IMPUNITY OR ACCOUNTABILITY IN THE EXTRACTIVE INDUSTRIES: REGULATION, REFORM, OR RESISTANCE?

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1. Introduction: The Limitations of Human Rights Discourse

Globalisation – the process of the expansion of capitalism worldwide – dates back to the 15th century trans-Atlantic slave trade. In that period, preceding by two centuries the consolidation of the system of sovereign states, the chartered trading companies were “the instruments by which enormous areas [were] brought under the dominion of the European colonial powers.”¹ Through the practice of these profit-driven non-state actors the rules of the nascent law of nations were formulated.

After the industrial revolution a positivist, state-centric discourse was adopted that better accommodated and facilitated the increasingly prominent role of the state in the administration of overseas possessions. The corporate non-state actor – once bestowed with sovereign powers – was reduced from subject to object of international law. That law has continued to evolve within the positivist framework,² notwithstanding the post-Nuremberg human rights paradigm that extended legal personality to individuals.³

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² See e.g. Jeanne M. Woods, “Reconciling Reconciliation”, UCLA Journal of International Law & Foreign Affairs 3 (1998), pp. 87-88 (arguing, in context of...
The current phase of globalisation – neo-liberalism – features the re-emergence of the corporate non-state actor in a quasi-sovereign role. Thus, to the extent that States remain the primary duty-holders under international law, while corporate actors assume more and more the functions traditionally exercised by the state, the international law discourse has limited ability to protect human rights, especially economic, social and cultural rights, which remain the normatively underdeveloped step-children of the human rights family.

This essay begins with a critique of the liberal theories of property rights that legitimised the colonial project, and the role of the positivist doctrine denying corporations international legal personality. It next chronicles U.S. military policy toward Africa and its links to corporate exploitation of energy resources. Finally, the paper considers the regulatory regime applicable to corporations and the potential impact of the adoption of voluntary corporate codes on human rights standards.

2. From Liberalism to Neo-Liberalism

The rights of self-determination and permanent sovereignty over natural resources – preconditions to the realisation of economic, social and cultural rights in Africa – remain central to the debate over the protection of the latter. The former rights have long been the focus of struggles challenging the ideology of conquest that is inextricably woven into the international legal imagination, and that is justified in the name of a “civilising mission.”

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3 South African Truth Commission, that sovereign prerogatives often supersede duty to prosecute human rights violations).


5 The right to self-determination is the collective right of peoples to “freely determine their political status and freely pursue their economic, social and political development.” This right is codified in Articles 1(2) and 55 of the United Nations Charter. See *U.N. Charter*, Art. 1, para 2 & Art. 55.