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Multinational Enterprises and Human Rights Protection

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Abstract: Multinational enterprises are playing an important role in economic globalisation. Meanwhile, it is common for multinational enterprises to violate human rights overseas while it is difficult for victims to seek remedies. The international law which can regulate human rights violations by multinational corporations are mostly soft laws, but there is a lack of guarantees for the implementation of soft law. In domestic law, most host countries are developing countries that cannot regulate multinational enterprises effectively. And home states lack the will to regulate multinational enterprises because their interests are so closely linked. There are also obstacles like the exercise of jurisdiction and the corporate veil which prevent the multinational enterprises responsible for human rights overseas. Therefore, this essay clarifies the extraterritorial jurisdiction, the non-harm principle and the human rights due diligence to support the responsibility of multinational enterprises. Eventually, this essay clarifies that it is necessary to narrow the gap between the ideal of hard law and the reality of soft law in international law. In the meantime, host states and home states should both strengthen the legislation of human rights due diligence and protection for high-risk industries. Harmonious interaction and co-development of international and domestic law should also be considered and the non-governmental organisation should issue guidelines, and strengthen the regulatory role.

Keywords: multinational enterprises, human rights, extraterritorial jurisdiction, home state

1. Introduction

With economic globalisation and the liberalisation of investment and trade, multinational enterprises are flourishing and become an important engine of growth for the world economy [1]. They not only facilitate cross-border financial flows but also promote the expansion of international trade. The multinational enterprises' subsidiaries abroad energise local economic development, which is needed by the local governments. Moreover, the multinational enterprises have a deeper influence on the international politics and economics. These factors are all becoming an important basis for foreign investment management and decision-making of the governments [2]. However, since the 1990s, the negative impact of human rights violations of multinational enterprises in their productive activities has also received widespread attention from the international community. For example, there are many multinational enterprises cutting costs by polluting the environment, which poses a threat to the health of the residents. Besides, employing child labour, unreasonably prolonging the working hours of employees and so on are often witnessed in the subsidiaries of host states [3].

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The authority of multinational corporations keeps growing as they expand, surpassing that of the governments of the developing nations in which they operate. Because big multinational corporations deliver significant financial benefits to their home states, the host governments are either unable or unwilling to adequately control these businesses. Once host states regulate and penalise human rights abuses by multinational enterprises, the multinational enterprises may not want to invest in their countries anymore, which may lead to a great loss to them. At the same time, the interests of the multinational enterprises are in connection with the home states, and these home states do not want to regulate issues involving their interests. Because the home states of multinational enterprises are mostly developed countries and the host states are mostly developing countries. The standard of compensation for the same violation in the home state may be several times higher than that in the host state, thus increasing the cost of multinational enterprises. Besides, another reason is the respect for the sovereignty of a country, which considers that its jurisdiction gives way to the territorial jurisdiction of the host state.

Moreover, in the international law, the legal accountability of the multinational enterprises and the remedies for the victims are still in a state of absence. There is currently no international treaty that stipulates the obligation of home countries to regulate the extraterritorial behaviour of multinational enterprises, which can only be interpreted through the principles of the law.

With the growing international calls for multinational enterprises to take responsibility, it is a necessity to carry out deeper research on this topic and look for more legal grounds to ask multinational enterprises to take responsibility.

Therefore, this essay will clarify the legal basis including international law and domestic law for the responsibility of the multinational enterprises for human rights violations. After that, it will apply the legal hermeneutics research method to analyse their shortcomings and provide some specific suggestions. In addition, the case analysis method and legal hermeneutics research method are applied in this article to provide some illustrations.

2. Legal basis for the responsibility

2.1. The international law

2.1.1. The regulation of the international law

International law is the name given to the rules of custom and agreement which civilised nations regard as legally binding in their dealings with each other. In addition to being nationals of their own country, individuals are, under certain conditions, subjects of international law. This is the reason why individuals are internationally regulated and internationally protected [4]. The United Nations has enacted many conventions to protect human rights. Moreover, there are also regional conventions to protect human rights as in Africa, Europe and America.

The growing scope and influence of multinational enterprises are increasing the international community's expectation that these enterprises should observe human rights and take on corporate responsibilities. To address human rights abusing problems by multinational enterprises, the United Nations attempted to develop a treaty as early as the 1970s. However, countries were deeply divided in their conflicts on the treaty and eventually, the United Nations only enacted Guiding Principles, which focuses on the the obligation of the state and enterprises to defend human rights and the right to redress.

These guiding principles have further reaffirmed the responsibilities of enterprises to respect human rights and clarified the human rights standards that enterprises should comply with and the ways to implement them, which contributed to the international community's consensus and

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expectation. In addition to the direct means, these principles also point to indirect means by which countries can regulate the behaviour of business enterprises and the remedies after abuse.

2.2. Comments on the international law

These guiding principles catch direct attention to certain key issues related to human rights and multinational enterprises. They put moral pressure on countries to gradually address the condition of multinational corporations violating human rights. They help to build a basic notion of human rights protection among nations and businesses in the international community to some extent.

These international human rights treaties, however, are "soft law" restrictions that are not legally obligatory. Furthermore, not only do they lack direct binding authority on enterprises, but the majority of the principle-based laws on corporations' human rights obligations and responsibilities are highly ambiguous. For example, the guideline underlined the business obligation to protect human rights. It employs the word "responsibility" rather than "duty" in the text to emphasize that respecting rights is not a direct obligation imposed on companies by current international human rights legislation [5]. The guideline adopts a moderate and conservative approach to the question of state regulation of multinational corporations' extraterritorial human rights duties. Furthermore, according to the guideline, "all governments must defend against corporate-related human rights abuses inside their territory or authority." Countries have recognized the value of some extraterritorial authorities in a variety of policy areas, including anti-corruption, antitrust, security rules and so on. However, this is not the case since the legislation is not developed enough.

Although some of these documents are not yet legally binding and their complementary value cannot be ignored, they constitute an important source of soft law for arguing that home states have extraterritorial human rights obligations to regulate multinational enterprises. The essence of soft law is the communication of spirit and principles. When States are aware of the spirit of the relevant principles, people are bound internally, though not legally binding.

In 2019, the United Nations put forward the Legally Binding Instrument to Regulate, which clarified the extraterritorial human rights obligations of home States to regulate multinational enterprises and is legally binding [6]. This draft is a great progress, meaning that the rules about the extraterritorial human rights regulation of the multinational enterprises are transferring from the soft law to hard law. However, the draft has not yet been adopted for entry into force because it involves multiple interests and conflicts. It is a twisted and difficult process to turn it into implementation, which needs a long time.

2.3. The regulation of the law of host states

Theoretically speaking, host states own the absolute right of control over the entrance and establishment of multinational enterprises. There is no doubt that multinational enterprises must comply with the local laws of the host country. However, host states are mainly developing countries, whose economic power is weaker than multinational enterprises'. These developing countries offer favourable conditions to attract investment from multinational enterprises to develop their economies. This economic development comes at the expense of local ecosystems and labour rights. These favourable conditions may conflict with the host country's laws and regulations governing multinational enterprises, so the host country is forced to forego enforcement of the laws and regulations. In addition, some developing countries are even too poor to have the capacity and technology to enact laws.

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2.4. Obstacle and Supporting theories of the regulation of the home states' law

2.4.1. Obstacle of the regulation of the home states' law

2.4.1.1. The principle of Forum non-conveniens

When host states cannot offer remedies, victims often sue the parent company in the courts of the home states to seek remedies, because the home states are mostly developed countries with sufficient economic power, well-developed legal systems, and adequate expertise to regulate and regulate their enterprises [7]. Besides, there are more funds which can be provided for victims. However, the home states do not want to regulate issues involving their interests. Therefore, the court of the home states may argue one of the obstacles called the principle of Forum non-conveniens to avoid taking responsibility. In international civil litigation activities, although the court has jurisdiction over the case, if hearing the case will cause inconvenience to the parties and the administration of justice, thus failing to guarantee justice and preventing a speedy and effective settlement of the dispute, the original court may decline to exercise jurisdiction ex officio or at the request of the defendant in its discretion. The court may refude with an inconvenient forum, if there is an alternative court with the same jurisdiction over the action. Thus, if the court of the home state of the multinational enterprise declines jurisdiction, there is little hope that the victim will be able to obtain judicial remedy from other courts.

2.4.1.2. The exercise of jurisdiction

Furthermore, the exercise of the host states' authority is constrained by international law's norms of independence from foreign powers and impartiality in domestic matters. Extraterritorial jurisdiction is so likely to collide with other governments' sovereignty, which is difficult to resolve.

2.4.1.3. The corporate veil

Another obstacle is the corporate veil, which means that the corporation as a legal person has its independent personality. The principle of the independent legal person establishes that the parent company and the subsidiary are two separate corporate entities. Therefore, it is difficult to hold a parent company accountable to a subsidiary against the corporate veil principle. In the case Adams v. Cape Industries Plc, workers sued the subsidiary for damage to their health [8]. Although they won the case, the subsidiary became insolvent and thus could not make a compensation. Therefore, these workers subsequently sued the parent company, claiming to pierce the corporate veil. The Court of Appeal rejected the claim, holding that the principle of limited liability and independent personality was intrinsic in the traditional company law of the UK. Nowadays, although the principle of piercing the corporate veil is permissible in certain circumstances to increase the likelihood of a victim obtaining remedy, it is rarely applied in practice. The burden of proof on the victim is heavy, and the courts have mostly rejected it on the grounds of traditional independent legal persons and limited liability.

2.4.2. Supporting theories of the regulation of the home states' law

2.4.2.1. Extraterritorial jurisdiction

Although there are many obstacles for the parent company to take responsibility for human rights violations, it is noteworthy that there are also some theories which support that the parent company should take responsibility.

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One of the theories is extraterritorial jurisdiction, which means that a state may exercise jurisdiction over nationals or non-nationals outside its territory exceptionally. There has been the judicial practice in several countries like America and Canada to exercise extraterritorial jurisdiction over the foreign subsidiaries of transnational corporations. But there are still a large number of controversies on the theory and practice of extraterritorial jurisdiction. Considering that extraterritoriality is not one of the traditional principles of jurisdiction, which are territoriality, personality, protection, and universality. Furthermore, because extraterritorial jurisdiction exists, it must be used extremely cautiously and in a way that avoids conflict with a state's sovereign [9].

2.4.2.2. The non-harm principle

Another theory is the non-harm principle, which means that a state must not deliberately permit activities on its territory that violate the rights of other states. The non-harm principle was established in the Trail Smelter case [10]. A Canadian lead and zinc smelter located about ten kilometres from the US-Canada borderline was emitting gaseous sulphides that were seriously polluting the US ecosystem. The affected citizens in the US region strongly protested to the Canadian Government. As an eventual result of international arbitration, the arbitral tribunal ruled that Canada should be held responsible and compensate the United States victims for their losses and cease releasing toxic gases at the site. Then the non-harm principle is applied to human rights law and translated into an obligation that a state ought to respect and protect human rights and do nothing harmful to people extraterritorial.

2.4.2.3. Human rights due diligence

In addition, human rights due diligence is another theory meaning that corporations are required to develop vigilance plans to figure out and prevent the risk of direct or indirect injury to workers as a result of operational activities. In the case Chandler v Cape plc, the victim was exposed to asbestos while working for a subsidiary and became ill. However, the subsidiary no longer existed, so the victim sued the parent company, alleging that a duty of care was broken.

Rather than breaching the corporate veil, the victim's attorney held the parent company directly accountable by using due diligence in respect to human rights. Despite the fact that these cases took place in particular jurisdictions, the underlying body of jurisprudence indicates that, in addition to limited liability, the parent company should be held accountable for corporate debts without lifting the corporate veil and in accordance with tort law. The verdict in this case ultimately shows that, under certain conditions, the law may hold a parent company accountable for the health and safety of the workers employed in the subsidiary. For instance, the parent company and the subsidiary should be the same in all important business areas. Or the parent company should be aware of the subsidiary's unsafe work practices, and both should share mutual knowledge of health and safety in the relevant industry.

However, in the vast majority of countries and international law, this doctrine of human rights due diligence remains at the theoretical level, which means that it does not have enough legal binding and lacks practice. Only France turned it into the act, namely the Duty of Care Act, which holds French corporations accountable for the impact of their global operations, including subsidiaries and entire supply chains [11].

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3. Suggestion

3.1. From the Perspective of international law

The hard law ideal and the soft law reality of multinational corporations' obligations to protect human rights remain at odds. At the legislative and implementation levels, the efficacy and efficiency of international law are primarily determined by the state's determination, and the growth of international law must be balanced with the evolution of national law. An international agreement for many international organizations and human rights has started to be a good thing, but it requires long and difficult negotiations between representatives of many countries, from changing the structure until the end of the text. Therefore, international law must take into account the level and level of development of each country's legal system so that the two countries can become friends and create harmony. The international community's interest in matters pertaining to the protection and advancement of human rights has grown as awareness of the inception of international human rights law into domestic law has expanded. With the ongoing development and enhancement of national legislation, it is envisaged that certain nations will endorse legally binding agreements concerning multinational enterprises and human rights, and adopt stringent legal frameworks.

3.2. From the perspective of domestic law

Additionally, there is a difference between states' de facto and de jure obligations to uphold, defend, and remedy human rights. There is still much controversy and doubt about the issue of home states regulating the extraterritorial human rights obligations of multinational enterprises. However, some home states have begun to confront the issue of human rights abuses by multinational enterprises outside their territories in practice. France has taken the first step in legislating on corporate due diligence. Just as Miriam R. Aczel said, there are no borders in justice and France's 'Duty of Care' Act should be applied to other countries [12]. It is necessary to strengthen legislation of due diligence in home states and host states.

Meanwhile, domestic legislation could go beyond human rights due diligence and should be tailored to address some of the most high-risk industries violating human rights. In Canada, human rights abuses by mining companies in other countries have attracted community-wide attention. Several non-governmental organisations and human rights organisations have commented on human rights abuses by Canadian extractive and mining companies in developing countries. However, the Canadian response bill was not passed because of competing party interests and opposition from large mining corporations. Therefore, the government of a country must negotiate with all parties and corporations. After considering all parties' interests, the bills will be better. Although there is currently relatively little practice in legislating specifically on the risk of extraterritorial harm to human rights in a particular industry, more and more legislations on high-risk industries will emerge as the idea of extraterritorial human rights obligations of home States takes hold.

3.3. The role of non-government organisation

The harmonious coexistence and co-development of international and domestic law must be considered in the legal regulation. International law can reduce the likelihood of lengthy jurisdictional battles by fostering a basic consensus among States on jurisdictional rules and choice of law issues. States may consent to international agreements that set forth guidelines aimed at lowering legal barriers and accelerating the trial of significant cases. Both the states' will and the state of development of domestic law must be considered in the formation of international law. Besides, non-governmental organisations should also play a greater role in it. It is noteworthy that the famous Caux Roundtable Principles were business moral principles put forward by a non-governmental

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organisation. These principles place higher demands on companies, not only to create wealth but also to influence the future of their communities with healthy business activities. Corporations are required to do their best to protect the rights and interests of their customers in their commercial activities, treat their employees well, and pay attention to their spiritual pursuits. When dealing with the related interests of customers, employees, owners and suppliers, it should consider the welfare and interests of others to achieve a win-win result. Although they are principles not obligations, with more countries joining in the organisations, these concepts will hopefully take hold in people's hearts and minds and bind multinational enterprises like the law.

4. Conclusion

Basic international human rights standards should be more than just verbal declarations. They should also be translated into duties for states and responsibilities for multinational enterprises, given the increasing number of these businesses and their real influence on human rights globally. It is a fact that the current legal remedies are noticeably inadequate in terms of both domestic and international law. In international law, it is vital to close the gap between the soft law reality and the hard law ideal. Meanwhile, human rights due diligence laws and high-risk industry protection should be strengthened in both home and host states. Moreover, the non-governmental organization should establish guidelines and bolster its regulatory role, and it should think about the harmonious coexistence and development of domestic and international law. The belief is that barriers to the traceability of multinational corporations' human rights responsibilities will eventually be gradually reduced with the effort and supervision from multiple parties. More and more studies on legislation about regulating multinational enterprises and protecting human rights at both international and domestic law levels are hoping to come out.

References

[1] *Rodrigo, O. (2004) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. In: United Nations General Assembly. Geneva.pp.1.*
[2] *United Nations Conference on Trade and Development. (2023) World Investment Report. https://unctad.org/publication/world-investment-report-2023.*
[3] *Ruggie, J. (2011) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_ch.pdf.*
[4] *Oppenheim, L. Oppenheim's International Law (1955) Encyclopedia of China Publishing House, Beijing.*
[5] *Ruggie, J. (2011) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_ch.pdf.*
[6] *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, oeigwg chairmanship third revised draft (2021)*
[7] *Gwynne, S., Beyond, K. (2014) Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World, Colombia Human Rights Law Review 158: 171-173.*
[8] *Adams v Cape Industries Plc [1990] 2 WLR 659.*
[9] *Jennifer, Z. (2010) Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas. https://www.hks.harvard. edu/centers/mrcbg/programs/cri /research /papers.*
[10] *United States v Canada (The Trail Smelter case) Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)*
[11] *The Duty of Care Act (Devoir de vigilance) 2017.*
[12] *Miriam, R. A. (2021) Justice without borders: Opportunities from France's 'Duty of Care' Act applied to Uganda. Energy Research & Social Science, 75:2.*