequal treatment of victims of corporate human rights violations. International human rights bodies are in a powerful position, able to eliminate discrepancies under national laws and to create a level playing field by identifying and developing minimum requirements.

1. State v. Private Liability

While the ECtHR only has jurisdiction over states, the applicants in *Özel v. Turkey* could have brought proceedings before the domestic courts against both the implicated authorities and the private actors – although in the end no authorisation was granted to prosecute the authorities. Given that there were arguably grounds for both private and state actors to be held liable in this case, the ECtHR should have used this opportunity to discuss the lurking question over the interrelationship between state and private liability under domestic law for human rights violations by companies.

Generally, action against the state takes the form of an administrative procedure, through which the adequate implementation of the regulatory framework *vis-à-vis* private actors is demanded. The situation in *Özel v. Turkey* was somewhat specific, in the sense that it dealt with the criminal liability of state officials for the deaths and injuries (partly) caused by their conduct. In its judgment, the Court proffered that regardless of

22 See also e.g. Brigit Toebes, 'Direct Corporate Human Rights Obligations under the Right to Health: From Mere "Respecting" Towards Protecting and Fulfilling', in Cernic and Van Ho (eds.), Human Rights and Business: Direct Corporate Accountability for Human Rights, ed. Cernic & Van Ho (Oisterwijk: Wolf Legal Publisher, 2015), 267.

23 The terminology in this sentence stems from Knox's typology of contemplating, specifying, placing and enforcing correlative private duties. John H. Knox, 'Horizontal Human Rights Law', *American Journal of International Law* 102 (2008): 1-47.

24 In conformity with the obligation of states to provide access to effective remedies, in particular judicial remedies (see Principles 25 and 26 of the UNGPs).

any criminal liability of the private parties involved, 'the absence of criminalisation and prosecution of persons exercising public functions, due to the refusal to authorise [such proceedings] by the administrative authorities, raise[s] an issue under Article 2'.[25]

The Court did not develop this general statement, which is regrettable from a business and human rights angle, as it could have untangled some of the questions referred to above. Consider the following fictitious illustration. Babies die after the consumption of milk powder that was produced in a particular factory in blatant violation of food safety regulations. The authorities fail to adequately monitor these regulations because they lack the necessary human and financial resources. Proceedings against the factory and/or its directors are successful and result in appropriate compensation and sanctions within a reasonable time. In addition, the government thoroughly reviews the circumstances of the dramatic event and adopts measures to enhance the human and financial resources of the food safety agency.

In this illustration, the authorities clearly violate their positive obligations under the substantive limb of Article 2, as they fail to monitor the factory producing the milk powder as a result of which babies died. However, in light of the successful claims against the actual perpetrators and the authorities' review of the regulations, there is arguably no violation of the procedural limb of Article 2. A scenario in which only the authorities could be prosecuted would even be worse. If the parents could only sue the authorities and not the factory and/or its directors, they would be disempowered, because holding the actual perpetrator accountable can be an important step in the healing process.

In sum, instead of sticking to a general statement the Court should have shed light on the interplay between state and private liability at the domestic level when human rights violations are committed by private actors. On the one hand, requiring that a cause of action against the actual perpetrator is available seems expedient. On the other hand, the ECtHR should identify the circumstances, if any, in which a state acquits itself of its obligation to protect and in which a cause of action that is available against the private perpetrators only, and not against the implicated authorities, is sufficient.

2. Criminal v. Civil Liability

In *Özel v. Turkey* both criminal and civil proceedings were available, so the ECtHR had a unique opportunity to discuss the relationship between criminal and civil liability for human rights violations committed by companies. Qualifying all corporate misconduct as a crime is arguably inconceivable. However, chances are that national laws differ as regards the criminalisation of acts or omissions by companies or their employees. Such legal divergence increases the risk that multinational enterprises relocate in view of the applicable regulatory standards.[26]

Criminal proceedings have at least two appreciable features: the stigma attached to a finding of guilt and the responsibility of the public prosecutor to collect evidence. Nevertheless, the argument that every interference by a company with a human right

25 *M. Özel and Others v. Turkey* App. 14350/05, 15245/05 and 16051/05, 17 November 2015, para. 198. Unofficial translation from French by the Author.

26 Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *Yale Law Journal* 111 (2001), 463; August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in Alston (ed.) Non-State Actors and Human Rights, ed. Alston (Oxford University Press, 2005), 54-55.

amounts to a crime is hardly sustainable. The ECtHR should thus clarify whether and under what circumstances corporate conduct should qualify as a crime in order for a state to comply with its obligations under the European Convention. The Court is actually not unfamiliar with making such assessments. In a number of previous judgments which did not deal with corporate conduct, the Court held that criminal law provisions had to be put in place – for instance, in relation to intentional killings, slavery and forced labour and human trafficking.[27] Therefore, in *Özel v. Turkey* the ECtHR could have discussed whether the fact that a human rights violation is committed by a company, as opposed to an individual, affects the question of whether criminal law provisions are required.

Moreover, it is unclear whether the qualification of corporate misconduct as 'a human rights violation' – and thus possibly engaging the state's international legal responsibility – has or should have an impact on the severity of the penal sanctions and/or on the amount of damages.[28] Divergence on this issue is probable. The judgment in *Özel v. Turkey* does not elucidate this question, as the Court only held that the amount of the compensation was too modest.

3. Corporate v. Individual Liability

A final judicial enforcement issue that arose in *Özel v. Turkey* deals with the liability of the company itself in comparison to the liability of individual associates, directors or employees.[29] The pros and cons of corporate and individual liability have been discussed in legal scholarship,[30] but authoritative enforcers of human rights have yet to take a stance.

While civil and administrative sanctions can generally be imposed on companies as legal entities, corporate criminal liability is a contentious concept. The main stumbling block is establishing guilt on the part of legal entities, which do not have a mind of their own and can only act through natural persons.[31] In *Özel v. Turkey* the ECtHR is silent about the fact that only individuals can be prosecuted under Turkish criminal law. In light of the controversy about the compatibility of corporate criminal liability with the basic principles of criminal law, the Court is unlikely to impose an obligation on states to hold companies criminally liable – and this paper does not argue that such liability is an absolute requisite. However, there are no ideological controversies regarding civil claims against companies as legal entities. In *Özel v. Turkey* only the construction company was held civilly liable to pay damages. The victims were frustrated that none of the individual defendants had to pay compensation, not even the two persons who were held criminally responsible.

Convincing arguments can be made for both corporate and individual responsibility.

27 ECtHR (Grand Chamber), *Oneryildiz v. Turkey*, App. No. 48939/99 (30 November 2004), para. 92; ECtHR, *Siliadin v. France*, App. no. 73316/01 (26 July 2005), paras 89 and 112; ECtHR, *Rantsev v. Cyprus and Russia*, App. No. 25965/04, 7 January 2010, para. 284.

28 Such qualification may also have a practical impact on the burden and standard of proof, for instance.

29 In this Part III and in Part IV 'corporate liability' entails that the company itself is held liable. In the other sections of the paper 'corporate liability' includes all regimes to hold companies accountable, whether liability is imposed on the company itself or on its associates, directors or employees.

30 See in particular Pammela Q. Saunders, 'Rethinking Corporate Human Rights Accountability', *Tulane Law Review* 89 (2014): 603-68, and Ratner, *Corporations and Human Rights*, 473-475.

31 See e.g. Elidiana Shkira, *Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries,* (2013), full paper available on SSRN.

Personal liability of individuals creates a real deterrent. However, misconduct by individuals can be incited by a 'corporate culture'. In such a scenario, the company is likely to continue business as usual once the responsible individual is reprimanded and perhaps substituted. At the same time, when only the company is held liable and goes bankrupt, there is a real risk that no compensation will ever be paid. Victims can also differ in opinion on whether 'the company' or 'the responsible individual' should be held liable – for instance, when they perceive a company as an abstract entity, they can insist on identifying a natural person as the culprit.[32]

In *Özel v. Turkey* the ECtHR could have clarified the relationship between corporate and individual liability for human rights violations committed by companies. Although the best approach ultimately depends on the circumstances of the case and the victims' wishes, there are clear legal and psychological upsides to leaving open the possibility of holding both the company and the responsible individual(s) accountable. To provide victims with the greatest possibility of recovery, the Court could thus plead in favour of making both roads simultaneously available – whether through criminal or civil liability.

IV. CONCLUSION

The ECtHR's judgment in *Özel v. Turkey* aligns with its established case law and with the international legal framework on business and human rights. The case could possibly go unnoticed, therefore, unless scholars strike a blow for a more realistic and effective approach. Whilst the Court should not deviate from the idea that states bear an obligation to adopt domestic laws so as to prevent and redress human rights violations by companies, authoritative guidance by human rights bodies is much desired and requisite in order for this approach to be truly effective.

Özel v. Turkey touched upon four elements of controversy within the business and human rights debate. On a substantive level, the Court did not seize the opportunity to acknowledge and specify the human rights obligations of companies. With respect to the judicial enforcement of corporate accountability, the Court should have discussed the interplay between different liability regimes – state versus private actor liability, criminal versus civil liability and corporate versus individual liability.

In November 2015, the discussions at the Fifth UN Forum on Business and Human Rights reaffirmed the discord afflicting the HRC since June 2014.[33] Many states are unwilling to negotiate a treaty that imposes and enforces binding human rights obligations vis-à-vis companies; neither has the business community any intention of participating in such a process. Therefore, at the moment, the most logical step forward is strengthening and streamlining the prevailing international legal framework on business and human rights, which demands that states ensure corporate accountability within their domestic legal systems. In order to increase the effectiveness of this approach and to create a level playing field, human rights bodies, such as the ECtHR, bear a particular responsibility to specify duties and to scrutinise liability regimes.

32 Saunders, *Rethinking Corporate Human Rights Accountability*, 653-655; confirmed in semi-structured interviews conducted by the Author in South Africa (Nov. 2014 – March 2015). For questions on methodology, please contact the Author.

33 At the Forum, the HRC adopted two resolutions, one establishing a working group to negotiate a treaty imposing binding and judicially enforceable human rights duties on companies and one endorsing the UNGPs' approach that only states have international legal obligations, whereas companies have a moral responsibility to respect human rights. See footnotes 6 and 7 of this article.