Favorites of Nature but Orphans of Justice

Multinational Corporations In Resource Rich Yet Poor Countries; Human Rights Perspective

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ABSTRACT

This paper is about the battle which many may already consider lost – struggle of people from developing countries to claim their rights against the mighty Multinational Corporations (MNCs) who severely exploit human and natural resources and cause irreparable damage to the environment in these countries to pursue their goal - minimize costs and maximize profit.

Owing to their legally artificial and already transnational nature, and the loopholes in national and international human rights law, MNCs are getting away with the most severe human rights violations, further encouraged by impunity to keep doing same injustices.

The claim of this paper is that MNCs are evolving as the most powerful threat among the lawful non state agents to the realization and enjoyment of fundamental rights, which is the most visible in the light of the developing countries.

The paper explores the multi-dimensional nature of the battle of poor communities against MNCs and concludes, that while the problems of those *resource rich yet poor* nations are so complex and deeply rooted that they can be handled only through multi-actor engagement strategies, this in no way absolves the MNCs from their own share of responsibility towards these countries and their populations.

The paper refers to relevant examples throughout the analysis and sends a message to powerful MNCs that the recent groundbreaking developments demonstrate - MNCs cannot render themselves immune from truth about injustices they commit, and the latter is in fact speedily finding ways to translate itself in sanctions imposed upon MNCs by judges and by market forces, consumers.

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If We Do Not Maintain Justice, Justice Will Not Maintain Us"

Sir Francis Bacon
(1561-1626)

EXECUTIVE SUMMERY

Introduction

Historically there is a dispute as to which was the first multinational corporation (*hereinafter* MNC).[1] Some have argued that the Knights Templar, founded in 1117, became a multinational when it stumbled into banking in 1135. However, others claim that the Dutch East India Company, established in 1602 was the first proper multinational.[2] Today there are some 70,000 of multinational corporations (transnational firms), together with roughly 700,000 subsidiaries and millions of suppliers spanning every corner of the globe[3] and they constitute half (51) out of 100 largest economies of the world:[4] all are larger than Denmark, Chile, Finland, Malaysia, Norway, New Zealand, Thailand, Turkey, South Africa, Saudi Arabia.[5] In 1995 e.g. the revenues of 200 MNCs operating in 16 countries equaled to 31, 2 percent of the World GNP.[6]

Their power and wealth are completely out of scale with those of many countries: e.g. in 1999, Exxon- Mobil's revenues totaled $185 billion, while Chad and Nigeria's gross domestic products (GDPs) equaled a paltry $1.6 billion and $43.3 billion, respectively.[7] And the trend is

[1] There is no universal definition of a multinational corporation. For the purposes of this paper it means 'A corporation that has its facilities and other assets in at least one country other than its home country. Such companies have offices and/or factories in different countries and usually have a centralized head office where they co-ordinate global management.' *see* *http://www.investopedia.com/terms/m/multinationalcorporation.asp*; for further definitions see *e.g.*, The OECD Guidelines for Multinational Corporations (2000).

[2] George Trefgarne, *How the First Multinational was Hijacked by Greed* (2006) *available at* http://findarticles.com/p/articles/mi_qa3724/is_200610/ai_n17191656/print.
See also Clem Chambers, *Who Needs Stock Exchange? available at* http://www.mondovisione.com/index.cfm?section=articles&action=detail&id=60613

[3] Thalif Deen, *Rights: The Scariest Predators in the Corporate Jungle* (2006) (citing the data of Geneva-based UN Conference on Trade and Development (UNCTAD) *available at* http://www.ipsterraviva.net/Europe/article.aspx?id=3357.

[4] P. Sheehan, *'Leviathan Inc'*, The Sydney Morning Herald (2000), cited by Robert McCorquodale, *Human Rights and Global Business*, in *Commercial Law and Human Rights*, p.90 (ed. by Stephen Bottomley and David Kinley, 2002)

[5] Globalization: *What You Don't Know Can Hurt You*, Excerpts from a talk by Jerry Mander Reported in Timeline (July/August 1998) *available at* http://www.sustainable-city.org/intervws/mander.htm

[6] *The World's 200 Largest TNCs: Home Country, Revenues and Profits*, Data for 1995, by Global Policy Forum (referring to *Le Monde Diplomatique*, April 1997, p. 16) *available at* http://www.globalpolicy.org/socecon/tncs/tables/tnctab.htm

[7] Marina Ottaway, *Reluctant Missionaries*, Foreign Policy, pp. 44-54 (Jul. - Aug., 2001)

toward greater corporate dominance.[8] Its reach is no longer limiting itself to financial/economic spheres *stricto sensu* but is directly shaping the daily lives of millions of people around the world[9] and not always in positive. Corporations were important players in running the machinery of Holocaust and maintaining Apartheid, they remain the significant actors in pulling the strings and keeping the repressive regime of Burma.[10]

Besides involvement in these large scale human rights catastrophes, the open list of violations committed by MNCs includes violations of: rights to life, including the right to enjoy life; freedom from torture and cruel, inhuman, or degrading treatment; freedom from forced or slave labor; freedom from arbitrary detention or deprivation of security of person; freedom to enjoy property; freedom from deprivation of or injury to health; enjoyment of a clean and healthy environment - the latter also implicating interrelated international law recognizing private responsibility for pollution; and freedom from discrimination.[11]

Based on the extensive data, only the highlights of which were given above and which will be subjected to comprehensive analysis below, this paper argues that in the end of the last

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[8] Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int'l L. 45 (2002) ("a comparison of figures from 1991 and 2000 shows a dramatic change over nine years. In 1991, nineteen countries had revenues higher than General Motors, compared to only seven today; similarly, in 1991, three corporations were among the top twenty-eight economic entities, compared to fifteen today").

[9] *Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and Fortune Global 500 Firms,* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/4/35/Add.3, par. 11 (2007) [hereinafter *Human Rights Policies and Management Practices* (2007)]

[10] This allegations will be further supported in detail throughout the paper by quantitative and qualitative data based on *U.S. v. Alfried Krupp et al.*, 9 Trial of War Criminals Under Control Council Law No. 10, p. 4 (1948), *U.S. v. Friederich Flick*, 6 Trial of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No 10, pp. 1217,1222 (1947); Truth and Reconciliation Commission Final Report, Vol. 4 (1998), Vol. 6(2003); *Khulumani Barclay National Bank Ltd., Ntsebeza v. Daimler Chrysler Corp.* Nos. 05-2141, 05-2325, Brief for plaintiffs/appellants (2nd Cir., 2007); *Abuses by Corporations in Burma: Collective Summary and Recommendations*, Submitted by Earth Rights to the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, (November 10, 2005), *etc.*

[11] Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 Vand. J. Transnat'l L. 801, 817-19 (2002) ("One should also consider private corporate deprivations of rights such as free choice in work; fair wages, a "decent living," and remuneration for work of equal value; safe and healthy working conditions; protection of children from economic exploitation; and protection of mothers"); *See also* Surya Deva, Human *Rights Violations by Multinational Corporations and International Law: Where from Here?,* 19 Conn. J. Int'l L. 1 (2003).

century MNCs evolved as certainly one of the most powerful threats to human rights, if not the most powerful one yet! This threat is particularly evident in the light of the so called developing countries, from where MNCs take the natural resources and recruit the labour force the most.

'Corporations generate propaganda that global corporatization (promoted as "free trade") raises living standards. But this story is contradicted by global economic data (documented extensively by the Center for Economic and Policy Research) which demonstrate that corporate colonialism-- the siphoning of profit from the country or region of production - is having a debilitating impact on many developing countries.'[12]

Various reporters assert that particularly *violent* are the extractive industries.[13] First, experience in the recent past shows that there is a direct link between natural resources exploited by extractive industries, such as oil, natural gas, copper, gold, diamond, and other rare and precious ores and "new wars."[14] Second, 'since unexploited oil fields are, by definition, located in developing areas, there companies are also more likely to operate in pristine environments and disrupt the lives of indigenous people or and local communities in general. And because they operate in volatile settings, they often become entangled in security operations conducted by their own or by government forces, with all the risks of human rights violations involved in the process.'[15] Above all, some extractive companies are bigger economies than many oil producer countries and that further adds an argument to putting extractive industries in the very center of the limelight.

[12] Jeff Milchen, *Inherent Rules of Corporate Behavior*, available at http://reclaimdemocracy.org/corporate_accountability/corporations_cannot_be_responsible.html

[13] *Promotion and Protection of Human Rights*, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2006/97 (2006) [hereinafter *Promotion and Protection of Human Rights* (2006)]

[14] Bonn International Center for Conversion, Who is Minding the Store: The Business of Private, Public and Civil Actors in Zones of Conflict, p.12 (2006) [hereinafter Who is Minding the Store (2006)] (The wars and violent conflicts in Angola (diamonds, oil) the Democratic Republic of the Congo (diamonds, cooper, cobalt, coltan, etc.) Nigeria (oil) and Sudan (oil) are the most prominent cases of recent years, but by far not the only ones)

[15] Ottaway, *supra*, 7.

Ironically enough, while producing a striking record of human rights violations all over the world,[16] extractive industries, and above all oil corporations, are at the same time generating the lifeblood of our civilization. It probably will not be an over exaggeration if one says that we are a petroleum civilization in fact: 'According to US Department of Energy, the world daily consumption of oil today is 84 million barrels, while for 2030 the estimated consumption will be 118 million barrels…literally every moving system on the planet is powered by petroleum, and there is no substitute for it. All of our industries depend on petroleum; we are simply stuck with our addiction to it.'[17]

Yet, as said, the other side of the reality is that running the petroleum civilization costs lives and liberties to thousands of people mostly from the developing world, which get the least benefit from and pay the highest price for sustaining this civilization. Operation of extractive industries has been the direct cause of turning many nations' life and wealth into blood and tears [18] - starting from Burma continued with Sudan or Nigeria and keeping the colonial-time injustice of re*source rich yet poor nations* as an ongoing nightmare for the generations of hundreds and thousands.

Probably, for many people from the business community the statements made above will seem extremely offensive and unfair, and others will harshly respond back that it is the responsibility of the governments to take care of human rights and social welfare of their people and not of those MNCs, some others will simply ignore these claims, thinking that it is not their business at all.

[16] For geographical aspect of extractive MNC's involvement in human rights violations worldwide (according to the violation types occurring in countries featured) *see* the map composed by AMNCsty International and The Prince of Wales International Business Leaders Forum, *available at* http://www.iblf.org/docs/geography/extractives.pdf

[17] An excellent presentation on the current and future role oil is supposed to play in international politics was given by *Professor Michael Klare* (US) in The London School of Economics and Political Science, which I had an honor to attend, record is *available at* http://www.lse.ac.uk/resources/podcasts/publicLecturesAndEvents.htm, *Michael Klare,* Oil, War and Geopolitics: The Struggle Over What Remains (9 January, 2008).

[18] For an overview of oil's negative role in the life of ordinary people in African countries *see e.g., Oil in Africa, Heaven or Hell,* Vol. 3 (2006), from AfricaFiles *available at* *http://www.africafiles.org/atissueezine.asp?issue=issue3. See also Turning Treasure into Tears: Mining, Dams and Deforestation in Shwegyin Township, Pegu Division, Burma,* Earth Rights International (2007)

Meanwhile those who identify themselves on the other side of the business-human rights discourse will vigorously agree and will further advocate for ending the impunity of MNCs and make a demand that they should be held responsible for all the *negative impacts* of their operations on those poor communities. More pessimist ones,[19] still on this latter side of the discourse, will reluctantly reiterate that nothing is going to change the situation since the problem lies within the inherent nature of the corporate entity itself, including MNCs, in particular: profit is the ultimate measure of all corporate decisions (profit imperative), corporations do not have morals or altruistic goals (amorality), they view employees as non-managerial cogs in the wheel (dehumanization), corporate societies, are intrinsically committed to intervening in, altering and transforming nature (opposition to nature), all corporate profit is obtained by a simple formula: profit equals the difference between the amount paid to an employee and the economic value of the employee's output (exploitation);[20] For all these reasons, some say, corporate entities simply cannot accommodate causes of morality and human rights.

However surprising it might be, almost all of the controversial arguments listed above do make a point! Nevertheless, the aim of this paper is not to take a side of any of these parties to the discourse but to look beyond the *black and white* picture depicted by them and rather focus on those *grey* parts of the story which are often neglected and forgotten. Since, for the reasons listed above extractive industries provide a particularly striking example of business involvement in human rights violations, the paper will primarily, but not exclusively, concentrate on these MNCs to better understand the crucial points of business – human rights dilemma.

As said, impact of extractive MNCs' operations has been particularly negative on the developing ones. This paper from the very beginning rejects the assumption that the reason of this negative impact paradigm in developing countries lies foremost or exclusively in the

[19] These people might seem to be actually *realists* for some, but my personal guess is that from human rights perspective they will be rather considered as *pessimists.*

[20] Jerry Mander, *In the Absence of the Sacred :The Failure of Technology and the Survival of the Indian Nations*, (Sierra Club Books, 1991) (giving a list of eleven inherent rules of corporate behavior)

inherent nature of MNCs in general or of MNCs operating in extractive industries in particular. On the contrary, it suspects that this *negative impact paradigm* must rather be the result of convergence of several factors, than of amorality of corporations or environmentally unfriendly specificities of the extractive industries alone.

The paper demonstrates correctness of its original suspicion and provides a comprehensive analysis of other converging factors producing the *negative impact paradigm.*

The conducted analysis suggests that relationship between the business and human rights in general, and extractive MNC and their host communities in particular, are much more dramatic and complex than we normally could have imagined; Seeing this reality makes it clear that the solution to the threat coming from MNCs to the enjoyment and realization of fundamental human rights can only be dealt through a long-term and strategic coordination of institutionalized and individual commitments and resources of a far bigger circle of actors than through efforts by MNCs alone or even by all business community together.

Paper is divided into three equally important parts dealing with three pillars on which the *negative impact paradigm* is built up. It starts with the general overview of MNCs' operations in the host countries and portrays a broad picture of MNC's interrelations with the local community and *vice versa.* Tracking the dynamics of these interrelation in chapter one reveals the true nature of the *negative impact paradigm*: when human rights watchdog institutions cite statistics about poverty and underdevelopment in those resource rich countries on the one hand and size of their natural wealth exploited by MNCs on the other hand, it is difficult to explain *negative impact paradigm* by anything but greediness and immorality of MNCs. However, as already said, the analysis in chapter one reveals a set of factors from local populations' political, social, economic and cultural lives which contribute immensely to the *negative impact paradigm*.

As said above, this *paradigm* in practice is mostly reflected in human rights violations of local people, they not only shatter our basic understandings of ethics and morality by their severity, but also often constitute breaches of established legal standards; The second chapter

consequently tries to find out what is the role of legal standards in theory and in practice in the interplay of human rights and business. Analysis of existing legal framework in fact starts already in chapter one, however while the latter focuses exclusively on national legal systems, chapter two looks at international law primarily.

Chapter two poses and at the end tries to answer several questions, most importantly - whether corporations can be held liable for violating the norms of international human rights law, which is certainly among the most controversial issues of contemporary international law in general. After going through the relevant case law of national and international judicial bodies having dealt with this question from the WW II period until today, the paper reaches the conclusion that while imposition of direct human rights obligations on corporations which were not originally envisioned as subjects of international law might still fit within the overall logic of international human rights law and the policy behind it, the problem remains in the lack of an appropriate mechanism (judicial forum) which will enforce these obligations in practice.

Though it would be very interesting to see the pros and cons of setting up a new international mechanism of redress for victims of corporate human rights abuses, it does not immediately relate to the topic of this thesis and therefore will not be dealt by it.

Chapter three concentrates on a somewhat new but already an integral part of the ongoing business and human rights discourse, which is the so called *corporate social responsibility* (CSR), the lack of which(referred to as *alien's syndrome* in the paper) forms the third pillar of the *negative impact paradigm.* The chapter provides an overview of arguments for and against the idea of CSR, the latter saying that besides compliance with the laws and regulations business should take a further step and act as a socially responsible citizen by upholding and promoting non economic values.

While there is a large body of arguments criticizing CSR as an unfair burden placed on the shoulders of the business, the paper rebuts this claim based on several arguments, including the one which shows that socially responsible business behavior repays itself on the market.

Chapter three also demonstrates that even strictly profit oriented market rules can help to advance human rights causes if their potential is properly evaluated and wisely utilized by relevant institutions and human rights watchdogs.

At the end of each chapter there is a conclusion summing up the key findings of the analysis in that particular chapter. At the end of the paper there is a section of concluding remarks and observations which provides an overview of the paper and to a degree reflects the part of the research which, for the objective purposes, could not appear in the final version of this paper. It also highlights some issues which would be highly desirable to be addressed in future researches.

Methodology and Terminology

Business and human rights discourse has become particularly intensive during the recent years and apart from nation states, business entities and human rights monitoring organizations, a vast number of interested academics, practitioners, organizational bodies and ordinary individuals are involved in it. Considering that almost each and every claim in this discourse is contested, grasping the rapidly developing state of affairs in the field required not only a comprehensive research but very frequent update of this information.

To tackle this challenge, the research largely relies on academic sources, researches carried out by Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, jurisprudence of different courts and tribunals dealing with the issue of corporations' human rights responsibilities;

On the other hand, as the specifically practice - oriented nature of the topic required, the paper greatly relies on publications by human rights monitoring institutions who intensively scrutinize MNCs behavior worldwide and are vigorously involved in the discourse, also paper relies on soft law instruments and corporate codes of conducts, statements and press releases by the business entities, materials providing empirical data and statistics on the research related issues.

The research also generously benefited from electronic databases (WestLAw) and electronic resource centers providing business and human rights newsletters. This paper also reflects some part of public and academic debate going on in London universities, think-tank institutions and was also influenced by massive street actions for support of Burma taking place here in UK in October 2007.

To support its claims and make its arguments clearer, the paper often refers to different examples of particular cases of business - human rights conflicts and correlations.

For practical considerations, the paper does not draw a distinction between Multinational Corporations (MNC) and Transnational ones (TNC) and may refer to them interchangeably,

particularly when citing research materials. Also paper may often use the term 'business,' 'corporation' or 'company' which as well is done for practical considerations and should not certainly be understood as a shift in the object of discussion.

The paper intensively relies on the concept of a developing country, but does not restrict its meaning with any official definition of this term. For the purposes of this paper, the word 'developing countries' refers to countries with a low standard of living and low or moderate score on the Human Development Index which are often as well characterized by weak governance, corruption, weak or corrupted judiciary and are repressive or particularly unfriendly environment to guaranteeing human rights, score non-free or partially free in political terms; in short, these are countries which are rich in resource yet, for some strange reasons, still remains massively poor when it comes to the standards of living of ordinary people.

While referring to those representing the human rights side of the business-human rights discourse, the paper uses several terms interchangeably, such as: human rights organizations, NGOs, human rights watchdogs, human rights monitoring institutions.

The paper also develops its own terminology (e.g. *negative impact paradigm*, *presumption of evil* or *alien's syndrome*), which was very helpful while writing in order to better conceptualize the issues and also aims to make it easier and more interesting for the reader to follow its line of arguments.

The research was completed by the conclusion that that solution lies not in elimination but in the *transformation* of the *negative impact paradigm.*

Before altering things, however, one should start with understanding its inherent nature and determine its potential for change, and this is what the paper tries to do for the next tens of pages.

CHAPTER ONE - PUTTING THE NEGATIVE IMPACT PARADIGM INTO CONTEXT

PART I – THE STATE

1.1. A. Democratization of Violence and Shrinking Realm of the Nation State

The rise of MNCs as of the increasingly powerful threat to human rights is not an isolated development but a part of global transformations challenging the *status quo* position of the nation state; From the very first years when the idea of human rights law started to develop internationally, it acknowledged the state as the primary, if not the only, threat to human rights, and consequently - imposed the duties to uphold these rights solely on the state. However, global transformations, or globalization in other word, have led to the situation when the state is no longer the main source of violence against the individual but almost *primus inter pares.*

'A new supranational order somehow 'beyond' or 'over' the sovereignty of individual states has dramatically diminished the importance of each single state's jurisdictional lines for the conceptualization and resolution of problems facing its own citizens.'[21] This has pushed the nation states to greater cooperation with each other and with non-state agents as well in order to handle the challenges of the globalized world ahead.[22] The latter development inevitably resulted in the increase in the role and consequently in powers of non-state agents at the expense of shrinking the realm of state domain of authority. This fundamental shift from state-centric to multi-centric order has produced its inevitable consequences *inter alia* on some basic standards of human life, benchmarked by human rights.

[21] Cosmo Graham, *Human Rights and the Privatization of Public Utilities and Essential Services*, Privatization and Human Rights in the Age of Globalization (Koen De Feyter and Felipe Gomez Isa ed. 2005). *See also* Alfred C. Aman, JR, *Privatization, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law, Id., See also* Clair Apodaca, *Global Economic Patterns and Personal Integrity Rights after the Cold War*, International Studies Quarterly (2001); *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies*, by International Council on Human Rights Policy (ICHRP) 1 (2002) (Many argue that as the global economy is becoming more integrated the power of states is declining) [hereinafter *Beyond Voluntarism* (2002)]

[22] *See e.g.*, Alfred C. Aman JR, *Id.* ('states must partner with other actors, both state and non-state, if they are to solve problems that extend beyond their territorial reach')

As a result, what we are facing now is the *democratization of violence*[23] having replaced the previous – elitist system of coercion, where only the state had the monopoly over the necessary capacities and legitimacy to use the power against the individual.[24] In the era of democratized violence 'threats to the enjoyment of human rights come from non-state actors rather than directly from state agents.'[25]

While, however non–state agents are not particularly new phenomena on the landscape of human rights,[26] what has placed them, and consequently the threat coming from them, in the limelight is the steady and rapid growth of their number on the one hand, and significant increase in their capacities to hurt human rights on the other hand; These capacities are particularly alarming when measured against the shrinking abilities of the nation state to fulfill its traditional duties owed to its citizens and, in the context of this paper particularly, the *duty to protect* individuals from the abuses coming from non-state actors.[27]

As already highlighted in the executive summery, this paper argues that MNCs are certainly the most powerful potential enemies[28] to human rights in the nearest years to come. Nobody argues for sure that e.g. terrorists are less powerful or less increasing threat to human rights. But what makes MNC case different is that first, unlike terrorists, MNCs are not *per se*

[23] The expression used by Zakaria, s*ee* Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (2003).

[24] In terms of transnational networks and other capacities to harm human rights worldwide one cannot avoid thinking of terrorists, as for the *legitimacy* to use the force, recent Russian legislation which allowed oil corporation to create its own private army is an excellent point of reference here, *see Gazprom to Raise Its Own Private Army to Protect Oil Installations*, The Times, July 5, 2007 ('The law allows *Gazprom* and *Transneft* to recruit and arm their own security forces, giving them greater powers than private security firms').

[25] Andrew Clapham, Human Rights Obligations of Non-State Actors, p.1 (Oxford University Press, 2006).

[26] One can think of pirates as examples who were so powerful and dangerous non-state actors that they were declared as *hostis humani generis* (enemies of humanity).

[27] The duty to protect is enshrined in core UN human rights treaties and there is a general consensus that it also exists under customary international law. Moreover, the UN treaty bodies unanimously acknowledge that this duty requires steps by States to regulate and adjudicate abuses by all social actors including businesses. *See e.g.*, Business *and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 1/HRC/4/35, pars. 10, 18 (2007) [hereinafter *Business and Human Rights: Mapping International Standards, (*2007)].

[28] However, if put in the context of already existing data on corporate human rights violations, one may also consider that MNCs are not only *potential* but already the *actual* enemies of human rights.

illegal in their nature and aims, and second, because of this the threat coming from MNCs is usually less visible, which may in fact immunize it from the inspecting eyes and regulatory hands of the law and policy. And while we may *handle* terrorism in these terms, meaning - put it under a total ban of law and ostracize it by policy, we may not do the same with the MNCs: while the latter may even be involved in perpetration of international crimes such as genocide and war crimes, or cause devastating harm to the environment, MNCs as actors cannot be outlawed and ostracized;

The only strategy we can use against abusive MNCs is to put in practice the mechanism which will prevent or mitigate the harm posed by them and make the wealth they generate an object for a more fair distribution, in other words, what is needed is to *transform* their output and not to eliminate it. [29]

However this has proved to be easier said than done: until now the power of MNCs remains almost exclusively regulated by market-forces rather than human rights law norms and consequently the alarm from human rights community in respect of MNCs is constantly on.

This paper argues that while the MNC may have an inherent construction which makes it hardly capable of accommodating or promoting human rights causes, this cannot be the sole or the primary reason causing the *negative impact paradigm*, the phenomena already mentioned above. Rather the paper will demonstrate below that MNC inherent nature alone would have not been able to leave that much drastic footprint on human lives as it has actually done, if there was

[29] It has to be clarified that while the harm generated as a result of MNCs' operations and particularly of those from extractive industries has triggered greatest anxieties in local communities and alarm in international watchdog institutions, the idea of shutting down the extractive business as such was not accepted as a plausible alternative either; *See e.g.,* Ottaway, *supra*, 7 ('In April 2000 a coalition to represent 200 NGOs from 55 countries determined to stop all World Bank financing of oil and other mineral extraction projects under the motivation that oil and mineral riches in general have proven to be a curse for developing countries. Such a radical position, however, has little resonance in poor countries, where the idea of renouncing oil revenue has no appeal').
One should as well look at the issue realistically - not only those 'poor countries' will be against this kind of 'solutions,' but industrialized nations first and foremost, since they hold a critical consumer interest in these resources, and especially oil. See e.g., *Michael Klare, supra,* 17.

an efficient mechanism to regulate their conduct in the countries of their presence or universally and if the situation in those countries where they usually operate was not so difficult from human rights perspective already before the MNC arrives there.

As already mentioned above, state is considered to be the primary duty holder of human rights obligations.[30] It has the duty *to respect and fulfill human rights* (meaning to refrain from violating human rights and undertaking some positive measures to make their realization possible) and also the *duty to protect* them from third party violence, which in fact means abuses from non-state actors; While the first two duties are designed to regulate relations between the state and the individual, the last one makes the state a *buffer zone* between the individuals to guarantee that they do not encroach upon each others' rights or liberties. Thus, the *duty to protect* also includes individual's protection from corporate human rights abuses;[31] However, in reality states often fail to fulfill this duty and this failure leaves the individual tête-à-tête to huge corporate actors, without any protective or preventive mechanism in between. The failure of the primary duty-holder – the state – to meet its obligations to protect individuals from corporate abuses has resulted in a widespread impunity of corporations and mass human rights violations.

While inadequacy of the existing legal framework of human rights protection against corporate abuses is already shaping itself as a severe reality, contestation arises whether there is a particular type of the state or a group of states who fail to meet their *duty to protect* in practice or is it the state - centric international law as a regulatory framework which fails to capture corporate powers and its negative impacts. [32]

[30] *Promotion and Protection of Human Rights*, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, E/CN.4/2006/97, pars.7, 9 (2006), ("Even when the human rights regime was constructed, which seemingly clashed with these principles by creating obligations transcending statehood and nationality, states were designated as the only duty-bearers who could violate international human rights law and they alone were held responsible for implementing human rights principles by enforcing treaty-based obligations or customary norms within their domestic jurisdictions").

[31]The State duty to protect against non-State abuses is part of the very foundation of the international human rights regime. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises. S*ee e.g., Business and Human Rights: Mapping International Standards* (2007)

[32] While the difference between these two might not be very clear from the beginning, and in reality they do overlap at a considerable extent, for the purposes of this paper it does make sense to analyze them

The sections below will demonstrate that the problem lies not in the failure of the first or the second one but in the convergence of these two; it will also analyze causes of these failures in further detail;

1.1. B Trans National *versus* Trans Border Entities – A Loosing Game

The data about MNCs financial output provided above, dwarfing that of many of the nation states', is one but clear indication that MNCs are often 'relatively more powerful [in financial terms] than the state in which they operate.'[33] Apart from that, MNCs enjoy structural and jurisdictional advantages compared with the nation state: states still suffer from trans-border limitations, while the MNCs have reached the level of trans-nationality;[34]

In addition, MNCs, having a complex structure of multiple layers of ownership and control simultaneously operating in several jurisdictions, are indeed very skilful to move capital between different countries, create flexible international structures and exploit the legal fiction that subsidiaries are independent from their parent companies.[35] All these make it difficult for any single state to regulate MNC's activities.[36]

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separately, since as problems they require different solutions - if the analysis leads to the answer that it is the particular group of states which fail to protect individuals from corporate abuses, then solution lies in building the state apparatus capable of effective human rights protection in these particular countries, which in fact is a very long-term and labour consuming work requiring coordination of internal and external actors, such as grass roots organizations and international development institutions/agencies; If the answer however is in the second one, then it means that groundbreaking changes are needed to happen in the traditional framework of the international human rights law. These changes fall exclusively under the authority of international law makers - states and intentional organizations such as UN, e.g., and should comply with strictly defined procedures, it will also require more theoretical work and its nearly universal acceptance by the states.

[33] P. Sheehan, *supra* 4.

[34] *See e.g.*, Surya Deva, *supra* 11 (Sassen argues that "off shoring [of plant, production, and workers] creates a space economy that goes beyond the regulatory umbrella of the state, see Saskia Sassen, *Losing Control? Sovereignty In An Age Of Globalization* 8 (1996)) *See also* George Soros, *Towards a Global Open Society*, Atlantic Monthly 20 (1998) ("[T]he capacity of the state to look after the welfare of its citizens has been severely impaired by the globalization of the capitalist system ....",) In such a situation there remains little that state can do to capture the corporate power, besides it is argued that "[S]election of a state of incorporation may be a matter of mere convenience--a decision made at a particular time for tax or other reasons." *See e.g.*, Fleur Johns, *The Invisibility of the Transnational Corporation: an Analysis of International Law and Legal Theory*, 19 Melbourne Univ. L. Rev. 893, 895-96 (1994).

[35] *Beyond Voluntarism*, (2002), p.80 ("In many countries courts will uphold the legal fiction that parent companies are legally completely separate from their subsidiaries and are therefore not liable for wrongs they commit. Classically, it is said that the parent company is no more responsible for the actions of its

Sometimes, instead of or in addition to suing the subsidiary that carried out the acts in their own country, victims decide to sue a parent company in a foreign country. The reason may be that the subsidiary is insolvent or uninsured, therefore the only hope of compensation is to get it from the parent company; in other cases victims do not have much hope that justice will and can be done in their own country. It may also make sense to sue the parent company when it is in charge of decisions about the company's international operations and the profits from subsidiaries go back to the parent company. However, in most common law countries judges are authorized to stop proceedings if they consider that the case started in the country which is not an appropriate place for launching the complaint, (called the *forum non conveniens* doctrine). This constitutes a major obstacle to litigants in cases where the subsidiary, evidence and witnesses are all located in another country. [37]

In conclusion, MNCs often outgrow the ability of individual states to regulate them effectively.[38] This in turn renders the state-centric system of international human rights law ineffective in capturing transnational corporate power.

1.1. C. Corporate Immunity, Exploiting Loopholes of National Laws

Structural and jurisdictional hurdles highlighted in the previous section seriously impair the abilities of the nation state to regulate transnational corporate powers. However, as seen above, these hurdles are rather a general trait of the existing situation and stay relevant

subsidiary than a member of the public would be for the negligence of a corporation in which she holds one share. In many cases parent companies escape liability even though they effectively control their subsidiaries through structures such as cross-directorships and by retaining control over shares or key policies. Only in exceptional cases will courts "pierce the corporate veil." Exceptions include cases where the corporate group structure is a sham or façade, or when an express agreement exists between a parent and subsidiary that one acts as the agent of the other. One lawyer with much experience in this area noted: "The effect of the corporate veil makes it practically difficult for claimants injured by multinationals to get justice anywhere… [They] fall through the net completely.")

[36] *Id.* at 11,12;

[37] *Id.* at 80 (The notion of sovereignty, upon which international law is built, makes it undesirable for one state to give its laws extraterritorial operation. A suit for fixing responsibility before a municipal court is often scuttled with the plea of *forum non conveniens*.
Cassels observes that the "doctrine shields multinationals from liability for injuries abroad.")
See also see Jamie Cassels, *the Uncertain Promise of Law: Lessons from Bhopal (*1993).

[38] *Beyond Voluntarism,* (2002) pp.11, 12.

notwithstanding the level of development of a particular country itself, its national legal system or the specificities of the MNC's industry in question;

Yet some other factors which may have implications on the *negative impact paradigm* are country or industry specific, for example - the social and economic context in the hosting country. In fact, 'there is evidence which demonstrates that the worst corporate-related human rights abuses happen in the host countries that are characterized by a combination of relatively low national income, current or recent conflict exposure, and weak or corrupt governance.'[39] And there is an overlap with the extractive sector here, reason being that extractive companies operate in such environments more often than others.[40]

These countries prove to be particularly weak in enforcing the state *duty to protect*. The reasons are manifold and complex: many of the developing countries do not possess the legal and/or economic capacity to bring corporations before justice. Judiciary is usually ineffective and corrupt[41] and the citizens do not have much trust in it; .Others lack the resources or will to control powerful global actors like TNCs which in fact are usually the most influential actors in the host countries; Moreover, many countries do not have appropriate substantive or procedural legislative mechanisms in place to enable holding transnational corporations to account.

Access to justice mechanism is certainly a point of reference here; in most cases only a person or group that has suffered direct harm can begin proceedings against a corporation. This

[39] *Promotion and Protection of Human Rights,* (2006) (identified 27 countries where 65 of such instances took places and found 'striking and not entirely unexpected' patterns: majority of them either recently emerged from conflict or still are in it. These countries are characterized by "weak governance." On the Freedom House index of political systems - where "not free" is ranked as one, "partially free" two, and "free" three - their average is 1.9; On a "rule of law" index developed by the World Bank, almost all score below the average score; On the Transparency International Corruption Perceptions Index - where "zero" is labeled "highly corrupt" and "10" is described as "most clean" - their average score is 2.6.)

[40] *Id*. par.30. The reason of this fact has nothing to do with specific corporate structure or management of extractive industry MNCs. Rather it lies in the fact that oil industries e.g. 'cannot choose where deposits are located and have often to operate in conflict-ridden countries governed by unsavory regimes, made all the more unsavory by oil revenue that encourages government centralization, fiscal irresponsibility, extravagant spending, and corruption.' *See* Marina Ottaway, *Reluctant Missionaries,* 125 Foreign Policy, (Jul. - Aug., 2001)

[41] *See e.g., Wiwa v. Royal Dutch Petroleum Company, et al*., 226 F.3d 88 (2d Cir. 2000) (the US Court accepted the argument of the victim alleging that Nigerian courts were uncertain forum for justice. Citing the U.S. Dept. of State, 2000 Country Reports on Human Rights Practices, Nigeria (Feb. 2001), the Court said: "The judiciary is subject to political influence, and is hampered by corruption and inefficiency. The judicial system was incapable of providing citizens with the right to a speedy, fair trial").

limits action by civil society groups,[42] which are often better positioned to engage into legal controversies than direct victims of the violations. Furthermore, in some cases the national law deliberately discriminates among the citizens based on their ethnic or religious belonging, which effectively bans many of the victims of MNC abuses to initiate the litigation.[43]

Delays and ineffective interim measures are problems of many developing countries. In most of these countries courts lack necessary resources, civil litigation against companies is costly and often take a long time to produce results, it also is often the case that reforms in procedural rules do not keep pace with broader developments,.[44] *Burden of proof* often makes it difficult for victims in civil proceedings against corporations to satisfy the necessary standard of proof, because the company has complete control over documents and evidence and there is a strong trend for commercial enterprises to be secretive.[45]

Above all, there are a set of other matters that may as well hinder execution of justice: the most important ones include: *costs of litigation* which has a potential to discourage the victims to appeal to courts. While corporations have financial capacities to litigate for several years and delay the case until the victim, with miserable financial resources, is prepared to negotiate and settle for less compensation.

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42 Beyond Voluntarism, *(2002), p. 79 (Where, as is often the case, victims are poor or from a vulnerable group, such rules leave responsibility for action to those least well able to initiate it;*

[43] *See e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc., 374* F. Supp.2d 331 74 (S.D.N.Y. 2005) (Plaintiffs raised the arguments that the rights of non-Muslims are greatly reduced in Sudan under the system of Islamic law (*Shari'a*) in place. This in practice means total lack of legal personality for plaintiffs who practice traditional African religions, and diminished testimonial competence for Christians. The victims consequently concluded that "the trial of this case in Sudan will result in a total failure of justice" as it would be rather surprising if the government of Sudan conducted a war of "ethnic cleansing" against plaintiffs and at the same time granted them a fair judicial process to remedy those injuries).

[44]*Beyond Voluntarism,* (2002) ("Sixteen years after the deadly gas leak from a Union Carbide plant in Bhopal, India, that eventually killed about 15,000 people and affected 500,000, large amounts of compensation from a court settlement have still not been paid out. Prolonged litigation often works to the disadvantage of the victims — in particular where their need for a remedy is immediate. Companies on the other hand can use the threat of delay (and rising costs) to their advantage. Furthermore, In some countries, it appears that the level of damages that can be awarded or the fines that can be imposed against companies are so low that it is often cheaper for large corporations to pay fines or damages than invest in management or structural changes that prevent harm from recurring").

[45] *Id.* at 80. (Rules requiring the company to provide access to documents ("discovery") are sometimes inadequate. It may be necessary to shift the burden of proof).

State intervention because of the fear of loosing the investor, or other reasons, the state may intervene on the side of the powerful MNC, making the misbalance of powers between the victim and the defendant even more severe.[46] *Fear and social stigma* - despite laws prohibiting reprisals against employees and others who sue companies, few victims actually bring proceedings since majority of them is afraid of publicity and the social and personal consequences of complaining.[47]

PART TWO – MULTINATIONAL CORPORATION

1.2. A What Does Foreign Direct Investment Cost and Who Pays the Price?

In general, human rights are not usually an issue for the states in investment or free trade policy consideration and bilateral treaties.[48] Very few of them have programmes, projects, measures or policies that are *specifically* and *expressly* focused on human rights issues in this respect.[49]

The country may face a serious conflict of interests 'if it tries to act on behalf of victims, or to develop laws that hold corporations accountable, and at the same time tries to attract foreign direct investment (*hereinafter* FDI) from multinationals who can choose to invest in any

[46] *Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler Corp*. 05-2141, 05-2326, (2d Cir. 2007) (in this case a group of victims sued corporations for involvement in human rights violation committed during the apartheid regime, Penuell Mpapa Maduna, who was then the Minister of Justice and Constitutional Development for South Africa, submitted an *ex parte* declaration to the district court asking that the proceedings be dismissed. Specifically, he pointed out that 'permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. .. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.')

[47] *Beyond Voluntarism*, (2002) (Researchers have reported that women who make up 65-85% of the workforce in Export Processing Zones in India do not speak up about poor conditions because they fear to lose their jobs). *See also* Terry Collingsworth, *The Alien Tort Claims Act- A Vital Tool For Preventing Corporations From Violating Fundamental Human Rights*, International Labor Rights Fund, p.6 (2003) (providing an example of Burmese victims who escaped forces labour in Thailand and while in refuge submitted the complaints, which otherwise would not be possible for them).

[48] *Human Rights Policies and Management Practice*, (2007).

[49] *Id*. at 8

number of countries.[50] This holds twice as truth in case of poor nations and those newly recovered from conflict. Many developing countries do not find it reasonable to apply strict human rights policies to FDI which traditionally seems to be the key solution to their pool of problems.[51] Moreover, in order to attract FDI, they may not only be uninterested in enforcing human rights norms against MNCs,[52] but even go one step forward by lowering the applicable standards.[53] Human Rights monitoring organizations have also recorded abuses committed with the aim of attracting investments.[54]

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[50] *Beyond Voluntarism*, (2002)

[51] *Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler Corp*. 05-2141, 05-2326, (2d Cir. 2007)

[52] On the 29th of November, 2007 a particularly interesting discussion was held in Royal Institute of International Affairs (Chatham House) in London concerning the strategies and policies of the newly elected government of Sierra Leone, a country which recently recovered from bloody conflict (popularly named as *blood diamond conflict* after the movie) and just recently made a peaceful transition of power through a democratic election. Particularly interesting for me was to learn about the position of the government towards their old contracts with the foreign investors, which are the issue of extreme sensitivity for the people in the country. The government however, delicately denied revising contracts with old foreign investors. The justification is that, although these contracts are particularly sensitive issue for the whole nation, the trust which those investors declared to the country during its most difficult days should be appreciated and in a sense 'paid back;' And above all, almost striking was the fact that while the economic rule and peace recovery were named as the government's priorities, I find it particularly difficult to remember anybody in the whole auditorium even mentioning the words *human rights.*

[53] See generally Michael E. Porter, *Competition in Global Industries: a Conceptual Framework*, in Competition in Global Industries 15 (Michael E. Porter ed. 1986) (arguing that a developing nation must show itself to be an advantageous location for business in order to attract direct investment by MNCs). This is particularly true for developing countries. *See also* Kwamena Acquaah, *International Regulation of Transnational Corporations: The New Reality*, 66 (1986); (observing "the dilemma thus posed for the host [Third World] governments is a choice between foreign investment and the health and safety of its citizenry"). Surya Deva, *supra* 11 (concluding that 'more often than not, the dilemma is resolved in favor of foreign investment, even at the cost of ignoring or waiving human rights obligations').

[54] Mark B. Baker, *Crosby v. National Foreign trade Council(NFTC): Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma; the Commonwealth of Massachusetts, the WTO, and the Federal Courts*, 32 Law & Pol'y Int'l Bus. 51, (2000) (citing the case of Burma for example, when during the period 1992-97 approximately two million Burmese people were used for forced labor to make the Burmese infrastructure more attractive for foreign investment and tourists. The forced use of citizens as porters by the army was accompanied by mistreatment, illness, and sometimes deaths was a common practice) *See also* Discussion in United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: Globalization, Integrated International Production and the World Economy* p. 260 (New York: United Nations, 1994), ('Many nations have introduced "export processing zones" (EPZs) designed to encourage foreign investment and have sought to maintain the international competitiveness of these zones by actively supporting moves by businesses to suppress unionization and maintain docile and inexpensive workforces'); *See also* Discussion in OECD, *Trade, Employment and Labour Standards* , COM/DEELSA/TD (96) 8 /FINAL, p. 35. (1996), ("[i]f there is one development that has drawn widespread attention to the question of workers' rights it is the keen competition among countries to attract investors to export processing zones by offering concessions that limit the exercise of those rights, or allowing practices that have the same effect").

Another side of the problem is the threat of market withdrawal once the MNC is already in the country: owing to their size and share in internal market, they have significant impact on the host country's economic, and consequently political stability; especially in the developing countries. Therefore, rejecting the investor in many cases might simply equal to economic and hence political suicide.[55] Thus, rather than controlling and regulating them, states often prefer to adjust their policies to the needs and conditions proposed by the MNCs. This breaks the balance in favor of MNCs rather than the state and its population,[56] further undermining there guarantees of human rights protection against corporate abuses.

In addition, governments often also hold share in the respective MNC operation in their countries,[57] which makes them reluctant to bring the partner before justice. Furthermore, an argument can be made that, the revenues from MNC activity satisfies elementary needs of the population and can further promote realization of economic and social rights, the promise which is often difficult to reject for poor and conflict-torn nations.[58]

1.2. B. From Corporate Cooperation to Corporate Complicity

Execution of justice against corporate human rights abuses is often hindered not only due to state hunting for FDI or shortcomings of the legal systems, but also because it often happens

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[55] Mobolaji E. Aluko, *On the Resource Control Battle: From Dichotomy to Quartonomy, From Isopatials to Isobaths* (2003) *available at* http://www.ngex.com/personalities/voices/mwe021903baluko.htm (In 2001 for example, with an estimate Gross Domestic Product of $40.1 billion, oil export revenues of about $19.5 billion represented about 95% of Nigeria's foreign exchange earnings)

[56] *Beyond Voluntarism*, (2002)

[57] Bonn International Center for Conversion, *Who is Minding the Store: The Business of Private, Public and Civil Actors in Zones of Conflict, p.16* (2006) [hereinafter W*ho is Minding the Store (2006)*].

[58] The critical role of FDI in the life of poor nations and their struggle against misery was highlighted in the speech of the UN Secretary General, *Kofi Annan* at the World Economic Forum in Davos, Switzerland, in 2001; *He* said: "The only developing countries that really are developing are those that have succeeded in attracting significant amounts of direct foreign investment, as well as mobilizing the savings and resources of their own citizens. Unfortunately, that is only a relative handful of countries. The rest of the developing world, and especially the least developed countries, is almost entirely missing out -- in spite of the fact that many of them have put in place highly welcoming regulatory frameworks for foreign investment, and are making extra efforts to attract it. If they have not succeeded, it is often because they lack the necessary infrastructure, or because their market is too small and too isolated to be of interest. Local markets have to compete in the global market, and it is unforgiving." *see In Address to World Economic forum, Secretary-General Says Globalization Must Work for All***,** The text of an address by Secretary-General Kofi Annan in Davos, Switzerland, on 28 January 2001 to the World Economic Forum, *available at http://www.un.org/News/dh/latest/address_2001.htm*

that restoring justice turns to be often in the same hands who themselves participated in committing injustices. In other words, the state, or rather the government itself is often involved in corporate human rights violations. In such situations, the government simply sits to judge its own case.

At the first sight, close ties between the MNC and the host state do not *per se* look illegal or suspicious, as they are the necessary precondition for starting the business: without the approval of the state the company simply cannot enter the country and obtain access to natural resources which are usually owned in some fashion by the government of the country. All these attach a special value and significance to the state's approval of the MNC. If the approval is obtained by legal means, it is not the question of controversies; however this is not always the case. In many of the developing countries, where MNCs usually operate, corruption and payment of bribes are endemic[59] and MNCs often get involved in it:[60] financial transactions between the MNCs and host governments consist of mostly "legal, albeit –morally questionable – payments."[61]

Furthermore, the most serious mistake the companies may and usually do commit is connected with the choice of security guards. The property and infrastructure of MNCs, as well as their human resources, cost millions of dollars and nobody questions their legitimate interest

[59] *Who is Minding the Store, (2006)* p.16

[60] In March 2003, James Giffen of the Mercator Corporation was indicted, accused of bribing President Nursultan Nazarbayev of Kazakhstan with $78 million to help ExxonMobil win a 25 percent share of the Tengiz oilfield, the third largest in the world. On April 2, 2003, former-Mobil executive J. Bryan Williams was indicted on tax charges relating to this same transaction. The case is the largest under the Foreign Corrupt Practices Act. Foley & Lardner, LLP., *SEC and DOJ Enforcement Actions and Opinions.* (May 30, 2003) *available at* http://www.fcpaenforcement.com/documents/document_detail.asp?ID=1388&PAGE=2
This series of events is depicted in the film *Syriana*;
In April 2003, Investigative reporting by *Forbes Magazine* alleged that "ExxonMobil handed hundreds of millions of dollars to the corrupt regime of President José Eduardo dos Santos in the late 1990s to control concessions covering 11 million acres (44,500 km²) off the coast of Angola that hold an estimated 7.5 billion barrels (1.2 km³) of crude." Forbes Magazine, Dangerous *Liaisons* (April 28, 2003) *available at* http://www.forbes.com/forbes/free_forbes/2003/0428/084.html.

[61] *See e.g., Who is Minding the Store* (2006). It should be further noted here that corruption has a deleterious effect on rule of law and human rights in general and often undermines institutional guarantees for their protection. By engaging in it, and thus accepting corruption as a rule of the game, business strengthens the perverse state apparatus in the detriment to overall prospects of human rights protection in the country.

and the right to take care of its security; however, the problem is in the particular ways in which companies often choose to secure themselves. The case study shows that, resource companies who operate in the developing courtiers for the provision of security often rely on state militaries, the idea being that physical protection is the service the state is generally well-positioned to provide,[62] and at some level security forces affiliated with companies become implicated in serious human rights abuses.[63] The fact is that often these military or paramilitary groups do already have drastic or at least discredited records of being involved in violent conflicts or repressions against their civilian population, and their oppressive capacities get indeed stronger when they are backed by corporate money and *legitimate reason* to use the force to protect MNC's security.

Furthermore, by contracting security forces of the host state who are party to a conflict, which often happens in practice, the company inevitably submits itself to siding with the government and its forces and in a way, legitimizes security forces by accepting their protective services. As a result, the groups in conflict with the government will perceive the company as an ally of its enemies; this renders company property and staff a 'legitimate target' in the eyes of these groups,[64] which may easily lead to a vicious circle of violence.

Sometimes companies go even further and provide transportation, communication and other infrastructure for the military, directly pay the units that guard their assets, or - even worse - when company staff participates in military operations and human rights violations or when company sites are used in the conduct of human rights violations.[65] Here the human rights violations committed by the security forces will also be attributed to the company. [66]

[62] Debora Spar, *Foreign Investment and Human Rights - International Lessons,* Challenge, (Jan-Feb, 1999).
[63] Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 Yale J. Int'l L. 487 (2001).
[64] *Who is Minding the Store,* (2006) p.16
[65] *Id.* (referring to the practice of Freeport in Indonesia/ West Papua and company military relationship in the oil-producing regions of Sudan)
[66] *Id.* (mentioning e.g. numerous allegations against BP in Colombia, Shell in Nigeria, and *Unocal* and Elf (now Total) in Burma for their use of security forces implicated in large-scale human rights abuses and war crimes).

The scenarios described above in this section has two equally important sides: first, it demonstrates how the most widespread type of MNC related human rights violations happen in practice[67] and second, it reveals the real reasons which frequently stand behind the state's alleged 'inability' to bring the violator before justice, and the reason is that state and the MNC are simply often together in violating human rights.

This latter scenario almost absolutely excludes the chance of achieving justice through national legal system: 'As observed, state is usually able to render itself virtually judgment-proof by creating court systems unwilling or incapable of adjudicating claims for compensation or punishing transgressions of criminal law by powerful actors.'[68]

1.2. C. Constructive Engagement: a Mistake or a Lie?

Owing to lessons learned from the recent history, a certain *presumption of evil* has emerged within the consciousness of human rights community which immediately raises alarm when the corporation intends to invest in a repressive regime,[69] and transforms the alarm into a waterfall of criticism if the corporation continues to stay in the country after abuses getting even worse.[70]

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[67] *Business and Human Rights: Mapping International Standards* (2007) (Of the more than 40 Alien Tort Claims Act cases brought against companies in the United States (now the largest body of domestic jurisprudence regarding corporate responsibility for international crimes), most have concerned alleged complicity where the actual perpetrators were public or private security forces, other government agents, or armed factions in civil conflicts.

[68] Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 Yale J. Int'l L. 487 (2001);

[69] Companies that seek to establish operations in countries that do not observe at least minimum international human rights standards will have to prove to their employees customers and other stakeholders that they are not seeking advantage from and are not otherwise complicit in those human rights violations. Otherwise they will risk adverse publicity. shareholder protests and lawsuits,' *See Corporate Social Responsibility: Corporate Counsel Build A Treasury Of Good Will* - Part II, interview with Jerome J. Shestack, Partner and Co-Chair, Business Litigation Practice Group, Wolf Block, The Metropolitan Corporate Counsel (January 2005) *available at* http://www.metrocorpcounsel.com/pdf/2005/January/37.pdf
See also Ottaway, *supra*, 40 (while providing the case summery, writes: "Already incensed by the imposition of strict Islamic law in Sudan, the abuses committed by soldiers against civilians, and the reappearance of slavery, international human rights organizations and church groups were appalled when oil revenue started flowing to the Sudanese government. launched a divestment campaign against Talisman to force it to abandon the project").

[70] See e.g., Corporate Social Responsibility, News and Resources, *Should I Stay or Should I Go? –When Should Companies Just Pull Out? available at* http://www.mallenbaker.net/csr/CSRfiles/badlands.html

In response to the *presumption of evil* business has developed counter argument which is usually shaped in the name of *constructive engagement;* the latter tries to assert that by investing in the country or remaining there does no harm but helps the population as it provides jobs, and helps satisfy the basic needs of the people. Furthermore, they claim that 'economic exchanges in the form of trade and investment will spark political liberalization - defined as including observance of human rights — in countries governed by repressive regimes.'[71]

There is a quantitative and qualitative data which proves that the claim of *constructive engagement* is nothing but a lie and often a conscious one: the two case studies below will be used as examples to shed the light on this fact.

Constructive Engagement in Apartheid South Africa

The claim of *constructive engagement* was originally devised to justify US corporations' continued presence in South Africa during the apartheid regime. Because of the significant leverages on the regime,[72] the US business was intensively called for to divest from the repressive country.

[71] They usually claim that "both trade and the promotion of human rights can serve the same purpose -- namely bettering the well-being of individuals... As a trading nation, Canada must promote trade as an engine for growth and jobs, both at home and abroad. The creation of work is a critical aspect of the human rights agenda. …Trade initiatives can also help in our pursuit of democratic development. Our efforts to develop strong trading relationships provide us with entrées into many parts of the world where we can promote the human rights and democratic development agenda." See *Notes for An Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, At the Consultations with Non-governmental Organizations in Prepartion for the 52nd Session of the United Nations Commission on Human Rights* (February 13, 1996). See also *Notes for an Address by the Honourable Raymond Chan, Secretary of State (Asia-Pacific), Before the House of Commons on the Anniversary of Events in Tiananmen Square* (June 4, 1996):
See also Stephen Lavergne, *China 2000: The Nature of Growth and Canada's Economic Interests,* Department of Foreign Affairs and International Trade Policy (Canada), Staff Paper No. 94/10 advocating a robust "comprehensive and constructive engagement" with China on the basis that China is "a strategically important player in a number of critical issues in both the Asian and world arenas" and an important investment destination for Canadian firms.

[72] *see* Craig Forcese, *Putting Conscience into Commerce: Strategies for Making Human Rights Business as Usual* (1997) (notes that ' United States was South Africa's largest trading partner, its second largest foreign investor, and the source of one-third of its international credit during this time. US corporations controlled almost half of the South African oil industry, 75 percent of the computer industry, and 23 percent of the auto industry. The US imported one-third of South Africa's totals Krugerrand gold exports, a critical source of foreign exchange earnings.')

The primary response of US corporations was argument that their presence in the country was having a positive influence on the treatment of blacks.[73]

The work of South African Truth and Reconciliation Commission (TRC) and recent successful lawsuits of the victims of the corporate human rights abuses committed during the apartheid, however, reveal the drastic reality - in fact corporations operating in South Africa played an integral role in apartheid crimes, devising and implementing apartheid policies:

TRC found that 'business was central to the economy that sustained the South African state during the apartheid years. Certain defendant corporations, especially the mining industry were involved in helped to design and implement apartheid policies. Hundred and probably thousands" of businesses, "including subsidiaries of leading corporations, became willing collaborators in the creation of [apartheid] war machine, which was responsible for many deaths and violations of human rights."[74]

'Corporations did more than passively benefit from the vast pool of cheap labor created by the apartheid system. Some of them were directly implicated in the design of apartheid policy.[75] Corporations created, funded or actively collaborated with security forces that murdered, maimed or exploited blacks, suppressed black trade union and created deplorable labor conditions, violated the UN sanctions by selling arms to the regime; and threw the regime a life raft by financing the system when it was on the verge of collapse, knowing that the funds were being used to intensify repression and cause the human rights violations.'[76]

[73] *Id.* (citing Morgan Guaranty Trust Corporation writing that "the continued presence in South Africa of US companies constitutes a source of economic well-being for black South Africans, and can be a spearhead for improvement in employment practices, as shown by the [Sullivan Principles].")
[74] Truth and Reconciliation Commission, Final Report, Vol. 4, Chap. 2, par.126, 161
[75] *Khulumani Barclay National Bank Ltd., Ntsebeza v. Daimler Chrysler Corp.* Nos. 05-2141, 05-2325, Brief for plaintiffs/appellants, pp. 8-12 (2nd Cir., 2007) (revealing that tactics used to destroy opposition to apartheid were formulated at joint military/business conferences which allowed multinational corporations to help mold apartheid policy, leading to one of the bloodiest periods in South African history) ('Carlton Conference of 1979 introduced a "new era" of cooperation between business and government officials through a "total strategy" which promoted the maxim that the struggle was 20% military and 80% social, political and economic.'), ('several defendant corporations were actively represented on the Defense Manpower Liaison Committee and other key policy-making bodies, placing them at the heart of the South African military-industrial decision making complex').
[76] *Id.*

The symbiotic relationship between the apartheid state and corporate business led to systematic human rights abuses:[77] extrajudicial killings, torture, forced relocation, forced labor and displacement of thousands of victims.[78]

Constructive engagement in Burma

The case of Burma will demonstrate a different factual perspective of the *constructive engagement*: unlike some corporations' involvement in South Africa, who started operating in the country long before the apartheid regime was established there, the US corporation *Unocal* made the conscience decision to invest in Burma, the country which by that time already had the name of one of the most flagrant violators of human rights.

In 1988 a military regime took power in Burma; after a generation of isolation the country was open for foreign investment; The notorious image of the military junta has not prevented business actors (especially oil) from investing in the country under the guise of *constructive engagement*: Since 1988, the oil and gas sector has provided by far the largest amount of foreign direct investment for the military regime. In 1995-96, the oil and gas industry invested some 200 million dollars, more than the next five largest sectors of the economy combined. [And] These figures only represent the initial investment stage.[79]

The corporations claim their engagement is positive for the country, but the reality is the last decade of foreign investment in Burma has been a classic case of destructive engagement. [80] While corporate engagement has not advanced the economic and social life of the majority of the population on the one hand, there is considerable evidence on the other hand that the expansion

[77] *Id.*
[78] Khulumani Barclay National Bank Ltd., Ntsebeza v. Daimler Chrysler Corp. Nos. 05-2141, 05-2325, Brief for plaintiffs/appellants, pp. 8-12 (2nd Cir. 2007).
[79] Abuses by Corporations in Burma, (2005)
[80] *Id.* This claim is widely heard against Burma today. Its correctness became particularly evident to me on the 6th of October, 2007 when I joined the march for Burma of thousands of individuals in London. The March was calling for western powers and EU to take action against the repressive regime and the corporations to immediately divest. The speeches given there by refuges from Burma made it more evident to me than any other research done for this paper, that there was no other word but *destructive engagement* which could express the role business was and it is still performing in Burma.

of these industries has not noticeably reduced the frequency and type of human rights abuses regularly associated with the military regime and its proxies. Rather on the contrary, FDI not only perpetuates the military regime, but has itself been the direct cause of human rights violations:[81] murder, torture, rape, forced labor[82] and forced relocation of the entire villages,[83] forced labour, rape, torture, massive relocation of people, etc.[84]

It is well-documented that MNCs are directly participating in either committing these type of human rights abuses or aid and abet the actual perpetrator: e.g. *Unocal* hired military battalions to perform security services, clear the pipeline route, and force the villagers at the gunpoint to work on construction of its infrastructure. The military used slave labor and threatened human rights groups that any threats to the *pipeline* would result in the increase in the number of soldiers and forced labour. The company provided surveys and maps to the military to show where they needed helipads, secured money, equipment and food for them.[85] It is asserted that 'absent the pipeline project, the abuses would have never occurred.'[86]

A clear sign of the fact that "constructive engagement" is not working in Burma is the flow of refugees and migrants, people who are running away from their own country and human and economic devastation which the military regime brought there.[87]

Burmese villagers initiated a lawsuit against *Unocal* and alleged that Energy Company was responsible for human rights violations which the military committed alongside the pipeline

[81] *Abuses by Corporations in Burma* (2005) ('large infrastructure projects have led to massive labor violations in Burma. Forced labor remains widespread in the areas discussed in ERI's studies and is in many instances, directly related to resource extraction. Local sources report that they are regularly required to porter, construct roads and buildings, deliver messages, serve on village militias, and so on. Land seizures, especially in mining areas, are widespread. The forced payment of fees is also commonplace. Villagers regularly have to contribute money in order to avoid having to provide forced labor, carry out everyday activities, and/or harvest timber and non-timber products that were previously freely available. Incidents of violent assault, rape, torture and extra-legal forms of military conscription connected to these abuses have also been reported')

[82] *Doe I v. Unocal Corp.*, 110 F. Supp.2d 1294, 1306 (C.D. Cal. 2000) *Order Granting Defendants Motion for Summary Judgment.*

[83] *Doe I v. Unocal Corp*., 110 F. Supp.2d 1294, 1306 (C.D. Cal. 2000)

[84] *Id.*

[85] Terry Collingsworth, *The Alien Tort Claims Act - A Vital Tool For Preventing Corporations From Violating Fundamental Human Rights,* International Labor Rights Fund p. 6 (2003).

[86] Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act,* 26 Yale J. Int'l L. 487 (2001).

[87] *Abuses by Corporations in Burma*, (2005)

route. The villagers submitted that the company knew or should have known about those abuses. In 2005 however, while the victims were successfully making their way in the US Court, *Unocal* eventually decided to end the case with a friendly settlement. Monetary terms of the settlement were not made public. A statement was released by both sides saying that agreement would provide compensation for the villagers and provide money "to develop programs to improve living conditions, healthcare and education and protect the rights of people from the pipeline region." [88]

1.2. D Preliminary Conclusions

The sections above demonstrated that contemporary human rights system which is supposed to shield individuals from third party violence through the state *duty to protect* presents itself as an inadequate construction to ensure that in practice corporations do not encroach upon the rights of individuals. The fact is that realization of the *duty to protect* depends on its implementation and enforcement by the nation state and its institutions, and the latter, because of a number of reasons referred to above, often fail to undertake this task.

This failure is rooted in the weakness of particular states which lack adequate material and procedural legislation, and/or effective judiciary to guarantee these rights through enforcing the state's *duty to protect*. Alternatively, states are tempted to turn a blind eye on corporate human rights abuses, either in pursuit of FDI or in order to protect themselves from accountability for complicity with the corporations. Last, but not least, trans-border limitations prevent states, as well as the victims, from effectively chasing transnational corporate powers.

The absence of the adequate legal mechanism to prevent or minimize harm and if still done, to *address* and most importantly – *redress* it, makes actual as well as potential victims particularly vulnerable to MNCs. Broken mechanism of restoring justice or a particularly hard procedural way of reaching the court is another significant 'contributor' to the *negative impact*

[88] *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, Marc Lifsher, (2005) *available at* http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm

paradigm: Once incurred, the harm from human rights abuses even doubles if it is left un-redressed and without a proper compensation.

Moreover, the message of impunity, which the broken mechanism of restoring justice spreads widely, undoubtedly encourages and invites future corporate human rights abuses.

PART THREE – THE PEOPLE

1.3. Beyond the Scene: Economic, Psycho-social and Cultural Underpinning of the FDI

It was already demonstrated above, that consciously or unwillingly, MNCs put enormous pressure on government policies, *inter alia* human rights policies. This is particularly destructive in the context of developing nations with *non-free* or *partially free* political regimes and the lack of genuine commitments to human rights and/or mechanisms for their implementation. This is one side of the story which reveals how MNC engagement accelerates and exacerbates ongoing human rights abuses by giving reason, 'motivation' and often material capacities to the governments to bolster their repressive muscles.

The section to follow will go even to a deeper layer of FDI - human rights' correlation, revealing the direct interplay between the MNC and the local community. In particular, this section will describe the psycho-social and cultural underpinnings of the FDI to further explain the *negative impact paradigm*.

1.3. A. Breaking the Status Quo

After the MNC invests and enters the country, the traditional and somewhat "backward" way of life of the locals is challenged by a considerable number of "foreigners," construction of new companies, mining towns, roads, supermarkets etc. In some situations building infrastructure leads to relocation of the entire villages or is accompanied by the use of tactics such as murder and rape to compel local population to work for it.[89]

[89] *See e.g., Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000).

It has been observed, that MNC's presence in the country, or in a particular region, usually increases and moreover - legitimizes presence of the security forces there; as noticed above, these security forces are often the same people as state security forces or those who have close ties to the army.[90] Apart from the fact that heavy militarization of the region itself puts human rights at an increased risk, it is often the case that MNC ends up being involved in an ongoing conflicts between the government and certain groups or opposition regions, or inter group clashes and controversies. Evidence demonstrates that corporate engagement often exacerbates existing tensions[91] and strengthens the state's repressive machinery, which inevitably results in detriment to human and community rights.[92]

On the other hand, independently from already existing tensions, MNC engagement may fuel (violent) conflict within different community groups who benefit from MNC's operations and those who do not;[93] deliberately or negligently designed discriminatory policies in the field of employment and compensation usually lead to such consequences.[94]

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[90] *Total Denial: A Report on the Yadana Pipeline Project in Burma* by Earth Rights International & Southeast Asian Information Network (1996), (asserting that the 'presence of TNC in the country and its close contacts with the military had even more devastating consequences on human rights and ethnic tensions in Nigeria: "[p]pipeline's presence has notably increased the presence of security forces (providing protection to the pipeline) in the region of civil unrest and armed opposition to the dictatorship by ethnic groups As a result [v]iolent clashes took place between the communities on one side and army, police and security staff on the other. Violent conflicts also occurred between communities and even between those groups of communities.')

[91] see e.g. Jane Perlez and Raymond Bonner, *Militarized Commerce: Below a Mountain of Wealth, a River of Waste,* New York Times, (December 27, 2005) (providing the case of Indonesia where corporation helped the centralization of the state government with detrimental 'end- product' on human rights: "Freeport was operating the region of Papua, a region with deep separtist sentiments almost from Indonesia's independence, and the only one following Christianity in the world's biggest Muslim country. The mine became a chance for the military, deeply nationalistic institution not only to profit but also to deepen its presence in a province where it had barely a toehold before Freeport arrived.")

[92] *Id*. (As in previous cases, here also strengthening of the state repressive machinery led to massive human rights violations: The Indonesian Human Rights Commission determined that human rights abuses in the mine region were directly related to activities of the armed forces and military operations carried out in the framework of safeguarding mining operations of PT Freeport Indonesia.)

[93] *Human Rights and Environmental Operations Information on the Royal Dutch/ Shell Group Companies*, Independent Annual Report (Shell International, (1996-97)

[94] *see e.g.* Malin Kall, *Oil-Exploitation in Nigeria: Procedures Addressing Human Rights Abuses*, in Expanding the Horizons of Human Rights Law, (Ineta Ziemele ed. 2005) (point out that "National and international observers claim that Shell's practice of payments through the awarding of contracts to traditional chiefs in communities, their payments of compensation for environmental pollution and the distribution of development projects were deliberately aimed to corrupt chiefs and divide communities.")

1.3. B. Harm to the Environment – Slippery Slope

MNC's operations, especially extractive activities, as well as building the necessary infrastructure for the business often cause destruction or harm to the local environment,[95] which in turn leads to particularly severe repercussions where the local community heavily depends on an intact environment for their material reproduction, (e.g. subsistence farming, fishing and hunting);[96]

While it might be one particular operation for the corporation, it may lead to a slippery slope tragedy for the local community destructing their entire source of living and the way of life, e.g.: *Shell*'s operations in Nigeria (Ogoni land)[97] caused severe pollution of the environment (violating the rights to a clean environment and health) and destruction of their homes and crops - amounting to deprivation of individual right to property and also the collective right to the people's "own means of subsistence." Inadequate compensation for rendering the land economically useless after the extraction of oil, led to extreme poverty - which is a direct way to perpetuate exclusion and marginalization of local population robbed off their rights and dignity.

The expansion of intensive forms of resource extraction is, in most cases, unsustainable. Given the poverty rates in countries where these resources are usually located, people are trapped between powerful military and business interests. With few viable alternatives, many communities feel compelled to participate in the unsustainable exploitation of the natural resources even though they know they are destroying the very ecosystems they need for their own survival.[98]

Apart from the fact that the land often constitutes a particularly important source of subsistence, its destruction or deprivation from the community often as well equals to psycho-

[95] *See e.g.,* Ottaway, *supra,* 40 (provides that according to a recent CIA study, companies spilled some 2.5 million barrels of oil in the Niger delta from 1986 to 1996, and they contribute to global warming by flaring large quantities of gas for which they have no market).

[96] This very issue highlights well the inherent gap in mentalities of the local population and the foreign business which often lies in the basis of the conflict and violence: To modern capitalist societies land is merely a material thing that can be bought and sold or otherwise exploited, while for many communities outside this world it is "mother earth", home of the ancestor's spirits and of the unborn generations.

[97] for an overview *see e.g.,* Beth Stephens, *supra,* 8

[98] *See e.g., Abuses by Corporations in Burma,* (2005)

cultural tragedy for them. 'To modern capitalist societies land is merely a commodity that can be exploited, bought and sold while for many communities outside this world it is "mother earth", home of the ancestor's spirits and of the unborn generations.'[99]

Furthermore, the shift from small-scale to large-scale extractive industries economically leads to displacement of many individuals and local businessmen, primarily through increased levels of competition, inflation, and corruption. Ironically, the corporations themselves create a situation in which the local people—who were once self-sufficient—become in need of social programs by provision of which corporations then show off to the outside world. [100]

Apart from threatening their material way of life 'they' (outsiders) bring in their culture and values, which are often perceived by the local population as threatening their identity and traditions. FDI leads to further changes to social structures as well; this in turn deepens gender inequalities and makes inter-group tensions even stronger.[101]

1.3. C. Secrecy and Silence

What is troubling and sometimes even striking is the severe inequality in distribution of the financial benefits coming from the FDI; it results in little for the general population and almost exclusively benefits the corporations and the governments.[102] Furthermore, it has been documented that this money often provides essential hard currency for the military that in turn

[99] *Who is Minding the Store*, (2006)
[100] *Id*.
[101] *See e.g.*, Bonn International Center for Conversion, *Who is Minding the Store: The Business of Private, Public and Civil Actors in Zones of Conflict*, (2006), (arguing that FDI in extractive industries often exacerbates differences that were unimportant before, e.g. between women and men (mining is almost completely masculinized industry in which men get most- if not all- of the jobs at the project site, making them the major cash- earners), between those with a job at the project site and those without; . . . between those who receive compensation (because they own the land which is directly used by the project) and who do not (because their stretch of land is a few yards further away) Divisions of this kind can lead to the conflict, itself a payment of compensation can become a cause of social disintegration of local societal structures – and hence of conflict).
[102] *See e.g.*, Ottaway, *supra*, 40 (the U.K.-based NGO Global Witness published a report, *A Crude Awakening*, accusing oil companies in Angola of "paying vast sums (the future development potential of Angola) into a black hole" of government corruption and lack of accountability) .

often uses the money mostly for arms[103] and even more to suppress its own population and particularly dissent.

The final accord in this whole drama is informational vacuum the local population is often kept in: for them it seems like the whole world is changing or falling apart, but nobody explains to them what is happening, not to mention that nobody consults with them and asks their opinion:[104] locals are directly exposed to ready-made decisions about the critical issues of their private and social life; these decisions are usually made thousands of miles away from them by the people who have barely ever seen or talked to these communities and are obviously ignorant to the peculiarities of their mentality and way of life; Moreover, in many situations locals have no idea how to protect themselves by legal means and even if the relevant law exists in the country, they randomly know about their rights under this law.[105]

In this situation it is not surprising that people on the ground get feeling of being marginalized and exploited by the investors and often, by the government as well.[106]

1.3. D. Conclusion on Chapter I

The analysis above has demonstrated the broader picture of FDI and its psycho-social and cultural underpinnings at the local level. It has revealed that direct and side effects of FDI are caused by a variety of context-specific factors.

After researching the particular details of business and human rights interplay and its consequences on the local communities, the chapter concludes that the *negative impact paradigm* does not exclusively lie in the nature of MNC or that of its operations, but owes itself to a

[103] *Abuses by Corporations in Burma,* (2005)
[104] *See* e.g., *Who is Minding the Store,* (2006) p.14; see also Ottaway, *supra,* 40.
[105] This issue is very well demonstrated in the recently done documentary *When Silence is Golden* directed by Alexandra Sicotte-Lévesque (released in December, 2007) The film is about the gold mining activities of a Canadian mining company near a small town in Western Ghana and unfolds the whole drama of the local population trapped between the narrow-minded business managers, violent security forces and the extreme poverty which continues even after the natural resources, belonging to the community, are giving a good profit to the investor.
[106] *Who is Minding the Store,* (2006), (This often has to do with unrealistic expectations with regard to the extent of "development "and "wealth" a mining or oil production project can deliver. However unrealistic expectations often are the natural consequences of false promises by MNCs management or state authorities.).

convergence of several factors; in fact these factors can be boiled down to two key ones. First factor is the socio-economic and political background of the communities where natural resources are usually located and where MNCs operate – consequently;

As researched above, this background, which varies from *repressive/hostile* to *not human rights oriented,* is inherently fragile to guarantee effective protection and realization of human rights, *inter alia* and especially against such powerful actors as MNCs. In most situations the MNC is changing the *status quo* already unfavorable for human rights for even worse, they do it by directly strengthening repressive machinery of the state or providing *incentives* or *legitimacy* for the states themselves to do so.

But one fact is becoming clear: MNC are 'rarely able to exploit natural resources and the local population without the co-operation or at lest approval [even if tacit] of the Government of the state that is being exploited.[107]

Second factor identified as a reason causing the *negative impact paradigm* is the lack of adequate procedural and substantive guarantees which would restore the justice broken as a result of MNC' operations. In convergence to the above described background in the country, lack of this mechanism turns the MNC into a giant actor with huge powers but without any commensurate responsibilities or restraints to balance the threat or harm they pose to the local communities.

It should be underlined here that human rights violations are not a new thing in this world, and even without MNCs they have been from time immemorial perpetrated by state agents, (and though depressive but albeit a realistic look at the world would strongly suggest that it is not possible to create the world free from human rights violations), what is at stake and what the international human rights law and its national counterparts serve/ should serve, is to minimize and redress them - more importantly, but cannot obviously eliminate them.

[107] Malin Kall, *Oil-Exploitation in Nigeria: Procedures Addressing Human Rights Abuses,* in Expanding the Horizons of Human Rights Law, (Ineta Ziemele ed. 2005);

The impact of MNCs' engagement would not certainly be as negative as it is, if there was a proper mechanism to effectively address the abuses committed by MNCs. However, as this chapter has highlighted, this mechanism is particularly inefficient and full of difficulties for the victims.

On the other hand however, 'It would be a misunderstanding to say that MNCs are completely outside the reach of law; this is clearly not the case,'[108] however, efficiency and sufficiency of legal mechanism in place are clearly issues to be questioned and they will be discussed in the next chapter.

CHAPTER TWO -NEGATIVE IMPACT PARADIGM AND INTERNATIONAL LAW

PART ONE – TRIGGERING THE NEED FOR INTERNATIONAL REGULATION

This chapter aims at researching two main issues, first whether it is possible to use international law, as an alternative forum where human rights protection will not depend on a particular state's political will or institutional resources to hold MNCs accountable, and second – if the first question is answered in positive - how open this forum is for victims, in particular - is it a sporadic, side- effect development of some other phenomena or is it a firmly developed (developing) norm of international law which ascertains, that MNCs are legally responsible for human rights violations;

In order to find the answers to these questions, the section will look at different sources of international law to see where they stand at the moment in establishing corporate responsibilities for human rights violations.

[108] See e.g, Philip Alston, *Non-state Actors and Human Rights*, (Oxford, Oxford University Press, 2005); *see also* Andrew Clapham, *Human Rights Obligations of Non-State Actors* chap. 9,(Oxford, Oxford University Press 2006)

2.1. A. In Absence of the Judge

As already discussed above, litigations against MNCs in the host states, where violations occur and consequently which have uncontested jurisdiction over the cases, are hindered by a set of objective and/or subjective factors described above in detail, and are therefore - rare; As for the home countries of the MNCs, they are not particularly keen on exercising jurisdiction against their corporate citizens for violations committed thousands of miles away and, apart from that, it is difficult for the victims as well to litigate there(for financial or procedural considerations, etc);[109] alternatively, as mentioned above, *forum non convenience* doctrine may easily prevent the litigation from proceeding in a country other than the host one.

To date, there were instances of litigations against corporations for abuses committed abroad in Britain, Canada and Australia,[110] but it has not been tested in most of European states.[111] The most important country in this respect is USA, where based on Alien Tort Claims

[109] In this context it is interesting to look at the state answers to the question whether states can prosecute cases involving corporate abuse of human rights that occurs domestically or overseas This question was posed to the states by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises;
Nearly 30 per cent of responding States have a national legal system permitting the prosecution of legal persons, and enable extraterritorial jurisdiction over human rights violations committed overseas. Most of these countries allow for direct legal liability of legal entities. This means that they can prosecute corporations for human rights violations committed extraterritorially.
Around 30 per cent of countries note that their criminal codes allow for direct liability of legal entities but do not provide for extraterritorial jurisdiction, so they can only prosecute domestic crimes. Approximately 35 per cent do not have laws providing for liability for legal persons at all. Ten per cent did not respond to the question;
The questionnaire also mentions that 'in some cases, the criminal liability of legal persons is still quite recent; for instance, one European country first allowed such prosecutions in 1999;' *see* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and Fortune Global 500 Firms*, A/HRC/4/35/Add.3, pars. 35-6, (28 February 2007).

[110] Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, *New Law Journal*, Vol. 148, No. 6864, 13 November 1998, pp. 1686-1687 and Vol. 148, No. 6865, 20 November 1998, pp. 1706-1707 in V ("In Britain, tort litigation has been launched against corporations based in Britain for injuries inflicted abroad. In a leading case against RTZ (formerly a Rio Tinto subsidiary), the victim suffered from cancer after working at RTZ's uranium mine in Namibia. He was allowed to pursue his claim in Britain. Two other claims have been launched, against Thor Chemical and against Cape Asbestos for its operations in South Africa. Both make it more likely that victims will be able to seek redress from companies based in the UK. The potential of the Human Rights Act, which gave the European Convention on Human Rights the force of domestic law in British courts since 2 October 2000, still has to be explored; Cases in Australia and Canada have also raised the possibility that domestic courts may be used to address claims of corporate excesses abroad.")

[111] *Beyond Voluntarism*, (2002), p. 105

Act [hereinafter ATCA] - almost a unique piece of legislation - a considerable number of complaints have been initiated against US corporations for abuses committed abroad.

On the other hand, a number of international *ad hoc* tribunals have developed certain set of standards and applied them to non state actors for holding them liable for human rights violations, *inter alia* to MNCs; Consequently, this section - which aims to identify and analyze the existing judicial standard of dealing with corporate human rights abuses - will look at the litigations under ATCA and the legacies of Nuremberg Tribunal and Nazi trials in general, and that of those – International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) – in short, it will explore the position of those judicial bodies where the issue in focus was mostly brought up and dealt with.

2.1. B. US Judiciary – An Exceptional Exception: Litigations under the Alien Tort Claims Act

The largest number of lawsuits related to corporate human rights liability for violations committed abroad have been brought in the United States[112] under the 200-year-old Alien Tort Claims Act (ATCA) which confers upon the district courts original jurisdiction of any civil action by an alien for a tort only[113] committed in violation of the law of nations or a treaty of the United States. This allows foreign victims of serious human rights abuse abroad to sue the perpetrators in U.S. courts.[114]

[112] *Beyond Voluntarism*, (2002), pp. 103-4

[113] It should be noted however, that ATCA does not impose strict separation between the civil law norms and criminal law norms while establishing liability, rather on the contrary – it has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the ATCA. For instance, in *Kadic*, the court held that the defendant could be held liable under the ATCA based on international criminal law norms prohibiting genocide and war crimes. *see Kadic v. Karadzic*, 70 F.3d 232, (2d Cir. 1995); And in fact ATCA is not unique in this sense ICTY has recognized the propriety of civil remedies for violations of international criminal law in certain circumstances, noting for example that a torture victim might "bring a civil suit for damage in a foreign court." *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, par.155 (Dec. 10, 1998).
This distinction will not be also drawn between the two types of litigations and remedies for the purposes of this paper.

[114] The accused perpetrator must be in the U.S. to be served court papers, but otherwise neither the victim nor the perpetrator need to reside in the United States. *See* the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350.

Though ATCA provides the largest and a unique body of domestic jurisprudence regarding corporate responsibility for human rights violations[115] it is not a smooth and broad way to justice and its application remains limited: In order to be actionable under the ATCA, defendant's conduct must violate 'well established, universally recognized norms of international law.'[116] This requirement limits actionable abuses to genocide, war crimes, torture,[117] as well as acts of torture, summary execution, and rape if committed in the course of genocide and/or war crimes,[118] extrajudicial killing, slavery, unlawful detention and crimes against humanity.[119] This set of actionable violations excludes a rather substantial part of abuses which in fact are very frequent as a result of MNC's operations,[120] including local, international environmental pollution,[121] arbitrary arrest,[122] destruction of property (if not the part of war crimes or genocide) or illegal expropriation of property,[123] surveillance, mental torture, death threats, house arrest, and environmental abuse[124] torture and summery execution.[125]

[115] *Business and Human Rights: Mapping International Standards* (2007), par. 30.
[116] *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir.1980)).
[117] It is well-established in the post-World War II jurisprudence *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995) (it was hold that individuals may violate international law by committing acts of genocide, war crimes, or torture).
[118] *See Kadic*, 70 F.3d at 243-44;
[119] *Sosa v. Alvarez- Machain et al.*, 542 U.S. 692 (2004).
[120] Earth Rights, *Abuses by Corporations in Burma:* (2005) ('in Burma logging and mining activities occur in a context where there is no regulatory oversight. As a result, actors involved in both of these sectors can operate with little fear of facing fines or other penalties for the damage caused by clear-cutting, indiscriminate road-building, hydraulic mining, "deep trenching," explosives, and other highly destructive techniques. Without laws that would permit a Burmese citizen whose health and/or livelihood have been harmed by such activities to file lawsuits to stop them and/or seek compensation for their injuries, there is little incentive for anyone to change their behavior').
[121] *See e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), (which holds that international, or local pollution is not actionable under the ATCA because such a pollution does not violate customary international law.) In practice this is a very serious shortcoming of ATCA from the perspective of its potential to secure protection of corporate human rights abuses, since the environment, especially in case of extractive industries operations, is often severely damaged and further leads to other human rights violations, as it happed e.g. in Nigeria, or Burma;
[122] *See e.g., Sosa v. Alvarez- Machain et al*., 542 U.S. 692 (2004) (in his opinion for the Court, Justice Souter said that arbitrary arrest could not be the basis for an ATCA claim, as it was not a violation of either any self-executing treaty signed by the United States or of a binding norm of customary international human rights law, as the ATCA requires).
[123] *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) (The court held illegal expropriation of property was not an act of "universal concern" or a *jus cogens* violation, *Bigio*, 239 F.3d at 448.)
see also Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp.2d 289, 303 (S.D.N.Y. 2003), (which accepted the argument of Talisman and said that 'generally speaking, confiscation of

Furthermore, in order to be successful the plaintiff must demonstrate that the defendant's wrongful conduct was committed either under the color of law,[126] meaning with the state's participation in it, or in violation of such a norm of international law[127] which extends the responsibility to the conduct of private parties.[128] In practice this means that in case the defendant is not able to prove that the committed violation is the most serious violation of a universally recognized international (human rights) law norm,[129] the only way to hold the corporation to account is to demonstrate that the corporation was acting together with the state in committing abuses.[130] While 'under color of law' standard enables the defendant to sue for a wider range of human rights violations rather than for the most fundamental abuses only, the claim requiring from US judiciary to recognize foreign state's engagement in serious human rights violations is a matter outside of legal considerations *stricto sensu*; Foreign sovereign immunity, political question, *forum non convenience* and a number of other doctrines suggests that in these situations considerations of international politics should take priority over other considerations, including legal or human rights ones.[131] This fact is often cited when criticizing

property without just compensation does not violate the law of nations', however the court then said that the situation was distinct when it took place during the genocide, war crime or crimes against humanity)

[124] *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (granting motion to dismiss against Indonesian nationals who brought suit against domestic corporations conducting mining activities).

[125] *Kadic*, 70 F.3d (holding that "torture and summary execution—when not perpetrated in the course of genocide or war crimes - are proscribed by international law only when committed by state officials or under color of law).

[126] *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), (defining that ' private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid').

[127] *Sosa v. Alvarez- Machain et al.*, 542 U.S. 692 at 733 (2004) (claim "must be gauged against the current state of international law,") *see also* Filartiga v. Pena-Iarala, 630 F.2d 876 (ed. Cir. 1980) ("[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today").

[128] *Sosa v. Alvarez- Machain et al.*, 542 U.S. at 732 & n.20 (2004) (the Court observed in a footnote that "whether a norm is sufficiently definite to support a cause of action" raises a "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.")

[129] *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995), (holding that individuals may violate international law by committing acts of genocide, war crimes, or torture).

[130] *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), (defining that ' private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid').

[131] This is not a rule definitely, but in practice has often hindered the cases to proceed.

ATCA and claiming that it has been transformed into a tool for second-guessing American foreign policy and affirming its judicial imperialism.[132]

The effectiveness of ATCA is contested.[133] It is worth noting, that by 2006 out of the 36 ATCA cases involving companies, 20 have been dismissed, 3 settled and none decided in favor of the plaintiffs; the rest were ongoing. Thus, ATCA's influence has been mainly existential: the mere fact of providing the possibility of a remedy has made a difference.[134]

ATCA remains a limited tool which is difficult and expensive to use and it is unique;[135] this obviously is not the best condolence to actual and potential victims of corporate human rights abuses;

On the other hand however, it should not be underestimated that under the severe scarcity of applicable norms of corporate accountability for human rights violations and of their enforcement bodies, which will be dealt further below, ATCA jurisprudence has plaid an essential role in shaping the legal dimension of business and human rights discourse: furthermore, it conveys a clear massage that corporations are not outside or above the law, they do have obligations under international human rights system and can be held liable for transgressing them;

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[132] e.g., The National Chamber Litigation Center (NCLC), which has filed *amicus* briefs in some of these cases, believes that ' the American justice system should not be used to influence foreign policy, remedy the injustices of foreign governments, or regulate Overseas labor standards and that diplomatic avenue to address such issues already exist.' *See e.g.*, The National Chamber Litigation Center (NCLC), *An in-depth analysis of cases and emerging legal issues* (May 15, 2007).

[133] Anthony J. Sebok, Is *the Alien Tort Claims Act a Powerful Human Rights Tool?* (2004) *available at* http://www.cnn.com/2004/LAW/07/12/sebok.alien.tort.claims/ ('deciding Sosa, avoided many of the hard questions that have made the ATCA so controversial in the past 10 years. It thus left open the question of whether the ATCA will be as powerful a weapon as human rights activists hope -- or as weak a weapon as multinationals hope')

[134] *Promotion and Protection of Human Rights,* (2006) par. 62; However one should recall here the recent groundbreaking *Khulumani* litigation of the victims of apartheid mentioned above, which definitely conveys an overly optimistic message.

[135] *Id.*

PART TWO - NON-STATE ACTORS STANDING INTERNATIONAL TRIALS, LEGACY OF THE XX CENTURY: NUREMBERG MILITARY TRIBUNAL, ICTY, ICTR

As already mentioned above, ATCA is a unique piece of legislation and no other individual state provides similar avenue to victims of MNCs. Consequently, the research will now move on to the legacy of international judicial bodies. It will look at the particular scenarios of corporate involvement in human rights abuses identified in post World War II international jurisprudence and will examine whether appropriate standard have been elaborated to address these violation.

2.2. A. Aiding and Abetting

One of the most well known scenarios is when the company actively assists, directly or indirectly, in human rights violations committed by others. This form of prohibited involvement is widespread in mining industries when companies finance security forces to protect their installations, knowing that they are likely to commit human rights violations.[136] It is also referred to as corporate aiding and abetting liability. International law has found non state actors, including corporations, liable for adding and abetting in human rights violations.[137] The applicable test involves finding of two necessary elements: *actus reus* -required conduct- of practical assistance, encouragement, or moral support,[138] which has a substantial effect on the perpetration of human rights crimes;[139] and the *mens rea* - required mental state of knowledge

[136] International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies, p.* 126 (Feb. 2002)
[137] The Nuremberg Tribunals applied this standard, and more recently, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have recognized it as customary international law. The most widely cited formulation of aiding and abetting liability is derived from the ICTY's judgment in *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998)
[138] *See* Report of the Special Representative which rightly points out that the element of 'moral support' may pose specific challenges. *Business and Human Rights: Mapping International Standards* A/HRC/4/35, par. 31, (19 February 2007)
[139] *See Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998), pars. 232-35

that one's acts would contribute to the commission of such abuses.[140] According to current stage of international law, knowledge is a sufficient *mens rea* for triggering liability.[141]

Friedrich Flick, a German steel industrialist, was convicted of crimes against humanity during the Second World War, for seeking out forced labour and giving large sums of money to the SS, thereby knowingly participating in persecutions and other atrocities that they perpetrated. Two other industrialists were sentenced to death for knowingly supplying zyklon B poison gas to Auschwitz for the purpose of killing people.[142]

As further defined by international bodies, action by the company or active participation might be direct[143] indirect, e.g. through financial or other material support to abusers, [144] or silent complicity.[145]

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[140] *See Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998), *Id*. par. 243; *see also U.S. v. Friederich Flick, in* 6 Trial of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No 10, pp. 1217,1222 (1947), (establishing that he who "knowingly by his influence and money contributes to the support thereof must … be deemed to be, if not a principal, certainly an accessory to such crimes;" note that defendants were Friedrich Flick and five other high-ranking directors of Flick's group of companies).

[141] *see Prosecutor v. Furundzija*, par.252, (the tribunal found that knowledge was the appropriate *mens rea*, expressly rejecting the idea that an aider and abettor must intend that the abuses occur). *see also Tadic*, pars. 689, 691-92 (holding that the "accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law;" The Nuremberg Tribunal found corporate directors of the Krupp factory liable for aiding the Nazi regime where the defendants had plundered and spoiled civilian property in occupied territories, and deported and used prisoners of war and concentration camp inmates as forced laborers). *Prosecutor v. Vasiljevic*, ICTY Case No. IT-98-32 (Appeal Chamber Feb. 25, 2004) par. 102, (The Appeals Chamber in *Vasiljevic* subsequently affirmed, "Knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation.") *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Trial Judgment, ICTR-96-4-T, pars. 538-539, (2 September 1998), (the court quoted from a UK case *National Coal Board v. Gamble*: "an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor").

[142] International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies*, p.127 (Feb. 2002).

[143] *Id*. at 126 (recalling that German companies actively recruited forced labour from the Nazi regime and advised the authorities on developing the forced labour system. In South Africa under the apartheid regime, some firms informed on trade union officials to the security police and called police in to disperse peacefully striking workers.)

[144] When the International Criminal Court statute was negotiated in Rome in July 1998, some delegates remembered coffee companies that helped in Rwandan genocide in 1994 by storing arms and equipment and the radio station that had incited genocide. *see* Kamminga, Menno T. and Saman Zia-Zarifi eds. *Liability of Multinational Corporations Under International Law*, The Hague: Kluwer Law International, 2000, *see also* International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism*, 2002), (recalling that in the course of recent claims against banks for complicity in Nazi era abuses, the Deutsche

2.2. B. Joint venture

The joint venture is established as long as it is shown that the original common design did envisage that the parties would commit some sort of crime, or 'where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.'[146] The case scenario fits within this boundaries even if the company does nothing to actively assist the perpetrator, except for fulfilling its side of the joint venture contract.[147] Apart from criminal responsibility, a company in a joint venture might be directly liable under principles of tort law.[148]

Bank admitted that its branch in Poland knowingly financed construction of the Auschwitz crematorium. The publication further suggests that 'in such cases a connection can be established between the financing and the violations in that the financing provided the perpetrators with the means to carry out their abuses.')

[145] *Prosecutor v. Akayesu,* ICTR Case No. ICTR-96-4-T (Trial Chamber Sep. 2, 1998), pars. 65, 477, 548 (establishing that if silence in the face of horrendous human rights violations amounts to "a direct and substantial contribution to the commission of an offense," it may be a basis for aiding and abetting liability, for example, the presence of the defendant with authority, where the defendant declines to use that authority);

See also Fu Part of Non-state Actors Standing Trials: Legacy of the XX Century *rundzija*, *supra* note, par. 199 (in reference to a military commander interrogated a woman while his subordinate raped and tortured her, the tribunal held that "in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime.", thus the tribunal considered that his *tolerance of the practice* and *continued interrogation* constituted intangible moral support and encouragement.);

see also Prosecutor v. Kayishema and Ruzindana, ICTR Case No. ICTR-95-1-T (Trial Chamber May 21, 1999), par. 202, *Prosecutor v. Galic*, ICTY Case No. IT-98-29-T (Trial Chamber Dec. 5, 2003), par.169, 170-172, (ICTR as well establishing the notion that if an individual is in a position of power, prolonged inaction may be tantamount to encouragement).

[146] We have seen above that making a way to the investor and building the necessary infrastructure sometimes leads to reallocation of the entire communities, killings and torture of its member, etc. In this case company liability can be found based on the doctrine of joint venture that government's abuses may have been predictable and foreseeable by the company. see e.g. Prosecutor v. *Tadic, case No. IT-94-1-AR72 (1995),* par 198. (citing Comments of Judge Advocate in a British post-War trial, *Trial of Franz Schonfeld &others*, British Military Court, Essen, 11-26 June 1946, UNWCC, Vol. XI, p. 68, quoting that if the original common design did not envisage any unlawful act, it might be sufficient to show that they combined for a lawful purpose carried out by unlawful means).

see Prosecutor v. *Tadic, case No. IT-94-1-AR72 (1995),* par. 204. (In joint venture company might reasonably foresee or subsequently obtain knowledge that the government would probably commit abuses in carrying out its part of the agreement) situation is similar as it as in Case of *Unocal* where the company was directly warned about the possible consequences of investing in Burma.

[147] *Beyond Voluntarism,* (2002) (It is interesting to note here that according to English and Australian courts when it entered a commercial agreement with the government, the company knew that it would be substantially assisting or encouraging the government to commit acts which in law amounted to a tort. US law appears to add another, more stringent, test of joint enterprise, requiring that the joint enterprise gives the business a "right of control" or influence over the actions of the authorities).

[148] *See Business and Human Rights: Mapping International Standards,* (2007), p.130 (arguing that if the company actively assisted a government to carry out abuses it might be liable for intentionally inflicting harm (direct tort liability). If it owed a duty of care to victims it might be negligent for example in failing

A classic example of joint venture was *Unocal'*s agreement with French company *Total* and Burmese government to build a natural gas pipeline in Burma despite the fact that *Unocal* was clearly warned about the possible illegal/devastating consequences of this investment: before undertaking the projects, *Unocal* hired outside consultants to conduct a "risk assessment." The consultants expressly warned *Unocal* that the government of Burma in virtually all walks of life uses systematic forced labour. *Unocal* also had access to years of report by the US Department of States, the International Labour Organization, Amnesty International and Human Rights Watch. Despite the expressed warnings the company received, it decided to go forward with the project. During the construction process *Unocal* hired another outside consultant, who as well reported widespread nature of heinous human rights violations in the country. Even despite these results of the conducted monitoring, the company did not take any steps to avoid contributing to human rights disaster in Burma.[149]

2.2. C. Benefiting – Is It Legally Punishable?

Apart from human rights abuses resulting from a company aiding and abetting the government or forming a joint venture with it, which as demonstrated above violate existing norms of international law as recognized by the international tribunals, including that of customary international law at large, the scenario may also be that human rights violations are committed by the government and the company benefits from it commercially.[150]

The possible scenarios may include situations when governments commit abuses to produce infrastructure necessary to attract the investor and to make a way for its further operations, as it happened in Burmese people's case referred above, alternatively, governments

properly to select, train or control security forces that carried out abuses. Alternatively, a company might be responsible for harms committed by a government because they entered into a "joint enterprise.")

[149] see Terry Collingsworth, *The Alien Tort Claims Act - A Vital Tool For Preventing Corporations From Violating Fundamental Human Rights,* p.5 (2003) (quoting the John Haseman, a former military attaché at the US Embassy in Burma reporting to *Unocal:* "based on my three years of service in Burma, my continuous contacts in the region since then and my knowledge of the situation there, my conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation without compensation of families from land near/along the pipeline route, forced labor to work on infrastructure projects supporting the pipeline. . . ; and imprisonment and/ or execution by the arm of those opposing such actions.")

[150] Forcese, *supra*, 72

may commit abuses to provide firms with resources, which might be the case when the land and livelihood of local populations destroyed or severely damaged in the interest of the investor, or the governments may accommodate commercial interests by resorting to repression to forestall labour unrest, as it used to happen in South Africa during the apartheid regime.

Although, under existing principles of criminal or tort law just *passively benefiting* from the government's wrongdoing does not trigger legal responsibility, it is observed however, that in many situations passive benefit may quickly slide into another, more active category of potential complicity, such as direct or indirect assistance, which in turn, as showed above, does fall under the reach of existing international human rights law norms. [151]

2.2. D. Preliminary Conclusions

Based on the analysis above, the answer to the first question presented at the beginning of this chapter, namely whether international law *extends* its reach to non state agents in general, and to MNCs in particular for human right violations – has to be answered positively. As the analysis of the jurisprudence of ATCA and three intentional tribunals has demonstrated, international law does not limit its reach to state agents exclusively and extends its application to non-state actors as well, including MNCs. As also seen above, this extension is limited however; for finding the liability of a non-state agent acting under the color of law the breach of established human right is to be shown, while in case private agent acts independently from the state, as research above demonstrates, the breach of a *universally* recognized human rights norm is required.

Having said that, we should now turn to the second question posed at the begging of this chapter, in particular - whether the development and application of the norms of corporate

[151] However, it is often observed that many situations, passive benefit may quickly slide into another, more active category of potential complicity, such as direct or indirect assistance. See e.g., *Beyond Voluntarism* (2002), p. 132

human rights violations identified above are a sporadic phenomena, a side-effect of some other developments or they are either established or an emerging norms deriving legitimacy from the inherent nature of the international law as such. In fact this is not one but rather a set of several interconnected sub-questions and finding answers to them requires a thorough and comprehensive analysis of the pedigree and history of international law.

PART THREE– INTERNATIONAL LAW, NEED FOR ENTRENCHMENT

2.3. A. Conceptualizing the Debate over the Direct Human Rights Obligations of MNCs

After conducting this comprehensive analysis the ultimate conclusion is that the question above can be boiled down to the following issue: namely, whether international law, as it stands today, places on non state actors, and consequently on MNCs, *direct* human rights obligations, enforcement of which is independent from the enforcement of the *duty to protect* by the state; the nature and problems with the enforcement of the latter we already explained above.

Answering the question on *direct* human rights duties of non-state actors is of pivotal importance for understanding the *negative impact paradigm.* As we have seen above, the latter is at large created because the national mechanism of addressing and redressing abuses resulting from MNC operations is simply non existent or non-operative in most of the situations. And consequently, if human rights are supposed to be protected only through the state's *duty to protect*, and not by some other international mechanisms in addition, this means that inability or unwillingness of the state to protect human rights against corporations is automatically translated into denied justice for the vast majority of the victims. Full stop.

If however, international law places direct human rights obligations on the MNCs, they are enforceable independently from the particular state's position to the committed violations and that effectively means that, when the avenue to justice *through the state* is closed, another direct one is open to hold corporations to account.

Whether this avenue exists or not, however, is not clear yet. Controversies over the issue derive themselves from the fact that traditionally corporations were not viewed as subjects of international law. International law developed as a set of rules to regulate the relationships of states among themselves. International human rights law developed to regulate state's conduct towards its own citizens, or between individuals through the state's legal mechanism. According to these arrangements, corporations might be held liable for human rights violations when the state enforces its *duty to protect* individuals from third parties, including corporations: 'rather than establishing an international enforcement mechanism [international instruments] of human rights obligations applicable to MNCs international law instead requires the state to enact domestic measures of enforcement.'[152]

Despite this initial design of international law, an argument can still be made to support the claims for direct human rights obligations of non-state actors. First, international law is not static but a developing body of law - it has recognized at least since the Nuremberg Tribunals that all actors, including non-state actors, have duties to refrain from assisting states in the commission of such abuses.[153] Shortly after the Second WW, International Court of Justice stated clearly that "subjects of law in any legal system are not necessarily identical in their nature . . . and [the latter] depends upon the needs of the community."[154] Furthermore, nowadays they are increasingly recognized as "participants" at the international level, [155] with the capacity to bear some rights and duties under international law.[156]

[152] Stephens, *supra*, 8

[153] *see The Krupp Case*, Military Tribunal IV, Case 10: *U.S. v. Alfried Krupp et al.*, Jul. 31, 1948, *in* 9 Trial of War Criminals Under Control Council Law No. 10, p. 4 (1948).

[154] *Advisory Opinion on Repartions for Injuries suffered in the service of the United Nations*, ICJ Rep 174 at 179 (1949) ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community")

[155] It is appropriate to further clarify here that the term "participants" was used by Rosalyn Higgins, current President of the International Court of Justice (ICJ), and Theodor Meron, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY).

[156] S*ee e.g., Business and Human Rights: Mapping International Standards* (2007), par. 20 (pointing out that 'they have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution. Although this has no direct bearing on corporate responsibility for international crimes, it makes it more difficult to maintain that corporations should be entirely exempt from responsibility in other areas of international law').

Albeit the most prominent and frequently cited argument in support of this issue is the preamble of the Universal Declaration[157] saying that 'every individual and every organ of the society' is bound by it and an argument further made based on it by a prominent scholar of international law Luis Harkin, that 'every individual and every organ of the society' excludes no one, 'no company, no market, no cyberspace.' The Universal Declaration applies to them all.' [158]

And second argument to support the claim for direct obligations is embodied within the very logic of international law that with the right comes the duty. 'Multinational corporations have benefited from the development of international law, and have lobbied to ensure that it protects their rights and interests. Such corporations have access to international commercial dispute and other compensation mechanisms.'[159] Therefore, it should entirely appropriate to apply international legal obligations to companies.[160] In the next section we shall look to what extent this logic or international law is applied to MNCs.

[157] Universal Declaration of Human Rights, GA Resolution, *217 A (III) of 10 December 1948*

[158] Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets', *Brooklyn Journal of International Law*, 25:1, p. 25 (1999).

[159] *see Beyond Voluntarism,* (2002), (outlining that e.g., under a treaty created through the World Bank, foreign corporate or individual investors, as well as states, are able to submit disputes to binding arbitration by the Washington based International Centre for the Settlement of Investment Disputes (ICSID); Under the provisions of a UN treaty, companies that submit disputes to a wide range of arbitration procedures are able to block national court proceedings and have the arbitral awards enforced around the world; The Multilateral Agreement on Investment (MAI), which was put on hold in October 1998, would have gone much further by allowing private investors to sue states in a special tribunal for violating the agreement. Companies can bring claims before several other panels. They include the Iran-United States Claims Tribunal, set up by the Security Council as part of the resolution to the Tehran hostage crisis in 1981; the United Nations Claims Commission set up after the Kuwait conflict in 1990; and panels set up under the 1988 Canada-United States Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA) and etc.).

[160] *See* Ottaway, *supra*, 40.(It is also interesting no know that e.g. the charter of the Dutch West India Company together with rights to "make contracts, engagements and alliances with princes and natives of the countries…and also build forts and fortifications there, to appoint and discharge Governors, people for war, and officers of justice, and other public officers, for the preservation of the places, keeping good order, police and justice," was considered as to have the subsequent responsibilities. The powers of the East India Company, declared British statesman Edmund Burke, "have emanated from the supreme power of this kingdom. . . . The responsibility of the Company is increased by the greatness and sacredness of the powers that have been entrusted [sic] to it." It was thus proper, he concluded, that the governor of the East India Company should be hauled in front of "the supreme royal justice of this kingdom" and held accountable for his actions in India.)

2.3. B. Position Taken by International Organizations and Regional Human Rights Courts

If one looks at current developments in international law it is noticeable that this logic is widely shared by international policymakers: Practice of the most representative international body of states – the UN clearly supports an idea of putting certain duties on corporations. "[w]hile it may appear that sanctions/obligations are confined to U.N. member states, the reality has suggested otherwise."[161]

The United Nations Security Council has frequently utilized economic sanctions to punish the unlawful acts of states. While such sanctions are formally directed at states, they also entail certain duties for corporations. Similar was the General Assembly resolution stating that "the continued cooperation by certain States and foreign economic interests with South Africa in the military, economic, political and other fields, as such cooperation encourages the Government of South Africa in the pursuit of its inhuman policies." Thus, United Nations precedent indicates that corporations have duties under international law.[162]

The practice of the European Union as well indicates that corporations may be subject to international law. Treaty Establishing the European Community and the binding decisions of the European Council and Commission have "created a vast body of legal obligations which apply directly to corporate entities" including, for example, a prohibition on anticompetitive behavior.

Beyond commercial regulations, precedent from the European Court of Justice has held that corporations may be held liable for human rights violations such as discrimination.[163]

[161] Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443 (2001)

[162] For example, corporations wishing to purchase oil from Iraq following the implementation of sanctions were required by the Security Council to follow certain procedures. *See, e.g.*, S.C. Res. 986, U.N. SCOR, U.N. Doc. S/RES/986 (1995); Letter dated 26 July 2001 from the Chairman of the Security Council Committee Established by Resolution 661 (1990) Concerning the Situation Between Iraq and Kuwait Addressed to the President of the Security Council, U.N. Doc. S/2001/738.
Similarly, the General Assembly passed a resolution deploring "the continued cooperation by certain States and foreign economic interests with South Africa in the military, economic, political and other fields, as such cooperation encourages the Government of South Africa in the pursuit of its inhuman policies." G.A. Res. 2671 F, U.N. GAOR, 25th Sess., Supp. No. 28, at 33-34, U.N. Doc. A/8028 (1970). Thus, "[w]hile it may appear that sanctions obligations are confined to U.N. member states, the reality has suggested otherwise." *See Ratner, supra* 160.

[163] The Treaty Establishing the European Community and the binding decisions of the European Council and Commission have "created a vast body of legal obligations which apply directly to corporate entities"

Companies enjoy legal rights and owe legal duties under foreign investment law and some multilateral conventions, and are subject to various bribery conventions, and anti-corruption law. International law holds corporations liable for labor and environmental violations.

Economic Cooperation and Development (OECD) and the International Labour Organization (ILO), although their norms are not legally binding, also define duties applicable to business. The Rio Declaration on Environment and Development, Agenda 21 and the Copenhagen Declaration for Social Development seek to improve the legal and policy framework in which TNCs conduct business.[164]

In short, corporations are increasingly placed under the duty to comply with certain standards and obligations related to human rights and environment; however, recognition of corporations as the duty holders is one issue and different issue is recognition of them as the holders of *direct* duties under human rights law. This difference is critical, since, as explained in section above, the latter scenario would cardinally change the situation of human rights protection against corporate actors.

Yet, whether international law recognizes *direct* human rights obligations of corporations is not clear enough. Positions taken by different actors in the field are increasingly controversial: e.g. the most recent general comment of the Committee on Economic, Social and Cultural Rights (CESCR) on the right to work recognizes that various private actors "have responsibilities regarding the realization of the right to work", that private enterprises - national and multinational - "have a particular role to play in job creation, hiring policies and non-discriminatory access to work". But then, in the same comment, the Committee appears to reiterate the traditional view that such enterprises are "not bound" by the Covenant. Similarly,

including, for example, a prohibition on anticompetitive behavior. Ratner, *supra* note 27, at 484. Beyond commercial regulations, the European Court of Justice has held that corporations may be held liable for human rights violations such as discrimination. *See, e.g.*, Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, 1419; Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455, 457-63.

[164] *See* W. Greider, *The Right and U.S. Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, *See also* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Jun. 21, 1993, art. 2, par. 6, E.T.S. No. 150, and the International Convention on Civil Liberty for Oil Pollution Damage, Nov. 29, 1969, art. 1, par.2 (entered into force Jun. 19, 1975).

the most recent general comment of the Human Rights Committee (HRC) concludes that the treaty obligations "do not … have direct horizontal effect as a matter of international law," meaning that they take effect as between non-State actors only under domestic law.[165]

Regional approaches to this issue also very greatly: The African Charter on Human and Peoples' Rights is unusual because it imposes direct duties on individuals, but opinions vary on their effect and whether they apply to groups, including corporations. Expert commentary suggests that the Inter-American Court of Human Rights may have moved away from the traditional view when it recognized that non-discrimination "gives rise to effects with regard to third parties", including in private employment relationships, "under which the employer must respect the human rights of his workers."[166] The European Court of Human Rights has generally adopted the traditional view, imposing far-reaching obligations to protect on States but leaving to them the choice of means.[167]

2.3. C. Policy Argument behind the Direct Human Rights Duties on MNCs

However, this so called 'traditional view' on international law is already loosing its credibility and 'long-standing doctrinal arguments over whether corporations could be "subjects" of international law, which impeded conceptual thinking on this issue and the attribution of direct legal responsibility to corporations, are yielding to new realities.'[168] There is a steadily rising voice among the experts which says that 'if international law is to be effective in

[165] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) par.8.
[166] *Id.* par. 43 (referring to the Advisory Opinion of The Inter-America Court of Humain Rights, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants, OC-18/03 17, 2003.
[167] *for an overview see e.g.,* Andrew Clapham, *Human Rights Obligations of Non-State Actors* chap. 9,(Oxford, Oxford University Press 2006)
[168] *Business and Human Rights: Mapping International Standards* (2007) (For example, the United Nations Sub-Commission on the Promotion and Protection of Human Rights, explaining that its proposed norms reflect and restate existing international law, attributed to corporations within their spheres of influence entire spectrum of State duties under the treaties, in particular duty to respect, protect, promote, and fulfill rights.)

protecting human rights, everyone must be prohibited from assisting governments in violating those principles.'[169]

Furthermore, it was recognized by the US court that even if the company is not acting together with the government in committing human rights violation, "no logical reason exists for allowing corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."[170] Thus, it was clarified by the court that corporate abuse *per se* must and can be held to account by the international law. This argument has an irrefutable policy justification: as far as the victim of human rights violation is concerned, it is hardly relevant whether the violator is the state or the MNC. The system which enforces only those rights that are violated by the state, and thus inevitably leaves outside its scope at least half of the victims, is apparently outdated.

"If international power has shifted from nation-states toward MNCs, then a legal system that focuses only on the former would be unrealistic and ineffective."[171] To avoid the danger of becoming obsolete in promoting human rights, it needs to reexamine the status of MNCs as mere objects in order to remain relevant today; international law should accommodate such non-state actors as subjects.[172]

The discourse on direct human rights obligations of non-state actors is not black and white however, and the controversy over the issue does not exhaust itself by two alternative answers that either *there is* or *there is no* such a thing in the law; some observers claim that while the international law instruments in fact do already impose direct legal responsibilities on corporations, the problem lies in the fact that there is a lack of direct accountability mechanisms.[173]

[169] A. Clapham, *Human Rights Obligations of Non-State Actors*, p.80 (Oxford University Press, 2006)
[170] *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).
[171] Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 Duke L. J. 770 (1983) *see also* A.A. Fatouros, *On the Implementation of International Codes of Conduct: An Analysis of Future Experience*, 30 Am. U. L. Rev. 951 (1981).
[172] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 Conn. J. Int'l L. (2003)
[173] *Business and Human Rights* (2007) par. 35

Based on the conducted research, part of which was reflected above, it is difficult to ascertain that imposition of direct human rights obligations is a (fully) established norm of contemporary international law;[174] However, bearing into consideration again this research, rather than declaring that there is a total lack of direct human rights obligations imposed on corporations under contemporary international law, this paper shares the position that the problem lies not in the lack of direct human rights obligations as much as it does lie in the absence of a mechanism which would put the obligation into practice.

The logic of this conclusion will be very clear if we shortly recall the part above which analyzed the legacy of Nuremberg Tribunal, ICTY, ICTR and ATCA jurisprudence dealing with human rights violations by non-state actors, including corporations; We have seen that none of them has rejected application of the international human rights law to non-state actors merely because they were non-state agents. Furthermore, they enforced the human rights norms against these actors in both situations, when they were acting under the color of law and when acting as *per se* private actors. Thus, these tribunals applied international human rights law not through enforcing the state *duty to protect* but directly imposing and enforcing these duties against non state agents.

One should also bear in mind that Nuremberg trials belong to the same period of time when the foundation of international human rights law was actually designed; This means that the position taken by Nuremberg Tribunal, in particular that the international law is not limiting its direct application to the states or their agents but should look beyond them when enforcing human rights, was elaborated during the very first years of the system. Moreover, it further kept reemerging when the 'needs of the community' called for it: the standards of applying human rights obligations directly to non-state actors were further developed in the jurisprudences of the ICTR and ICTY respectively.

[174] One should keep in mind here that certain human rights violations whether committed by the corporation alone or together with the state, as seen above, do trigger corporate responsibility directly, e.g., prohibition of genocide or torture

Starting from the trials of corporate directors at Nuremberg, ending up with the recent successful lawsuits of the victims of corporate human rights abuses during the apartheid, the message holds clear that the idea of direct human rights obligations of non-state actors is not alien to international human rights law but derives its legitimacy from the very foundation of this system.

However, on the other hand, what we have seen as well is that those tribunals were not permanent bodies but *ad hoc* institutions set up for a limited period of time and mandate in order to deal with specific human rights catastrophes, like Holocaust or genocide; and the ATCA as well remains a limited and unique tool to search for justice. Thus, at the given moment there is hardly any, or very few judicial bodies available to victims of corporate human rights abuses which would apply the already created standards of direct human rights obligation and further develop them. And the historic chance of firmly capturing corporate power in the hand of international enforcement mechanism was missed when this idea did not succeed while setting up the International Criminal Court.[175] Therefore, all the mentioned arguments above suggest that the problem lies not in the lack of direct human rights obligations as much as it does lie in the absence of a mechanism which would put the obligation into practice.

Nevertheless, it should be stressed here that the legacy of the tribunals is a part of the international legal reality and 'just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today.'[176]

On top of all that, it has to be underlined here that defining and clarifying international human rights norms applicable to MNCs is essentially important not only for ensuring protection of individuals and communities at risk of corporate abuses, but it is important for corporations

[175] *Business and Human Rights: Mapping International Standards* (2007) par. 21 (recalling that for example the ICC preparatory committee and the Rome conference on the establishment of the ICC debated a proposal that would have given the ICC jurisdiction over legal persons (other than States); However, differences in national approaches prevented its adoption) .
[176] *Id.*

as well: although, as demonstrated, the field of corporate human rights standards is full of controversies and loopholes, it is still evident that they do have *some* obligations which may be triggered against them under *some* circumstances, but till these 'some' is transformed into 'certain,' it looks like that corporations are walking on the minefield which may explode any time, without giving them a fair chance to mind the danger.

2.3. D. Conclusion on Chapter Two

This chapter has demonstrated that MNCs have not been totally outside the reach of law at least since the time of Nuremberg trials; however the problem is that at the given moment international law, and mostly its enforcement mechanism, is lagging behind the reality that MNCs are evolving as an increasing and intensive threat to the realization and enjoyment of human rights and are in fact violating them in their daily operations.

This *lagging back* situation is somewhat strange, because by adjudicating corporate directors who collaborated with Nazi before the Nuremberg Tribunal, international law as such was one of the first to get involved and actually take a side in business – human rights discourse.

This chapter further revealed that Nuremberg trials were not unique in this sense and ICTY and ICTR further upheld its approach and developed clear standards for adjudicating private actors for human rights violations.

The similar position was taken by US courts that turned the 200 year old federal legislative piece – ATCA - into a unique avenue in this world which enables the victims of corporate human rights abuses to bring violators before justice.

To see the broader position taken by international law on this subject, rather than only the jurisprudence of particular courts, the chapter goes through especially controversial debate in contemporary international law over the issue whether corporations have *direct* human rights obligations. As a result the chapter concludes that according to the predominant position of contemporary international law, the short answer to the question is *no*, however, significant trend

calling for changing the approach is fairly observable in the ongoing debate, as it was highlighted above.

Overall, the chapter suggests that since the mentioned international tribunals who developed standards of holding corporations responsible were not permanent but *ad hoc* in their nature, and since litigating in US courts under ATCA remains a limited tool not available to all victims of corporate abuses, the problem of corporate impunity from international human rights law perspective lies not as much in the lack of direct human rights obligations of corporations, as much as it lies in the lack of the mechanism which would actually continue enforcing the standards developed by *ad hoc* tribunals and would further develop them.

However, till this happens, the current situation of international law has its role in construing the *negative impact paradigm* of MNCs operations in developing countries.

CHAPTER THREE –
SOCIALLY RESPONSIBLE CORPORATE CITIZENSHIP: ONLY CORPORATE?

PART ONE
CORPORATE SOCIAL RESPONSIBILITY: THEORETICAL DIMENSION

Analysis of the *negative impact paradigm* in chapters one and two revealed that the existing legal framework in charge of regulating MNC's operations in relation to human rights and redressing its negative consequences is inefficient and at large inadequate to handle the challenges posed by global actors similar to MNCs.

On the other hand however, the broader picture of psycho-social underpinnings of FDI described above reveals that the interplay between the local population and the MNC investing in the country is more complex than the law alone can handle. A considerable problem lies in the *initial* and *continued alienation* between the investor and the local population which keeps the *negative impact paradigm* stable. This problem will be further referred to in the paper as ***alien's***

syndrome (or in extreme cases like Indonesia Freeport, rival's syndrome, one could say) and the next sections will deal with it and the related issues.

3.1. A. Alien's Syndrome

Awareness about multidimensional nature of the *negative impact paradigm* inevitably requires looking for a regulatory framework which will go beyond the required standard of law and will accommodate specific social needs of the local community.

As the case study of business - human rights interplay demonstrated in chapter one, local communities often see the investor as a stranger taking the side of the repressive regime or exploiting them independently from the government. And although sometimes local communities are also violent and try to get some economic benefit from MNC operations through illegal means (e.g. kidnapping the staff or 'stealing" the oil from the pipeline), if one puts their behavior into context, it will often appear that their violence is an *answer back* to ignorant and exclusively profit-oriented corporations who do not otherwise give them attention and deliberately ignore their peaceful grievances and demands.[177]

As analyzed above, investment often exacerbates division between the different groups within the society and draws the divisive line between 'us'(locals) and 'them'(foreigners and the small group who benefits from their presence); As practice proves, corporations often find themselves entangled in violent conflicts inside the country, since remaining neutral during the ongoing hostilities is particularly difficult. The local population is getting increasingly hostile to corporations who in locals' eyes are getting rich by exploiting people's natural wealth, but are greedy and giving nothing or very miserable amount of money back to the population. This if *alien's syndrome*, and it constitutes the third pillar of the *negative impact paradigm*.

To reiterate again, integrating *alien* in the social structure is not the challenge law can handle alone, a broader regulatory mechanism should be created to address the matter; In a

[177] *When Silence is Golden*, *supra*, 104

human community membership of an individual in a certain group is usually based on two key points- rights and corollary duties, the scope and content of which is defined not only by law but also by *morals.*

As researched above, when it comes to corporations there is no shortage of rights and even privileges for them, the problem is rather identification and enforcement of *corollary* duties of these rights, and this applies not only to legal duties but also, and sometimes even more- to the moral duties as well. The main argument advanced is that business is not like humans, morals are not business of business.

A concept elaborated to address the problem of *alien's syndrome* and controversies over it is already an indivisible part of the business and human rights discourse and is known under the name of *Corporate Social Responsibility*.[178]

3.1. B. Corporate Social Responsibility: The Map

Over the past ten years or so, corporate social responsibility (*hereinafter* CSR) has blossomed as an idea.[179] It would be a challenge to find a recent annual report of any big international company that justifies the firm's existence merely in terms of profit, rather than "service to the community."[180] CSR commands all big companies to be good corporate citizens,

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[178] *see* Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective*, (2006), (saying that 'CSR as a rapidly developing business strategy (and not simply a theory in the management literature), is a response to globalization and the extension of global multi-national enterprises ("MNCs") across countries, with the implication that state control over such enterprises is rapidly fragmenting.' (Logsdon & Wood, 2002; Zumbansen, 2006). Thus, broader units of analysis that reflect these global challenges are often used)

[179] For a short overview of its history *see e.g.,* Alice and John Tepper Marlin, *A Brief History of Social Reporting*, Business Respect, Issue Number 51, (9 Mar., 2003). *See also* Corporate Social Responsibility: *Corporate Counsel Build A Treasury Of Good Will* - Part II, interview with Jerome J. Shestack, *Partner and Co-Chair,Business Litigation Practice Group, WolfBlock,* The Metropolitan Corporate Counsel (January 2005) ('since the mid-20th Century. When the Harvard Business School offered its first course in ethics in 1915. there were few takers. Today. more than 95% of business schools offer courses in business ethics and CSR. and the courses are often mandated. There are more CSR symposia. more learned articles. more conferences. more media attention. and more CSR websites than ever before. There is an impressive list of corporate-initiated programs that have benefited society')

[180] The Economist, *The Good Company*, (2005) *available at* http://www.economist.com/surveys/displaystory.cfm?story_id=E1_PVVVNTN; *see also* Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective*, (2006) (referring the Maignan and Ralston (2002)'s cross-national study which showed that ' …businesses' communication about CSR, as evaluated by the information displayed in the 100 largest company web pages in 1999 in France, the

and in fact they all want to show for the outside world that they are.[181] However, as noticed, a field CSR is still "emergent."[182] While theoretical perspectives on corporate social performance or stakeholder management have been developed for over two decades[183] it is only in the last decade that businesses have begun to exhibit serious evidence of CSR in their strategic management and stakeholder social reporting.[184]

In general terms CSR can be seen as a concept whereby organizations consider the interests of society by taking responsibility for the impact of their activities on customers, shareholders, employees, communities and the environment in all aspects of their operations. This obligation is seen to extend beyond the statutory obligation to comply with legislation and to call upon the organizations to voluntarily take further steps to improve the quality of life for employees and their families, local community and society at large.[185]

However, there is no universal definition of CSR,[186] and the same applies to its understanding by individuals and businesses: surveys in different countries show that people

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Netherlands, the UK and the US, varies significantly…. these four countries do not ascribe the same importance to managing their image as a socially responsible organization, and …businesses draw on different mechanisms in different countries to communicate the nature of their CSR principles, processes and stakeholder issues. For example, US and UK firms tended to be more eager to show that they "cared" about CSR issues, at least, on the surface, whereas Dutch and French firms were more likely to include CSR issues in their websites only as a response to stakeholders' scrutiny and pressures.')

[181] The Economist, *The Good Company*, (2005)

[182] McWilliams, A., Siegel, D.., and Wright, P... *Corporate Social Responsibility: Strategic Implications,* Journal of Management Studies, 43: 1-18 (2006).

[183] A. Carroll, *A three-dimensional Model of Corporate Performance*, Academy of Management Review, 4: 497-505 (1979); R.E. Freeman, Strategic *Management: A Stakeholder Perspective.* Englewood Cliffs, NJ: Prentice Hall (1984.); McWilliams, A., and Siegel, D. *Corporate Social Responsibility: A Theory of the Firm Perspective*, Academy of Management Review, 26: 117-27(2001).

[184] Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective*, (2006).

[185] *see e.g.,* The World Business Council for Sustainable Development in its publication "Making Good Business Sense" by Lord Holme and Richard Watts, used the following definition. "Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large" The same report gave some evidence of the different perceptions of what this should mean from a number of different societies across the world. Definitions as different as "CSR is about capacity building for sustainable livelihoods. It respects cultural differences and finds the business opportunities in building the skills of employees, the community and the government" from Ghana, through to "CSR is about business giving back to society" from the Philippines. *available at* http://www.mallenbaker.net/csr/404.html

[186] Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective*, (2006).

have very distinct mental maps and expectations of what CSR is and is not, what it should be in an ideal world, and who should be involved in CSR issues.[187]

Traditionally in the United States, CSR has been defined much more in terms of a philanthropic model. Companies make profits and then they donate a certain share of the profits to charitable causes. The European model is much more focused on operating the core business in a socially responsible way, complemented by investment in communities for solid business case reasons.[188]

However there is also a difference within the European countries: while it is mostly performance driven in the UK, and an extension of their core company values in the US, for Dutch and French firms e.g. it shows to be a combination of performance-driven, values-driven, and stakeholder driven.[189] Furthermore, traditional cultures that promote ethical idealism and communitarian norms, and tend to have a Roman Catholic heritage (e.g., Colombia and Italy) are more supportive of social CR than environmental or economic CR. Secular-rational and survival societies such as ex-Communist countries (e.g., Croatia and Hungary) or Confucian-oriented societies (e.g., Taiwan and Hong-Kong) are more likely to support economic CR initiatives.[190]

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[187] Some of the studies suggest that these differences are contingent on the industry. S*ee e.g.,* Bansal, P., & Roth, K. *Why Companies Go Green: A model of Ecological Responsiveness,* Academy of Management Journal, 43: 717-736 (2000); Strike, V. M., Gao, J. and Bansal, P. *Being Good While Being Bad: Social Responsibility and the International Fiversification of US Firms,* Journal of International Business Studies, 37: 850-862 (2006). Others suggest that it depends on the societal culture. See e.g., Waldman, D.A., Sully de Luque, M., Washburn, N. and R.J. House, *Cultural and Leadership Predictors of Corporate Social Responsibility Values of Top Management: A GLOBE Study of 15 Countries.* Journal of International Business Studies, 37: 823-837 (2006),

[188] Corporate Social Responsibility – What Does It Mean? *available at* http://www.mallenbaker.net/csr/CSRfiles/definition.html

[189] Maignan, I., & Ralston, D., *Corporate Social Responsibility in Europe and the U.S.: Insights from Businesses' Self-Presentations*. Journal of International Business Studies, 33: 497-514 (2002)

[190] C.P Egri et al., *The influence of personal values and national contexts on attitudes towards corporate responsibilities.* Third B.C. Organizational Behaviour Conference, Vancouver , Canada, V.V., & Thanh, H.V. (2006) *But see* Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective* (2006) (noting that 'other comparative studies have not so clearly concluded that national cultural and market settings are strong predictors of managerial CSR behavior. Instead, they put more weight on the values of individuals and organizations regardless of country or regional institutional and cultural context')

Despite these differences CSR is generally understood as a business behavior *over* and *above* the compliance with minimum legal requirements which looks beyond the profit and provides some community services voluntarily, in other terms 'CSR is the tribute that capitalism everywhere pays to virtue.'[191]

These volunteer initiatives usually involve:[192] local capacity building and education - e.g. supporting literacy initiatives for children, or a broader community in underprivileged communities in the country of operation, supporting orphanages and special schools, awareness rising through establishing certain information centers, etc, *ad hoc* measures such as relief operations during natural disasters and other emergencies through providing essential supplies, staff resources and financial assistance. and further provision of reconstruction and rehabilitation assistance local enterprise development, promoting measures for community health (e.g. building a hospital), good governance, ensuring that the wealth created by corporate activities benefits host communities, etc.[193]

If one looks at reports from MNCs, like Shell, BP Texaco etc, they are vigorously discussing their performances in these fields. It should also be mentioned that sometimes businesses take collective initiatives to be a good global citizen.[194]

'World Business Council on Sustainable Development issued a manifesto titled "From Challenge to Opportunity," filled with pictures of baking deserts and disease-stricken peasants, but also with promises to "seek greater synergy between our goals and those of the society we

[191] The Economist, *The Good Company,* (2005)
[192] See e.g., the data under the heading *BP and Development* on the company's official website, *available at* http://www.bp.com/genericsection.do?categoryId=6906&contentId=7030799
[193] http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=137
[194] *Key Mining and Oil Companies Pledge to Keep Hands Off Protected Sites*, Business Respect, Issue Number 62, dated 2 Sep 2003 (informing that Royal Dutch/Shell and the International Council on Mining and Metals (ICMM) have stated that they will not lead land explorations in any of the 172 protected areas listed by the World Heritage) *available at* http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=1058

serve." BP signed on, and so did everyone from Adidas to Procter & Gamble. Which is nice. The question is, what does it amount to?"[195]

The practical consequences and value of such undertakings are often the matter of harsh criticism and contestation when human rights community turns it eye to them.[196] While the critics are active in questioning good citizenship of corporations, others get active in questioning the legitimacy of the idea/duty of good citizenship as such.

3.1. C. 'Business of Business is Business' - Three B approach to CSR

On one side of the current debate are those who argue that "business of business is business" and any effort to use corporate resources for purely altruistic purposes is socialism.[197] This belief is most established in Anglo-Saxon economies. On this view, "social issues are peripheral to the challenges of corporate management. The sole legitimate purpose of business is to create shareholder value [198] – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[199]

The biggest of critics of CSR was Milton Friedman, referring to it as 'preaching pure and unadulterated socialism', and further saying: '…*w*hether blameworthy or not, the use of the cloak

[195] Bill McKibben, *Hype v. Hope*, Mother Jones (November/December 2006) *available at* http://www.motherjones.com/news/feature/2006/11/hype_vs_hope.html

[196] *See e.g., Shell Defends Against Raft of NGO Accusations*, Business Respect, Issue Number 84, dated 29 Jun 2005 *available at* http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=1459

[197] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine (1970) ('in a free society, and have said that in such a society, "there is one and only one social responsibility of business–to use it resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud'); *See also* Henry G. Manne, Milton Friedman was Right, "Corporate Social Responsibility" is Bunk, Wall Street Journal (2006).

[199] *Id.*

of social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society.'[200]

The argument was further advanced that the 'origins of this transformation lie in the minds of people who do not like or appreciate the genius of capitalist success stories, including always politicians, who will generally make any argument in order to control more private wealth… The logic of their own arguments requires that essentially private corporations be viewed as somehow "public" in nature. That is, the public, or the preferred part of it, often termed "stakeholders" (another shameful semantic play, this time on the word "shareholders"), and has a pseudo-ownership interest in every large corporation. Without that dimension in their argument, free market logic would prevail.'[201]

3.1. D. Challenging the three B approach

The core of the arguments against CSR is that it is just not the business of business and what can be legitimately demanded from the latter is nothing more than complying with the basic laws and regulations of a particular country.[202] This paper, however, holds the position of *zero tolerance* to this proposition: conducting business in a *socially irresponsible manner* which was a reality for decades and at large still continues to be, has brought irreparable harm to thousands of individuals and the communities, including to yet unborn generations through the destruction of environment; not to mention the problem of unsustainable exploitation of natural resources, which poses the threat of critical importance to all people all over the globe, not only to particular communities. The magnitude of human suffering resulting from socially irresponsible way of doing business deprives all the legitimacy to the claim above.

[200] Friedman, *supra*, 189 (The argument is that if these are "social responsibilities," they are the social responsibilities of individuals, not of business. as only people can have responsibilities;)

[201] Henry G. Manne, *Milton Friedman Was Right, "Corporate social responsibility" is Bunk*, *Wall* Street Journal (November 24, 2006) *available at* http://www.opinionjournal.com/editorial/feature.html?id=110009295

[202] See e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine (1970)

We have seen above, in the light of concrete cases, that corporations or the state in the interest of the corporation, often deprive the locals their elementary means of survival while providing no alternative source of livelihood to them. This creates the situation when the poor communities are becoming even poorer after the corporation comes to the country, instead of becoming better off as a result of the flow of FDI. In this situations merely obeying basic regulations (which are usually ineffective and not enforced) and paying taxes (which usually benefits only a handful of government officials) while leaving the people excluded from the process of wealth distribution is not only greediness but a robbery in its full sense.

On top of that, it has to be stressed here that the law as such, even if good in itself, is not and cannot be the all-inclusive instrument to handle each and every challenge underpinning the flow of the FDI, particularly when it comes to the societies with somewhat backward political, social and economic situations. 'Multinational corporations can be so powerful both politically and economically that they cannot be readily controlled by national governments. That power facilitates the ability of multinational corporations to further socially responsible programs. and also they are blamed if such programs do not emerge. In short, with power comes responsibility.'[203]

PART TWO – CORPORATE SOCIAL RESPONSIBILITY: PRACTICAL DIMENSION

Reaching the consensus over the issue of legitimacy of CSR idea is still not the end of the story. As one might have already noticed from the sections above, CSR discourse is full of controversies and vagueness, which may easily give rise to the question whether CSR as such can be an effective tool for protecting local communities from corporate abuses, or mitigate their harmful consequences and thus help to transform the *negative impact paradigm*. As seen above, there is no universal definition and understanding of the concept of CSR, and as logically

[203] *Corporate Social Responsibility*: *Corporate Counsel Build A Treasury Of Good Will - Part II,* interview with Jerome J. Shestack, *Partner and Co-Chair,Business Litigation Practice Group, WolfBlock,* The Metropolitan Corporate Counsel (January 2005)

predictable - there is also the lack of one comprehensive list of particular responsibilities meant under it.

Such responsibilities are scattered in the voluntary codes of conduct, either adopted by individual companies, or by group of them collectively, initiated itself by business actors voluntarily or as a result of a great pressure from stakeholders and watchdog institutions, or initiated by other international actors. These codes vary greatly in their form, nature, origins, profile of participants, subject matter, monitoring mechanism, etc. In short, CSR is an *open door* it terms of the concept as well as the process.

To give a general but more tangible idea about the diversity in this field, the section below will provide a short outline of the most frequently cited and well-known CSR instruments.

3.2. A. UN Instruments of Corporate Social Responsibility

Global Compact

The most universal initiative calling for responsible business behavior is the United Nations Global Compact (UNGC), which is a pact between UN and private enterprises. The idea was proposed by the UN Secretary General and together with UN institutions was further developed by a large number of international human rights and environmental NGOs, international trade associations, transnational companies and international enterprise associations. [204] UNGC is an open forum to all companies that expresses a willingness to begin incorporating within day to day operations its principles about human and labour rights, the environment, and now also transparency.[205]

[204] *See e.g., Who is Minding the Store (2006),* p.28

[205] These principles are that the businesses should support and respect the protection of internationally proclaimed human rights, and make sure that they are not complicit in human rights abuses. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Businesses should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility and encourage the development and diffusion of environmentally friendly technologies. Businesses should work against corruption in all its forms, including extortion and bribery; The comprehensive data and analysis about the GC is *available at* http://www.unglobalcompact.org/

The main criticism of the GC is connected with its weak monitoring mechanism and the fact that it gives the right to the participants to cherry-pick out of all the ten principles those ones which they wants to adhere to;[206] It is observed that this fails to prevent even the most controversial companies from joining GC.[207]

However the explanation for these weaknesses may be derived from the statement of the Secretary General who saying that that 'the Compact is not a regulatory regime or a code of conduct, but a platform for learning and sharing lessons about what works and what doesn't.'[208]

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights [209]

The UN Norms have garnered considerable attention particularly in CSR literature since they are the first internationally accepted initiative governing all enterprises not just those participating voluntarily.[210] The Norms impose the general obligation upon the business entities 'within their respective spheres of activity and influence…to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.' It also places obligations on transnational corporations and other business enterprises in the spheres of the right to equal opportunity and non-discriminatory treatment, right to security of persons, rights of workers, respect for national sovereignty and human rights, obligations with regard to

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[206] *Who is Minding the Store (2006)* p.36 (further noticing that 'GC is often denigrated as a "menu" of principles'.)
[207] *Id.* at 28 ('experience from efforts in the health sector to preclude the participation of tobacco companies suggests that it is difficult to prevent even the most controversial companies from joining GC')
[208] The Address by Secretary-General Kofi Annan to the World Economic Forum in Davos, Switzerland, 28 January, 2001. *available at* http://www.un.org/News/dh/latest/address_2001.htm
[209] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Approved August 13, 2003, by U.N. Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).
[210] *Id.* at 30

consumer protection and obligations with regard to environmental protection.[211] The Norms establish a compliant and settlement mechanism and in case of transgressions reparation, restitution, compensation and rehabilitation have to be provided too those 'adversely affected by failures to comply with these Norms.'[212]

Companies have not individually criticized the Norms, since they are not willing to take an individual stance against what is widely accepted as a critical imitative for social responsibility. However severe criticism has been voiced by the International Chamber of Commerce, the International Organization of Employers and its American Branch organization, the US Committee for International Business. 'This comprehensive, multi-issue initiative has unfortunately floundered due to political opposition.'[213]

3.2. B. The Voluntary Principles on Security and Human Rights

This is a unique tripartite, multi-stakeholder initiative which has excusive sphere of reference; it focuses specifically at extractive and energy sectors.[214] It was developed as a result of dialogue among the governments of UK, US, Netherlands and Norway with a number of major domestic companies (including Anglo-American, Rio-Tinto, BP and Shell) 9 major NGOs (among AI, HRW and International Alert.) and three observers, including ICRC. [215]

The principles provide guidelines for security management through balancing the needs for safety while respecting human rights and fundamental freedoms and addresses three main areas: risk assessment; interactions between companies and public security. Although the overview of efforts undertaken by the companies to adhere to the principles are not discouraging, it more appears that the principles are still at the stage of establishing themselves as a desirable standard in the eye of the industries rather than already producing tangible results balancing

[211] *Id.*
[212] *Id.*
[213] *Who is Minding the Store?* (2006), p.30
[214] Five-Year Overview of the Voluntary Principles on Security and Human Rights, *available at* the official website http://www.voluntaryprinciples.org/
[215] *Id.* ('The Principles are seen as credible, thanks in part to multi-stakeholder participation, and palatable to both executives and home and host government bodies, given their voluntary nature and flexible guidelines').

security and human rights.[216] Apart from that, there is a concern that the lack of an audit mechanism may foster the perception among some stakeholders that the Voluntary Principles lack transparency.[217]

3.2. C. OECD Guidelines

Another often cited collective code of conduct is the OECD Guidelines for Multinational Enterprises. These are recommendations addressed by the governments of 30 member and 9 nonmember countries to multinational enterprises operating in or from adhering countries.[218] Duties imposed by the guidelines on the companies are in the spheres of general policies (e.g. to contribute to economic, social and environmental progress with a view to achieving sustainable development and respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments), *Disclosure* (e.g., to ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance), *Employment and Industrial Relations* (e.g. contribute to the effective abolition of child labour; Contribute to the elimination of all forms of forced or compulsory labour), *Environment* (e.g. engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation) *Combating Bribery* (Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment.) and some others.

The main implementation mechanism of the Guidelines are the National Contact Points (NCP), which enable 'interested parties' to file a complaint to them in case of company fails to comply with the guidelines, The NCP may review the situation but their decision is not binding

[216] If one looks at the information provided on their official website, it is very evident that companies more describe the measures undertaken to comply with the norms rather than providing the concrete examples or tangible results of these measures.
[217] Five-Year Overview of the Voluntary Principles on Security and Human Rights, *available at* the official website http://www.voluntaryprinciples.org/
[218] *Who is Minding the Store (2006),* p.29

and sanctions are basically limited to *naming and shaming*. These guidelines are regarded as a useful guidance for companies operating in countries where local laws, regulations or institutions are weak, but the critics of the guidelines often point our that since they cover only OECD member and several non-member countries, it may result in OECD-based companies being undercut by actors in the developing world in a "race to the bottom" transparency totem pole.[219]

3.2. D. Publish What You Pay

This campaign aims to help citizens of resource-rich developing countries hold their governments accountable for the management of revenues from the oil, gas and mining industries.[220] It is a global civil society coalition with over 300 member organizations from more than 30 countries around the world working to promote transparent and accountable management of natural resource revenues.[221] It was based on the common belief of worldwide NGOs that 'the call for companies to *Publish What You Pay* is a necessary first step towards a more accountable system for the management of natural resource revenues paid by extractive industries company to governments in resource-rich developing countries.'[222] Apart from calling to companies for transparency, the coalition also calls on resource-rich developing country governments to publish full details on revenues.

Membership of the Publish What You Pay (PWYP) coalition is only open to civil society groups and non-governmental organizations and thus it represents only the position of one side to the discussion. In practice this strictly divides people in those who "watch" and those who ''are watched" leading to deep controversies as to the acceptable standard of compliance

[219] *Who is Minding the Store* (2006), p.32
[220] See further the official website http://www.publishwhatyoupay.org/english/
[221] *Eye on Extractive Industries Transparency Initiative - Civil society Perspectives and Recommendations on the Extractive Industries Transparency Initiative*, by Revenue Watch Institute (2006)
[222] In fact this seems to be a very comfortable way to deal with the problem of mismanagement of revenues when the population of the richest courtiers in the world usually live for a dollar per day, and involvement of civil society, with a traditional role of a watchdog, rather then business to control this issues is a better solution, the problem however, among many others is the traditional weakness of civil society in those countries, and to be really effective it needs local civil control , not international that much, though both are necessary

with the PWYP standard. 'Corporations would prefer to give aggregated data while NGOs argue that anything less than desegregated by country and available to all would defeat the purpose.'[223]

Another very important concern is also that PWYP 'cannot capture all contractual revenue flows…also it does not tackle corruption such as revolving doors and conflict of interests. It is also beyond its scope to assess whether investment costs in, say, oilfield reflect true market value or contain hidden subsidies that could generate bribes.'[224] On top of all this, business might find it difficult to accept the idea of having the duty to put on the table information which is often quite sensitive to it, and one should admit that arguing against them will be particularly difficult in case of privately owned business.

3.2. E. Kimberley Process

The initiative which supporters of the CSR are very quick to cite as a example of a clear success of such volunteer initiatives in general is the Kimberley Process, apart from that it is also referred to as a 'a rare and probably the first successful instance of cooperation between NGOs, industries and the governments.'[225] The success of the Kimberley Process is a result of several factors, namely the correctly chosen target - which was never to eliminate the sale of illicit diamonds, but markedly curtail their profitability for criminals; simple and effective enforcement tool - worldwide certification mechanism to track diamonds production, trade and sale from beginning to end; and indeed participation and founding membership of the major mining and trading states.

However, unfortunately, when talking about the successes of the Kimberley Process the possibility to apply its positive experience to other industries is very limited: it should be also born in mind that the results were at large determined by the characteristics of diamond as of a

[223] *Who is Minding the Store* (2006), p.32
[224] Nicholas Shaxson, *The Elf Trial: Political Corruption and the Oil Industry. Global Corruption Report 2004*, Transparency International (2004)
[225] *Who is Minding the Store* (2006), p.32

product itself.[226] And this latter fact renders the positive experience not very applicable to other industries, for examples petroleum or gas.

Without going to further details it should be shortly mentioned here that companies are also individually adopting voluntarily codes of conduct 'the number of which has mushroomed in recent years. However most codes use inspirational language ("strive", "seek", "work towards", "try to minimize", "give proper regard to") or state broad values of the organization, such as business integrity, openness, enriching the community, treating people with dignity and respect, or conducting business responsibly. A few codes, however, also express clear, blanket commitments to implement the Universal Declaration.[227]

3.2. F. Preliminary Conclusions

The aim of this overview above was not to give a comprehensive and detailed insight in the substance or strategies of those instruments but rather to draw a surface picture of the existing instruments of CSR and identify their most visible shortcomings.

The conclusion which can be fairly drawn from this picture is that CSR instruments lack clarity and coherence: the duties imposed upon the *responsible corporate citizens* are not limited in scope or in substance, they are usually worded in inspirational and broad terms and often do not give much guidance as to which particular steps would count for compliance or noncompliance with these aspirations.

The efforts and resources necessary to campaign for CSR duties and follow up its success later on are split on various independent pieces of CSR instruments. Moreover the latter do not seem to be creating a well-coordinated network of CSR initiatives but rather look like

[226] *Id.* p.33 (pointing out that diamonds play a very limited role for the global economy: they are marketed to individual consumers and are bought for their symbolic values. It also notes that what contributed to the success was also the dramatic background necessary, with easy marginalization of armed groups created by the than ongoing civil wars in Angola, Sierra Leone, Liberia and the Democratic Republic of Congo)

[227] Body Shop, *Trading Charter* (1994) says: "We aim to ensure that human and civil rights, as set out in the Universal Declaration of Human Rights, are respected throughout our business activities. We will establish a framework based on this declaration to include criteria for…"

isolated rings of the same chain, that obviously dilutes effectiveness and strength of the whole field of CSR in general.

On the other hand the impression is that the standards of socially responsible business behavior are scattered all over the place, in various different instruments of CSR, which leads to considerable confusion and may leave the impression of a *mass.* Above all these, the instruments often repeat or merely paraphrase the already existing duties but do not make a meaningful move forward to improve the actual guarantees that these duties are in fact implemented in corporate practices and produce tangible results in practice. Monitoring mechanisms are weak, if they exist at all and none of the envisioned international procedures have any system for financially assisting those who wish to lodge complaints. Most of them lack transparency as well which may affect their legitimacy negatively.

On the other hand however, one cannot avoid the fact that although there are shortcomings and loopholes, the mere existence of the idea of CSR itself and even somewhat hectic but growing recognition of this idea, including by corporations themselves, is already making a difference. When critically analyzing CSR as a tool to improve business's human rights behavior, one should always bear into consideration that CSR was not invented as a substitute to law and binding regulations. It is rather intending to promote the culture of *good corporate citizenship* in order to mitigate the negative consequences of the drastic social inequalities between the individuals/communities and the corporate citizens. In addition, some norms of corporate responsibility are 'one step' further actions which do not always fall within the legitimate domain of legal regulation.[228]

Above all, when critically analyzing CSR it has to be admitted that it does have certain obvious advantages compared to the law which enables CSR to promote human rights cause more effectively in certain situations than the law can do it: many situations in which business

[228] Under any system of liberal market economy it would be unimaginable of course to have a law which impose as duty on the private business entities to build hospitals or finance awareness rising seminars for the local population.

and human rights correlate are complex and law may not always be able to handle them: CSR unlike the national laws do not suffer from trans-border limitations and thus is more able to chase the transnational powers.

Furthermore, while strict laws may easily scare away the FDI to a rather regulation-free zones, or alternatively - drive the business underground, CSR is in a better position here as well, since no government can immunize its investors from CSR, rather on the contrary- heavier the situation in terms of human rights protection is in the country, the 'stricter' the demands of the CSR becomes towards the businesses operating in this situation. In short there is simply no place where the business can hide from the social expectations of internal and external actors demanding from it to behave in a socially responsible way.

To summarize, CSR is not backed by legal sanctions, which might be seen as its weakness, but in fact this weakness is its strength as well at the same time: exactly because of the fact that it is not the law, but is an idea backed by irrefutable policy justifications, it can penetrate everywhere - in bad and good governance zones, in democratic or repressive regimes, in countries bound by certain international treaty or those outside its realm, and as we are all witnessing lately, it is penetrating through previously *exclusively* profit-oriented minds of the businesses, which is an already optimistic signal.

However, back to the arguments advanced above, CSR still has a long way to go to acquire necessary clarity and coherence[229] and translate itself from *words* into *actual business behavior*, first and later on – enable millions of people over the globe to harvest the fruits of *responsible corporate citizenship*.

[229] without which the idea clearly risks of loosing credibility over time and becoming a hollow

PART THREE– MATCHING THEORY WITH PRACTICE: HOW CAN CORPORATE SOCIAL RESPONSIBILITY WORK WITHOUT SANCTIONS?

As the reader might already have noticed, CSR is a particularly controversial issue which allows both sides of the debate to advance strong arguments for and against this phenomenon. Since CSR instruments are more to encourage volunteer initiatives from business rather than impose strict duties and harsh sanctions on them, skeptics of CSR may argue that they are there 'merely to forestall tougher regulation: they are designed with a limited unrepresented group of stakeholders, suffer from weak enforcement mechanisms and, in any case, tend to be process based not performance-based.[230] They tend to favor large MNCs over smaller players, particularly those from developing world, whose participation remains meager.[231]

Businesses on the other hand may say that free-riding by competitors, and defections, whereby a firm may self-regulate itself out of competition in a "race to the bottom," render voluntary commitments non-credible.[232] Thus business may legitimately fear that *responsible corporate citizenship* can place certain companies in a competitive disadvantage compared with those who care and spend less for human rights and the environment, and above all 'many corporations still question what CSR buys.'[233]

And after hearing these two radically different positions, a neutral but interested individual may simply ask: is the idea of CSR enforceable in practice? What is the thing that convinces MNCs to comply with certain requirements without a fear of sanction on the one hand and expectation of profit –its main goal- on the other?

The section below will try to provide some answers to these questions.

[230] *Who is Minding the Store: The Business of Private, Public and Civil Actors in Zones of Conflict,* Bonn International Center for Conversion, (2006) p.26
[231] *Id.*
[232] *Id.*
[233] *Corporate Social Responsibility: Corporate Counsel Build A Treasury Of Good Will* - Part II, interview with Jerome J. Shestack, *Partner and Co-Chair,Business Litigation Practice Group, WolfBlock,* The Metropolitan Corporate Counsel (January 2005).

3.3. A Name and Shame Strategy – Do We Really Now How to Do it?

Although the sanctions for noncompliance with CSR norms are basically limited to *bad publicity threat*, in fact this is not as weak or ineffective sanction as one might think; *Naming and shaming* "can impose considerable "reputation costs,"[234] which is a particularly valuable asset for many businesses. Evidence demonstrated that corporate social performance information shapes consumer purchase intentions.[235]

Nike's experience - when it became a lightning rod for concerns over labor practices in Asia charged with running sweatshops (since then the company has worked hard to manage fair labor conditions in its supply chain) or as *Royal Dutch Shell* experienced with the Brent Spar environmental imbroglio – further highlights that stakeholder can indeed become 'strategic nightmares for companies.'[236] (*Shell* responded to consumer boycotts by becoming a leader in implementing sustainable development principles.) In addition, particularly vulnerable to consumer boycotts are oil companies since they sell directly to consumers through service stations. As such, they are ripe targets for consumer boycotts.[237]

However, on the other hand, consumer behavior, more particularly *socially responsible purchases* is not a universal norm: surveys demonstrate differences based on the nationality of the consumers, e.g. consumer survey data conducted in France, Germany and the US, and concludes that American consumers are mostly concerned with corporate economic

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[234] *Who is Minding the Store: The Business of Private, Public and Civil Actors in Zones of Conflict*, Bonn International Center for Conversion, p.7 (2006).

[235] *Corporate Social Responsibility: Corporate Counsel Build A Treasury Of Good Will* - Part II, interview with Jerome J. Shestack, *Partner and Co-Chair, Business Litigation Practice Group, Wolf Block,* The Metropolitan Corporate Counsel (January 2005) *available at* http://www.metrocorpcounsel.com/pdf/2005/January/37.pdf (citing the study for World Bank/IMF by PricewaterhouseCoopers which interviewed some 25.000 citizens from across 23 countries on six continents. According to the results, over one in five consumers reward or punish companies based on perceived social performance). *See also* E. H. Creyer & W. T. Ross, *The Influence of Firm Behavior on Purchase Intention: Do Consumers Really Care About Business Ethics?* Journal of Consumer Marketing, 14, 421-432 (1997); *See also* T. J Brown & P.A. Dacin, *The Company and the Product: Corporate Associations and Consumer Product Responses*, Journal of Marketing, 61, 68-84 (1997).

[236] *See e.g.*, Arguments Against Corporate Social Responsibility, *available at* http://www.mallenbaker.net/csr/CSRfiles/against.html (arguing that 'the market capitalization of a company often far exceeds the "property" value of the company. For instance, as much as 96% of Coca Cola is made up of "intangibles" - a major part of which rests on the reputation of the company. Only a fool would run risks with a company's reputation when it is so large a part of what the shares represent')

[237] Ottaway, *supra*, 40

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responsibilities, agreeing with such statements as business must "maximize profits" and "control their production costs strictly," as opposed to statements emphasizing companies' legal, ethical and philanthropic responsibilities. Meanwhile, French and German consumers generally tend to put more value on supporting socially responsible organizations conforming with legal and ethical standards. They also have better tactics and mechanisms in place to monitor and influence the behavior of organizations as a consumer group.[238]

On the other hand it is important to note that 'while there are societies that place a lot of emphasis on consumers' voice and have in place direct mechanisms where they can express their concerns such as in France, this is not the case in other societies, such as in Japan e.g., where the consumer movement has been relatively weak.'[239]

It should be also noted that costumers are not always the primary stakeholder drivers; study demonstrates that while it is the case in UK e.g. customers and regulators are more salient in France and the Netherlands.[240]

The above demonstrated differences in how the 'bad publicity' shapes itself in costumers' behavior in different societies further suggests, that the success of *name and shame* politics is highly conditional depending on the overall nature of the society to which the customer belongs. The basic suggestion based on above surveys and recent histories is that while *name and shame* politics work well in western societies, as studies have demonstrated, it may be a total/ a near failure in other countries.[241]

This high level of conditionality of *name and shame* politics only adds an argument to the claim that CSR is not supported by effective enforcement mechanism and therefore is ineffective

[238] *see* I. Maignan, *Consumers' Perception of Corporate Social Responsibilities: A Cross Cultural Comparison*. Journal of Business Ethics, 30, 64 (2001) (cited in Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective*, (2006) For the pioneering insights into the so-called, 'socially responsible buying' behavioral literature)

[239] R.E. Wokutch, *Corporate Social Responsibility Japanese Style*, Academy of Management Executive, 42: 56-74 (1990)

[240] I. Maignan & D. Ralston, *Corporate social responsibility in Europe and the U.S.: Insights From Businesses' Self-presentations*. Journal of International Business Studies, 33: 497-514. (2002)

[241] Based on the insiders view, I may suggest that it is not very realistic to expect its success in most of the post Soviet countries.

as a tool. Moreover that customer behavior is only one and in fact the last ring in the chain of factors which usually defines success of 'bad publicity' strategy.[242] However, one might as well think about the initial purpose of the CSR which is not supposed to do the job of the law, but only to create use alternative route to justice by appealing to moral sentiments of particular individuals (mostly consumers), and obviously - as morality is the sphere of cultural relativism rather than of universalism, *name and shame* politics cannot achieve universal success (from optimistic perspective – at lest for a while).

3.3. B The other side of corporate social responsibility – does the bell tolls only for corporate citizens?

While as suggested above *name and shame* may not be universally applicable tool, it certainly is a uniquely democratic mechanism which can, and therefore should, be used to overcome the deadlock of the so called *real politics* and profit oriented immoral deals between businesses and governments; This mechanism takes the power from handful of policy-makers to adequately react on corporate abuses, including inefficient or corrupt courts, and gives it to people, ordinary individuals to do justice; and using this tool in a wise way may really make a change.

In fact considerable evidence suggests that western societies are increasingly sensitive to these illicit business practices and their sensitivity puts pressure on the businesses to change these practices. Overseas consumer activism helps even in such situations when the local government itself does not care much about its people or the environment.[243] This provides a strong argument in favor of the efficacy of legal versus market "enforcement" of standards and

[242] Moreover, one might also underline that success of the *name and shame* strategy crucially depends on coincidence of several factors: first that the information becomes available, second that it reaches right/capable actor to start the campaign, third choice of a correct strategy of campaigning (with all its details, e.g. core message, place, time), sensitivity of audience, consistency in keeping alarm

[243] see e.g., Williams and Aguilera, *Corporate Social Responsibility in a Compartive Perspective* (2006) (providing an example of MNC compliance with ISO 9000, which are a set of international environmental standards in China. 'They discover that MNC compliance with this environmental standard, whether it is substantive or symbolic, is determined by customer preferences, customer monitoring, and expected sanctions from customers in their home countries.')

show to human rights activists the way to a new powerful avenue of achieving justice: forget about preaching the businesses leaders for a moment and look at the consumers whose voices corporations hear better than that of any other actor.

Market is the highest court for any business and when the corporation sees the demand on the market, it gets the message that everything is going fine. Does not that mean that by our tolerance or indifference towards illicit or immoral ways in which the goods we consume are (might be) produced, we indirectly light the green lights to these practices?

Even the most activist judge would find it impossible to see the necessary elements of criminal complicity in this kind of consumer behaviour, and it most certainly does not constitute a crime to buy a thing on the general market which might be produced by forced labour; But we certainly will have no moral legitimacy, and even common sense at all, if we are waiting from the businesses to look beyond the law and behave morally, if we do not do the same ourselves.

It is always easy to blame others, and it is becoming somewhat *convenient* to put all the fault of modern day injustices on transnational shoulders of the MNCs, thinking that since they are so huge, they will survive it! But before you take a deep breath of happiness and joy in just a few days, hold on for a moment and think about 'Where do your flowers and chocolate come from this valentine's day?'[244]

3.3. C. 'Making Profit under the Guise of CSR', Is it bad?

CSR has been criticized not only for being vague, inconsistent and weak tool with poor enforcement mechanism for human rights protection, as seen above, but also because some consider it as a guise skillfully used by businesses to hide their real interest, which always boils down to nothing but *profit.* As in case of former arguments, the same holds true here: the criticism does make sense, however it is not always correct or precise assessment of the situation:

[244] International Labour Rights Forum published on it website this call and a story under the title *Justice for Valentine's Flower Workers* http://www.laborrights.org/ (accessed on the 7th of February, 2008)

Some believe that CSR programmes are often undertaken in an effort to distract the public from the ethical questions posed by their core operations. In fact this allegation at a certain extent proves true.[245] Others go further and allege that vast part of apparently nonprofit-oriented behavior by corporate managers is really - and necessarily - a profit-maximizing response to business, social or political pressures dressed up to look like something else."[246]

In the light of growing public awareness and resistance to environmental and societal harm, more corporations are seeking to veil their amorality and appear altruistic. This practice of "green washing" is intended to coax more people to buy their products, services or stock, but if corporate benefits do not accrue, altruistic poses are dropped. Unfortunately this allegation is backed by the reality.[247]

In fact seeing the CSR as a part of corporate strategy to be successful on the market does make a logical sense: If we assume that as asserted - the performance of business organizations is affected by their strategies and operations in market and non-market environments, then how the corporation performs socially might be one construct that captures a major element of these non-market strategies. And the increasing power of activist groups and the media in pluralist western societies make organizations' non-market strategies even more important.[248]

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[245] British American Tobacco Report Shows Truth Behind Greenwash, *Press Release by the Friends of the Earth (Apr 28 2005), available at* http://www.foe.co.uk/resource/press_releases/british_american_tobacco_r_27042005.html
See also Corporate Social Responsibility – Companies in the News, BP available at http://www.mallenbaker.net/csr/CSRfiles/bp.html (noting that 'BP's move towards positioning itself as a sustainable energy company has been the proverbial red rag to a bull for some. They point out that BP's claim to be a global leader in producing the cleanest burning fossil fuel (natural gas) is an incremental improvement over oil at best, and a distraction from getting away from fossil fuels at worst. BP, they claim, has co-opted the language of the environmentalists without the real commitment to deliver. Campaigners named BP as one of the "top ten worst corporations" in 2006 following the Prudhoe Bay oil spill. They say that since branding itself an environmentally sound corporation with the "Beyond Petroleum" tagline in 1997').

[246] Henry G. MAnne, *Milton Friedman Was Right, "Corporate Social Responsibility" is Bunk*, Wall Street Journal (2006)

[247] Jeff Milchen, *Inherent Rules of Corporate Behavior* (2000) (citing an example of Exxon Corporation executives who after realizing that their spending to mitigate damage to Alaskan shores after the Valdez oil spill was not swaying public opinion enough to benefit the company's bottom line, dropped the pretense of moral obligation and stopped the cleanup)

[248] Marc Orlitzky, Frank L. Schmidt, Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-analysis* (*'Can business meet new social, environmental, and financial expectations and still win?')* (Business Week 1999)

The question whether CSR is a new *tool* to survive the increasing competition on the market and make more profit cannot be answered properly without having evidence that there is a direct link between company's social performance and the profit it makes on the market.

Until recently, there were assumption of inconclusive findings on this issue; however a recently conducted analysis might change a picture: the analysis finds correlation between company's social/environmental performance and financial performance. It asserts that first and foremost, 'market forces generally do not penalize companies that are high in corporate social performance; And portraying managers' choices with respect to Corporate Social Performance(CSP) and Corporate Financial Performance(CFP)as an either/or trade-off is not justified in light of 30 years of empirical data;' [249] As further shown by the study – 'across studies CSP is positively correlated with CFP, the relationship tends to be bidirectional and simultaneous, Corporate virtue in the form of social and, to a lesser extent, environmental responsibility is rewarding in more ways than one.'[250]

Based on the results of this study, two conclusions can be drawn: first, which the study clearly supports is that business can afford being socially responsible, [251] second, allegations that compliance with CSR rules is just another way to make profit may, at some extent, be right.

But before using this latter finding as an argument to throw additional stones on the business, one might ask a common sense question: what is the overall goal of CSR norms - to transform business in a full-hearted missioner or to help alleviate the cost of their operations which almost always lies solely on the shoulders of poor local communities making them even poorer and miserable?

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[249]Marc Orlitzky, Frank L. Schmidt, Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-analysis* (*'Can business meet new social, environmental, and financial expectations and still win?')* (Business Week 1999)

[250] Id., *see also Corporate Social Responsibility: Corporate Counsel Build A Treasury Of Good Will* - Part II, interview with Jerome J. Shestack, Partner and Co-Chair,Business Litigation Practice Group, WolfBlock, The Metropolitan Corporate Counsel (January 2005 (Jerome J. Shestack says: 'while cases should be decided on their merits, my personal experience as a litigator is that it is often easier to defend a corporation that has become known in the community and to the judiciary for its commitment to social programs such as providing legal services to the poor and the practice of diversity').

[251] Marc Orlitzky, *supra,* 247

The point of asking this question is to take a position that while keeping a watchful eye on the behavior of business in general, human rights community should not overdo in its criticism, otherwise it may seem *too capricious* and loose credibility. As far as the business compliance with CSR norms in a particular case is not just a façade and brings the results for poor communities which CSR norms are aiming at, its profit oriented underpinning should not really be the reason to criticize business.

3.3. D. What should business actually do?

Finally, after reviewing pros and cons of CSR idea, and the key arguments which might be advanced for and against it, we arrived to the question which lies in the heart of the contemporary CSR discourse: What *should* business actually do? Answers to this question are diverse and controversial, as one might already have expected. Positions vary greatly: starting from stubborn allegations that 'business of business is business'(quoting Friedman) ending up with the revolutionary ideas that business of business is promoting human rights and democracy: proponents of the latter idea assert that 'As "organs of society," such corporations have a "moral and social obligation" to respect the United Nations Universal Declaration of Human Rights.

It is not enough that the company itself respects human rights, the publication notes. The company must also pressure its business partners and the government of the host country to do the same.[252] These people think that corporations even have the responsibility to resolve conflicts and foster socioeconomic development; they must "proactively create positive societal value by . . . engaging in innovative social investment, stakeholder consultation, policy dialogue, advocacy and civic institution building."[253] The further argues that 'leaders from business must come to realize that they represent the vanguard of tomorrow's global society, in which markets must be open, but open markets must be fully underpinned by shared values and global solidarity. They are the first truly global citizens, and only they can give meaning to that term through their

[252] Ottaway, *supra*, 40
[253] *The Business of Peace, the Private Sector as a Partner in Conflict Prevention and Resolution,* International Alert, Council of Economic Priorities, The Prince of Wales Business Leaders Forum (2000)

actions and advocacy to ensure everyone, rich and poor alike, has the chance to benefit from globalization.[254]

The counter argument to this position is simple and clear: although corporations may be "organs of society," they are highly specialized ones, and their strengths lie in finding, extracting, and distributing natural resources, rather than in commitment to democracy and human rights. Taking after the role of an agent for social change does not fit within the nature and overall goals of these organizations.[255]

In the executive summery of this paper a reservation was made that its aim would not be siding any of the parties to the debate but trying to see as bigger picture of the actual truth as possible. While trying to do so, the paper will pose the question whether business itself has any interest in or benefit from existence and realization of human rights and rule of law in general or are they completely irrelevant for the business and therefore - imposition of any related duties (obviously except for those not to actually violate human rights, as defined by legal standards highlighted in chapter 2), will be simply *too much* and will impose an unfair burden of doing public job on private institutions –corporations.

When thinking about the benefits which business may get from human rights and rule of law, it is of strategic importance to correctly understand what these two values stand for, more precisely - what is the role they play in the society, business is also a part of which. The sort answer would be that it is a matter of common knowledge that upholding human rights is a significant guarantee of stable peace and social coherence, which is a basic asset for most businesses to thrive.

When the country adheres to human rights it means that people there and also the businesses benefit with legislative and institutional guarantees of right to property, independent

[254] The Address by Secretary-General Kofi Annan to the World Economic Forum in Davos, Switzerland, 28 January, 2001.
[255] Ottaway, *supra*, 40 (noting that a recent Shell-commissioned report examining 82 of the company's 408 development projects in Nigeria reveals that less than one third of those projects have been successful. missionaries)

and impartial judiciary and right to a fair trial, which are essential for any business to generate wealth and most importantly, to be able to protect it from illegal expropriation and attacks from the government and third parties.

In the rule of law societies there is little or no corruption and business does not have to pay *de fact* taxes in the forms of gifts and pay offs to the rulers of the day. Competition is healthy and transparent; an above all, there is an environment of predictability and continuity, which is absolutely critical necessity for the financial stability and growth of the business. In support of this idea, here is an evidence, which demonstrates that particularly large oil companies are getting more and more reluctant to invest in a conflict-ridden, repressive and corrupted countries: 'corporations and their investor, banks, are wisely choosing not to take risks, specifically in some countries where they have been robbed by the governments almost at the gunpoint or their investment was taken through corruption or otherwise, or where their staff are kidnapped and premises attacked.'[256]

And furthermore business is starting itself loudly recognizing that "an irrefutable case can be made that a universal acceptance of the rule of law, the outlawing of corrupt practices, respect for workers' rights, high health and safety standards, sensitivity to the environment, support for education and the protection and nurturing of children — are not only justifiable against the criteria of morality and justice. The simple truth is that these are good for business (and most business people recognize this.)" [257]

The analysis above reveal that business has a direct interest in the existence of the society which adheres to human rights and rule of law, and thus promoting and upholding its causes by business means not only contributing to common good but promoting its direct interest as well.

[256] *Michael Klare, supra,* 17
[257] International Centre for Human Rights and Democratic Development, *Summary Report: Globalization: Trade and Human Rights, the Canadian Business Perspective* (Feb. 1996), p.3 (citing the statement of Thomas d'Aquino, CEO of the Business Council on National Issues)

However, despite the fact that there are examples of business recognizing its interest in human rights and rules of law abiding societies, the reality still remains that many business people, future and current leaders of this community, find it somewhat difficult to see the link between the business and human rights and their direct interest in upholding them;[258] and making this link clear for them will be decisive for tackling *negative impact paradigm* and many more problematic issues of business and human rights relations.

After highlighting that business holds an interest in the rule of law and human rights abiding societies, and therefore, logically should take part in building and sustaining it, another challenging issue is to identify particular *means* which are acceptable to be used by business for reaching this goal. Again the participants of the general debate on business and human rights vary on this matter and the discussion is much broader and vaguer than on many other issues of the discourse.

This paper takes a different position from those ones which are the most often heard in the debates and suggests that business can in fact be the agent of a change, but not by imposing a direct pressure on the governments and engaging in activist campaigns of enlightening repressive regimes about the democracy and human rights, as many require them to do, in other words not being an *active social entrepreneur*, but being a *passive but responsible* citizen : e.g., while business cannot declare disobedience to the abusive government and deny paying taxes to it, it can refuse to collaborate with discredited security forces(both state and private), insisting that they be formed in accordance with civilian control, transparency, accountability, adherence to the law and human rights;[259]

While it is not the *business of business* to directly engage in the allocation of budget revenues and oversee that money is actually going to people not to the handful of government

[258] Apart from the fact that human rights observers also underline this reality, my personal experience of talking with people coming from business, economics, finances and the related professions also strongly supports this impression. An evident example was during my being at the GEP Conference in Nottingham in 2007 where the fact that forced labour should not be used in business practices was a matter of hot and very serious discussion between me and them. And what worked at the end was the sentimental education approach, nothing else.
[259] *Who is Minding the Store*, (2006)

officials, what they can and should do it adhering to initiatives such as Publish What You Pay, e.g., By doing so business will indirectly promote transparency and accountability of the government while not changing it own aim and nature of legitimate activity. If business will make itself transparent, the civil society institutions and other legitimate watchdogs will be able to take care of their part of job and hold the government accountable without directly involving business in it.[260]

Moreover, while it is clearly beyond anyone's capacity to move the natural resources from bad governance ones to good governance zones, business should and must adhere to the rules of sustainable development, which in fact is in business's long term interest as well and provide prompt and fair compensation to those who loose their of income and often the whole *land of ancestors and that of unborn generations* as a matter of business their operations. In short, according to this position, there are no *burdensome* requirements of *doing good*; instead there is a call for *not doing bad.*[261]

3.3. E. Conclusion on Chapter Three

Ccorporate social responsibility has firmly established itself as an integral part of business and human rights discourse over the past decade. Nevertheless, there is still no universal definition of this concept and the substance as well as the value people see in it differ across the cultures and communities.

The practical side of this concept is even more controversial. CSR duties are scattered in various non binding instruments which lack clarity and coherence and have number of clear shortcomings, such as weak monitoring and implementation mechanisms.

[260] Nigeria: Oil Tax Audit Reveals Huge Gap, Business Respect, Issue Number 93, dated 12 Apr 2006 http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=1596 (An audit of payments made by oil companies in Nigeria has uncovered huge discrepancies between the amount that the firms say they paid and what the government says it actually received.)

[261] Goes without saying that not doing bad is far more than abiding to laws and regulations of the countries where MNCs operate, as suggested by Friedman, since as seen most of those countries do not have an efficient legislative and procedural guarantees against environmental abuse or many similar matters.

Against this background the paper suggests that in fact the weakness of CSR as of a regulatory mechanism is very much its strength as well: and in the light of a short comparative analysis of law and CSR it identifies cases when the latter clearly enjoys a considerable comparative advantage and can achieve the purpose which the law often finds it more difficult or simply impossible to do. The paper also focuses on the sanction mechanism of CSR and argues that *name and shame* strategy can be successfully used by the human rights community to advance its causes. The paper refers to a large body of empirical evidence which in fact supports its claims.

In response to the claim advanced by the business community portraying CSR as an attempt to oblige private entities to do the job of a public institution, the paper makes it very clear that business holds a direct interest in rule of law and human rights abiding society and based on finding this link, it further advances the argument that business should *take part* in the process of putting these values into practice. Moreover, the paper refers to a meta-analysis which demonstrates that socially responsible businesses are not penalized but often rewarded on the market.

In the end the paper significantly departs from traditional claims advanced by the human rights community. In particular it suggests that business should focus on its own practices and guide them by *do no harm* principle rather than aggressively agitate and pressure the governments to change their practices towards human rights,[262] as many human rights activists require them to do. The paper takes a firm position that this is simply not the job for business; it is neither capable nor legitimate actor for doing it.

[262] Extreme situations similar to Burma scenario today might trigger such a responsibility on the side of business to join the international pressure on the repressive government; however this should not be applied to other *casual* situations of democracy promotion.

Concluding Observations and Remarks

I

Traditional perception that state is the primary threat to the enjoyment and realization of fundamental human rights and individual liberties is no longer valid. Unprecedented rise in the number and powers of non state agents like multinational corporations, insurgent groups, terrorist, etc. is dwarfing the powers of the nation state in a groundbreaking way and speed and exposes individual rights and liberties in front of the unparalleled multi-level threat of violence

. The case of MNCs is particularly controversial and calls for a special solution. Unlike terrorists, e.g., whose existence and activities are totally legitimate to be subjected to universal condemnation, MNCs serve as a critical economic stamina of the globalized world of our times which is unimaginable and simply nonexistent without their role and involvement. But while running the global economy and markets, MNCs can and do violate fundamental human rights starting from the right to life ending with the right to self-determination and privacy of individuals and communities;

The techniques of MNC violating human rights are manifold: corporations often passively benefit from human rights abuses committed by the state agents in the interest of attracting, pleasing or keeping the investment in the country; In order to minimize costs corporations often cause irreparable harm to the environment and local communities while building infrastructure or exploring and exploiting natural resources; These operations often destroy the lands and contaminate the water resources of the local population which in fact constitutes their basic and often only means of subsistence. Corporations are particularly reluctant to provide fear and just compensation to those directly and devastatingly affected by their operations and unsustainable exploitation of the environment. This often leads to a new circle of human rights violations of the local people.

Moreover, corporations often hire private or state military forces for their security purposes and knowingly continue providing financial and technical support to them while these

security forces are suppressing local population, massively kill, torture, rape, intimidate locals, recruit and subject them to forced and child labour. Corporations are not only financing, and thus sustaining repressive regimes by investing and doing business there, but they are documented to have provided direct financial, material, intellectual and technical support in designing and implementing heinous international crimes of genocide, war crimes, crimes against humanity and apartheid. It goes without comment that they often call these activities *constructive engagement* in the country.

Despite the claim that corporations are artificial persons, legal fictions without actual personality behind, it is already a fact that corporations do violate fundamental human rights and human suffering resulting from these violations is striking.

The impact MNCs produce in developing countries is particularly alarming. The population in these countries is often war-torn, recovering from bloody conflicts or still entangled in them, they live beyond the line of poverty, are illiterate and badly informed about their rights or legal mechanisms available to claim these right against their governments and MNCs. Governments of these countries, in turn, are often weak and corrupt, incapable of handling economic and social challenges facing their population. This makes them particularly open to foreign investors to come and take over the state's role and functions.

Alternatively, the state apparatus is relatively stronger, but repressive and highly militarized. It intensively seeks collaborators in the face of MNCs to boost its wellbeing by exploiting natural resources and local population and further suppressing and marginalizing the locals by channeling the profit from the MNC operations exclusively to their own pockets. In both these scenarios the mechanism of making justice is weak or totally broken, judges are corrupt, laws are badly designed to guarantee procedural and substantial rights of victims, proceedings are lengthy and often ineffective in providing remedies.

Furthermore, International mechanism of justice is also at large unreceptive to the allegations of corporate human rights abuses. International law, which was originally designed to

impose obligations, including human rights obligations only and exclusively on states, stands obsolete, yet firm in upholding its initial position. There are increasing calls for international law to revisit the status it attaches to non state actors, including MNCs, in the light of recent developments and the growing threat they are posing to individual and community rights.

Despite the fact that international law seems to have a potential to accommodate MNCs as direct duty holders of international human rights law, and despite the previous experience of doing this in respect of private individuals when holding them liable for international crimes, international law as it stands today provides very poor or almost no actual protection to victims of corporate human rights abuses.

The unique piece of US federal legislation, ATCA, is gradually gaining its strength and significance in filling this gap, but while ATCA is still a limited tool for achieving justice, the gap remains significant and is clearly having a chilling effect on the victims fight for restoring justice against MNCs.

And even if one might believe that international law can or does already impose direct human rights obligations on corporations, the challenge remains in the lack of a functional international mechanism which will adjudicate corporate behavior against their international human rights duties. In addition, although some work has already been done in the past by *ad hoc* international tribunals in this direction, substantial work remains to be undertaken to adequately define the scope and content of corporate responsibility for human rights violations under international law.

The lack of regulatory mechanism to put MNCs' activities into certain predetermined boundaries triggered innovative thinking and search for new tools to control their transnational power and threat they pose to human rights. A somewhat new mechanism under the name of *corporate social responsibility* has been devised for integrating business into social fabric of the hosting community and encouraging it to adhere to certain rules of social cohabitation which are *above* and *beyond* the law. While this idea is gaining acceptance among the big corporations,

either as a matter of pressure from human rights community or as a matter of seeing certain benefits in adherence to CSR rules, many businesses still question what does CSR buy and how legitimate is it to bind private entities with duties to voluntarily undertake public functions? A number of collective and individual codes of conducts for businesses have mushroomed recently; however, these codes of conduct lack effective monitoring and implementation mechanisms and clarity as well as coherence. And it will take a long time to transform them in actual business behavior.

The puzzling controversial evidence of MNCs' role as of the producer of the lifeblood for our global civilization on the one hand and being nearly the agent of a devil, bringing destruction, blood and misery to thousands of individuals in many corners of the world has to be explained against this very background: MNCs, designed for making profit and traditionally pursing this goal by seeking to minimize costs and maximize benefits, are at large left immune or without effective control from state- imposed regulatory policies, national and international laws and social mechanisms of restoring justice and are thus free to pursue their goal in already poor and marginalized societies by *all the means* available to them as a matter of techniques and intelligence. And MNCs in fact are making the full use of this situation - they simply chase the profit. The *negative impact paradigm* is opened up.

Certainly it would be mistakenly pessimistic description of the situation if one would forget about the *potential* which lies in all these three tools to hold MNC responsible for their abuses of human rights – national legal system, international human rights law and corporate social responsibility; and quite recently we have witnessed the instances of successfully using them to restore justice. While this may be a hope for possible victims, many current ones probably will not survive to see the fruits of turning the *potential* of these tools into practice. And it might not be the best consolation for many other human rights activists as well, since whatever positive changes might happen from now on, we cannot turn the clock back and

eliminate the traces of those brutalities, they are forever curved on the moral CV of our civilization.

II

It is a well-known case for social scientists that the appearance and rise of new power has always been the reason and source of anxiety among the old, the so called *status quo* powers who perceive giving up their influence and privileges as often the signal of approaching catastrophe. New powers however, encouraged by their increasing influence and capacities are particularly reluctant to accept the rules of the game which the old powers are trying to impose on them. And the conflict between them inevitably has far more important consequences than that of either of these two winning or loosing the battle.

This theory has its role to play to explain the increasing alarm over the MNCs global dominance voiced mostly through international governmental organizations, like UN, OECD and etc. or politicians from powerful industrialized countries, US and UK may be cases for reference, who are voicing the concerns of the larger interest group – *status quo* powers - over the MNC's increasing new power –and are framing these concerns in a number of ways, including business and human rights discourse in its broadest sense.

On the other hand, however, what can also be observed in the light of current situation is the struggle among the new powers as well, and in this case these are MNCs one the one hand and development agencies and global civil society organizations with human rights and environmental portfolios on the other hand. Struggle between these two sides are increasingly taking the form of throwing the stones on each other, rather than coordinating their efforts and resources for finding the solution for those poor and marginalized communities; communities who are beloved ones of the nature, rich in natural wealth and resources, but remain the orphans of law and often that of morals as well, and are therefore still bearing the trait of never developed developing nations.

Building independent and impartial judiciary, transparent and accountable government and peaceful and sustainable democracies out of newly war-torn, poorly educated nations, still having the burden of colonialism on their economic and political mentality, is obviously beyond the domain and capacities of MNCs; But unfortunately it is also beyond the capacities of UN, World Bank or any single global civil society organization. If the *negative impact paradigm* was solely the fault of MNC, the situation would have been much easier to resolve, but this is not clearly the case.

The first step of finding the solution from this paradigm is therefore not passing the 'hot potato of democratic reforms' on each other, as one specialist of democratic reforms has correctly observed, but engaging in a meaningful dialogue of how to help those poor and marginalized people from developing nations to themselves make the home-grown peace and democracy. International actors should not try to do it for them; it will just not be successful.

Another thing we should and have to do now is to acknowledge that all we, without distinction of country and level of development, and the positions we use to take on business – human rights discourse, are facing a dilemma: 'The unequal distribution of benefits, and the imbalances in global rule-making, which characterize globalization today, inevitably will produce backlash and protectionism. And that, in turn, threatens to undermine and ultimately to unravel the open world economy that has been so painstakingly constructed over the course of the past half-century…if we cannot make globalization work for all, in the end it will work for none.'[263]

The technique to survive this challenge is not to pass the responsibility of finding the way on each other, but to think, engage in a meaningful dialogue and teach each other how to go forward safe.

Meanwhile, the recognition of multi dimensional nature of *negative impact paradigm* which can only be addressed by multi-actor cooperation strategy, is in no way exempting the

[263] Kofi Annan, *supra* 58

national governments, MNCs and - to moral extent – also the individual members of the consumer's community - from their own share of responsibilities to guarantee and respect individual and community rights as it is due according to national and international laws and considerations of socially responsible global citizenship (corporate, as well as individual!)

Corporations can and of course will try to ignore the *profit-value* of ethical and socially responsible behavior, and will stay calm as far as they manage to render themselves immune from litigations and fines. However, the trials of corporate leaders in Nuremberg for their collaboration with Nazi , friendly settlement of *Unocal* with Burmese victims of forced labour and the recent success of victims in *Khulumani Case* against a large group of corporations collaborating with apartheid regime, and on the other hand successful instances of succeeding by *name and shame* strategy, do convey an increasingly realistic message that corporations cannot for long render themselves immune from the *truth* about the committed injustices and the victims do already know how to translate the *truth* in *money*, the language corporations do understand the best.

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