

The impact of globalization on human rights in the developing world:

Transnational corporations and human rights – the masterpieces of globalization in the era of democratized violence

Abstract

The main idea of the paper is that in the era of globalization and democratized violence the main threat to the enjoyment of human rights comes not from the state, as before, but from Transnational Corporations (TNCs). Particularly vulnerable to this threat are developing countries, since for the circumstances peculiar to them existing system of ensuring accountability for human rights violations by non-state actors, *inter alia* TNCs, is inherently dead-born; While the paper suggests a new avenue to seek justice against TNCs, it underlines the necessity of constructive dialogue between business and human rights that should be based on mutual respect for both interests.

Key words: transnational corporations, human rights, democratized violence, developing countries, Trojan Horse of democracy

Prelude

Demise of the nation state

The motivation of this paper is the fact that globalization has already led to the situation when the state is no further the main source of violence against individuals but almost *primus inter pares*. What we are facing now is the *democratization of violence* having replaced the previous - elite system of coercion, where it was only the state who had monopoly over the necessary capacities and legitimacy to use the power against the individual. [I]n the era of democratized violence threats to the enjoyment of human rights come from non-state actors rather than directly from state agents.¹

This shift of powers from state to non state actors is the result of mainly two new developments in international political and economic order: a strong wave of democratization of governance (emerged as a reaction to the unheard atrocities committed by the omnipotent state

¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, (2006)

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elevated to the level of totalitarianism in the 20th century) and economic globalization committed to the ideas of free market and trade liberalization.

It is a generally accepted fact that globalization, mainly economic one - a new supranational order somehow 'beyond' or 'over' the sovereignty of individual states has dramatically diminished the importance of each single state's jurisdictional lines for the conceptualization and resolution of problems facing its own citizens and international community in general.²

As often observed, the main beneficiaries of this process are big economic entities, and mostly transnational corporations.³ (*hereinafter* TNCs). The general decline of the state's powers has opened the door for them to take after those activities which at one point of time were in the [exclusive]domain of [nation] state.⁴ This change exposed the individual before a multi- actor system with each of the actors having considerable capacities to directly effect his or her freedom and rights. That is how the state monopoly of power was challenged by non state actors, mostly by TNCs, and led to so the called *democratization of violence*.⁵

However, what turned the *democratization of violence* into a minefield for human rights (*hereinafter* HR) was the fact that transfer of powers and functions from states to private actors was not accompanied by a transfer of responsibilities.⁶ While the biggets portion of powers to effect human rights were shifted to TNCs, the duties to protect and guarantee them were left solely to the nation state, which by that time was already robbed by globalization of appropriate

² see e.g. Cosmo Graham, *Human Rights and The Privatization of Public Utilities and Essential Services*, and Alfred C. Aman, JR, *Privatization, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law in Privatization and Human Rights in the Age of Globalization* (Koen De Feyter, Felipe Gomez Isa ed.) 2005;
Clair Apodaca, *Global Economic Patterns and Personal Integrity Rights after the Cold War* Clair Apodaca, *International Studies Quarterly*, 2001

³ Kofi A. Annan, *Help the Third World Help Itself*, *Wall St. J.*, Nov. 29, 1999, at A28.

⁴ RIGHTS VIOLATIONS BY MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: WHERE FROM HERE? by Surya Deva, 19 *Conn. J. Int'l L.* 1 *Connecticut Journal of International Law*, Fall 2003

⁵ for the notion of *democratization of violence* see further Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, (2003)

⁶ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 *Berkeley J. Int'l L.* 45 *Berkeley Journal of International Law* 2002

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capacities to exercise effective control over the emerging dominance of transnational corporations.

It was this huge gap between powers and responsibilities that created a loophole in the legal system opening the way to mass human rights violations and subsequent policy of impunity.

The preliminary question in the paper, as suggested in the title, is the impact of globalization and in particular of its masterpieces- TNCs on human rights in the developing countries. As a generally accepted fact, these are the countries who have paid the highest price for globalization but have not gained proportionate benefits from it.

To deal with the mentioned question, first part of the paper focuses on effects of economic globalization on the state as well as on transnational corporations, who are generally considered to be the most powerful non state actors of our times. Paper first pours some light on TNCs - mysterious masterpieces of globalization and their omnipotent power. Then it deals with concrete cases of 'cleaning the ways' to TNCs in the developing countries. As a next step the paper suggests that the consequences of the 'cleaning' would not have been as drastic as they in fact are, if there was an effective legal avenue to hold corporations accountable for their abuses and to compensate victims.

Bearing this proposition into mind, the paper explores and further elaborates on the major loopholes in the present system of rights' protection against non-state actors, particularly TNCs.

In order to make the problems as well as solutions more evident, the paper concentrates on the most common scenarios of rights' violations by transnational corporations taking into consideration some relevant specificities of the developing world. In the light of those scenarios it reaches the conclusion that in the era of democratized violence the existing system, in which the state is the sole target of international human rights obligations, is not a sufficient legal framework to guarantee universal respect for and protection of human rights.

At the end, the paper elaborates on a new avenue to find justice for the victims of transnational corporate actors and asserts that the avenue should be opened if the international human rights law intends to remain an adequate safeguard for human freedom and rights.

On the other hand, while the paper strongly takes the position that business should adhere to the rules of socially responsible global citizenship, it criticizes the trend towards excessive burdening of business with general considerations of human rights and democracy. The paper claims that desire transnational corporations to serve as a Trojan Horse of democracy in the developing world is a deep misunderstanding of the nature of both: democracy and the TNC,

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which has neither appropriate capacities nor legitimacy to take after the role of a democratic reformer.

The final observation of the paper is that solution of abovementioned problems is not in criticism and endless process of passing on each other the 'hot potato' of democratic reforms in the developing world; but solution is in constructive and continuing dialogue between business and human rights. Above all, the paper assert that the blueprint of this dialogue is to be the understanding that compromising human freedom and dignity to the considerations of business is too high price to be paid in the 21st century.

Transnational Corporations - Masterpieces of Globalization

TNCs are economic entities or cluster of economic entities that do not confine their activities to one single state, have multiple layers or ownership and control and simultaneously operate in several jurisdictions.⁷

Today more than half of the world's 100 largest economies are corporations with relatively more power than the government of the state in which they operate.⁸ The revenues of largest fifteen corporations are bigger than of all but thirteen nations. General Motors, for example, is larger than the national economies of all but seven countries. The consequences of their decisions or activities reach far beyond the capacities of any single nation state. TNC have enormous influence on the economies of most countries and in international economic relations. And the trend is toward greater corporate dominance: a comparison of figures from 1991 and 2000 shows a dramatic change over nine years. In 1991, nineteen countries had revenues higher than General Motors, compared to only seven today; similarly, in 1991, three corporations were among the top twenty-eight economic entities, compared to fifteen today.⁹

⁷ There is no uniform definition of TNCs, see e.g. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); The OECD Guidelines for Multinational Enterprises, June 27, 2000, 40 I.L.M. 237, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 17, 2000, 41 I.L.M. 186, U.N. Global Compact 2000, <http://www.unglobalcompact.org>; Peter Muchlinski, *Multinational Enterprises and the Law* 12 (1995)

⁸ P.Sheehan, 'Leviathan Inc', *The Sydney Morning Herald* (Sidney, Australia) 15 January 2000, cited by Robert McCorquodale in Human Rights and Global Business, *Commercial Law and Human Rights*, (ed. by Stephen Bottomley and David Kinley, 2002)

⁹ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy.¹⁰ Their role in the globalized world has become too important to be ignored.⁴

This data pours some light on the issue of why they are considered to be the most powerful non state actors and sometimes even more influential than many of the states where they operate taken together.

Due to their huge power which is mainly controlled not by law but by global free market, the threat they have posed to the enjoyment of human rights is considerably bigger than one coming from any other actor, including the state itself;

It was the lack of adequate, if any, legal constraints on their passionate pursuit of profit that opened a minefield for HR. The list below names but does not exhaust the rights TNCs were alleged to have violated:

Human rights to life, including the right to enjoy life; freedom from torture and cruel, inhuman, or degrading treatment; freedom from forced or slave labor; freedom from arbitrary detention or deprivation of security of person; freedom to enjoy property; freedom from deprivation of or injury to health; enjoyment of a clean and healthy environment - the latter also implicating interrelated international law recognizing private responsibility for pollution; - and freedom from discrimination. One should also consider private corporate deprivations of rights such as free choice in work; fair wages, a "decent living," and remuneration for work of equal value; safe and healthy working conditions; protection of children from economic exploitation; and protection of mothers.¹¹

The threat to human rights coming from TNCs became particularly evident in the light of deleterious consequences of their activities in developing countries, those who due to the legacy of colonization, dictatorial regimes and extreme poverty were already suffering from *per se* unfriendly environments for the realization of individual freedoms and rights. Those countries and peoples appeared to be extremely vulnerable to TNCs enormous power.

¹⁰ I.d.

¹¹ Jordan J. Paust, Human Rights Responsibilities of Private Corporations, 35 Vand. J. Transnat'l L. 801, 817-19 (2002); HUMAN RIGHTS VIOLATIONS BY MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: WHERE FROM HERE? by Surya Deva, 19 Conn. J. Int'l L. 1, Connecticut Journal of International Law, Fall 2003

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The stories below are living examples of how brutally did the masterpieces of globalization robbed those poor and marginalized communities of their last remnants of freedom and dignity.

'Cleaning the ways' to TNCs: real stories of HR violations

One of the most notorious stories of mass HR violations is connected with the name of Unocal- oil extraction company operating in Burma. When the TNC started its operations in the country, the state was governed by military regime already known for its involvement in gross human rights violations. Despite this fact, the corporation concluded a contract with the state military to provide security protection for the pipeline project.

[T]o clear the way to the pipeline and the accompanying infrastructure, while discharging the 'contractual duties,' the military committed grave human rights violations, *inter alia* relocation of the entire villages and the forced labor. In order to compel people to work soldiers used tactics such as murder and rape. Violations committed against villagers along the pipeline route, for and under the banner of protecting the corporate project included killings, torture, rape, displacement of entire villages, and forced labor.¹²

Unocal became a famous story also because of its almost successful way up to US courts to find justice. However, before the final decision, the corporation managed to make a settlement outside the court. Monetary terms of the settlement weren't made public.

Unocal story is a telling example of the fact that in its pursuit of profit TNC can go as far as getting into close union with notorious military junta, the one already having a long and nasty records of human rights abuses. The case also demonstrates that corporation, while possibly not having original intention to launch the forced labor campaign in the country(as *Unocal* alleged), may choose not to refuse the benefit coming from the continuing abuses committed by military forces under the name of the corporation.

On the other hand, it is also an example of how economic engagement by TNC may support or promote continued violations of human rights in the country: [M]ore than providing a motivation for the abuses, the pipeline project provided material and financial support to the security forces. Participation by the company in the provision of military security was intimately

¹² Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000).

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linked to the army's human rights abuses. Absent the pipeline project, the abuses would have never occurred.¹³

Presence of *Shell* in the country and its close contacts with the military had even more devastating consequences on human rights and ethnic tensions in Nigeria: “[p]ipeline’s presence has notably increased the presence of security forces (providing protection to the pipeline) in the region of civil unrest and armed opposition to the dictatorship by ethnic groups. As a result [v]iolent clashes took place between the communities on one side and army, police and security staff on the other. Violent conflicts also occurred between communities and even between those groups of communities.”¹⁴

There is a strong evidence that following the principle of “divide and rule” both, the government and the TNC encouraged and later on benefited from these conflicts. “National and international observers claim that *Shell’s* practice of payments through the awarding of contracts to traditional chiefs in communities, their payments of compensation for environmental pollution and the distribution of development projects were deliberately aimed to corrupt chiefs and divide communities.”¹⁵ In addition to creating a reason for conflict, Shell used its financial powers to fuel it by arming a private military force, supplying weapons and financial support to the Nigerian military and police force and in other ways co-operating with Governmental authorities.¹⁶ Above all, it was clear that violent conflicts did occur between groups who benefited from Shell’s operations and those who did not.¹⁷

The final accord that unmasked the severe fight of the state (by the support of the corporation) against the local population to protect the interests of the corporation was the sham trial and conviction to death of Ken Saro Wiwa, one of the most influential local leaders

¹³ ATCA'S ACHILLES HEEL: CORPORATE COMPLICITY, INTERNATIONAL LAW AND THE ALIEN TORT CLAIMS ACT by C. Forcese, 26 Yale J. Int'l L. 487 Yale Journal of International Law Summer 2001.

¹⁴ EarthRights International & Southeast Asian Information Network, Total Denial: A Report on the Yadana Pipeline Project in Burma (1996)

¹⁵ Malin Kall, *Oil-Exploitation in Nigeria: Procedures Addressing Human Rights Abuses* in *Expanding the Horizons of Human Rights Law*, (ed. Ineta Ziemele) 2005

¹⁶ see I.d

¹⁷ Human Rights and Environmental Operations Information on the Royal Dutch/ Shell Group Companies, Independent Annual Report (Shell International 1996-97)

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struggling against the repression of the locals and harm to the environment caused by the Pipeline

Both the government and the corporation got a direct benefit from this fight against local population. The division and suppression made it more difficult for the latter to demand from the corporation compliance with international norms protecting the environmental and fair distribution of benefits. In addition if unity was created between these clashing groups the share of the oil revenue flowing to the pockets of members in the Government would decrease. The population on the other hand was trapped in furious violence coming on the one hand from internal community conflicts and on the other hand stronger military, generously financed by Shell. They could not get fair benefits from the pipeline but became even more oppressed and marginalized than before.¹⁸

To sum up, *Shell's* story in Nigeria is the story of how the TNC's presence in the country deepened existing conflicts and generated new ones, causing in the society even more division, violence and impoverishment as a result of harm to environment than is was before the TNC entered there.

Another example where the TNC helped strengthening of governing regime against the local population is the case of *Freeport* in Indonesia where corporation helped the centralization of the state government with detrimental 'end-product' on human rights: Freeport was operating the region of Papua, a region with deep separatist sentiments almost from Indonesia's independence, and the only one following Christianity in the world's biggest Muslim country. [T]he mine became a chance for the military, deeply nationalistic institution not only to profit but also to deepen its presence in a province where it had barely a toehold before *Freeport* arrived.¹⁹

¹⁸ see generally Malin Kall, in *supra note* 16 (describing the situation that the primary beneficiary of the money coming from the pipeline project was government: *Shell* has estimated that from in 1958 when it first started its operations to until the mid-1990s, about 79 per cent of the profits of the oil produced has gone to the Nigerian Government in taxes, royalties and equity stake. To the criticism that money was not fairly distributed to the local population *Shell* answered that the distribution of royalties and taxes was clearly a matter for the Nigerian Government and the Nigerian people. As for the environmental pollution, *Shell* paid compensation for it, however, since the only owner of the land was the government, ordinary people got very little from it.)

¹⁹ Militarized commerce Below a Mountain of Wealth, a River of Waste By Jane Perlez and Raymond Bonner *New York Times* December 27, 2005

As in previous cases, here also strengthening of the state repressive machinery led to massive human rights violations: The Indonesian Human Rights Commission determined that human rights abuses in the mine region were directly related to activities of the armed forces and military operations carried out in connection with efforts to overcome the problem of peace disturbing elements . . . and in the framework of safeguarding mining operations of *PT Freeport Indonesia* which the government has classified as a vital project."²⁰

Thus, *Freeport* case like *Unocal* and *Shell* proves the correctness of the observation that [w]hen the state is already repressive and the investor focuses narrowly on the project at hand, then the inflow of capital will likely serve only to line the pockets of the local elite and enhance their repressive capabilities.²¹

Apart from violations connected with particular TNCs, HR monitoring organizations have also recorded abuses committed with the aim of attracting investments, this was the case of Burma for example, when during the period 1992-97 approximately two million Burmese people were used for forced labor to make the Burmese infrastructure more attractive for foreign investment and tourists. The forced use of citizens as porters by the army was accompanied by mistreatment, illness, and sometimes deaths was a common practice.²²

Another scenario when hunting for investment has detrimental effects on human rights is when the state lowers the applicable HR standards in order to prove its advantageous position for the investor.²³

The last two examples demonstrates that even entering the country, TNCs may become the incentive and reason of human rights violations.

Another field crucial to human existence where the detrimental effect of transnational corporate activity has been clearly demonstrated is environment: Several lawsuits illustrate the

²⁰ *supra note 18*

²¹ Foreign investment and human rights, International Lessons, Spar Debora, copyright 1999 M.E.Sharpe Inc. Challenge, January 1, 1999

²² Mark B. Baker, Crosby v. National Foreign trade Council(NFTC): Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma; the Commonwealth of Massachusetts, the WTO, and the Federal Courts, 32 Law & Pol'y Int'l Bus. 51, 2000

²³ See generally Michael E. Porter, Competition in Global Industries: A Conceptual Framework, in Competition in Global Industries 15 (Michael E. Porter ed. 1986)

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harm that transnational can inflict when freed from the environmental regulations that apply in their home countries. Texaco in Ecuador, Freeport-McMaron in Indonesia, and Shell in Nigeria have been accused of using devastating practices long banned in Europe and the United States. In Ecuador, for example, Texaco oil operations have reportedly spilled million gallons of oil and dumped billions of gallons of untreated toxic brine into the water and soil. In Indonesia, investigators have accused Freeport-McMaron of dumping hundreds of thousands of tons of toxic mine tailings into local waterways, destroying the local river, flooding surrounding forests, and polluting lakes and ground water.²⁴

Shell's operations in Nigeria are reported to have devastated large tracts of land, producing fires that burn around the clock and soaking the groundwater with oil.²⁵ This harm to the environment and the slippery slope consequences following it clearly demonstrated the close connection of environment with other fundamental human rights.: Extraction of oil in Ogoni land (Nigeria) caused severe pollution of the environment, violating the rights to a clean environment and health; Destruction of their homes and crops as a result of oil extraction amounted to deprivation of individual right to property and also the collective right to the people's "own means of subsistence." Inadequate compensation for rendering the land economically useless after the extraction of oil led to extreme poverty- the most direct way to perpetuate further exclusion and marginalization of people robbed of their rights and dignity.

To sum up, the abovementioned cases of rights' violations in connection with TNCs put forward the following conclusions: TNCs can be a strong incentive for the government to abuse human rights or lower the standard of their protection to attracting investment; after entering the country TNCs can serve as a direct cause or legitimizing factor for using state coercive power against its own citizens to protect the TNC facilities and interests; alternatively, even if the corporation is not originally intending to be the reason of HR violations, by being silent beneficiary of ongoing abuses by military and continuing provision of financial support to it TNC can greatly encourage further violations.

Whichever is the case in particular circumstances, it is evident that TNCs has some *inherent capacities* to catalyze human rights violations and turn the living conditions of the local

²⁴ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

²⁵ I.d.

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population even worse than before, exposing it to much stronger repressive state machinery and wide range of new challenges, such as for example contaminated environment –which is usually an important source of food for the local people.

This is the reason that the societies which are already weak and poor under repressive state regimes or are governed by those committed to democracy but weak to protect the interest of its citizens, are extremely vulnerable to TNCs. That explains though does not justify one part of the deleterious consequences of TNCs activities in the developing countries.

These deleterious consequences further the argument that the *minefield* is operating on the other way round also- not only uncontrolled corporate power creates a severe threat to human rights, but the latter are also a dangerous zone for TNCs, though with a specific challenge: TNCs can not avoid it, but learn how to walk on it.

And here lies at the same time the way out and the dilemma: on the one hand, consequences of transnational corporate activities would not have been as drastic as they are today if there was an effective and adequate legal framework to put constraint on their pursuit for profit, make TNCs compensate for committed abuses and, consequently serve as a strong discouragement for further HR violations; It may seem a bit cynic to all good will efforts of HR missionaries to ‘moralize’ TNCs, but the fact is that TNCs will continue to be involved in forced labor, e.g. until the price for this involvement is not much higher than gain from it. This is what the law must do – eliminate the so called *cost effectiveness* of HR violations.

Activities of Unocal Corporation in Burma, Shell Oil Company in Nigeria, Texaco in Ecuador, and Freeport-McMarron in Indonesia, to name a few, having violated a wide range of HR and in fact remained unaccountable for their conducts²⁶ are strong argument to encourage further violations. The guilt for this impunity is fairly attributable to a complex of factors under the umbrella notion of ‘loopholes of existing regulatory regime.’

Dilemma lies in the fact that while the existing system is a failure, there is no new one that could bring us to justice. And we cannot get rid of the existing one before implementing the new and efficient way for TNC accountability.

To cure the ill one must now the reasons and sources of the disease, following this general truth, in the next part the paper will refer in detail to the deficiencies of the existing legal

²⁶ HUMAN RIGHTS VIOLATIONS BY MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: WHERE FROM HERE? by Surya Deva, 19 Conn. J. Int'l L. 1 Connecticut Journal of International Law, Fall 2003

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system of human rights protection which are common for all states and also to those which make the problem of accountability more problematic in developing countries.

Old Avenue to Justice: state-centric nature of the system and its main deficiencies

It would be a misunderstanding to say that TNCs are completely outside the reach of law; This is clearly not the case, however, as reality has already demonstrated, the existing legal system that tries to cope or decrease the detrimental effects of transnational corporate activities is ineffective.

The paper suggests that the main cause of this ineffectiveness is the state-centric nature of the international human rights law and its incapacity (unwillingness) to impose direct legal obligations on TNCs.

Now the paper will deal with these two factors in more detail.

It is generally considered that the most obvious source of TNC accountability is the regulation by the state where the abuses occur²⁷. And in fact the existing legal system fully accepts this proposition without any further challenges or expansion of the scope of duty holders. Though state-centric approach has seemingly clear advantages, because it permits local control over local events,²⁸ the masterpieces of globalization, transnational corporate activities have undermined its adequacy and demonstrated that in the era of *democratized violence* when the state does not hold the monopoly on power but is the *primus inter pares*, state centric system of human rights obligations is inherently dead born.

The duties to *protect, respect, promote and guarantee* human rights is directed solely to the state, making e it the monopolist over the obligation to ensure human rights protection within its jurisdiction and thus contribute to universal respect for HR. This system fatally links the fate of human rights with the coexistence of two clear-cur conditions in each and every country: the will and the ability of individual state to guarantee that HR are protected from state

²⁷ Sarah Joseph, Corporations and Transnational Human Rights Litigation, (2004)

²⁸ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

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as well as nonstate intervention in their realm. When either of those mentioned two conditions is lacking or is not sufficiently present, the door to make rights real is finally closed. . .

The several following pages will further elaborate on these possible scenarios in detail.

First factor, that is common for all states without distinction of the level of development is that TNCs are objectively difficult to be regulated creatures. Their master –globalization - has clearly made it sure that they can fully enjoy all the benefits from open borders and free market both, when it comes to making profit and when they need to shield from accountability for their misdeeds.

TNC - a 'creature' difficult to be regulated

The major problem for the state centric system in this context lies in the considerable difference between the scope of reach of corporate power and the one of the state. Corporations have achieved such a level of internalization and disassociation from [t]he state of incorporation that the latter may be nothing more than a convenient location chosen for tax and other regulatory advantages.²⁹ In fact TNCs do not recognize national boundaries and further their activities outside the reach of any single jurisdiction. States are rather contrary- their authority operates within a strictly defined territory: states suffer from trans-border limitations; That makes it objectively difficult for national legal systems to 'capture' corporate power that has already outgrown the national legal framework and has reached the level of transnationality; In addition, the notion of sovereignty, upon which international law is built, makes it undesirable for one state to give its laws extraterritorial operation. A suit for fixing responsibility before a municipal court is often scuttled with the plea of *forum non conveniens*.³⁰

Arguendo, state legal system handicapped by trans-border limitations does not constitute a proper legal tool to effectively control transnational corporate power and its trans-border consequences.

²⁹ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

³⁰ Jamie Cassels, The Uncertain Promise of Law: Lessons from Bhopal 56 (1993). (Cassels observes that the "doctrine shields multinationals from liability for injuries abroad.")

Lack of universal HR obligations applicable to TNCs

The lack of universal HR obligations applicable to TNCs³¹ gives them wide discretion to choose among different jurisdictions a more friendly one for their profit oriented activities which will not 'burden' them with those annoying HR obligations. As already mentioned, TNCs do not confine their activities with one particular state but operate in several of them simultaneously, [t]herefore they can [easily] evade state power and the constraints of national regulatory schemes by moving their operations [among]their different facilities around the world."³²

Besides providing a generous possibility to hide from HR accountability in one national jurisdiction from another, lack of consensus on applicable rules perpetuates the existing dilemma of [a]pplying different standards at "home" and in "Rome,"³³

In short, the lack of universal HR norms applicable to TNCs is one of the most important deficiencies of current legal system that undermines its chances to be effective and keeps the policy of impunity immune.

Achilles' Heel of developing countries

The above-mentioned two deficiencies are common problems for developing as well as developed legal systems. Though there are some other loopholes more often associated with developing nations. Those peculiarities make developing countries even more vulnerable to TNCs than states are generally. It is true that countries are [n]otoriously inconsistent in their

³¹ Ariadne K. Sacharoff, *Multinationals in Host Countries: Can they be Held Liable under the Alien Tort Claims Act for Human Rights Violations?*, 23 *Brook. J. Int'l L.* 927, 958-64 (1998) ;

See, e.g., OECD Guidelines, (providing that enterprises should "contribute to economic, social and environmental progress with a view to achieving sustainable development") and Global Compact, (inviting world business to "undertake initiatives to promote greater environmental responsibility").

³² Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 *Am. U. J. Int'l L. & Pol'y* 1, 8 (1993)

³³ HUMAN RIGHTS VIOLATIONS BY MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: WHERE FROM HERE? by Surya Deva, 19 *Conn. J. Int'l L.* 1 *Connecticut Journal of International Law*, Fall 2003

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respect for and enforcement of international human rights³⁴ in general, however, developing countries in comparison to developed ones, have far stronger temptations for trade off between human rights and other goods . 'more appropriate for their level of development'

Furthermore, [m]any of the developing countries do not possess the legal and/or economic capacity to bring corporations before justice, Judiciary is usually ineffective and corrupt³⁵ and the citizens have not much trust in it; .others lack the resources or will to control powerful global actors like TNCs which in fact are usually the most influential actors also at the local level in many countries; the rest may go as far as being complicit in the human rights abuses, as in Burma or Nigeria under the former military dictatorship.³⁶

These actual scenarios revealing the powerless position of developing states to TNCs make a strong argument in support of the general observation, that developing countries are those who suffer the most from the dark side of the globalization. It is true that the latter brought many 'uncomfortable' changes also for developed states and exposed them to the new reality that [s]tates must partner with other actors, both state and nonstate, if they are to solve problems that extend beyond their territorial reach,³⁷ However, what is peculiar to developing nations is that, as revealed in the scenarios above, they are not sufficiently independent to be 'partners' – they cannot afford to have their own will and to perform according to it. Developing nations are usually subjected to the decisions of others of what to do and how, those decisions are made by the elite of the globalized world being far away from marginalized and poor, both geographically and mentally.

Back to the particular issue of TNC-state relations, the following part will further elaborate on the above-mentioned scenarios and demonstrate that it is hopeless to seek justice there where it was never intended to be.

³⁴ Christine Baez et al., *Multinational Enterprises and Human Rights*, 8 U. Miami Int'l & Comp. L. Rev. 183, 187-89 (1999-2000) at 220.

³⁵ It was stated by US court in *Wiwa v. Royal Dutch Petroleum Company* case that respects of the issue of exhaustion of local remedies that Nigerian Courts were corrupt and inefficient

³⁶ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

³⁷ Alfred C. Aman, JR, *supra note 3*

Weak judiciary and problems with access to justice

In theory, independent and impartial judiciary would be the most appropriate, in terms of flexibility to peculiar details of each and every case, and legitimate, in terms of relatively high level of independence and impartiality in comparison with other actors, actor to put limits on the profit making passions of TNCs and to strike the balance between the interests of two : business and human rights. Though in practice even western societies could not escape from the facts when the machinery of the law was used to make strength prevail over justice.³⁸

Nevertheless, it is generally accepted that judicial integrity and independence is more a problem for developing than for developed nations with longer tradition of rule of law and democracy.

In developing countries there are few signs of judicial independence. Courts are understaffed, they lack proper equipment, training, and motivation for the performance of their duties, due in no small part to inadequate compensation. In some cases the situation is even more problematic as there are simply no constitutional provisions providing for fair public trials or any other rights. Court systems are seriously flawed particularly in the handling of political cases. They are often used to take action against, or deny legal remedy to, political activists and government critics.³⁹

Already mentioned sham trial of Saro Wiwa, where he was deprived of the right to the counsel, to appeal and presumption of innocence and was sentenced to death on the basis of a definition of murder that was not consistent with the Nigerian Criminal Code⁴⁰ is a telling example of the degree of judicial indolence and impartiality in Nigeria, that can be fairly generalized for the purposes of characterizing judiciary in other developing countries also.

³⁸ See Human Rights in a Changing World Antonio Cassese Temple University Press Philadelphia, 1990 A 'Contribution' by the West to the Struggle against Hunger: The Nestle Affair, where he refers to the decision of the Swiss court in Nestle case (one hardly knows to be angry or discouraged when reading this judgment. This judgment constituted an astonishing mixture of basic deference to the high and mighty, of pedantic formalism in applying legal standards and of pharisaical respect for the rules of democracy.)

³⁹ see e.g. U.S. Dep't of State, Burma Country Report on Human Rights Practices for 1998, 815 (1999). U.S. Dep't of State, Indonesia Country Report on Human Rights Practices for 1998, 915 (1999). U.S. Dep't of State, Nigeria Country Report on Human Rights Practices for 1998, 322 (1999).

⁴⁰ see Malin Kall, *supra note 15*

Costs of litigation and difficulties with access to justice can further discourage the victims to appeal to courts. Corporations have financial capacities to litigate for several years and delay the case until the victim, with miserable financial resources, is prepared to negotiate and settle for less compensation. This is how does the poverty in the population undermine *the 'from the bottom'* mechanism of bringing TNCs to justice.

In short, often there is neither way to justice nor the actor to follow it. . .

Choice between bad and worse – tragic fait of developing nations

For developing nations transnational corporate investors seem to be a direct way to 'the promised world' of wealth and development, without which, as illusion further suggest, they can not get out of poverty and hunger rampant in those countries. This fact precludes the developing nations to be too picky, if at all, on human rights policies and practices of the TNC intending to invest in the country. As already observed above, [i]n order to attract foreign investment, they may be uninterested in enforcing human rights norms against TNCs, or may even go one step forward by lowering the applicable standards.⁴¹

After the powerful TNC enters the developing nation what pulls the strings of the national economy is the investment, not the government or the will of the people. Therefore it becomes extremely difficult and dangerous for the country to get into conflict with it. Nigeria's example can serve as a clear illustration of this scenario: in 2001 more than 90 per cent of the nation's revenue was derived from oil-exploitation.⁴²

This excessive dependency and vulnerability of the economy to the TNC's continuing presence in the country can be a strong incentive to turn a blind eye before corporate HR abuses. '[un]der the threat of losing an investor, the state tailors its national policy to the needs and wishes of corporations.'⁴³ Furthermore, an argument can be made that the revenues from TNC activity satisfies elementary needs of the population and can further promote realization of economic and social rights. Thus the developing nation is usually standing before a choice between bad and worse perspectives, and going out from the logic 'at least some rights' it chooses the bad one.

⁴¹ Michael E. Porter, *supra note 23*

⁴² C. v. Nwankwo, Nigeria Human Rights Report, (Constitutional Rights Project, Nigeria, 2001) p.6)

⁴³ See. e.g. J. Cassels, *Outlaws: Multinational Corporations and Catastrophic Law* (2000) 31 *Cumberland Law Review* 311, 317-9; also Joseph, *supra note 7*.

Arguendo, while weak judiciary can serve as an explanation of state's incapacity to bring TNC before justice, economic dependence of the country on the investor is a classic case where the state is an interested party to keep the policy of 'forgiveness' in respect of TNCs; this policy usually has the face of impunity.

One of the most widespread phenomena in developing countries and the most wicked danger to both, human rights and justice system is the situation when the states or their corporate hands are in connivance with TNCs in human rights violations; This phenomena is often called *militarized commerce*.⁴⁴ and it is particularly frequent in extraction industries. We have already referred to some of these scenarios in the light of Burma, Nigeria and Indonesia. We have seen the drastic 'side-effect' of the situation on human rights when the corporation adds its huge financial capacities to the repressive machinery of an undemocratic state.

The paper will now refer to the objective reasons of why does this phenomena emerge and spread, later it will refer to the relationship between militarized commerce and existing system of HR accountability and demonstrate that militarized commerce wholly undermines the efficiency of that system.

Militarized Commerce

Transnational corporations are often accused of human rights abuses and environmental pollution, but they are rarely able to exploit natural resources and the local population without the co-operation or at least approval of the Government of the state that is being exploited.⁴⁵ Examples of Nigeria, Burma and Indonesia were clear demonstrations of this proposition.

It is a simple reality that without the approval of the state, the company simply cannot enter the country to launch the business. The company must obtain access to natural resources which are typically owned in some fashion by the government of the country. All these attach a special value and significance to the state's approval, of TNC . Once access to resources is secured and the extraction process is started, the main concern for the corporation becomes maintenance and protection of the source of valuable asset. On the other hand, the thriving

⁴⁴ see e.g. C. Forcese, 'Deterring 'Militarized Commerce' : The Prospect of Liability for 'Privatized Human Rights Abuses' (2003) 31 *Ottawa Law Review*

⁴⁵ *Oil-Exploitation in Nigeria: Procedures Addressing Human Rights Abuses* by Malin Kall in *Expanding the Horizons of Human Rights Law*, 2005

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business almost always becomes an object of critical state interest, which views it as a source of profit and some degree of stability in the country securing the regime's ruling position. Thus the corporation and the state find each other united with a strong common interest - to protect the physical security of the asset of critical importance for both. Because physical protection is generally services the state is well positioned to provide links between firm and state are likely tightened.⁴⁶

Substantial common interest generates the dangerously close relations and sometimes even diffusion between the state and the corporation. Involvement in the abuses further strengthens the mutual interest to keep the reliable partner in the country and in the power. What transforms the partners into the shields for each other from accountability is the fact that the immunity of one can be easily jeopardized by bringing another before justice. Understanding of this reality is the concluding accord of the prelude to militarized commerce.

The case studies, some of which we have already referred to above, show, that first, resource companies operating in the developing world often rely on state militaries for the provision of security and second, security forces affiliated with companies at some level have been implicated in serious human rights abuses.⁴⁷

As we have already seen in the light of cases of Shell, Unocal and Freeport, the effects of militarized commerce on human rights is deleterious as it strengthens state repressive machinery and encourages (directly or indirectly) further violence, abuses and antagonism not only between the governing regime and the local population but among the different groups of the society itself.

Deleterious effects of the militarized commerce are doubled under the state centric system of HR obligations, since one thing is to promote policy of human rights violations and another and albeit more dangerous- to promote policy of impunity for those violations.

[I]t does not take much insight to see that it is unlikely that a state which itself abuses human rights would prosecute such cases or be receptive to civil litigation. As observed, state is usually able to render itself virtually judgment-proof by creating court systems unwilling or incapable of

⁴⁶ *supra note 21*

⁴⁷ ATCA'S ACHILLES HEEL: CORPORATE COMPLICITY, INTERNATIONAL LAW AND THE ALIEN TORT CLAIMS ACT by Craig Forcese, 26 Yale J. Int'l L. 487 Yale Journal of International Law Summer 2001

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adjudicating claims for compensation or punishing transgressions of criminal law by powerful actors.⁴⁸

Thus militarized commerce not only intensifies abuses but it also establishes impunity for the committed violations. Impunity encourages further violence and abuses; As a result, militarized commerce creates a vicious circle of HR violations leaving almost no possibility to find the way out to justice. This scenario, which is a quite widespread phenomena in developing states, completely reveals the dead born nature of the state centric system: under this system the state sits to judge its own misdeeds. It would be too infantile to have any hope of success for HR under such a scenario.

To sum up, state centric system of human rights obligations is clearly outdated and inadequate to further its goals in the modern era. This is mainly the result of the fact that the system has not been adjusted to the changes brought by globalization: while the power and capacities to violate human rights have been fully democratized, the system of duties to respect and protect rights remained clearly monopolistic- directed solely to the state.

As demonstrated above, this inadequacy of the system proved to be particularly dangerous for human rights when powerful non state actors - TNCs enter the picture;

As mentioned above, trans-border limitations on the powers of the state and the lack of universality of applicable human rights obligations makes TNCs almost unreachable objects for justice.

While these are the common challenges to human rights in developing as well as developed world, in the former case they rise particular alarm: the loopholes in the legal system strengthen the generally hostile environment to human rights and ensure impunity.

reliance on state centric system of HR enforcement against corporations is inadequate⁴⁹ it is particularly unsatisfactory or unrealistic to expect TNC human rights accountability with regard to a certain operation to emanate exclusively from the [developing]state in which that operation exists.⁵⁰

⁴⁸ I.d.

⁴⁹ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 461 (2001)

⁵⁰ See e.g. Muchilinski, *Multinational Enterprises and the Law* (Oxford, Blackwell, 1995) 228-33; also Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in *Liability of Multinational Corporations under International law* (ed. by M. Kamminga and S. Zia-Zarif, 2005)

The way out- HR norms directly applicable to TNCs?

As already observed in the beginning of the paper, globalization has dangerously weakened the main pillar of the international law of human rights obligations – the nation state- the problem now is that there was not erected a new pillar to keep the system safe from failure.

The situation already resulted from democratization of violence asserts that at best, states could only be one of the bearers of the enforcement responsibility and not the sole bearer.

However, the existing system departs from the needs of the new reality: currently international law does not recognize TNCs as its subjects or holders of direct HR obligations. As already observed, rather than establishing an international enforcement mechanism [international instruments] of HR obligations applicable to TNCs international law instead requires the state to enact domestic measures of enforcement.⁵¹ As proved, the latter is not a very reliable source of TNC accountability for HR violations, especially in developing countries where there is the greatest need for this accountability.

Shift of powers from state to non state actors is already a fact and we cannot turn the clock back. What we can do is to go one step further from the existing reality and impose direct HR obligations on non-state actors. This proposition does not mean that all of those actors should be elevated to the level of subjects of international law or have equal rights and obligations. It was acknowledged by the International Court of Justice more than half a century ago that “subjects of law in any legal system are not necessarily identical in their nature . . . and [the latter] depends upon the needs of the community.”⁵²

Judging from this logic, as far as the victim of HR violation is concerned it, is hardly relevant whether the violator is the state or the TNC. The system which enforces only those rights that are violated by the state and thus inevitably leaves outside its scope at least half of the victims is apparently outdated. In order to avoid the danger of becoming obsolete in promoting human rights, international law has not to confine its reach to state action and to accommodate TNCs as subjects.⁵³

⁵¹ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

⁵² Reparations for Injuries Case, 1949 ICJ Rep. 178

⁵³ Kadic, 70 F.3d at 239; Jonathan I. Charney, Transnational Corporations and Developing Public International Law, 1983 Duke L. J. 748, 749 (1983); RIGHTS VIOLATIONS BY MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: WHERE FROM HERE? by Surya Deva, 19 Conn. J. Int'l L. 1 Connecticut Journal of International Law, Fall 2003

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The minefield of democratized violence which has already produced drastic impacts on human rights leaves it without any doubt that it is in the very *need of the community* to recognize TNCs as subjects of international law to impose upon them direct human rights obligations.

As former U.N. Secretary-General Kofi Annan has put it "[t]ransnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects."⁵⁴

By opening the door to direct HR responsibilities of TNCs the problem does not end, rather contrary – it further opens the door to many new challenges. To avoid transformation of those challenges into dilemma, decision makers need special care and reasoning .

The key issue in this respect is to decide how much responsibility to impose upon the TNCs? where to draw the limit between “must” and “should”? Another challenge here is how to make the new system real- meaning enforceable?

Milton Friedman once suggested that the only social responsibility of corporations is to increase profit. However, nowadays when the activities of corporations have acquired transnational dimension and have consequences on far larger groups of individuals than their shareholders are, this proposition has certainly lost credibility. The idea that business should take into consideration human rights and certain norms of social justice while pursuing its goals is gradually gaining recognition and power. However, up to now it still remains more the realm of morality than of law;

There is an idea that business is generally a-moral⁵⁵, meaning it does not have moral category as such. One can share this idea or deny it, though what is unquestionable is that both moral and business will be better protected from abuses and excessive burdens if the standards of what is acceptable business activity and what not are determined by legal, not by moral causes.

At the given moment the plan for moral or socially responsible business, or standards of corporate social responsibility (CSR) as it is often called, is of non-biding nature and is not backed by strict sanctions for noncompliance with its rules; consequently, the main challenge for corporate social responsibility as a system is to transform its inspirational standards into operational ones.

⁵⁴ Kofi A. Annan, *Help the Third World Help Itself*, Wall St. J., Nov. 29, 1999, at A28.

⁵⁵ see *THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS*, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law, 2002

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Another challenge CSR faces is to make a proper dividing line between responsibilities that should be imposed upon the business and those to be kept away from it for being excessive burdens bringing the business to a standstill. This line between the two sometimes seems to be pretty narrow.

The firm position taken in this paper is that without meeting the second challenge the first will bring negative effects to the business, that will serve the goals of neither CSR nor HR.

In the following part the paper discusses some particularly interesting details of these challenges.

First it focuses on Nestle affair as an example of how can the business plan, even with the best intentions for the population, lead to pernicious effects if it does not accommodate particular needs of the society where the business operates. The case is specifically interesting as it highlights that due to extreme vulnerability of the local population of the developing countries they *per se* constitute the zone of a high risk. Therefore, business should treat these societies with particular care and follow some 'stricter' rules of the game when being in the developing world.

Then the paper deals with the problem of setting too high standard to business and criticizes efforts of making TNCs a Trojan Horse of democracy in developing countries.

The paper does not propose a concrete formula where to draw the line between duties "should" and "must." Instead the paper suggest the 'procedure' of making this formula and the considerations that should and should not be taken into account while deciding about its substance.

Being a 'Nestlé's mother' - it is not the product but the circumstances that kill

This is a clear case of the lack of the sense of social responsibility in business considerations that led to catastrophic results. To raise the standard of life and nourishment of children large food industries in the West, among them Nestle, encouraged and organized widespread distribution of powdered milk in the developing countries. However, instead of being a factor for progress, this campaign contributed of causing illnesses and malnutrition, the prelude to death,

The quality of the milk was not contested, it was the same as one used for feeding the infants in the developed world. The reason of mortality and diseases was simple, though tragic: The powder milk to have beneficial effects, the baby's bottle must be sterilized, there must be drinkable water, and the accompanying instructions for using the bottle must be followed rigorously. But in many of those countries none of this happened: hygienic and sanitary conditions, and more generally conditions or social progress, that may make replacement of mother's milk by powdered milk useful, do not exist in most developing countries.

The court concluded that the reference to breast feeding in [information] brochures might be sufficient for the state of knowledge in the West, but for mother in developing countries it is by no means sufficient.⁵⁶

The level of education in developing countries has long been the issue of concern for many missionaries of development in the West. In the context of the Nestle case it was the most peculiar characteristic of the market in which the company entered. Low level of education in those countries however was neither the 'fault' of the company, nor subject to overnight change even if Nestle would have done huge efforts for the enlightenment of the local population.

What was then wrong with Nestle strategy of penetrating in the developing countries' markets.? The answer is simple: It was clear that the milk produced that result in the particular social conditions of backward countries, that would in no way happen in the developed ones. the company failed to pay due respect to the peculiar local conditions when pursuing its business activities.

Nobody will reasonably argue that Nestle should have undertaken activities to rise general level of education in the countries were it was pursuing its business goals, or to undertake provision of access to clean water or necessary facilities of bottle sterilization for all those mothers; This would be unrealistic obligations imposed upon the business; despite the fact that having all these problems resolved in the country would be highly desirable and would have precluded that drastic result of the powder milk. But Nestle was simply not the proper actor to do all these.

The only thing Nestlé must have done was tailoring advertising campaign to the specific conditions of the country. This would mean to provide mothers with adequate information in an understandable manner to them that the rules of preparation of the milk were to be followed strictly and noncompliance with them would cause drastic effects. If Nestlé had done this, mothers would have had a real possibility to make a choice to use the powered milk without sterilized bottles or not; This choice in the fact was deprived to them. [T]hose poor mothers were 'misled both by their ignorance and the backward conditions in which they lived, and by Nestlé deceptive publicity (deceptive because it is totally inappropriate to the conditions of those poor countries.'⁵⁷

⁵⁶ Antonio Cassese: A 'Contribution' by the West to the Struggle against Hunger: The Nestle Affair, in Human Rights in a Changing World Temple University Press Philadelphia, 1990

⁵⁷ I.d.

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Nestle case is a clear example of the fact that when the business ignores the local conditions and interests and straightforwardly follows its narrow goals the result can be as drastic as transformation of life-saving product into a life-destroying one. It further highlights that business responsible only for rising profit threatens by deprivation of the real choice, and even life(as in happened in Nestle affair), to all of us; though again looking on the issue from the prism of “developing” and “developed,” the threat is much severe to poor and marginalized, to those from ‘backward countries’

If business is further allowed to pursue its narrow goals without a strong sense of good corporate citizenship, that must be backed by legal standards and strict penalties for noncompliance, nobody is protected from one day finding himself in the very place of ‘Nestlé’s mother’ : deceived and even being held responsible for this.⁵⁸

TNCs Trojan Horse of Democracy in developing countries?

Let’s now refer to the dilemma when what is required from the business goes much further than to tailor its practices to the local conditions to avoid HR violations.

After the atrocities of the 20th century shocking the consciousness of mankind, the western nations realized the common interest in global peace through universally guaranteed human rights.

Achievement of this goal made it necessary to eliminate the results of historical injustice caused by western exploitation of un-western countries. Interestingly enough, in practice these aspirations were mainly translated in energetic, though in most cases unsuccessful efforts to export western concept of rule of law and HR in formerly exploited, currently referred to as developing countries. However, coming across with the sea difficulties of dealing with democracy deficit in those countries the western missionaries of democracy decided to change the strategy: “The so-called partnership between NGOs, developed countries, and transnational corporations is beginning to look like a game in which each actor tries to pass the hot potato of reforming reluctant government to somebody else. Neither the Us, government the WB not the HR NGOs could convince the military regime in Nigeria to mend its ways in the past and cannot

⁵⁸ The Swiss judge examining the case for defamation brought by Nestlé said: *The adequate causal connection between the purchase or other supply of milk powder and the death of infants fed on these products is interrupted by the action of third parties for which the plaintiff [Nestle] cannot be held criminally responsible.* The judge clarified it in his oral explanation of his judgment given the same day that *the third party was “mothers using bottles”*

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force change in Myanmar or Sudan today. So they saddle the oil companies with the task. And the oil companies are finding ways to pass the burden back. “⁵⁹

There is an interesting observation that passing the responsibilities of reformer from the state or democracy missionaries to TNCs is not a new phenomenon but rather a reemergence of the concept of *charter company* having played a great role in the first phase of globalization, opening up the world for trade and establishing empires. ⁶⁰

Does the 21st century and its main inheritance from the previous one –democracy- leaves the place for the phenomenon of charter company - private entity taking after the role of the state administration or reformation?

The answer to this question entails two equally important parts, first whether the TNC is capable to undertake this role and second what can serve as legitimate ground for this phenomena of shift of governing or reforming powers?

The paper deals with both issues in this final part and reaches the negative conclusion for several reasons elaborated on below. Both questions will be dealt with in this part with further detailed explanations for negative answer to both issues.

While the conclusion of the first part of the paper was that TNCs should become addresses of direct HR obligations to keep the system of rights’ protection effective, caution is required while doing this in practice for not to make a fatal mistake: blurring the line between HR responsibilities that should be imposed upon the business and the ones which will be an unattainable standard excessively burdening business.

Nowadays there is some trend to make TNCs into a Trojan Horse in the developing world to bring there democracy and human rights. One of the most striking examples is the case of a Canadian company, *Talisman Energy* which made a huge investment in Sudan in oil extraction project. Already incensed by the imposition of strict Islamic law in Sudan, the abuses committed by soldiers against civilians and the reappearance of slavery, international human rights organizations and church groups were appalled when oil revenues started flowing to the Sudanese Government. They launched a divestment campaign against Talisman to force it to abandon the project. The value of Talisman’s stock plummeted.

The Canadian government sought a compromise: Talisman could stay in Sudan and avoid the imposition of sanctions by the Canadian government provided it took an active role in ending

⁵⁹ Reluctant Missionaries; international corporations, by Ottaway, Marina , Carnegie Endowment for International Peace Foreign Policy, July 1, 2001

⁶⁰ see I.d.

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the Sudanese civil war, encouraging Khartoum to improve its human rights record, and made sure the Sudanese government would use oil revenue for the benefit of its citizens and not to finance the war. . .

This is the very example of setting such kind of obligations that are neither achievable for them (and even for any single actor in this world) nor legitimately falling under the scope of TNCs' mission and purpose.

There is a famous proposition that Universal Declaration of Human Rights (UDHR) applicable to 'every individual and every organ of society . . . excludes no one, no company, no market, no cyberspace.'⁶¹ Though this proposition sets a progressive policy it does not provide us with much guidance about the appropriate procedure of pursuing the policy. This should not blind us: TNCs may be "organs of society" (and thus fall under the reach of the UDHR but they are highly specialized ones: the main challenge facing them is to be cost effective if they wish to be competitive and remain on the market, consequently their strength lies not in devotion to democracy and HR but in doing profit.

[T]NCs are not the right organizations for furthering moral causes and taking on the role of imposing change on entire countries [simply] does not fit the nature of these organizations.⁶²

Shell's example can serve as a good illustration of this proposition: a recent examination of the company's 408 development projects in Nigeria reveals that less than one third of those projects in Nigeria reveals that less than one third of those projects have been successful.⁶³

The aim of this argument is not to deny that corporations can help HR. No doubt they can do it but "not by casing themselves as the agents of civilization and morality but by themselves becoming more moral and civilized." As an example, TNCs can set a certain minimum level of HR protection as a strict pre-condition for the investor to enter the country. If this standard is universal and there is a unity in the business world in adhering it, then even the repressive governments will have no other way than to *democratize* themselves.

⁶¹ THE AMORALITY OF PROFIT: TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, Beth Stephens, 20 Berkeley J. Int'l L. 45 Berkeley Journal of International Law 2002

⁶² *supra* note 51

⁶³ *Id.*

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However, the 'negative' obligation of TNC - not to violate HR cannot be transformed in such a positive obligation as to in fact govern the country in the name of as vague and easily subjected to manipulation notions as democracy and HR of the people are.

Thus the question whether TNCs, and business sector in general, capable to take after the obligation to promote democracy and human rights is to be answered in negative, as their mission and essence is doing profit not democracy.

Another issue is whether they are legitimate to take after the role of the Trojan Horse of Democracy?

The answer to this question is again negative for the considerations to be discussed in the following part of the paper.

Democracy is not only the issue of an outcome but of the procedure also, mainly the procedure of making the decision. TNCs who are the masterpieces of globalization, as well as the globalization itself, suffer from severe inherent disease – inability of democratic decision making; Therefore they cannot 'make' without democratic decision making process. The three comparative examples highlights this proposition:

Democracy requires that the process of making a decision is at least as broad as the impact of its outcomes, while decision making process in TNC is strictly elitist, based on a small group of the top people; and in fact it cannot be otherwise, since for business type of entity effective and speedy decision is far more important than inclusive one.

In Democracy decision making is (should be) transparent, ensuring the broadest participation of every stakeholder In the TNC on the contrary- those who pull the strings of the decision in most cases are hardly identifiable due to the complex system of internal management of the organization.

Democracy is built on strict institutional mechanisms of accountability of decision makers to those who are effected by the decision; Decision makers under the TNC's banner can hardly be subjected to any similar system of accountability for transnational consequences of their decision; Multiple layers of control and ownership insulate individuals from the sense of responsibility for corporate actions.

Thus, entrusting decision making authority (under the banner of building democracy in developing countries) into TNC runs counter with essential pillars of democracy– transparency, participation and accountability. When it comes to the performance of the original functions of TNC- making profit- this system of decision making is effective and therefore legitimate; but as

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far as the lives of far larger communities are concerned than the shareholders, decision making system of TNC suffers from the deficit of democratic legitimacy.

Arguendo, TNC as it exists today with its structure and functions, does not have legitimacy to serve as a Trojan Hoarse of Democracy; of course, we can adjust its capacities to the needs of democratic decision making, however, this 'transformed creature' will be not be a TNC as such any more.

In sum, the final part of the paper demonstrated that while socially responsible business is a compelling interest of the whole human race, it should not lead us to saddling the TNCs with excessive and unreachable obligations to 'make democracy' instead of profit; The latter is absolutely legitimate right and obligation of the business, while the former falls outside its scope.

Conclusion:

Cases from recent history demonstrate that effects of TNCs in developing world are deleterious. TNCs have *inherent capacities* to catalyze human rights violations sometimes even without entering the country; However, deleterious effects were not the result of those capacities only; What contributed greatly was the lack of adequate and efficient legal system to hold TNCs accountable for committed violations, to compensate the victims, and thus serve as a further deterrence of future violations.

The major deficiency of the existing system lies in its state- centric nature, that makes the way to justice particularly difficult in developing counties. Therefore, if the HR system intends to remain relevant, it should accommodate TNCs as direct addressees of HR obligations.

The obligation of responsible global citizenship should not make TNCs into a Trojan Horse of Democracy in developing world. Constructive dialogue between the HR and business is necessary to create the system respecting the interest of both; However, the blueprint of the system must be a clear and strong consensus that human rights are beyond the profit.

Finale

For a long period of time it was considered that the only social responsibility of business is to increase profit, however, in the era of democratized violence this proposition has certainly lost legitimacy.

The methods used for western investments to penetrate in the developing countries are shocking in their brutality, in the scale of human rights violations and harm to environment. It took a very high price to 'clean the way' to transitional corporations in developing countries, this price was not paid by money but by human lives and dignity of the local populations. Whatever positive measures we do undertake from now on, we cannot turn the clock back and eliminate the traces of those brutalities, they are forever curved on the moral CV of the whole humanity.

The only thing we can do now is to acknowledge that all we, without distinction of country and level of development, are facing a minefield and the technique to survive is not to avoid it or pass the responsibility of finding the way on each other, but to think, to engage in dialogue and to help each other to go forward safe. The thing that should guide all of us in this process is that human dignity and freedom are beyond the profit. These are the only values that make our being worth of survival.