ENFORCEMENT OF HUMAN RIGHTS AGAINST TRANSNATIONAL CORPORATIONS: HOW MUCH DOES THE UNITED STATES REALLY CARE?

INTRODUCTION

Across the globe, international businesses are being accused of massive human rights violations. Well-known transnational corporations (“TNCs”), such as Apple, Nike and Hersheys, have been publicly charged with taking advantage of foreign workers, foreign lands, and damaging impoverished communities in the name of productivity and profit. Despite this poor track record abroad, few laws, domestic or international, exist to prevent violations. While the United States has discussed how TNCs can better cope with violations of human rights, the nation has not taken any steps toward creating or supporting an enforceable law. This complacent attitude leads one to question how committed the U.S. is to the legal protection of human rights.

This perspective will examine the United States’ commitment to the protection of human rights and the discipline TNCs face for violations. It will begin by addressing international human rights laws and the inherent complications of enforcement against TNCs. It will then discuss the domestic laws implemented to combat the human rights violations TNCs commit, as well as the fallibility of those laws. Specifically, it will discuss the legal failure in Kiobel v. Royal Dutch Petroleum. Lastly, it will conclude with an analysis regarding the intersection of future international human rights law and the accountability of TNCs, specifically via an international treaty.

In examining the role the U.S. has played in enforcing human rights against TNCs, it appears there is an extreme need for legislative action. In sum, the U.S. should use its regulatory powers to require that TNCs uphold international human rights policies. However, this regulation strategy creates an international jurisdictional dilemma. A possible solution is the creation of an international treaty providing the U.S. jurisdiction over TNCs, regardless of location, if human rights are violated. Therefore, regardless of domestic or

international incorporation, an avenue for justice will exist within the U.S. for victims of human rights abuses. While the U.S. has not been proactive in addressing human rights abuses by TNCs, creating forward-thinking laws and regulations may help prevent future harms.

I. INTERNATIONAL GUIDELINES ON HUMAN RIGHTS VIOLATIONS AND TNCs: THE RUGGIE FRAMEWORK

In 2011, the United Nations promulgated The UN Guiding Principles on Business and Human Rights (“UNGPs”), otherwise known as, “the Ruggie framework”, in an effort to enhance corporate accountability for human rights internationally.\(^2\) The U.N. published the UNGPs as guidelines, or suggested best practices, to prevent and protect workers from suffering human rights violations by their employers.\(^3\) The UNGPs are non-binding, and TNCs can adopt them on a purely voluntary basis.\(^4\) These guidelines do not constitute law, and thus lack an enforceability mechanism. This has led critics to question the effectiveness of the UNGPs.\(^5\) Under international law, corporations have no “legal personality”, and the U.N. cannot require that TNCs be subject to the UNGPs.\(^6\) However, in the U.S. justice system, corporations are treated as individuals and can be subject to legal obligations.\(^7\) Therefore, the U.S. has the unique ability to regulate TNCs regarding human rights violations by mandating compliance with either the Ruggie framework or an alternative, but comparable, guideline. Still, the U.S. has done no such thing.

\(^2\) Id.


\(^4\) See Special Representative of the Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework, U.N. Doc. HR/PUB/11/04 (2011) (explaining the three main principles of the UNGPs for TNCs as: (1) obligations to respect, protect, and fulfill human rights and fundamental freedoms; (2) complying with all applicable laws; and (3) matching appropriate and effective remedies if UNGPs are breached).


\(^7\) Id.

II. THE U.S.’ ROLE IN ENFORCEMENT OF HUMAN RIGHTS AGAINST TNCs

Though the U.S. has not made the framework into law, it has begun to engage in an organized discourse on how to combat issues of human rights abuses. Three years after the UNGPs were released, the UN requested that Member States create National Action Plans (“NAP”) “to promote the implementation of the UNGPs within their respective national contexts.”9 Rather than forcing nations to comply with specific regulations, the UNGPs allow each nation to determine how best to proceed with human rights violations according to each nation’s specific circumstances. The U.S. has begun the process of developing its own NAP, calling upon stakeholders and members of the public to contribute their thoughts on how best to “promote responsible business conduct abroad.”10 Nonetheless, no promise exists regarding the creation of any enforceable law as a result of this public engagement.

The most relevant U.S. legislation for the enforcement of human rights violations is the Alien Tort Statute (“ATS”).11 The ATS grants U.S. courts jurisdiction over a complaint of an international law violation, regardless of violation location or perpetrator citizenship, in an effort to promote and protect human rights obligations. However, the ATS only permits a “cause of action for the modest number of international law violations with a potential for personal liability at the time”.12 Therefore, the statute can only be invoked for the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”13 “Safe conducts” is never defined in the statute, and “rights of ambassadors” and “piracy” do not fully encompass the breadth of human rights violations that may arise. The statute does not address corrupt government practices, coercion, or any other multitude of human rights violations. Last updated at its inception, the ATS cannot fully encompass the wide breath of human rights violations TNCs are committing today.

U.S. courts need broader jurisdiction over human rights violations. One way to accomplish this is by amending the ATS to include a wider range of

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13 Id.
violations of international human rights law in its jurisdictional scope, and to extend its jurisdiction to include the actions of TNCs. As previously stated, the U.S. is in a unique position to enforce laws against corporations, but TNCs complicate the issue of jurisdiction. TNCs incorporated abroad or committing human rights violations internationally are not subject to the same regulations as domestically incorporated companies. When exploring international relations, the U.S. is more concerned with protecting the rules of sovereignty and creating positive alliances than actively pursuing jurisdictional challenges which may arise. Therefore, TNCs are often able to escape regulation and responsibility for human rights violations. While the U.S. has the ability to become an international leader in enforcing human rights laws against TNCs, there are currently no laws to enforce, and no statutes to grant jurisdictional authority.

III. WHEN DOMESTIC LAW IN THE U.S. FAILS

To demonstrate how real and problematic human rights issues involving TNCs are, consider Kiobel v. Royal Dutch Petroleum. In this 2013 case, Nigerian nationals, granted asylum in the U.S., filed suit in the U.S. against Royal Dutch Petroleum Company (“RDPC”) and Shell Transport and Trading Company (“Shell”). These companies are incorporated in the Netherlands and England, respectively. The Nigerian nationals alleged that the Shell Petroleum Development Company (“SPDC”), incorporated in Nigeria as a joint subsidiary of the former two companies, caused gross environmental harm to the land. They further alleged that, when locals began protesting the harm, the SPDC conspired with the Nigerian government to suppress the locals, condoning and encouraging the use of violent and, in some cases, fatal force. The petitioners alleged that RDPC and Shell “aided and abetted” these crimes by supporting the SPDC as a subsidiary. The Second Circuit dismissed the petitioners’ complaint on the grounds that “the law of nations does not recognize corporate liability.” This was to be expected, considering

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15 Id. at 1659.
16 Id. at 1662.
17 Id.
18 Id.
19 Id. at 1662–63.
20 Id. at 1663.
that the current framework of human rights law, internationally and in the U.S., does not treat corporations as legal entities.\textsuperscript{21}

The U.S. Supreme Court granted Writ of Certiorari, requesting that the parties argue the issue of: “whether and under what circumstances the [Alien Tort Statute] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”\textsuperscript{22} The Supreme Court ultimately ruled that the ATS did not grant the U.S. jurisdiction.\textsuperscript{23} The ATS did not apply, as the complaint did not fall within one of the three originally contemplated categories for violations of international law.\textsuperscript{24} Additionally, the Court wished to avoid an issue of sovereignty; none of the parties involved were U.S. citizens, the companies were not incorporated domestically, and the alleged crimes occurred on foreign soil.\textsuperscript{25} There is a presumption against extraterritorial application of a statute unless Congress indicates otherwise, and the ATS lacks explicit indication of Congress’ intention to apply it to the circumstances presented.\textsuperscript{26} Federal courts are limited “to recognizing causes of action only for alleged violations of international law norms that are ‘specific, universal, and obligatory’.”\textsuperscript{27} There is no universal, international law requiring TNCs to protect human rights. The case was dismissed, and the victims of the alleged abuse were left without redress in the U.S.

IV. LOOKING AHEAD: TNC ENFORCEMENT FOR HUMAN RIGHTS VIOLATIONS

It is clear that the current international framework does not provide enforceable regulations for TNCs. However, there is hope for the future. The United Nations Human Rights Council is attempting to create a treaty “imposing international human rights legal obligations on transnational corporations.”\textsuperscript{28} The treaty would create enforceable laws regulating the actions of TNCs by enforcing the fundamental human rights of their employees

\textsuperscript{21} Muchlinski, supra note 6.
\textsuperscript{22} Kiobel, 133 S. Ct. at 1663. (quoting Kiobel v Royal Dutch Petro Co., 182 L. E. 2d. 270 (2012)).
\textsuperscript{23} Kiobel, at 1667-68.
\textsuperscript{24} Id.
\textsuperscript{25} Kiobel at 1664.
\textsuperscript{26} Id. (quoting Morrison v. Australian National Bank Ltd., 130 S. Ct. 2869, 2878 (2010)).
\textsuperscript{27} Id. at 1665 (quoting In re Estate of Marcos, 25 F.3d 1467, 1475 (1994)).
and persons with whom they may come in contact. However, the treaty would not absolve nations of the duty to pass laws to protect victims of corporate human rights violations. If this treaty comes to fruition, perhaps victims would be able to bring claims for compensation and redress of grievances in the U.S. or abroad.

If the U.S. adopted such a treaty, it would require TNCs to implement specific protocol to prevent human rights abuses. TNCs would be held legally accountable for human rights violations in a way that is unprecedented. Private companies would likely be required to hire human rights consultants and supervisors to create specific policies and ensure their compliance. Failure may result in a cause of action, providing redress for victims. Regardless, jurisdictional issues may plague such a treaty and create implementation problems. The treaty would need to specifically state that the U.S. jurisdiction would extend to any violations of international law, to offset the limitation of U.S. federal courts “recognizing causes of action only for alleged violations of international law norms that are ‘specific, universal, and obligatory.”

Human rights laws should be universal, and could be, if the U.S. adopted a treaty. However, this prospect seems unattainable considering the following state of affairs. At the request of the Human Rights Council, Member States were asked to vote on whether they should establish a working group to develop a business and human rights treaty. The U.S. voted against the working group. It would seem, with an understanding of how paralyzed the U.S. courts are in dealing with TNCs and human rights violations, that the U.S. would want to work on establishing enforceable laws that would allow for victim redress. This contradiction in intention and behavior leads one to question the U.S.’s position regarding the protection of human rights.

Further exploration into this area is necessary to understand why exactly the U.S. voted against it. In fact, most Member States either abstained or voted against the proposal. Do other countries have the same issues the U.S. does in their inability to enforce human rights obligations against TNCs? Do other countries have statutes similar to the ATS, but allow for a wider application?

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29 Id.
30 Id.
31 Kiobel, 133 S. Ct. at 1665.
33 Id.
34 Id.
Surely, each Member State wants to protect its own interests in this matter, and signing an international treaty may force concessions.

The U.S. may think its NAP serves as an effective substitute for signing the treaty. However, in order for the U.S. to enforce human rights, it requires enforceable law. This treaty seems to be the next logical step on the path towards protection human rights against TNCs. Considering the current powerlessness of the U.S. courts to address issues such as *Kiobel*, one must question how genuinely concerned the U.S. is about the enforcement of human rights violations against TNCs.

*Madeline Kahn*

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* Emory University School of Law, J.D. Candidate, 2016; Writer, *Emory Corporate Governance and Accountability Review*; Clinic Member, *Barton Child Law and Policy Center*; B.A. Philosophy, Minor in Spanish, Emory University. I would like to thank Professor Hallie Ludsin for inspiring me to write this piece, and Warren Steele for his constant inspiration, insight and support.