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The Long Arm of the Law: Chasing Justice Across Borders

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With the world getting more interconnected, the battle for seeking justice for human rights abuses transcends borders and remains a complex tussle - one in which the reach of domestic law falls short in safeguarding victims of such abuses. Post the 1991 Liberalisation, Privatisation and Globalisation reforms, major Trans-National Corporations (TNCs) find a significant presence across most nations, where the net worth of some TNCs is more than the entire GDP of a country. These corporations have a significant impact on a country's economy, opening the gates for potential human rights abuses by them.[1] *And the worldwide presence of these companies makes it difficult to attach accountability when these violations occur outside the home country of the corporation. Hence, the extraterritorial laws are needed to hold these companies accountable for wrongdoings. This paper explores the question of how efficient different national legislations granting extra-territoriality to domestic courts are in addressing human rights violations by Trans-National Corporations (TNCs) in host states.*

Keywords: *extra-territorial jurisdiction, transnational corporations, human rights violations, corporate accountability.*

INTRODUCTION: WHAT IS EXTRA-TERRITORIALITY?

The principle of territorial jurisdiction, i.e. a state has jurisdiction over acts occurring in its territory, is the norm under international law. But when a state adjudicates on a matter that

[1] Debosmita Nandy and Niketa Singh, 'MAKING TRANSNATIONAL CORPORATIONS ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS' (2009) 2 NUJS Law Review <https://www.commonlii.org/in/journals/NUJSLawRw/2009/4.pdf> accessed 04 July 2025

has taken place outside its territory, it is acting extraterritorially, which is an exception to the territoriality principle. The extraterritorial principle does not merely include the exercise of extraterritorial jurisdiction by a state to attach corporate liability on human rights offenders, but should also include any state measures taken to enhance accountability for violations committed by TNCs in host countries.[2]

THE INTERNATIONAL LEGAL FRAMEWORK ESTABLISHING CORPORATE ACCOUNTABILITY

Even after persistent efforts, the United Nations has been unable to bring into force a binding convention that imposes mandatory obligations on TNCs for their activities in host nations or give power to the host nations to regulate these TNCs. However, some of the non-binding treaties on the subject matter include:

United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises about Human Rights: This makes it a duty of TNCs to conduct due diligence to ensure that their activities do not lead to human rights abuses and that the TNCs are not able to benefit from these abuses.[3]

Guiding Principles on Business and Human Rights: These require voluntary monitoring of the supply chain and due diligence by TNCs and grant remedies to states for preventing human rights abuses by the companies in their jurisdiction.[4]

OECD Guidelines for Multinational Enterprises: These voluntary guidelines make it the duty of TNCs to take the required action on the identification of an activity leading to human rights abuses in their supply chain.[5]

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[2] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117(3) Journal of Business Ethics <https://www.jstor.org/stable/42001865> accessed 04 July 2025

[3] UN Sub-commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2003)

[4] 'Guiding Principles on Business and Human Rights' (*OHCHR*, 2011) <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 04 July 2025

[5] 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (*OECD*, 08 June 2023) <https://www.oecd.org/en/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en.html> accessed 04 July 2025

Though stepping in the right direction, the voluntary and non-binding nature of these treaties acts as an impediment to accomplishing their target goals. The reason behind the difficulty in creating binding treaties and attaching international corporate accountability to actions of TNCs outside the home countries lies in the continuous tussle between the host country's desire for inflow of FDI with these TNCs and the lack of willingness to impose strict policies upholding human rights accountability of TNCs, which might deter them from setting foot in their jurisdiction. The absence of binding, mandatory obligations and associated legal outcomes in the treaties creates a lack of incentive for the companies to comply with them and allows for the continuance of human rights abuses, defeating the purpose of the treaties.[6] Hence, the current international regime of holding companies responsible for human rights violations on a territorial basis is inadequate to effectively deal with modern abuses by these TNCs operating on a global basis.

ANALYSIS OF THE USA'S ALIEN TORTS CLAIM ACT 1789

Despite the lack of an effective international regime on corporate accountability, some nations have displayed the political will to introduce domestic legislation granting extra-territorial jurisdiction to their domestic courts for holding TNCs accountable for human rights violations in the host states. This chapter examines the Alien Torts Claim Act of 1789 (hereinafter 'ATCA') of the USA, one of the most renowned statutes on extra-territorial human rights abuses, for the reason that most major TNCs are incorporated in the USA. The ATCA grants jurisdiction to domestic courts for trying claims brought by an alien for violation of the Law of Nations. Hence, it gives rights to aliens to sue for breaches under the Law of Nations, including customary international law and jus cogens norms, before US courts, even if the violations have occurred outside the US territory.[7]

EVOLUTION OF CASES ON FOREIGN CORPORATE ACCOUNTABILITY UNDER ATCA

The first case against a corporation under ATCA was Doe v Unocal. In a case wherein Burmese villagers sued Unocal, a California-based company, for alleged human rights abuses during the Yadana gas pipeline's construction in Myanmar, the Ninth Circuit Court

[6] Cedric Ryngaert, 'Editorial: Accountability of Multinational Corporations for Human Rights Abuses' (2018) 14(2) Utrecht Law Review <https://ssrn.com/abstract=3204437> accessed 04 July 2025
[7] Alien Tort Claims Act 1789

of Appeals accepted the jurisdiction of U.S. courts to take up the matter, even though the act of violation occurred outside the U.S. However, before the arguments on the merits of the case could start, Unocal decided to settle the case and paid compensation to the Burmese villagers.[8] Although Unocal was not held liable by the court, the ability of the victims to extract compensation from the company can be marked as a success of ATCA.[9] However, the question of the jurisdiction of the Court for claims against TNCs under ATCA was not clearly addressed, as the outcome was not delivered by the court. Though this case does provide a ground for arguing in favour of the same due to the fact that jurisdiction was recognised by the Appellate court for the first time.

This question was next addressed in Kiobel v Royal Dutch Petroleum Company[10], wherein Nigerian citizens accused the defendant of helping and abetting the Nigerian government in transgressing international law on Nigerian soil. The court applied the 'presumption against extraterritorial application' principle [unless otherwise indicated, Congress enacted legislation is exclusively applicable within US territorial jurisdiction. Therefore, a statute must be applied territorially if it makes no explicit reference to extraterritorial application; to hold that, due to the express lack of this presumption in ATCA, courts do not have jurisdiction to try cases where the human rights violation has occurred outside US territory.

The SC also established a test of touch and concern to the territory of the US for the court to have jurisdiction over an extraterritorial act, and also, that the concern must be of sufficient magnitude to be able to rebut the territorial presumption. Mere corporate presence of the company in the US does not suffice for the applicability of ATCA.[11] This case represented a major shift in ATCA litigation, where allegations of human rights abuses occurring completely outside the US cannot be brought under the purview of this act, as opposed to before, where cases were decided even though the act was extra-territorial. The new standard of sufficient touch and concern made it difficult for aliens to bring a case under ATCA. However, the court still left the question of corporate liability under ATCA unanswered.

[8] *Ibid*
[9] Nandy (n 1)
[10] *Kiobel v Royal Dutch Petroleum* Co [2013] 569 US 108
[11] *Ibid*

In Jesner v Arab Bank[12], wherein foreign nationals who were injured in terrorist attacks connected to Arab Bank filed a claim against the bank under the ATCA, the court held that foreign TNCs cannot be defendants for claims under ATCA, as holding otherwise would cause diplomatic tensions between the USA and Jordan and affect foreign relations of the country, which goes against the aim of the legislation. The court also stated that the executive branch, and not the judiciary, is responsible for imposing liability on TNCs for international law violations (doctrine of separation of powers). An insufficient connection between terrorist attacks and the Arab Bank's act of processing transactions via the New York branch was established, excluding it from the scope of ATCA.[13] The concern of the judges behind giving the judgment was politically motivated based on the fear and apprehension that if foreign TNCs are sued in America, American companies can also be investigated in other jurisdictions. This shows how the judiciary is getting swayed away from the purpose of ATCA (to provide a forum for human rights violations abroad) by extraneous and self-motivated considerations. Even though the direct liability of TNCs was not analysed in Jesner, it paved the way for dilution of extraterritorial corporate accountability under ATCA, which was exactly what happened in the Nestlé case.

In Nestlé USA, Inc. v Doe[14], wherein Nestlé USA and Cargill were sued for using child labour in cocoa farms of the Ivory Coast (where Nestlé purchases its cocoa from), the court applied the two-step analysis given under RJR Nabisco, Inc. v European Community, holding that ATCA does not rebut the presumption of territorial application due to lack of explicit mention of extraterritoriality. So, to bring a case against TNC under ATCA, the plaintiff has to show that the relevant act occurred entirely in US territory, and mere general corporate activity of TNC in the USA is not sufficient. Hence, this case completely diluted the use of ATCA for holding a TNC liable for an extraterritorial act, and hence drifted away from the original intent of the statute.

The evolution of these cases has removed the element of extraterritoriality from ATCA, while creating a legal void for transnational human rights abuse victims. The series of cases has narrowed the scope of ATCA by emphasising the domestic character of disputes with the

[12] *Jesner v Arab Bank PLC* [2018] 138 S Ct 1386
[13] *Ibid*
[14] *Nestlé USA Inc v Doe* [2021] 141 S Ct 1931

need for a domestic act to have jurisdiction, hence, limiting the recourse available to foreign victims for abuses outside the US.

DEFENCES USED BY US COURTS

Additionally, the US courts reject cases under ATCA based on doctrines like forum non conveniens[15] (hereinafter FNC), where a case is dismissed when another more appropriate forum is available to exercise jurisdiction of the case. Two requirements must be met for a judge to dismiss a matter under the FNC doctrine. First, there needs to be a suitable alternative place where the case can be filed. Second, both private and public interests need to be carefully taken into account. The US foreign policy interest in the case and the convenience of the disputing parties, including the availability of witnesses and evidence, will be the important aspects that the court considers. The scope (subject matter) of ATCA is also narrow, allowing only for civil and political rights abuses, whereas major corporate abuses are related to environmental, social, labour, etc, issues, which fall outside the ambit of the statute.[16] The political question doctrine is also used, under which a case can be dismissed if it will interfere with U.S. foreign policy or foreign diplomatic relations (as was used in the Jesner case), which ultimately gives power to the executive/political branch to dictate the working of the judiciary.[17]

One of the cases where the FNC doctrine was used by a US court to dismiss a case was the Bhopal Gas Leak Tragedy.[18] Because only a tenuous connection of the incident can be linked to New York, which was not sufficient to tax the time and resources of the country. Union Carbide Corporation (UCC) was sued by the Indian government in US courts under the ATCA in connection with the Bhopal gas tragedy, which resulted in thousands of deaths and injuries in India due to a methyl isocyanate leak from UCC's Bhopal subsidiary. India took on the role of parens patriae, defending the Indian victims in U.S. courts, under the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985.[19] The U.S. court rejected India's

[15] Iman Prihandono, 'Barriers to Transnational Human Rights Litigation Against Transnational Corporations (TNCs): The Need for Cooperation Between Home and Host Countries' (2011) 3(7) Journal of Law and Conflict Resolution <https://researchers.mq.edu.au/en/publications/barriers-to-transnational-human-rights-litigation-against-transna> accessed 04 July 2025
[16] *Ibid*
[17] Nandy (n 1)
[18] *Ibid*
[19] Bhopal Gas Leak Disaster (Processing of Claims) Act 1985

contention that Indian courts were not 'up to the task of conducting the Bhopal litigation'. This dismissal was incorrect as FNC doctrine needs to be interpreted in the light of advancements, to mean not only that there exists another forum but also that the forum has the capacity to decide the case and the resources/means to enforce the award, which did not rest with India at that time. Ultimately, the litigation against the TNC had to take place in the host country, i.e., India, wherein very small compensation was awarded by the SC. Hence, with all this, ATCA has lost its relevance with time and has undermined the U.S. role in addressing global human rights abuses linked to U.S. corporations.

ANALYSIS OF OTHER NATIONAL LEGISLATIONS GRANTING EXTRATERRITORIAL JURISDICTION TO DOMESTIC COURTS

With the increasing presence of TNCs worldwide, various other nations have come up with legislation granting extraterritorial jurisdiction to domestic courts to try cases of human rights abuses abroad. This chapter examines a few of them.

UK's Modern Slavery Act 2015: The UK's Modern Slavery Act imposes an obligation on companies[20] to make an annual slavery and human trafficking statement enlisting the steps taken by them to ensure the non-prevalence of slavery in their business/supply chain. All companies that provide goods or services in the UK are subject to the obligation under S. 54 of the Act, so long as they generate £36 million in revenue annually.[21] The entities need not be UK-registered companies, but merely need to supply some goods & services in the UK. The focus of the act on business activities instead of domicile expands the scope of this law to include foreign incorporated businesses having business in the UK, hence having extraterritorial reach.[22] This is a groundbreaking law, giving power to the government to monitor the activities of companies abroad for the first time.

However, even this act has its limitations, reducing its effectiveness to address slavery issues within the supply chain. The disclosure requirement under the act applies to individual

[20] Susan F Eandi, 'Did You Know That The UK Modern Slavery Act 2015 Has Extraterritorial Effect?' (*The Employer Reports*, 09 November 2017) <https://www.theemployerreport.com/2017/11/did-you-know-that-the-uk-modern-slavery-act-2015-has-extraterritorial-effect/> accessed 04 July 2025

[21] *Ibid*

[22] Ryan J Turner, 'TRANSNATIONAL SUPPLY CHAIN REGULATION: EXTRATERRITORIAL REGULATION AS CORPORATE LAW'S NEW FRONTIER' (2016) 17 Melbourne Journal of International Law <https://law.unimelb.edu.au/__data/assets/pdf_file/0009/2039571/08_Turner_171.pdf> accessed 04 July 2025

entities instead of the entire group of entities, of which the individual is a part. This means that only an individual entity's supply chain is assessed, letting the other entities escape charge-free. This allows bypassing of the obligation by structuring the business in a way that limits liability.[23] The individual liability regime also pushes for a not my fault mindset, where companies focus on saving their face over addressing the real slavery problem. This blame-shifting is due to the assignment of liability on a single company, despite the truth that exploitative conditions are a result of composite acts of different actors rather than one single entity. Hence, joint liability, along with stronger supplier relationships, is necessary to mitigate risks.[24]

Finally, there is no platform, penalties or enforcement mechanism for non-compliance under the Act, and reliance is placed on consumer pressure and public assessment. This soft approach of naming and shaming is limited in its scope, as consumers are often unaware or inconsiderate of the presence of these violations in a company's supply chain.[25] A more phased and rigorous enforcement process, including fines, court cases, accountability of board members, or disqualification of members for non-compliance, is necessary to ensure self-adoption of due diligence by companies and the realisation of the purpose of the act.[26]

But despite these shortcomings, the Modern Slavery Act is a stepping stone for holding TNCs accountable for abuses in their supply chain, even outside the UK and acts as a catalyst for change in companies' internal policies.

French Duty of Vigilance Act 2017: The French Duty of Vigilance Act was passed post the Rana Plaza collapse in Bangladesh and focuses mainly on the fast fashion industry. It imposes an obligation on French companies.[27] To prepare a vigilance plan disclosing measures to prevent human rights violations in the activities of the company itself, companies under its control (subsidiaries) and the supplier companies with whom it has signed contracts. The

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[23] *Ibid*
[24] Laura Haworth, '7 Things Wrong with the Modern Slavery Act' (*Ardea International*, 19 October 2017) <https://www.ardeainternational.com/thinking/7-things-wrong-modern-slavery-act/> accessed 04 July 2025
[25] *Ibid*
[26] Brooks E. Allen et al., 'UK Modern Slavery Act: The Future of Transparency in Supply Chains' (*Lexology*, 19 September 2024) <https://www.lexology.com/library/detail.aspx?g=16552449-0889-46b7-91f1-9ac77dd1915a> accessed 04 July 2025
[27] Claire Bright, 'Creating a Legislative Level-Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?' (2018) EUI Working Paper MWP 01/2020 <http://dx.doi.org/10.2139/ssrn.3262787> accessed 04 July 2025

law applies to businesses that have been registered or incorporated in France for two consecutive fiscal years and that have at least 5,000 employees in France (directly or via their French subsidiaries) or 10,000 employees worldwide (through their French and foreign subsidiaries). Thus, the scope of the act is wide enough to include the responsibility to prevent abuses not only in the parent company, but also in the subsidiary companies and subcontractors/suppliers, which can be foreign companies as well. Hence, the courts have extraterritorial reach. This Act aids in achieving justice by allowing the lifting of the corporate veil. Due to the concept of a separate legal entity, the parent company cannot otherwise be held liable for violations by its subsidiaries. However, this French Act's regime bypasses the corporate veil and allows parent companies to be held liable for violations by their subsidiaries, subcontractors, making the parent companies more vigilant about the acts of their subsidiaries. Thus, the reach of French courts, both territorially and extraterritorially (international supply chain), has been expanded, which is a remarkable feature of this act.

The approach under the act is of an ex-ante prevention plan instead of an ex-post reporting plan, where the company is required to know and show how their activities impact human rights, hence, taking measures to prevent the crime even before it has happened. Civil liability is also attached to non-compliance under Article 2 of the act in the form of compensation. However, the burden of proof to show violation by the company and the subsequent damage caused thereto lies on the claimant, which is a big obstacle under the act, loosening the ends of seeking justice.

To date, only 2 cases have been admitted before the French courts under this Act. The first one was filed by NGOs (Notre Affaire à Tous and Amnesty International France), arguing that TotalEnergies' vigilance plan fails to address climate risk. In June 2024, the Paris Court of Appeal ruled that this action filed by NGOs is admissible, and the case has moved to trial.[28] The second case was filed by French Mexican NGOs against Electricité de France, alleging that their vigilance plan was unable to identify risks and demanded a new one. This was also held to be admissible and has moved to be heard on the merits.[29] Even though the number

[28] *Ibid*

[29] Loes van Dijk, 'France's Duty of Vigilance Law Takes First Steps: Two Companies Face Trial After Court of Appeal Rulings' (*Climate Court*, 10 July 2024) <https://www.climate-court.com/post/france-duty-of-vigilance-law-takes-first-steps-two-companies-face-trial-after-court-of-appeal-rulin> accessed 04 July 2025

of cases is small and they have not been decided yet, this marks a big step towards holding companies liable for their human rights violations under the new Act.

Despite these obstacles, the French Act has been said to be 'a historic step forward for the corporate accountability movement, and a testament to the importance of civil society participation in the lawmaking process.'[30] It makes the large French TNCs more accountable for their actions, causing human rights abuses in their worldwide supply chain, and claims can be brought against the same before French courts.

CONCLUSION

In conclusion, extraterritorial legislations like ATCA, the French Duty of Vigilance Act and the UK's Modern Slavery Act have established legal frameworks to address issues of human rights abuses by MNCs in host countries, however, with varying results. ATCA, which was initially a groundbreaking law for cross-border human rights abuses, lost its teeth with the restrictive interpretations given by the US courts, limiting its applicability to cases that have a strong connection with the USA. So, recent laws like the French Duty of Vigilance Act gained prominence, which hold MNCs accountable in their home countries for human rights violations caused by their subsidiaries, suppliers and contractors (by lifting the corporate veil) abroad, thereby filling jurisdictional gaps which otherwise acted as a deterrent to justice. The UK's Modern Slavery Act was a good initiative to ensure transparency in the international supply chain of MNCs; however, it lacked an enforcement platform.

While these legislations are a step in the right direction, to address the limitations in extraterritorial laws in transnational corporate human rights litigation, multilateral treaties between various countries can help provide a universal framework for corporate accountability of TNCs by standardising human rights frameworks, making it difficult for TNCs to exploit loopholes in domestic legislations to escape liability. However, since reaching a consensus between so many nations is a tedious task, with each country having different priorities and interests, a bilateral treaty between two countries can also offer a practical, targeted approach due to ease of negotiation. They can provide for easier and

[30] Bright (n 27)

quicker enforcement mechanisms, like providing direct access to remedy under the country's legal system to victims, tailored for specific abuses.[31]

Alternatively, domestic regulations can be strengthened to provide for enforcement mechanisms like individual liabilities of directors or penalties for non-compliance with human rights due diligence standards. International cooperation between domestic courts also fosters efficient handling of transnational cases by the sharing of resources. The current regime, integrated with these reforms, will allow for extraterritorial laws to become more effective and create trusted routes for victims to seek corporate accountability.

[31] Nandy (n 1)