
**A GLOBAL ADMINISTRATIVE LAW APPROACH TO REGULATING
TRANSNATIONAL CORPORATIONS WITH RESPECT TO HUMAN RIGHTS
VIOLATIONS IN DEVELOPING COUNTRIES**

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ABSTRACT

The problem that is sought to be addressed herein is the issue of transnational corporations (“TNCs”) slipping through the gaps of human rights regulations at the domestic level as these entities transcend boundaries. Consequently, victims of human rights violations by these TNCs are denied redress. This problem is compounded by the fact that governments of states where these violations occur, even where the law provides for it, (a) might not have the wherewithal to go after the errant TNCs or (b) might be disincentivised to do so due to the substantial foreign investment brought in by them. The solution that this essay puts forth is a global regulatory mechanism that integrates and works with national mechanisms. This would overcome the hurdle of international law not being able to impose obligations directly on TNCs as they are not subjects of international law.

States however, being subjects of international law, will be more compliant to an international law solution. The global regulatory body must follow procedural principles of Global Administrative Law, at the same time making room for national regulatory bodies to retain local procedural safeguards. Ideally, the coordination between the global and national bodies must eventually lead to homogenization of administrative principles.

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INTRODUCTION

On December 2nd 1984, in the dead of night, methyl isocyanate, a deadly gas, escaped from the chemical plant belonging to Union Carbide in Bhopal, Madhya Pradesh in Central India. This plant belonged to Union Carbide India Limited, a subsidiary of the American corporation, Union Carbide.¹ The winds then blew large quantities of this gas all through the city of Bhopal, causing several thousand deaths, many more injuries and destruction of local crops, cattle and nearby water sources.² Apart from being, in itself, one of the worst industrial tragedies ever, the attempted redress that followed was so inadequate that the victims have been, in Upendra Baxi's words, undergoing a 'ceaseless process of revictimage'.³ While one of the basic principles of Indian administrative law states that public decisions must be taken in consultation with affected interests, the Bhopal victims never benefit from this maxim.⁴ They were not only denied the right to be heard but also were not consulted before a settlement with Union Carbide was entered into, the terms of which extinguished all claims and cases against both the parent and the Indian subsidiary corporations, within and outside India.⁵

Cases like these make one question whether developing countries might be adequately incentivised to regulate transnational corporations (hereinafter referred to as "TNCs") in the first instance and also to hold them liable in case of wrong doing. On the one hand, these

¹ Abhi Raghunathan, *The Grand Trunk Road from Salomon to Mehta: Economic Development and Enterprise Liability in India*, 100 GEO. L.J. 2, available at

<http://georgetownlawjournal.org/files/2012/01/Raghunathan1.pdf> at p. 572, 573.

² *Id* at 573.

³ Upendra Baxi, *The Myth and Reality of the Indian Administrative Law*, in ADMINISTRATIVE LAW., 13 (I.P. Massey, 6th ed., 2007).

⁴ *Id*.

⁵ *Id.*; see also Usha Ramanathan, *Business and Human Rights: The India Paper*, at 5, available at <http://www.ielrc.org/content/w0102.pdf>; *Judgment extinguishing all claims. available at* <http://cseindia.org/userfiles/scbhopal.pdf>.

states seek to increase foreign investments by creating an investor-friendly environment for transnational companies and on the other hand, it is the very same state government that is charged with regulating and monitoring these TNCs and enforcing human rights laws when they are violated.⁶ In addition to this, TNCs are also uniquely situated inasmuch as the theory of limited liability applicable to corporations shields them from liability in the home state for violations on the part of subsidiaries in the host state.⁷ The economic might of TNCs is another factor that might dis-incentivise developing countries to regulate them. Further, many instances of human rights violations by TNCs involve complicity with the governments of the host state. Attempts in the TNCs' home country to address extra-territorial transgressions by TNCs usually run into issues of it not being the appropriate forum (forum non convenience) or separate legal entity status of the parent and subsidiary corporations.⁸

HUMAN RIGHTS OBLIGATIONS OF TNCs UNDER INTERNATIONAL LAW

Presently there is no consensus about whether international law lays out the human rights obligations of TNCs.⁹ While there are non-binding codes of conduct, (examined in section 2. of this note), in place, TNCs themselves cannot be made liable under international law because they are not 'subjects' of international law and hence lack 'legal personhood'.¹⁰ The

⁶ International law makes it the obligation of states to regulate and redress all human rights obligations within the state.

⁷ The country in which the holding company of the TNC is incorporated is referred to as the home state (typically a developed country) and the country in which the subsidiary is incorporated is referred to as the host state (typically a developing country).

⁸ Marion Weschka, *Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?* available at http://www.zaerv.de/66_2006/66_2006_3_a_625_662.pdf at p.630.

⁹ Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: RECENT CHANGES AND RECURRING CHALLENGES*, available at: <http://www.law.northwestern.edu/journals/jihr/v6/n2/2/Duruigbo.pdf>.

¹⁰ This has been criticized by many as an outdated understanding of international law. See Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-

conventional definition of a ‘subject’ of international law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.¹¹ However, recent cases under Alien Tort Claims Act (ATCA) in the United States show a tendency of understanding corporations as subjects of international law.¹²

International law only imposes obligations on States which must in turn regulate corporations under their jurisdiction. Voluntary codes of conduct for TNCs have largely been ineffective so far because, as the name suggests, they lack enforceability. International law therefore does not fully address the issue of TNCs falling through the gaps of home state and host state laws. Further, TNCs are under-regulated under domestic law due to the disincentives in regulating them for both the host state and the home state as mentioned above. What is required then is a global regime that can impose obligations on corporations thus providing individuals with access to redress.

STATE ACTORS AND HUMAN RIGHTS, Series of the Collected Courses of the Academy of European Law, Oxford Univ. Press, 2005 at p. 3 cited in Olivier De Schutter, *Transnational Corporations and Human Rights: An Introduction*, Global Law Working Paper 01/05 Symposium - ‘Transnational Corporations and Human Rights’ available online: https://docs.google.com/viewer?a=v&q=cache:Bb9S0s51KUIJ:www.law.nyu.edu/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DECM_DLX_015825%26RevisionSelectionMethod%3DLatestReleased+&hl=en&gI=in&pid=bl&srcid=ADGEESiJvnovODjZnmeApsOtUK85yOIGJgVKakkZc9oAvqRaiingFAWGZifldG7N0yTqMdwW2qoA2iFitr1fyKa61GINBwAWhmpty9TxdHvcz0HT8jtwGtoUkUCNeFRp_RIqRTXWUaO&sig=AHIEtbRme-LAya6C7IykJSZgahelMpyx4g.

¹¹Reparation for Injuries Suffered in the Service of the United Nations (Reparation Injuries Case), 1949 I.C.J. 179, cited in IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 7th ed. 2008, at 57.

¹² See *Wiwa v. Royal Dutch Petroleum (Shell)* 2002 U.S. Dist. LEXIS 3293, 28/02/2002 [Hereinafter “Shell Case”, available at

<http://www.earthrights.org/files/Legal%20Docs/Wiwa%20v%20Shell/distr-court-opinion-Feb-2002.pdf>.

(Weschka, 630). But see Jose Alvarez, *Are corporations subjects of international law?* Available at <http://digitalcommons.law.scu.edu/scujil/vol9/iss1/1>, where he argues with that while attributing legal personhood to corporations may be useful to impose liability on corporations for human rights violations, it may also lead to undesirable consequences like for instance in the context of the investment regime.

INTRODUCTION TO GLOBAL ADMINISTRATIVE LAW

The principles of global administrative law are not only informative in understanding the working of such a global regime but are also essential for its legitimacy and efficacy. Kingsbury, Krisch and Stewart, in their seminal work on global administrative law explain that global administrative law is a natural extension of the increase in the reach and forms of trans-governmental regulation and administration designed to address the consequences of globalized interdependence.¹³ The regulation of TNCs with respect to human rights is one such issue emerging out of globalized interdependence. International organizations and informal groups of experts or officials usually implement global regulation, thus performing administrative functions, necessitating a set of global administrative law rules to ensure their accountability.¹⁴ Kingsbury, Krisch and Stewart in defining global administrative law, crystallize its principles as comprising of adequate standards of transparency, participation, reasoned decision, legality and finally effective review of rules and decisions made.¹⁵

THE ROAD AHEAD

This paper makes the case for an integrated global regime that presupposes cooperation from nation states in order to function as an effective regulatory and redressal mechanism. In other words, it proposes an international law solution that will need cooperation at the domestic level in order to be effective. This presents two problems. First, both states and TNCs have to subscribe to this mechanism and one part of this note will look at what factors might motivate them to do so. Second, even if adequately incentivised to buy into this framework, both states and TNCs might worry about the procedural functioning of this body and legality of its

¹³ Kingsbury, Krisch and Stewart, *The Emergence of Global Administrative law*, 68 LAW & CONTEMP. PROBS. 15, 16, 15-61 (2005) available at

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp>.

¹⁴ *Id.*

¹⁵ *Id.* at 17.

decisions. Therefore, in requiring states to cooperate and participate in this global regulatory mechanism, it is important to identify the relevant administrative law principles which engender sufficient unanimity amongst states including third world countries, to make these principles binding upon them. Further, it would be important to incorporate measures specific to each state at the national level to support global efforts. At the same time, as it inevitably happens, the principles of administrative law that have largely gained universal acceptance must also trickle down to mechanisms in the national level albeit, gradually. Also, to address situations like the Bhopal Gas Case in India where the problem was not the absence of principles of administrative law but rather the failure to give effect to them, watchdogs (such as NGOs) must be assigned to monitor whether these principles are given effect.

Thus, it is not enough to formulate a global mechanism, but also to incentivise participation by states and TNCs to make it workable, and finally to integrate the top-down approach with the bottom-up approach with respect to principles of global administrative law in this context. Amongst other things, this would require the participation of governments of states, TNCs, and NGOs, especially those of developing countries, in the formulation and functioning of such a global regime in order to incorporate the differing realities in these countries.

REGULATION OF TNCs WITH RESPECT TO HUMAN RIGHTS UNDER INTERNATIONAL LAW

The International Labour Organization (ILO) adopted the ‘ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy’ providing guidelines pertaining to conditions of work, life and industrial relations to governments, workers’ organizations, employers’ organizations and multi-national enterprises (TNCs to use the terminology in this proposal).¹⁶ However, it provides for no implementation mechanism

¹⁶ MNE Declaration 1977, 4th edition, *available at* http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

although the underlying ILO convention is binding on states.¹⁷ The UN Global Compact, a voluntary initiative open to businesses, provides for businesses to support and respect the protection of internationally proclaimed human rights and ensure that they are not complicit in human rights abuses.¹⁸ Here too, there is no monitoring or implementation mechanism in place even for participating corporations.¹⁹ The ‘OECD Guidelines for multi-national enterprises’, a code of conduct addressing TNCs operating in or from the adhering states, although voluntary, provides for establishment of National Contact Points (hereinafter referred to as “NCP’s”) in member states.²⁰ Although these NCPs provide for conciliation and mediation, the proceedings are kept confidential and thereby lack in transparency.²¹ The ‘UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ do provide for implementation mechanisms in their text but requires TNC’s as an initial step to incorporate these norms in their internal policies and also in their contracts with third parties.²² No real method of redress has been provided in case of infringement of these norms. Thus, international law only imposes obligations on States which must in turn regulate corporations under their jurisdiction; and voluntary codes have not proved to be very effective so far.

TOWARDS AN INTEGRATED GLOBAL REGIME – A GLOBAL ADMINISTRATIVE LAW SOLUTION

Since regulation by the host state or the home state is not effective in isolation and since the numerous efforts in international law are lacking in terms of mechanisms for implementation,

¹⁷ See Weshka, *supra* note 8 at p.645.

¹⁸ Principles 1 and 2, *available at*: <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/>.

¹⁹ See *supra* note 8 at p.651.

²⁰ Guideline 11, *available at*: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

²¹ Procedural Guidance C(4), *available at* <http://www.oecd.org/daf/inv/mne/48004323.pdf>;

See Weshka, *supra* note 8 at 648.

²² ¶¶15, 17, *The 2003, Working Group on the Working Methods and Activities of Transnational Corporations*, (2003) E/CN.4/Sub.2/2003/12 *available at*: <http://www1.umn.edu/humanrts/links/NormsApril2003.html>. See Weshka, *supra* note 8 at p.653.

there is a need to harmonise and implement these efforts. In suggesting a global regulatory mechanism, this note draws from and seeks to lend itself to the emerging global administrative law jurisprudence. It proposes a global regulatory mechanism that presupposes cooperation from domestic administrative agencies to implement its decisions. The note will first consider and examine the possible ways to give effect to this. One option would be the creation of a dedicated international organization for this. A second option is for a body under the aegis of the United Nations to take this up to give effect to and expand its current human rights conventions. Alternatively, the existing OECD system could be modified to provide for state participation with the NCP's being controlled jointly by the state and the OECD. Further research is necessary to determine what body would be most suitable for this. Whichever body is entrusted with this role, it must incorporate the principles of global administrative law to gain legitimacy and hence acceptance and participation by states.

Another important area that needs to be examined is how states and TNCs may be incentivised to participate in this global framework. From the perspective of TNCs, one huge advantage would be *ex ante* certainty about the liabilities it might be subjected to and the obligations it has with respect to human rights. TNCs would also have access to an international forum for dispute resolution whose rules and procedures are credible and known.²³ Also, through such a mechanism, TNCs can avoid the possibility (however remote) of being held liable in both the home and the host state. States too would benefit from this as it would ensure a system for the uniform regulation of TNCs in all countries. By participating in and cooperating with such a global process, each state would ensure that its interests are

²³ A case in point is that of the Chevron dispute in Ecuador where local courts imposed liability in the billions on the company based on a very dubious process and quite possibly fabricated evidence. *See Dow Jones, U.S. Judge Issues Injunction In Chevron-Ecuador Dispute to Block Enforcement of Judgment*, available at <http://www.theamazonpost.com/in-the-news/dow-jones-u-s-judge-issues-injunction-in-chevron-ecuador-dispute-to-block-enforcement-of-judgment>.

protected. Thus, in proposing a global regulatory mechanism and integrating national mechanisms with the same, the different political and social realities in each country will be accounted for. What must also be borne in mind is that there could and most likely will be TNCs in the future which are incorporated in developing countries and doing business in developed countries and that the same global framework would apply to these TNCs. Finally, giving NGOs and welfare groups a role in the system will ensure that the rights of the marginalised and the poor in developing countries will be upheld.

The next issue to be dealt with is the prescriptive role, if any, of this global regulatory body. While Kingsbury *et.al.* define global administrative law as procedural rules and exclude substantive law from its ambit, Chimni argues that such a strict exclusion is not possible.²⁴ Pascale Hé lè ne Dubois and Aileen Elizabeth Nowlan argue in the context of the World Bank, which has had to synthesise different national laws in varied disciplines for its sanctions procedures that a global administrative law approach would help the Bank develop substantive norms independent of whether they are in line with particular national systems.²⁵ Similarly, any regulatory body dealing with liability of TNCs with respect to their conduct affecting human rights in developing countries must not only follow the procedural principles of global administrative law but also develop substantive norms with respect to attribution of liability. This would call for, at least to a limited extent, a synthesis of principles of principles from different national laws. Thus this note argues, at least in this context, that global administrative law must include a substantive component.

²⁴ B.S. Chimni, *Co-option and Resistance: Two faces of global administrative law*, available at <http://www.iilj.org/GAL/documents/CO-OPTIONANDRESISTANCETWOFACESOF.pdf>, at 804.

²⁵ Pascale Hé lè ne Dubois and Aileen Elizabeth Nowlan, *Global administrative law and the legitimacy of sanctions regimes in international law*, 36 YALE J.INT'L L.15 (Fall 2010) available at <http://www.yjil.org/docs/pub/o-36-dubois-nowlan-global-administrative-law-sanctions.pdf> at 16.

Last but not least, it is imperative to examine concerns raised from various quarters about global administrative law having an imperial character. Susan Strange too conceives of inter-governmental organizations as being perceived by citizens of weaker states as “instruments of a new kind of colonialism that preserve capitalist hierarchies of power” at the cost of individuals.²⁶ If these concerns are true, as Chimni argues, it would lead to dominant actors like TNCs using global administrative law to their advantage.²⁷ This would make the whole exercise of developing a global regime futile and as David Kennedy puts it, “*improving the machinery of government makes no sense if scoundrels rule—or if the entire global architecture has a substantive skew against the poor, ...against the developing world, ...*”²⁸ Since the focus of this note is to address human rights violations of TNCs in developing countries, it especially addresses voices from the developing world in the formulation of the global regulatory mechanism in this context. However, as the Bhopal tragedy shows us, governments of developing countries might themselves be participants in the conspiracy against its poor. This note therefore argues that while it is true the global framework must consciously ward against incorporating capitalist power hierarchies, it is not just necessary to consult with the governments of developing countries but it is also essential to provide for the participation of local NGOs and affected individuals.

To give teeth to the global regulatory framework, it is worthwhile to examine the possibility of a dispute resolution forum that, to comply with standards of administrative law, is transparent, accountable, envisages the participation of TNCs, affected citizens and non-governmental organizations, and subject to review.²⁹ Another option is to borrow a pre-

²⁶ SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 93 (1996) .

²⁷ Chimni,, supra note 24.

²⁸ David Kennedy, *The Mystery of Global Governance*, available at

http://www.law.harvard.edu/faculty/dkennedy/publications/Kennedy_GlobalGovernance.pdf at. 843.

²⁹ Kingsbury and Casini, *Global Administrative Law Dimensions of International Organizations Law*, available at at 324.

existing international organization's services for over-sight and dispute resolution.³⁰ Once a global level decision is adopted by the dispute resolution structure, it may be implemented against private parties through implementing measures at the national level.³¹ Where implementation at the national level is concerned, it would be useful to allow the unique experience of each state to inform the implementation mechanism. This is to ensure that it is accessible to affected individuals in those states. For instance, in the Indian context, as seen in the Bhopal case, access to judicial review of administrative rule and decisions is not practicable for a vast majority and this possibly holds true for most third world countries.³² Finally, a system of coordination between courts and administrative agencies at the international and domestic levels must be established to avoid conflicts in this regard.³³ Thus one must work towards an integration of the state and international regimes through a global regime that accommodates differing legal and administrative principles in the developing world.

CONCLUSION

This note has tried to add to the scholarship around holding TNCs responsible for human rights violations in developing countries and has proposed a solution in international law integrated with domestic law to address the issue. Although this has been identified in

³⁰ For instance, the International Centre for Settlement of Investment Disputes, instituted for the resolution of controversies regarding World Bank investments, also decides conflicts regarding the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement, and the Colonial Investment Protocol of Mercosur. Cited in Sabino Cassese, *Global Administrative law: An Introduction*, available at <http://www.iilj.org/GAL/documents/CassesePaper.pdf> at p. 16.

³¹ See Kingbury *supra* note 13 at 16.

³² Chimni suggests assignment of watchdogs in such cases to ensure compliance. See B.S. Chimni, *Global Administrative Law: Winners and Losers*, available at: <http://www.iilj.org/GAL/documents/ChimniPaper.pdf>, at 17.

³³ Fabrizio Cafaggi, *Enforcement of Transnational Regulation: Ensuring compliance in a Global World*, available at subscribing libraries at 7.

previous works as one area where global administrative law could develop, there is no work that specifically examines its use and functioning in the area and. This note has tried to fill that void while at the same time attempting to find a solution to the problem of TNCs going unregulated especially in the context of human rights violations.