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THE LEGAL RESPONSIBILITY OF MULTINATIONAL CORPORATIONS OPERATING IN AFRICA: TOWARDS A MORE BALANCED APPROACH

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ABSTRACT

The African continent has faced a particularly challenging dilemma in the past century. The abundance of natural resources on the continent has led to an influx of corporate investment and exploration. This has often had devastating effects on local populations and the natural environment due to the unsound business practices of multinational corporations operating in countries such as Nigeria with its vast oil deposits. However, a significant contributor to the problem is the ineffective regulatory framework of African countries hosting the activities of multinational corporations, which can lead to extensive social abuses and the over-exploitation of natural resources.

This paper will focus specifically on the situation in Nigeria, as it provides a good example of the challenges African countries currently face in hosting the activities of multinational corporations. In the past, the predominant focus has been on the responsibility of multinational corporations under international law, and how to regulate their activities in the host countries where they operate. This paper argues that, even though the international regulation of multinational corporations is an important endeavour in preventing these potentially harmful practices, such regulation will not be wholly effective unless the main sources of the problem are addressed. These include ineffective domestic regulation and the enforcement of laws governing the activities of foreign corporations, as well as corruption and the mismanagement of funds generated by foreign investment.

Even if a comprehensively binding international legal framework governing the activities of multinational corporations can be established, certain challenges facing host countries will remain unless the root causes of abuse are addressed by the national governments of these countries.

Key words: Multinational, Africa, Nigeria, Regulation.

THE EFFECTS OF MULTINATIONAL CORPORATE ACTIVITY

'There is one and only one social responsibility of business - 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' (Friedman, 1970).

In an era of rapid globalisation, the effect that technological advancement and rapid industrialisation on the environment has raised concern (Avery, 2000, p.17). In recent years, however, pressure from civil society and local communities has, in a sense, influenced the 'rules of the game,' and consequently corporations have started to adopt new strategies to address some of the negative impacts of their commercial operations (Uddo, 2013; Chatham House, 2013).

Multinational corporate responsibility for environmental degradation and human rights violations is problematic from the perspective of international law. Multinational enterprises (henceforth 'multinationals') establish themselves and conduct business in various countries around the globe, and their economic influence and political power outweigh those of certain

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states (Anderson and Cavanagh, 2000; Joseph, 2004, p. 1; De Jongh, 2011, p. 1). Statistics reveal that, in 2000, corporations constituted 51 of the top 100 economies in the world, whereas states constituted 49. For example, economically, Royal Dutch Shell is larger than Venezuela, General Motors is larger than Denmark, and Sony is larger than Pakistan (Anderson and Cavanagh, 2000; Joseph, 2004, p. 1; De Jongh, 2011, p. 1). The regulation of these multinationals' activities is further complicated by the fact that they regularly operate in developing states with vast natural resources and insufficient methods to ensure that such resources are managed efficiently and sustainably. Despite the fact that there are numerous agencies in certain African countries tasked with regulating the activities of multinationals, effective domestic regulation and enforcement remain problematic.

Factors such as lack of funding, staff who have not received sufficient training, and a lack of modern technology to monitor the compliance of multinationals with set standards, are some of the causes of ineffective domestic regulation and insufficient enforcement of existing laws (Oshionebo, 2009, p. 72). Even if compliance could be monitored and regulated efficiently, enforcement would likely remain problematic due to issues such as corruption (Oshionebo, 2009). Moreover, these states are usually severely dependent on foreign investment and trade, which bring promise an improvement of the overall financial and social situation through a direly needed influx of corporate capital (Duruigbo, 2003, pp. 168–169). Law enforcement is also particularly challenging when multinationals operate in developing countries with lax or no environmental laws or standards (Duruigbo, 2003, p. 168).

While multinationals have rights under international law, the extent to which they also have duties is, at best, uncertain. For example, multinationals have rights under international investment law and have also utilised international law norms to invoke their rights in terms of privacy, property and fair trial (Morgera, 2009, p. 51; Gatto, 2011, p. 61). States are still the primary subjects of international law and, therefore, regulating the actions of a multinational effectively becomes the responsibility of the state within which that corporation operates (the 'host state') or is incorporated (the 'home state': Muchlinski, 2007, p. 158).

Notwithstanding the possible negative effects of multinationals operating in the extractive industries in Africa, they can also have a positive effect on the countries in which they operate, impacting on areas such as job creation and economic growth. Often, however, the damage these entities cause to the surrounding environment may be substantial and irreversible (Jike, 2004, pp. 689–690). Environmental damage to farmland, water resources, and forests could cause other sectors of a country's economy (e.g. agriculture) to suffer. This could lead a country to become too dependent on only a few sectors, such as natural resource extraction (Jike, 2004, pp. 689–690; Standing, 2007, p. 3; Collier, 2007; Mills, 2012, p. 203). It has also been said that environmental degradation and natural resource extraction can lead to higher levels of poverty, the displacement of local communities, and local violent conflicts, as is evidently the case in countries such as Sudan and Nigeria (Jike, 2004, p. 689–690; Standing, 2007, p. 3; Collier, 2007; Mills, 2012, p. 203).

As stated above, the activities of multinationals can exacerbate inequalities within the specific communities in which they operate (Eaton, 1997, as cited in Joseph, 2004, p. 2; Skogly, 1997, p. 47). As a response to vigorous opposition by local communities, some multinationals recruit local military units or private security forces to deter protesters. Authors have described this phenomenon as 'military commerce' (Forcese, 2000, pp. 171, 173; Joseph, 2004, p. 3; Alston, 2005, p. 151). The presence of private military security companies has been associated with grave human rights abuses, such as extrajudicial killings, torture, crimes against humanity, and genocide (*Wiwa v Royal Dutch Petroleum* (2002)[2]; *The Presbyterian Church of Sudan v*

[2] (2002) 96 Civ 8386, 2002 US Dist LEXIS 3293 (SDNY).

Talisman Energy (2003)[3]; Joseph, 2004, p. 3; Earth Rights International, 2014; International Crimes Database, 2014).

Concerns regarding the untethered freedom with which some multinationals conduct their affairs appear to be well founded, and are likely to be an issue of contention in future. There is also a valid argument to be made, however, for placing responsibility on the state in which the acts take place. Technically this could be considered as the home state or the host state, as both could exercise jurisdiction over a multinational enterprise. However, it is argued in this paper that a host state is able to exercise greater influence on the actions of a multinational and is therefore in a better position to regulate such activities.

CHALLENGES FACED BY THE AFRICAN CONTINENT

The situation in Africa regarding the activities of multinationals has become a concern in the past few decades. The continent has always boasted one of the world's largest concentrations of natural resources. Industry has taken notice, as is evident from the large number of multinationals currently operating on the continent. Africa received 56 billion dollars in foreign direct investment in 2013, a 7% increase from the previous year (Sulaiman, 2014). Following the independence of many African states from the 1960s onwards, certain resource-rich states, such as Nigeria, have been economically very successful during certain prosperous periods. Furthermore, despite the economic crises of the 1970s and of 2008, there is still great demand for raw natural resources from the African continent (Custers and Matthysen, 2009).

The problem is, however, that exporting states often have weak regulatory systems, which leads to extensive social abuses and over-exploitation in certain areas. For example, it has been argued that Nigeria has 'an array of petroleum and environmental laws that can at best be described as obsolete and inadequate' (Duruigbo, 2003, p. 170; Joseph, 2014, p. 306).

Claims against multinationals in cases such as *Wiwa v Royal Dutch Petroleum* (1998),[4] *Wiwa v Royal Dutch Petroleum* (2002),[5] *Lubbe v Cape Plc* (2000),[6] *Connelly v RTZ Corporation Plc* (1997)[7] and *Aguinda v Texaco* (1994)[8] illustrate some of the negative impacts, both in terms of human rights generally and of the environment specifically, often associated with the activities of multinationals operating in the extractive industry in Africa and in other parts of the world (Earth Rights International, 2014; Meeran, 2011).

In *Wiwa v Royal Dutch Petroleum* (1998)[9] and *Wiwa v Royal Dutch Petroleum* (2002),[10] Royal Dutch Petroleum was sued in an American court for its complicity with the Nigerian military in committing various human rights violations against the Ogoni people of Nigeria. These atrocities included the torture and execution of protestors. Among the victims was Ken Saro-Wiwa, an internationally recognised activist and writer. The surviving family members of the victims brought the claims against Shell, and after several years of litigation, the parties reached a settlement on the eve of trial in 2009 of $15.5 million, payment of some of the plaintiffs' legal fees, and the establishment of a trust to benefit the Ogoni people.

Lubbe v Cape Plc (2000)[11] dealt with a personal injury claim by miners working at an asbestos mine in South Africa. The mine was run by a subsidiary of Cape Plc, and the claims alleged that Cape Plc had failed to take appropriate measures to ensure the safety of its workers with regard to possible asbestos poisoning. The claimants decided to bring the suit in England, but the defendants objected to this on the grounds of *forum non conveniens*. After an appeal to

[3] (2003) 244 F Supp 2d 289 (SDNY).
[4] (1998) No. 96 Civ. 8386 (KMW) (HBP), 1998 U.S. Dist. LEXIS 23064 (SDNY).
[5] (2002) 96 Civ 8386, 2002 US Dist LEXIS 3293 (SDNY).
[6] (2000) UKHL 41.
[7] (1997) UKHL 30.
[8] (1994) No. 93 Civ. 7527 (VLB) WL 142006 (S.D.N.Y. Apr. 11, 1994).
[9] (1998) No. 96 Civ. 8386 (KMW) (HBP), 1998 U.S. Dist. LEXIS 23064 (SDNY).
[10] (2002) 96 Civ 8386, 2002 US Dist LEXIS 3293 (SDNY).
[11] (2000) UKHL 41.

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the House of Lords, it was decided to allow the claim due its complexity and the fact that the required medical and legal expertise would probably not be available in South Africa. The case eventually became a class action with 7500 workers joining the suit. In the end Cape Plc decided to settle the case for 21 million pounds. Later, however, the amount had to be renegotiated in conjunction with another company due to Cape Plc's deteriorating financial situation.

The *Connelly* case (1997)[12] involved a claim by an employee of a Rio Tinto uranium mine in Namibia, a subsidiary of RTZ Corporation. The claimant alleged he had developed laryngeal cancer from exposure to uranium dust and that the company had acted negligently in terms of health and safety standards. Again, the claimant approached the English courts due to his belief that he would not receive adequate legal aid in Namibia where the subsidiary was based. The English High Court eventually rejected his claim.

In the *Aguinda* case (1994),[13] the plaintiffs claimed that Texaco was polluting their water on a daily basis by releasing large quantities of toxic petroleum waste into it. The case was brought before an American court under the auspices of the Alien Tort Claims Act, but the American court ordered the case to be heard in Ecuador. The case was subsequently heard by the Ecuador Supreme Court, which found in favour of the plaintiffs. However, the plaintiffs are still facing difficulties in enforcing the judgment as Texaco refuses to adhere to it.

Some studies have suggested that the African continent's dependence on its vast natural resources is responsible, at least in part, for the prevalence there of civil conflict, social inequality, environmental degradation, and negative economic growth (Bannon and Collier, 2003; Collier, 2007, Standing, 2007; Mills, 2012). This phenomenon has been described as the 'resource curse,' and it seems to have affected Africa more than any other continent (Bannon and Collier, 2003; Collier, 2007, Standing, 2007; Mills, 2012). Nigeria is one of the best examples of the manifestation of this 'resource curse'. Despite the country having generated oil revenues amounting to $400 billion in the past 50 years, Nigeria is still one of the poorest countries in the world in terms of *per capita* income, with over 80% of Nigerians subsisting on less than two dollars a day (Collier, 2007; Mills, 2012, p. 203; Aljazeera: Counting the Cost, 2014).

Another economic phenomenon closely related to the 'resource curse', which has manifested itself in many African countries (including Nigeria), is 'Dutch disease'. The term originated in the 1960s in the Netherlands, when that country experienced an economic crisis due to the discovery of North Sea gas deposits. The aforementioned phenomenon occurs when a country exports large quantities of a specific natural resource to the detriment of other sectors in the country, such as agriculture, leading to a decline in their development. The state becomes overly dependent on exports of this resource and does not develop other sectors. This eventually leads to local goods becoming too expensive for the average citizen to afford, because these goods have to be imported. This could, under certain circumstances, have a negative impact on a country's overall economic situation. Of course, some countries are not negatively affected by an abundance of natural resources; however, according to authors such as Collier, the majority of countries seem to encounter the challenges mentioned above (Collier, 2007, p. 39).

A MORE BALANCED APPROACH TO REGULATING THE ACTIVITIES OF MULTINATIONAL CORPORATIONS IN AFRICA

In general, the international community tends to focus on the international legal responsibility of multinationals and how a comprehensive legal framework can be implemented to regulate their activities globally (Sagafi-nejad and Dunning, 2008; Hamdani and Ruffing, 2015;

[12] (1997) UKHL 30.
[13] (1994) No. 93 Civ. 7527 (VLB) WL 142006 (SDNY Apr. 11, 1994).

UNOHCHR, 2016). This is surely a very important endeavour, as in the past much uncertainty surrounding the exact status and legal obligations of these entities has prevailed. However, as important as establishing such a legal framework is, examining why certain countries are so negatively affected by the activities of multinationals is also important, as is determining what can be done to address these root issues.

An interesting case study for understanding the complexities of this problem is the current situation in Nigeria surrounding oil extraction operations by multinational corporations such as Royal Dutch Shell. Most of Nigeria's oil reserves are located in the Niger Delta region, which is also the largest wetland in Africa and one of the largest wetlands in the world (Shinsato, 2005, p. 193; Ayuba, 2012, p. 19). Commercial oil production commenced in 1958 by Shell British Petroleum (now Royal Dutch Shell) (Ayuba, 2012, p. 19). The Nigerian oil industry consists of six joint venture operations managed by Shell, Mobil, Chevron, Texaco, Agip and Elf-Aquitaine (Nigerian National Petroleum Corporation, 2016). Chapter Four of the Nigerian Constitution states that all oil resources are the property of the Nigerian federal government, and therefore the Nigerian National Petroleum Corporation (NNCP) manages the country's oil reserves in partnership with the aforementioned foreign corporations (The Nigerian Constitution, 1999; Human Rights Watch, 1999, p. 26; Shinsato, 2005, p. 191). Section 44(3) of the Nigerian Constitution states: 'Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly' (The Nigerian Constitution, 1999).

Until fairly recently, Nigeria was the continent's primary oil producer, and the oil industry has provided the vast majority of the country's overall revenue (Ayuba, 2012, p. 20; Thompson, 2016). This dependence on the oil sector means that other sectors of the economy, such as agriculture, have lagged far behind. This has necessitated the import of food products to sustain the general population, effectively making Nigeria a 'petroleum-based single commodity reliance economy' (Ikein, 1990, pp. 19–20). Nigeria's agricultural sector flourished in the years directly following the Second World War. The country was one of the main exporters of goods such as cocoa, palm oil and groundnuts, and also exported large amounts of goods such as cotton, rubber and hides (Shinsato, 2005, p. 191). The oil producing areas of the country are mostly inhabited by minority groups, and these are also the people most negatively affected by the operations of multinationals (Ikein, 1990, p. 28; Human Rights Watch, 1999, p. 91). According to Dommen,

> the worst victims of environmental harm tend also to be those with the least political clout, such as members of racial and ethnic minorities, the poor or those who are geographically isolated from the locus of political power within their country (1998, p. 3).

This state of affairs is particularly evident in the national revenue sharing formula, which provides that most of the national revenue is allocated to the federal government, with the rest of the funds being distributed among the states and local governments (Premium Times, 2016). The problem with this revenue allocation formula is the vast discrepancy between the majority of the revenue being allocated to the federal government and the fact that most of the revenue is generated by local governments, which bear the brunt of the negative impact of the income-generating activities (Akujuru, 2015, p. 24). It has been argued that an insufficient amount of revenue is being invested back to remedy the negative impact of development in these areas (Akujuru, 2015, p. 26). Furthermore, the current resource allocation formula is severely out-

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dated, and there have been calls on the government to implement a new formula more in line with current financial realities and challenges (Oluwasegun and Anofi, 2015).

The vast amounts of national revenue allocated to the federal government is worrisome, as many claims have been levelled against the Nigerian government of corruption with regard to the management of oil revenues. It is estimated that senior officials of the Nigerian government have embezzled at least 50 billion dollars of oil revenues since the 1960s. The lack of transparency surrounding the amount of oil revenue that has accumulated, and the mismanagement of oil revenue, largely contribute to this problem (Standing, 2007, p. 3).

One must keep in mind the very distinct duties of multinationals as opposed to national governments. The duty of a corporation is to maximise profits, albeit within legal and ethical perimeters. The government's duty, on the other hand, is to act as a shield to protect its citizens from external and internal threats against its physical territory. As Ikein (1990, p. 27) states,

> only the government of the producer state can exercise its sovereign power to reverse the imperialist trend and protect the welfare of its people. State government must make multinationals socially accountable for their activities in the host communities if truly balanced development is to be achieved.

Although there has been much controversy surrounding the previous Nigerian government's administration of oil revenues (Akinbajo, 2015; Brooks, 2016), the tide might be turning following the election of President Muhammadu Buhari in May 2015. President Buhari has vowed to put measures in place to diversify the economy and decrease the country's dependency on oil exports. He has also taken a hard line on corruption and has committed his administration to rooting out all forms of it, especially in the oil sector (Ajakaye, 2016; Energy Reporter, 2016; All Africa, 2016).

CONCLUSION

It remains to be seen whether any of these changes will effectively improve the situation in Nigeria, not only for a certain elite segment of the population, but for all citizens, especially those most negatively affected by economic endeavours such as the oil industry in the Niger Delta. Nigeria seems, however, to be on the right path to accepting more responsibility for the challenges the country currently faces. For real progress to be made, a bottom up approach has to be adopted. Only then will countries such as Nigeria prosper, no matter what the future may hold.

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