

Extending Corporate Liability to Human Rights Violations in Asia*

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The focus of this paper is to look at recent developments in international human rights law that hold corporations liable for human rights abuses and explore the protection provided under the Alien Tort Statute to victims from Asia. Legal infrastructures are lacking in many Asian countries, resulting in victims seeking other means for relief. Domestic legislation can be used to regulate and monitor corporate human rights violations, but multilateral efforts that create measures to enforce corporate accountability should also be considered to increase protection of human rights.

Keywords: *Human Rights, Corporate Social Responsibility, Alien Tort Statute, Asian Developing Countries, Violations*

1. INTRODUCTION

The traditional paradigm of international law has focused on the responsibility of the nation-state and individuals. Previously, the scope of international human rights law was limited to violations by states. However, an increasing number of cross-border transactions by non-state actors including international organizations, non-governmental organizations and corporate entities have resulted in a need to move beyond the traditional paradigm that focuses on human rights violations by state actors. Corporations have infringed human dignity through direct corporate activities, or through cooperation with state actors. Infringement of human rights by non-state actors has created a view that attempts to establish a legal process to impose human rights obligations directly on corporations to propose that corporations be held responsible for human rights abuses that take place in their sphere of operations (Ratner, 2001:443-9).

Transnational corporations (TNCs) have become powerful actors in the global arena. The situation for human rights issues is different in many developing countries because many see corporate investments as an opportunity for economic growth and development. Some of these governments do not have the resources necessary to monitor corporate behavior. In extreme cases, governments have granted corporations de facto control over territories in exchange for corporate investments. In other cases, governments have used corporate resources to abuse human rights (Ratner, 2001:462-3).

Even if corporations do not act with the intent to assist state activities that violate human rights, there has been a tendency for developing states to be more lenient regarding regulation of corporate activities in efforts to attract corporate investments. It has become easier for corporations to transfer operations to states with fewer regulatory burdens, and so many corporations have become more independent from government control (Ratner, 2001:463). Some have as much, or even more, power than states. Under circumstances where corporations have more power than states and states desire corporate cooperation to increase foreign investment and enhance economic growth, relying on state duties is not sufficient

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enough to protect individuals from human rights violations. Thus, various types of problems have emerged. There have been some cases where states have been unable to control TNC activities, while other states go so far as to solicit corporations to impinge on human rights.

Many governments in Asia continue to believe that foreign investments have a positive impact on development. Despite studies that indicate that development is the prime vehicle for promoting realization of human rights, such as the right to adequate standard of living, rights of education, food, and housing, the right to work and the right to social security, development has overtaken poverty as the single largest cause of human rights violations and environmental degradation in South Asia (Dias, 2000:415). The problem is especially dire in Asia because it lacks the mechanisms necessary to hold corporations accountable for human rights violations. Asia lacks both domestic and regional infrastructures to provide appropriate protections to locals from abuses.

In light of the challenges faced in Asia, despite developments in the international human rights arena, this paper aims to explore how international legal customs have developed to hold TNCs liable for human rights violations and possible measures to provide protection within the Asian context. Various market forces can contribute to controlling corporate behavior and internal structures of the corporation to make them more accountable (Engle, 2004:103). In addition, it looks at the example of the Alien Tort Statute (ATS) as a forum that provides redress to victims and incentivizes corporations to be more responsible. Market forces, when linked with legal regulations like ATS, can be used to encourage improvement of working conditions for labor from developing countries.

The Alien Tort Statute promotes goals of protecting human rights and denies safe haven to human rights abusers by allowing aliens to bring tort claims against transnational corporations in U.S. district courts. Recently, it has been used for claims against corporations that have violated the laws of nations or are complicit in such violations (28 USC 1350, 2009), bringing transnational corporations into U.S. courts for violations taking place overseas (*Khulumani v. Barclay Nat'l Bank*, 2007). The threat of ATS litigation encourages corporations to improve their human rights policies and practices to avoid litigation, because the risks to business reputation from credible allegations of human rights abuses can create incentives to enforce corporate social responsibility (Dellinger, 2009:55).

2. EXTENDING CORPORATE LIABILITY TO INTERNATIONAL HUMAN RIGHTS VIOLATIONS

The United States Department of State estimates that 600,000 to 820,000 men, women and children are trafficked across international borders each year, with approximately 80 percent consisting of women and girls, of which up to 50 percent are minors. It has also been documented that many are trafficked with the help of corporations (US Government, 2005). In response to problems that have emerged with corporate activities in developing countries, The Council of Europe Convention on Action against Trafficking in Human Beings has suggested states adopt legislative or other measures that are necessary to ensure that a legal person can be liable for a criminal offense (Cernic, 2008:130).

International human rights law protects fundamental human rights that cover both individual interests and the interests of society. They are generally rights that include common universal values of individuals. For example international human rights includes preserving the security of persons, the freedom of individuals from torture, inhuman and

degrading treatment, arbitrary killings, arbitrary detention, enforced disappearances, rape, sexual slavery, extrajudicial killings, genocide, war crimes, crimes against humanity, and other violations of humanitarian law, and other international crimes defined by international law (Cernic, 2008:16).

There has been increasing awareness of the role of private entities in violations of human rights (Weiss and Shamir, 2011:155). Human rights obligations of states and corporations are different in nature and scope. Some human rights obligations are inherently connected with states, such as the right to fair trial, the right to nationality and the right of political asylum. These rights are connected to the concept of state sovereignty and fall within the public sphere of obligations of the state (Cernic, 2008:130). The nature of some rights and obligations cannot be extended to corporations. Human rights obligations are much wider for the state than for corporations. Thus, corporate responsibilities should not mirror the duties and responsibilities of states.

Corporations acting on the international level must observe obligations to protect fundamental human rights preserving the security of persons (Cernic, 2008:130). Fundamental human rights that preserve the security of persons aim to protect the full capacity of any individuals' right to live. Crimes against humanity include murder, enslavement, deportation or forcible transfer, torture, rape, or other inhuman acts, and these crimes are committed as part of a widespread and systematic attack directed against a civilian population.

Corporations should also protect fundamental labor rights. The International Labor Organization Declaration on Fundamental Principles and Rights at Work (ILO Declaration, 1972) includes minimum principles on which the fundamental labor rights of corporations are based (Fitzgerald, 2005). The ILO Declaration is a statement of commitment by governments, employers' and worker's organizations. It has also been interpreted to apply to corporate activities. Fundamental human rights, including labor rights, encompasses freedom of association, the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor and the elimination of employment and occupational discrimination (Cernic, 2008:16).

Despite increased awareness of the corporate involvement in human rights violations, extending liability to corporations is more challenging. Most countries lack national legislation that establishes duties of corporations with respect to human rights. Even for states that have legal instruments that apply to corporate entities, the scope of jurisdiction is largely limited to domestic spheres and cannot be used to regulate activities in host states (Weiss and Shamir, 2011:155). The scope of domestic legislation that exists in most developing countries in Asia is very limited. It does not provide adequate protection to locals against corporate human rights violations.

3. THE HUMAN RIGHTS ELEMENT OF CORPORATE SOCIAL RESPONSIBILITY

On a broader level, the international community has recognized that international law should be applied within the context of human rights to monitor the behavior of corporations (UN Human Rights Norms for Corporations: preamble). By enforcing standards of corporate responsibility and accountability, it will be possible to eliminate any incentives that may be perceived by countries in providing lower standards of corporate behavior or cooperate with egregious corporate behavior (Cernic, 2008:16). In particular, human rights corporate social

responsibility measures include the assurance of basic standards of treatment to all people, regardless of nationality, gender, race, economic status, or religion. Human rights policies generally guard against issues such as child labor in manufacturing, government action depriving citizens of basic civil liberties and forced or prison labor. With a corporate responsibility framework, it will be possible to limit the competitive advantage of corporations that undergo violations to human rights for corporate interests. A corporate accountability framework can create more certainty and stability for corporate global business, and can clarify expectations for corporate responsibility for human rights in their operations (U.S. GAO, 2005). Responsibility mechanisms by corporations can include internal activities or broader efforts on a regional or international scope.

Many corporations have taken up Corporate Social Responsibility (CSR) by adopting various voluntary initiatives, as well as private codes of conduct, both internal and industry wide. The World Bank has defined CSR as “the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and the society at large to improve their quality of life, in ways that are both good for business and good for development. Businesses do not fill the role of government, but rather help to promote human rights in their own sphere of competence.” (Dias, 2000:43) It is founded on the idea that business decisions affect societal stakeholders and business is responsible for those effects (Swanson, 1995:43, 60). Some businesses engage in CSR under the belief that they are ethically obliged to do so, but others assume CSR activities are in the corporation’s own interests (McWilliams and Siegal, 2011:117). Multinational corporations that proactively implement sound CSR practices related to the protection of human rights will gain various benefits such as an effective marketing edge or improving their reputation among stakeholders.

According to the results of an extensive program of research and consultations undertaken by Ruggie, the UN Special Representative of the Secretary-General for business and human rights appointed by Kofi Annan in 2005, labor rights were by far the most recognized of rights in corporate policies. All Fortune Global 500 respondents to the study cited non-discrimination as a core corporate responsibility, with the highest rate of recognition in the business recognition report being of non-discrimination and workplace health and safety (Ruggie, 2006a; 2006b). Other rights identified included the freedom of association, the right to collective bargaining and the prohibition against child and forced labor. Ruggie conducted a second survey to compare trends in Chinese companies, discovering that Chinese companies recognized rights at a lower rate than the companies in the global sample with the exception of the right to development, which was more often recognized in Chinese companies (Bader, 2008). The contrast can be interpreted as a reflection of the influence that corporations receive from the values presented by their home governments.

Corporate initiated codes of conduct are becoming more common. A corporation that follows both internal and external codes of conduct will have a more effective Corporate Social Responsibility framework that establishes trust from stakeholders. International organizations have created a class of codes to apply universally to all transnational and local business organizations to encourage corporate responsibility. For example, the OECD Guidelines for Multinational Enterprises or the United Nations Global Compact (UNGC) (Cernic, 2008:16) were created by industry-controlled organizations.

UNGC encourages corporations to embrace and enact ten principles concerning human rights, labor rights, the protection of the environment and corruption. UNGC asks businesses

to support and respect the protection of internationally proclaimed human rights within their sphere of influence. It also suggests that businesses make sure that they are not complicit in human rights abuses. Labor rights that do not specify which human rights businesses should support and respect are carved out as an exception. The limitation of UNGC's effectiveness is that it does not provide mechanisms for monitoring and sanctioning corporations that violate the principles. The Global Compact has attracted a large number of participants, including corporations in over 120 countries worldwide (Cernic, 2008:16). However, without an effective monitoring system, the effects of UNGC have been marginal.

The Organization for Economic Cooperation and Development 1976 Guidelines for Multinational Enterprises requires multinational enterprises to respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments (OECD, 2001). The UN's Declaration on the Rights and Responsibilities of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms states that private actors have an important role and responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized (Cernic, 2008:16).

Legal persons are included in the preamble of Universal Declaration of Human Rights, which suggests that all organs of society "shall strive by teaching and education to promote respect for the rights and freedoms and by progressive measures." (UDHR, 1948:Preamble) The UN Human Rights Norms for Corporations recognizes that corporations are obliged to observe international value systems, including human rights. The United Nations has acknowledged that corporations have the obligation to promote, respect and protect human rights established under international law (Cernic, 2008:16). The United Nations Global Compact encourages businesses to support and respect the protection of internationally proclaimed human rights.

A key characteristic of these codes is their voluntary nature. They also require participation of non-state actors to develop them and commonly refer to human rights obligations within international treaties. Enforcement of these codes can be achieved through sufficient monitoring and reporting activities. The Human Rights Council has commissioned a report on the possibility of developing a binding code for transactional corporations based on international human rights standards (Ruggie, 2008a).

The impact of corporate codes of conduct has been limited because they lack a monitoring or enforcement mechanism and because an effective human rights compliance regime has to be more involuntary in nature. Current initiatives lack a consensus and are limited to prescriptions of vague standards. Existing measures do not resolve dilemmas of applying different standards at home or host countries, nor do they adopt an indirect approach to deduce obligations for TNCs under international human rights law. There is no clear or universal human rights standards offered which can be applied by and enforced against TNCs (Deva, 2003:1, 18).

In response to this problem, it has been proposed that the World Trade Organization (WTO) undertake supervision of human rights violations by corporations, under the belief that human rights issues are not outside the scope of the WTO and its objectives to liberalize international trade. The proposed enforcement role by the WTO is founded on the idea that trade and human rights are interconnected (Deva, 2003:1, 18, 116). In addition, because the WTO has also been severely criticized for its role in creating conditions that permitted

human rights violations to occur, it is attempting to engage civil society and create transparency regarding the impact of trade rules upon human rights (Pillay, 2004:74). It has set forth the '10 benefits of the WTO Trading System' which include promotion of peace, an easier and more efficient life for all, greater incomes, more jobs and better standards of living. However, despite these efforts and the WTO's conformity with international human rights law, to position the WTO as a core institution responsible for international human rights violations would be unfounded and beyond the scope of its institutional power.

Sanctions stronger than promoting values of corporate responsibility are also available to international organizations, which can contribute to overcoming some of the limitations due to the lack of a monitoring or enforcement mechanism. Under Article 41 of the UN Charter, the Security Council has the power to interfere with the course of business activities in case of threats to peace, and impose sanctions on State, individuals, groups of individuals or legal persons (Joyner, 2003: 329, 330-332).

Corporations that are already involved in a given armed conflict can be directly targeted by sanctions. In other cases, corporations are preventively prohibited from carrying out certain activities linked to this conflict. However, sanctions provided by the UN Security Council are limited. They do not provide the efficacy of actual laws that hold corporations accountable for breaches of international human rights violations. Also, the UN does not have the authority to directly prosecute violations of its embargoes (Bismuth, 2010:203, 211). The value of the sanctions imposed by the Security Council is limited to preventing or restricting economic activities, impacting corporate behavior in armed conflicts, highlighting the existence of selective mechanisms for imposing direct responsibility on corporations for violations.

Several international human rights treaties include state obligations to protect human rights in relation to the activities of a corporation (Knox, 2007). Whether or not the scope of international treaties includes corporate behavior, some continue argue that corporations do not have direct international legal obligations and should only have limited indirect obligations (Cernic, 2008:16).

For example, the International Convention on Civil Liability for Oil Pollution Damage and the COE Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment place responsibilities on businesses by extending their reach to legal persons (Cernic, 2008:16). Both conventions define persons liable to the convention as any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions. The hazardous waste convention imposes strict liability on the corporate generate of hazardous waste (Council of Europe, 1993).

International human rights treaties have not been an exception to the indirect regulation rule. Several international human rights treaties indirectly identify obligations for corporations. For example, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) stipulates that each state shall prohibit and bring to an end... racial discrimination by any persons, group or organization, which may appear to include a private corporation. However, CERD does not impose obligations to avoid discrimination against groups or organizations – it only addresses states. The Anti-apartheid Convention provides that states are to declare criminal those organizations, institutions and individuals committing crimes of apartheid (Cernic, 2008:16).

Corporations have expressed their commitments to protect human rights through various agreements. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Corporations and Other Business Enterprises with Regard to Human Rights states

that corporations are required to promote respect and protect human rights recognized in international as well as national law, and it has been described as a restatement and clarification of the existing human rights obligations of corporations. The primary obligations require corporations to promote, secure the fulfillment of respect, ensure respect of and protect human rights (U.N. Economic and Social Council, 2003). Both the international community and corporations have recognized a duty imposed on corporations to protect individuals against corporate human rights violations. Nonetheless, it is true that most international treaties directly address states. Although there is no actual restriction for corporations to comply with direct obligations under international law, under most treaties, it is the responsibility of the state to translate their international obligations into national legislation that can be applied to corporations. Despite the lack of domestic legislation that provides protection within Asia for human rights violations, individuals have found a forum for relief against corporate human rights violations in US courts under the Alien Tort Statute since the 1980s.

4. THE EFFECT OF ECONOMIC GROWTH ON HUMAN RIGHTS IN ASIAN DEVELOPING COUNTRIES

Development appears to be the prime vehicle for promoting human rights, including the right to adequate standard of living, rights of education, food, and housing, the right to work and the right to social security (Dias, 2005:415). Ironically, there has been increasing evidence that the impact of corporate activities in developing countries can result in human rights violations (Human Rights Watch, 2008; Ruggie, 2008a). It has also been found that in terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources than some states. Developing countries frequently lack the domestic legal infrastructure necessary to protect locals from human rights violations. Moreover, even though environmental preservation and rehabilitation remain as high priorities for development (Cernic, 2008:16), these values have been sacrificed for other forms of development.

It has been well established that foreign direct investment can stimulate economic growth, development and employment, and can contribute to improving human rights in many developing countries as a direct, or indirect, effect and consequence of the presence of investments (Cernic, 2008:16). However, when corporations do not commit to observing human rights standards, foreign investments can result in human rights violations. Depending on the nature of the investment and the actions of the investing entity, foreign investments can have either a positive or negative effect on human rights. Some high-profile examples are British Petroleum's development of the Cusiana-Cupiagua oil fields in Colombia; and alleged human rights violations that occurred during Total and Unocal's construction of the Yadana gas pipeline in Burma and Thailand (Human Rights Watch, 1999).

The problem in Asia is that there is no mechanism to hold corporations accountable for the human rights violations generated through corporate activities. This is especially true for corporations with operations in developing countries, where the rule of law is ineffective and there are no legal remedies and no possibility of redress. Further aggravating the problem is the existence of a downward regulatory spiral, or "race to the bottom", that has created competition in efforts to attract foreign direct investment from Transnational corporations among developing country governments involving China, Vietnam, Singapore, and Malaysia

(Ruggie, 2008b).

Evidence indicates that TNCs operating in host countries have violated environmental and labor standards as well as infringed on individual human rights. Transnational corporations have also lowered production costs through systemic violations of core labor and antidiscrimination standards in Asia (Duke, 2000:339, 343-4). In Asia, a general framework needs to be created to ensure the protection of human rights, in spite of each government's eagerness to encourage development by relaxing regulations to attract corporate investments.

A 2006 International Labor Organization report estimated that there was an average of 218 million child laborers worldwide (ILO, 2006:6). It has been widely reported that corporations have used child labor in several Asian countries including Bangladesh, Malaysia, Vietnam, and Philippines. The worst forms of child labor include slavery and forced or compulsory labor, prostitution and production of pornography, and drug trafficking. Despite a requirement by ILO Convention 138 for the minimum age for admission to any type of employment or work that... is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years, a number of developing countries have allowed child labor. The ILO Convention 182 obliges states to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor (concerning people under the age of 18) as a matter of urgency (Cernic, 2008:16).

Complex human rights violations can arise during the process of industrial development. For example, in the first stage, developers and their government partners often force indigenous populations to relocate before the project construction can commence. During this stage, military forces employed to guard the project abuse local inhabitants. Second, when commercial production begins, a substantial new source of revenue serves to legitimize and empower autocratic and unstable regimes with shameless histories of human rights abuses. Third, once resource extraction and transport has commenced, there are adverse health issues. The costs of domestic goods and services rise sharply, HIV/AIDS hollows on the tails of flourishing drug markets and prostitution, and labor is drawn away from traditional public and private sectors in areas such as education and subsistence agriculture (Dias, 2000:43). Once the project matures, economic activity and labor demand declines, leaving dependent workers in an under-diversified economy.

5. ALIEN TORT STATUTE AS A FORUM TO REDRESS VICTIMS IN ASIA

The Alien Tort Statute was passed in 1789 as an attempt by Congress to keep lawsuits involving international law in federal courts (28 USC 1350, 2009):

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Since then, Alien Tort Statute suits have been brought against violations of international law such as terrorism, state-sponsored torture and extrajudicial killings, war crimes, crimes against humanity, and genocide. In 1980, the U.S. Court of Appeals for the Second Circuit heard the case of *Filartiga v. Pena-Irala*, allowing the first ATS case based on human rights abuses. The court found that torture perpetrated by a person invested with official authority violates universally accepted human rights norms, regardless of the nationality of the parties. In 1998, the first ATS case against a corporation was allowed to proceed, which led to many corporations starting to adopt policies designed to mitigate human rights abuses. The

Unocal litigation is one of a number of cases against corporations that alleged liability for human rights violations in foreign countries (*Doe v. Unocal*, 1998).

The case of Unocal in Burma illustrates a case where corporate investments led to human rights violations of local individuals. Burmese peasants made a lawsuit against the US oil company, Unocal, for forced relocation, forced labor, rape, torture and murder (Maassarani, 2007:135). Burma's Yadana gas field, located in the Andaman Sea about 60 kilometers off Burma's southwest coast, was developed in 1992 under a conventional "production sharing" contract between Unocal (28.26%), TotalFinaElf, the project operator (31.24%), the state-owned oil companies of Thailand (PTT-EP) (25.50%), and Burma (MOGE) (15%). Human rights abuses occurred along the 65-kilometer onshore Burmese section of the \$1 billion pipeline constructed in 1998 to carry the gas 649 kilometers across Burma into Thailand (*Doe v. Unocal*, 1998).

The victims filed suit in US Federal and California state courts under the Alien Tort Statute and state law, respectively, after allegedly suffering abuses at the hands of Burmese army units who were hired by the consortium to secure Yadana pipeline (*Doe v. Unocal*, 1998).

In 1998, the District court ruled, for the first time in US legal history that a corporation and its executive officers could be held liable under the Alien Tort Statute for violations of international human rights norms in foreign countries and that US courts have the authority to adjudicate such claims. In December 2004, an out of court settlement was reached. This was after the court had established that Unocal knew that the military had a record of committing human rights abuses, that the Project hired the military to provide security for the Project (a military that forced villagers to work and entire villages to relocate for the benefit of the Project), that the military committed numerous acts of violence while forcing villagers to work and relocate, and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortuous acts. Unocal learned that neglecting to act responsibly could ultimately put their reputation and bottom line at risk (*Doe v. Unocal*, 1998).

There have been two additional Alien Tort Statute proceedings involving projects located in Indonesia. In *Freeport v. K N Energy* (1991), Tom Beanal, a resident of Irian Jaya and the leader of the Amungme Tribal Council of Lambaga Adat Suki Amungme, brought a class action against Freeport-McMoran Inc and Freeport-McMoran Copper & Gold Inc in the Eastern District of Louisiana. The claim related to the Grasberg mine, an open pit copper, gold and silver mine situated in Irian Jaya (*Freeport v. K N Energy*, 1991).

Beanal alleged under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) that the Grasberg mine breached international environmental laws, that Freeport had committed cultural genocide by destroying the Amungme's habitat and religious symbols, and that Freeport's private security force acted together with the State of Indonesia to commit human rights violations. The court found that in relation to both the environmental allegations and allegations of cultural genocide, the relevant international laws that were said to have been breached had failed to attract universal acceptance. The court found further that Beanal's claims of torture and genocide were not pleaded with the requisite factual specificity and definiteness to survive a motion to dismiss (*Freeport v. K N Energy*, 1991).

In June 2001, eleven Indonesian citizens filed suit under the ATS and the TVPA in the US District Court of Columbia against Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation and Exxon Mobil Oil Indonesia Inc and PT Arun LNG Company. The plaintiffs alleged that the defendants contracted with a unit of the Indonesian national army

to provide security for the pipeline, in the context of the ongoing conflict between the Indonesian Government and Acehese (*Doe v. Exxon*, 2005).

The defendants allegedly made payment conditional on the army providing security, made decisions about where to build bases, hired mercenaries to train the troops and provided logistical support. The plaintiffs allege that Exxon and PT Arun were therefore liable for human rights violations committed by the Indonesian military, as aiders or abettors, joint venturers or as proximate causes of the alleged misconduct (*Doe v. Exxon*, 2005).

None of the legislation available in Asia is comparable to the protection that has been provided by the Alien Tort Statute (ATS) in the US. In the US, courts have applied a variety of tests to determine whether the acts or private individuals were closely linked to the state to make them liable.¹ The courts have found that when a private entity acts on behalf of the state, it is liable for state violations of human rights. These tests have been applied to the context of private corporations to determine whether corporate acts have violated international law for purposes of Alien Tort Statute.

The US provides a forum for victims of human rights violations perpetrated directly or with complicit participation of TNCs. The majority of plaintiffs seeking redress in a domestic court against corporate violators of human rights have brought suit in the US under the ATS (Pillay, 2004:489).

The Alien Tort Statute was adopted to “define and punish...offenses against the law of nations” (Trnavci, 2005:193, 222). The first cases (*Moson v. The Fany*, 1793; *Bolchos v. Darrel*, 1795) decided under Alien Tort Statute involved interpretation of maritime law.² Since then, however, US courts interpreted their jurisdiction to hear claims of torts which violated jus cogens norms. Since 1980, the Alien Tort Statute has been held to apply to violations of core principles of human rights by private individuals and corporations including allegations of mass murder, rape, torture, ethnic discrimination, environmental damages and unfair labor practices (Pillay, 2004:71). This has limited claims in cases of human rights violations because very few human rights have been recognized as attaining jus cogens.

US courts have interpreted the relevant section of ATS as granting jurisdiction to US courts to hear foreign tort cases and US district courts have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States (Pillay, 2004:71). Alien Tort Statute claims are twofold. The first is whether the alleged tort is a violation of the law of nations. The second is to determine who is subject to Alien Tort Statute.

In *Sosa* (*Sosa v. Alvarez-Machain*, 2004), the courts found it necessary to examine customary international law to determine whether the alleged tort is actionable under the ATS. Article 38(1) of the Statute of the International Court of Justice (ICJ) has been recognized as the leading authority of international law in the US. The authorities provided for in Article 38(1) provide means to determine whether a rule is international law (USC 103, 1987). When examining an ATS claim, courts should consider these sources of international

¹ E.g., U.S. civil rights laws also prohibit various forms of private discrimination, although the constitutional basis for those provisions does not involve the Fourteenth Amendment and its requirement of state action.

² The court considered whether an action of the return of a ship allegedly seized in violation of the law of nations could be brought under Alien Tort Statute; regarding following the piratical seizure and sale of slaves by the defendants, who were Spanish and French nationals.

law.³ In *Sosa*, the courts looked to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to determine binding customary international law. Using the standard in *Sosa*, other courts have turned to various sources of international law to define the scope of Alien Tort Statute and it has now been accepted that, in addition to the offenses at enactment, there is universal acceptance of defined prohibitions on torture, genocide, and certain war crime within the international community.

Less accepted norms require courts to make determinations on whether they are actionable under Alien Tort Statute. Corporate violations are likely to fall within these less accepted norms and subject to examination, making it difficult to make determinations. Further complicating the matter is that, once a tort has been established as actionable under ATS, courts need to consider which defendants are held liable. The Supreme Court has not ruled on a specific category of defendants that are held liable under ATS. It is also unclear as to which law to look at to make such determinations.

The first case, in which a plaintiff alleged a corporate entity and violated the law of nations, was in 1997 (*Kiobel v. Royal Dutch Petrol*, 2010). In *Doe I v. Unocal* (2002), Earth Rights International and the Center for Constitutional Rights took action on behalf of Bruma farmers. The suit alleged that Unocal was responsible for human rights abuses committed by Burmese soldiers during a pipeline project in which Unocal worked as a partner. The Ninth Circuit Court of Appeals overturned a 2000 district court decision, finding that victims of the military's abuses could not sue the California-based company, and remanded the case for trial.

First, the court determined whether the alleged torts of forced labor, murder, rape and torture qualified as violations of the law of nations. In analyzed international agreements, declarations and circuit interpretations of international law found that the torts qualified as violations of the law of nations. Next, the court considered whether the alleged tort required the party to engage in state action and held that Unocal Corp. could be held liable as a private actor for the alleged torts (*Doe I v. Unocal*, 2002). The court concluded that Unocal may be liable under the ATS for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor and that Myanmar Military and Myanmar Oil are entitled to immunity under the Foreign Sovereign Immunities Act. The Unocal court extended liability to corporate ATS defendants, but it did not distinguish between corporate entities and private individuals. The premise of the courts determination was whether international law holds a private actor or a public actor liable for alleged torts (Theophila, 2011:2859).

Since *Unocal*, 140 cases alleging human rights violations under the Alien Tort Statute have been filed against corporate defendants. Transnational corporations have the assets necessary to make settlements and are not entitled to foreign immunities. However, plaintiffs seeking redress from corporate defendants are faced with some procedural challenges. In *Sosa*, the court suggested that the plaintiff's claims under ATS should follow any local remedies that are available (Theophila, 2011:85, 2877).

Common law in the US recognized corporations as a "legal person." In 1909, the Supreme Court first held that corporations could be held accountable for illegal conduct (*New York Central & Hudson River Railroad v. United States*, 1909) and, since then, statutory law has treated corporations and individuals similarly. Under international law, the

³ The ICJ statute instructs a court to consider general principles of law together with rules established within binding international conventions. Courts also need to consider the judicial decisions and scholarship.

traditional view has not been to view corporate entities as subjects to international law, but more within the domain of domestic law. More recently, the International Court of Justice has suggested that customary international law should develop rules governing the international activities of corporations (Belg. V. Spain, 1970), and today, international law has recognized the corporate entity to have some duties and obligations under international law (Theophila, 2011:2878-9).

Recently, in 2010, the US Court of Appeals for the Second Circuit denied the ability of US courts to hold corporate “persons” liable for violations of the law of nations under the Alien Tort Statute. In *Kiobel v. Royal Dutch Petrole*, the majority holding focused on whether international law or domestic law should govern in making a determination of whether a corporation could be held liable under ATS and whether corporate liability was a norm of customary international law of sufficient specificity and universality to sustain a cause of action under ATS (*Kiobel v. Royal Dutch Petrole*, 2010).

Under this interpretation, corporations are no longer liable under ATS. Courts have had different rationales in determining corporations accountable under ATS. Some courts have stated that they assume corporations can be liable under ATS (*Presbyterian Church v. Talisman Energy*, 2009).⁴ Before *Kiobel*, no court had determined that a corporation could not violate the law of nations, but in 2010 the Second Circuit (*Kiobel v. Royal Dutch Petrol*, 2010), the US District Courts for the Central District of California (*Doe v. Nestle*, 2010) and the Southern District of Indiana (*Flomo v. Firestone Natural Rubber*, 2010; *Viera v. Eli Lilly*, 2010) held that courts did not have jurisdiction over corporate entities. While *Sosa* set forth a standard for the types of violation subject to Alien Tort Statute, the decision in *Kiobel* has created a debate regarding the issue of corporate liability. In the 1980s, the US government noted that a refusal to recognize private cause of action could damage the credibility of the nation in the protection of human rights (*Filartiga v. Pena-Irala*, 1980). However, without a clear set of standards for choice of law issues, the ATS may no longer provide a measure for protection against corporate human rights violations.

While the US seems to have moved a step backwards following its decision in *Kiobel* to limit corporate liability, it is currently awaiting the judgment by the Supreme Court with regard to this issue. On the other hand, foreign courts have increasingly extended liability for human rights abuses to American corporations. In Europe, regulation enables jurisdiction within the courts of EU Member States for cases against corporations registered or domiciled in the EU in respect of damage sustained in third countries (The Council of the European Union, 2001:1-23).

American courts are increasingly becoming involved in global issues and the future of legal mechanisms for holding TNCs accountable, especially in developing countries, is uncertain. From a broader perspective, ATS has provided victims with a forum for relief when self-regulation by corporations is unable to protect the local population (Slawotsky, 2005: 1065, 1109). Domestic regulation can provide measures that promote standards of corporate behavior which balance corporate responsibility and economic growth in developing countries. The Alien Tort Statute has provided jurisdiction for relief to victims in Asia. Asian countries need to move forward and join the global movement towards enforcing measures that hold corporations accountable for violations.

⁴ Assuming corporations may be held liable for violations of customary international law.

6. CONCLUSION

Asian countries lack domestic legislation that provides adequate protection for its locals against corporate human rights violations. Instead of turning to domestic legislation, locals must seek other measures to protect themselves from violations. At the domestic level, most countries do not have national legislation that establishes the duties of corporations with respect to human rights and, for domestic laws that apply to corporations in their home states, these do not ordinarily regulate corporate activities in host states (Weiss and Shamir, 2011:155).

Nonetheless, domestic legislation may be a means to regulate and monitor corporate human rights violations. Although the scope of its application is currently under review by the Supreme Court, Unocal opened the door to extending corporate liability under the Alien Tort Statute. US courts have found that acts of a private entity on behalf of states can be found liable for state violations of human rights, and granted jurisdiction to US courts to hear foreign tort cases (Pillay, 2004:71). ATS is limited to violations of the law of nations or treaties of the United States, thus its scope of application does not sufficiently cover corporate human rights violations. However, the ATS has provided an opportunity to protect locals in Asia from corporate violations.

The case of Enron evidenced that many Asian governments ruled by law rather than under the law. The law was not an end in itself but used for whatever the objectives the ruling party had in mind. Companies have aligned themselves with corrupt and authoritarian regimes, entering into mutually beneficial contracts at the expense of the poor and weaker public. Governments offered attractive tax incentives, land or guarantees on security and resources to multinational corporations, the price of which is paid for by exploited workers or displaced communities. In countries like India, the Philippines, Burma and Cambodia, state security officers seize land through violent economic development campaigns for corporations. Underdeveloped legal systems also contribute to endemic corruption. Governments continue to look for measures to attract foreign direct investment from corporations at the price of exposing its people to human rights violations. In many cases, governments are involved in direct human rights violations.

Due to the lack of domestic regulation in Asia, a framework that includes participation by various actors and states on an international level may present an answer to the current human rights problems. Corporations need to enforce Corporate Social Responsibility values and create measure to enforce commitments to be accountable, while on the state level domestic legislation such as the ATS must create effective jurisdiction for violated locals to claim protection in host countries. Monitoring by non-governmental organizations and international organizations can also contribute to advanced global efforts to increase protection of human rights. A collaborative multilateral approach is necessary in providing protection to individuals from human rights violations, especially in developing countries in Asia.

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