HUMAN RIGHTS STANDARDS AND MULTINATIONAL CORPORATIONS: THE DILEMMA OF 'HOME' AND 'ROME'

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> *'If Rome is a significantly different place, then standards that are appropriate at home do not necessarily apply there.'*[1]

1. Introduction

In recent times it is increasingly felt that multinational corporations (MNCs)[2], as real users of free market economy, should conduct their business with a human face or in a 'human rights friendly manner'.[3] Interestingly, such a feeling is shared by MNCs, states, international

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[1] John R Boatright, *Ethics and the Conduct of Business* (3rd edn., New Jersey: Prentice Hall, 2000), p. 379.

[2] The term 'MNCs' has been used in a wider sense to include both multinational corporations and transnational corporations (TNCs). Although MNCs and TNCs are often used interchangeably, there is a distinction between the two. Korten observes: 'A multinational corporation takes on many national identities, maintaining a relatively autonomous production and sales facilities in individual countries .... The trend of transnationalism involves the integration of a firm's global operation around vertically integrated supplier networks.' David C Korten, *When Corporations Rule the World* (Connecticuit: Kumarian Press & Berrett-Koehler Publishers, 1995), p. 125.

[3] This is clear from the mass literature that has come up both in print form and on the web dealing with various aspects of the issue. In fact, now certain corporations are running the *business* of guiding the business community on how to behave as

organisations, non-government organisations (NGOs), academics and common people alike, though they differ on the reasons for this.[4] Therefore, the critical point of debate is no longer about *why* should MNCs respect human rights but *what* should they follow? Which standards of human rights – universal, national norms of the country of operation, or national norms of the parent company – should guide the conduct of MNCs? Moreover, should the 'shield' of cultural relativism be available to MNCs, which is often invoked with varying success by several states? Here it must be noted that this debate on standards is the direct result of globalisation[5] and growing influence of MNCs in international trade and governance.[6]

In response to the above debate, Boatright, as the quotation in the beginning reflects, and many others would suggest that MNCs are not bound, legally or morally, to apply universal standards of human rights, and that morally relevant local differences should be kept in mind.[7] In this article I would, however, show that the adoption of different human rights standards, in view of local differences, by the MNCs does not ensure effective protection of human rights. It rather allows them to violate human rights at will. Therefore, I would argue that MNCs should

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socially responsible corporations. In recent times, the evolution of the *Global Compact*, the European Union's *Green Paper on Corporate Social Responsibility* and the *UN Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2000 Revision of ILO and OECD Guidelines*, to name a few, are indicative of the same trend.

[4] MNCs, for example, may feel the need to respect human rights to maintain their good will, or in order to gain competitive advantage. International institutions and states, on the other hand, expect so because MNCs should behave like a responsible global citizen. Academics may perceive it as a necessary condition for MNCs' existence and carrying on of business. This spectrum of reasoning is just indicative of diversity and does not in any way suggest their mutual exclusiveness.

[5] The term 'globalisation' means different things to different people. In the present context it is used in a general sense to indicate the phenomena of liberalisation of economies through privatisation, shifting of power from state to private actors and removal of national barriers with reference to market, capital, services, governance, etc.

[6] MNCs exercise considerable influence in governance by influencing, at least, policy formulation regarding public health, child labour, workers' rights, consumer protection, foreign investment, environment protection, women's rights at workplace, indigenous peoples' rights, etc. The influence of MNCs on all these and such other policy questions has a direct bearing on governance.

[7] *Supra* note 1, pp. 378-87.

follow universal standards for universal human rights. Further, the plea of cultural relativism should not be available to MNCs even if it is invoked by states, whether rightly or wrongly. The MNCs, which sail on the principle of universalism to enhance trade, cannot claim parity with states due to various reasons discussed later. In other words, whether in 'Rome' or anywhere else, do as you would do at 'home', and for human rights purposes, the home of an MNC is not the country of incorporation but the whole *universe*.

Though there are various instances of MNCs applying different human rights standards at different places, in the present article I have picked up the *Bhopal* case[8] as an indicator of usual business practice followed by MNCs. This is done for three reasons. First, the Bhopal catastrophe is unparalleled in terms of gravity and long term implications and therefore, could be used as an effective indicator. Second, though more than eighteen years have passed since the tragic incident, the challenges posed by it in terms of developing effective legal strategies to avoid repetition of Bhopal are still unanswered. Third, my first hand experience of the miseries of Bhopal victims provides me with an insight which is not merely bookish.

2. The Search for International Business Standards

A search has been on for quite some time about the standards applicable to private actors who do business on the international or transnational level. As pointed out earlier, MNCs are the prime focus of this inquiry. Efforts are being made on institutional[9], regional[10]

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[8] Bhopal is a city in India where due to leakage of MIC gas from the pesticide manufacturing factory of UCIL, a subsidiary of UCC, on the night of 2-3 December 1984 more than three thousand people died and several thousands suffered serious injuries.

[9] By 'institutional' I mean the efforts made by individual corporations or group of corporations. Primarily, it would include Business Code of Conducts, which are becoming increasingly popular among MNCs.

[10] Such efforts are initiated by various regional bodies, e.g., EU, OECD, etc. See *Green Paper on Promoting a European Framework for Corporate Social Responsibility* (2001) and *OECD Guidelines for Multinational Enterprises* (1977/2000). Regional efforts are a compromise between national and international standards, and in a way reflect the inability to agree on international standards for the time being. However, more importantly they constitute one step closer to an ideal of international standards.

and international levels[11] for the evolution of standards. These efforts are the result of either voluntary assumption of responsibility by corporations, market coercion[12], or states' obligations under the International Bill of Rights. Such a wide spectrum of debate, at least, demonstrates the urgency for international business standards. I feel that it is essential to agree on international standards because only such standards can afford effective protection of universal human rights. The present article makes no attempt to analyse the diversified efforts being made in search of international standards, but only examines the two alternate approaches that guide the inquiry of standards. The two approaches are the 'business approach' and the 'human approach'. The former is based on varying standards, i.e., no *standard* standards, whereas the latter envisages universal standards. I would argue that the business approach should be discarded in favour of the human approach.

2.1 No 'Standard' Standards: The Business *Approach*

2.1.1 Business dilemma of choosing out of three standards

Even if a convincing case of corporate responsibility for human rights violations is made out, a major difficulty would be in the identification of the standards to be applied by corporations. This would be more in the case of those corporations which operate in different states, placed in different stages of development.[13] In such a situation, the MNCs face a business dilemma. Should they apply the 'host' standards or the 'home' standards or the 'international'

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[11] At the international level, the efforts are headed by international organisations like UNO and ILO. *UN Global Compact* (1999), *Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2002), *ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy* (1977/2000) and *ILO Global Social Label* (1997), etc. are indicators of international efforts.

[12] Besides consumers' awareness, market coercion is also due to the role played by the media and NGOs. Globalisation of information technology has given impetus to this movement.

[13] Human Rights Program Harvard Law School, *Business and Human Rights – An Interdisciplinary Discussion held at Harvard Law School in December 1997* (Cambridge, MA: Harvard Law School Human Rights Program, 1999), pp. 9-10, 14-18. An argument is often made by the developing countries that the First World countries are trying to impose their standards on them.

standards? Duffield puts it as follows: 'Whether international standards that are generally applied in the home country of an MNC, by virtue of the domestic laws in operation there, should be applied where the domestic regulations are less thorough?'[14] It must be noted that Duffield is contemplating a situation where there is no difference in the 'home' and 'international' standards. But there can be situations where these two do not concur. This would be the case if the MNC is situated in a country where human rights standards are inferior to international norms.

The business dilemma of applicable standards is often resolved by the MNCs rather easily, notwithstanding that this may give the impression of hard choices to be made. By citing local practical difficulties, arising because of differences in culture, level of development, socio-politico system, etc., in following the home or uniform standards, the MNCs would settle for local standards. The common argument in terms of justification would run as follows: the *'business' of business is to do business and this is possible only by following host standards and practices*. On the adoption of such double standards Braithwaite argues that 'moral failure of the transnationals lies in their willingness to settle for much lower standards than at home'.[15] In fact, the application of the business approach results not in mere double standards but 'multiple standards'; the standards that an MNC may apply are not merely two but may be infinite as per the local conditions. Therefore, I prefer to call it a situation of 'no *standard* standards'. The guiding principle of the business approach is the profit of stockholders (not of stakeholders) and not the protection of human rights. The latter is not even considered as stakeholders' profit, or at least part of profit.

2.1.2 Was 'Bhopal' really different from 'home'?

'Bhopal'[16] signifies how the business dilemma of varying standards is resolved, rather easily, and how the business approach fails to

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[14] Clare Duffield, 'Multinational Corporations and Workers' Rights' in Stuart Rees and Shelley Wright (eds.), *Human Rights and Corporate Responsibility – A Dialogue* (Sydney: Pluto Press, 2000), p. 193.

[15] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge & Kegan Paul, 1984), p. 246.

[16] I have used the term 'Bhopal' to denote not only the tragedy that occurred on the night of 2-3 December 1984 but also to include what preceded and followed the tragedy.

protect even basic human rights. What standards of safety and technology should Union Carbide Corporation (UCC), a company incorporated in the US, apply in a MIC-based pesticides manufacturing plant in Bhopal, a city in a developing country? Since UCC already had one such plant in West Virginia, it had the choice of applying either the same, inferior or superior standards. But UCC, without any moral or legal hesitation, handed over an inferior technology to Union Carbide India Ltd. (UCIL) for the Bhopal factory. Application of *different and inferior* standards was not limited to mere technology. As compared to the Virginia plant, considerably lower standards were applied by UCC-UCIL in Bhopal even regarding equipment, storage, safety devices, training of workers, operational procedure, etc.[17] This inferiority in overall standards was driven by economic consideration not only in the beginning but also throughout the life of the plant; there was a direct link between UCIL's losses and lowering or non-compliance with standards.[18] And all this was done by an MNC and its subsidiary which had projected themselves as ambassadors of 'environmental excellence' and a 'builder of modern India'.[19]

Why should UCC, or any other MNC for that matter, apply different (read *inferior* in terms of developing countries) standards while operating away from home? The response of any MNC like UCC would be simple: it makes business sense to establish and operate a plant in India only if lower standards are applied, otherwise the corporation loses any possible economic advantage. I call this the 'business justification' of the business approach. The 'academic

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[17] See, for a detailed account, Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (Massachusetts: Ballinger Publishing Co., 1987), pp. 42-57; Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993), pp. 18-25; and Kim Fortun, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders* (Chicago: University of Chicago Press, 2001), pp. 121-131.

[18] Shrivastava, *supra* note 17, pp. 49-52, Boatright, *supra* note 1, p.377 and Arthur Sharplin, 'Union Carbide Limited and the Bhopal Gas Incident: Issues and Commentary' in W Michael Hoffman, *et al* (eds.), *The Corporation, Ethics and the Environment* (Westport: Quorum Books. 1990), pp. 129-30.

[19] UCC gave such advertisements in several leading magazines. This continued even after the Bhopal accident. See, for some of these advertisements, Fortun, *supra* note 17, pp. 94-97, 345.

justification' of this business approach would, however, be not as simple. The explanation may range from different local conditions to varying stages of development, from cultural relativism to voluntary acceptance of different standards by the concerned country. For example, justifying disparity in standards in the Bhopal plant as compared to Virginia plant, Boatright writes:

> *'If Rome is a significantly different place, then standards that are appropriate at home do not necessarily apply there. Consumer and worker safety standards in the developed world, for example, are very stringent, reflecting greater affluence and a greater willingness to pay for more safety. The standards of these countries are not always appropriate in poorer, less developed countries with fewer resources and more pressing needs. It may be rational for a government like that of India to prefer a plant design that increases jobs and reduces the price of goods at the expense of safety. The United States government made different trade offs between safety and other values at earlier stages of the country's economic development. On the other hand, the marketing of hazardous consumer products abroad or the exposure of workers to easily prevented workplace hazards may be considered a violation of basic human rights.'*[20]

The crux of Boatright's argument is that the host place was materially different from home and therefore, UCC was justified in adopting different standards in Bhopal. In other words, morally relevant local differences of 'Rome' (Bhopal) necessitated the approach of 'when in Rome, do as Romans do'.[21] Before analysing the 'human rights value'[22] of above Boatright's observation, let us try to find out, first, how Rome was different from home and second, whether those differences were really *relevant*, even though they may be 'material' as Boatright suggests, to determine the issue of different standards.[23]

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[20] *Supra* note 1, p. 379. (emphasis added)

[21] *Id.*, pp. 378-79.

[22] The 'value' of the statement in terms of the protection it affords to human rights.

[23] It does not follow necessarily that 'material' differences are always 'relevant' for a particular issue.

Bhopal was, and is, different from West Virginia in many ways. It was a small city in the heart of India, striving for industrial development. The infrastructure of transport, safety, health, communication, etc., had no comparison with Virginia. In terms of employment opportunities, wages and working conditions, people of *Rome* stood nowhere near to populace of *home*.[24] Besides, there were many slum/hut dwellers, with no bargaining power, who had migrated from different parts of the country in search of jobs. The people, who constituted much of the work force in the plant, were generally poor and illiterate. The regulatory legal framework relating to the use of hazardous technology, working conditions, health and safety of workers, environment, etc., was either non-existent or non-enforceable.[25]

Boatright is, therefore, right when he observes that in terms of local conditions Bhopal was materially different from Virginia. But were these *material* differences *relevant* to determine what standards UCC-UCIL should apply in the Bhopal plant? The answer should be clearly in the negative. After all, what was at 'risk', that too of very high magnitude, by the lowering of standards? It was nothing but the right to life; to health; to a safe place of work; to information; to livelihood[26]; to a clean environment; and to receive *just* and speedy relief, to name but a few. Can such rights be subject to varying local conditions? The answer should again be in the negative, for these rights constitute the 'core' of universal human rights.

Here one must also not lose sight of the fact that the risk was generated and imposed not by an ignorant and incapable entity; UCC was both aware of the risks and capable of averting them.

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[24] See generally, for an economic and safety gap between developed and developing countries, Cassels, *supra* note 17, pp. 35-45.

[25] India enacted its comprehensive environment related legislation [Environment Protection Act] only in 1986, i.e., after the Bhopal tragedy. There were some legislations dealing with industrial safety [Factories Act, 1948], air pollution [Air (Prevention and Control of Pollution) Act, 1981] and insecticides [Insecticides Act, 1968], but there were either outdated or lacked implementation. See C M Abraham and A Rosencranz, 'An Evaluation of Pollution Control Legislation in India', (1986) 11 *Columbia Journal of Environmental Law* 101.

[26] There were many families whose survival depended solely on the wages of the earning member. So, indirectly incapacity or death of the earning member due to lower standards meant impairing the survival of the whole family. Moreover, this nexus was not beyond the reasonable foresight of UCC-UCIL management.

Different considerations may, however, apply when, first, one cannot reasonably foresee the risk generated by one's action[27] and second, one does not have the technical and/or economic resources to avoid it. In the Bhopal case, neither of these two factors were attracted. UCC was not naïve of the composition and toxic nature of MIC. It had spent millions of dollars in research on MIC and had admitted itself as a 'pioneer' in technology.[28] In fact, Edward Munoz, the technical representatives of UCC, in a letter to the Government of India, had claimed that 'during the last three years, Union Carbide Corporation has made dramatic improvements in the production technology of the miseries of its victims.'[29] On the second count also, the economic and technological capacity of UCC had undoubtedly placed it in a position where it could have adopted the same or superior standards in Bhopal plant.[30]

A natural query would be about the test to judge 'relevancy' of local differences. I suggest that relevancy is to be determined with reference to the protection of universal human rights. If by adopting a different standard as per the local difference, a universal human right is violated or even a reasonable prospect of violation is created, then such local difference, howsoever material it might be for that place, becomes irrelevant. On the other hand, if by application of a different, *not inferior*, standard, to suit the local difference, universal human rights are promoted, then such local difference is relevant. For example, a higher level of unemployment (a local difference) should not be exploited for paying unreasonably low wages. Similarly, the undeveloped environmental regime of a country should not become a license to emit more pollutants in the air. However, the presence of a large number of Muslim workers (again a local

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[27] This is possible if the state of art does not conceive any risk in the activity.

[28] See Union of India Complaint in the case filed in New York District Court, U Baxi and Thomas Paul (eds.), *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1986), pp. 3-4. The complaint mentions that *'defendant [UCC] represented to plaintiff that it was a pioneer in pesticide research and development with extensive research facilities ....'* It should be noted that this assertion was not contested by the UCC in its Motion.

[29] *Id.*, p. 66.

[30] UCC was the seventh largest chemical company in the US, with both assets and annual sales approaching $10 billion. It owned and operated business in forty countries. See Shrivastava, *supra* note 17, p. 35.

difference) may justify a provision for a separate place of worship inside the factory for the offering of daily prayers (a different standard).

Now we can try to discover the 'human rights value' of Boatright's observation, in the light of above discussion. I argue that the academic justification as reflected in the observation does not hold much water on closer scrutiny. First, 'Rome' was not a different place from home, as demonstrated above. The differences might be material but not *relevant*. How can differences be morally relevant, as Boatright seems to argue, when they lead to a violation of human rights? Second, even if we assume that UCC was justified in applying lower standards in the Bhopal plant, the fact remains that the accident occurred not because of lower standards but because of non-compliance with even those lower standards.[31] The UCC could have reasonably foreseen that failure to comply with even minimum safety standards would lead to massive deaths, and injury not only in the present but also the *future*.[32] Third, the Indian government could be interested in the production of pesticides at low cost (which country would not wish for that?) but that does not justify the almost total relinquishment of safety standards, especially when UCC claimed to be pioneer in safety and environment protection. Fourth, the plant design was never preferred by the Indian government, as claimed above. It was, in fact, chosen by UCC to lower its investment in infrastructure. It also exploited the weakness of the Indian legal framework of environmental protection. Fifth, a violation of 'basic human rights' arises in the Bhopal case even by Boatright's standards because for many initial years MIC was marketed from the US. Sixth, Boatright refers to 'greater affluence' and 'greater willingness to pay' of consumers of developed countries, to get better safety standards. But do, and should, human rights depend upon the paying capacity? The standards of human rights are not available for sale in the market on price determined by market principles. Last but

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[31] At the time of accident none of the safety devices in the plant were working. See Cassels, *supra* note 17, p. 19 and Shrivastava, *supra* note 17, pp. 56-57.

[32] In many instances the consequences of the tragedy continued to haunt future generations. See Cassels, *supra* note 17, pp. 5-6. In fact, in one case the Indian Supreme Court even granted compensation for the injury caused to a child in the mother's womb at the time of accident.

not the least, any argument which makes a distinction between the value of life in developed and developing countries is immoral *per se* and inconsistent with the notion of human rights.

2.1.3 Analysis of the business approach in the context of Bhopal and beyond

The above analysis exposes the inadequacy of the 'business approach' to suggest any guiding principle to agree on international standards for business. This inadequacy, in terms of Bhopal, is reflected in the following propositions which can be deduced from what was discussed earlier:

- UCC admittedly applied lower standards of technology and safety in the Bhopal plant as compared to Virginia.
- UCC applied lower standards despite knowledge of the risk of high magnitude and its capability to avert it.
- The adoption of inferior standards was driven by the profit principle.
- The local conditions of Bhopal were materially different from Virginia, but even material differences cease to remain *relevant* when universal human rights are at stake. Therefore, despite local differences, Rome (Bhopal) was not *really* different from home (Virginia).
- The relevancy of local differences is to be judged with reference to the effect, positive or negative, on the promotion of universal human rights.
- In spite of no *relevant* differences between Rome and home, UCC applied inferior standards in Bhopal, under the guise of 'when in Rome, do as Romans do'.
- UCC adopted the business approach to arrive on applicable lower standards in the Bhopal plant, which resulted in the violation of even basic universal human rights.

If one moves, firstly, from Bhopal-specific to the general paradigm and secondly, from 'is' to 'ought',[33] the above-stated propositions can be summed up thus: an MNC should disregard irrelevant local, even if material, differences and apply universal standards in its activities

[33] 'Is' denotes what MNCs actually do by following the business approach, whereas 'ought' signifies what should they do in terms of expectations of society.

all over the world, whether in Rome or home. For the adoption of different standards, only those local differences which promote universal human rights should be kept in mind.

Thus, with the help of the Bhopal case I have tried to show that both 'business' and 'academic' justifications of the business approach are unsound since they fail to protect even bare minimum human rights.[34] What is bare minimum for survival and human development constitute the 'core' of human rights, which cannot be subjected to any other condition. Failure of the business approach to effectively resolve the issue of standards compels us to explore other alternatives. I would argue that one of the alternatives could be in the form of the human approach, discussed below.

2.2 *Universal Standards for Universal Human Rights: the* Human *Approach*

2.2.1 Why discard the business approach?

The adverse consequences of following the business approach, which results in the adoption of varying standards by MNCs, are not limited to any one constituent but extend to all three broad participants of the business process: people (consumers, suppliers, general public, etc.), MNCs (the company and its subsidiaries as such, management, shareholders, etc.) and governments. Bhopal itself is a very good example of this. The lower standards at the Bhopal plant were reflected not only in technology, design, safety norms and operation but also in the training of personnel. All this led to an increase in 'risk' of the accident as well as the extent of harm. Even by a modest calculation, over 3,000 people died within the first two days of the accident and several more thousands suffered incurable diseases. The extent of the long term effects of exposure to MIC and other toxic gases in terms of breathlessness, dry cough, chest pains, nausea, respiratory diseases, abdominal pain, menstrual disorders, etc., is still uncertain.[35] Even the settlement of the case with UCC in terms of overall compensation failed to deliver justice to many victims. In short, the saga of miseries – medical, legal,

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[34] In the Bhopal case at least the right to life, health and safety, the right to information and the right to a clean environment were the bare minimum

[35] See Shrivastava, *supra* note 17, pp. 64-70 and Cassels, *supra* note 17, pp. 5-6.

economic and social – generated by 'no standard standards' for *generations* of victims that started on the night of 2nd and 3rd December 1984 is still continuing unabated.[36]

Even the proponents of varying standards are not immune from adverse consequences. MNCs' choice for lower standards is usually driven by short-term gains which often overshadow long-term gains. This myopic vision may prove fatal for the concerned MNC and its subsidiaries. In fact, the Bhopal accident had threatened the very survival of UCC-UCIL. Shrivastava sums up the effects on UCC thus:

> *'In its [Bhopal accident's] aftermath, the company was subject to worldwide humiliation. ... The company's reputation came under intense attack by the news media worldwide. ... [T]he public image of Union Carbide as a responsible company was seriously questioned. ... From a pre-accident level of $48 a share, the stock dropped to a low of $32.75 within a few weeks. ... Standard and Poors dropped the company's debt rating to the lowest investment grade. ... It was estimated that by the end of December 1985, 30 per cent of the company's stock had passed into the hands of takeover speculators.'*[37]

What Shrivastava states above is not something peculiar that happened to UCC, but this is what has happened or can happen to any other MNC having a negative balance-sheet on human rights.[38] This is bound to increase in time to come because of increasing

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[36] Many victims have still not received full compensation. The cases are still pending in US courts under the Alien Tort Claims Act.

[37] Shrivastava, *supra* note 17, pp. 76-77. In fact, UCC was later on taken over by Dow Chemicals.

[38] The examples of Shell, Body Shop and Nestle Baby Food are worth noting. In fact, now many big MNCS have become human rights conscious, *at least in their appearance*, a fact which is reflected in their Code of Ethics, advertisements, and investment in community welfare schemes. See, for example, the advertisement given in newspapers and TV by Shell to reaffirm its commitment to environment and sustainable development; *Sydney Morning Herald*, 7 September 2002, Good Weekend section, p. 23. See also John Harrison, *et al*, *Ethics for Australian Business* (Frenchs Forest: Prentice Hall-SprintPrint, 2001), pp. 1-9 and the material cited therein.

awareness regarding the issue generated by the 'partnership' of the media[39], NGOs[40] and the judiciary[41] in the era of information technology. Therefore, it is not in the interest of even MNCs, at least in the long run, to follow the business approach of varying standards about human rights.

There is, however, another important dimension of the issue, though largely unexplored. It is often suggested that MNCs have no option but to follow varying standards as by following universal standards they would lose their 'competitive advantage' vis-à-vis other MNCs. In other words, why should an MNC observe universal standards when it is not sure about the behaviour of its competitors? This fear is best illustrated, with a slight modification, in the Prisoner's Dilemma situation. This is a situation involving at least two corporations (let us assume 'X' and 'Y'). Both X and Y would have two choices: to follow universal standards or not to follow them. The possible results could be as follows:

1) X follows universal standards but Y does not follow them
2) Both X and Y follow universal standards
3) X does not follow universal standards but Y still follows them
4) Both X and Y do not follow universal standards

In situation 1, X may lose its competitive advantage qua Y, whereas in situation 3, Y may lose its competitive advantage qua X. In situations 2 and 4 neither of them may have competitive advantage over the other, though both may or may not have (depending upon

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[39] Newspapers and magazines play a key role in exposing instances of human rights violations by corporations. It is interesting to note that one generalist from Bhopal was writing about lack of safety and possible accident in UCIL Bhopal plant well before the actual accident. His voice was, however, unheard unfortunately. Such role played by the media is increasing and in fact, there is a feeling of competition among various newspapers to become 'first' to report the incident of human rights abuse. A recent example can be given of *The Indian Express* (11 August 2002) reporting how big corporations had plastered their advertisements on precious rocks on the Manali-Rohtang road.

[40] The efforts made by Amnesty International, Greenpeace, Lawyers Committee for Human Rights, Commonwealth Human Research Initiative, to name a few, are really commendable.

[41] The partnership of the judiciary results in taking *suo moto* cognizance of such incidents, evolving suitable remedies, and delivering speedy justice.

circumstances) a competitive advantage qua other corporations. It is apparent that fear of losing competitive advantage over competitors by following universal standards arise only because of uncertainty about the decision of the other party. It is, therefore, necessary to avoid this uncertainty to dispel any fear of losing competitive advantage. One way of removing 'uncertainty' could be by curtailing the options of MNCs regarding standards. The fear of losing competitive advantage is automatically taken care of if we discard varying standards and agree on universal standards.

Lastly, the business approach of varying standards is hazardous from the perspective of states as well. This is more in the case of states which are undeveloped or developing in terms of economic development and/or the legal framework for human rights. Since development demands foreign investment, MNCs take advantage of the vulnerable position of such countries and bargain for lower standards regarding workers' rights, public health, safety, consumer protection, environment, etc.[42] Duffield suggests that MNCs exploit the fear of governments of losing investment.[43] More often than not, the developing countries face a Hobson's choice and may bow under the might of MNCs. This situation of unequal bargaining power can, however, be remedied if we reject the business approach of varying standards and settle for universal standards. In case the non-negotiable nature of universal standards of human rights is accepted, MNCs would no longer be able to coerce developing countries for lower standards. This in turn would lead to the equitable development of the world in place of the 'selected' development at the cost of the 'neglected'.

Since the application of the business approach of varying standards to an inquiry of human rights standards for international business adversely affects every participant of the business process and not merely decision makers, it is a reason compelling enough to discard this approach in favour of the human approach.

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[42] See, for example, the advertisement given by the Philippines Government in *Fortune*: *'To attract companies like yours ... we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns ... all to make it easier for you and your business to do business here'*, as quoted in Korten, *supra* note 2, p. 159.

[43] *Supra* note 14, p.194.

2.2.2 Towards universal standards for universal human right

In contrast with the business approach, the 'human' approach of human rights standards views human rights above the profit principle and trade considerations. The *humanness* of this approach lies in the fact that it treats the 'human' as an end in itself.[44] Since the existence of human beings is a prerequisite for anything else, including business, interests of human beings cannot be subordinated to anything inferior to them; their interests can be balanced or subordinated only to something which is similar or superior in status.[45] Human rights constitute the core of interests of human beings, for human beings lose their 'human' character when devoid of human rights.[46] The *human* element consists of recognition of individual worth and treatment of human beings with equal respect and dignity. Since the business approach of varying standards subordinates these elements to profit, it needs to be replaced with the human approach which postulates universal standards for universal human rights. The adoption of universal standards would ensure equal treatment by disregarding irrelevant local differences.

The standards for universal human rights need to be universal, otherwise their *universality* is eroded. Universal human rights do not remain 'universal' if varying standards are applied, they lose their 'human' character if they assign different values to different people, and they cannot be considered 'right' if conditioned to local conditions or if their enforcement is at the mercy of violators. Presently, we are primarily concerned with the universal character of such rights. The universal nature of human rights is emphasised

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[44] One of the leading proponents of this was Kant; see Lerome J Shestack, 'The Philosophical Foundation of Human Rights' in Janusz Symonides (ed.), *Human rights: Concepts and Standards* (Aldershot: Ashgate/Dartmouth, 2000), p. 45. Korten also argues that development should be *'people centred'*, people being both the purpose and the primary instrument; *supra* note 2, p. 5.

[45] Since interests of fellow human beings would be equal in status, the human rights of one human can be balanced with equal human rights of others.

[46] Czerny writes: *'Human rights translate the human condition into those fundamental, essential, non-negotiable and enforceable terms which are necessary in order that life might be life, that is, in order that life must begin, grow, develop and flourish in all its attributes'* (emphasis added); Michael F Czerny, 'Liberation Theology and Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds.), *Human Rights in the Twenty-first Century* (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 36.

by all major international conventions/declarations, e.g., the UN Charter,[47] the Universal Declaration of Human Rights,[48] the International Covenant on Civil and Political Rights,[49] the International Covenant on Economic, Social and Cultural Rights.[50] This has been reaffirmed by the Vienna Declaration[51] and by the recent Draft Norms on Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Draft Norms).[52] The universality embedded in these declarations is also asserted by many scholars. Sidorsky, for example, observes that 'the phrase universal human rights is used to assert that universal norms or standards are applicable to all human societies.'[53]

A reference to the above treaties makes it abundantly clear that the international community regards certain human rights as possessing a universal character. Now the question is whether these universal rights can be effectively realised with varying standards. The answer should be in the negative, for the application of different standards as per local differences would open a floodgate of uncertainties. Moreover, universal human rights are based upon the premise that the creation of basic attributes needs to be protected all over the world, without any local distinction, to ensure human development. If we fail to agree on universal standards, it goes against the very thesis that certain rights are beyond national differences. For example, if we agree on a right to a safe and healthy working environment, then why should standards of safety or clean air be different in the US and India? Would not settling for lower standards for Indian workers vis-à-vis the US workers result in accepting that Indian workers are lesser humans than the US workers

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[47] 1 UNTS xvi, entered into force 24 October 1945. See Articles 1(3), 55(c) and 62(2).

[48] UN Doc. A/810 (1948), entered into force 10 December 1948. See the Preamble in particular.

[49] UN Doc. A/6316 (1966), entered into force 23 March 1976.

[50] UN Doc. A/6316 (1966), entered into force3 January 1976.

[51] A/CONF.157/23, entered into force 12 July 1993.

[52] E/CN.4/Sub.2/2002/13. See also Anne F Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century* (Hague: Kluwer Law International, 2000), p. 333.

[53] David Sidorsky, 'Contemporary Reinterpretation of the Concept of Human Rights', as quoted in Henery J Steiner and Philip Alston, *International Human rights in Context: Law. Politics, Morals* (2nd edn., New York: Oxford University Press, 2000), p. 327.

are? Furthermore, should different yardsticks govern the supply of harmful or potentially harmful products by an MNC in a developing country merely because its legal framework is not strong or its consumers are comparatively ignorant?

Such examples can be multiplied by involving other human rights, but the underlying point remains the same: human rights issues involving MNCs can only be resolved if MNCs are put under a mandatory obligation to apply universal standards for universal human rights. Such an obligation is also consistent, in one way, with the business approach of MNCs, i.e., removal of national boundaries. Rees argues that corporations rely on 'universalism' to enhance free trade but do not accept the same base for human rights.[54] This dichotomy needs to be exposed to give business a human face.

The universal standards apply everywhere in accordance with states' adherence to international law, or in accordance with the *jus cogens* quality that human rights have. If we can agree on common international standards regarding trade, intellectual property rights, arbitration, and so on, then why not regarding human rights? In this context any disagreement on universal principles for human rights would send a signal that human rights are of lesser concern than trade-related issues. The choice is with us whether we are willing to realise and accept this.

The thesis of universality can be supported by another argument as well. Any debate of varying standards focuses on vital differences between Rome and home; local conditions of Rome demand different standards as compared to home. But where is the home of MNCs? Should it be the country of incorporation, or the *real* place of operation through subsidiaries? I have argued above that as far as human rights are concerned, there are no relevant differences between Rome and home. Moreover, chances of human rights violations are greater in the area of operation than in the area of incorporation. Therefore, the 'home' of MNCs for the purpose of inquiry into human rights standards, as discussed below, should not be the country of incorporation but the whole world.

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[54] Stuart Rees, 'Omissions in the 20th Century: Priorities for the 21s' in Stuart Rees and Shelley Wright (eds.), *Human Rights and Corporate Responsibility – A Dialogue* (Sydney: Pluto Press, 2000), p. 298.

2.2.3 Operational issues of universal standards

Once we agree on universal standards for universal human rights, two issues related with the operationalisation of standards require consideration. First, what is the nature of the obligation? Is the obligation on MNCs merely negative (not to violate human rights) or does it also extend to taking positive steps? Second, how can those standards be agreed upon? Can the 'core' of human rights work as a starting point? I would argue below that the obligation of MNCs vis-à-vis human rights is both positive and negative. On the second count, I would argue that since an agreement on universal standards of human rights is full of complexities, the 'core' human rights could be taken as the starting point.

The presence of rights in human beings postulates the imposition of duties on 'someone'. Who would that someone be? That someone could only be such an entity which is both in a position to perform and is capable to perform duties. The 'position' is bestowed on someone because of a legal, moral, social or contractual duty, whereas the 'capacity' arises due to the presence of resources at their disposal. Does an MNC possess both these attributes to qualify as 'someone'? The response should be in the affirmative, for MNCs undoubtedly have both position and capacity. The position arises not only because of a moral and social duty but also because of a legal obligation to follow human rights. The capacity of MNCs to fulfill the required duties is self-evident; some MNCs are more capable than many states.

If MNCs qualify as bearers of duties, what should be the nature and extent of these duties? The nature and extent should be decided keeping in mind the objective for the imposition of duties. The objective could be nothing but ensuring the fullest realisation of human rights. That objective can be achieved only if duties are extensive, i.e., both positive and negative. Therefore, MNCs are under a dual obligation – the duty to respect human rights and the duty not to impede human rights.[55] Imposition of dual duties is necessary because rights can be violated both by an action as well as by omission. Mill very aptly argued that a person may cause evil to

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[55] Michael K Addo, 'Human Rights and Transnational Corporations – An Introduction' in Michael K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague: Kluwer Law International, 1999), p. 27.

others not only by his actions but also by his inactions, and in either case he is justly accountable to them for the injury.[56]

Many scholars may not agree with the imposition of such extensive duties on MNCs. Donaldson, for example, draws a list of fundamental international rights[57] and suggests that the 'corporation is an economic animal' and therefore, 'it would be unfair, not to mention unreasonable, to hold corporations to the same standards of charity and love as human individuals'.[58] He agrees with Shue regarding three correlative duties possible for any right,[59] but argues that duties of corporations do not extend to protecting from deprivation or aiding the deprived. Such duties, he feels, are within the province of governments.[60]

I would, however, argue, *contra* Donaldson, that the imposition of positive duties on MNCs is essential to protect human rights. It is true that positive obligations regarding human rights are primarily on states, though denied at one point of time. But this is no argument to deny the positive obligations of MNCs. Both states and MNCs can have positive obligations at the same time; duties on states do not dispense duties on other *similar* entities. Obligations arise, as stated above, because of position and capacity and not because of any 'charity'. It is again true that MNCs are driven by profit, but how do they earn profit? MNCs are dependent on investors, consumers, government and society as such for fulfilling their primary (or sole, as some would say) objective. The roots of profit lie in society; society is an integral part of the life cycle of corporations. Can corporations still earn profit if investors do not invest in them, or consumers do not buy (or are incapable of buying) their products, or government does not support their venture? Therefore, since MNCs use societal resources and are dependent on people to run and earn,

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[56] J S Mill, 'On Liberty' in M Warnock, *Utilitarianism* (London: Fontana, 1960), p. 74.

[57] Thomas Donaldson, *The Ethics of International Business* (New York: Oxford University Press, 1989), p. 81.

[58] *Id.*, p. 84.

[59] Three duties are: (1) to avoid depriving; (2) to help protect from deprivation; and (3) to aid the deprived. See Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980), p.57.

[60] *Supra* note 57, pp. 83-84.

they need to assist in the realisation of human rights even by taking positive obligations.

The positive obligations of MNCs may not be similar to or as extensive as that of states, but they should do their part as a *social* entity performing public functions, at least regarding 'core' human rights, as discussed below. For example, an MNC manufacturing life-saving medicines should be under an obligation to make available such medicines at a reasonably affordable price (not free or at nominal price as the obligation on the government might be), for failure to do so would violate the right to life and health. Similarly, an MNC should take positive steps in the form of affirmative action to integrate neglected sections of society in the mainstream, for failure to do so would violate the right to equality and equal respect.

In this regard, it may not be out of place to make a reference to the recent UN Draft Norms which mark an advancement over the conventional approach of mere negative obligations of MNCs. Para 12 lays down:

> *'Transnational corporations and other business enterprises shall respect civil, cultural, economic and social rights and contribute to their realisation, in particular the rights to development; adequate food and drinking water; the highest attainable standard of physical and mental health; adequate housing; education; freedom of thought, conscience and religion; and freedom of opinion and expression; ....'*[61]

This development further strengthens the argument of recognising positive obligations of MNCs regarding universal human rights.

The second operational issue relates to the process of evolving universal standards. Before proceeding further, the meaning of 'standards' should be understood. Standards are guiding principles against which the conduct of MNCs is to be judged. Despite universality of principles, the actual benchmark may differ from country to country. The principle of reasonable subsistence wages, for example, would not demand the same wages for workers in Virginia and Bhopal. It only requires that the factors which are taken into consideration to fix wages should be the same in both

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[61] *Supra* note 52. (emphasis added)

places.[62] Boatright also agrees with this when he observes that *'the disparity is not unjust if the same mechanism for setting wages is employed in both cases.'*[63] On the other hand, the principle of a safe and healthy working place, or the prohibition of forced and child labour would demand the same standards everywhere regarding a particular industry. Thus, the universal principles do not provide unreasonable or arbitrary yardsticks but merely seek to establish an equitable base for universal human rights.

The International Bill of Rights provides an exhaustive framework for universal human rights and it would be ideal if universal standards could be agreed upon regarding all human rights contained in the Bill. But as the task involves tough decisions to be made and does not seem to be achievable quickly, I suggest that MNCs should be bound to follow the universal standards at least regarding the core universal human rights. This would begin the process towards universal standards for universal human rights.[64]

The 'core' of international human rights is difficult to define or agree upon as it necessarily involves a hierarchy or grading of human rights. Meron points out that some human rights are obviously more important than others, but except in a few cases (right to life, freedom from torture) the choice is exceedingly difficult.[65] The difficulty in choice, however, does not establish that the 'core' does not exist or that it cannot be agreed upon. Donaldson, while making a distinction between minimum and maximum duties of corporations,[66] draws a list of ten fundamental international rights. The list contains rights

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[62] *Id.* UN Draft Norms (para 8) lay down that *'transnational corporations and other business enterprises shall compensate workers with remuneration that ensures an adequate standard of living for them and their families.'*

[63] *Supra* note 1, p. 379. (emphasis in original)

[64] Skogly observes that using the 'core content' of human rights would be a good starting point for agreeing on minimal standards; Sigrun I Skogly, 'Economic and Social Human Rights, Private Actors and International Obligations' in Michael K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague: Kluwer Law International, 1999), pp. 255-56.

[65] Theodor Meron, 'On a Hierarchy of International Human Rights' in Philips Alston (ed.), *Human Rights Law* (Adershot: Dartmouth, 1996), p. 80. He argues that the UN Charter, UDHR, ICCPR, etc., have used the terms 'fundamental human rights' and 'human rights' interchangeably.

[66] *Supra* note 57, p. 62.

to freedom of physical movement, ownership of property, freedom from torture, fair trial, non-discriminatory treatment, physical security, freedom of speech and expression, minimum level of education, political participation, and the right to subsistence.[67]

Without being exhaustive or specific, it can reasonably be argued that any human right which is the bare minimum for survival and development is 'core'. The UNDHR and the UN Draft Norms could throw the necessary guiding light on the search of a 'core'. As the core human rights cannot be conditioned by any other condition, the standards regarding them need to be universal.

It must, however, be noted that the purpose of defining certain universal human rights in terms of 'core' is not to classify universal human rights into two categories and in turn degrading the status of what is not core. The attempt only marks the beginning to accomplish an end which envisages that the worth of human beings is the same all over the world and is not subject to man-made variations.[68]

2.2.4 'Home' of MNCs

Both the guiding principles – 'when in Rome, do as Romans do' and 'when in Rome or anywhere else, do as you would do at home'[69] – raise a presumption about the 'home' of MNCs. It is assumed that the home of an MNC, or even a corporation, is the country of its incorporation.[70] Such a *fictitious*[71] assumption is necessitated by

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[67] *Id.*, p. 81. The list is reached by applying the following three conditions: (1) the right must protect something of very great importance; (2) the right must be subject to substantial and recurrent threats; and (3) the obligations imposed by the rights must satisfy a fairness-affordability test.

[68] Dispute can arise as to what is man-made. For example, whether the religious texts which authorise, if at all as often argued, subordination of women are man made or God created? Similarly, what would be the status of customs which permit *Sati* (widow burning) or mandate sacrifice of children to avert divine displeasure?

[69] *Supra* note 1, p. 382.

[70] This is based upon, what Blumberg calls, the nationality principle and territorial principle. See Philip I Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford University Press, 1993), pp. 171-76.

[71] I treat recognition of the separate personality of the corporation as a legal fiction. If the corporation itself is a fiction, any assumption about its 'home' should necessarily be a fiction.

various reasons. For example, which laws of which country should govern the constitution, running of internal affairs and business activities of an MNC? Moreover, where should it be liable for payment of taxes? One way of resolving these and such other issues was to agree on the principle that laws of the 'home' country should guide all affairs of an MNC. This resolution was again based upon a hypothesis that the municipal legal regime is the best available way of controlling the activities of MNCs. This underlying assumption is, however, increasingly exposed under the new world order. With some possible exceptions,[72] the municipal legal framework of even developed countries suffers from natural limitations arising from peculiar *modus operandi* of MNCs. Accepting incorporation as a determinative factor for the 'home' of a corporation could be considered reasonable at a time when corporations ordinarily confined their operations to one country, but not now when MNCs operate at the transnational level.[73] This regulatory incapacity of the municipal framework to hold MNCs accountable for human rights violations compels us to look for alternatives.

I argue that one of the alternatives lies in redefining the *home* of MNCs. Since the area of activities of MNCs defies any notion of boundaries and since they expect a uniform international yardstick regarding international trade, it is a necessary corollary that their 'home' is no longer limited to the country of incorporation. Rather, it now extends to the whole world, for otherwise how could MNCs ask for *homely* treatment in the 'house of their neighbor'? When MNCs reap the benefits of trade in a borderless world, they should also be accountable to a borderless framework of human rights. Such an international regime of accountability should be based on the premise that the 'home' of an MNC is not the country of incorporation but the whole world. It must, however, be noted that the suggested redefinition of 'home' applies to the issue of human rights alone; the home of MNCs for human rights violations and for other purposes may differ.

The above reconceptualisation of the 'home' of MNCs would not only provide a sound basis for the acceptance of universal standards but

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[72] Reference can be made to the use of the Alien Tort Claims Act in the US and tort cases dealt with by the UK courts.

[73] *Supra* note 70, pp. 171-72.

would also help in regulating the *liberty* of MNCs to move and operate in any part of the world without any limitation of boundaries.[74] When there is no longer any difference in standards in home and Rome, the liberty of MNCs to choose Rome and then commute from one Rome to another Rome is regulated to some extent, for the possibility of adopting lower standards at a particular place is ousted.

3. MNCs and Cultural Relativism

A possible challenge to universal standards of human rights for MNCs can be based on 'cultural relativism', an argument which is often resorted to by states. It is outside the province of the present article to deliberate upon the question whether states are justified or not in making the plea of cultural relativism.[75] It analyses the issue from the angle of MNCs alone. Cultural relativism is based upon the belief that local cultural conditions determine the existence and scope of human rights enjoyed by the people in a given society. Fernando points out that 'a central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.'[76]

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[74] This often happens when one of the MNC's subsidiaries is involved in a human rights violation in one country and the parent company may transfer the assets of 'involved' company to some safer company.

[75] See, for discussion on this issue, generally Henry J Steiner and Philip Alston (eds.), *International Human Rights in Context: Law, Morals, Politics* (Oxford: Clarendon Press, 1996), pp. 192-255; Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', 76 *American Political Science Review* 303 (1982); Yash Ghai, 'Human Rights and Governance: The Asian Debate', 15 *Australian Year Book of International Law* 1 (1994); Abdullahi Ahmad An-Na'im, 'Human Rights in Muslim World: Socio-Political Conditions and Scriptural Imperatives' 3 *Harvard Human Rights Journal* 13 (1990); A D Renteln, *International Human Rights: Universalism versus Relativism* (London: Sage Publications, 1990); Rein Mullerson, 'Universal Human Rights in the Multicultural World: Reasons and Excuses for, and Circumstances Conducive to their Gross and Systemic Violation' in Meghnad Desai and Paul Redfern (eds.), *Global Governance: Ethics and Economics of the World Order* (London: Pinter, 1995), p. 133; and Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002), pp. 77-118.

[76] Fernando R Teson, 'International Human Rights and Cultural Relativism' in Philips Alston (ed.), *Human Rights Law* (Adershot: Dartmouth, 1996), pp. 118-9. See also Harrison, *et al*, *supra* note 38, pp. 41-44.

Donaldson writes that cultural relativism asserts that words such as 'right', 'wrong', 'justice' and 'injustice' derive their meaning from the attitudes of a given culture.[77] In sum, the argument challenges the universal character of both human rights and their standards; human rights standards are culture-specific and not trans-cultural. I would, however, argue that MNCs could not use cultural relativism as a shield for applying varying standards of human rights.

The fallacy in the argument of cultural relativism does not lie in the 'factum' of differences amongst cultures but in the 'effect' of such differences on human rights. Differences do exist in different cultures, but all those differences, though material on occasion, are not relevant for the purposes of universal human rights. Only those cultural differences should be kept in mind which do not conflict with universal human rights, or may, in fact, promote human rights. Moreover, it can also reasonably be argued that regarding 'core' human rights, people of different cultures hardly differ. For example, people of all cultures everywhere need food to eat, clothes to wear, houses to live in, clean air to breathe, access to medicines for cure, though they may differ drastically about the *content* of these basic attributes.

MNCs, therefore, should not rely upon relativism to justify relative standards for, at least, three reasons. First, the *culture* of human rights, which is based upon equal worth and respect of human beings irrespective of distinctions and differences, is superior to different cultures prevailing in the world, for the latter do not *always* afford equal respect to all human beings.[78] Second, since MNCs rely upon universalism, and not relativism, for pleading uniformity regarding rules and regulations governing international trade, it would be immoral for them to discard universalism when it comes to human rights. Third, MNCs hardly keep variable cultures in mind when taking management decisions and in fact, are driven by only one culture, i.e., the profit culture.

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[77] *Supra* note 57, p. 14.

[78] The Harare Declaration on Human Rights stresses the importance of developing 'a culture of respect for internationally stated human rights', as quoted in Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), p. 3.

The argument that MNCs should disregard cultural relativism and adopt universal standards of human rights may give the impression of being unreasonable, for it demands from MNCs more than what is accepted by states. After all, why should MNCs, primarily established to maximise profit, comply with universal norms when even states, which have primary responsibility for the realisation of human rights, are reluctant to abide by such yardstick? This challenge sounds impressive but can be overcome by understanding the distinctions in composition, nature and modus operandi of MNCs and states. First, the state is a creation of people who control its policies and actions by various modes. MNCs, on the other hand, are not created either by people or state, though the corporation is a creation of the state. Because of this difference, neither the state nor the people, as the ultimate beneficiary of the creation of a corporation, have any effective control over the actions of the MNC.[79] Second, the nature of the separate legal personality of the state, as distinguished from the people behind it, is different from the separate personality of the MNC. Though both are the result of a legal fiction, there is a vital difference between the two. Heavy inroads have been made both into the doctrine of sovereignty of state and of fixing liability directly on state officials, independent of the state.[80] On the contrary, the fiction of the separate personality of the MNC, qua its management as well as subsidiaries is still running wild, for the piercing of the corporate veil is proving to be an inadequate tool. Third, the sole motive of an MNC is maximisation of profit, whereas a state acts beyond the profit principle. The central concern of a state is still the welfare of its people. Fourth, an MNC, unlike a state, operates at the transnational level. Since an MNC has no defined boundaries, its appearance as well as its

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[79] Here one must make a distinction between people and shareholders. Shareholders might have the power to control the actions of MNCs, but one must not lose sight of the shareholders' motive, as compared with the people's motives, in exercising such control.

[80] See the changes made by the Crown Proceedings Act (UK), 1947. See also the Indian Supreme Court judgments in *N Nagendra Rao & Co.* v. *State of AP* (1994) 6 SCC 205: AIR 1994 SC 1663; *Rudul Shah* v. *State of Bihar* (1983) 4 SCC 141; *Nilabati Behra* v. *State of Orissa* (1993) 2 SCC 746; and *Common Cause* v. *Union of India* AIR 1999 SC 2979.

disappearance can be deceptive. Fifth, an MNC operates through a web of parent and subsidiary companies, which is not the case with a state. In view of above differences, cultural relativism is no argument for MNCs even if invoked, rightly or wrongly, by states. MNCs cannot claim parity with states merely because they are performing like a state or state's functions. In fact, their claim of parity with states may boomerang to their detriment.

4. Conclusion

The human rights movement has reached a stage when it is not limited to imposing obligations merely on states not to violate and to respect human rights. Now it is vigorously argued, I think rightly, that even non-state actors, including MNCs, should be under a legal obligation to respect human rights. But such an extension of duties presents its own difficulties. One of the critical issues in this area relates to the nature of applicable human rights standards to MNCs. Since MNCs, unlike states, operate at the transnational level, they have the choice to apply different standards in different places of operation. More often than not, this freedom to choose standards results in the adoption of inferior standards of the host countries (mostly under developed or developing) as compared to the home country.

In this article I have tried to demonstrate, with the help of the Bhopal case, that the business approach of 'no standard standards' is unsound as it fails to protect even basic human rights. Therefore, the business approach should be rejected in favour of the human approach of universal standards. The standards regarding universal human rights need to be universal, for by application of varying standards they lose their universal character. They no longer remain 'human' if they assign different values to different people and cannot be considered 'rights' if their realisation is subjected to any other condition of lesser value. In other words, whether in 'Rome or anywhere else' the MNCs should do what they do at 'home'. For human rights purposes the *home* of MNCs is not the country of incorporation but the whole world as the nature and extent of their activities defies any conventional boundary of home. I have further argued that even the plea of cultural relativism cannot support the claim of MNCs to adopt varying standards.

It is true that the task of reaching an agreement on universal

human rights standards for MNCs is full of complexities.[81] But the importance of the objective involved in the process is a sufficient justification to grapple with those complexities. I believe that discarding double standards and agreeing on universal standards would not only dispel the fear of MNCs of 'loosing economic competitiveness' but would also lead to the equitable development of the world as developing countries would no longer have to relax their human rights norms just to attract foreign investment. The present article makes a humble attempt to build up a case for the evolution of universal human rights standards for MNCs.

[81] This is evident from the fact that dispute still exists regarding the application of universal standards by states. But, as suggested earlier, lack of consensus on such standards for states is no bar or hindrance to the evolution of universal standards for MNCs, since MNCs differ distinctly from states.