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A Critique of Human Rights Obligations of Transnational Corporations under International Law

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ABSTRACT

The growth in influence and power of the transnational corporation in a globalised world has been considered as being one of the most significant developments both domestically and internationally. It has resulted in various changes to political, economic and financial barriers by many developing countries with the hope to attract international investment, which had provided an opportunity for transnational corporations to exploit the resources of these countries. While TNCs have contributed to economic advancement in developing countries, they are also alleged to have violated Human Rights of the people.

The International Legal framework is designed to combat violations by the state actors. Even though there are various instruments of international law to regulate conduct of TNCs in respect of human rights, but these instruments are essentially non-binding and corporate responsibility under them remained weak and ineffective. This paper analyses various such instruments providing for human rights obligation of TNCs. The paper suggests imposing international obligations on corporations within the International Law of Human Right, making them a subject of international law for effective implementation of human rights obligation.

Keywords: *Globalisation, Transnational Corporations, Democracy, Human Rights, Corporate Responsibility.*

I. INTRODUCTION

In the era of globalization, transnational corporations appear to be a bigger threat to enjoyment of human rights than any other state or non-state actor. National economies of developing countries have, over recent years, been finding themselves bound to liberalise their socio-economic policies to attract foreign investment. As a result, Multinational corporations have assumed a greater control on economies of developing countries and have challenged the

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established principles state sovereignty.² This paper contends that the shift in sovereignty accompanying globalization has allowed the economic and financial sustainability concerns to become paramount, while the focus on protecting Human Rights is lost.

Even though there are various instruments of international law to regulate conduct of TNCs in respect of human rights, but these instruments are essentially non-binding and corporate responsibility under them remained weak and ineffective. Corporations have blatantly violated human rights and the existing legal framework keeps failing to enforce law, ensure compliance of human rights standards, determining accountability for violations.³ Legal doctrine of existing framework of international law are in itself a major hindrance in imposition of human rights obligations on corporations.⁴ The legal order has been designed to protect against abuse by powerful states, leaving out the responsibility of non-state actors; therefore, Transnational Corporations have become the Trojan Horse of democracy and human rights in developing countries. Further, the paper seeks to analyse several legal responses to globalization related to the promotion and protection of human rights.

The first part of the paper provides an insight about the impact of increasing role of transnational corporations in economic activities of state and its impact on limiting state sovereignty. Further, this paper shall also examine the inefficiencies of the legal framework and the lack of universal Human Rights obligations applicable to transnational corporations, taking into consideration some of common scenarios of violations by Corporations in the developing world. In the final part the paper suggests imposing international obligations on corporations within the International Law of Human Right, making them a subject of international law.

II. TNCs, GLOBALISATION AND HUMAN RIGHTS

TNC are enterprises which comprise entities in two or more countries, irrespective of the legal system and area of their activity. These entities are so linked with each other that one of them exercise a substantial impact over the activities of other, particularly to share resources and responsibilities.⁵ TNCs have great influence on the economic activities of almost all the countries and in international economic relations. Therefore, the results of their activities

² WILLIAM H. MEYER, *HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION*, 199 (Praeger Publishers Inc ed. 1998).

³ David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 Va. J. Int'l L., 931, 932-34 (2004).

⁴ J. C. Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. Pa. J. Lab. & Emp. L. 463, 472-78 (2000).

⁵ Draft United Nations Code of Conduct on Transnational Corporations, 1983, Preamble and Objectives.

transgresses the territorial limits of one state.

It is very evident that globalisation has resulted in cross border transactions and enhanced ability of civil society to promote human rights. International framework for protection of human right can itself be considered a gift of globalisation. As a result of globalisation in the past few decades international NGOs and activists have been able to develop some universal values about human dignity, it can also be credited for the end of military regimes in various counties. As a result, state sovereignty has been compromised at the hands of globalisation, but it has also provided the people of state with universal standard of protection.⁶ Universal awareness against climate change, racial discrimination and for human treatment of all would not have been a possibility without globalisation.⁷

On the contrary, with the globalisation and increasing trade, TNCs have obtained enormous power with respect to international investment, more particularly in developing countries. The control over financial aspect has allowed TNCs to coerce developing and underdeveloped states to liberalise its economy according to their needs.

State is undermined in the sense that forces acting on it have assumed a great control on it, international capitalism being the most significant one.⁸ For example if a state changes its taxation policy companies move out of it, and therefore, in the past the states have allowed corporations to function with very little restrictions and low tax rate.⁹

With respect to impact of it on Human rights, there are contrasting views. TNCs possess the ability to affect human rights in both positive and negative manner since they have direct impact on economic, social and political conditions of a state.¹⁰ Ideally, TNCs are not expected to have the capacity to do it since their operations are constrained to limited rights and obligations created by the States. However, TNCs have increasingly high jacked the state's authority over economic activities and as a result regulatory mechanism and policy of a state in also being partially controlled by them.

TNCs with their control over financial investment can subvert a state's willingness or ability to abide by its human rights obligations. On the other hand, TNCs can also affect human rights

⁶ B. Sumner, *History, Human Rights, and Globalization*, 32 J. Relig. Ethics 39, 42 (2005).

⁷ Mahmood Monshipouri & Reza Motameni, *Globalization, Sacred Beliefs, and Defiance: Is Human Rights Discourse Relevant in the Muslim World?* 42 J. CHURCH & STATE 709, 712 (2000).

⁸ M.B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 Wis. Int. Law J. 89, 94 (2001).

⁹ Jernej Letnar Černic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises*, 3 HANSE LAW REVIEW 71, 77-79 (2008).

¹⁰ M. Monshipouri et al, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, HUMAN RIGHTS QUARTERLY, 973-78 (2003).

through another actor for example many TNCs hire para military forces for security purposes in their manufacturing units, these forces have at many occasions have committed crimes of torture, inhuman treatment and punishment against workers.

(A) Corporations and Human Rights violations in developing countries

The threat to human rights caused by TNCs become particularly distinct in the context of developing countries. These countries were already struggling to keep their environment safe from the damage caused by pursuit of individual freedoms and rights due to their legacy of colonization, dictatorial regimes, coupled with abject poverty. When it comes to being subjected to the TNC's enormous power, these countries appear to be the most vulnerable.

Having said that, in the past TNCs have encroached upon various social, economic and cultural rights.¹¹ Examples of which are Sweatshop factories of multinational companies like Nike, Gap, Walmart, Amazon which are alleged to have been violating the rights of workers of adequate and safe working conditions, human treatment and minimum wages.¹² Furthermore, there exists abundant evidence to showcase the actions of TNCs with an aim of suppressing trade unions, denying their right to organize. Many TNCs like Coca-Cola in Colombia and Phillips-Van Heusen in Guatemala have been alleged to have been responsible for torture, confinement, and even murder of trade-union leaders by using paramilitary forces.¹³ TNCs have also been responsible for environmental disasters. Royal Dutch/Shell's oil production in Nigeria, and BHP Billiton's copper mining in Papua New Guinea caused serious damage to the environment and many of the local inhabitants who were dependent on fishing and farming were affected.¹⁴ TNCs are also found to have violated third generation rights in developing countries- The Bhopal gas tragedy in India and Nike sweatshops in Indonesia and Pakistan are few of the many prime examples of the third generation human rights "violations."¹⁵

Various human rights violation by these TNCs in developing countries often go unpunished because of the inability of national laws of a state to impose obligations of them. The diluting concept of state sovereignty in human rights sphere is not recognised under International law and TNCs have been using it for their advantage.

¹¹ Id, at 982.

¹² Jakki Forester, *Sweatshops Violate Human Rights; American Companies At Fault*, THE COLLEGIAN (April 30, 2013) <https://www.kstatecollegian.com/2013/04/30/sweatshops-violate-human-rights-american-companies-at-fault/> (last visited Feb 19, 2021).

¹³ See United Steel Workers and International Labor Rights Fund, Press Release, *Coca-Cola (Coke) to be Sued for Human Rights Abuses in Colombia*, (Jul. 19, 2001).

¹⁴ Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1964 (1996).

¹⁵ Meyer, *Supra Note 2*, at 199.

III. POSITION OF TNCs IN INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS REGIME

Under the traditional approach to international law, TNCs are not its subjects.¹⁶ However, the emergence of TNCs, inter-governmental organizations, and NGOs and their increasing influence on state activities, has given a new meaning to state sovereignty, which is ‘pluralistic and limited.’¹⁷ Nevertheless States’ key position in international legal order is unaffected, but their monopoly over objects of this order is certainly diminished.

The alarming trend of increasing influence of TNCs on policies of a state presents a need of recognition of TNCs as a subject of International Law, still a full legal personality to TNCs, like any State, is not desirable. States must keep their primacy in the international law, while arguing for this proposition the ICJ in the famous *Reparations case* observed, that “it is not necessary that the subjects of a legal system are identical in terms of their nature or rights. Their nature depends upon the needs of the society.”¹⁸

Hence, it is perhaps more appropriate that the extent of rights and obligations of TNCs is kept limited. They cannot possess the status of a party to international instruments or forums so that the primacy of states in this regard is preserved.

Further, the *UN Norms on the Responsibilities of Transnational Corporations and Other Enterprises with Regard to Human Rights*¹⁹ (2003) places HR obligations on TNCs with respect to their area of activity and extent of influence.²⁰ It compels TNCs to promote, secure and protect all the internationally recognized human rights.²¹ However, the Norms remain silent on the manner in which corporations can be held responsible directly under international legal order, it merely implies that such a possibility exists.

From the understanding of these Norms it is reasonable to infer that the corporations can be held directly responsible only through the responsibility placed on the States direct by the Norms.

¹⁶ NICOLA JÄGERS, *THE LEGAL STATUS OF THE MULTINATIONAL CORPORATION UNDER INTERNATIONAL LAW, IN HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS* 259, 262 (Michael K. Addo ed., 1999).

¹⁷ Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADELAIDE L. REV. 219, 246 (1999).

¹⁸ 1949 I.C.J. at 178.

¹⁹ U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Available at <http://hrlibrary.umn.edu/links/norms-Aug2003.html> (Last visited on June 17 2021).

²⁰ Para 1, *UN Norms on the Responsibilities of Transnational Corporations and Other Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²¹ *Id.*

Old Avenue of Law and justice: State-centric approach of the International Legal Order

TNCs are not outside the reach of law, and are subject to various international and national legal frameworks. However, the reality of today's world demonstrates the fact that the existing legal system regulating the transnational corporate activities is ineffective in coping or decreasing their detrimental effects. The primary reason for this ineffectiveness can be traced into the state-centric nature of human rights law regime both at national and international level. The system fails to impose direct legal obligation or responsibility on TNCs for violations of human rights.

The old school idea of State as the monopolistic authority obliged to protect, respect, promote, and guarantee human rights within its territory is the biggest concern today. This system can ensure protection of rights only on coexistence of two conditions; first is the willingness and second is ability of state to guarantee and protect human rights from state or non-state intervention.²²

The lack of universal obligation to TNCs allows them to choose among different jurisdiction a friendlier one which will not hinder their profit centric functioning with HR obligations. In order to ensure economic development, developing countries has to liberalise their socio-economic policies and standard of human rights protection. The financial power of TNCs affect both the willingness and ability of a developing state to ensure compliance of human rights standard and hence they are objectively difficult to be regulated.

(A) Existing Legal Framework

It is very clear that national framework in developing countries is inefficient in controlling the detrimental effects of TNCs. Even the International Legal Framework does not provide solution to this problem. There are various instruments in the field of Business and Human Rights, though none of them can be regarded as an efficient or adequate safeguard for human rights.

(B) OECD Guidelines

*Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises*²³ is one of the instruments which regulates corporate responsibility and it is adopted by forty States including four non-OECD members.²⁴ The Guidelines were

²² Anderson, *Supra Note 4*, at 472-78.

²³ OECD, 'Guidelines for Multinational Enterprises' OECD Doc. C (76) 99 (1976).

²⁴ Stephen Tully, *The Review of the OECD Guidelines for Multinational Enterprises*, 50 International and Comparative Law Quarterly 394, 398-401 (2001).

initially thought as addendum to the OECD Declaration on International Investment and Multinational Enterprises of which they still form part. They constitute a legal document, which includes only a non-binding collection of principles and standards for responsible business conduct consistent with applicable laws. Even though they are not fully enforceable, they nevertheless represent adhering countries' expectations for multinationals enterprise's behavior. However, its observance is completely voluntary and it cannot be legally enforced²⁵, which makes it another non-binding treaty or Soft law.²⁶

Furthermore, The OECD Guidelines do not define term 'multinational' whose meaning varies throughout the world. They are addressed to 'all entities, including parent companies, local subsidiaries, as well as intermediary levels of the organization'.²⁷ To the extent that the parent companies actually exercise control over the activities of their subsidiaries, they have a responsibility for observance of the Guidelines by those subsidiaries.²⁸ That said the Guidelines avoid making specific recommendations in relation to the division of responsibilities between parent companies and their local entities apart from that they all have to observe the Guidelines.

(C) UN Global Compact (200)

The *UN Global Compact (2000)*²⁹ in its first principle provides that Businesses should support and respect human rights which are proclaimed internationally. The pact was signed by 13000 Businesses³⁰ and is a step towards recognising positive responsibility of Businesses towards human rights. However, it is merely a non-binding pact³¹, with the objective of promoting adoption of socially responsible and sustainable policies of business.

(D) Guiding Principles on Business and Human Rights (2011)

The United Nations Guiding Principles on Business and Human Rights is the first authoritative text adopted by the UN Human Rights Council.³² It addresses the 'complex global challenges of business and human rights'.³³ It is an advanced approach since it addresses the multinational corporate group as a whole, and it is applicable on all the business enterprises irrespective of

²⁵ The OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary, DAFNE/IME/WPG (2000) 15 Final (OECD: Paris, 2001), Concepts and Principles I.1.

²⁶ *Supra Note 9*, at 72-73.

²⁷ OECD Guidelines, Chapter 1, Section 3

²⁸ *Id.*

²⁹ UN Global Compact (July 2000) <https://www.unglobalcompact.org/what-is-gc/mission/principles> (Last visited Feb15, 2021).

³⁰ Our commitment to the United Nations Global Compact, British Council. <https://www.britishcouncil.org/our-commitment-United-nations-global-compact> (last visited June 18, 2021).

³¹ *Id.*

³² 'The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011'.

³³ John Ruggie, Progress in Corporate Accountability (Institute for Human Rights and Business 2013).

their sector, size, Structure, location or ownership.

The Guiding Principles comprises in itself three aspects i.e. ‘protect, respect, and remedy.’ *firstly*, duty of the State to protect, which provides that States have a positive duty to ensure protection of human rights of all against State as well as Non-State actors.³⁴ The Guiding Principles follows the traditional approach that protecting human rights is fundamental duty of states and this obligation remains to be of States. *Secondly*, the corporate responsibility to respect, imposes a negative duty on corporations to avoid infringing human rights while conducting their business operations.³⁵ Responsibility to respect in its truest implication is an embodiment of principle of minimum conduct which is recognised internationally. And *finally*, access to remedy, provides a mechanical framework which can provide judicial as well as non-judicial remedies.³⁶

The biggest shortcoming of these Guiding Principles is that it fails to enforce legal obligations on MNCs. It lacks a mechanism for enforcement of rights, and focuses greatly on voluntary initiatives which sometimes corporations may choose not to implement.³⁷ In fact, voluntary measures are often unsuccessful in providing adequate safeguards against business abuse of human rights.

The voluntary nature of these principles is the reason for its failure, despite of its great potential to endorse a dialogue between State and Corporations. Even though these principles are to be commended to introduce human rights responsibility of Corporations, Voluntary initiatives is a limitations that makes these principles only as strong as corporations choose to make them, and leaving out the corporations who choose not to implement them.

However, it cannot be denied that the Guiding Principles provide a very efficient mechanism for protection and respect for Human Rights. What is required here is an address by the International community to recognise the weaknesses in this system proposed by the Guiding Principles and establish a framework that imposes enforceable accountability.

(E) Proposed treaty governing Business and Human Rights and its setback

Addressing the voluntary nature of the Guiding Principles and need of an enforceable instrument as a safeguard for human rights, in September 2013 Ecuador proposed a treaty³⁸ for

³⁴ OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ HR/Pub/11/04 (2011), Principle 1.

³⁵ *Id.*, Principle 2.

³⁶ *Id.*, Guiding Principles 25-31.

³⁷ International Federation for Human Rights, Joint Civil Society Statement on the Draft Guiding Principles for Business and Human Rights (International Federation for Human Rights 2011) 3 (accessed 15 June 2021)

³⁸ Binding Treaty on Business & Human Rights, <https://www.business-humanrights.org> (last visited June 18,

enforceability of human rights obligations on transnational corporations, and it received great support from civil sectors.

However opposing that the International Organisation of Employers expressed a concern that it will cause a delay in implementing the present Guiding Principles. Therefore, it is a genuine setback to the progress achieved by the Guiding principles, in improving the position of human rights position and remedial measures.³⁹ Ruggie cited various concerns regarding potential polarisation, lack of support from business community, delay in justice for victim, issues with extraterritorial jurisdiction, and a serious doubt about the political will to implement an internationally binding treaty.⁴⁰

The treaty has already taken six years and is still in its second draft. It appears that there has been differences between states in agreeing to a standard of legal liability. And in the end chances are that the treaty will simply imitate the lowest agreeable standard for protection, laying far behind current standards enshrined under the Guiding Principles.

IV. THE WAY FORWARD- RECOGNISING RESPONSIBILITY UNDER EXISTING THE INTERNATIONAL HUMAN RIGHT LAW REGIME

The UDHR in its preamble itself makes it clear that it is not only the duty of state but of all organs of society to promote and respect human rights. Corporations being themselves an organ of society cannot escape this duty or obligation.⁴¹ Former U.N. Secretary-General Kofi Annan while arguing for TNCs' direct obligation for violations said "transnational corporations are the first to benefit from globalization. TNCs must oblige to their share of responsibility with respect to the effects of it."⁴²

Even in the Reparations for Injuries case, the International Court of Justice observed that even non-state actors like UN, may be granted a personality under international legal order. An entity enjoying sufficient rights and duties under the framework of international law is definitely its

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³⁹ International Organisation of Employers, 'Consensus on Business and Human Rights is Broken with the Adoption of the Ecuador Initiative' (26 June 2014) https://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/csr/EN/_2014-06-26__G-566_Consensus_on_Business_and_Human_Rights_is_broken_with_the_Adoption_of_the_Ecuador_Initiative.pdf (accessed June 17, 2021).

⁴⁰ John Ruggie, *A Business and Human Rights Treaty? International legalisation as precision tools – Commentary*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (June 13, 2014) <https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision> (last visited June 18, 2021).

⁴¹ See Oloka-Onyango, J., & Udagama, D, *The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights*, PRELIMINARY REPORT, SUB-COMMISSION RESOLUTION 1999/8 (1999).

⁴² Kofi A. Annan, *Help the Third World Help Itself*, WALL ST. J. (Nov. 29 1999).

subject. The way TNCs are treated under the existing legal regime it is very clear that these corporations possess various rights and duties under international law, and it lead to a rational understanding that TNCs are subjects of international law and possess a personality under it.

The international legal system for protection of human rights requires Corporations to follow three of its aspects, i.e. respect, protect and fulfil as provided in the Guiding principles 2011. Recognition of TNCs as subjects of international law seems to be the only feasible manner to enforce these obligations.

However, putting direct responsibility on TNCs doesn't solve the problem but it opens the door for other different challenges. There will be a need to decide the extent of responsibility that can be imposed, keeping in mind that eventually these obligations must not be excessive and discourage trade. Further, Corporate social responsibility has been considered non-binding, but today there is a need to transform this standard from inspirational to operational. But considering the attitude of Corporations towards Corporate social responsibility, making it a binding obligation will attract a lot of resistance from corporations.

V. CONCLUSION

The traditional approach of considering TNCs as mere objects of International Law does not hold much weightage in the current legal framework. Blatant disregard of human right and violations committed by TNCs are a matter of concern before the entire world. Though the international community has responded with various instruments but the effective implementation and enforceability has always been questionable and it ultimately has failed to ensure observance of human rights standard by corporations. The guiding principles of 2011 though appears to be a silver lining for observance of human rights standards, they still fail to sufficiently implement corporate accountability due to its voluntary nature. The Human rights and business treaty though aims for a legally binding framework for human rights enforcement, however it seems very difficult to bring states on the same platform along with corporations and civil society.

There is a need to interpret international legal doctrines which accept personality of TNCs as capable of holding obligation or duties under international law. There is a need to establish an understanding that TNCs are capable of possessing duties and may be held accountable under the existing legal framework. It at all the changes in interpreting and applying international human rights law can be implemented, transnational corporations will be brought out of their legal vacuum, capable of being accountable for their actions.
