

TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS VIOLATIONS: MECHANISM OF REGULATION UNDER INTERNATIONAL LAW

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ABSTRACT

This article delves into the critical issue of human rights violations perpetrated by Transnational Corporations (TNCs) and the imperative for a binding international treaty to regulate their activities. As globalization intensifies, TNCs wield unprecedented influence over economies and societies, necessitating a comprehensive legal framework to hold them directly accountable for human rights abuses. The analysis explores existing challenges within the current international legal landscape, emphasizing the limitations of voluntary guidelines and the need for a binding treaty to bridge the accountability gap. Drawing insights from recent developments, such as the United Nations' Guiding Principles on Business and Human Rights, the article scrutinizes potential mechanisms for enforcement, emphasizing the role of states, civil society, and TNCs themselves. The article concludes by advocating for a collaborative approach to establish a binding treaty that not only addresses human rights violations by TNCs but also fosters a global business environment aligned with the principles of justice, accountability, and the protection of fundamental human rights.

Keywords: *Transnational Corporations; human rights violations; international law; Human Rights Law International Treaty; Regulation of TNCs*

INTRODUCTION

Transnational Corporations (TNCs) has become more powerful due to globalization and the resultant business interactions cutting across the national borders. Their activities definitely have significant impact on the enjoyment of human rights. So corporate impunity for violations of human rights has become a major issue for the international law discourse.¹ Regulating TNCs through international law and imposition of direct obligations on TNCs under international law has now become a very important topic of discussion. It is alarmingly demanded that human rights violations by TNCs are to be prevented.² So, for preventing human rights violations by TNCs, they are to be regulated effectively. Also, adequate redress has to be given to the victims of such violations. Domestic legislations and mechanisms are proved ineffective because of the transnational nature of activities of TNCs.

There are several major limitations pertaining to international regulation of TNCs. The most important one is that TNCs are traditionally not the subjects of international law and so they cannot

¹ Peter Muchlinski, "Human Rights and Multinationals: Is There a Problem?", 77 *International Affairs*(2001) p. 42

² Nicola Jagers, "The Legal Status of the Multinational Corporation under International Law", in Michael K. Addo(ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer Law International, The Hague (1999) at p. 260.

be directly regulated through international law. On the other hand, international law holds states responsible for taking action in cases of violations of the norms of international law.³ So direct responsibility is upon the states in cases of violations by TNCs also. So it is the states who are to take effective measures under respective domestic laws to control and regulate TNCs. But the matter is that this method is also not devoid of shortcomings because states are facing too many difficulties towards effectively regulating TNCs due to want of resources and power. States have limitations also on extraterritorial activities of TNCs. In fact these shortcomings of the domestic law regarding regulation of TNCs is alarming and requires attention by international law since the level playing field of TNCs are transnational and that they have activities spanning territorial limits of many states and sometimes such activities are even worldwide. So regulation by any specific state both by the home state and by the host states could not be practically accomplished. Accordingly the result is that TNCs that are exploiting the wealth and wellbeing of the public could operate with impunity both under domestic law or under international law. TNCs shall not be allowed to continue unregulated just because of the practical difficulties by states domestically or due to the technical shortcomings under international law. What is more viable for TNCs' regulation, given their transnational nature, is regulation under international law by finding place therein for inclusion of TNCs in the subject list of international law.⁴

So in this article it is contended that the demand for imposing international law regulation of TNCs in the new context is necessitated because of impunity of TNCs under domestic law because of the inability of states or inaction due to collusion with states must be done and shall search for the viability of creating a legally binding international instrument addressing TNCs directly with clear and express human rights obligations on them. Thus it is vital to articulate direct human rights obligations and accountability on TNCs under international law. It is also suggested that a legally binding treaty on the topic is essential for curbing the problem of corporate impunity for human rights violations.

BACKDROP OF THE STUDY

Initiatives have been undertaken by the UN since early 1970s in addressing the issue of regulation of international business.⁵ The UN Centre on Transnational Corporations was established in 1974 and it began negotiations on a code of conduct. These negotiations stalled in 1990s with the abandonment of the Draft Code of Conduct on Transnational Corporations in 1994, since there was a divide between proponents of a legally binding code on the one hand and a voluntary one on the other hand.

³ Marion Weschka, "Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?" 66 *Heidelberg Journal of International Law*, (2006) at p. 626.

⁴ Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", 111 *Yale Law Journal*(2001) at p. 461.

⁵ David Weissbrodt, "Human Rights Standards Concerning Transnational Corporations and Other Business Enterprises", 23 *Minnesota Journal of International Law* (2014) at p. 136.

A second high tide towards a binding code is seen started with the announcement of the UN Global Compact by the UN Secretary General in the year 1999. The Global compact is a voluntary initiative through which corporations agree to implement a set of Principles in their business operations. Thereafter, proliferation of various non-binding instruments under the auspice of UN as well as national and other regional arrangements can be seen for regulation of TNC activities. Some of them have failed due to non-adoption it by the UN and some have lost relevance due to their voluntary nature of compliance.

The Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights in 2003, Appointment of UN Special Rapporteur on Business and Human Rights in 2005, the resultant adoption of the UN Guiding Principles on Business and Human Rights in 2011, and also the ongoing process initiated with the establishment of an Inter-Governmental working Group with the mandate of legally binding instrument are the efforts taken by the UN towards regulation of TNCs.⁶

RATIONALE FOR INTERNATIONAL REGULATION OF TNCs

TNCs, due to their transnational nature of activities as well as with their complex parent-subsidary structure, have been successfully avoiding national regulations of both their home and host states.⁷ Moreover, they are seeking to operate in countries with less regulatory standards and therefore are capable of extracting more profits mostly at the expense of human rights violations of stakeholders and other citizens.⁸ They have the capacity even to force the governments of such weak developing states that are in need of investment to come to their terms and demands. Thus they have become extremely influential governance actors on the global plane and therefore regulation of them through domestic jurisdictions has become ineffective as well as practically impossible.⁹

Human rights are the central normative prong of the global order since the Second World War and offer protection to fundamental human rights of individuals. The conventional international law framework for the protection of human rights is state centric. It obligates primarily states to promote and safeguard human rights. Though the emergence of TNCs has posed serious challenges to this model, the conventional nature of international law posits difficulty in imposing liability on TNCs for human rights violations committed by them. Human rights abuses of varying nature by TNCs in their activity zones reveal that corporate impunity is a legal lacuna in the international legal system also.

So also, the limited scope of state responsibility regarding human rights violations by TNCs as well as extraterritorial jurisdiction of states over activities abroad, the difficulty to enforce liability

⁶ Adam McBeth, Justine Nolan & Simon Rice, *The International Law of Human Rights*, Oxford University Press, Oxford, 2nd Edn. (2017) at p. 620.

⁷ Menno T. Kamminga, "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the E.C.", in Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, Oxford (1999) at p. 553.

⁸ Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU Law an International Law*, Edward Elgar, United Kingdom, (2011) at p. 14.

⁹ Christopher L. Avery, *Business and Human Rights in a Time of Change*, Amnesty International, UK Section, (2000) at pp.65-68.

for parent companies domiciled mostly in developed nations, the application of international doctrines of state sovereignty, the insistence of *forum non conveniens* principle by national courts along with the inability of victims to bring cases against corporate giants prove that there is an evident disproportion between the rights as well as the benefits TNCs enjoy in violation of human rights and the scarce obligations they undertake to prevent and compensate human rights violations. But the fact that TNCs operate beyond the territorial limits of more than a single nation and have jurisdictions exercisable by states more than a single one thereby make national regulation unpredictable and uncertain. Therefore international mechanism for accountability is preferable to guarantee the uniform implementation of human rights with regard to human rights violations by TNCs.¹⁰

OBJECTIVE OF THE STUDY

The aim of this research is to examine whether human rights obligations pertaining to TNCs can be drawn under international law and how TNCs can be held accountable for their violations of human rights. The objective of the study is to propose suggestions towards drawing up of an international instrument codifying the human rights obligations of TNCs hoping that the supervisory mechanism under such instrument would ensure that TNCs would fulfil their obligations.

RESEARCH PROBLEM

The research problem undertaken in this study is that whether accountability for human rights violations can be imposed directly upon TNCs under international law and if accountability can be discerned what is the mechanism through which such obligations can be enforced?

HYPOTHESIS

The existing means by which TNCs can be held responsible for human rights violations both under national and international legal systems are insufficient and so in order to guarantee protection of human rights against violations by TNCs, the present regime of TNC regulation for human rights violation must be developed towards creation of a legally binding international instrument.

SCHEME OF STUDY

There are two main approaches to address the issue of accountability of TNCs for human rights violations under international law. The first approach is that how best the human rights system based on state responsibility can be reinforced for the purpose. Human rights protection is predominantly based on the state-centred approach. So keeping this matter aside stating that nation states may lose power would drastically weaken the purpose behind incorporation of human rights jurisprudence. Since states are accountable for the protection of human rights, the focus should be to find solutions as to how national regulation can be improved to respond to the issue of human rights violations by TNCs. Thus an attempt is made also to assess the state responsibility doctrine and the extent it includes violations of international human rights obligations by TNCs. The

¹⁰ Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" 6 *Northwestern Journal of International Human Rights* (2008) at p. 222

assumption underlying this analysis is that there is a home-state whose nationality the TNCs possess which is responsible for the activities of TNCs functioning within the home and also abroad. So it is important to assess whether states are well able to function as a coherent and viable actor for implementation of human rights in the new and challenging world of globalization. But the debates surrounding state sovereignty undermines the ability of states to regulate TNCs on national and international levels. TNCs are sometimes described as stateless entities due to their special structuring and functioning. Thus an approach aimed solely at strengthening states' capacities for curbing the problem of impunity for human rights violations committed by TNCs would definitely be a futile attempt.

Thus a second but complementary approach is necessary for answering the new needs faced by the human rights system arising from the increased demand for direct accountability of TNCs. Solutions are necessary for making TNCs directly accountable. What is needed is an extension of the international system of regulation so as to embrace within its framework TNCs' direct accountability for their human rights violations.

MAJOR REASONS FOR IMPOSING DIRECT RESPONSIBILITY ON TNCs UNDER INTERNATIONAL LAW

Various reasons have been identified for making TNCs directly liable under international law. They are summarized as follows.

TNCs are powerful governance actors on the global stage which significantly affect the enjoyment of human rights.¹¹

TNCs activities on the enjoyment of human rights are considerable. They always choose states having less regulatory standards. So they can very well exploit the resources as well as the people there since these countries are having only weak standards. Besides they can even move or shift their activities to some other state if the state is going for some strict measures against them. They may even pressurize states to lower regulatory standards by deciding to move from such states.

In some cases TNCs themselves or in collusion with states may engage in exploitative techniques that may result in human rights violations. Such ability and practices of TNCs are well documented by the UN also.¹²

Governance gap and accountability deficit is there with respect to TNC regulation.

Since with the advent of globalisation, the actors and stakeholders in international law has enhanced. TNCs have grown even above states power and they possess and enjoy rights under international law. Since these TNCs are recognised as actors under international law, technicalities

¹¹ Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU Law an International Law*, Edward Elgar, United Kingdom, (2011) at p. 14.

¹² UN Commission on Human Rights, "Protect, Respect, Remedy: A Framework for Business and Human Rights, UN Doc. No. A/HRC/8/5 (7 April 2008)

due to traditional approach shall not be taken as hurdles to impose responsibilities on them.¹³ The important factors with respect to deficit in accountability are globalisation on the one hand and corporate form of TNCs and the resultant doctrinal challenges in the domestic as well as international law. Accumulation of power and wealth with TNCs are also contributing to the increased violations of human rights. The age-old understanding of the idea of state as sole actors are gone due to globalisation. States are now not in a position to command against giant TNCs. Authority of states in many areas is becoming less where powerful private entities started their operations.¹⁴ So accountability deficit could be evinced especially in the case of developing states that are not in a position to ensure protection of rights against these TNCs.

Regulation under the domestic law is not effective

There are problems with regulation of TNCs by way of domestic law regulation because of tension with respect to state sovereignty of home state and host state, the doctrine of corporate veil and the practice of *forum non conveniens*.¹⁵ Also, home state may not exercise jurisdiction over subsidiaries of TNCs that are functioning in some other states. Nationality principle and territoriality principle provide jurisdiction to host states upon such subsidiaries. So home state are devoid of any power to exercise jurisdiction in such cases. So the matter is that any one single state cannot effectively exercise jurisdiction or control and regulate TNCs whose activities span beyond boundaries of any one state. Thus jurisdiction by domestic courts become unpredictable also. Hence regulation by way of international law is highly necessitated especially for uniform application of international human rights laws to guarantee safeguards provided there in such instruments.¹⁶

No effective mechanism is available as of now even in domestic law or in international law.

Therefore a new mechanism must be established through which impunity of TNCs could be well addressed. The study suggests that a legally binding treaty would be a viable solution if drafted in clear terms the responsibilities and duties of TNCs while doing transnational activities. Thereby the issue relating to weak state responsibility towards effective safeguarding of rights of people with effective remedies also.

The dichotomy between the concept of international legal personality and private public dichotomy cannot be allowed in relation to application of human rights law against violations while carrying out transnational activities by TNCs.¹⁷

It is also noteworthy that international law does not have any set criteria to determine the method under which international legal personality can be acquired. Moreover, no closed list of subjects

¹³ Olivier De Schutter (et al), "Foreign Direct Investment, Human Development and Human Rights: Framing the Issues", 3 *Human Rights & International Legal Discourse*(2009) at p. 159.

¹⁴ Joyner C.C., *International Law in the 21st Century: Rules for Global Governance*, Rowman & Littlefield Publishers Inc., Oxford (2005) at pp. 288-295.

¹⁵ Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here?", *Connecticut Journal of International Law* (2003) at p. 6.

¹⁶ Ibid.

¹⁷ Hansen RF, "The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap", 10 *Global Jurist* (2010) at pp.12-13.

are given in international regarding international legal personality. No authority or specified norm also is there to determine from time to time who all possess international personality. It is also significant to note that in *Reparations for Injuries Case* the concept of international legal personality has been liberalized by the International Court of Justice in conferring United Nations Organization the status of subject under international law.¹⁸ Thus for conferring international legal personality to an entity what is needed is that the entity must have the capacity to act and have rights and duties under international law. So it could be stated that the matter of legal personality cannot contribute any obstacle to impose human rights accountability on TNCs.

Articulating the Mechanism of regulation of TNCs under international law

A legally Binding treaty is suggested to fill the governance gap in relation to human rights accountability of TNCs and other business enterprises. Since a global phenomenon requires a global response for carrying out effectively the issues underlying it, what is required with respect to violations of TNCs, is to find out a solution under the shade of international law itself. Moreover, the concept of human rights also derives its origin under international law.

The best mechanism/kind of international instrument for TNC regulation

Though various options are available ranging from a framework treaty to a legally binding one, it is suggested that an international treaty with effective enforcement mechanisms to be made available nationally and internationally is required to be created. Many soft law mechanisms have been adopted by the UN over these years and they all have proved not effective towards regulation of TNCs. So a treaty on the same line with a very weak enforcement mechanism would be one like 'no mechanism at all'. This way it is strongly suggested that a treaty imposing direct obligations on TNCs with a strong enforcement mechanism is to be effectuated.

Who all are to be regulated by the treaty

Now the question is with respect to the regulatory targets of the treaty. The matter is that whether all business entities are to be brought within the purview of the treaty. But if all business entities including domestic and transnational corporations have been taken, the importance might have been lost because it would be difficult to handle all the companies within the cover of a single treaty. At the very same time, it should be noted that since these entities are parties of transnational businesses on a mutual coherent way, leaving some of them out of the treaty mechanism would be impractical in that those domestic entities in the business supply chains may continue violations of human rights with impunity. So it is necessary that all business entities shall be brought under the regulatory framework of the proposed treaty.

Nature of violations to be addressed in the treaty

It would be somewhat easy if only on gross violations of human rights are made subject matter of the treaty. But such a treaty would be a very narrow one and that might not cover a great majority of human rights violations committed by businesses. So the treaty has to incorporate all the human rights norms recognized by all the human rights instruments.

¹⁸ *Reparation for Injuries Suffered in the Service of the United Nations Case*, ICJ Rep. 1949 at p. 179

Kind of liability on TNCs

The treaty focuses on the role and impact of TNCs and other business entities in matters relating to human rights violations by TNCs. TNCs are special agents having direct impact on human rights of individuals while engaging in business activities. They are mighty and powerful enough than states to handle issues that are consequent to their operations. So the suggestion is that the treaty should contain provisions imposing obligations directly on them. TNCs should be made directly responsible reversely as regarding traditional indirect obligation that are performed seldom only.

Nature of obligation of states

The treaty must clarify and strengthen states' obligations also. It is true that states remain a weak link in holding corporations accountable for human rights violations, especially when they compete to attract foreign investment. Provisions should made in the treaty that states shall have to preserve their regulatory space to protect human rights while negotiating trade or investment agreements.

States must be Required to Exercise Extraterritorial Jurisdiction:

The treaty must include provisions requiring states to exercise extraterritorial jurisdiction especially where other states are weak, unwilling or unable to take action against TNCs. Or else the victims may continue to be deprived of remedies.

Parent Company Liability

In transnational businesses TNCs are most often act as a cluster. They operate in parent subsidiary limited liability perspective. This would always be an obstacle for the victims of corporate human rights violations committed by subsidiary companies to claim remedies from the parent companies who take a major share of profit accrued out of such exploitation. Subsidiary companies are often not in a financial position to meet the financial obligation in cases of human rights violations. The rules relating to parent subsidiary limited liability must be liberalized in cases of transnational corporate human rights violations. So the suggestion is that the treaty must contain provisions requiring due diligence test to determine the extent of involvement of parent companies.

Provision for Access to Remedy

Victims right to access to remedy shall be recognised in the treaty. Provisions conferring access to remedy to the victims shall be included. Provisions must specify various remedial measures including punishment violators of human rights. Interim measures, reparation as well as penalty or punishment shall be made available in the treaty.

Enforcement Mechanisms

Sufficient enforcement mechanisms shall be included there in the treaty. These mechanisms may include non-state based mechanisms, state-based mechanisms and international monitoring and enforcement mechanisms. International Court on Transnational Corporations or an International Tribunal to hear and adjudicate complaints shall have to be included in the treaty provisions. A Treaty Monitoring Centre on Transnational Corporations to monitor compliance of the treaty

provisions should also be there. The treaty must also create an International Arbitration Mechanism to resolve cases of human rights violations in an expeditious way.

CONCLUSION

In conclusion, the examination of human rights violations committed by Transnational Corporations (TNCs) has illuminated a critical facet of the globalized world's challenges. The evolving landscape of international law, while providing a framework for addressing human rights abuses, underscores the need for a more robust and comprehensive approach to hold TNCs directly accountable.

As we navigate the complexities of this issue, it becomes apparent that TNCs must be recognized as key actors in the international arena with the power to impact human rights significantly. The call for direct responsibility under international law is not just a legal imperative but a moral obligation to protect the dignity and well-being of individuals affected by corporate activities.

Recent developments, such as the United Nations' Guiding Principles on Business and Human Rights, demonstrate a growing awareness of the need to bridge the accountability gap. However, challenges persist, and the effectiveness of these principles relies on states' commitment to enforcement, corporate transparency, and the establishment of mechanisms to investigate and redress violations.

In the pursuit of justice, collaboration between states, civil society, and TNCs is paramount. By fostering a culture of corporate social responsibility and ensuring compliance with international human rights standards, we can aspire to a world where business enterprises actively contribute to, rather than compromise, the protection and promotion of human rights.

In moving forward, the international community must remain vigilant, continuously refining legal frameworks, and promoting a collective ethos that places human rights at the forefront of global economic endeavours. Only through concerted efforts and a shared commitment to accountability can we strive for a world where TNCs operate as responsible stewards of human rights, leaving an indelible mark on the path toward a more just and equitable future.
