

MONSANTO, THE WITCH WITH THE POISON APPLE(?)

A case study about the legal liability of Multinational Corporations such as Monsanto in International Law

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1. Introduction

This paper will focus on the ongoing and unresolved debate between initiatives to impose binding legal obligations on Multinational Companies (hereinafter referred to as: MNCs) such as Monsanto and their voluntary corporate social responsibility. The aim of this paper is not to provide a full and exhaustive list of tools or mechanisms dealing with MNCs and their negative impact on human rights, but rather to zoom in to what extent MNCs such as Monsanto can be held liable for violations of the right to a healthy environment, the right to food and the right to health (hereinafter referred to as: the basic rights).

1.1 Globalization and Multinational Companies

Due to globalization, powerful non-state actors (hereinafter referred to as: NSA) such as MNCs have been created that may violate human rights. These violations were not thought of during the development of the modern human rights movement. Challenges arise because the law has been designed to restrain abuses by powerful states and state agents. It was not intended to regulate the conduct of NSA themselves or to intervene in states where human rights violations happened.¹

1.2 How to define “Multinational Companies”

According to the United Nations (hereinafter referred to as: UN), the criteria below are generally accepted as characteristic of MNCs:

- Transnationality (activities in various countries);
- Global business strategy;
- Central decision-making;
- Economic power (market influence, size).²

1.3 The rise of MNCs

MNCs are believed to originate from the 16th century. It started from the colonizing and imperialist travels from Western Europe.³ Companies such as

¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford Scholarship Online, 2010)

² Louis Emmerij and Richard Jolly, ‘The UN and Transnational Corporations’ (UN Intellectual History Project, New York, July 2009)

British and Dutch East India Trading Company traded goods and services across national boundaries and had a geographical reach rivaling today's largest MNCs.⁴ Since that time the influence of companies with international nature has been growing steadily and have shifted the economy from international to globalized. The capability of MNCs to accumulate the financial and human resources around the world and to use them in commercially beneficial activities made them the most outstanding form of business.

The economic activities of MNCs have been the subject of a series of research studies both sociological and economic. With the research the development process of countries of the Third World have been assessed as to what effect MNCs have on it with their activities. Findings however have been contradicting. Some studies say that activities of MNCs are good for developing countries / economies, whilst others conclude that these activities are damaging the development process of these countries. MNCs tend to search for cheap locations to create their goods. This results in them choosing countries where the wages are low and labor rights protection are weak. The result is that basic rights are often denied. Various lawsuits show the harm MNCs can inflict on the environment when no regulations are applied in their home countries.⁵ One sharp example of environmental problems caused by MNCs, is the Monsanto case.

1.4 Who is Monsanto?

Monsanto was originally a chemical company which provided chemical weapons to the US Government during the Vietnam War in 1960. After the war, the company had to change strategies as chemical weapons were no longer needed. In 1980, the company began experimenting with genetically modified seeds, organisms and even animal body parts. All research they did was patented. Monsanto now controls over 90% of the global seed market and with more than

³ Jed Greer and Kavaljit Singh, 'A Brief History of Transnational Corporations' (*Global Policy Forum*, 2000) <<https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html>> accessed 28 January 2019

⁴ Alfred D. Chandler, Jr. and Bruce Mazlish, *Leviathans: Multinational corporations and the new global history* (Cambridge University Press, 2005)

⁵ David Kinley, *Human Rights and Corporations* (1st edn, Routledge, 2009)

11,000 patents, they also own and control plant materials we consume on daily basis.⁶ With its patents and sale of its products, Monsanto is gaining control of the world's most essential resource, namely food.⁷

1.5 Critics on Monsanto

Worldwide Monsanto's use of the herbicide "Roundup" has been criticized by NGOs. Roundup contains glyphosate, which is a chemical that poses great risks for human health and environment. This chemical is toxic towards plants and can cause damage to the endocrine system of human cells. A study, assigned by Friends of the Earth Europe (hereinafter referred to as: FOEE), found in urine samples from 18 different European countries traces of the herbicide. The reports also showed increase in birth defects in Paraguay, increased rates of genetic abnormalities and miscarriages in Ecuador and Colombia, and an increase in cancer rates in Argentina.⁸ Since at least 1978, several lawsuits have been filed against Monsanto. The trial of the century was the Dewayne Johnson v. Monsanto case.

1.6 The Dewayne Johnson v. Monsanto case

In August 2018, the Superior Court of California in San Francisco awarded Dewayne Johnson US\$250 million in punitive damages and about US\$39 million in compensatory damages against American chemical company Monsanto after ruling that its famous herbicide Roundup gave the former school groundskeeper terminal cancer. During the trial, the jury heard evidence on how Monsanto deliberately withheld information about the cancer-causing effects of Roundup from the public for decades.⁹

Johnson, 46, was responsible for mixing and spraying hundreds of gallons of Monsanto's glyphosate-based product line and applied the herbicide 20 to 30

⁶ Anna Lailley and JC O'Connell, 'The Monsanto Monopoly' (*How they gained monopoly power*, 12 April 2012) <<http://greenwoodeconomics.blogspot.com/2012/04/monsanto-monopoly-by-anna-lailley-jc.html>> accessed 28 January 2019

⁷ *ibid.*

⁸ Facing Finance, 'Monsanto: Environmental and Public Health Violations Related to Pesticides and Genetically Modified Crops' (Facing Finance, 7 January 2014) <<http://www.facing-finance.org/en/database/cases/monsanto-environmental-and-public-health-violations/>> accessed 28 January 2019

⁹ Dewayne Johnson et al. v. Monsanto et al. [2018] Superior Court of California CGC-16-550128

times per year. In 2014, he was diagnosed with non-Hodgkin's lymphoma. The disease means that Johnson can sometimes be too crippled to speak while 80 percent of his body is covered with lesions. The Dewayne Johnson v. Monsanto case is the first Roundup cancer lawsuit to proceed to trial. Currently, there are more than 5,000 similar cases in the United States (US), 450 of which are in California. Plaintiffs include cancer patients, spouses of cancer patients or their estates. Based on this ruling the Vietnamese government renewed its demand that Monsanto and other US companies involved in the production of Agent Orange should pay compensation to victims in the country.¹⁰

1.7 The Vietnam v. Monsanto case

The history of Monsanto and Vietnam go back at least 50 years when it was asked to produce chemical weapons for the US government. The result, Agent Orange, was used by US troops in their fight against the Vietnamese forces. Agent Orange had the power to remove ground cover (plants, trees, etc.) and destroy food.¹¹ Monsanto was one of few companies which provided the US government with this chemical. About 12 million gallons of Agent Orange over a large portion of southern Vietnam has been sprayed by the US Army.¹²

The Vietnamese pursued the US government back in 2004, to accept liability for the consequences of the toxics used by the US during the war in Vietnam. The Vietnamese alleges that Monsanto, who made the herbicides, were in “violation of international law and war crimes, and under the common law for products liability negligent and intentional torts, civil conspiracy, public nuisance and unjust enrichment, seeking many damages for personal injuries, wrongful death and birth defects and seeking injunctive relief for environmental contamination and disgorgement of profits.”¹³

¹⁰ *ibid.*

¹¹ Dien Luong, ‘55 Years After Agent Orange Was Used In Vietnam, One Of Its Creators Is Thriving Here’ (*World Beyond War*, 31 October 2017) accessed 28 January 2019

¹² Tom Fawthrop, ‘Vietnam’s war against Agent Orange’ (*BBC News*, 14 June 2004) <<http://news.bbc.co.uk/2/hi/health/3798581.stm>> accessed 28 January 2019

¹³ War Legacies Project, ‘Agent Orange Record’ (*AOR*, 3 August 2010) <<http://www.agentorangerecord.com/home/>> accessed 28 January 2019

Monsanto, which has never acknowledged its role in the devastation, argues that Agent Orange “was only produced for, and used by, the government,” noting that Monsanto was just one of nine wartime government contractors who manufactured the same toxin from 1965 to 1969. An international court opened in France in 2009 to deal with the matter of Agent Orange and the Vietnamese victims. However, neither the US government nor the companies sued appeared before the court. On the 18th of April 2017, in The Hague, the Netherlands, the Monsanto Tribunal decided that Monsanto was guilty of ecocide causing long-term consequences on the ecosystem of various nations, including Vietnam.¹⁴

1.8 Monsanto Tribunal

The aim of this tribunal is to hold the chemical and seed giant Monsanto to account for violations of human rights around the world. To this end, a panel of international experts was set up to assess an indictment of environmental associations, farmer’s organizations and indigenous peoples. The panel came to the conclusion that Monsanto applies “practices that have a negative impact on the right to a healthy living environment, the right to food and the right to health.”¹⁵

The tribunal ruled that the activities of Monsanto can constitute a crime of ecocide. However, such a crime is not recognized in international criminal law yet. The term ecocide has been used to define a loss of biodiversity and natural ecosystems, but also damages caused to people’s health. Monsanto decided not to defend their practices before the tribunal considering the tribunal a farce.¹⁶

1.9 Accountability of Monsanto under International Law

Since the 19th century, states were viewed as the only entities capable of bearing legal rights and duties when looked at from an international law perspective.¹⁷

¹⁴ VietNamNews, ‘Monsanto court ruling bolsters the hope for millions of Vietnamese Agent Orange victims’ (*VNN*, 26 August 2018) <<https://vietnamnews.vn/society/464566/monsanto-court-ruling-bolsters-the-hope-for-millions-of-vietnamese-agent-orange-victims.html#oLqpckD163Dc8Q2a.97>> accessed 28 January 2019

¹⁵ Foundation Monsanto Tribunal, ‘International Monsanto Tribunal’ (*Monsanto Tribunal*, 2 December 2015) <<http://www.monsanto-tribunal.org/>> accessed 28 January 2019

¹⁶ Tommaso Perrone, ‘Monsanto has been found guilty of “ecocide”’ (*LifeGate*, 3 May 2017) <<https://www.lifegate.com/people/news/international-monsanto-tribunal-ecocide>> accessed 28 January 2019

¹⁷ Emeka Duruigbo, ‘Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges’ (2008) NJIHR

Only a few number of international legal norms have been applied directly to NSA. Those were primarily related to war crimes, crimes against humanity and/or forced labour.¹⁸

MNCs have not yet been recognized by the international legal system. Under international law, Monsanto can only be held accountable for its actions on a limited basis, even though its actions impact human rights.¹⁹ Several international initiatives have been created that impose direct obligations on MNCs, such as the Draft set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises.²⁰ However without consensus among the various nations, there is no binding instrument currently. Another possibility to hold MNCs liable is to extend the jurisdiction of the International Criminal Court.

The Monsanto Tribunal concludes that jurisprudence has to be developed in the first place on ecocide to accuse the acts of Monsanto as a form of crime. If ecocide is recognized as a crime in international criminal law, the activities of Monsanto could be denounced as such.

This means that the fight against Monsanto has still a long way to go, since the liability of MNCs has been limited to international criminal law.²¹

1.10 Conclusion

International law does not directly address MNC's, when they are evading responsibility and legal liability, and cannot hold individual states responsible for MNCs conduct abroad. Its powers to enforce punitive actions are limited. To battle the impunity of MNCs it is required to create a corporate standard on both national and international levels.

<<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1073&context=njihr>> accessed 28 January 2019

¹⁸ Carlos Manuel Vazquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2012) Columbia Journal of Transnational Law <<https://ssrn.com/abstract=844367>> accessed on 28 January 2019

¹⁹ Esther M.J. Schouten, 'Defining the corporate social responsibility of business from international law' (2007) Managerial Law <<https://doi.org/10.1108/03090550710759658>> accessed 28 January 2019

²⁰ Sune Skadegaard Thorsen and Annemarie Meisling, 'Perspectives on the UN Draft Norms' (OHCHR, 26 June 2004) accessed 28 January 2019

²¹ *ibid* 18.

In my opinion, the ongoing debate between initiatives to impose binding legal obligations on MNCs (such as Monsanto) remain unsolved as liability of MNCs is still in development.²² Yet, with the Monsanto Tribunal, the opportunity has been created to hold Monsanto liable in international law.

1.11 Is Monsanto the witch with the poison apple?

The answer to this question is 'no', until international law succeeds to develop mechanisms which improve democratic accountability in developing host countries. To gain this balance, international rules, legal frameworks and processes for addressing abuses by MNCs must also be created.

²² John Gerard Ruggie, 'Multinationals as global institution: Power, authority and relative autonomy' (2017) Regulation & Governance <<https://doi.org/10.1111/rego.12154>> accessed 28 January 2019

2. Summary

Globalization has created staggering opportunities for MNCs around the world and Monsanto is at the forefront of those opportunities. The advantage Monsanto brings to farmers through their supply chain allows them to continue to be a leader in their industry. According to NGO's, Monsanto harms the environment and health, including with its pesticide Roundup and through the development of genetically modified crops. The extent in which Monsanto can be held liable for its actions and the impact it has on human rights, is still limited. According to the Monsanto Tribunal, jurisprudence has to be developed in the first place on ecocide to accuse the acts of Monsanto as a form of crime. If ecocide is recognized as a crime in international criminal law, the international law can hold Monsanto liable for its actions. Even though we have a long way to go, the creation of a legal framework by the Monsanto Tribunal, wherein MNCs will be legally held liable for misbehaviour, is showing up on the horizon.

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<<http://www.agentorangerecord.com/home/>> accessed 28 January 2019

4. Appendix (A) for further information

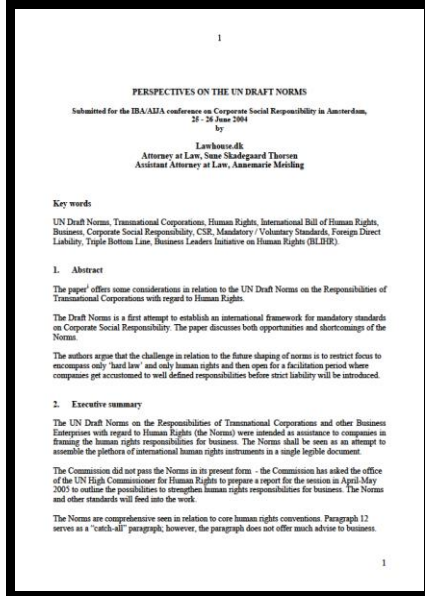
Type	Name	Source
Website / Video	The World according to Monsanto	https://www.youtube.com/watch?v=6nNFmzA0tJI
Website / Video	Monsanto's Toxic Tricks	https://www.youtube.com/watch?v=9-R2jPnbTt8
Website / Video	Toxic Rain – The Legacy of Agent Orange	https://www.youtube.com/watch?v=XUFlonB69h8
Website / Video	How America got into the Vietnam War	https://www.youtube.com/watch?v=y4l2H-DWDVU
Website / Video	Monsanto Tribunal	www.monsanto-tribunal.org
International Organization	War Legacies Project – Agent Orange Record	www.agentorangerecord.com
International Organization	WTO – Sanitary and Phytosanitary measures	www.wto.org/english/tratop_e/sps_e/sps_e.htm
International Organization	WHO – International Agency for Research on Cancer	www.iarc.fr
NGO	European Food Safety Authority	www.efsa.europa.eu
NGO	European Chemicals Agency	echa.europa.eu
NGO	Health and Environment Alliance	www.env-health.org
Other actors	BASF, the world's largest producer and marketer of chemicals	www.basf.com/nl/nl.html
Other actors	LifeGate - Ecocide	www.lifegate.com/people/news/international-monsanto-tribunal-ecocide
Other actors	Environmental Protection Agency	www.epa.gov

Normative Frameworks	Voluntary Principles on Security and Human Rights	www.voluntaryprinciples.org
Normative Frameworks	Guiding Principles on Business and Human Rights	www.ohchr.org
Normative Frameworks	GREEN PAPER: Promoting a European framework for Corporate Social Responsibility	www.europa.eu
Normative Frameworks	The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights	www.business-humanrights.org
Normative Frameworks	General Agreement on Tariffs and Trade	www.wto.org

5. Appendix (B) Normative Frameworks

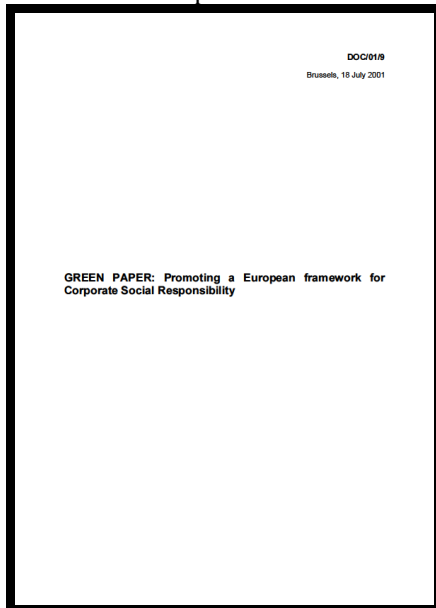
Perspectives on the UN Draft Norms

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Promoting a European framework for Corporate Social Responsibility

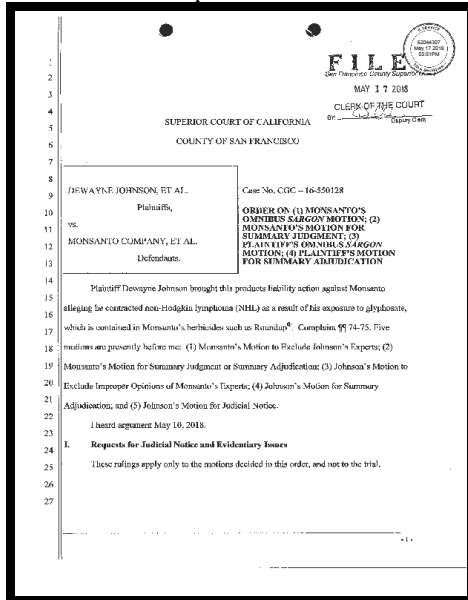
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6. Appendix (C) Decisions/Rulings

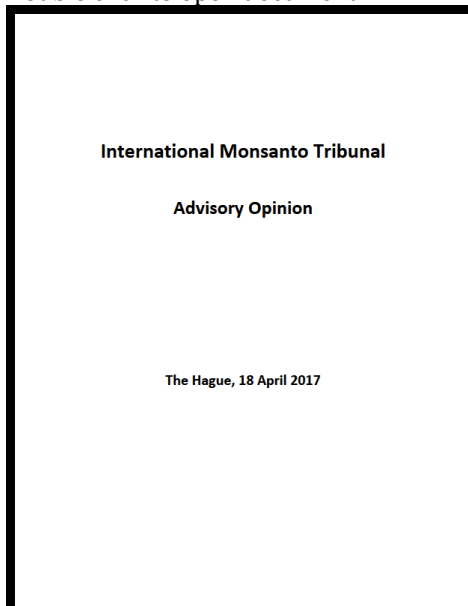
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Decision International Monsanto Tribunal

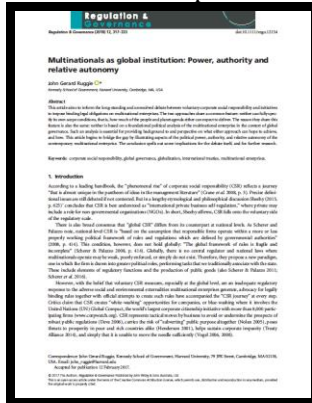
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7. Appendix (D) Academic Articles Law

Multinationals as global institution: Power, authority and relative autonomy

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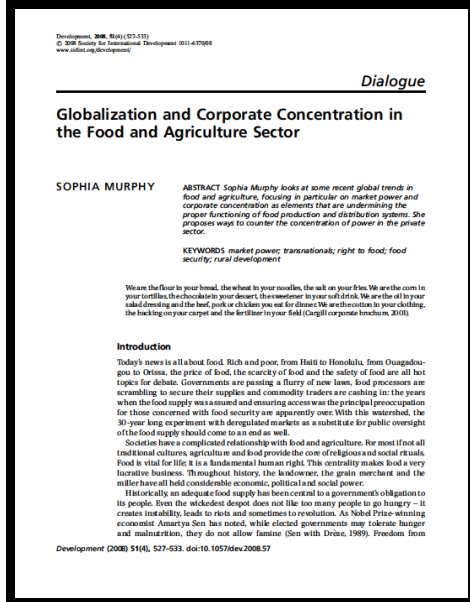
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8. Appendix (E) Academic Articles within other disciplines

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