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In 1997 I was interviewed by a Swedish business newspaper about Corporate Social Responsibility ("CSR"). Some days later I ran into a CEO of a Swedish multinational corporation. I curiously asked if he had read the article and, if so, what he thought about it. The CEO answered: "All that about ethics is very interesting. But how much does it cost? How long does it take to become ethical? And what are the results?"

This gives you a picture of what business is all about. The main task of a corporation is to earn money to its shareholders. Corporations are no "good-doers". That is not their role in society, as they put it. Only if corporate misbehavior adversely affects business, will the corporation work for betterment. Does the existence of death penalty in the US or in any other country have any impact on a corporation's decision to invest in such country? I do not think so. Not as an isolated phenomenon. At least not today or in the near future.

Before I try to focus on the subject-matter, I wish, from my experiences as an international business lawyer, to give you some ideas of corporate culture today and what threats the corporations are facing and what they react to. I hope this can form a basis for our discussion.

Professor Jeffrey Garten, Dean at Yale Management School, says in his book "The Mind of the CEO" that the work has become so complex that only a few managers can perform their tasks satisfactorily. The average time today as a CEO is only 4 years. The corporate sector is facing new demands that frustrate many managements.

### Background

Twenty years ago we lived in a relatively simple world. The cold war and the terror balance were stabilizing factors. Our major concern was the risk of a nuclear war - daunting but still uncomplicated.

Then the Berlin Wall fell and many borders disappeared. We felt optimism and belief in the future, a peaceful future we thought. What really happened we all know. The peace dividend from the collapse of the Soviet Union has not appeared.

We are now living in a world of rising risks and increasing volatility: business risks, environmental risks and risks of military engagements. Risks of terrorism, criminality and disease. We also run the risk of unpredicted catastrophes as complex new systems interact, such as distributed computer networks, the Internet and modern capital systems. On top of all this we have poor management and lack of leadership.

The nation state on its own is too small and often too fragmented to provide an effective response to problems of a globalising world. International and intranational institutions are often slow to respond. They are under funded and are driven by the need of broad consensus. In contrast to the nation state, which has power over its own territory only, the multinational corporations ("MNC") have some influence in the countries where they operate. The increasingly informed and critical general public is realizing the weakness of the nation states on the global level. This imposes an increasing responsibility on the other major organ of society - the corporate sector. The corporations have been remarkably unprepared for this development.

### Threats the corporate sector faces today

The activist groups are successfully scrutinizing the operations of the MNC's. Antisocial behavior is made public through the Internet and the media. A digital camera and a mobile phone can make public embarrassing facts with lightning speed. The corporations have nowhere to hide, not even in the Third World.

The trademark is often the most valuable asset of a MNC. A tainted trademark affects the business; the consumers will stop buying, the cost of capital will increase, the stock will possibly decline in value and recruiting top talent will be more expensive. Even Wall Street analysts are beginning to realize this. It is all about risk assessment.

But this is not the whole story. The values of the general public are changing faster than the legislators can enact necessary laws and conventions. This creates opportunities for lawyers (especially common-law lawyers). Violations of Human Rights ("HR") by corporations are increasingly ending up in the courtrooms.

### Some legal background

International law is made by states for states. Corporations doing business over nation borders are not subject to international law as they are not states. Only as an international law is implemented in the legislation of the nation state, does it become binding also in relation to individuals and legal entities - but only within that state.

The rapid development of society during the 1990s and the myriad of local laws, conventions and rules concerning HR, have created a confused situation. The legal systems are in many respects out-dated and inefficient. Large MNC's are beyond the reach of many states to regulate them. The uncertainty of law is a growing problem.

But the judges, mainly Anglo-Saxon, are not waiting for the legislators to catch up. They have in a number of court cases strongly spoken out against MNC's violations of HR. These judges are changing justice to conform to changing values. International law is not static.

In the most recent years Freeport McMoran, Rio Tinto, Talisman Oil, Shell, Unocal, Texaco, Nike, Gap, Nordstroms, Polo Ralph Lauren and many other corporations have all been subject to lawsuits in the US for their activities far from the location of the litigation. Whatever the final outcome will be, the broad discovery rights allowed by US courts, can force a defendant to disclose embarrassing information about its corporate operations. This generates adverse publicity and presents further litigation risks.

The legal landscape is changing rapidly. I will give you some examples.

### Piercing the corporate veil

The corporate idea is that a shareholder shall never risk more money than invested in the company. The company has its own identity and is alone responsible for its acts and omissions. Slightly more than a century ago, a corporation was not allowed to own shares in another company.

Today there are corporate clusters with a huge number of entities in many countries, with a powerful parent company at the top. The parent can hide behind an undercapitalized subsidiary to reduce its risk exposure.

Recently UK courts have accepted jurisdiction over parent companies for damage caused by their overseas subsidiaries. If the management of a parent company has control or knowledge of its subsidiaries' operations, a "duty of care" arises. The parent company will be accountable for failure to take steps to prevent the subsidiary from *inter alia* violating workers' safety or HR.

In 1997 Cape plc, London, was sued by employees of its South African subsidiary. The claimants had been exposed to asbestos dust and fibre from the South African operations. They argued that the subsidiary was in fact controlled by Cape in London and that Cape therefore owed them a duty of care. In June 2000 the House of Lords ruled in favor of England as the proper legal forum (with the parent company as defendant). In December 2001 the case was settled. Cape agreed to pay GBP 21 million to the claimants.

### Double standards

Can a corporation hide behind local laws? Most corporations are of the opinion that their operations in a developing country are socially responsible as long as their subsidiaries comply with the local laws of the host country. These laws can be weak and undeveloped; no environmental protection, no security for the workers, low wages, no unions, etc. Many nation states are unwilling, for competitive reasons, or unable to influence the

behavior of companies effectively. MNC's that are applying double standards, one at the home country and one at the host country, have recently been sued in the US.

#### Operations abroad - increasing responsibilities

There are three main alternatives for a corporation to consider before deciding whether to invest abroad or not:

(i) Not to invest at all is the conservative alternative. But if the target country is in the Third World, this would be a pity. Developing countries need foreign investments to increase the pace of development.

(ii) To invest but stay passive and try to serve as a good role model - to turn a blind eye to the conditions in the host country. This is no longer considered as enough by the public opinion in the west - if the host government is repressive. The MNC manufactures products or extracts natural resources, it pays taxes, it develops infrastructure. All this increases the government's repressive strength. The MNC also provides legitimacy to such government (e.g. extraction companies such as Talisman Oil and Lundin Oil have been heavily criticized for operating in Sudan).

(iii) To be proactive by working for a sustainable future of the host country is necessary today. This is a difficult task to achieve. The MNC's generally do not know what to do. And they do not want to get involved in politics except if extreme circumstances so require (e.g. Shell's active criticism of the Apartheid in South Africa; various attempts among competing companies to form "good cartels" in developing countries to jointly influence a repressive host government; to make sure that security forces do not violate HR).

#### The Shell case

This case shows how things can go very wrong. It is also interesting as it concerns death penalty.

Royal Dutch Petroleum and Shell Transport and Trading Company together with the former CEO in Nigeria, were sued 1996 in a District Court on Manhattan for violation of HR under the 200 years old US Alien Tort Claims Act ("ATCA"). The relevant part of the Act states: "*The District Courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States*".

The Nigerian government tortured and hanged Mr. Ken Saro-Wiwa, an author and the leader of the protest movement against Shell's oil extraction. What perhaps made this matter to a media disaster for Shell was the statement of its spokesman:

*"I am afraid I cannot comment on the issue of the Ogoni 2, the tribunal and the hanging. This country has certain rules and regulations on how trials can take place. Those are the rules of Nigeria. Nigeria makes its rules and it is not for private companies like us to comment on such process in the country."*

This statement moved Shell from the business pages to the headlines.

The plaintiffs, relatives of Mr Saro-Wiwa, claim that Shell had been complicit with the Nigerian government. Shell's attorneys rebutted that it would not be acceptable if US courts were converted to international tribunals with universal jurisdiction, to judge where the parties and the subject-matter have no connection with the US.

The case was dismissed by the Court of the Southern District of New York but the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit allowed the case. It *inter alia* found that "*.. such violation of international law constitutes violation of the domestic law of the United States, giving rise to a claim under the ATCA whenever the perpetrator is properly served within the borders of the United States.*" The US Supreme Court upheld this decision and the case is now back to Manhattan for hearing.

The days are gone when corporations can stay out of domestic affairs. Business and HR are no longer separate disciplines. This development is not only a headache for CEOs and Directors but also an opportunity. These and other cases show that when HRs are violated, MNCs can be sued in courts at central commercial jurisdictions for the operations conducted by a subsidiary anywhere in the world. What is happening is that non-binding norms of international conventions are slowly but surely being converted to material customary law; the "soft" norms are getting "hard".

You are certainly aware of the court cases in the US against the banks and corporations that, during World War II, had business relations with the Nazis. Three months ago, AIG, NY-Life, JP Morgan Chase, Fleet Boston among others were sued for their involvement in the slave trade which ended 1865. The claimed amount is USD 1.4 trillion. Just recently Swiss banks were sued for their financing of the South African Apartheid regime.

These cases are of the more spectacular kind, but they show that the legal argumentation seems to have no barriers.

As I mentioned, the legal landscape is changing. If a corporation violates any of the fundamental human values, described in the Preamble to the Universal Declaration of Human Rights, the ILO principles and the OECD guidelines, jurisdiction will always be found.

### Impact of Death Penalty

The death penalty is the ultimate denial of HR. It is killing of a human being in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights. Unlike imprisonment, the death penalty entails the risk of judicial errors which can never be corrected.

The existence of death penalty is only one of many negative factors, which will be included in the risk assessment conducted by a corporation before investing in a country. If the host country is in the Third World, the existence of death penalty is a symptom indicating that the step to violate HR in other respects could be short. This factor can damage the reputation of a corporation doing business in such a country. If the host country is a well-performing democracy, the existence of death penalty will perhaps be considered as a risk by the corporate leaders, but a lesser risk (even if executions of humans could be considered as widespread or systematic violation of HR, as defined in international customary law).

The Shell case shows that being related to killing in the name of justice can damage a corporation's reputation immensely. This was Nigeria, but when will it be relevant in relation to more civilized countries? Many of the major NGOs, such as Amnesty International, are pursuing effective campaigns against the death penalty. This will, at least in the long term, likely affect the public opinion and increase the risk exposure of a corporation, which is benefiting from or complicit with those who are related to death penalty (e.g. corporations who fund election campaigns of politicians who are for death penalty, may perhaps be considered as complicit).

In the US the impact of the death penalty on the commercial interests is being discussed. I have been told that the non-Caucasian inhabitants of a state in the US, which exercises death penalty, have a lesser sense of security. This may negatively affect their solidarity towards their society and, thus, be less motivated as employees. If this is true, corporations may possibly consider such a state unattractive compared with a state without death penalty.