

Is an International Corporate Human Rights liability framework needed? An Economic Power, Business and Human Rights, and American Extraterritorial Jurisdiction analysis*

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Abstract

All companies, regardless of the sector they belong to, can positively or negatively impact human rights. Governments are increasingly aware of the benefits that free trade brings their nations, which has led them to do whatever is necessary to attract foreign investment, even if it means to act against the interests of their own people. The power relationship between corporations and states generates a tension derived from their nature: while the objective of states is the welfare of its members, the purpose of corporations is profit. It is in the crack generated by the collision of powers and purposes between these two actors, that this article is intended to raise the discussion on the need to establish an international framework for corporate liability for human rights violations. To achieve its goal, the article will analyze the opportunities and obstacles raised by the exercise of extraterritorial jurisdiction in the American context and its relationship with the developments in the business and human rights field.

Key words: Business and Human Rights, Corporate Liability, Foreign Direct Investment, Extraterritorial Jurisdiction, Aliens Tort Claim Act (ATCA)

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***¿Es necesario el marco de responsabilidad
de los Derechos Humanos Corporativos Internacionales?
Un análisis del poder económico, los derechos comerciales y humanos
y la jurisdicción extraterritorial de los Estados Unidos***

Resumen

Todas las empresas, sin importar el sector al que pertenezcan, pueden tener un efecto positivo o negativo en los derechos humanos. Los gobiernos están cada vez más conscientes de los beneficios que implica el libre comercio para sus naciones, y esto los ha llevado a realizar lo necesario para atraer la inversión extranjera, incluso si se tiene que actuar contra los intereses de sus propias poblaciones. La relación de poder entre las empresas y los estados genera una tensión que surge de su propia naturaleza: mientras el objetivo de los estados es el bienestar de sus miembros, el propósito de las empresas son las utilidades. Debido a la grieta producida por el choque de poderes y los propósitos existentes entre estos dos actores es que este artículo pretende generar la discusión sobre la necesidad de establecer un marco internacional para responsabilidad corporativa para las violaciones de los derechos humanos. Para lograr este objetivo, el artículo analizará las oportunidades y los obstáculos que surgen con el ejercicio de la jurisdicción extraterritorial en el contexto de los Estados Unidos y su relación con los desarrollos en el campo de los derechos comerciales y humanos.

Palabras clave: Derechos comerciales y humanos; responsabilidad corporativa; inversión extranjera directa; jurisdicción extraterritorial; Ley de Reclamación por Agravios contra Extranjeros (ATCA, por su sigla en inglés)

Introduction

It could be arguable, that the human rights international regime is designed to make States the sole bearer of responsibility for human rights promotion and protection. After all, what is the reason of existence of States if not to guarantee the welfare of its members? As clear as that argument seems to be, assuming it as an absolute statement has the consequence of appearing highly questionable the reasons why corporations could or should be responsible for human rights violations. How do they enter the picture and for which reasons should they do so?

Trying to approach those questions from a normative perspective, Professor Louis Henkin resorted to the preamble of the Universal Declaration of Human Rights, which establishes that "every individual and every organ of society, (...) shall strive by teaching and education to promote respect for these rights and freedoms (the ones enshrined in the Declaration)" (Human Rights Commission, 1984, Preamble). In his keynote address at Brooklyn Law School on November 5, 1998, Professor Henkin emphasized that regarding human rights, "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all" (Henkin, 1999, p. 25).

The purpose of this article is to present a different approach to the normative interpretation given by Professor Henkin; that is, an approach based on politics, economics and judicial arguments to address the main questions listed above. With that in mind, this article is divided into three chapters with independent, but at the same time inter-related approaches, giving space to interdisciplinary considerations.

In the first chapter under the title *Corporations as relevant actors in the human rights regimes: A matter of power*, I aim to establish that a product of globalization is the world giving greater relevance

to markets than to states. Society has given enough strength to corporations, as tenants of the economic power, to have a direct impact on individual human rights. As a consequence of this new reality, the need for the development of a human rights framework for corporate responsibility arises.

Under the title: *A too friendly 'investment friendly' state? – Foreign Direct Investment and corporate human rights responsibility* in the second section of this article, I will present how the intention of a state to open their economy to foreign investment –although being a positive thing, can result in the negative relaxation of its public policies, jeopardizing the obligation of states to guarantee the full exercise of rights of its citizens. In this chapter I will also address how the modern structure of corporations, that is, increasingly transnational and complex, may be used as a mechanism for avoiding national or international responsibility.

Finally, the third chapter is entitled '*The exercise of extraterritorial jurisdiction: solution and obstacle to the responsibility of corporations*'. In this chapter I use the American domestic jurisdiction as an example of how through a separation between parent corporations and their subsidiaries, Transnational Corporations (TNCs) have gone to exceptional lengths to deny national tribunals competence to acknowledge human rights violations committed abroad.

Corporations as relevant actors in the human rights regimes: a matter of power

In today's world, the power relationship between states and corporations has shifted as a consequence of a market-centralized society and the increasing economic power of corporations. In this chapter I will present the risks that this new reality represents for human rights protection due to states commonly finding themselves in difficult positions of inferior economic power.

This in turn obliges them to negotiate their sensitive public policies with powerful corporations.

1. *A new corporate-inclusive world scenario*

It would be possible to achieve human rights protection solely through obligations upon governments if they were considered to be the only source of threats to human dignity or if they were powerful enough to effectively restrain any wrongful conduct against fundamental rights within their territory (Ratner, 2011). However, the reality of the situation is different. Today's globalized world, nurtured by expedited means of communication, involves the interaction of a number of additional powerful actors such as corporations, upon which some "[s]tates lack the resources or will to exercise an effective control, [and] others may even go as far as soliciting corporations to cooperate in impinging human rights" (Ratner, 2011, p. 461)

In fact, following Susan Strange's proposal for a new conceptualization of politics and power, I am of the same opinion that the integration of the world economy, pushed by multinational corporations, has shifted the balance of powers away from states and towards global markets (Strange, 1996). It is mandatory to include economic power considerations in this reality, which moves away from focusing exclusively on political power when answering the question: who controls the world economy? The fact that economic power resides in corporations, in particular in transnational corporations, demonstrate the great influence that they can have over individuals and their rights, because in the end: "markets matter more than states" (Ratner, 2011 p. 462) in today's society.

Examples of how the shifting power balance may affect individuals and their rights will be discussed in this article as numerous cases of human rights violations committed by corporations are analyzed.

Acknowledging the fact that states have the primary responsibility for the protection of human rights, the power that companies accumulate, both nationally and internationally, makes it impossible to ignore their relevance and influence in relation to human rights. Corporations have enough strength to violate, put at risk, or contribute in the violation of human rights before the eyes of a perplexed State that is unable or unwilling to avoid it. "Today we (...) live in a global world, wherein a variety of actors for which the territorial state is not the cardinal organizing principle, have come to play significant public roles" (Ruggie, 2006, p. 10).

2. *Examples providing evidence for corporations' economic power versus states economic weakness*

Following the reasoning above, I will now demonstrate that corporations' economic power, in particular that of transnational corporations, is often bigger than the countries that they are dealing with. This creates an unfair playing field (Stiglitz, 2007-2008). The analysis of states' socio-economic status will be based on statistical data provided by the World Bank (World Bank, 2012, 9 of July). In regards to private enterprises I will rely on information published by Forbes Magazine (Forbes Magazine, 2012, 18 of April). After comparing the 2011 revenues of the companies with the 2011 Gross Domestic Product (GDP) of 192 countries¹, some interesting findings were obtained:

- The annual sales of Royal Dutch Shell (USD\$ 470.2 billions) are higher than the GDPs of 168 countries, out of the 192 analyzed. This means that if Shell was a state, it will occupy the 25th position in the World Bank GDP Ranking.

¹ GDP is defined as: A measure of the value of the total production in a country, usually in a given year Fairlex Inc. (2012). *Fairlex Financial Dictionary*. Website: <http://financial-dictionary.thefreedictionary.com/GDP> (Last visited Sep. 7, 2012).

- Out of the 10 companies in the world with the highest revenues, six of them are in the oil and gas industries, demonstrating why this is such a relevant sector for the human rights discussion.
- When put together the revenues of the top 10 corporations with the highest sales in the world (USD\$ 3.345.30 billion) they are higher than the GDPs of all the countries in the world except for four. Moreover, of these ten corporations, only 2 (Shell from the Netherlands and BP from the United Kingdom) are not one of the four countries with the highest GDPs.
- Out of the One hundred largest companies in the world (not only considering sales, but profit, assets and market value), 31 from the United States, 25 are from the European Union², and 17 from BRIC³ countries⁴.
- Out of the list of the 100 companies with the highest sales, 35 are from the United States, 33⁵ from the European Union, and 14 from BRIC countries⁶.

The statistics shown, far from making any kind of accusation against TNCs in general, aim to demonstrate the circumstances that exist for corporations to wield their economic power against states; creating an uneven playing field in order to gain special tax or regulatory treatment from them (Stiglitz, 2007-2008).

Because of this unbalanced relationship, states may feel pressured to favor the interests of

² France (7); Germany (7); United Kingdom (5); Italy (2); Spain (3); Netherlands (2) and Belgium (1).

³ The term BRICs or BRIC countries is an acronym for Brazil, Russia, India and China. Goldman Sachs Head of Global Economic Research Jim O'Neill first used the term in a 2001, see O'Neil, J. (2001, 30 November). Building Better Global Economic BRICs'. *Global Economic Paper*, (No. 66), Goldman Sachs. Available at: <http://www2.goldmansachs.com/ideas/brics/building-better-doc.pdf> (Consulted until May 2, 2010).

⁴ China (8); Brazil (5) and Russia (4).

⁵ Germany (11); France (8); United Kingdom (4); Italy (4); Spain (3); Netherlands (2); and Luxemburg (1).

⁶ China (7); Brazil (5) and Russia (2).

TNCs, even if, by doing so, they act against the welfare of their population. Where a government is too weak to comply with its public mandate, it could reach such a degree that the necessity for the international community to react in defense of the human rights of the citizens of that state becomes warranted. Of course, developing a useful and objective criterion for determining what would be considered 'such a degree' is a difficult task.

The negotiation and application of those standards by states will represent an even greater challenge. The establishment of clear standards of corporate responsibility becomes an international necessity.

3. *A too friendly 'investment friendly' state? Foreign Direct Investment and corporate human rights responsibility.*

As previously stated, the imbalance in economic power between states and corporations is sufficient justification to make the activities of corporations in developing countries an international concern, where those activities are directed against particularly vulnerable parts of the population.

In today's free-trade based markets most of the commerce that takes place within a country is conducted by foreign corporations, or corporations with assets in multiple countries (Stiglitz, 2007-2008, p. 453). There is no large or medium-size company that is established in one country that does not have a plan to expand its business to other territories in the pursuit of better and more profitable markets.

Generally, the increasing activities around the world of TNCs have also brought enormous benefits to developing countries. A particularly noteworthy benefit for example, is the closing of the knowledge gap between developing and developed nations. According to Nobel Prize

laureate Joseph Stiglitz, this factor is even more important for the welfare of a country than the resources gap. Indeed, "[m]ore important than the capital that [multinational corporations] bring, are the transfer of technology, the training of human resources, and the access to international markets" (Stiglitz, 2007-2008, p. 453).

All of these benefits have led to an increasing desire by developing countries to attract foreign investment since the 1970s. The desire of developing nations to present themselves as 'investment friendly' countries requires that they concede to normative and public policy concessions; resulting in negative consequences which are not foreseen at the time they were given. Moreover, even if these negative consequences were foreseen, developing countries would not have the power to bargain a different outcome (Vázquez, 2005). "[a]s a result, countries often find that they have assumed obligations which, further down the road, will place limitations on their own development programs. The normative challenge, for its part, calls for a refinement of [foreign investment] policy and its alignment with the countries' larger development plans" (Economic Commission for Latin America and the Caribbean -ECLAC-, 2001, p. 15).

Caused by the same phenomena built on the dogma: '[Foreign Direct Investment]: the more the better', (Economic Commission for Latin America and the Caribbean -ECLAC-, 2001, p. 15) countries widely open themselves to investors without having the adequate mechanisms to monitor corporation's activities both internally, in their relationship with their own workers, and externally in the impact that it may have on the wider community, such as environmental issues or the impact on vulnerable communities (Ratner, 2011, p. 462).

Professor Stiglitz gives a powerful example of the problems arising as a consequence of the wrongful behavior of TNCs:

In some cases [T]NCs take a country's natural resources, paying but a pittance while leaving behind an environmental disaster. When called upon by the government to clean up the mess, the [T]NC announces that it is bankrupt: All of the revenues have already been paid out to shareholders. In these circumstances, [T]NCs are taking advantage of limited liability. In some cases, when the adverse consequences of their actions are criticized, [T]NCs plead that they are simply following the law; but such defenses are disingenuous for they often work hard to make sure that the law suits them well (Stiglitz, 2007-2008, p. 474).

As a result of the described situations an international concept for corporate responsibility needs to be developed. Such a concept should include intelligible human rights standards for corporations and states concerning the effects of TNC's behavior; that will include enforcement and accountability measures, as well as effective access to remedies for victims of corporate misconduct.

4. The exercise of extraterritorial jurisdiction: the obstacle and the solution to corporate responsibility

In compliance with his 2005 mandate, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises SRSG, held four workshops during 2006 that included academic experts, legal practitioners and non-governmental organizations (NGOs) representatives from different regions. Two of the workshops, one held in New York and the other in Brussels, were concerned with corporate responsibility under international law and on extraterritorial jurisdiction. The summaries of the workshop's discussions were compiled in the SRSG 2nd Addendum to the 2007 Report to the United Nations Human Rights Council (Ruggie, 2007).

Participants of the workshop “focused the discussion mainly on the exercise of extraterritorial jurisdiction by a home State over the overseas activities of TNCs with some link to that State” (Ruggie, 2007, p. 41). There was a general agreement upon the fact that “some link to the State” should refer to the bond of the TNC with a particular State based on its nationality. An exemption to this rule is the exercise of universal jurisdiction by a State, defined as a jurisdiction that could “be invoked for a limited number of international crimes (crimes against humanity, genocide, war crimes, torture, forced disappearances)” (Ruggie, 2007, p. 42).

Following the reasoning of the SRSG workshop, I will focus the discussion on the exercise of extraterritorial jurisdiction, particularly in the United States, for both substantial and practical reasons. First, from a substantial perspective, the United States’ legal system has served as the forum where some of the most complex issues regarding the accountability of foreign corporations have been addressed. Legal frameworks such as the Aliens Claims Tort Act and the Torture Victim Protection Act have encouraged the proliferation of cases against foreign companies or domestic companies that committed human rights violations abroad. Secondly, from a practical perspective, most if not all of the biggest corporations in the world have some ‘presence’ in the United States, which makes them susceptible to liability under American laws (Joseph, 2004, p. 87).

Today, globalized corporations operate worldwide using the form of “multinational corporate groups” organized in “incredibly complex” multi-tiered corporate structures consisting of a dominant parent corporation, sub-holding companies, and scores or hundreds of sub-servient subsidiaries scattered around the world” (Blumberg, 2002, p. 493). “Ordinarily, the ultimate ‘parent’ of the group is a publicly traded company” (Born & Rutledge, 2007, p. 164).

Using its ‘complex structure’, the company may try to avoid having direct contact with the US by performing all its acts through its subsidiaries, agents or distributors. In doing so, “the foreign company is not subject to US jurisdiction, because it lacks its own minimum contacts⁷ with the relevant US forum” (Born & Rutledge, 2007, p. 165). In *Berkey v. Third Avenue Railway Co.*, Justice Cardozo held that “[t]he whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphors. Metaphors in law are to be narrowly watched, for starting at devices to liberate through, they end often enslaving it” (*Berkey v. Third Avenue Railway Co.* 1926, p. 94) Justice Cardozo’s finding is still relevant, specially if we acknowledge the non-existent agreement in the issue of the parent-subsidiary corporation’s relationship.

Under an intricate parent-subsidiary relationship, plaintiffs for human rights abuses committed by TNCs face two main procedural obstacles in US courts: first for the court to be able to exercise jurisdiction they need to establish ‘personal jurisdiction’ and secondly, there is the

⁷ For understanding the ‘Minimum contacts’ formula, see Born & Rutledge (2007, p. 80-81). *International Shoe Co. v. Washington*, 326 U.S. 310 (Supreme Court of the United States 3 of December of 1945): “Due Process requires that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it, “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’ “. Most recently *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 NW2d 565 (Supreme Court of Minnesota 24 of June of 2004): “A five-factor test determines whether jurisdiction is consistent with due process: (1) the quantity of contacts with the forum state; (2) the nature and quality of those contacts; (3) the connection of the cause of action with these contacts; (4) the interest of the forum state; and (5) the convenience of the parties.” Also see *CFA Institute v. Institute of Chartered Financial Analyst of India*, 551 F3d 285 (United States Court of Appeals Fourth Circuit 9 of January of 2009); *Group Ltd. v. Washington Regional Medical Center*, 536 F3d 757 (United States Court of Appeals Seventh Circuit 5 of August of 2008); *Anderson v. Dassault Aviation*, 361 F3d 449 (United States Court of Appeals 4 of March of 2004); *Marshall v. Inn On Madeline Island*, 610 NW2d. 670 (Court of Appeals of Minnesota 9 of May of 2000); *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408 (Supreme Court of the United States 24 of April of 1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (Supreme Court of the United States 21 of January of 1980).

risk that US Courts may deny the claim under the jurisdictional ground of *forum non conveniencie* (Joseph, 2004, p. 28).

4.1. *Personal Jurisdiction*

In order to establish the liability of a parent company, the requisite personal jurisdiction must be proven, that is, that the parent corporation was acting in the host state through a subsidiary, agent or distributor (Joseph, 2004, p. 84)⁸.

In this regard, the case law is inconsistent, allowing in some cases foreign companies to isolate themselves from the jurisdiction of US courts by using an agent, subsidiary, distributor or any other business partner, and disregarding it in others. In *Lister v. Marangoni Mecanica SpA*. (1990), for example, a Utah District Court upheld personal jurisdiction where products were marketed through a distributor who agreed to distribute them in host states. On the other hand, in *Maschinenfabrik Seydelmann v. Altman*. (1985), a District Court of Appeal of Florida denied personal jurisdiction where a German defendant appointed an exclusive US distributor that over a 22-year period sold 23 machines with a total value of USD\$1 million (Born & Rutledge, 2007, p. 147).

Trying to prevent inconsistencies as presented above, US Courts base their decisions on two criteria. "First, US courts have asserted jurisdiction when a domestic company is merely the "alter ego" of a foreign parent. Second, jurisdiction may be exercised where a domestic subsidiary is the "agent" of its foreign parent" (Born & Rutledge, 2007, p. 165).

⁸ See also ATCA Cases: *Presbyterian Church of Sudan v. Talisman Energy* (United States District Court of the Southern District of New York 19 of March of 2003); *Wiwa v. Royal Dutch Petroleum* (United States Court of Appeals of the Second Circuit 14 of September of 2000); *Doe v. Unocal*, 27 F.Supp2d. 1174 (United States District Court, C.D. California 25 of March of 1997).

a) *The 'alter ego' doctrine*

According to this doctrine, personal jurisdiction is given when "a parent and its subsidiary fail to comply with the formal requirements of corporate separateness, or when a parent exercises an extreme level of control over its subsidiary, so that they cannot be regarded as 'really separate entities'" (Joseph, 2004, p. 84).

In *Doe v. Unocal* (2001, p. 926), the U.S. Ninth Circuit Court of Appeals laid out the requirements that a plaintiff has to establish in order for the court to apply the *alter ego* doctrine:

... to demonstrate that the parent and subsidiary are "not really separate entities" and satisfy the alter ego exception to the general rule that a subsidiary and the parent are separate entities, the plaintiff must make out a prima facie case "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice (*American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*, 1996, p. 591).

At the end, the aim of the alter ego test is to show that the parent corporation controls the subsidiary "to such a degree as to render the latter the mere instrumentality of the former" (*Calvert v. Huckins*, 1995, p. 678).

But although the criteria needed for the fulfillment of the *alter ego* test have been set out clearly in the decision above, they remain very difficultly to satisfy as they need to be established in an "extremely fact-intensive" process (Blumberg, 2002, p. 498). For example, in the *Unocal* Case, the District Court found that "the level of control was not however so extreme as to establish 'alter-ego' status" (Joseph, 2004, p. 85). For the foreign parent corporation it is therefore desirable to hide its links with its U.S. based subsidiary. On the other hand, on behalf

of the plaintiff it will of course, require great amounts of human and pecuniary resources allocated to legal research to demonstrate a lack of separateness between the two companies.

Another difficulty that arises in the application of the *alter ego* test is being able to determine when the parent company's control is carried out to an extreme, specially regarding activities that may involve human rights violations and the framework developed by the SRSG that involves a "corporate responsibility to respect human rights" (Ruggie, 2008)⁹, with a strong need for due diligence on behalf of the parent corporation.

b) *Alter-ego v. human rights due diligence*

The business and human rights framework of the UN presented in 2008 by the SRSG, is based on three pillars: the duty of the state to protect against human rights abuses by third parties, including by businesses; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies in judicial and non-judicial form (Ruggie, 2008, p. 9).

The category of corporate responsibility has due diligence as one of its key elements which is defined as the "appropriate corporate response to managing the risks of infringing the rights of others" (Ruggie, 2010, p. 79). It consists of a set of steps that a "company must take to become aware of, prevent and address adverse human rights impact" (Ruggie, 2008, p. 57).

⁹ See also: J. Ruggie. (2009, 22 of April). Business and Human Rights: Towards operationalizing the "protect, respect and remedy" framework. *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, (pp. 13-20), U.N. Doc. A/HRC/11/13; J. Ruggie. (2010, 9 of April). Business and Human Rights: Further steps towards operationalizing the "protect, respect and remedy" framework. *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, (pp. 12-18), U.N. Doc. A/HRC/14/27.

The following four due diligence components were integrated by the SRSG into the report in respect of human rights: 1) A statement of policy articulating the company's commitment to respecting human rights; 2) Periodic assessment of the actual and potential human rights impacts of the corporation's activities and relationships; 3) Integrating these commitments and assessments into internal control and oversight systems; and 4) Tracking and reporting performance (Ruggie, 2010, p. 83).

If performed by the parent corporation towards a subsidiary, the due diligence components could be understood as satisfying the 'extreme control' requirement of the *alter-ego* test. Yet, parent corporations could argue that they are exercising a very close control of their subsidiary not because the latter is a mere legal instrument of the former, but because they have to comply with their human rights due diligence responsibilities.

Such an argumentation could render the *alter-ego* test inapplicable. On the contrary, TNCs could argue that they cannot comply with their human rights due diligence responsibilities, because by doing so the parent corporation will exercise extreme control over their subsidiaries, making them liable for their wrong doing. This position will turn the *alter-ego* doctrine into an excuse for non-compliance with due diligence responsibilities.

c) *The 'Agency' doctrine*

An alternative way to establish jurisdiction over a foreign corporation could be by determining the existence of an 'agency' relationship between the foreign parent company and its US subsidiary. Agency is defined in common law as "[...] the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests as-

sent or otherwise consents so to act” (American Law Institute, 2006).

Following this definition and its development through US courts (although similarly inconsistent as it is regarding the alter-ego doctrine), one may come to the conclusion that a relationship of agency exists if the following requirements are satisfied: a) The alleged agent must have acted for the benefit of the alleged principal; b) The principal must have knowledge of, and must have consented to, the agent’s actions on its behalf; and c) The principal must have had sufficient control over the agent’s actions (Cutco Industries, Inc. v. Naughton, 1986)¹⁰.

In the Second and Ninth Circuits, a new doctrine on agency was developed in the *Unocal* and *Wiwa* cases. According to these cases, “an entity is a corporation’s agent if it performs services that are ‘sufficiently important to the [parent] that if it did not have a representative to perform them, the [parent’s] own official would undertake to perform substantially similar services” (Joseph, 2004, p. 85).

However, with regard to the agency standard, certain difficulties in establishing jurisdiction in U.S. courts arise. First, the case law on the applicability of the agency test is so heterogeneous that “some courts have abandoned any attempt at articulating a test, opting instead for a ‘totality of the circumstances’ approach” (Born & Rutledge, 2007, p. 180).

Secondly, an even more obvious complication is that “[c]ommon law agency has not arisen as a basis for jurisdiction over parent corporations in respect of the actions of their subsidiaries in transnational human rights litigation” (Joseph,

2004, p. 85). Because of that, “multinational liability under the “agency” concept is most often an entirely unpromising remedy” (Blumberg, 2001).

4.2. *Forum Non Conveniens*

Forum Non Conveniens (FNC) is a common law doctrine under which courts may decline to exercise jurisdiction over an action on the basis that the balance of relevant interests is in favor of the trial being conducted in a foreign forum (Rothluebber v. Obee, 2003)¹¹. At its “broad discretion” (Peregrine Myanmar Ltd. v. Segal, 1996, p. 46) courts may, dismiss a case despite having the requisite subject matter and personal jurisdiction, where another forum is available and more appropriate (Blumberg, 2002, p. 501). *Forum Non Conveniens* is not considered *ex officio* by judges, it only arises on the defendant’s application (Joseph, 2004, p. 87).

a) *The elements of the Forum Non Conveniens Test*

As established by the two American landmark decisions on *Forum Non Conveniens*, *Gulf Oil Corp. v. Gilbert* (1947) and *Piper Aircraft Co. v. Reyno* (1981), two-step test needs to be used to determine if *Forum Non Conveniens* is applicable or not. The first step is to examine the availability of a more adequate alternative forum to adjudicate the dispute. Secondly, if an adequate alternative forum exists, the court will then balance the public and private interests to determine whether the convenience of the parties and the goals of justice would best be served by dismissing the action in favor of the alternative forum (Fellas, 2008, p. 326)¹².

¹⁰ See also *Grove Press, Inc. v. Angleton*, 649 F.2d 121 (United States Court of Appeal Second Circuit 12 of May of 1981) at p. 122; *Plaza Realty Investors v. Bailey*, 484 F.Supp. 335 (United States District Court Southern District of New York 14 of December of 1979) at p. 347; *Louis Marx & Co. v. Fuji Seiko Co., Ltd.*, 453 F.Supp. 385 (United States District Court Southern District of New York 30 of May of 1978) at p. 390.

¹¹ See also: *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (United States Supreme Court 10 of March of 1947); *Semanishin v. Metropolitan Life Ins. Co.*, 46 N.J. 531 (Supreme Court of New Jersey 4 of April of 1966); *Plum v. Tampax, Inc.*, 402 Pa. 616 (Supreme Court of Pennsylvania 30 of January of 1961); *Piper Aircraft Co. v. Reyno*, 454 US 235 (United States Supreme Court 08 of December of 1981); Joseph (2004, p. 87).

¹² See also Joseph (2004, p. 88) and Blumberg (2002, p. 505).

i) *Existence of an adequate alternative forum*

Under the adequacy criteria, the Court has to assess whether an alternative more adequate forum is available to provide effective relief to the plaintiff. In *Piper Aircraft Co. v. Reyno* (1981), the US Supreme Court held that "while domestic plaintiffs should be afforded 'substantial deference' in their choice of forum, courts should be 'less solicitous' in the case of foreign plaintiffs seeking to benefit from the more liberal tort rules provided for the protection of Americans" (Blumberg, 2002, p. 505).

In *Sarei v. Rio Tinto* the Court chose to strictly apply the test by arguing that Australia, the home country of one of the defendants, was not an adequate forum because the exact ATCA claims were not recognized under Australian law, notwithstanding the fact that the claims were actionable under domestic tort law (*Sarei v. Rio Tinto*, 2002).

In *Presbyterian Church of Sudan v. Talisman Energy*, the Court found that Canada was an adequate forum even though it did not permit ATCA like claims. The decision was justified on the ground that the plaintiffs did not challenge Canada's adequacy as a forum, although the court also mentioned that if Canada's adequacy would have been contested, the outcome would have been different (*Presbyterian Church of Sudan v. Talisman Energy*, 2003). From this holding we may conclude, tribunals seem to give more importance to formal rather than substantive issues when it comes to determining its jurisdiction under the *Forum Non Conveniens* doctrine. In so doing, the legal system is deprived of coherent and continuous interpretation and application of this issue.

In applying the aforementioned criteria to determine the adequacy or inadequacy of a forum¹³,

¹³ See John Fellas "There are three different bases for claiming that a forum is inadequate: (a) the substantive law of the alternative forum is inadequate; (b) the procedures of the alternative forum

difficulty arises where a case is considerably fact-intensive and is an issue that is further compounded by the discretionary nature of the judicial decision-making in these cases.

The lack of uniformity in applying the doctrine has motivated many countries, specially developing ones, to issue legislation that permits victims to refrain from exercising jurisdiction in domestic courts when the case has been taken before a foreign tribunal¹⁴. The sole purpose of such measures is to prevent defendants from having a case dismissed in an American court that is brought by a citizen of the same nation as the defendant¹⁵.

ii) *Balancing private and public interests*

Since *Gulf Oil v. Gilbert*, the private interest of the litigant is considered to be the most pressing criteria when it comes to balancing public and private interests. The court held that:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. (...) But unless the balance is stron-

are inadequate; or (c) the political or social circumstances in the alternative forum are such as to render it inadequate" (Fellas, 2008, p. 330-335).

¹⁴ The practice of issuing legislation to counteract the effects of FNC in foreign courts, was developed in the late 1990's by civil law countries -mainly Latin Americans- and is known as 'retaliatory legislation'.

¹⁵ See *Diario de Centro América*. (1997, 12 of June). Decreto 34 de 1997 de Guatemala Artículo 2, Tomo CCLVI, Numero 69: "La acción personal que un autor nacional radica validamente en el extranjero ante juez que es competente, hace fenecer la competencia nacional (...)". (Non official translation made by the author: The personal action that a national submits abroad before a competent judge terminates the domestic jurisdiction (...)).

gly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed (Gulf Oil Corp. v. Gilbert, 1947, p. 508).

In considering the criterion of private interests, the courts are trying to guarantee due process as well as general procedural principles such as celerity and economy of the process whilst also ensuring that the judge has direct contact with the elements of the case, including its proofs. There is nothing wrong in that protective analysis when it comes to cases that involve human right violations committed by corporations, except that the analysis cannot overlook the fact that the two parties to the process are never equal in their means and possibilities. Therefore the judicial reasoning should necessarily consider the existent inequalities between the normally wealthy and powerful corporation and the human rights victims¹⁶. Consequently, the judge should aim, through their decision-making, to balance the standing of the two parties by favoring the interest of the victims above the corporation's private interests.

Further to this, both Gulf Oil v. Gilbert (1947) and Piper Aircraft Co. v. Reyno (1981) also presented public interest as something that needs to be taken into account by the judge:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community that have no connection to the litigation. In cases that affect many people, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they may only learn of it through the media. There is a community interest in having local controversies decided at home. Furthermore, there is an appropriateness, too, in having the trial of a diversity case in a forum that is at home

¹⁶ There could be an exception in the cases that involve a strong union as a counterpart of the corporation. Anyway some criteria to determine how different the situations of the parties of the process are should be developed by the jurisprudence.

with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself (Gulf Oil v. Gilbert, 1947, p. 509).

Although the value given by tribunals to each of the *Forum Non Conveniens* elements is still subject to dispute, it has been considered that if the availability of an adequate alternative forum has been determined and the private interest considerations strongly favor dismissal, there is no need to consider the public interest factors¹⁷. The public interest therefore acts as a secondary factor, to be considered only "if the trial judge finds the balanced private interests to be in equipoise or near equipoise" (Gulf Oil Corp. v. Gilbert, 1947, p. 509).

The latest tendency, as laid out in *Presbyterian Church of Sudan v. Talisman Energy* (2003) and *Wiwa v. Royal Dutch Petroleum* (2000), is to use the private interest consideration in favor of ensuring litigation against TNCs. This case exemplifies a jurisprudential change towards what was suggested in the 'private interest' discussion above, the recognition by tribunals that an enormous imbalance of resources exist in favor of the defendant (the corporation), making the inconvenience of a process in a different forum affordable to them.

b) *Forum Non Conveniens and TNC's responsibility for human rights violations: the threshold imposed by ATCA and TVPA in the US.*

Since the celebrated 1986 case of *In re Union Carbide Corp. Gas Plant Disaster at Bhopal* (1986)¹⁸ *Forum*

¹⁷ See *Empresas Lineas Maritimas v. Schichau-Unterweiser*, 955 F.2d 368 (United States Court of Appeals, Fifth Circuit 12 of March of 1992); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (United States District Courts, S.D., Texas, Houston Division 11 of July of 1995); *Delgado v. Shell Oil Co.*, 231 F.3d 165 (United States Court of Appeals, Fifth Circuit 16 of November of 2000); *Kully v. Aircraft Service Int'l Group, Inc.*, 662 F. Supp. 2d 259 (United States District Court E.D. New York 10 of August of 2009).

¹⁸ In the Bhopal (1986) case, the US District Court for the Southern District of New York considered that "(...) all of the private interest factors described in *Piper* and *Gilbert* weigh heavily toward

Non Conveniens has been pleaded by TNCs in virtually all human rights cases involving violations committed by multinational parent corporations abroad that resulted in injuries of foreign workers, consumers, or residents (Blumberg, 2002, p. 502). "It presents a further formidable obstacle to litigation seeking an American adjudication of allegedly wrongful conduct abroad injuring foreign plaintiffs, whether brought against the American multinational parent corporation, or one of its foreign subsidiaries" (Blumberg, 2001).

As it was signal by the SRS in his 2008 Report to the Human Rights Council, it should be a matter of concern that *Forum Non Conveniens* is such a recurrent tool used to dismiss 'corporate-human rights' cases in common law countries. Many governments argue for dismissal on the grounds of "matters of State", may influence even the most independent judiciaries. As a result victims will be deterred from their claims and furthermore will face the perceived impossibility of enforcing the remedies they are entitled to (Ruggie, 2008, p. 9).

In the US, a change in the justiciability of human rights cases is being pushed by ATCA and TVPA. This tendency logically originates from case law, as *Forum Non Conveniens* and ATCA are in contradiction with each other. On one hand, the ATCA is a "statute that opens U.S. courts

to suits by alien plaintiffs who have suffered human rights violations abroad", in an example of what can be consider as an exercise of universal jurisdiction (Baldwin, 2007). On the other hand *Forum Non Conveniens* is a doctrine that "operates to shut the door to U.S. courts when the plaintiffs are aliens and the violations have occurred overseas" (Baldwin, 2007). The conflict between the two mechanisms has produced a slow evolution towards stronger judicial means for making parent corporations more responsible under ATCA, even by pushing the change as far as to affect Non-ATCA plaintiffs as was the case in *Martinez v. Dow Chem. Co. (2002)*¹⁹.

United States Courts are increasingly more prone to accept arguments that demonstrate that the alternative forum proposed by the defendants is inadequate, accepting for that purpose non-traditional sources, such as State Department Reports that demonstrate high corruption levels in the forum, to be submitted as evidence. Decisions such as *Wiwa v. Royal Dutch Petroleum (2000)*²⁰; *Iragorri v. Int'l Elevator Inc.*

dismissal of this case on the grounds of *forum non conveniens*." (In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 844 (United States District Court Southern District of New York 12 of May of 1986)) at p. 686 – 687.

¹⁹The public interest factors set forth in *Piper* and *Gilbert* also favor dismissal. (...) The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity" (at p. 867).

²⁰(...) In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism. (...) To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947." (at p. 867).

¹⁹ In this case, workers claimed to have been exposed to and rendered sterile by a chemical produced by the chemical companies and used by the growers on banana farms in Costa Rica, Honduras, and the Philippines. The court concluded that none of the three States were available as an alternative forum for the worker's claims. Therefore, The court denied defendant's motions to dismiss for *forum non conveniens*. This decision has been criticized by: *Realuyo v. Villa Abrille*, 32 Media L. Rep. (BNA) 1427 (United States District Court for the Southern District of New York 08 of July of 2003) at ¶ 38; *Morales v. Ford Motor Co.*, 313 F.Supp.2d 672 (United States District Court, S.D. Texas, Brownsville Division 31 of March of 2004) at ¶ 676. And followed by: *Johnston v. Multidata Sys. Int'l Corp*, 523 F.3d 602 (United States Courts of Appeals Fifth Circuit 07 of April of 2008) at ¶ 607; *Fernando Ramirez Sainz, Peticionario v. Alexander Cabanillas, Fulana de Tal y la Sociedad Legal de Gananciales compuesta por ambos, Peticionarias*, 2009 TSPR 151 (Tribunal Supremo de Puerto Rico 06 de octubre de 2009) at ¶ 41.

²⁰ In September 25 1998, following the Report of Magistrate Judge Henry Pitman, Judge Wood from the U.S. District Court for the Southern District of New York dismissed this case on the basis of forum non conveniens, as it was considered that England was an "adequate alternative forum". The case was appealed by the plaintiffs before the U.S. Court of Appeals for the Second Districts, which decided on September 14 2000 to reverse the dismissal based on forum non conveniens and remanded the case for further proceedings. Shell moved for certiorari before the US Supreme Court, but the petition was rejected in March 26 2001. Finally, the case was settled through an agreement on the eve of trial on June 8 2009, according to which Shell committed

(2001), *Aguinda v. Texaco, Inc.* (2002); *Bigio v. Coca-Cola Co.* (2006); *Khulumani v. Barclay Nat'l Bank Ltd.* (2007); and *Arar v. Ashcroft* (2008), "decreases the chance of an [*Forum Non Conveniens*] dismissal in torture cases, and might even be used to deflect [*Forum Non Conveniens*] arguments in all ATCA cases" (Joseph, 2004, p. 99).

A change has began in the American culture, although in such a heterogeneous and cumbersome fashion that it makes it difficult to predict how a case involving a corporate human right violation is going to be decided by a court, diminishing both the juridical certainty and encouragement that victims may have to vindicate their rights.

Probably acknowledging that heterogeneous cultural change, on 17 October 2011 the US Supreme Court decided to grant writ of certiorari to the *Kiobel v. Royal Dutch Petroleum Co.* (2010) case²¹. The case was brought by Nigerian plaintiffs (Esther Kiobel, the wife of Dr. Barinem Kiobel- an Ogoni activist who campaigned against the environmental damage caused by oil extraction in the Ogoni region of Nigeria) against Shell, alleging that the company aided and abetted the Nigerian military dictatorship in the 1990s in the commission of gross human rights violations, including torture, extra-judicial execution, and crimes against humanity (Center, Business and Human Rights, 2009)²².

The *Kiobel* case is the first time an ATCA case on corporate responsibility is reviewed by the Supreme Court, giving the opportunity to 'crystallize' uniform criteria on most of the issues

to pay US \$15.5 Millions as compensation. *Royal Dutch Petroleum Co. v. Wiva*, 532 U.S. 941 (United States Supreme Court, 26 of March of 2001).

²¹ Certiorari was granted in October 2011 (80 U.S.L.W. 3237 (United States Supreme Court 17 of October of 2011)). After a long period of *amicus curie* submissions, the case is pending for decision.

²² See also Ruggie, J. (2012, 4 of September). *Kiobel and Corporate Social Responsibility*. John F. Kennedy School of Government, Harvard University. Available at <http://www.business-humanrights.org/media/documents/ruggie-kiobel-and-corp-social-responsibility-sep-2012.pdf>

addressed in this section. The Court will rehear the case on 1 October 2012 and in the meantime requested the parties to "submit briefs on whether the ATCA allows federal courts to hear lawsuits alleging violations to the law of nations that occur outside the US" (Center, Business and Human Rights, 2009, 25 of September).

In other jurisdictions, the application of the *Forum Non Conveniens* doctrine in cases that involve human rights violations by corporations share the same difficulties showed by American jurisprudence. In countries like the United Kingdom, many cases have been submitted against parent corporations and in all of them *forum Non Conveniens* has been present as part of the exceptions alleged by the defendants. It was only until the *Andrew Owusu v. N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*, (2005) case, that the European Court of Justice decided that

... application of the doctrine *forum non conveniens* is liable to undermine the predictability of the rules of jurisdiction (...) and consequently to undermine the principle of legal certainty (...). Moreover, allowing *forum non conveniens* would be likely to affect the uniform application of the rules of jurisdiction contained in the Convention and the legal protection of persons established in the Community (*Andrew Owusu v. N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*, 2005, p. 41 – 46).

This decision has made hundreds of litigation suits possible against corporations established in the European Union.

On the other hand, many states have seen the *Owusu* case as a decision against their legal procedural system, as it has been the case of the UK:

The United Kingdom regrets the inflexibility inherent in the [*European Court of Justice's*] decision in *Owusu v. Jackson*. It has to a great extent disabled our valuable

procedural mechanism of *forum non conveniens* which facilitates the transfer of cases which would be more appropriately dealt with by the courts in another jurisdiction (...).

There is a clear need for a broader transfer rule which would also be apt to cover situations of the kind which arose on the facts of *Owusu* (United Kingdom Ministry of Justice, 2009, 3 of September).

An international approach has been taken in proposing a uniform standard for the application of the *forum non conveniens* doctrine in international litigations. However, the approach given by the 1999 Preliminary draft convention on Jurisdiction and Foreign Judgments (Hague Conference on Private International Law, 2012, 5 of September) did not consider a human rights perspective, although it is recognizable that the work done by the Special Commission of the Hague Conference on Private International Law laid the foundations for the construction of an international *forum non conveniens* standard.

The purpose of this article is not to propose the elimination of *forum non conveniens*, but to encourage the equipment of judges with the appropriate tools to allow them to apply it in a more consistent way, recognizing the unbalance that normally exists between defendants and plaintiffs. Parent corporations cannot use *forum non conveniens* as a means to avoiding their responsibility for human rights violations or for the violations committed by its subsidiaries.

A possible solution to the problem of *forum non conveniens*, could have been the inclusion of criteria for the applicability of *forum non conveniens* in human rights litigation against corporations, in the Guiding Principles for Business and Human Rights submitted in 2011 by the SRSG and unanimously approved by the UN Human Rights Council (Ruggie, 2011)²³.

²³ Regarding the endorsement made by the Human Rights Council to the Principles, see, Human Rights Council, United Nations

Conversely, anyone could argue that the guiding principles were supposed to be general and not specific enough to have set criteria on the matter. Although recognizing the generality of principles, a general norm guiding extraterritorial jurisdiction, including the *forum non conveniens* doctrine in it, could have been developed and complemented by a commentary addendum to it that includes a detailed criteria.

After the SRSG finished his mandate with the presentation of the Guiding Principles, a five independent experts working group was appointed, with a wide three-years mandate that focus, among other things, in continuing exploring options and making recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities (Human Rights Council, 2011, 16 of June). Probably it will be under this Working Group's mandate that we will finally achieve a clarification on the *forum non conveniens* issue, contributing to the restoration of victims' human rights.

5. Conclusion

As a result of globalization, many corporations have gained significant economic power which often puts them in a stronger position to negotiate against weaker states whose political power is subjugated by economic powering today's world. The complexity of multi-national and multi-layer corporate structures hinders the potential reach of justice to reach as far as needed to achieve its goal. Moreover, the inexistence of proper uniform procedural mechanisms to allow human rights victims' access to justice constitutes an obstacle to their fight for obtaining adequate reparation.

(2011, 16 of June), Human Rights and transnational corporations and other business enterprises, Geneva: United Nations Human Rights Council.

The fact that TNCs represent one of the most relevant participants in the international sphere is unquestionable. Corporations, as an active participant of an international community that has recognized human rights as a cornerstone of its international legal system, have the obligation to respect human rights and be held responsible when they fail in doing so. In the words of Irene Khan, Secretary-General of Amnesty International, "human rights are rooted in law. Respecting and protecting them was never meant to be an optional extra, a matter of choice. It is expected and required. It should be part of the mainstream of any company's strategy, not only seen as part of its corporate social responsibility strategy" (Khan, 2005, 2 of June).

If the goal of corporations is to obtain revenues, then governments need to find mechanisms that will enforce them in following international human right standards, rather than violating them. A first step towards that goal is without a doubt the creation of a corporate responsibility framework that is logical, fair and clear enough to be feasibly adopted and enforced, as well as to act as a deterrent against human rights violations.

The Guiding Principles on Business and Human Rights were submitted by the SRSG and endorsed by the Human Rights Council in 2011. Taking into account the acceptance the SRSG's work has had among the different international stakeholders, it is imaginable the strong value that these principles are going to have, even as the soft law instrument they are.

It is expected that the consequence of the different circumstances explained throughout this article, motivate the creation of an international framework for corporate responsibility of human rights violations.

Regarding the legal development of the ATCA in the US, and the way it will continue having an impact in corporate responsibility and hu-

man rights victims' access to justice; we face a precious opportunity with the decision of the US Supreme Court to review the appeal denied by the US Second Circuit Court of Appeals, in *Kiobel v. Royal Dutch Petroleum Co.* (2010) case. It is the first time that the US highest Court reviews the issue of corporate responsibility under ATCA. The consequences, for better or worse, will be the unification of standards on corporate responsibility, a field that until the day has been very heterogeneous.

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