

# MAKING TRANSNATIONAL CORPORATIONS ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS

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*In today's era of globalisation and free trade, transnational corporations (TNCs) have become more economically powerful than many countries around the globe. A number of TNCs have a strong and influential presence in developing countries such as India, since these TNCs are often perceived to be indispensable for their economic growth and development. Such powerful TNCs have the opportunity for gross human-rights violations, such as exploitation of the right to health of the workers, unsafe consumer practices, negligence in protecting the lives of the people residing in the vicinity of factories producing dangerous chemicals or causing environmental damage. The article would hence examine the feasibility of attaching human rights responsibilities to the TNCs under international and domestic laws. The article shall also critically study the efficacy of transnational human rights litigation as one of the potential remedies along with an analysis of the legal hassles involved in the process. Moreover it shall also examine the causes behind the failure of Bhopal litigation and look at the legal system of India to analyse its ability to combat such human rights violations at the hands of TNCs in the foreseeable future. Lastly in conclusion, the article shall offer alternative remedies for the victims of human rights violations in the developing countries.*

## I. INTRODUCTION

The phenomenon called 'Globalization' has harmonized the business environment throughout the world and built up a globally integrated market. It has

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liberalized trade under the aegis of the World Trade Organization, thus trying to remove the disparity existing between the developed world and the developing countries. But globalization has evoked several conflicting responses regarding both the description and the consequences of such integration. For instance, globalization demands deregulation for effective trans-border movement of business,<sup>1</sup> but at the same time it requires domestic regulations of foreign entities to avoid outflow of resources.<sup>2</sup> On one hand, this phenomenon has removed State borders regarding trade, but on the other hand, has also served to strengthen the boundaries when it comes to access to life-saving drugs, employment, transfer of technology etc.<sup>3</sup> Similarly, it is hotly debated whether globalization poses a threat to human rights through activities of different corporations or provides an impetus to their realization by uniting the world human rights movement.<sup>4</sup>

Transnational corporations (TNCs) have emerged as a potent economic force in this era of globalization. A UN study defines TNCs as “enterprises irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.”<sup>5</sup> Thus, on the face of it, a TNC would appear to be a business entity that operates in more than one country through its subsidiaries and has control over the income-generating assets of not just its home country but also of its country of operation, i.e. the host country. The phenomenon of globalization and the growing trend of liberalisation have made it much easier for these TNCs to permeate state borders and establish themselves in countries more than just one or two.

The most important reason for the growing presence of TNCs in the international economic scenario is the competitive advantage of a global network of production. They usually have better access to international capital markets and can therefore, finance huge projects far more effectively. Their control of

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<sup>1</sup> UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 139 (2002).

<sup>2</sup> JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 55 (2002).

<sup>3</sup> For example, globalization has led to more stringent immigration, patent, employment, outsourcing and labour movement laws in the US. See for example, *US anti-BPO Bill Passed*, available at <http://economictimes.indiatimes.com/articleshowarchive/442845.cms> (Last visited on January 14, 2009). US also has separate standards of ‘prior art’ within US where it should be known or used by anyone, and outside US, where it should be patented or described in a printed publication.

<sup>4</sup> Louis Helkin, *That “S” Word: Sovereignty, Globalization and Human Rights, Et Cetera*, 68 *FORD-HAM L. REV.* 1 (1999); Dina Shelton, *Protecting Human Rights in a Globalized World*, 25 *B. C. INT’L & COMP. L. REV.* 273 (1997).

<sup>5</sup> Report of UN Centre on Transnational Corporation: E/1988/39/Add. 1 para. 1 a.30, as cited in, D A Ijalaye, *THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW* 7 (1978).

capital, technology, information and services give them enormous power in the host countries. An estimated number of 35,000 TNCs operate through 170,000 foreign subsidiaries throughout the world.<sup>6</sup> The 100 largest of these TNCs hold approximately 16% of the world's productive assets.<sup>7</sup> In the year 2000, the top 200 TNCs had combined revenue greater than the combined GDPs of all states, excluding those of the top ten countries.<sup>8</sup> Among the 100 largest economies in the world, 51 are corporations and only 49 are countries.<sup>9</sup> A closer look revealed that US corporations occupy 82 slots of the Top 200 list, while Japanese corporations come second with just 41 slots.<sup>10</sup>

The TNCs, therefore are a gargantuan economic power, and by nature of their business and size, are present in many countries apart from the country of their incorporation. They provide employment to 90 million of the world's population, out of which, a workforce of around 27 million is from the developing countries.<sup>11</sup> Correspondingly, they have increased influence on the fulfilment and enjoyment of human rights of a wide range of people, in a number of jurisdictions, including employees, consumers, people who reside in neighbouring areas and other stakeholders. Host countries, which are more often than not, the developing and the least developed countries, seek to attract foreign investment by relaxing labour and environmental standards, taxations laws and other procedural requirements. This inevitably leads to a race to the bottom for these countries, which means, while vying for the attention of global capital forces, the developing countries reduce their standards to alarmingly low levels in a bid to compete with other countries in this fight for foreign investment. In such nations, these TNCs have perpetrated a variety of human rights abuses by employing child labourers, failing to provide safe and healthy working environment, discriminating against women workers and repressing the trade-unions and thereby affecting the right to collective bargaining of the workers.<sup>12</sup> In such a scenario, it becomes imperative to hold the erring TNC accountable, with just and effective remedies for the victims of the human rights violations.

In the first part of this paper, we shall examine whether TNCs are liable to observe human rights obligations and whether they can be held accountable for gross violations of the same. We shall also discuss the feasibility of applying international law and municipal laws to hold the TNCs accountable. In the next part,

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<sup>6</sup> Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, available at [www.corpwatch.org/downloads/top200.pdf](http://www.corpwatch.org/downloads/top200.pdf) (Last visited on June 15, 2008).

<sup>7</sup> Medard Gabel & Henry Bruner, *Global Inc.: An Atlas of the Multinational Corporation 5* (2003) as cited in, David Weissbrodt, *International Standard-Setting on the Human Rights: Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373 (2008).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2001, 9, as cited in, Weissbrodt, *supra* note 7.

<sup>12</sup> Weissbrodt, *supra* note 7.

we seek to look into the remedy offered by human rights litigation in the home country as well as in the host country by examining cases brought under the Alien Torts Claims Act, 1789 in the US as well as the Bhopal litigation by India against the Union Carbide Corporation. Lastly, in conclusion, we shall attempt to provide alternative solutions to hold the erring TNCs liable for various human rights violations.

## II. LIABILITY OF TRANSNATIONAL CORPORATIONS

TNCs usually operate in a number of developing countries apart from their country of incorporation. Developing countries try to attract Foreign Direct Investment (FDI) through different policy measures like building of Export Processing Zones (EPZ), which provide special incentives to the TNCs in the form of flexible labour or environmental laws.<sup>13</sup> In these countries, the TNCs cut down cost of production to a great extent by not following minimum standards of work place safety and by not providing their workforce with basic amenities and living conditions. The TNCs benefit from little or no environmental regulations, while the rights of people to access clean drinking water and air and a toxicity-free neighbourhood are denied due to the polluting activities of the corporations.<sup>14</sup>

This necessitates a study of the legal regime in question to ascertain how to hold these TNCs responsible for violations of human rights in the host countries.

### *A. THE BASIS OF HUMAN RIGHTS OBLIGATIONS FOR TNCs*

TNCs have always argued that their only responsibility is to make profits for their shareholders and that they do not have any positive duty to observe human rights.<sup>15</sup> Moreover, it is generally argued by corporations that those which invest time and money into observing human rights, will be at a competitive disadvantage in relation to other unscrupulous corporations that do not undertake such responsibilities.<sup>16</sup> However, with changes in the nature and

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<sup>13</sup> CHU YUN JULIANA NAM, *COMPETING FOR FDI THROUGH THE CREATION OF EXPORT PROCESSING ZONES: THE IMPACT ON HUMAN RIGHTS* 163 (Olivier De Scutter ed., 2006).

<sup>14</sup> Nike, the leading sport shoe manufacturer, always outsourced all their manufacturing processes to contractors in low-wage countries like Korea, Taiwan, Vietnam, Indonesia and China. Workers in these countries earned, in an average \$1 for a grueling 11 hour day, often with mandatory overtimes and in crowded, poorly ventilated factories. When confronted, Nike initially denied all responsibility by stating that they bought the shoes from independent contractors. See JOHN R BOATRIGHT, *ETHICS AND THE CONDUCT OF BUSINESS*, 404 (2007). Coca Cola has been criticized for setting up bottling plants in water-stressed areas in Jaipur, without consideration for local communities. See *TERI faults Coca Cola for Depleting Community Water Resources*, available at <http://infochangeindia.org/200802196945/Water-Resources/Features.html> (Last visited on January 14, 2009). These are a few of the growing instances of human rights violations by TNCs.

<sup>15</sup> PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 515 (2007).

<sup>16</sup> *Id.*

location of power in the contemporary globalized world, where increased power has passed into the hands of the TNCs, the boundary between the public and the private spheres has become blurred. TNCs can now affect the economic welfare of the communities in which they operate and due to indivisibility of human rights, they have a direct impact on the human rights enjoyed by such communities.<sup>17</sup>

It is also noteworthy that the TNCs are not burdened with the responsibility of preserving civil and political rights since it is the state and not the TNCs, which is in a position to secure such rights of the people. But, since the TNCs have the potential to directly affect the social, cultural and economic rights of the people of the host country, they cannot escape from such a responsibility. Though the TNCs may not have a positive duty to secure the human rights for the stakeholders and people in areas of their operation, they surely have a positive duty to avoid any violation of any of the rights enjoyed by such people. However, despite such strong theoretical and moral case for extending responsibility for human rights violations to TNCs, their legal liability to observe human rights remains uncertain as is evident from the following study of different legal systems under which an erring TNC may be held accountable.

## *B. LIABILITY UNDER PUBLIC INTERNATIONAL LAW*

International law governs the relations between the States and hence the rights and obligations have a bearing only on the ‘persons’ concerned therewith. The term ‘international legal person’ is employed for the entities that are “capable of possessing international rights and duties and are endowed with the capacity to take certain types of action on the international plane”<sup>18</sup> and it is they who are the bearers of rights and duties under international law.<sup>19</sup> The issue of whether TNCs could be treated as the subjects of international law has evoked a great deal of doctrinal controversy. The traditional positivist doctrine deems only States as the subject matter of international law. Over the years, there has been a trend to argue for inclusion of TNCs within the purview of international law to bring in some accountability to their actions. Jurists like Wolfgang Friedman and Lauterpacht have opined that the concept that only states can be subjects of international law was influenced by the western Christian world and with the changing nature of international relations in the post world war era, there was a need to recognize TNCs also, as subjects of international law.<sup>20</sup>

Amidst the prevailing belief in the 1970s that TNCs were problematic for the developing countries, emerged another school involving eminent third-

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<sup>17</sup> *Id.*, 516.

<sup>18</sup> LORI F. DAMROSCH, *INTERNATIONAL LAW: CASES AND MATERIALS* 249 (2001), as cited in, Emeka Duriigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 *NW.U.J.INT’L HUM. RTS.* 222 (2008).

<sup>19</sup> *Id.*

<sup>20</sup> Wolfgang Friedman, *The Changing Dimensions of International Law*, 62 *COLUMBIA L. REV.* 1148 (1962).

world jurists, like Upendra Baxi, who stressed upon the need to have TNCs included within the domain of international law so as to help the Third World countries seek justice against them.<sup>21</sup> Malcolm Shaw also, had been quite sceptical of the fact that international law had observed its own rule of treating only States as the subjects of international law. He supported his position by citing instances when chartered companies, insurgents and belligerents and international organizations were also treated as the subjects of international law.<sup>22</sup> From the above discussion it is clear that though there is a sizeable academic literature urging for the inclusion of TNCs within the purview of international law, the present jurisprudence does not consider the TNCs as the subjects of international law, notwithstanding the fact that some of their activities might violate the sanctity of the same.

### *C. LIABILITY UNDER INTERNATIONAL HUMAN RIGHTS LAW*

There are two dimensions to the human rights regulation of TNCs by states – ‘direct’ regulation by international human rights law and ‘indirect’ regulation through obligations imposed upon states so as to control private actors. The starting point of direct regulation is the Universal Declaration of Human Rights (UDHR), whose Preamble states that ‘every individual and every organ of society’ is bound to abide by its substantive human rights provisions.<sup>23</sup> In today’s time, due to privatization policies, many countries have handed over functions traditionally performed by the state to the corporations. So logically, if human rights were historically granted to individuals so as to safeguard them from abusive actions of the states, then presently private entities entrusted with performing some functions of the state should also be called upon to respect human rights. Ideally, it ought to be the state, which is charged with the duty to secure human rights for individuals within its jurisdiction, but TNCs can provide crucial collateral support to that end.<sup>24</sup> It can be argued that TNCs have a minimum duty of ‘do no harm’ and additional obligations to take positive steps to protect human rights depending on their proximity with the rights bearers.

Many international covenants attach direct or indirect obligations on the states to control activities of private entities, in order to fulfil their duties towards their citizens in upholding their human rights. These obligations are sometimes expressly enunciated like Article 2(e) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), where states are mandated to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; or are inferred indirectly from the general obligatory clauses of International Covenants like Article 2(1) of International Covenant on Civil and Political Rights (ICCPR) which requires States to protect people from human rights abuses by other people. The duty of States to give effect to human rights between private parties has also been confirmed in a

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<sup>21</sup> *Id.*

<sup>22</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 177 (2003).

<sup>23</sup> JENNIFER A ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 77 (2006).

<sup>24</sup> *Id.*, 78.

number of cases in various international fora. In the cases *Awas Tingni Community v Nicaragua*,<sup>25</sup> and *Social and Economic Rights Action Center v Nigeria*,<sup>26</sup> violations of human rights were entailed in a state's failure to prevent human rights abuses by corporations. Thus, it can be argued that the international treaty law jurisprudence not only recognizes it to be the prerogative of a State to respect human rights of its people but also its responsibility to prevent human rights abuses by any other private entity.

Article 25 of the present statute of the International Criminal Court, titled as 'Individual Criminal Responsibility' states that 'the Court shall have jurisdiction over natural persons pursuant to this Statute'.<sup>27</sup> The term 'natural persons', as appearing in the Article, clearly excludes entities with legal personality, such as corporations. The underlying reason for the exclusion of non-natural persons is the difficulty attached to the proof of *mens rea* of such corporations.<sup>28</sup> The International Criminal Court follows the procedure that involves 'naturalistic' evaluation of its subjects and then holding them criminally liable. The TNCs by their very nature are incapable of forming any criminal mental attitude before the commission of the crime, and hence criminal liability can only be attached to the Directors or officers responsible for such acts.<sup>29</sup> Thus, it can be concluded that despite recognizing the need to address human rights violations by corporations, international law does little to address the issue comprehensively. Lack of proper enforcement mechanism for human rights abuses committed by private bodies also proves to be a huge obstacle for people seeking relief under the international law.

#### D. LIABILITY UNDER MUNICIPAL LAWS

The main responsibility to address any human rights abuse should lie with the States themselves since it is they who undertake to respect and ensure human rights while signing or ratifying any international convention on human rights.<sup>30</sup> A number of States have recognized the need to hold corporations responsible for gross negligence of human rights and have enacted legislations

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<sup>25</sup> *Awas Tingni Community v Nicaragua* case no 79, Intern-Am CHR (Judgment of the Inter-American Court of Human Rights of 31 August 2001), as cited in SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 9 (2004).

<sup>26</sup> *Social and Economic Rights Action Center v Nigeria* Comm 155/96 (African Commission on Human and People's Rights, 27 May 2002), as cited in SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 9 (2004).

<sup>27</sup> M C BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 39 (1998), as cited in, OLIVIER DE SCHUTTER, *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 287 (2006).

<sup>28</sup> Cristina Chiomenti, *Corporations and the International Criminal Court*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* (2006).

<sup>29</sup> *Id.*

<sup>30</sup> Simon Chesterman, *The Turn to Ethics: Disinvestment From Multinational Corporations for Human Rights Violation: The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577 (2008).

regarding gender discrimination and sexual harassment in workplace, environmental standards, occupational health safety and consumer welfare. Many countries have comprehensive labour laws, which take care of the welfare of the working classes. The United Kingdom has enacted a Human Rights Act, which is in relation to human rights violations between private entities. However, it has been noted that such legislations regulating behaviour of corporations are more prevalent in developed countries. The traditional reliance on the domestic law of the host country, for enforcing environmental and social norms, means that vindication of a community's rights or interests is generally dependent on the effective functioning of the host country's regulatory agencies or its judiciary.

The fact that developing countries are not capable of regulating the corporations strictly can be attributed to the lack of appropriate legal mechanism and the weak governance system often present in such jurisdictions. In a bid to attract foreign investment, the developing countries offer a relaxed legal order to the TNCs on a platter, thereby giving them sufficient leeway in relation to observance of human rights norms. This is also because the developing countries suffer from disproportionate negotiating power vis-à-vis the economically powerful TNCs. So, these states cautiously exercise their power of regulation and intervention, and that too, to mostly suit the interest of global capital forces. Moreover, the powerful TNCs are also able to discourage any sanctions by threatening to disengage from a state, and sometimes even from a developed country. In 1998, Rolls Royce threatened to leave the markets of UK if it should adopt Europe's high labour standards, which was one of the reasons for UK's initial failure to sign the social provisions of the Maastricht Treaty of the European Union.<sup>31</sup> Political considerations also have a role to play in the failure of States in bringing the TNCs under their control. The economically powerful TNCs operating in developing countries have immense political force and even the clout to overthrow public officials from their posts. Such threats act as an impediment for the political functionaries to bring any action against these TNCs.<sup>32</sup> Due to a combination of these factors, the TNCs possess an increased capability to evade, disregard or subvert national policies in countries of their operation and escape the consequences of their actions with ease. Hence, from the above discussion it is clear that holding TNCs liable under the municipal law of the host states might not be a viable option.

### III. HUMAN RIGHTS LITIGATION AGAINST TNCs

TNCs can be held accountable either at the host countries or in their home countries for the perpetration of human rights abuses. This has given rise to a plethora of instances of transnational human rights litigations worldwide.

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<sup>31</sup> SARAH JOSEPH, *TAMING THE LEVIATHANS: MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS* 177 (2002).

<sup>32</sup> Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT'L HUM. RTS. 222 (2008).

### *A. LITIGATION IN THE HOME COUNTRY: THE ALIEN TORT CLAIMS ACT, 1789*

Under the Nationality principle, states may extend their jurisdiction to cover extra-territorial actions based on the nationality of the actors. One of the oft-used pieces of legislation in relation to transnational human rights abuses is the Alien Tort Claims Act (ATCA) of the United States (US), for the simple reason that most of the erring TNCs are often incorporated in the US. The ATCA states that “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty in the United States”. A study of this piece of legislation is imperative to ascertain the efficacy of litigation in the home country to bring justice to the victims of human rights violations.

The scope of ATCA has been expanded historically through numerous watershed judgments. But arguably the most important decision came in 1997, where in *Doe I v Unocal Corp*,<sup>33</sup> it was held for the first time that ATCA actions can lie against private corporations. Here, a group of Myanmar farmers were permitted to proceed with an ATCA claim against Unocal, a Californian energy corporation, alleging that the TNC, acting through its partners in the Myanmar military and police forces, had committed a range of egregious human rights abuses like forced labour, forced relocation, torture, rape, murder etc., while conducting its Yadana gas pipeline project in Southern Myanmar. The plaintiffs based their claims on the grounds of wrongful death, battery, false imprisonment, wilful infliction of emotional distress, negligence and conversion, along with an equitable claim of unjust enrichment. The litigation concerned activities perpetrated by the Myanmar military, which had been hired to provide security for the onshore construction and operation of the pipeline. Responsibility for the onshore project was vested in the Myanmar Gas Transmission Company (MGTC), floated by a joint venture, consisting of the Myanmar government-owned oil company - the Myanmar Oil and Gas Enterprise (MOGE), the French corporate group Total, a Thai Petroleum company PTTEP, and the US-based company Unocal which owned 28% stake. One of the arguments put forth by Unocal before the California State Court was that the responsibility of the onshore project was with MGTC and not them. Chaney J. in this instant case went on to hold that Unocal, as one of the participants in the joint venture owning the subsidiary company, could be held liable for the tortious acts, because MGTC was the alter ego of each of the parties to the joint venture.<sup>34</sup>

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<sup>33</sup> *Doe I v Unocal Corp* [963 F Supp 880 (CD Cal 1997)] as cited in SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 22 (2004) and available at [http://www.earthrights.org/doe\\_v\\_unocal\\_case\\_history.html](http://www.earthrights.org/doe_v_unocal_case_history.html) (Last visited on September 25, 2008).

<sup>34</sup> As per general principle of law, actions of an entity are treated as that of another, if the former is an alter ego of the latter. It is akin to the ‘piercing of corporate veil’ doctrine, which goes beyond the separate legal personality of the corporation and establishes a unity of interest or ownership between the two entities, so as to hold one liable for the actions of the other.

One of the biggest challenges faced by the litigants was to establish that the parent corporation had ‘substantial business dealings’ or ‘certain minimum contacts’ to be able to hold them vicariously liable for the actions of their agent, the Myanmar military, under the personal jurisdiction of the US courts. Lew J. dismissed this case in 2000 on the ground that Unocal could not be held liable unless it intentionally wanted the military to commit abuses, which the plaintiffs had not shown. But in 2002 United States Court of Appeals for the Ninth Circuit allowed the lawsuit against Unocal to go forward. It was held that Unocal knowingly assisted the military in perpetrating the abuses, which was enough to go to trial. This decision was vacated in 2003 and Judge Lew’s decision was reinstated, pending an appeal to an eleven judge en banc panel within the Ninth Circuit. In 2005, Unocal agreed to settle the claims and compensate the Burmese villagers who had suffered atrocious abuses at the hands of the military. Though Unocal could not finally be held to be liable, the ability of the Burmese victims to extract a settlement from the erring TNC can be viably argued to have been one of the avowed successes of this prolonged litigation.

The ATCA grants aliens rights to sue in torts for breaches of ‘laws of nations’, thereby meaning sources of international law beyond treaty law. This essentially means that the human right claimed by the litigant should emanate from customary international law and jus cogens norms. The corpus of customary international law is much larger than that of jus cogens, and hence a conflict arises when courts adopt either the wider, or the narrower scope, of the law. However, the Supreme Court of the United States gave a landmark decision in the recent *Sosa v. Alvarez Machain*<sup>35</sup> to resolve the above dilemma of the courts. The parties were demanding for both the expansion and limitation of the ATCA. The court had to strike a proper balance between the two and came up with the solution that only the violation of “a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18<sup>th</sup> century paradigms we have recognized” would be capable of providing a cause of action under the ATCA.<sup>36</sup> The Court further observed that when a certain norm has acquired enough specificity, the practical consequences of making that norm actionable in federal courts should be taken into account. While deciding the above case, the Court found that the norm of arbitrary preventive detention had acquired enough specificity, and accepted that its violation could give rise to a cause of action under the ATCA. Thus, the Court attempted to provide an unambiguous guidance for identifying the relevant principle of customary international law, the violation of which would be sufficient to give rise to a cause of action under the ATCA.

But foreign plaintiffs seeking to hold TNCs liable for environmental or social harms committed abroad face a nearly insurmountable set of jurisdictional, procedural, and substantive hurdles to overcome. These obstacles include judicial

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<sup>35</sup> *Sosa v. Alvarez Machain* [542 US 692 (2004)] as cited in Gregory T. Euteneier, *Towards a Corporate “Law of Nations”: Multinational Enterprises’ Contributions to Customary International Law*, 82 TUL. L. REV. 757 (2007).

<sup>36</sup> *Id.*

application of three doctrines used to dismiss cases of foreign jurisdictions filed in the US courts: (a) the doctrine of *forum non conveniens*, which provides a court's discretionary power to decline to exercise jurisdiction when it appears that the case may be more appropriately tried elsewhere, (b) *comity*, which provides that under certain circumstances, deference should be given to the laws and interests of a foreign country and (c) the political question doctrine, which allows a judge to dismiss a case if the judge determines that hearing the case will interfere with U.S. foreign policy.

Human rights abuses also can be classified as ordinary torts, like wrongful death, battery, negligence, nuisance etc. US Courts have subject matter jurisdiction over transitory torts, committed in other countries, provided they are unlawful under the laws of that country and further provided that, that country's laws are consistent with the policies of the US forum. US federal courts also have diversity jurisdiction to consider civil law complaints arising between aliens and US citizens and corporations if the claim is over \$ 75,000 USD.<sup>37</sup> Ordinary transnational tort jurisdiction acts as an important supplement to ATCA jurisdiction. They are useful in cases where the alleged human rights abuse fails to rank as a breach of a law of the nations, like litigation regarding environmental harm. It may also lie in regard to human rights abuses committed by corporations in the numerous circumstances where customary law fails to recognize liability. A TNC can be liable for reasonably foreseeable harms caused by its negligent conduct or for both likely and unlikely consequences of their reckless and intentional conduct.

It might be however recollected that a series of transnational tort claims were brought by Ecuadorian plaintiffs against Texaco regarding its alleged responsibility for contamination of the environment in the Amazon and resultant health problems, all of which were dismissed on the ground of *forum non conveniens*.<sup>38</sup> Shell Oil and Dow Chemicals were sued for manufacture of the pesticide dibromochloropropane, which caused sterilization to the plaintiffs, when used in banana plantations in Central America, Africa and South East Asia. Though the chemical was banned in the US, it was exported to other countries. An action for wrongful death and personal injury was brought under a Texas law in *Dow Chemicals v Castro Alfaro*<sup>39</sup>. The litigants could move past the *forum non conveniens* hurdle only because the Texan statute did not apply the same in relation to transnational tort cases. Finally the case was disposed off after the TNC agreed to settle it out of court. Thus, it can be seen that though transnational litigation against human rights violations by the TNCs, mostly of the US origin, in the courts of the US, is a useful step to mete out justice, it seldom offers an effective remedy to the victims, who have to cross difficult procedural hurdles like 'personal jurisdiction' and 'forum non conveniens' before the case is even heard.

<sup>37</sup> SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 65 (2004).

<sup>38</sup> *Sequihua v Texaco* [Inc 847 F Supp 61 61 (SD Texas 1994)], *Aguinda v Texaco* [142 F Supp 2d 534 (2001)] as cited in SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 97 (2004).

<sup>39</sup> *Dow Chemicals v Castro Alfaro* [786 S W 2d 674] as cited in SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 94 (2004).

## *B. LITIGATION IN THE HOST COUNTRY: THE DISASTER THAT WAS BHOPAL*

One of the most famous cases of transitory tort claims in US was brought by the Indian Government against Union Carbide Corporation (UCC) for personal injuries when its subsidiary gas plant in Bhopal leaked Methyl Isocyanate gas killing and disabling thousands of people. The case was ultimately fought in the Indian courts and the litigation had been rightly termed by Upendra Baxi as the second Bhopal catastrophe. If the first produced actual and toxic impacts on the people of Bhopal, the second aggravated and accentuated their agony for a full five years of protracted litigation.<sup>40</sup> India articulated a new concept of *parens patriae* by which it assumed the role of litigant on behalf of all the victims under the newly formulated Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and sued the UCC before the US court. All the claims of the Indian government were dismissed on the ground of forum non conveniens. The reasons cited by Keenan J. to dismiss the Bhopal case were primarily that the catastrophic industrial accident in Bhopal had only a ‘tenuous connection’ with New York, and it would impose a considerable burden on the court system and would ‘tax the time and resources of citizens’.<sup>41</sup> The Court also said that India had a “very strong interest in the aftermath of the accident and the litigation would offer a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system”.<sup>42</sup> Repelling India’s contention that ‘the courts of India are not up to the task of conducting the Bhopal litigation’, Judge Keenan further observed that “The Union of India is a world power in 1986 and its court(s) have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its people would be to revive a history of subservience and subjugation from which India has emerged.”<sup>43</sup> It is a shame that Indian courts failed to meet the expectations of not only a Judge sitting in an US court, but that of its own people as well.

India contended that although Union Carbide India Ltd (UCIL) was the entity running the Bhopal plant, UCC was the holding company, with full control over the management and affairs of the plant. India filed all claims against UCC, the parent company, which it contended, was the multinational operating the pesticide plant in Bhopal. If it were to succeed, no TNC would be able to deploy its local subsidiary as a shield in instances of human rights abuse. India accomplished in entailing UCC as the primary defendant by suing it in US courts. It also succeeded in establishing a principle of absolute liability for multinational enterprises carrying

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<sup>40</sup> UPENDRA BAXI & AMITA DHANDA, VALIENT VICTIMS AND LETHAL LITIGATION - THE BHOPAL CASE, i (1990).

<sup>41</sup> Allison M. Dussias, *Indians and the Indios: Echoes of the Bhopal Disaster in the Achuar People of Peru’s Struggle Against the Toxic Legacy of Occidental Petroleum*, 42 NEW ENG. L. REV. 809 (2008).

<sup>42</sup> SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 92 (2004).

<sup>43</sup> UPENDRA BAXI, INCONVENIENT FORUM AND CONVENIENT CATASTROPHE – THE BHOPAL CASE 69 (1986).

on hazardous activities. It assailed such a principle by way of the 1986 Delhi Oleum Gas Leak case,<sup>44</sup> and pushed the boundary of tort liability for mass disasters caused by TNCs.

The defenses taken by UCC were varied: Firstly, they argued that UCIL was an independent Indian corporate entity, not under the control of UCC. Secondly, it was argued that the principle of absolute liability was not recognized in tortious jurisprudence and hence not applicable to UCC. Thirdly, Methyl Isocyanate gas was not 'ultra hazardous' and even if it was so, India stored such toxic gases in profound quantities as a matter of its industrial policy. Fourthly, Indian government and the state government of Madhya Pradesh were also argued to have been equally liable. After five years of prolonged human suffering, the Supreme Court of India finally held the UCC absolutely liable for the mass disaster, but the amount of compensation awarded was an act of mercy 'for the benefit for the claimants and not as fines, penalties or punitive damages'.<sup>45</sup> This largely reflects the failure on the part of the judiciary and the executive who gave in to the influence and pressure of UCC.

In light of such a disastrous human tragedy and travesty of justice, it needs to be questioned why the Indian government allowed a plant dealing with hazardous chemicals to be set up in a populous city like Bhopal in the first place. In a bid to attract foreign investment, it was also never questioned why the automated emergency warning systems installed in the Union Carbide plant of West Virginia, US was not present in the Bhopal branch.<sup>46</sup> It is also evident that the out-of-court compensation by UCC was agreed by the Indian government not as a punitive measure but as an act of mercy, only to facilitate a one billion dollar investment in India by Dow Chemicals, which, in 2001, acquired the UCIL but not its liabilities. It is also noteworthy that the settlement did not include funds to clean up the contaminated plant site or to compensate 'second-generation victims', i.e., individuals who were born after the disaster but suffer from birth defects and other health-related problems resulting from the disaster. Moreover, till today, even after 24 long years, the compensation amount of \$470 million remains unrealized for the victims of the catastrophe, who as a matter of fact, had to march from Bhopal to Delhi as recently as in 2008 to get their voices heard. Combined with the irresponsible attitude of the Indian bureaucracy in disbursing the compensation amount to the victims, this debacle of litigation against a TNC in the jurisdiction of the host country shows lamentably, that the victims of societal and environmental violations cannot rely on their own country for redress.

It is however not true that India does not have any remedy for such an instance. Over the years, the Supreme Court, through judicial activism, has read a

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<sup>44</sup> M C Mehta v Union of India, (1987) 1 SCC 395.

<sup>45</sup> Union Carbide Corporation v Union of India, [AIR 1990 SC 273], 275 as cited in Surya Deva, *From 3/12 to 9/11: Future of Human Rights*, (2004) 39 ECONOMIC & POLITICAL WEEKLY 5198.

<sup>46</sup> Dussias, *supra* note 41.

number of human rights into the Fundamental Rights granted by the Constitution. It is now an established fact that the right to life and personal liberty under Article 21 takes into account a right to a meaningful life, in a clean environment with access to all the basic amenities, which makes life worthwhile. Though fundamental rights under the Constitution have been traditionally granted against the state, the judiciary has time and again maintained that all organs of a society have the duty to respect them.

The Supreme Court in *Consumer Education and Research Centre v Union of India*<sup>47</sup> opined that “[...] the court would give appropriate directions to the employer, be it state, or its undertaking or private employer to make right to life meaningful, to prevent pollution of workplace, protection of environment, protection of health of workmen [...] the authorities or even private persons or industry are bound by the directions issued by this court under Articles 32 and 142 of the Constitution.”. It also went on to say that monetary damages can be claimed for contravention made by the state, its servants, its instrumentalities, a company or a person in their purported exercise of their powers and enforcement of the rights claimed under the Constitution or any law.<sup>48</sup> The Supreme Court in *Bodhisattwa Gautam v Subhra Chakraborty*<sup>49</sup> also awarded interim compensation to a rape victim for violation of her fundamental right under Article 21 of the Constitution by a private individual. It clearly proves that even private individuals and entities like corporations have a duty to respect the fundamental rights of a human being granted by the Indian Constitution. The Civil Procedure Code also allows for representative suits to be filed on behalf of a group of victims under Order I Rule 8 against the erring TNC with respect to a violation of any statutory right under any law. Since all labour rights have been enumerated under numerous labour legislations in India, their violation may attract a suit under the Civil Procedure Code or a writ petition under Article 226 of the Constitution.

There are however still a number of areas where India can take measures to improve the human rights accountability of corporations. Some of the Directive Principles of State Policies enumerated under the Indian Constitution can be granted the status of Fundamental Rights to secure their enforceability before the Indian courts. Such directives can also be developed into legislations with clearly laid down rights for the people against the state or private entities.<sup>50</sup> Since the majority of human rights violations are usually labour-related, India needs to provide much tighter protections for the labourers under its various labour laws. The working

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<sup>47</sup> AIR 1995 SC 922.

<sup>48</sup> *Id.*, 941, ¶ 30.

<sup>49</sup> AIR 1996 SC 922.

<sup>50</sup> Directive Principles which can be granted the status of Fundamental Rights can be those under Article 39, urging for adequate means of livelihood and preservation of health and strength of people; Article 42 urging for humane conditions of work; Article 43 urging for a decent standard of life of the workers by ensuring full enjoyment of leisure and social and cultural opportunities and Article 48A, urging for protection of environment and the forests.

conditions as prescribed under the Factories Act, 1948 are considered to be comprehensive but the penalties stipulated are not strict enough, since it mentions Rupees One lakh as the maximum limit for fine. It is suggested that keeping in mind the economically powerful TNCs as well as other domestic industrial establishments, the legislation should provide for a substantially larger amount in lieu of such fine and a longer period of imprisonment than the stipulated 2 years. Other welfare laws like the Employees' Provident Funds and Miscellaneous Provisions Act, 1952,<sup>51</sup> the Employees' State Insurance Act, 1948,<sup>52</sup> Maternity Benefit Act, 1961,<sup>53</sup> Equal Remuneration Act, 1976<sup>54</sup> and like legislations can be made more effective by providing strict penalties for the corporations in the event of non-compliance. Moreover, the Public Liability Insurance Act, 1991, enacted especially to protect victims in a situation of industrial hazard like the Bhopal instance, stipulates a penalty of imprisonment for a term of one and half years, extending up to six years and a maximum fine of Rupees One lakh, in respect of a failure to take out adequate insurance cover. This penalty is nothing in comparison to the magnitude of the offence of not adequately ensuring safety and the health of labourers working in hazardous establishments.

Further, the environmental laws of India can be armed with stricter penalties for violation of their provisions. The Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 have stipulated such penalties, which are frankly extremely negligible for companies, in terms of the strictures imposed.<sup>55</sup> The permits and licenses required under the environmental laws must be compulsorily ensured to avoid any instance of environmental degradation by the activities of these corporations. Thus, it is argued that there are ways to avoid the human disaster that was Bhopal, provided Indian government is willing to uphold its duty to respect, protect and promote the human rights of its people.

#### IV. CONCLUSION

During the last few decades, transnational litigation has emerged as one of the most frequently employed dispute resolution methods against TNCs despite the fact that the process itself is not hassle-free and efficient. A number of

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<sup>51</sup> Punishment stipulated under § 14 is imprisonment for a term of one year and a fine of Rupees Five Thousand.

<sup>52</sup> Punishment mentioned under § 85 is imprisonment for a maximum of three years and fine of maximum Rupees Five Thousand.

<sup>53</sup> Punishment under § 21 for non-compliance is imprisonment for a term of three months, extending up to one year and fine ranging from Rupees Two Thousand to Rupees Five Thousand.

<sup>54</sup> Penalty mentioned under § 10 is imprisonment for three months extending up to one year and a fine of Rupees Ten Thousand, extending up to Rupees Twenty Thousand.

<sup>55</sup> The punishment mentioned is usually imprisonment for a term of maximum of six years and sometimes as less as three months and a fine of generally Rupees Ten Thousand, with a provision of Rupees Five Thousand per day for a continuing offence.

cases are dismissed by the courts on the grounds of procedural shortcomings like forum non conveniens, without even going into the merits of the case. A very few cases are able to reach the stage of adjudication, where the courts of the developed countries seek to compensate victims without taking any punitive measures against the corporations themselves. The effectiveness of transnational litigation is also often questioned due to the fact that there is almost little or no participation by the victims in the process. Both financial and practical constraints prevent the stakeholders from directly participating and understanding a process that is conducted in a foreign language, expressed in the backdrop of a foreign political and legal tradition, and interpreted with Western cultural values.<sup>56</sup> There is also a possibility that, as a result of bringing claims before the foreign courts, the legal system of the developing countries will become less competitive compared to that of developed countries like the US over time. It will never be equipped to adjudicate class actions and hold domestic or foreign violators of human rights accountable for their misconduct. Such transnational human rights litigations may weaken local institutions of the countries whose citizens bring the claims in foreign countries and reduce their ability to regulate domestic matters.<sup>57</sup> Due to numerous shortcomings and extremely low success rate of such litigation either in the home country or the host country of the TNC, an alternative way needs to be explored within the framework of the international standard-setting instruments.

Presently, there are no legally binding uniform standards for corporations to follow during their operation in multiple jurisdictions. The debate on the question of human rights responsibilities of corporations had its origins in early 1970s during the formulation of the New International Economic Order by the newly decolonized states. A draft Code of Conduct was prepared by the Economic and Social Council according responsibilities upon the TNCs in observing human rights norms. The same failed to be adopted due to major disagreements between the developed and the developing countries. In 1976, the Organization for Economic Corporation and Development (OECD) adopted the OECD Guidelines for Multinational Enterprises to stipulate, inter alia, human rights obligations of TNCs. Similarly, the International Labour Organization (ILO) adopted the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977 as an instrument to regulate the conduct of TNCs. However, none of these instruments can be described as effective in imposing human rights standards on TNCs. They impose on States obligations to set up National Contact Points (NCPs) in order to receive specific instances of complaints by interested parties in case of non-compliance by companies. These NCPs however have no investigative power, the procedures lack transparency and have been seen to be biased towards the interests of the business, being governmental organs. The only sanction that can be imposed is adverse publicity in relation to the erring TNC. Both these instruments are non-binding with respect to TNCs and are mere guidelines.

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<sup>56</sup> Andrea Boggio, *The Global Enforcement of Human Rights: The Unintended Consequences of Transnational Litigation*, 10 THE INT'L J. OF HUMAN RIGHTS 325 (2006).

<sup>57</sup> *Id.*

The debate on how to improve the human rights accountability of TNCs has continued throughout the last century. The UN Sub-Commission for the Promotion and Protection of Human Rights approved by way of Resolution 2003/16 of 2003, a set of Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, also known as the 2003 Norms. It is based on the idea that even though States have the primary responsibility to promote, fulfil and protect human rights, the TNCs, as organs of society, are also responsible for upholding the human rights principles as set forth in the Universal Declaration of Human Rights. According to these Norms, the TNCs and other business enterprises shall use due diligence in ensuring that their activities do not directly or indirectly contribute towards human rights abuses, and that they do not benefit from any such activities.<sup>58</sup> These codes however, are voluntary in nature, and cannot be enforced by the States, or any international regulatory organization, or any court of law, in cases of their non-compliance by the TNCs. Further, at its 2005 session, the Human Rights Commission appointed Prof John Ruggie as a Special Representative of the Secretary General (SRSG) to clarify the standards of corporate responsibility and accountability for TNCs and other business enterprises with regards to human rights. In his article, the SRSG had criticized the 2003 UN Norms on a number of grounds and concluded that they do not constitute clear standards for corporations.<sup>59</sup>

It is hereby suggested by us that the UN Norms and other non-binding instruments can be developed into a binding legal instrument, through a transition from being a soft law to being a hard law instrument, under which liabilities can be accorded to TNCs. The Norms can also be provided with teeth through establishment of a dispute resolution mechanism. This adjudicatory body should be accessible to all countries, groups of people and non-governmental organizations, and would primarily aim at redressing grievances locally. It can act as an accountability-clearing house for norms like the Equator Principles, which do not have any compliance mechanism or can act as an appellate agency for bodies like NCPs, as set up under the OECD Guidelines. It is extremely important that the new mechanism acts independent of any pressure or influence of the TNCs, states or any other agency. It should have transparent and simple procedural requirements, which ought to be publicly available for the participation by all members of the society. Professionalism and fairness should be the other principles based on which the mechanism would be expected to function effectively. The mechanism should not replace the continued application of national and international law by domestic courts. When enforcement authorities are not available, then the mechanism itself would be left with the same remedies which are available in other international fora: (i) the ability to provide credible and

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<sup>58</sup> OLIVIER DE SCHUTTER, *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 11 (2006).

<sup>59</sup> See John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 *AJIL* 819 (2007).

independent fact-finding and (ii) the power to recommend remedies such as enjoining wrongful conduct, compensating the aggrieved, and taking actions towards compliance.<sup>60</sup> Such a mechanism should have the power to impose strict punitive sanctions upon the erring TNCs. Other features such as speedy disposal of cases and free legal assistance to the needy can also be made part of the structure. It is finally proposed that the new mechanism could eventually supplant, complement or harmonize other existing accountability mechanisms.

It is hereby concluded that with special attention to the need of the developing countries and the vulnerable groups of people, this global system can provide a feasible solution to the problem of holding TNCs accountable for human rights violations.

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<sup>60</sup> Natalie Bridgeman and David Hunter, *Narrowing the Accountability Gap: Towards a New Foreign Investor Accountability Mechanism*, 20 GEO INT'L ENVTL. L. REV 187 (2008).