



Hindrances to transnational basic freedoms suit against transnational enterprises: The requirement for participation among home and host nations

Abu Daud

California University, USA

Abstract

Till date, the enforcement of international human rights law has been relied largely on judicial remedies at the national level. This is more specifically for corporate human rights violation cases where a remedy mechanism to hold transnational corporations (TNCs) directly liable at the international level is absent. Transnational litigation has been increasingly utilized by victims of corporate-related human rights violations in seeking remedies. However, human rights litigation against TNCs in foreign countries has not been a simple process for the victims. Therefore, a special legal framework is urgently needed to guarantee not only victims' right to access to a judicial mechanism but also their right to an effective remedy. This article proposed cooperation between home and host countries to authorize court jurisdiction in order to provide greater access to judicial remedy for victims of TNCs' human rights violations. It presented the possibility for this cooperation to materialize through bilateral investment treaties.

Keywords: Transnational litigation, bilateral investment treaties, human rights, transnational corporations.

INTRODUCTION

Current international law recognizes that preventing or punishing third party interference with the enjoyment of human rights and providing remedies to victims are a part of the state's duty to protect human rights (Ruggie, 2007a). Unfortunately, though failure to take necessary steps to fulfill this duty may amount to a failure of the state to comply with its treaty obligation, effective sanction at the international level to deter non-compliance is still absent. As a result, states take different approaches and standards in providing access to remedy for victims. One of the most important means to seek remedy is through judicial mechanism. The role of the judiciary to provide remedy for victims of corporate wrongdoing is crucial. The Committee on Economic, Social and Cultural Rights has strongly stressed that the enjoyment of some human rights cannot be made fully effective without the role of the judiciary (UNCESCR, 1998). This is true because the judicial mechanism is not

only capable of resolving allegations of human rights violation and of issuing judgment, but it is a mechanism through which an enforceable award of compensation can be secured (Stephens, 2002a). In particular, the judicial mechanism is the only device capable of granting specific redresses for different plaintiffs. Koh (1991) states that, plaintiffs in human rights cases may pursue two different goals. First, the tort plaintiff seeks compensation, deterrence, and denial of safe haven to the defendant. Second, the institutional reform plaintiff aims at government policy reform.

Given the central role of the judicial mechanism at the national level, examining the use of transnational litigation by victims of corporate human rights abuses is important. This article proposes cooperation between home and host countries to establish court jurisdiction in order to provide greater access to judicial remedy for victims of transnational corporations' (TNCs) human rights violations. As Stephens (2002a) emphasizes, 'an international agreement that specifically protects the right to seek civil remedies for human rights abuses would add an important tool to the accountability movement'. This framework will not only help victims achieve the best outcome when seeking redress but will also guarantee

their right to access to judicial remedy.

LEGAL BARRIERS IN TRANSNATIONAL HUMAN RIGHTS LITIGATION

To limit the discussion on judicial remedy at the national level, this article focuses on judicial remedy in TNCs' home countries, specifically on civil litigation. This does not mean that judicial mechanism in host countries is totally absent or that the role of other possible judicial mechanisms, such as criminal and administrative courts, is not recognized. Since TNCs are subject to both the law of home and host countries, victims may take legal actions against TNCs in both jurisdictions. Though home countries are not obliged to hold their TNC nationals liable for conducting abusive behavior abroad, a growing number of legal actions have been brought by foreign victims against TNCs directly in their home countries (Joseph, 2004). Comparing court practices in home and host countries would be perhaps the best way to explain why foreign jurisdiction is more preferable for victims in seeking redress.

International law scholars argue that, for several reasons, courts in host countries have proven inadequate in resolving cases of TNCs related to human rights abuses. This has been either because of the lack of the independency of the courts or the absence of substantive and procedural laws. Furthermore, there has been an unequal power between TNCs and host governments. Consequently, TNCs are able to set investment conditions within the period of their business operation (McLoughlin, 2007). These conditions may be set to the very minimum environmental, labor, and other social standards. For example, in the Bhopal case, plaintiffs and the Indian government strongly insisted that this case should be heard by a US court. They argued that Indian law lacks in substantial and procedural law to deal with such a complicated case against TNCs (Muchlinski, 1995). In addition, it seemed impossible to expect an Indian court to maintain its impartiality when the host government is involved in the violation. This is also the case in the forced labor in the Yadana pipeline construction in Burma or in the environmental damages, as a result of oil exploration, in Nigeria (Stephens, 2002b).

In contrast to the above condition, a majority of TNCs are incorporated in developed countries, which have more advanced judiciary systems and preferable procedural rules. In some jurisdictions, for instance, the losing party does not have to pay for the litigation fees of the winning party, which means that almost no risk is involved in bringing a case. Furthermore, several jurisdictions offer plaintiff-friendly discovery procedures, in which plaintiffs may use a defendant's evidence and information to prove their case. More importantly, the possibility exists that plaintiffs may be awarded a

significant amount of compensation, especially in a jurisdiction where judges are authorized to grant punitive damages (Stephens, 2002a).

However, even if without the above advantages, transnational litigation may still be preferable for victims of human rights violations. In fact, compensation has been ordered in only a small number of cases (Aceves, 2000). This is primarily because, in seeking remedies, victims do not merely expect a favorable judgment. Koh (1991) argues that practical results from litigation are equally essential. Transnational litigation should not be measured simply in terms of the potential amount of compensation but also on whether it is able to effect several subsequent actions, such as in terms of 'the norms declared, the political pressure generated, the government practices abated, and the lives saved'. Nevertheless, in choosing transnational litigation, victims may even expect less than the results as advanced by Koh (1991) above. Plaintiffs in transnational human rights litigation may simply aim to force defendants to appear before the court and to respond to their claims, so that the abusive conduct of TNCs and the injustices suffered by the victims can be officially recorded (Slaughter and Bosco, 2000).

To a certain extent, initiating transnational human rights cases has been possible in a number of TNC home countries. US courts have been the most attractive forum, with only few cases in the United Kingdom, Australia, and Canada (Jagers and Heijden, 2008). Additionally, Jagers and Heijden (2008) find it highly possible to bring transnational human rights cases under the Dutch tort law. In fact, the enforcement of international human rights law has been relied largely on judicial remedies at the national level. This is more specifically for corporate human rights violation cases where a remedy mechanism to hold TNCs directly liable at the international level is absent.

United States

Suing parent companies of TNCs for violations of international human rights law in US federal courts under the Alien Tort Claims Act (ATCA) has become possible, following decisions in three landmark cases. These are the *Filartiga v. Pena-Irala*; *Kadic v. Karadzic*; and *Doe I v. Unocal* cases. The Court of Appeal decision in *Filartiga* is significant for at least two reasons. First, it defined the type of violations which are acceptable as a valid cause of action under the act. The court emphasized that the present consensus among states should be used in determining whether or not violations of international law have occurred (Koecher, 2007). Second, this decision affirmed that an alien may bring legal action alleging breach of the law of nations, even if the violation was conducted outside US jurisdiction (Mensch, 2006). In the *Kadic* case, the court decided that a private individual

may be held responsible for violating certain forms of international law, regardless of whether or not the conduct has any connection with the state's action (Rutherford, 2002). Finally, in *Doe I v. Unocal*, for the first time, the court confirmed that plaintiffs may bring a case alleging violation of international human rights law against a private corporation even if the element of state action is absent (Joseph, 2004). Unfortunately, the possibility of bringing legal action against TNCs in US courts has become unclear, following a groundbreaking decision of the US Court of Appeals for the Second Circuit in the *Kiobel v. Royal Dutch Petroleum* case. In this case, the majority decision ruled that customary international law only confers jurisdiction over natural persons; therefore, ATCA cannot be used as a basis to sue corporations. The majority concluded that:

...no corporation has ever been subject to any form of liability under the customary international law of human rights, and thus the ATS, the remedy congress has chosen, simply does not confer jurisdiction over suits against corporations.

The above examples demonstrate that bringing a case against TNCs under the ATCA has never been a simple process for plaintiffs. Judges have taken different views regarding the applicability of ATCA to hold transnational corporations liable for violating human rights, and there has been no consistency on this particular issue. Rather than discussing all possible substantive and procedural obstacles, this article focuses on four specific burdens which are found to be the most contentious issues in transnational human rights litigation within the US courts.

Subject matter jurisdiction

Commentators have found the scope of subject-matter jurisdiction of courts under ATCA too narrow; it only covers violations of civil and political rights and of international humanitarian law (McLoughlin, 2007). Whereas, majority of corporate human rights abuses concern environmental, labour, and health issues, which fall under economic, social, and cultural rights (Pillay, 2004). More specifically, US courts have been reluctant to recognize environmental abuses as violations of the law of nations. In *Beanal v. Freeport McMoran*, plaintiffs sought remedies for the environmental damages arising from the copper and gold mining operations of the defendants. Plaintiffs based their allegation on several international instruments, including the 1992 Rio Declaration. However, the court decided that since a sovereign state has the right to set its own environmental standards, environmental violation should not be regarded as an issue of international law. For this reason, the *Beanal* claim did not fall within the subject-matter jurisdiction of the ATCA (Joseph, 2004). Similarly, an

allegation of environmental abuse was also raised in *Sarei v. Rio Tinto, PLC*. In this case, plaintiffs based their environmental claim for a rather different reason.

Plaintiffs argued that the environmental harms caused by the defendant's mining operation have 'deprived Bougainvilleans of their right to life, health, and security of the person'. Unfortunately, the court took a similar position as in the *Beanal* case and decided that any environmental issues, regardless of the harms caused, did not fall within the ATCA subject matter jurisdiction (Joseph, 2004). Zia-Zarifi (1999) argues that deciding which customary international law should be applied in a case involving private actors is the most difficult task for US courts. The courts seem to divide ATCA cases into two categories: whether they involve a 'marginal' or 'core' violation of human rights. Despite the decision of the US Supreme Court in *Sosa v. Alvarez-Machain*, which for the first time, set the standard on what type of claims are actionable under ATCA in the future, no uniformity exists among courts in applying these categories.

State action requirements

To be regarded as actionable under the ATCA, some human rights violations by private actors require governmental action. This requirement is considered as another essential burden for victims when they seek redress under US jurisdiction. Because international human rights rules are binding only to governments-not to private actors- courts must first examine whether a private defendant was acting under the 'color of law' (Oxford Pro Bono Publico, 2008). Courts have been used four separate tests to examine the existence of governmental action or aid (Hall, 2002). These tests are public function, nexus, symbiotic relationship, or joint action. In a recent case, the court also employed the 'proximate' test (Forcese, 2001).

However, the application of these tests by courts has raised criticisms. For instance, Bridgeman (2003) has found that courts have taken various approaches in applying the tests. It is unclear to what extent a test is appropriate in establishing a certain fact. As Judge Paez puts it in *Doe I v. Unocal*, state action cases 'have not been a model of consistency'. These tests have, in fact, originated from the act on Civil Action for Deprivation of Rights 42 USC § 1983 which have been used to determine 'state action' in domestic cases. Thus, it is doubtful whether the tests are suitable to determine government- corporation relationship in cases where international human rights law are involved (Joseph, 2004). For this reason, Collingsworth (2002) suggests a simpler way to hold corporation liable for violating human rights. He argues that 42 USC § 1983 act is only an instrument to identify who is a 'state actor'; therefore, it is not necessary to examine whether a corporate defendant falls within a category of a state actor or not. A corporate

defendant should be held liable simply by determining whether it has engaged in aiding and abetting a state actor. As far as the victims are concerned, this test is preferable because it will be unrealistic to let human rights violation by TNCs go unpunished merely because the state action element is absent (Collingsworth, 2002).

Forum non conveniens doctrine

Another significant barrier in human rights litigation under the ATCA mechanism is when the defendant raises a motion that another forum is more appropriate and convenient for settling the case (Murphy, 2002). Based on the forum non conveniens (FNC) doctrine, a court may dismiss a case after examining whether a defendant's motion to dismiss satisfies two conditions. First, an adequate alternate forum, where the case could be brought, must exist (Zerk, 2006). An independent and functioning judicial system would sufficiently constitute an adequate forum. However, the mere availability of judiciary mechanism at the alternate forum is insufficient to grant a dismissal; the court will consider whether that forum is able to adjudicate the subject matter of the case (Joseph, 2004). Second, public and private interests must seriously be considered (Zerk, 2006). The court will first examine US foreign policy interest in relation with the case. Similarly, it will also consider the convenience of the parties in dispute, including the availability of witnesses and evidence. However, the US courts have been applying various standards in granting or declining motion to dismiss on the ground of the FNC doctrine (Joseph, 2004).

Criticisms that urge US courts to abolish the FNC doctrine in human rights cases have been raised (Boyd, 2004). This is because in many cases 'the doctrine's balance of factors is heavily weighted against human rights plaintiffs'. This doctrine is incompatible with the traditional jurisdictional principle, in which courts must adjudicate cases and disagreements within their jurisdiction. In fact, there has been no clear explanation on why courts should permit private convenience to override plaintiff's legal right to obtain remedies in US forums-more especially in human rights cases (Boyd, 1998). Skolnik (2002) emphasizes that the US Supreme Court has actually given a clear standard on the application of the FNC doctrine. The 'ultimate inquiry' in FNC determination is which forum will best serve the 'ends of justice'. Therefore, if adjudicating human rights claim is within the strong interest of US courts in delivering justice, this discretionary FNC doctrine should not be further applied (Skolnik, 2002).

Political question doctrine

Another substantial burden in US courts is the application

of the political question doctrine. A court must determine whether the dispute involves a political question and is, therefore, non-justiciable (Joseph, 2004). The basic tenet of this doctrine is to prevent a court from adjudicating a claim which may intrude upon the executive's foreign policy and will, therefore, impede the 'separation of powers' principle (Boyd, 2004). This doctrine can be a highly serious burden for victims. This is because it allows dismissal of any type of cases, including allegations of gross violations of human rights, regardless of the severity level (Joseph, 2004).

There are a number of possibilities for governments to intervene in private law suits, particularly in human rights cases. Courts have been actively requesting the executive branch's opinion in sensitive cases. Private parties may also request for government intervention, primarily because they believe that courts will seriously consider all policy interests of a government. Interestingly, a foreign government can even file a statement of interest in which a court may also adhere (Boyd, 2004). Thus, a single case can have many different competing interests which have to be considered by a court in deciding whether a political question is involved. The application of this doctrine has been widely criticized. Sutcliffe (2009) asserts that instead of providing the court with flexibility to properly determine which executive statement deserves adherence, this doctrine has apparently forced and controlled the court to rely upon a rather vague analysis contained in a government's statement. This situation will, in turn, give the executive and political branches the power to dictate upon the judiciary (Williams, 2000). The justification of this doctrine has been based largely on the insistence of the executive branch that foreign affairs must be governed by the 'president's single voice' (Boyd, 2001). However, Boyd (2001) further finds that the above justification is in fact contrary to the real practice. The US political branches have hardly come out with a single consensus on foreign policy affairs. Thus, since the judiciary has the constitutional mandate to resolve claims of unlawful conduct, it should not be precluded by interests other than to bring justice for victims (Price, 2005).

Canada

Since 1998, the Supreme Court of Canada has recognized that private actors can violate human rights (Paust, 2002). However, till date, only one human rights case has been brought by a foreign plaintiff against TNCs in Canada. This is possibly because of the strict requirement for courts in establishing jurisdiction over an extraterritorial action. A court must first ensure that the case has 'real and substantial' connection with the Canadian forum (Joseph, 2004). This is considered as the very first barrier for plaintiffs to overcome. The next

hurdle is dismissal on the ground of an FNC motion. Although the Canadian legal system consists of both civil and common law traditions, the doctrine of FNC is applied throughout the Canadian territory. For instance, in Québec, a province with a strong civil law tradition, the FNC doctrine is incorporated under Article 3135 of the 1994 Civil Code of Québec. Another significant obstacle for foreign plaintiffs is the Canadian choice of law rules. In determining the choice of law issue, the court, generally, will apply the law of the country where the injurious act was committed (Walker, 2000). So far, it remains unclear how Canadian courts would deal with these three obstacles. The *Recherches Internationales Québec v. Cambior Inc.* case may be the best example to show that courts in Canada may not always be amenable to hear a foreign case. In *Cambior*, 23,000 Guyanese victims filed a civil tort claim against *Cambior Inc.*-a company based in Québec and the parent company of *Omai Gold Mines Ltd.* which is engaged in mining activities in Guyana-alleging that, the company was responsible for the spillage of toxic pollutants into a river. Unfortunately, this case was dismissed by the Québec Superior Court on FNC grounds. The court held that Guyana would be a better forum to adjudicate the claim (Anderson, 2000).

Regarding the 'real and substantial' connection requirement, the Supreme Court of Canada has set several standards. One of the grounds to establish a court's jurisdiction is the connection 'between the defendant and the forum province'. In *Cambior*, the court has no difficulties in establishing whether the connection exists; it was clear that the defendant is domiciled in Québec. However, the court had given less weight to this connection when it decided that Guyana was the appropriate forum. Maughan J. (1998) has stated that, in determining the appropriate forum, the court did not 'consider that the location of *Cambior's* domicile in Québec is a factor of significant importance'. Talpis and Kath (2000) criticize this decision for its inconsistency with the traditional view of Québec's civil law, which based on this tradition, 'the court of the domicile of the defendant should be that natural forum'. Thus, no forum would be more appropriate than the Canadian court.

In dealing with defendant's motion on FNC, the court in *Cambior* was guided by the decision in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* and the English court approach to the FNC challenge in the *Spiliada Maritime Corp. v. Cansulex Ltd* case. After examining these two cases, the Supreme Court added another test in examining the FNC motion by the question 'Is there a more appropriate jurisdiction based on the relevant factors? (Farrow, 2003)'. One of the relevant factors tested by the court in *Cambior* was whether the plaintiffs would have a meaningful access to justice in Guyana. Next, the court also examined the connection of the accident and the victims to Guyana.

However, despite testimony from the plaintiff's expert that the condition of Guyana's administration of law had reached a state of collapse', the court ruled that 'justice 'would be rendered in Guyana' (Imai et al., 2007). In dismissing the case and deciding that Guyana is the appropriate forum, the court gave strong emphasis on two facts. First, victims have no association with Québec, and second, similar proceeding had already been initiated in Guyana (Rolle, 2002). Similarly, this decision is also criticized by Talpis and Kath (2000) for its inconsistency with the precedent given by the United States of America v. *Ivey* case, in which the Supreme Court of Canada has clearly reaffirmed the strong principle to hold Canadians liable for violating environmental law in other countries.

Finally, with regard to the issue of choice of law in a foreign tort claims, the Canadian Supreme Court has given its guidance in the *Tolofson v. Jensen* case. In this case, La Forest J. (1994) believes that there was a 'territorial limits of law under the international legal order'. A court should refrain from applying the forum law (*lex fori*) on cases arising in foreign jurisdictions and should therefore apply the *lex loci* (Walker, 2000). Accordingly, this precedent was adopted by the court in *Cambior* as one of the reasons to stay the proceedings. Substantial consideration was given to the fact that adjudicating this case would require the court to apply Guyanese law (Rolle, 2002). The court's reluctance to apply foreign law has been criticized by Talpis and Kath (2000) as unnecessary. This is because foreign law can actually be applied in Québec courts. Furthermore, the civil code of Québec clearly provides that proof can be made under the foreign law. Thus, seemingly, there were not enough reasons to dismiss this case on foreign law concern (Talpis and Kath 2000).

United Kingdom

A number of legal actions have been brought against UK-based parent corporations for cases of wrongful conduct of their subsidiaries abroad. In the *Ngcobo v. Thor Chemical Holdings Ltd.* case, for instance, a number of workers initiated a claim against *Thor Chemical Holdings Ltd.* in England, asserting that the defendant has been involved in the 'negligent design, transfer, set up, operation, supervision and monitoring of an intrinsically hazardous process' at its subsidiary's plant in South Africa.

The defendant challenged the jurisdiction of the court by raising a *forum non conveniens* motion and requested to stay the proceedings. The court rejected the defendant's FNC motion, which was later affirmed by the Court of Appeal.

Unfortunately, because this case was settled before the trial, the question on whether the court will pierce the corporate veil of the group of the company and hold the

parent liable remains unresolved. Likewise, the issue on what law should be used by the court in adjudicating the abusive conduct of the corporate defendant is still unclear (Oxford Pro Bono Publico, 2008).

Nevertheless, courts have shown their ability and willingness to adjudicate transnational human rights cases. In *Lube and Ors v. Cape plc*, the Court of Appeal allowed the lower court to continue the proceeding of a claim brought by victims of asbestos-related illness against a UK parent company (Joseph, 2004).

The plaintiffs alleged that the parent company failed to issue a worker's safety instruction for its subsidiary's asbestos plant in South Africa. Joseph (2004) states that, this decision is important for two reasons. First, it opens the opportunity for foreigners to seek redress in UK courts against British parent companies. And second, it sets a higher standard of obligation for parent companies to control their subsidiaries abroad; at the same time it also lowers the possibility for parent companies to escape from liability. Despite the above possibilities, victims of corporate wrongdoing may still find substantive and procedural burdens when they litigate in British courts.

Inevitably, when deciding a transnational case, UK courts will have to examine the applicable law to the substantive issues. In relation with this issue, foreign plaintiffs may face at least two potential hurdles. First, courts will consider a plaintiff's cause of action as legitimate only if the alleged conduct is able to be pursued under the law of tort as applicable in the foreign state where the damage arose. A provision in the Private International Law (Miscellaneous Provisions) Act 1995 [PIL (MP) A] clearly states that in a case where the injury or damage is sustained in a foreign jurisdiction, the law of that country must be applied in adjudicating the case (Oxford Pro Bono Publico, 2008). Although an exception may be given in a situation where application of foreign law would be in breach of the English 'public policy' principle, courts had been reluctant to activate this exception (Joseph, 2004). Thus, corporate wrongdoers have the opportunity to escape from English tort rules, which might impose a higher standard of liability than foreign tort law rules.

Second, plaintiffs' efforts to seek justice in UK courts may potentially be prevented by the statutes of limitation. The Limitation Act 1980 provides for a three-year limitation period for claims on personal injury or death. Likewise, the Foreign Limitation Periods Act 1984 provides that where substantive issues of a claim are to be determined in accordance with foreign law, questions of limitation regarding these issues must also be determined pursuant to that relevant foreign law. Exceptionally, if both English and foreign law are applicable in determining substantive issues of the case, the question on limitation will be settled by English law. In *Connolly v. RTZ*, for instance, the judge found that the plaintiff's claim was clearly time-barred, primarily because

the proceeding were issued and served outside the limitation period, as stated under both English limitation statutes and Namibian law (Joseph, 2004).

European Union

Under the harmonized European Union (EU) law, civil courts of EU member-states can entertain foreign direct liability claims. A proceeding against EU-based parent companies has been possible with the application of the 1968 Brussels Convention, which has been transformed into the EU Council Regulation No. 44/2001 (the Brussels Regulation). Under Article 2(1) of the Brussels Regulation, all companies domiciled in an EU member-state can be sued in the courts of that member state. Furthermore, Article 5(5) of the Brussels Regulation makes it possible for plaintiffs to sue an EU-based company in any other EU country where its branch, agency, or other establishment is located. These provisions, therefore, open the possibility for victims of corporate wrongdoings to seek redress in every EU member-state. Thus, victims of corporate-related human rights abuses may file their claims in civil courts in EU countries, regardless of their nationality or the place where the damage was inflicted or the injury sustained (Jagers and Heijden, 2008).

Despite the wide possibility to sue corporations for violating human rights, a jurisdiction limitation exists in a tort liability claim under EU laws. The courts can only adjudicate cases against defendant companies registered and seated in an EU member-state. Wouters and Ryngaert (2009) have argued that these inflexible nationality and territoriality requirements may discourage victims of corporate-related human rights abuse to litigate in EU countries. In *Wiwa v. Royal Dutch Petroleum Co.* case, for example, plaintiffs brought a case against the Royal Dutch Petroleum Company (a Netherlands-based corporation) and Shell Transport and Trading Co, PLC (a UK Company). Instead of bringing the case in an EU court, where the defendants are registered, plaintiffs brought their claims to the District Court for the Southern District of New York. One of the possible reasons for this strategy is that US courts are able to entertain a claim which involves several defendants having different nationalities. In contrast, the issue on a court's jurisdiction could be more problematic had the plaintiffs brought this case against the defendants in the Netherlands or in the UK (Enneking, 2009).

Another possible barrier for foreign plaintiffs in EU forums is the question on the applicable law. Under the European Parliament and Council Regulation on the law applicable to non-contractual obligation (Rome II), the law applicable to a foreign direct liability case is guided by the principle of *lex loci damni*. This means that the court where the remedy is sought shall apply the law of the country in which the damages was sustained (Jagers and

Heijden, 2008). However, subject to a number of limitations, there are several exceptions to this rule, one of which is when the resulting damage is environmental. A claim on environmental damage arising out of the defendant's harmful activities abroad might be brought under the tort law of the forum. Additionally, there are three other exceptions relating to the choice of law issue. A court in an EU country may refuse to use foreign law if it is inconsistent with the public policy of the forum. Another possibility is when courts may apply the overriding mandatory provisions of the forum. The last possibility to derogation is when the nature of the case forces the court to take into consideration the rules of conduct and the safety of the place where the abusive conduct took place. However, except in cases involving environmental damage, Enneking (2009) doubts that the Rome II regime on choice of law rules would encourage EU courts to depart from applying the often less favorable tort law in developing countries. The Rome II regulation sets a significantly high threshold for the law of the forum or the law chosen by the parties to be applied. The Dutch court, for example, will in principle have to apply the law of the country where the damage was incurred in adjudicating a foreign direct liability case (Casterman and van der Weide, 2009). In short, the Rome II regulation seems to lead EU courts to automatically base their judgment in accordance with the law of the country where the damage arose (Enneking, 2009).

Another potential obstacle in a tort case arising out of human rights violations by TNCs is when establishing the parent company's liability for the wrongful conduct of a subsidiary abroad. Unfortunately, there is no uniformity regarding this issue across EU member-states. The mere fact that a family relationship exists is not sufficient to impute the liability of a subsidiary to its parent company. However, there are several possible ways to lift the corporate veil of an EU based parent company. One of this is when the parent corporation has failed to properly supervise the conduct of its foreign subsidiary. A parent company owes a duty of care to its subsidiary. This principle imposes a parent with a duty to know or ought to know what necessary action should be taken or has been taken by a subsidiary to prevent the harm from occurring (Casterman and van der Weide, 2009). However, courts in EU countries have never been tested in delivering a final decision on a parent's liability for human rights violation by a subsidiary abroad. The Lube v. Cape PLC was the only case where plaintiffs alleged that a duty of care had been violated by a parent company. As this case was settled out of court, the question on the duty of care as a basis of parent accountability remains unclear.

Australia

An international human rights obligation will not automatically have binding effects in Australia. Similar in

the UK where international law is not directly incorporated into domestic law, this law must be transformed into a legislative act before it becomes part of Australian domestic law (Joseph, 2004). Nevertheless, human rights violation by TNCs can be a legitimate cause of action under Australian tort law (Oxford Pro Bono Publico, 2008). A few cases have been filed by foreign plaintiffs against Australian companies, and most of these cases have been settled out of court. Like Canada, Australia has no substantive and procedural law concerning human rights violation by its nationals abroad. However, there is a greater possibility to hold TNCs liable for human rights violation committed abroad in Australian courts. This is due to the more favorable FNC approach (Prince, 1998). Different from other common law jurisdictions, Australian courts have been applying a substantially higher threshold in examining FNC motions (Chesterman, 2004). Under the 'clearly inappropriate forum' test, it is most unlikely that Australian courts will grant a stay on the ground of FNC. This is particularly where the defendant company is domiciled in the jurisdiction of the court. Prince (1998) firmly believes that this threshold had contributed in forcing corporate defendants to choose the out-of-court settlement mechanism.

In *Dagi v Broken Hill Proprietary Co. Ltd.*, a legal action was brought by a number of Papua New Guinea landowners against BHP in the Supreme Court of Victoria. In this case, the plaintiffs alleged that BHP had continuously dumped mine tailing waste into the Ok Tedi River. Accordingly, the activity has caused severe environmental damages to the river and has destroyed the plaintiffs' way of life (Kyriakakis, 2005). In 1996, the plaintiffs and the defendant reached an agreement to settle the case. BHP offered monetary compensation and agreed to fix the environmental damages. However, another law suit was filed by the victims four years later in *Gagarimabu v Broken Hill Proprietary Co. Ltd.* wherein the plaintiffs claimed that BHP had breached the 1996 Ok Tedi Settlement Agreement (Drimmer, 2010). Unfortunately, this case was dismissed in 2004.

A possible burden for foreign plaintiffs found in the *Dagi* case was the application of the 'Mozambique rule' as found in *British South Africa Co v. Companhia de Moçambique* case. Keyes (2005) states that this rule is one of the jurisdictional limits of common law, in which a court may dismiss a case based on the lack of subject matter jurisdiction. This rule prevents courts from adjudicating cases which force them to determine the entitlements of immovable property located overseas (Johnson, 2003). Based on this principle, the court in *Dagi and Ors v The Broken Hill Proprietary Company Ltd (No 2)* dismissed the case on the ground that it was not allowed to 'entertain a claim which essentially concerns rights, whether possessory or proprietary, to or over foreign land in the sense that those rights are the foundation or gravamen of the claim'. The court decided

that this case was not actionable, primarily because the claim concerned trespass, nuisance, and other negligence in relation to foreign land. Therefore, it is important for the plaintiff to formulate their cause of action in an appropriate way. As shown in this case, the 'Moçambique rule' can be a potential barrier for victims when seeking redress in Australian courts. This is especially the case when plaintiffs claim themselves as landowners whose land and water sources have been polluted by defendants.

Apart from the above obstacle, the choice of law rule as applied by Australian courts may also be a substantial burden in a tort- based human right case. Based on the *Regie Nationale des Usines Renault SA v. Zhang* case, courts apply *lex loci delicti* in adjudicating foreign tort claims. The only exception to this approach is when the application of foreign law would breach Australian public policy (Mortensen, 2006). Compared with other common law countries which apply a more flexible choice of law rules, Australian courts take a stricter approach. In Canada and the US, for instance, exception to the *lex loci delicti* rule may be given 'if the application of that rule would cause injustice'. Likewise, courts in UK may be able to use the law of another forum if 'it is substantially more appropriate' than the law of country where the abuse was perpetrated. One possible risk in applying a strict choice of law rules is when it gives defendants an opportunity to escape from liability. This is particularly true when the abusive conduct of the company does not fall within cases of illegal conduct under the law of the country where the harmful activity occurred (Kyriakakis, 2005).

COOPERATION IN ESTABLISHING COURT JURISDICTION

Based on the discussions previously, two points may be raised. First, the number of venues for victim of corporate-related human rights violations to seek remedies is very limited. Till date, civil courts of home countries have been one of the most prospective forums in holding TNCs accountable for violating human rights abroad. Yet, not all courts are amenable to adjudicate transnational claims grounded on international human rights norms. Second, although initiating transnational human rights litigations in a majority of TNCs' home countries has been possible, the cases are handled through similar procedural law as applied to other civil cases. Despite the distinct characteristic of human rights claims, courts apply general civil procedural law and doctrines. Consequently, only a small number of cases can hurdle these obstacles. For this reason, a significant legal breakthrough to overcome these problems is needed or otherwise, victims will continuously face obstacles when seeking remedies in foreign jurisdictions.

To overcome the above issues, Aceves (2000)

proposes that states must cooperate to establish a convention on civil litigation for human rights cases. The main purpose of this convention is to impose on states the obligation to 'adopt national legislation to authorize civil suits for human rights violation' and this convention must contain rules on court jurisdiction and enforcement of rulings. In addition to this proposal, Mostajelan (2008) finds that in order to guarantee civil remedy for victims of human rights violations, states' action is essentially required. He further believes that states should enforce 'public international law within their courts through more lenient jurisdictional requirements' (Mostajelan, 2008). Unfortunately, although both scholars have explained the significance of their proposals, the factors that may drive states to enter into cooperation in order to guarantee civil actions against TNCs remain unclear. For this reason, this part will further analyze a possible framework for home and host countries to enter into cooperation on transnational civil suits for human rights violation by TNCs.

Previous attempts

One of the possible frameworks to facilitate home and host state cooperation is to establish a multilateral convention on civil litigation for human rights cases. However, negotiating an international agreement aimed at creating uniformity of rules in court jurisdiction across many different countries is not an easy task. An unsuccessful attempt was made by states in creating a world-wide regime of court jurisdiction and enforcement of judgment. The initial idea was to negotiate the convention on jurisdiction and foreign judgment in civil and commercial matters, under the auspices of the Hague Conference on Private International Law (the Hague Conference). This convention was aimed at prohibiting signatory countries from exercising certain bases of personal jurisdiction, and at the same time, at requiring them to enforce judgments obtained only through the application of a mandatory basis of jurisdiction (Van Schaack, 2001). The US had a substantial interest in negotiating this instrument; a global agreement would make US rulings enforceable in other countries. On the other side, the EU countries had an interest in expecting some restrictions to the application of 'jurisdictional excessiveness' of US courts (Silberman, 2002).

One of the major difficulties in the negotiations was to accommodate the differences between states over the issue of jurisdictional reach. The range of countries with different cultural and legal backgrounds has made unfeasible the effort to reach consensus on what to include in the required and prohibited bases of jurisdiction (Silberman, 2002). Even if states are able to finalize this convention, Mehren (2001) identifies several practical difficulties. First, it will be difficult to expect jurists from

different legal backgrounds to understand and apply the convention correctly. This because no court system would be able to review whether a court in the contracting countries has correctly applied and interpreted the convention. Second, this convention will bring significant change to the practice of transnational litigation across the world. Consequently, long time practicing jurists may be reluctant to accept this change. Finally, a problem might occur if the application of this convention is found to be inconsistent with the existing jurisdiction and enforcement of judgment conventions-in particular, the Brussels and Lugano conventions. It will be difficult to fit a new convention with other conventions which have long been applied by a significant number of countries.

As some countries have realized that this project is too ambitious, the negotiation was then refocused to only one ground of establishing jurisdiction upon which consensus may be achieved. It focused on the consent of parties in a commercial contract regarding which court should adjudicate their dispute. This consent is as contained in a choice of court agreement (Brand, 2003). After several negotiations, the member- states of the Hague Conference finally signed the Final Act of its Twentieth Session on June 30, 2005, which includes the convention on choice of court agreement. One of the basic principles of this convention is that it recognizes party autonomy to choose where to settle their dispute. As a result, the chosen court must assume jurisdiction, and a suit filed in the non-chosen court must be dismissed (Teitz, 2005). Furthermore, apart from limiting the basis of jurisdiction, this convention applies only to business-to-business cases in civil and commercial matters. However, despite the effort to simplify this convention from its initial attempt, and many adjustments have been made to facilitate the difference in jurisdictional doctrine, states still seem to be reluctant to ratify it. Some commentators believe that states are watching whether the US would be the first country to ratify and that they will observe how it would implement the convention (Burbank, 2006).

The above example shows that drafting and negotiating a multilateral treaty in establishing jurisdiction involves legal and political difficulties. The situation may also be the same or even more difficult if states attempt to negotiate a multilateral agreement for human rights claims. Some countries and international organizations had actually proposed an inclusion of an exception provision for human rights cases during the negotiations of the convention on jurisdiction and foreign judgment in civil and commercial matters. The proposal to include this exception was driven by the fact that the convention prohibits 'tag' jurisdiction, a jurisdiction based solely on the presence of the defendant in that country (Vanderbloemen, 2000). With this prohibition, the drafter seemed to deny that, in many circumstances, the victim of human rights violations has no option other than to bring the claim before the court outside the place where the injury occurred. Therefore, the exception clause is

needed to facilitate victims' claims. One of the human rights exception provisions is as proposed by the Human Rights Coalition. The clause reads as follows: 'Nothing in this article shall prevent a party from bringing an action under national law based on a violation of human rights [to be defined]' (Van Schaack, 2001). Unfortunately, the negotiation of this convention was halted, and therefore, the prospect to include a human rights provision has also come to an end.

Possible alternative: Bilateral investment treaties (BITs)

Although achieving cooperation through a multilateral agreement is difficult, there is still possibility to reach consensus through another instrument. One of the most possible options is by establishing inter-state cooperation through bilateral agreements. Although no bilateral agreement on civil litigation for human rights cases has been signed yet, a bilateral treaty related to transnational civil litigation is not a new concept. In bankruptcy disputes, for instance, the US and British courts have concluded an order and protocol which regulates the roles of courts in both countries when resolving a parallel bankruptcy case (Slaughter, 2003). This example shows that, to a certain extent, courts in two different countries may possibly reach an agreement on procedural matters in transnational civil litigation. However, because most human rights disputes in civil courts involve both substantial and procedural law issues, the form of cooperation should be more than a court-to-court understanding. Therefore, this kind of bilateral agreement must be concluded at the inter-governmental level.

In contrast, Pfund (1998) believes that negotiating a series of bilateral treaties on court jurisdiction would be too resource-intensive and is not worthwhile. This is because each country will have to negotiate different conditions in many different countries. This argument may be true to some extent, but it might not be true for all circumstances. Negotiating an international agreement on jurisdiction and recognition of judgment can be exhausting if it is aimed to cover broader areas of civil litigation. For example, the convention on jurisdiction and foreign judgment in civil and commercial matters was aimed to cover all civil and commercial matters. One of the unresolved issues was the question on whether this convention would also apply to contracts concluded by consumers (Silberman, 2002). This single issue had made the negotiation more difficult and the consensus between states more unfeasible. However, the situation might be different in a negotiation of a treaty aimed at regulating one specific area of transnational civil litigation, such as human rights. In this case, state parties may effectively spend all their resources to discuss issues related to human rights litigation.

Thus, ensuring the availability of civil redress in home

countries through bilateral agreement has several advantages. One of the most significant advantages is because it only involves two countries. Thus, two countries can possibly reach a consensus on the scope of court jurisdiction. Parties in this bilateral agreement can compromise on the cause of action that can trigger court jurisdiction. Likewise, home countries may customize this issue with their legal traditions, human rights policy, and foreign relation interests. Finally, if necessary, adjustments with existing multilateral agreements on court jurisdiction can be made by home and host countries without violating their obligations under those agreements.

A more possible option in establishing home-host countries cooperation on court jurisdiction for human rights cases is through the inclusion of jurisdiction provisions into BITs. For several reasons, this option would be more effective than creating an independent bilateral jurisdiction treaty between home and host countries. As the final goal of this cooperation is to establish a more effective accountability mechanism for human rights violations by TNCs, inserting these provisions into BITs would be more effective because it will bind all actors that are deemed to have direct or indirect responsibility for a violation. As opposed to a special bilateral agreement on court jurisdiction, BIT is an instrument aimed to regulate investment activities; it involves not just home and host countries but also TNCs. Thus, it is preferable to put the rights and obligations of home and host countries, as well as those of parent companies of TNCs, under a single treaty. Two reasons support this framework. First, inserting court jurisdiction provisions would bind home countries to take necessary action to enable their courts to establish extraterritorial jurisdiction. And second, it would also help to hold the parent companies of TNCs liable for the wrongful actions of their subsidiaries abroad. Therefore, the arguments why home countries and parent companies should be involved into this cooperation on jurisdiction are as follows: First, home countries have been actively involved in negotiating BITs with host countries. They enter into BITs in order to facilitate the foreign business operations of their TNCs. In this particular action, home countries are deemed to have obligations in ensuring that their TNCs will refrain from violating human rights. The failure of home countries to control the conduct of their TNCs abroad can also be seen as directly facilitating the violations. Consequently, if human rights violations occur, home countries must share the responsibility for extraterritorial harm caused by their corporate nationals (McCorquodale and Simons, 2007). As part of this responsibility, home countries are bound to provide mechanisms for remedies to all victims. Home countries may guarantee this remedy mechanism by inserting the jurisdiction provision into BITs, authorizing courts to adjudicate extraterritorial conduct of their corporate nationals.

Second, the use of BITs may help to resolve parent-subsidiary liability problems. In many human rights cases, parent companies of TNCs are able to hide behind rigid applications of the 'separate entity' doctrine and to shift the liability to their subsidiaries. However, this doctrine should not be applied to all circumstances. The reasoning behind this proposition is quite clear. The decision to enter into a foreign investment activity and to conduct a foreign business operation is made by parent companies. Thus, inserting the court jurisdiction provision into BITs would significantly prevent parent companies to escape from liability for the wrongful conduct of their subsidiaries abroad. The jurisdiction provision will make parent companies to be aware that they can be subject to civil actions for liability in the judicial process of their own countries.

Jurisdiction provisions

Following the above analysis on the most suitable legal instrument to accommodate this cooperation, the next important issue is to specify the provisions that should be included in home and host-country agreements on court jurisdiction. These provisions should not only aim at authorizing civil actions by victims of corporate human rights abuse in home countries but also at assuring that victims are able to obtain reparations. Both home and host countries should seriously negotiate and include at least two substantial provisions into their agreement.

Provision on extraterritorial jurisdiction

This provision is needed in enabling a home country to establish jurisdiction over the extraterritorial conduct of its TNCs (Taylor et al., 2010). The basis for extraterritorial jurisdiction may vary between home countries and generally depends on the legal system they follow, as well as the existing jurisdiction convention they have entered into. Parties in this cooperation may decide that the presence of corporate defendants in a home country is sufficient for a court to exercise jurisdiction. Parties may also agree that court jurisdiction should strictly be based on the nationality of the defendant (Vanderbloemen, 2000). Alternatively, home and host countries may agree to classify court jurisdiction into three different categories. The first category is mandated or required jurisdiction, in which a court shall assume jurisdiction when several conditions are satisfied. One of the possible conditions is when the issue of the nationality of the corporate defendant is satisfied. The next category is prohibited jurisdiction, in which a court shall refrain from entertaining the case. The last category is permitted jurisdiction. A court is permitted to establish jurisdiction when it is authorized by the national law of home countries, as long as it is not contained in the

prohibited jurisdiction (Silberman, 2002).

The inclusion of the above provisions will significantly provide legal certainty for both plaintiffs and defendants. For plaintiffs, it may assist them to decide where to file a lawsuit against a particular corporate defendant. As for the defendants, it may also assist them in making a jurisdictional defense. However, in order to avoid different interpretations, the provision on the extent a court is allowed to establish or decline jurisdiction must be clearly worded. Likewise, every exception to this provision, if any, must be further explained in the agreement. Nevertheless, the possibility exists that courts in a home country may not be able to establish jurisdiction over the defendant.

Thus, a special rule to anticipate this situation must be available. In this case, both home and host countries may agree to a provision in which nothing could prevent plaintiffs from bringing their case before the courts of the host country or of any other countries. This provision is necessary to guarantee that the plaintiffs' right to judicial remedies is not being abolished by this extraterritorial jurisdiction provision.

Provision on the availability of civil causes of action for human rights violation

Till date, there has been no uniformity on this issue. As discussed previously, civil causes of action, or also known as the subject-matter of jurisdiction for violations of international human rights law, are only available in the US, one of which is under the ATCA. Nevertheless, the application of ATCA by US courts in legal suits against TNCs has also been criticized as too narrow. Some countries require that in order to be recognized as legitimate causes of action, the alleged conduct must also be justifiable under the law of the country where the injury was incurred. Some other countries apply their general tort law in dealing with human rights claims against TNCs. For these reasons, both home and host countries should clearly specify what causes of action can possibly be brought by victims against TNCs in their home countries (Taylor et al., 2010). This provision is important, particularly to give legal certainty on the grounds in which legal actions may be filed against TNCs.

The causes of action that can be included may vary from one BIT to another. Most home countries recognize violations to civil and political rights and to international humanitarian law as valid causes of action. Unfortunately, violations of economic, social, and cultural rights have not yet gained a broad recognition as acceptable causes of action. Thus, it might be useful if before commencing the negotiation of an agreement, both home and host countries should jointly conduct a 'human rights impact assessment' (Lenzen and d'Engelbronner, 2009). This assessment should cover all sectors of business

operations of the TNCs in the host country, the possible impact to human rights, and the rights that may possibly be affected. Subsequently, based on this assessment, both home and host countries can specify what causes of action should be included into this jurisdiction agreement.

However, an alleged misconduct may possibly not fall under any of the legitimate causes of action as agreed by both parties.

In this case, plaintiffs must also be given an opportunity to bring their case in the host country or in any other possible countries.

EXPECTED OUTCOMES

Leveling the playing field

Regarding the first concern, it is true that home countries' attempts in establishing jurisdiction to adjudicate human rights violation by TNCs abroad may invite resistance (Ward, 2010). This is because it will significantly discriminate TNCs originating from developed countries compared to their competitors, both from other developed countries and local companies in host countries. This cooperation will impose a higher accountability standard for investors originating from certain home countries compared to that for other investing companies. In short, it will unlevel the playing field and may bring negative impact to the competitiveness of TNCs originating from a developed country in the global market. However, establishing jurisdiction over the extraterritorial conduct of nationals of home countries is not unprecedented in international law (Joseph, 1999). For example, Article 4.2 of the 1997 OECD Bribery Convention imposes obligation to state parties to establish jurisdiction with respect to bribery committed by their nationals abroad. This convention aims to create a fair and competitive environment amongst all business entities. Most importantly, it creates a 'level playing field' for all corporations competing for projects outside of their home countries (Miller, 2000).

A similar framework may potentially be adopted for human rights violations by TNCs. Evidently, damages resulting from human rights violations are not less significant than the detrimental effects of bribing foreign officials. If states can successfully reach a consensus to punish their nationals for bribing foreign officials, then an agreement authorizing courts to adjudicate human rights violations by TNCs abroad is also possible. The problem is that no international agreement has directly imposed obligation to home countries to establish their jurisdiction over human rights violation by their TNCs abroad. However, although the current international human rights laws do not impose any obligation for home countries to regulate the extraterritorial activities of their nationals, there is also no prohibition for home countries to do so (Ruggie, 2007b).

If the main concern is the loss of competitive disadvantage by certain TNCs, then this is why cooperation between home and host country is significantly needed. This cooperation will create a level playing field among corporations doing business in a given country. The concern that authorizing transnational litigation may discriminate TNCs toward a higher level of adjudication process may be diminished through the uniform application of human rights responsibility standard which has legal force both in home and host countries (Joseph, 1999). Parties in this cooperation may agree to specify that specific human rights allegations with certain degrees of injury can be brought to courts in home countries.

Similarly, state parties in this cooperation may also agree that home countries are mandated to establish their jurisdiction 'only to the extent that parent corporation have neglected its duty of care to supervise' (Wouters and Ryngaert 2009).

These limitations will in turn, provide some flexibility to TNCs, but without allowing human rights violations to go unpunished. More importantly, these limitations may also reduce resistance from TNCs because it gives legal certainty to the extent a victim can bring a case against TNCs in their own countries.

Minimizing conflicts of interest

There is a fear that a home country attempts to hold its TNCs accountable may be seen as a violation of the rights of host countries to adjudicate human rights violation within their territories. However this fear is, in fact, less convincing. This is because the benefits obtained by host countries of entering into cooperation would outweigh the losses they incur from foreign direct investment activities. Imposing a higher standard of accountability mechanism on TNCs would arguably cause an adverse effect to the economic growth of developing countries. The risk of being sued by local communities may potentially discourage TNCs from investing abroad (Wouters and Ryngaert, 2009). This proposition may be true, because TNCs can easily relocate their business to other host countries with less accountability risk. However, host countries must also take into account the benefits they may obtain from having the accountability mechanism available in home countries. Stiglitz (2008) argues that an increase in incoming investments does not mean that developing countries will also gain more benefit. As foreign investments increase, developing countries will have to sacrifice their interests even more (such as in terms of lower environmental and working condition standards). In order to overcome this issue, some developing countries think that by inviting more foreign investments they can more than offset their losses. But they will not gain more benefits, because the losses they suffer would increase

faster than the benefits they would gain. Therefore, home countries' decision to adjudicate the extraterritorial conduct of their TNCs would not cause significant losses to host countries. On the contrary, the availability of judicial remedy in home countries would give host countries an opportunity to offset their losses resulting from the abusive conduct of TNCs.

In addition to the above concern, home countries also believe that authorizing transnational human rights law suits may bring negative impact to their foreign relation interest. One of the possible dangers is that it gives plaintiffs freedom to decide what cases to bring to and against whom. However, since plaintiffs have neither the expertise nor the constitutional authority to determine foreign policy, plaintiffs will merely focus on their litigation goal. Plaintiffs are also unlikely to take into account the foreign relation interest of a home country (Bradley, 2001). For these reasons, transnational litigation should not be opened widely, because it may substantially reduce the power of a home country government to make its best foreign relation decision. On the contrary, Boyd (2004) explains that exercising jurisdiction over an offshore human rights violation will not pose harm to foreign policy of the forum state. This is because states across the globe have increasingly been aware of the interest in not just punishing perpetrators but also in compensating victims of human rights abuses (Boyd, 2004). However, despite this common interest, there is no guarantee that foreign policy reasons will not be utilized to hinder transnational human rights claims against TNCs in the future. Although measuring the exact level of foreign relation damages caused by one transnational human rights case can be difficult, the potential costs should not be underestimated (Bradley, 2001). Therefore, cooperation between states is significantly required. This is because, cooperation between states may help to minimize the conflict of interest between countries arising as a result of a home country's decision to establish jurisdiction over an extraterritorial human rights violation of its own corporate nationals. In conclusion, the above discussion highlights two points. First, the possibility exists for home and host-country cooperation in establishing jurisdiction in which victims of corporate-related human rights violation can seek redress. Second, home countries would not be able to establish their jurisdiction over an extraterritorial conduct of their nationals without the involvement and support of host countries. The cooperation of host countries is essential in assisting home countries to mitigate the two potential problems: internal resistance and foreign relation issues.

CONCLUSION

Till date, transnational litigation has been increasingly utilized by victims of corporate-related human rights

violations in seeking remedies. However, human rights litigation against TNCs in foreign countries has not been a simple process for the victims. In fact, in only few cases judgment has been granted in favor of the victims. In many cases, courts stayed the proceedings before even examining the substance of the claims. There have been no consistencies and uniformity in dealing with human rights allegation against TNCs. Even in the US, where federal courts are authorized to establish jurisdiction over extraterritorial conduct of TNCs, the issue of subject-matter jurisdiction remains unclear. Therefore, TNCs as defendants have many ways to escape from a judicial process in their home countries. Therefore, a special legal framework is urgently needed to guarantee not only victims' right to access to a judicial mechanism but also their right to an effective remedy.

This article emphasizes that home and host countries are more than able to enter into a bilateral agreement on the question of jurisdiction for human rights claims. This framework is possible because entering into this bilateral agreement would not cause harm to both home and host countries. On the contrary, this agreement will help home countries to minimize damages to their foreign relation interest which may occur as a result of allowing their courts to adjudicate foreign human rights claims. This agreement may also provide legal certainty for TNCs on the extent to which a case can be brought against them. Furthermore, this agreement will create a level playing field for all business entities doing business in similar market, regardless of their country of establishment. As for the host country, this agreement will significantly provide an opportunity to offset the losses incurred as a result of lowering their standards to attract foreign investments. This is because courts are not only capable of granting financial compensation for victims but also of directing the violator to pay for environmental restoration, or to improve working conditions, or to preserve indigenous rights.

As global consensus on the issue of authorizing court jurisdiction for human rights cases would be a difficult task to achieve, states must find another approach towards cooperation. This article explains that bilateral agreements, particularly BITs, can be an effective instrument to facilitate cooperation between home and host countries in order to guarantee civil remedies. If BITs have been effectively guaranteeing the interest of TNCs in doing business overseas, they should also be able to guarantee civil remedies to harm caused by TNCs. Three provisions need to be agreed upon by both home and host countries, but the most crucial issue is the provision on extraterritorial jurisdiction. This provision would essentially help to remove barriers in holding TNCs liable for violating human rights abroad. Without this provision, it is unlikely that human rights violation by TNCs can be effectively punished. Apparently home country governments will face strong opposition from their TNCs.

This is the main reason why cooperation between home and host countries should be established. This will give home and host countries the opportunity to compromise on the best possible way to govern the extraterritorial conduct of TNCs.

REFERENCES

- Aceves WJ (2000). The Pinochet case and the move toward a universal system of transnational law litigation. *Harv. Int. L. J.*, 41: 145, 181.
- Anderson W (2000). Forum Non Conveniens checkmated - the emergence of retaliatory legislation. *J. Trans. Law Pol.*, 10: 194.
- Boyd KL (1998). The inconvenience of victims: abolishing Forum Non Conveniens in U.S. human rights litigation. *Va. J. Int. L.*, 39: 46, 84-85.
- Boyd KL (2001). Are human rights political questions? *Rut LR.*, 53: 321, 328.
- Boyd KL (2004). Universal jurisdiction and structural reasonableness. *Tex. Int. L. J.*, 40: 16, 26, 45.
- Bradley CA (2001). The cost of international human rights litigation. *Chi. J. Int. L.*, 2: 460.
- Brand RA (2003). A global convention on choice of court agreements. *ILSA J. Int. Comp. L.*, 10: 345.
- Bridgeman NL (2003). Human rights litigation under the ATCA as a proxy for environmental claims. *Yale Hum. Rights Dev. L.J.*, 6: 13.
- Burbank SB (2006). Federalism and private international law: implementing the Hague Choice of Court Convention in the United States. *J. Priv. Int. L.*, 2: 309.
- Casterman AG, van der Weide JA (2009). The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights., Leiden University, Leiden, pp. 38-39, 71.
- Chesterman S (2004). Oil and water: regulating the behavior of multinational corporations through law. *N.Y.U. J. Int. L. Pol.*, 36: 317.
- Collingsworth T (2002). The key human rights challenge: Developing enforcement mechanisms. *Harv. Hum. Rights. J.*, 15: 199.
- Drimmer J (2010). Human rights and the extractive industries: litigation and compliance trends. *J. World Energy L. & Bus.* 3: 132.
- Enneking LFH (2009). Crossing the Atlantic? The political and legal feasibility of European foreign direct liability cases. *George Washington Int. L. Rev.*, 40: 916, 930.
- Farrow TCW (2003). Globalization, international human rights, and civil procedure. *Alta L. Rev.*, 41: 201.
- Forcese C (2001). ATCA's Achilles heel: Corporate complicity, international law and the Alien Tort Claims Act. *Yale J. Int. L.*, 26: 505.
- Hall SM (2002). Multinational corporations' post-Unocal liabilities for violations of international Law. *George Washington Int. L. Rev.*, 34: 410-411.
- Imai S, Mehranvar L (2007). Breaching Indigenous Law: Canadian mining in Guatemala. *Indigenous L. J.* 6: 135.
- Jagers N, van der Heijden MJ (2008). Corporate human rights violations: The feasibility of civil recourse in the Netherlands. *Brooklyn J. Int. L.*, 33: 847, 852, 869.
- Johnson WR (2003). The Mozambique Rule and the (non) jurisdiction of the Supreme Court of Western Australia over foreign land. *UW Austr. L. Rev.*, 31: 266.
- Joseph S (1999). Taming the leviathans: Multinational enterprises and human rights. *Netherlands Int. L. Rev.*, 46: 178-179.
- Joseph S (2004). Corporations and Transnational Human Rights Litigation. Hart Publishing, Oxford and Portland, pp. 6-120.
- Keyes M (2005). Jurisdiction in International Litigation, Federation Press, Sydney, p. 71.
- Koecher A (2007). Corporate accountability for environmental human rights abuse in developing nations: Making the case for punitive damages under the Alien Tort Claims Act. *J. Trans. Law Pol.*, 17: 155, 164.
- Koh HH (1991). Transnational public law litigation. *Yale L. J.*, 100: 2371-2372, 2347, 2398.

- Kyriakakis J (2005). Freeport in West Papua: Bringing corporations to account for the international human rights abuses under Australian criminal and tort law. *Monash U. L. Rev.*, 31: 115-118.
- Lenzen O, d'Engelbronner M (2009). Guide to Corporate Human Rights Impact Assessment Tools. Human Rights in Business Retrieved 27 September, 2010, from http://www.aimforhumanrights.org/fileadmin/user_upload/pdf/HRB_Guide_to_corporate_HRIA_2009-def.pdf, p. 5.
- McCorquodale R, Simons P (2007). Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international human rights law. *M. L. R.*, 70: 621-624.
- McLoughlin AM (2007). International trend of multinational corporate accountability for human rights abuses and the role of the United States. *Ohio Northern U. L. Rev.*, 33: 155-156.
- Mensch NL (2006). Codes, lawsuits or international law: How should the multinational corporation be regulated with respect to human rights?" *U. Miami Int. Comp. L. Rev.*, 14: 258.
- Miller L (2000). No more this for that: the effect of the OECD Convention on Combating Bribery of Foreign Public Officials in international business transactions. *Cardozo J. Int. Comp. L.*, 8: 140.
- Mortensen R (2006). Homing devices in choice of tort law: Australian, British, and Canadian approaches. *Int. Comp. L.Q.*, 55: 846.
- Mostajeleian B (2008). Foreign alternatives to the Alien Tort Claims Act: the success (or is it failure?) of bringing civil suits against multinational corporations that commit human rights violations. *George Washington Int. L. Rev.*, 40: 523.
- Muchlinski P (1995). *Multinational Enterprises and the Law*, Blackwell Publishers Ltd., Oxford, pp. 110, 327.
- Murphy JF (1999). Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution. *Harv. Hum. Rights J.*, 12: 54.
- Murphy SD (2006). *United States Practice in International Law: Volume 2, Volumes 2002-2004*. Cambridge University Press, New York, p. 206.
- Oxford Pro Bono Publico (2008). Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse. A Comparative Submission Prepared for Professor John Ruggie UN Secretary-General's Special Representative on Business and Human Rights. Oxford Pro Bono Publico, University of Oxford, pp. 9-310.
- Paust JJ (2002). Human rights responsibilities of private corporations. *Vanderbilt J. Trans. L.*, 35: 810.
- Pfund PH (1998). The project of the Hague Conference on Private International Law to prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters." *Brooklyn J. Int. L.*, 24: 10.
- PillayS (2004). And justice for all? Globalization, multinational corporations, and the need for legally enforceable human rights protections. *U. Det. Mercy L. Rev.*, 81: 510.
- Prince P (1998). Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens approach is better. *Int. Comp. L.Q.*, 47: 592.
- Rolle ME (2002). Unraveling accountability: Contesting legal and procedural barriers in international toxic tort cases. *Geo. Int. Environ. L. Rev.*, 15: 171.
- RuggieJ (2007a). Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries. UN Doc A/HRC/4/35/Add.1., p. 9.
- RuggieJ (2007b). Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum, Corporate Responsibility Under International Law and Issues in Extraterritorial regulation: Summary of Legal Workshops, UN Doc A/HRC/4/35/Add.2., p. 14.
- Ruggie J (2008). Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Corporations and Human Rights: Protect, Respect and Remedy: A Framework for Business and Human Rights, Summary, UN Doc. A/HRC/8/5., p. 22.
- Ruggie J (2010). Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework, Summary, UN Doc. A/HRC/14/27., pp. 20-21.
- Rutherford L (2002). Redressing U.S. corporate environmental harms abroad through transnational public law litigation: Generating a global discourse on the international definition of environmental justice. *Geo. Int. Environ. L. Rev.*, 14: 814.
- Silberman LJ (2002). Comparative jurisdiction in the international context: Will the proposed Hague Judgements Convention be stalled." *DePaul L. Rev.* 52: 322-325.
- Skolnik MR (2002). The Forum Non Conveniens doctrine in Alien Tort Claims Act cases: A shell of its former self after *Wiwa*. *Emory Int. L. Rev.*, 16: 222.
- Slaughter AM (2003). A global community of courts. *Harv. Int. L. J.*, 44: 193.
- Slaughter AM, Bosco D (2000). Plaintiff's diplomacy. *Foreign Aff.*, 79: 106.
- StephensB (2002a). Translating Filartiga: A comparative and international law analysis of domestic remedies for international human rights violations. *Yale J. Int. L.*, 27: 1.
- Stephens B (2002b). The amorality of profit: Transnational corporations and human rights. *Berkeley J. Int. L.*, 20: 82-83.
- Stiglitz JE(2008). Regulating multinational corporations: Towards principles of crossborder legal frameworks in a globalized world balancing rights with responsibilities. *Am. U. Int. L. Rev.*, 25: 490.
- Talpis J, Kath SL (2000). "The exceptional as commonplace in Quebec Forum Non Conveniens law: Cambior, a case in point." *Revue Juridique Themis*, 34: 821-861.
- Teitz LE (2005). The Hague Choice of Court Convention: validating party autonomy and providing an alternative to arbitration. *Am. J. Comp. L.*, 53: 548.
- Van Hoek AAH (2008). Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of their Suppliers, Social Responsibility in Labour Relations: European and Comparative Perspectives. F. Pennings, Y. Konijn and A. Veldman, Kluwer Law Int., p. 163.
- Van Schaack B (2001). In defense of civil redress: The domestic enforcement of human rights norms in the context of the proposed Hague Judgments Convention. *Harv. Int. L. J.*, 42: 142, 183.
- Vanderbloemen TE (2000). Assessing the potential impact of the proposed Hague Jurisdiction and Judgments Convention on human rights litigation in the United States. *Duke L. J.*, 50: 919, 943.
- VonMehren AT (2001). Drafting a convention on international jurisdiction and the effects of foreign judgments acceptable worldwide: Can the Hague conference project succeed?" *Am. J. Comp. L.*, 49(2): 201.
- Walker J (2000). Are we there yet? Towards a new rule for choice of law in tort. *Osgoode Hall L. J.*, 38: 342, 349.
- Ward H (2001). Securing transnational corporate accountability through national courts: implications and policy options. *Hastings Int. Comp. L. Rev.*, 24: 454.
- Williams NS (2000). Political question or judicial query: an examination of the modern doctrine and its inapplicability to human rights mass tort litigation. *Pepp. L. Rev.*, 28: 866.
- Wouters J, Ryngaert C (2009). Litigation for overseas corporate human rights abuses in the European Union: The challenge of jurisdiction. *Geo. Wash. Int. L. Rev.*, 40: 943, 965.
- Zerk JA (2006). *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Cambridge University Press, New York, p. 214.
- Zia-Zarifi S (1999). Suing multinational corporations in the U.S. for violating international law. *UCLA J. Int. L. Foreign Aff.*, 4: 87, 90.

Cases, Treaties and Legislations

- Alien Tort Claims Act 28 U.S.C. § 1350 (2000).
- Amchem Products Inc. v. British Columbia (Workers' Compensation Board) [1993] 1 S.C.R. 897.

Beanal v. Freeport McMoran, 197 F 3d 161 (5th Cir. 1999).
 British South Africa Co v. Companhia de Moçambique [1893] AC 602.
 Connolly v. RTZ [1998] AC 854 (HL).
 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 [1998] OJ C 27/1.
 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1.
 Dagi and Ors v. The Broken Hill Proprietary Company Ltd (No 2) [1997] 1 VR 428 (VSC).
 Dagi v. BHP [1995] 1 VR 428.
 Doe I v. Unocal, Corp., 963 F. Supp. 880, 896 (C.D. Cal. 1997).
 European Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the Law Applicable To Non-Contractual Obligations [2007] OJ L 199/40.
 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
 Foreign Limitation Periods Act 1984 (United Kingdom).
 Gagarimabu v. Broken Hill Proprietary Co Ltd [2001] VSC 517 (SCT Vic).
 Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252.
 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).
 Kiobel v. Royal Dutch Petroleum, No. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010).
 Lubbe v. Cape Plc [2000] 1 WLR 1514.
 Morguard Investments v. De Savoye [1990] 3 S.C.R. 1077.
 Pushpanatan v. Canada (Minister of Citizenship and Immigration) [1998] 160 D.L.R. (4th) 193.
 Recherches Internationales Québec v. Cambior Inc. [1998] QJ no 2554 (Québec Superior Ct).
 Regie Nationale des Usines Renault SA v. Zhang (2002) 210 CLR 491.
 Sarei v. Rio Tinto, PLC, 221 F Supp. 2d 1116 (C.D. Cal. 2002).
 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
 Spiliada Maritime Corp v. Cansulex Ltd [1986] 3 WLR 972, 3 All ER 843, [1987] A.C. 460.
 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (entered into force on 15 February 1999).
 Tolofson v. Jensen [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.
 Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW) (HBP), 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998).