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WHY SHOULD TNCs HAVE HUMAN RIGHTS OBLIGATIONS? THE EVENTS IN BHOPAL AND RANA PLAZA – CHARACTERISTICS OF HUMAN RIGHTS VIOLATIONS INVOLVING TNCs

Abstract

A transnational corporation (TNC) is a company that has operations in multiple countries. TNCs are also referred to as multinationals. These companies are usually registered in all countries they operate in, and hold large amounts of revenue-generating assets. Today Transnational corporations (TNCs) are playing an important role in the global economy and human rights. Many of these corporations have great economic resources. However, their role in the field of human rights is also undeniable.

Keywords: *international law, transnational corporation, human rights, Rana plaza, subject*

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Nə üçün transmilli korporasiyaların insan hüquqları ilə bağlı öhdəlikləri olmalıdır? Bhopal və Rana Plazada baş verən hadisələr – transmilli korporasiyaların iştirakı ilə insan hüquqlarının pozulmasının xüsusiyyətləri

Xülasə

Transmilli korporasiya (TMK) bir çox ölkələrdə fəaliyyət göstərən şirkətdir. Transmilli korporasiyalara çoxmillətli şirkətlər də deyilir. Bu şirkətlər adətən fəaliyyət göstərdikləri bütün ölkələrdə qeydiyyatdan keçir və böyük miqdarda gəlir gətirən aktivlərə malik olurlar. Transmilli korporasiyalar (TMK) bu gün qlobal iqtisadiyyatda və insan hüquqları sahəsində mühüm rol oynayır. Bu korporasiyaların çoxu böyük iqtisadi resurslara malikdir. Lakin onların insan hüquqları sahəsindəki rolu da danılmazdır.

Açar sözlər: *beynəlxalq hüquq, transmilli korporasiyalar, insan hüquqları, Rana plaza, subyektlər*

Introduction

International law by definition is the law governing states. In other words, nation-states were and continue to be the primary subjects of international law, and though it does not exclude other players per se, they are broadly categorized as non-state actors. The terminology in itself suggests the secondary nature accorded to such players in international relations. However, the broad nomenclature bestowed upon these entities, which includes within its folds every organized and unorganized body ranging from Transnational or Multinational Enterprises to International Non-governmental Organizations to issue-specific Protest Forums, creates a genuine problem of oversimplification. These bodies have separate roles, objectives, and resources and are divergent in their respective ways of influencing International Relations. During the last century, transnational corporations (TNCs) have grown into proportions hard to estimate when laying the ground for the international human rights framework currently in place. Fortune 500, an annual list of the top 500 US companies based on their overall financial results over the past fiscal year, show that several companies present profits as large as, or even larger than the GDP of nation states. Foreign direct

investment makes up 39 % of total incoming finance in developing countries as of 2017. As corporations have grown larger, their impact on their surroundings have increased. The possibilities of improvement of the general welfare in the areas where transnational corporations establish their business are many, but alongside these possibilities come risks, that during the last decades have been debated extensively. There are numerous examples of events where TNCs have been connected to, or accused of participation in activities putting the human rights of employees, their families or surrounding local communities at risk. The debate regarding whether transnational corporations have obligations deriving from the current human rights regime, or should have such obligation deriving from new international human rights regulations has been ongoing since the 1970s.

In December 1984, a factory producing pesticides owned by the corporation Union Carbide India Limited (UCIL), released vast amounts of the toxic gas methyl isocyanate into the air. This leakage had devastating effects on the surroundings, resulting in deaths and long term injuries for the residents of Bhopal. The exact number of deaths and injuries are not known, but Amnesty International estimates the total number of deaths related to the leakage to be over 20 000 people until today (Amnesty International, 2004: 12). As well as injuring and killing humans, the leakage also polluted the environment in the surrounding area, e.g. poisoning the ground water.

UCIL was the subsidiary of a parent corporation based in the USA, Union Carbide Corporation (UCC). UCC had a strong influence over UCIL, not only providing it with technical means to run its production, but also with knowledge in the form of trained personnel. In the aftermaths of the leakage, many of the characteristic difficulties related to TNCs and human rights abuses emerged. The many victims sought remedies for the injuries suffered, but as UCIL did not possess sufficient assets to cover such economic compensation victims were left with no option but to seek remedies from the parent company, UCC. As neither UCIL or UCC had admitted any guilt for the leakage, victims faced a tough challenge standing up against the multinational corporation. The Indian court system was not up to the task of handling such a complex litigation process at the time, why the case was first brought before US courts. The Indian state had taken the role of *parens patriae*, representing the victims in the legal process. The US court dismissed the lawsuit based on the principle *forum non conveniens*, concluding that Indian courts were in a better position to determine the cause of the events and assign guilt and legal liability. In 1989 the Indian government and UCC made a settlement in the Indian Supreme Court, where UCC committed themselves to pay 470 million US\$. All future claims, both civil and criminal, against UCC and UCIL was dropped (Deva: 22-27; Baumann-Pauly, Nolan, Routledge, 2016: 23).

Surya Deva argues that the Bhopal events and legal aftermaths serves as an illustrative example of the issues typically arising when a TNC commits human rights abuses. He writes that the events paint a picture of the surroundings enabling such human rights abuses to take place, namely a TNC based in a developed country, placing its production and the risks that comes with it in a developing country, often with lax human rights protection. He also brings up the difficulties connected to the claims for remedies towards a TNC, such as piercing the corporate veil, navigating through foreign judicial systems, foreign courts being unable or unwilling to deal with the matter referring to *forum non conveniens*, insufficient legal aid to victims which in many cases make up large groups, corruption within state agencies, criminal and civil sanctions towards corporations being insufficient and last but not least, vague or unclear expectations on TNCs with regard to which, if any, human rights obligations they need to adhere to.

If the events in Bhopal shows how a TNC and its subsidiary in a host state can affect its surroundings and the local society, the collapse of Rana Plaza in Bangladesh in 2013 highlights the issue regarding the suppliers and subcontractors of TNCs. The Rana Plaza building was housing textile production, serving as a part of the supply chains of several TNCs. Labowitz and Baumann-Pauly writes that indirect sourcing is a method frequently used within the garment industry, where subcontracting production is used as a means to maximize profits. By keeping parts of the production outside the corporate structure TNCs have been able to shield themselves from responsibility concerning for example working conditions of such subcontractors (Nolan: 4-6).

Why should TNCs have human rights obligations? International human rights law has traditionally been focused at addressing states in relation to individuals. A legitimate question is therefore why TNCs, or corporations in general, should have responsibilities deriving from human rights regulations (Reparation for Injuries Suffered in the Service of the United Nations, 1949: 1).

A classical definition of the duties of a corporation was made by Berle who meant that a corporation is a judicial entity owing duties only towards its shareholders to maximize profit. Every activity not aiming to fulfill this goal was, according to him, not within the interest or obligations of the corporation. Friedman followed in Berle's footsteps when he in the 1960s based his theory on three arguments (Cernic, 2010: 32). Firstly, the corporation was to be seen as property of its owners and could therefore only be used for the benefits of its owners. Second, the reasons why a corporation is created are solely economical, why the corporation is not fit to deal with any other functions of society. Thirdly, Friedman argued that in order to fulfill its economic functions the corporation needs to separate economic from moral "responsibilities", meaning that a corporation does not have moral duties in the same way that individuals or other parts of a community. As these arguments were put forth over 50 years ago, the approach concerning the nature of corporations and their purpose can be said to have changed over time (Clapham, 2006: 60). Companies not acting in accordance with human right standards face reputational, legal and operational risks. Several of the biggest and most well-known multinational companies express a will to conduct their business in a way that advance rather than undermine the respect for human rights within the business sphere. These corporations have both recognized the risks that come with non-compliance with human right standards, but also the opportunities connected with a more progressive strategy. Worth noting is that there are allegations directed towards some of the very same companies, accusing them of still being complicit in human rights violations, in spite of their ambitious sustainability strategies.

A common argument as to why TNCs should not have responsibilities deriving from international human rights law connects to state-centrism: only states can have duties following international human rights law (Crawford, 2012: 12). This, as will be shown below, is no longer true. Other non-state entities, such as intergovernmental organizations and individuals, have been recognized as owing duties following international law, why it can be asked if TNCs also should be recognized as a possible bearer of duties and obligations. Even though states are the addressees of the International Bill of Human Rights, and many other human rights instruments, there is no "binding connection" between states and human rights instruments (Deva, 2012: 45). Ratner argues that the reasons why states have been connected to international human rights are that states historically represent the greatest potential danger to the individual, and that domestic law cannot alone effectively constrain state action. Transnational corporations considerably outstrip less developed countries in financial and technological terms, and as a result they are able to influence the policy and practice of less developed countries (Karavias, 2013: 35).

On one hand, TNCs have an enormous potential to provide an enabling for the enjoyment of human rights through investment, employment creation and stimulation of economic growth. On the other hand, the activities of TNCs have also threatened human rights in some situations and individual companies have been complicit in human rights violations (Klabbers, 2017: 25). Hence the roles of TNCs with regard to human rights are of twofold character: positive and negative. The scope of the commitment to support and respect human rights and to avoid complicity in human rights abuses is limited to the company's own sphere of influence. TNCs are supporting and respecting human rights in their spheres of influence in a wide variety of ways, including by adhering to national laws that have been adopted as a result of a State's international human rights obligations and commitments (Muchlinski, 2007: 65). Internationally, many companies participate in the United Nations Global Compact, which stipulates that those companies support and respect internationally proclaimed human rights. Similarly, many TNCs have already adopted voluntarily guidelines and codes of conduct and are seeking greater clarity on how they can avoid problems and positively affect the enjoyment of human rights in their activities. There is also growing recognition of the importance of designing implementation steps that will give life to the standards' application.

Hence, more discussion is occurring related to monitoring mechanisms that might provide for review, evaluation, revision, and performance improvements (Ramcharan, 2014: 21). Human rights organizations pressing TNCs to influence political developments in other countries sometimes confront a particularly complicated challenge to demonstrate that their advocated path towards agreed goals is in line with the preferences and priorities of the most affected foreign population. It arises hot disputes over whether TNCs should withdraw from a country with significant human rights abuses, or stay and work for change. On August 13 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the «Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights» (hereinafter referred to as «the Norms») in its Resolution 2003/16 (13).

The Norms represent a landmark step in holding businesses accountable for their human rights abuses and constitute a succinct, but comprehensive, restatement of the international legal principles applicable to transnational corporations with regard to human rights, humanitarian law, international labour law, environmental law, consumer law, anticorruption law, and so forth. In fact, the Norms are the first non-voluntary initiative accepted at the international level. The Norms attempt to impose direct responsibilities on transnational corporations as a means of reaching comprehensive protection of all human rights – civil, cultural, economic, political and social. Thus these Norms constitute an attempt in filling the gap in understanding the expectations on transnational corporations in relation to human rights. The Norms not only reflect and restate a wide range of human rights, labour, humanitarian, environmental, consumer protection, and anticorruption legal principles, but also incorporate best practices for corporate social responsibility. Besides, the Norms do not endeavor to freeze standards by drawing on past drafting efforts and present practices; they incorporate and encourage further evolution.

The Norms appear to be more comprehensive and more focused on human rights than any of the international legal or voluntary codes of conduct drawn up by the ILO, the OECD, the European Parliament, the UN Global Compact, trade groups, individual companies, unions, NGOs, and others. The Norms and Commentary provide for the right to equality of opportunity and treatment; the right to security of persons; the rights of workers, including a safe and healthy work environment and the right to collective bargaining; respect for international, national, and local laws and the rule of law; a balanced approach to intellectual property rights and responsibilities; transparency and avoidance of corruption; respect for the right to health, as well as other economic, social, and cultural rights; other civil and political rights, such as freedom of movement; consumer protection; and environmental protection. With respect to each of those subjects, the Norms largely reflect, restate, and refer to existing international norms, in addition to specifying some basic methods for implementation. One of the most influential public international legal instruments that regulate the responsibilities of transnational corporations with regard to human rights is the OECD «Guidelines for Multinational Enterprises». Unlike other «soft law» that is addressed by particular bodies of international organizations to their member States, the OECD Guidelines are recommendations addressed by governments to TNCs. The list of Governments includes those of thirty OECD member States and eight adhering non-member States. The Guidelines were first published in 1976 and most recently updated in 2000. The revised document covers a rather broad spectrum of issues ranging from compliance with local laws and regulations, refraining from anti-competitive practices, safeguarding of consumer interests and meeting host country tax liabilities (14). Among the major improvements that were resulted from the revised document are that the Guidelines have become globally applicable. New chapters on bribery and consumer interests have been added. Likewise, the chapter on Environment is reinforced. Finally, the implementation procedures of the Guidelines have been enhanced.

Conclusion

The growing independence of the world community, to which the liberalization of international investment and trade regimes has contributed significantly, has great potential for enhancing the

living standards of people throughout the world. As the core responsibility for human rights violations is taken upon states, insufficient attention is paid to some of the most powerful non-state actors in the world, that is, transnational corporations. However, with power should come responsibility, and International Human Rights Law needs to focus adequately on these extremely potent international non-state actors. In other terms, one cannot simply deny the responsibility of TNCs under human rights legislation because it does not directly codified in international law and has traditionally not taken into account. As Secretary-General of the United Nations Ban Ki-moon noted, «We need business to give practical meaning and reach to the values and principles that connect cultures and people everywhere».

While governments have the primary responsibility to promote, protect and fulfill human rights, the Universal Declaration of Human Rights calls on «every individual and every organ of society» to strive to promote and respect the rights and freedoms it contains and to secure their effective recognition and observance. The concept of «every organ of society» covers private entities such as transnational corporations. Transnational corporations are essential participants in the structure of International Law, but that current soft law does not by itself amount to a sufficient platform by which to recognize their international legal personality. Negative role played by TNCs, is the impetus for the development of International Law in the field of human rights, calling the activities of TNCs under some control.

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