Chinese Multinational Companies in Africa: The Human Rights Discourse

Qingxiu Bu
Sussex Law School, University of Sussex, Brighton BN1 9RH, UK
Q.Bu@sussex.ac.uk

Abstract

In this century, human rights have been transformed into a mainstream issue for multinational companies with a global presence. It is likely that a multipronged mechanism will imminently be demanded to ensure the accountability of economic actors responsible for human rights abuse. This paper places particular stress on the ostensibly prioritized objectives within international human rights arenas. A highly contentious debate revolves around whether China’s approach to ensuring human rights is in tandem with the West’s in helping Africa move forward or whether it will complicate the current playing field and even undermine the West’s long-standing credibility in relation to the protection of human rights. Relying heavily on instruments like the Alien Tort Statute (ATS) has proved inadequate. A more promising path seems to be a comprehensive framework of hard law and soft law initiatives, along with other incentives.

Keywords

multinational companies – human rights – UN guiding principles – Alien Tort Statute

1 Introduction

Over the past three decades, China has been the world’s fastest-growing economy, with its multinational companies (MNCs)1 rapidly emerging and

1 Different terms are used interchangeably for multinational companies, with a particular focus on state-owned MNCs. However, this does not necessarily mean that there is a principled distinction between such entities and other economic actors.
becoming leading global players. The country’s “go global” policy has catalyzed the growing engagement of Chinese MNCs on the African continent. As one of the promising tripolar global economic entities, China’s growing relationship with Africa has been both unprecedented and impressive. As the Sino-African economic and business partnership surges forward, the matter of human rights protections is increasingly becoming an imperative ingredient for any successful business. Responsible corporate actors should take into account the impact of their investment on both the economic and social arenas of the host country. However, the role that Chinese MNCs have been playing in the African continent’s sustainable development remains uncertain.

For instance, a Sino-Congo deal seems a positive way forward, in that it accelerates Democratic Republic of the Congo’s (DRC’s) regional economy. However, the escalating investment into the DRC has raised concerns regarding China’s nonattachment policy, and increasing pressure from the international community has been imposed on China’s MNCs to take their social responsibilities more seriously. China’s recent massive infrastructure investment in DRC can arguably be perceived by China and its Western counterparts as a different interpretation of the human rights aspects, and has aroused a hot debate about whether China is focused on attaining responsible stakeholder status in the international community. To clarify the potentially paradoxical issues, it is important to explore whether, in the long run, China’s recent approaches have the potential to facilitate human rights initiatives or to hinder them.

The strategic consequences of China’s increased focus on Africa have been the subject of much debate. Much less attention, however, has been paid to the likely legal consequences, including some of the human rights concerns. This paper explores ways to reshape the playing field among multinational stakeholders, including the West, China, and Africa. It primarily addresses three issues. First and foremost, this paper addresses the question of whether there are reasons to hierarchize human rights. Hierarchizing human rights arguably would justify China’s approach of prioritizing certain development objectives over others. Second, this paper offers a critical challenge to the widely held, but mostly controversial, view that under the Alien Tort Statute (ATS), corporations may not be liable for their violations. The assessment presented in this paper is based on the uniqueness of the arm’s-length activities of Chinese state-owned MNCs, which in substance blur the traditional divide between

---

2 A. Szamosszegi and C. Kyle, *An Analysis of State-owned Enterprises and State Capitalism in China* (Washington, DC: U.S.-China Economic and Security Review Commission,
state and corporation. Finally, a multi-pronged regulatory regime is explored for enhancing the protection of human rights.

Section 2 of this paper establishes the context under which China's projects are undertaken, with a primary focus on energy security, along with other economic and geopolitical strategies. China's emergence as a significant world player on the economic scene and its need for oil and national resources have driven China to enter into an increasing number of contractual relations with resource-rich countries. This strategy enables China not only to diversify its substantial reserves of foreign currency and help the Communist Party maintain legitimacy in power, but also to boost its African portfolio as a whole. Section 3 moves to current human rights theories and some cutting-edge practices of how to deal with human rights abuses, highlighting, in particular, the landmark case of the Sino-Congo deal. This section also examines whether it is possible for the Western and Chinese models of foreign aid to exist in tandem. Section 4 considers feasible remedial regimes for victims of human rights abuses and enforcement systems at both the international and domestic levels. The implications of *Kiobel v. Royal Dutch Petroleum* are important to consider. The U.S. Supreme Court's decision to rehear arguments in the landmark case indicates the split of the circuit courts and the limits of ATS, with a particular regard to the ATS' unstable forum for adjudicating civil liability for gross human rights violations committed abroad. A remaining issue is whether China should be liable for its state-owned or state-controlled MNCs, in view of their status as quasi-state actors. The question of how a more effective governance regime can be established seems indispensable from a legal perspective. Section 5 examines a tri-polar regulatory framework that aims at striking a balance between mandatory and voluntary enforcements. Emphasis is put on how international soft law initiatives, such as John Ruggie's “Protect, Respect, and Remedy” framework, are transposed within domestic legal systems, especially when national law does not function as presumed by those international norms. The conclusion includes some innovative proposals for facilitating China's legal response to the cutting-edge challenges that arise from the overseas behavior of its MNCs. It is vital to strike a balance between private and public enforcement of human rights laws to hold those MNCs to account for their involvement in human rights abuse. Meanwhile, it may make more sense to integrate the well-established international soft law initiatives into Chinese domestic legal regimes.

---

26 October 2011), available online at http://www.uscc.gov/researchpapers/2011/10_26_11_CapitalTradeSOEStudy.pdf.
2 Background

With three decades of rapid export and investment-driven growth, the Chinese economy has been expanding at a nearly double-digit annual growth rate. China has become the world’s leading exporter and the second largest economy. It is also the largest consumer of energy, accounting for half of the world’s growth in oil demand, even though its per capita energy use is less than one-third of that in the United States. Such remarkable growth has made securing natural resources one of China’s principal strategic interests. China’s primary crude oil suppliers are in conflict zones such as Angola, Sudan, and the DRC. More than 90% of oil from the DRC’s resource-rich Katanga province is reportedly exported to China. As a principal investor in Africa’s energy industry and transport and infrastructure projects, China has been Africa’s largest trading partner, and the Sino-African trade increased from US$125 billion in 2010 to US$155 billion in 2011. China’s approach to trade with Africa is characterized by a need for natural resources, and it has the capital to play the game, i.e. competing with the West, dramatically and competitively.

In compliance with predominant state capitalism, China needs to sustain its rapid growth to secure legitimacy of the Chinese Communist Party (CCP). Such a model is based on a restricted market system constrained by an overarching priority of maintaining the legitimacy of the single-party government. One of the most significant prerequisites is to secure natural resources for maintaining economic growth, which is conducive to advancing China’s long-term political and economic interests. The country’s export-led growth model has brought enormous trade surplus, and the substantial reserves of foreign currency must be diversified in order to dilute investment risks. Seeking to diversify away from U.S. government holdings, China pursues alternative investment opportunities, mainly in the exploitation of oil and other natural resources. This rationale is justified by China’s desire to use excess savings to open up new markets and ensure continuous energy and raw material supplies. Apart from building their own global supply chains and production network, state-owned MNCs have invested billions of dollars on infrastructure of

---

3 L. Hook, ‘Energy Rivals Scramble to Secure Resources’, Financial Times (20 January 2011). Despite being the world’s fifth-largest oil producer after Iran, China tails only the United States as a net importer of crude oil.

4 S. Raine, China’s African Challenges (Oxford: Routledge, 2009).

5 M. Ncube and M. Fairbanks, ‘China in Africa: Myths, Realities, and Opportunities’, Harvard International Review (Fall 2012), available online at http://programs.wcfia.harvard.edu/fellows/files/fairbanks.pdf.
the host countries to secure exclusive access to oil, gas, minerals, and other natural resources for maintaining China's economic growth. Thus, to enhance China's presence in Africa, the MNCs have increasingly invested in roads, railways, dams, pipelines, and ports in Africa.

In view of the aforementioned politico-economic pursuit, China appears to have created a systematic and coherent development strategy. As Brookes and Shin observed, "Many authoritarian African regimes, desperate to invigorate their fraying economies while maintaining a strong grip on political power, seem to find the state capitalism model preferable to the free-market promoted by the U.S. and the EU." China is ambitiously expanding its influence in Africa to secure supplies of natural resources. Western powers dominate in the Middle East, whereas China is the largest investor in Africa, as well as the largest buyer of African raw materials. Given the large portion of Middle East oil and gas production normally allotted to U.S. and European markets, the access to Africa's resources has played a strategic part in China's growth. The setback in China National Offshore Oil Corporation's (CNOOC's) attempt to acquire Unocal has made China secure its natural resource supplies through its own control. In the manifestation of China's geopolitical strategies, the behavior of its MNCs has an increasingly profound effect on human rights. While exploiting African resources, these MNCs have a responsibility to operate ethically and in accordance with legal obligations in order to minimize any adverse effects on human rights arising from their operations. The MNCs should be more careful about the impact of their activities or should otherwise be held accountable for any participation in human rights abuse.

3 Hierarchies of Development Objectives

Regarding the interdependence of human rights, claims of their hierarchical status are raised regarding prioritization on human rights norms. Different judgments vary across jurisdictions about how to make an interpretation, opening up a gray area that needs to be clarified. One thorny issue is how to define with more specificity what human rights are and whether it could be possible to justify certain prioritized objectives of human rights.

6 P. Brookes and J.H. Shin, 'China's Influence in Africa: Implications for the United States', The Heritage Foundation (22 February 2006).
7 S. Lohr, 'Unocal Bid Opens Up New Issues of Security', New York Times (13 July 2005).
3.1 Ensure Minimum Standards of Dignity

China’s view about human rights differs from conceptions generally agreed to by the West. Regardless of a lack of a sophisticated articulation of what human dignity means, some rights are fundamental and intrinsic to human dignity.\(^8\) Certain rights are absolute or non-derogatory, ius cogens, that are generally agreed upon throughout the world.\(^9\) The well-being and dignity of individual human beings are a matter of direct concern to international law.\(^10\) Due process rights are fundamental and indispensable for ensuring any other right; however, the rights to food and other basic needs take precedence.\(^11\) Socioeconomic rights are concerned with ensuring minimum subsistence requirements and standards of basic dignity,\(^12\) which depends largely on whether the minimum conditions necessary for people to live with dignity have been or are in the process of being secured.\(^13\) The ensurance of the minimum essential levels of covenant rights may lead to the full realization of other human rights.\(^14\)

China’s African policy can be measured in accordance with the minimum level of the given rights. Millions of African people suffer from hunger and lack of access to safe drinking water, with conflict zones particularly hard hit. Local people lack essential primary healthcare and education and need regional roads, rail, power, and fiber optic grids. Chinese discourse on human rights prioritizes the right to food, clothing, shelter, and economic development, all of which are desperately needed in Africa. China’s world-leading speed in building infrastructure has an indispensable role in meeting universal

\(^8\) J. Waldron, ‘How to protect dignity’, 71 Cambridge Law Journal (2012) 200–222.
\(^9\) J. Raz, The Morality of Freedom (Oxford: Oxford University Press, 1986), p. 182.
\(^10\) J. Charney, ‘Transnational corporations and developing public international law’, 4 Duke Law Journal (1983) 748–788.
\(^11\) T. Meron, ‘On a hierarchy of international human rights’, 80 The American Journal of International Law (1986) 1–23, at 11.
\(^12\) M. Salomon, ‘Why should it matter that others have more? poverty, inequality, and the potential of international human rights law’, 37 Review of International Studies (2011) 2137–2155.
\(^13\) C. McCrudden, ‘Human dignity and judicial interpretation of human rights’, 19 European Journal of International Law (2008) 655–724.
\(^14\) Government of China, Progress in China’s Human Rights Cause 2000 (White Paper, 9 April 2001), available online at http://english.peopledaily.com.cn/whitepaper/home.html. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides a basis for integrating the right to development into China’s Africa policy. The Chinese government signed the ICESCR in October 1997 and ratified it on 27 March 2001, to “fully demonstrate the Chinese Government’s positive attitude toward carrying out international cooperation in human rights as well as China’s firm determination and confidence in promoting and protecting human rights.”
minimum standards for a dignified life. Much of the needed investment in Africa’s public infrastructure can be financed by the MNC projects themselves, with well-structured loans backed by future payments of the projects’ revenues. Furthermore, a basic element for improving human rights is to eradicate poverty. After experiencing success with decreasing poverty within its own border, China feels its involvement in Africa is conducive to alleviating poverty and improving living conditions. To ascertain whether it is legitimate to prioritize some values over others, it is worth exploring whether China’s prioritized development objectives are justified or whether they will complicate the universally recognized human rights standards.

3.2 Rationale behind Multiple Established Values

The DRC’s poor infrastructure, such as its communications and transportation infrastructures, constitutes a formidable obstacle for the country’s democratic process because the lack of infrastructure makes it virtually impossible for most Congolese to participate in an election. Corruption makes Congolese life even more precarious. Transparency International’s most recent corruption perceptions index ranked the DRC 154th out of 175 countries.15 Prioritizing economy over human rights, China has implemented much-needed infrastructure programs in the DRC, providing a balance to traditional European and American dominance of the region.16 China’s investment in local infrastructure projects helps it gain access to resources,17 which also produces a positive output, benefiting local populations objectively. These positives have partly offset criticism about the effect of Chinese MNCs’ complicity in human rights breaches. However, genuinely justifying certain prioritized objectives is largely based on a critical evaluation of China’s Africa policy as seen through the framework of sustainable development.18

Arguably, Africa’s priorities to promote strategic and economic interests ought to trump other Western development agendas, such as human rights. Poverty eradication represents one of the most indispensable human rights, which is always paradoxically placed in a conflict position with other

---

15 Transparency International, Corruption Perceptions Index 2014 (3 December 2014), available online at http://www.transparency.org/country#COD.
16 L. Horta, ‘China in Africa: Soft Power, Hard Results’ YaleGlobal (13 November 2009).
17 C. Alden and M. Davies, ‘A profile of the operations of Chinese multinationals in Africa’, 13 South African Journal of International Affairs (2006) 83–96.
18 M. Power and G. Mohan, ‘Towards a critical geopolitics of China’s engagement with African development’, 15 Geopolitics (2010) 462–495.
established values, such as freedom and governance. An inescapable issue that remains to be clarified is how to determine these core objectives within the overall framework of human rights, optimally to develop democracy, freedom, and governance simultaneously. China has at least tentatively addressed the trumping issue as one of its top priorities when dealing with Africa. This difference has drawn a bright line between the Chinese version of human rights protections and those of its Western counterparts. The former model attracts most African leaders to join an economic alliance with China both politically and diplomatically.

The trend toward characterizing certain rights as being hierarchically superior may be seen as a response to the proliferation of human rights instruments, some of which are of poor quality and uncertain legal value. If improperly addressed, these priorities could adversely affect the credibility of human rights as a legal discipline. Resorting to hierarchical terms for human rights has not been matched by careful consideration of their legal significance, and few criteria for distinguishing between ordinary rights and higher rights have been agreed upon. There is no accepted system by which higher rights can be identified and their content determined, nor are the consequences of the distinction between higher and ordinary rights clear. The dichotomy has led to two distinct foreign aid approaches, one adopted by China and the other by its Western counterparts.

4 Noninterference Policy versus Conditional Aid

China has placed a high priority on maintaining strong ties with its African energy suppliers through investment, facilitated by a policy of “noninterference in internal affairs.” The Western interests lie in effectively countering developments in Africa by deftly encouraging respect for human rights across the African continent. The West’s vision of a prosperous Africa governed by

---

19 B. Hamm, ‘How can the poor gain their rights? Poverty reduction and human rights’ in VENRO – Perspective 2015 – Combating Poverty Requires Involvement (Bonn, 2004), available online at http://www.2015.venro.org/publikationen/dokumente/mr/mr-eng.pdf.
20 I. Taylor, ‘China’s oil diplomacy in Africa’, 82 International Affairs (2006) 937–959.
21 Meron, supra note 11, at 21.
22 P. Alston and R. Goodman, International Human Rights in Context: Law, Politics, Morals (Oxford, Oxford University Press, 2007), p. 158.
23 Meron, supra note 11, at 22.
24 D. Robinson, ‘Chinese competition in 21st century Africa: new rules for the West’, Australian Review of Public Affairs (December 2009).
democracies that respect human rights and the rule of law and that embrace free markets is being challenged by the escalating Chinese influence in Africa, largely because its aid focuses on economic growth with no attached conditionality.\textsuperscript{25} It remains a contentious debate whether it is effective to impose rigorous human rights conditionality on recipients of the financial aid.

4.1 \textit{Chinese Version vis-à-vis the Western Approach}

A lack of competition from the United States and the European Union renders a fertile investment environment for the aggressive presence of Chinese MNCs in Africa. Scrambling to obtain oil supplies as an integral part of its economic and foreign policies, China’s investments are mainly devoid of the conditions that traditionally have accompanied foreign aid. China prides itself on non-interference, separating business from human rights concerns and pledging to do business with whichever government is in power without being drawn into human rights issues.\textsuperscript{26} Neither does it attempt to enact social or political changes. Conversely, various human rights conditions are always being attached to the economic cooperation agreements between the West and African states,\textsuperscript{27} prioritizing the Western commitment to human rights and international law. For foreign aid to be effective regardless of who is in charge of a state, it must be equipped with conditions regarding human rights. In this vein, Western aid has been increasingly conferred only upon those states that are compliant with a growing list of conditions.

China offers African nations competition, emboldening them to take a harder look at the conditionality of the West.\textsuperscript{28} For instance, the World Bank and other donors have attempted to make lending to Sudan conditional on good governance. However, the government of Sudan has been able to avoid these conditions by obtaining large unconditional loans from China.\textsuperscript{29} It may be argued that the Western system is compromised by its own bureaucracy and by failures to strike a proper balance between efficiency and justice. To some

\textsuperscript{25} Brookes and Shin, \textit{supra} note \textit{6}.

\textsuperscript{26} G. Dyer, ‘Beijing and troubled nations: signals of a shift’, \textit{Financial Times} (20 January 2011).

\textsuperscript{27} P. Alston and J. Weiler, ‘An ‘Ever Closer Union’ in need of a human rights policy’, \textit{9 European Journal of International Law} (1998) 658–723, at 688–689.

\textsuperscript{28} P. Lyman, \textit{China’s Rising Role in Africa} (Testimony Presentation to the U.S.-China Commission, 21 July 2005), available online at http://www.cfr.org/china/chinas-rising-role-africa/p8436.

\textsuperscript{29} P. Keenan, ‘Curse or cure? China, Africa, and the effects of unconditioned wealth’, \textit{27 Berkeley Journal of International Law} (2008) 83–125.
extent, such discrepancies have been changing the strategic and economic playing field in Africa. As Komesaroff observed:

China’s success stems from building much-needed infrastructure in exchange for privileged access to high-quality natural resources. China’s twin policies of offering no-strings investment and refusing to interfere in the internal affairs of other countries, plus the fact that China is unburdened by a toxic colonial legacy on the continent, make its state-owned companies a far more welcome partner for African governments than troublesome Western investors.30

The assistance provided by China is fast, easy, and effective, with little discussion of human rights, the latter of which is a hallmark of Western support. In addition, China has been investing in infrastructure in the region, whereas the West has not.31 China has helped finance infrastructure projects based on loans with lower interest rates than most Western countries are willing to make. Africans have been frustrated by Western insistence on capacity building, instead preferring China’s focus on infrastructure and tangible projects.32 In this regard, China has bailed out certain rogue countries in the face of international sanctions and criticism. Although China’s aid’s effectiveness mainly depends on whether it contributes to sustainable economic growth and enhances governance, the Western strategy has been ineffective at achieving donors’ targeted goals, which do not reflect the minimum threshold of the protection of human rights.

4.2 Paradoxical Concerns
In the current playing field, Western MNCs seem to be at a disadvantage in securing lucrative contractual projects. Such implications should not be ignored, because it has close relevance to African sustainable development. The continuance of such a situation would jeopardize the well-established standard in striking a balance between foreign aid and the protection of human rights.

30 M. Komesaroff, ‘An African romance’, China Economic Quarterly (9 December 2010).
31 Horta, supra note 16.
32 ‘U.S. Embassy Cables: African countries prefer Chinese aid to US-China cooperation’, Guardian (4 December 2010).
4.2.1 Unlevelled Competition: State-Owned Enterprises versus Private Actors

MNCs have different goals, and their interests fundamentally rest upon the need to maximize profits. Nevertheless, a state-owned enterprise (SOE) is a separate legal entity created by a government to undertake commercial transactions on its behalf. The Chinese policy reflects a geopolitical and economic combination with its MNCs expanding into countries that Western oil companies tend to avoid, such as Sudan and Burma. China desires to establish long-term relationships with key energy industry partners by using a strategic “foot in the door” policy. In its efforts to secure stable energy and other natural resource supplies to feed its booming economy, China is willing to accept short-term loss for long-term gain. Most investments are through SOEs, whose individual projects do not necessarily have to be profitable, as long as they serve overall Chinese objectives. Because China’s principal interest in the African continent is access to natural resources, it is more affordable for MNCs to take much higher risks than do Western firms. The Chinese government provides insurance to its MNCs as long as they act in ways that are consistent with China’s long-term national strategic interests. The SOEs’ heavy subsidies can undercut competitors of Chinese MNCs, which do not have access to sovereign capital markets.

4.2.2 The Vacuum of the Market

China’s nonintervention approach has constituted strategic competition against the West. Western agencies differ from China’s practice in that they impose sophisticated social and environmental conditions on their support, which increases the cost considerably. There is definitely a moral duty for Western MNCs not to invest in a repressive society or to ensure that Western MNCs do not benefit from the failure of a government to enforce human rights standards. Despite the UN Global Compact’s proposal that corporations should not invest in repressive states, a commonly accepted guideline

---

33 R. Tong, ‘Challenges to American dominance in oil finance’, 4 China Security (2008) 45–51.
34 Lyman, supra note 28.
35 Keenan, supra note 29, at 94.
36 Ncube and Fairbanks, supra note 5.
37 E. Suzuki, ‘Bi-lateral policy orientation in the multilateral development policy: a challenge for the China Exim Bank and its accountability’, 6 Chinese Journal of International Law (2007) 127–133.
38 J. Knox, ‘Horizontal human rights law’, 102 American Journal of International Law (2008) 1–47.
has not been provided for determining whether and how companies can operate in countries where human rights violations are widespread.39 Accordingly, the Western conditioned-aid approach can even result in the divestment to advance the development of international norms for protecting human rights.

Hypothetically, such a distinct result between Chinese and Western approaches may originate from two differing philosophies. China places particular stress on consequentialism, whereas the West also focuses on proceduralism and deontologism. China emphasizes the merits of the presumptive result, whereas the West pursues procedural justice and is even willing to pay a disproportionate price for it. Western firms are more sensitive to accusations of human rights violations than are their Chinese counterparts. As a result, the United States and the European Union have been relatively disengaged from Africa’s infrastructure challenge.40

The West’s low tolerance for political and legal risks in Africa has created a vacuum that has sucked China into the continent’s conflict areas, such as the DRC, which is gripped by civil war and instability. The United Nations has repeatedly noted that multinational firms have a duty to respect its recommended sanctions;41 thus, Western oil companies have been forced to scale down operations in Sudan because of the perceived human right violations. Chinese MNCs have since stepped in to fill the void.42 The deterrence effect imposed on Western firms and their Chinese counterparts can be differentiated as “political risks that are high enough to deter the international oil companies from competing with Chinese corporations for assets in Sudan, yet low enough not to seriously jeopardize business operations.”43 In this perspective, the West may need to review and adjust its principles on aid effectiveness.

4.2.3 Undermining Western Efforts at Facilitating Democracy and Accountability

A variety of principles and objectives have shaped China’s overall strategy in Africa, including noninterference, the pursuit of resources, and a preference for

39 United Nations, The Global Compact: From Policy to Practice: Human Rights, available online at http://www.unglobalcompact.org/unlgc/unweb.nsf/contenttrhr2.htm.
40 J. Sachs, ‘China has left the West on the sidelines in Africa,’ Financial Times (22 September 2010).
41 UN General Assembly, Program of Action against Apartheid (UN Doc. S/16102, 25 October 1983).
42 Taylor, supra note 20.
43 E. Downs, The fact and fiction of Sino-African energy relations, 3 China Security (2003) 42–64; U. Ofodile, ‘Trade, aid, and human rights: China’s Africa policy in perspective’, 4 Journal of International Commercial Law and Technology (2009) 86–99, at 91.
economic development over other objectives.\textsuperscript{44} China offers aid and does not condition such assistance on a state’s human rights record.\textsuperscript{45} However, China’s nonintervention policy raises serious concerns about how human rights will be enforced in an era when states can obtain what they need – financing, arms, markets for their goods – without subjecting themselves to the conditions that Western governments attach to engagement and aid.\textsuperscript{46} China’s policies have not only propped up some of the African continent’s worst human rights abusers, but have also weakened the leverage of others trying to promote greater respect for human rights.\textsuperscript{47} Just as the West seeks to merge private-market activities with its transnational normative public law project, so has China intertwined its own version of policy with its approaches in Africa.\textsuperscript{48} The attached conditions of the West typically reach into the countries’ affairs, such as how much a recipient state should spend on social and health services or education. Such intrusive conditions drive those states to pursue other sources of financial support.\textsuperscript{49} Chinese investment practices, famous for their nonintervention policies, are more appealing to African countries, which means China has no compunction in dealing with the world’s worst human rights offenders.\textsuperscript{50} China’s dogma of national sovereignty makes it an attractive alternative to Western lenders,\textsuperscript{51} enabling China to gain many riskier but more potentially rewarding projects. Furthermore, China invests directly with the earmarked revenue or loans, especially on much-needed infrastructural

\begin{thebibliography}{9}
\bibitem{Keenan2015} Keenan, \textit{supra} note 29, at 97.
\bibitem{Givens2011} J.W. Givens, ‘The Beijing consensus is neither: China as a non-ideological challenge to international norms’, \textit{6(2) St. Antony’s International Review} (2011) 10–26.
\bibitem{Keenan2016} Keenan, \textit{supra} note 29, at 86.
\bibitem{HumanRightsWatch2006} Human Rights Watch, \textit{China-Africa Summit: Focus on Human Rights, Not Just Trade} (3 November 2006), available online at http://www.hrw.org/news/2006/11/01/china-africa-summit-focus-human-rights-not-just-trade.
\bibitem{Catá2010} Larry Catá Backer, ‘Michael Komesaroff on China in Africa: State Duty, Corporate Responsibility and the Changing Face of Economic Globalization’ (13 December 2010), available online at http://lcbackerblog.blogspot.com/2010/12/michael-komesaroff-on-china-in-africa.html; L. Catá Backer, ‘Rights and accountability in \textit{Development v. DAS Air} and \textit{Global Witness v. Afrimex}: small steps toward an autonomous transnational legal system for the regulation of multinational corporations’, \textit{10 Melbourne Journal of International Law} (2009) 258.
\bibitem{Ratner2001} S. Ratner, ‘Corporations and human rights: a theory of legal responsibility’, \textit{111 Yale Law Journal} (2001) 443–545.
\bibitem{Halper2010} S. Halper, \textit{The Beijing Consensus: How China’s Authoritarian Model Will Dominate the 21st Century} (New York, NY: Basic Books, 2010).
\bibitem{Tull2006} D. Tull, ‘China’s engagement in Africa: scope, significance and consequences’, \textit{44 Journal of Modern African Studies} (2006) 459–479.
\end{thebibliography}
constructions, such as hospitals and schools, which effectively avoid possible corruption and abuses. By contrast, it remains unclear whether the West’s intrusive conditional aid is able to avoid the embezzlement and manipulation of specific funds. More subtly and paradoxically, China’s infrastructural development for public good enhances the legitimacy of the government in power, which may have engaged in abusing human rights.

China boasts that it adheres to “sincerity, equality and mutual benefit, solidarity and common development” in its relations with Africa. It also states that it always privileges sovereignty over other considerations, advocating that economic development should trump political or civil rights, such as human rights. China also argues, “The West has tried to impose a market economy and multiparty democracy on those countries which are not ready for it.” As observed by former British Prime Minister Tony Blair, the West needs to “work on things the country judges to be vital, not necessarily the things that we think back in our home legislature gets the biggest cheer.” Arguably, Western priorities do not dovetail with those of most African countries. Given the option between painful restructuring and democratization by Western institutions and China’s nonintervention, most African states have been more receptive to China’s entreaties. Contentiously, China’s nonconditionality policy has been undermining Western efforts in vindicating human rights protections, which may seriously damage the credibility of the West’s long-standing commitment to the protection of human rights. Consequently, the Chinese MNCs may be aiding and abetting in human rights violations, even if indirectly.

---

52 Ministry of Foreign Affairs of the People's Republic of China, China’s African Policy (12 January 2006), available online at http://www.fmprc.gov.cn/eng/zxxx/t230615.htm.
53 Taylor, supra note 20.
54 H. French, ‘China in Africa: all trade and no political baggage’, New York Times (8 August 2004).
55 T. Blair, ‘A new partnership with Africa’, Africa Governance Initiative (9 December 2010).
56 N. Hachigian, W. Chen and C. Beddor, ‘China's new engagement in the international system in the ring, but punching below its weight’ (6 November 2009), available online at http://www.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/chinas_new_engagement.pdf.
57 Council of Europe, ‘Human rights and foreign policy’ (Committee on Political Affairs and Democracy, Doc. 13020, 14 September 2012), available online at http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=19005&Language=EN.
4.3  Is There a Case for Legitimate Intervention in the Affairs of Other Sovereign States?

It remains highly controversial whether external intervention in the affairs of other sovereign states is legitimate. The resolution of this controversy may pave the way for justifiably regulating transnational actors, irrespective of borders.\(^{58}\) It is essential to explore the extent to which MNCs can be indirectly liable for the human rights violations of host state governments. MNCs are generally subject to the host state's domestic laws and ought to comply with, and not interfere with, host state social, political and economic decisions.\(^{59}\) As officially observed by a leading Chinese press authority, intervention must first proceed with respect to the concerned state's sovereignty: "Human rights are something covered by the sovereignty of a country. A country's sovereignty is the foremost collective human right. . . . And sovereign is the guarantor of human rights."\(^{60}\) Taylor revoked such an argument, however, and held that:

According to China's non-interference policy, sovereignty trumps everything and so it is up to each country to decide what to do with Beijing's assistance. But if sovereignty is the guarantor of human rights and that sovereignty is being used to effectively undermine developmentalism, then there is a profound contradiction at the heart of China's discourse on human rights. Surely in such cases China is complicit in not only siding with autocrats and undermining a nascent human rights regime (one now supported by a number of African states). It is also undermining its own conception of human rights based on development, as well as its own interpretation of the linkage between human rights and sovereignty.\(^{61}\)

58  D.J. Karp, ‘Transnational corporations in 'bad states': human rights duties, legitimate authority and the rule of law in international political theory’, 1 International Theory (2009) 87–118.

59  OECD Guidelines (1976) paras 1–2; OECD Guidelines for Multinational Enterprises are annex to the OECD Declaration on International Investment and Multinational Enterprises; Ratner, supra note 49, at 454–457; J. Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge, Cambridge University Press, 2006), pp. 9–10.

60  ‘Human rights can be manifested differently’, China Daily (15 December 2005), available online at http://www.china.org.cn/english/China/151637.htm.

61  I. Taylor, 'China and Africa: the real barriers to win-win', FPIF Commentary (9 March 2007), available online at http://www.fpif.org/fpiftxt/4067.
Undoubtedly, internationally recognized human rights principles should prevail over the sovereign’s rules.62 Thus, MNCS must meet more stringent standards in protecting human rights. In this vein, legitimate regulation of MNCS is part and parcel of the emergency of the global rule of law.63 More challenging is how to ascribe nondiscretionary human rights duties onto MNCS in a justifiable manner, especially when host states have no competence in effectively regulating an MNC’s violation of human rights.64 In a statement on human rights, former U.S. Secretary of State Henry Kissinger declared: “While there will always be differences of view as to the precise extent of the obligations of government, … there are standards below which no government can fall without offending fundamental values. … Any government engaging in such practices must face adverse international judgment.”65 Put differently, it is not clear under which circumstances the sovereign’s authority should be disregarded. Pogge held that all ethnic agents have duties not to provide support to any institution that is involved in human rights violations.66 In terms of the MNC’s home state, China should have its part to play by applying domestic remedies to ensure that such abuses will not go unpunished, providing a jurisdiction over a business incorporated in China, regardless of the site of the conduct.

5 Extraterritorial Litigation: Is the Alien Tort Statute a Cure?

International law does not impose direct obligations on MNCS in relation to human rights. The problem of jurisdiction is one of the inherent challenges faced in attempting to bring MNCS within the rubric of international law.67 Since the traditional subjects of the rights and duties arising from international law are solely and exclusively relegated to states, limited international

62 M. Reisman, ‘Sovereignty and human rights in contemporary international law’, 84 American Journal of International Law (1990) 866–876.
63 R. Teitel, ‘The Alien Tort and the Global Rule of Law’, 57 International Social Science Journal (2005) 551–560.
64 E. Duruigbo, ‘Corporate accountability and liability for international human rights abuses: recent changes and recurring challenges’, 6 Northwestern Journal of International Human Rights (2008) 222–261.
65 H. Kissinger, ‘Statement before the OAS General Assembly’, 75 Department of State Bulletin (1976) 1–3.
66 T. Pogge, World Poverty and Human Rights (Cambridge, Polity Press, 2002), at pp. 52–70.
67 M. Tatgenhorst Drakos, ‘The corporate human rights impact assessment: top-down and bottom-up’, 18(1) International Affairs Review (2009), available online at http://www.iar-gwu.org/node/61.
law affects multinational businesses and their cross-border transactions, such as human rights, labor standards, and the environment. Non-state actors are challenging the limits of the existing international legal framework – that is, which courts are best suited to prosecute corporations for violations of international human rights law. It is worth examining whether civil law suits, such as through tort litigation, are an adequate alternative. The ATS carries a mandate to try private companies accused of human rights abuse, and this mandate is in line with U.S. economic interests. This section considers whether China’s non-intervention approach would lead to human rights abuses as compared with the Western model, which attaches great value to the rule of law.

5.1 Contextual Dilemma

Conventionally, states, and not MNCS, possess rights and obligations under international law. MNCS are not formally the bearers of the legally binding obligations under international human rights law. This idea has recently been upheld in Kiobel v. Royal Dutch Petroleum, wherein customary international law is created “only by achieving universal recognition and acceptance as a norm in the relations of States inter se.” Although MNCS may not be legally obliged under international law to comply with human rights standards, they may be liable for engaging in misconduct overseas. The ATS plays an important role in preserving U.S. capacity for global leadership in the defense of human rights. A refusal to recognize the cause of action might damage the credibility of U.S. commitment to the protection of human rights.

68 J. Slawotsky, ‘The global corporation as international law actor’, 52 Virginia Journal of International Law Digest (2012) 79–90.
69 28 U.S.C. para. 1350.
70 R. Knowles, ‘A realist defense of the Alien Tort Statute’, 88 Washington University Law Review (2011) 1117–1177.
71 M.J. Smith, ‘Sovereignty, human rights and legitimacy in the post-cold war world’, in C. Ingebritsen and S. Ramet (eds), Toward a New Partnership: International Norms in the U.S.-European Relationship since 1980 (New York, NY: Rowman & Littlefield, 2001), pp.
72 ‘UNODC and the Promotion and Protection of Human Rights’, available online at http://www.unodc.org/documents/justice-and-prison-reform/HR_paper_UNODC.pdf; T. Ahmed and L. de Jesús Butler, ‘The European Union and human rights: an international law perspective’, 17 European Journal of International Law (2006) 771–801.
73 Kiobel v Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010).
74 S. Cleveland, ‘The Alien Tort Statute, civil society and corporate responsibility’, 56 Rutgers Law Review (2004) 971–988.
75 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
Rationale: for and against the Corporate Liability

MNCs exercise powers that previously only states possessed. This globalization demands some countervailing effort to ensure that MNCs respect human rights. In fact, the laws of international business and trade grew out of the customary law of merchants. Enjoying forms of international personalities, non-state actors whose economic activities are associated with human rights abuses may bear international rights and obligations. Put differently, if non-state actors benefit from globalization and take advantage of international law in facilitating the growth of their business, they should also have human rights responsibilities. Thus, MNCs may be legally responsible for even indirect participation in human rights violations. Koh emphasized the illogic and perhaps injustice of recognizing private corporation rights under customary international law, while at the same time immunizing such entities from duties. Nerlich observed, “While currently there is no international court or tribunal that can exercise criminal jurisdiction over private legal persons for core crimes, this does not mean that the prohibitions underlying these crimes are not binding on transnational business corporations.” Such an argument has been upheld by Scheinin that a hypothetical World Court of Human Rights would have the power to enforce legally binding judgments

---

76 Duruigbo, supra note 64.
77 E. Kadens, ‘The myth of the customary law merchant’, 90 Texas Law Review (2012) 1153–1206.
78 A. Clapham, Human Rights Obligations of Non-State Actors (Oxford: Oxford University Press, 2006), p. 80.
79 E. de Brabandere, ‘Non-state actors and human rights: corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system’ in J. d’Aspremont (ed), Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law (New York, NY: Routledge, 2011), pp. 268–283; J. Paust, ‘Non-state actor participation in international law and the pretense of exclusion’, 51 Virginia Journal of International Law (2001) 977–1004.
80 H.H. Koh, ‘Separating myth from reality about corporate responsibility litigation’, 7 Journal of International Economic Law (2004) 263–274, at 265; H.H. Koh, ‘Why do nations obey international law?’, 106 Yale Law Journal (1997) 2599–2646: “ATS litigation embodied a “transnational legal process” that could lead to U.S. courts adopting international human rights norms – even if the claim was unsuccessful on the merits”; Z. Haider, ‘Corporate liability for human rights abuses: analyzing Kiobel & alternatives to the Alien Tort Statute’, 43 Georgetown Journal of International Law (2012) 1361–1390, at 1381.
81 V. Nerlich, ‘Core crimes and transnational business corporations’, 8 Journal of International Criminal Justice (2010) 895–908.
on transnational companies. In essence, extraterritorial litigation has much greater promise than extraterritorial or supranational courts as a means of alleviating the problems created by weak judicial systems. Given the absence of effective international mechanisms, enforcement generally occurs within domestic legal systems.

5.1.2 Inexplicit Status Quo
The threat of liability could pressure MNCs to conform their behavior to international standards. Although violations may be actionable either civilly or criminally under domestic laws, particular emphasis is put here on civil claims, an important tool of human rights enforcement that serves the needs of victims of human rights abuses. A number of civil lawsuits against multinationals have been initiated in the United States under the ATS for the MNCs alleged aiding and abetting of certain human rights violations occurring overseas. It remains unaddressed whether the ATS can be relied on as a potential source of pressure on MNCs; there is a particular controversy whether the ATS can hold corporations liable for aiding and abetting in the violation of human rights abroad. It seems more meaningful to scrutinize ATS litigation, the uniquely supportive framework for civil lawsuits seeking damages for international human rights abuses.

5.2 Jurisdiction
The ATS has proved to be an essential part of the U.S. goal to advance its commitment to the most basic customs of human rights law, which enables victims

---

82 Commonwealth Secretariat Press, We Need a World Court of Human Rights-UN Expert Tells Commonwealth (3 June 2009), available online at http://www.thecommonwealth.org/news/34580/34581/205483/030609un_special_rapporteur.htm.
83 J. Dammann and H. Hansmann, ‘Globalizing commercial litigation’, 94 Cornell Law Review (2008) 1–71, at 56.
84 B. Stephens, ‘Translating Filártiga: a comparative and international law analysis of domestic remedies for international human rights violations’ 27 Yale Journal of International Law (2002) 1–60.
85 Ibid., at 5.
86 A. Walker, ‘The hidden flaw in Kiobel: under the Alien Tort Statute the Mens Rea standard for corporate aiding and abetting is knowledge’, 10(2) Northwestern University Journal of International Human Rights (2011) 119–145.
87 S. Joseph, Corporations and Transnational Human Rights Litigation (Oxford, Hart Publishing, 2004) p. 17.
from overseas to avail themselves of U.S. courts and embodies the strongly embedded principle of private enforcement. Although U.S. courts often appear unbiased and honor a tradition of respect for basic human rights, it still remains contentious whether a domestic court can assert jurisdiction over the foreign affiliate of an MNC. Stephens examined the issue of whether a victim should be permitted to sue a defendant for serious human rights violations in foreign jurisdictions. The exploration definitely makes practical sense for providing promising redress to victims who have alleged that MNCS were directly involved with or aided and abetted in human rights violations. Despite the inexplicit ATS jurisdiction, there has been a marked upsurge in actions initiated by individuals to hold MNCS accountable.

5.2.1 Wiwa v. Royal Dutch Petroleum Company
The categories of defendants subject to suit seem to include corporations. On September 14, 2000, the U.S. Court of Appeals for the Second Circuit issued its opinion in Wiwa v. Royal Dutch Petroleum Company, affirming jurisdiction of U.S. courts over a case involving a foreign corporation alleged to have committed human rights violations in Nigeria. The defense of forum non conveniens sometimes represents an insurmountable hurdle for foreign litigants to seek a successful suit for violations of human rights laws abroad. Innovatively, the U.S. Court of Appeals highlighted U.S. interests in vindicating human rights in foreign countries and struck the balance of forum non conveniens, despite the matters.
existence of an alternative forum.94 Nevertheless, Wiwa’s authority remains open for debate, as the U.S. Supreme Court declined certiorari in this case. The Second Circuit’s unequivocal outweighing of U.S. interests in enforcing the human rights norms over the pure procedural barrier marks a milestone of the curial treatment of international human rights law claims under the ATS.95 In this vein, MNCs typically attract liability claims for acting in complicity in the commission of ATS-based crimes, rather than for directly perpetrating or being part of a conspiracy or joint criminal enterprise.96 Nevertheless, there is a continuing lack of international consensus on how and when to impose liability on corporations.97 A series of cases are articulated below to ascertain such an ambiguous and modern basis for a cause of action.

5.2.2 Doe v. Unocal

Doe v. Unocal became a landmark case in which the ATS was used against an MNC for human rights violations.98 Unocal was sued civilly in the United States for allegedly aiding and abetting in the Burmese government’s use of forced labor in the furtherance of a joint-venture oil pipeline project. Plaintiffs in Unocal were Burmese villagers subjected to various human rights violations, including forced labor in the creation of a pipeline across their land. International law would not foreclose jurisdiction over a foreign corporation.99 The circumstances under which an MNC can be held liable under the ATS for its role in human rights abuses remain vague.100 Although the Ninth Circuit held that plaintiffs could pursue their claim against the aiding and abetting of violations, the judges generated divergent opinions on whether and by what law and standard Unocal should be held liable.101 Unocal was eventually settled out of court. Of particular value would be the legal authority that allows for civil or

---

94 Fellmeth, supra note 89, at 244.
95 Ibid., at 249.
96 D. Scheffer and C. Kaeb, ‘The five levels of CSR Compliance: the resiliency of corporate liability under the Alien Tort Statute and the case for a counterattack strategy in compliance theory’, 29 Berkeley Journal of International Law (2010) 334–397, at 344.
97 J. Ku, ‘The curious case of corporate liability under the Alien Tort Statute: A flawed system of judicial lawmaking’, 51 Virginia Journal of International Law (2010) 353–395, at 385.
98 Doe v. Unocal Corp., 395 F. 3d 932 (9th Cir. 2002).
99 W. Dodge, ‘Corporate liability under customary international law’, 43 Georgetown Journal of International Law (2012) 1045–1052.
100 A. Bernard, ‘Holding corporations liable in the United States for aiding and abetting human rights violations abroad: a statutory solution’, 78 The George Washington Law Review (2010) 615–635, at 626.
101 Doe v. Unocal Corp., supra note 98.
even criminal legal action against MNCs that aid and abet others in the violation of human rights. Other courts followed Unocal’s lead by allowing claims against corporations, without actually creating binding law regarding whether corporations are proper defendants in an ATS claim. Corporate liability for jus cogens has its roots, which could support a claim against corporations under the ATS. In its decision, the Ninth Circuit concluded that corporations could be held vicariously liable, which has virtually extended liability beyond state actors for certain serious jus cogens violations.102

5.2.3 Sosa v. Alvarez-Machain

In 2004, the U.S. Supreme Court finally heard its first case regarding the ATS in Sosa v. Alvarez-Machain. The court refrained from answering too many questions that could guide the lower courts, but it did make one major decision – the ATS is a jurisdictional statute only.103 The ATS creates jurisdiction in federal district court for aliens for torts that violate the law of nations or a treaty of the United States.104 It may also look to customary international law that is “accepted by the civilized world and defined with specificity” in order to ascertain jurisdiction under the ATS, leaving the door open for only the most heinous of human rights violations, such as genocide, war crimes, torture, and slavery.105 Few corporations have ever been subject to any form of liability under the customary international law of human rights, largely because that customary international law consists of only those norms that are specific, universal, and obligatory in the relations of the state inter se. The court explicitly held that “a federal court power must be only invoked to recognize causes of actions that are specific, obligatory, and universally accepted.”106 Confirming a narrow ambit for ATS liability, the Supreme Court reasoned that a new cause of action was not created without power. It also announced that it would “welcome any Congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.”107

102 Sarei v. Rio Tinto, Plc., 487 F.3d 1193, 1202–03 (9th Cir. 2007); Ku, supra note 97, at 378–379.
103 A. Bellia and B. Clark, ‘The Alien Tort Statute and the Law of Nations’, 78 University of Chicago Law Review (2011) 445–552.
104 C. Bradley, ‘The Alien Tort Statute and Article 111’, 42 Virginia Journal of International Law (2003) 587–647.
105 S. Farbstein and T. Giannini, ‘The Alien Tort Statute and corporate liability’, 160 University of Pennsylvania Law Review (2011) 99–112.
106 Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (U.S. 2004), at 732.
107 Ibid., at 731.
Kiobel et al. v. Royal Dutch Shell

The ATS’s potential for extraterritorial application of existing domestic civil law to the illicit economic activities of MNCs remains inexplicit, due largely to a recent decision in Kiobel.\(^{108}\) The plaintiffs were Nigerian citizens who claimed that Dutch, British, and Nigerian corporations should be held liable for human rights violations committed by the Nigerian military with the companies’ assistance. The majority opinion in Kiobel interpreted Sosa as a restriction against corporate liability, because corporate liability is not a norm with defined specificity in international law.\(^{109}\) The decision stated: ‘[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights’.\(^{110}\) Judge Cabranes, in the Second Circuit, summarised the reasoning: ‘[c]orporate liability is not a discernible – much less universally recognized – norm of customary international law that we may apply pursuant to Alien Tort Statute (ATS). Accordingly, plaintiffs’ ATS claims must be dismissed for lack of subject matter jurisdiction’.\(^{111}\) Judge Leval concurred only in the judgment of the court and filed a separate opinion strongly disagreeing with the majority regarding its rejection of corporate liability per se under the ATS. Although Judge Leval stated in his opinion that the ATS ‘draws no distinction... between violations who are natural persons and corporations’,\(^{112}\) he concurred that, ‘[t]he complaint does not contain allegations supporting a reasonable inference that [Royal Dutch and Shell] acted with a purpose of bringing about the alleged abuses’.\(^{113}\) It seems, from Judge Leval, that no distinction should have been drawn between individuals (natural persons) and corporations, since both are private actors. As Ku argued,

\[o\]nly a few courts have actually held that Federal Courts have jurisdiction to hear cases regarding a corporation’s responsibility for human rights violations under the ATS and those cases relied on flawed reasoning... corporate liability is not a norm of customary international law of...

108 Kiobel et al. v. Royal Dutch Shell, Docket Nos. 06-4800-CV, 06-4876-CV (17 September 2010).
109 M.F. Librizzi, ‘The Alien Tort Statute and corporate liability: looking ahead to the supreme court decision in Kiobel’, New York University Journal of International Law and Politics Online Forum (27 February 2012).
110 Kiobel et al. v. Royal Dutch Shell, supra note 108.
111 Kiobel v Royal Dutch Petroleum, Docket Nos. 06-4800-CV, 06-4876-CV, slip op. at 2 (2d Cir., 17 September 2010) (Cabranes, J. concurring).
112 Kiobel, 621 F. 3d, at 152.
113 Kiobel et al. v Royal Dutch Shell, supra note 108, at 74 (Leval concurring).
sufficient specificity and universality to sustain a cause of action under the ATS.\textsuperscript{114}

Under a U.S. Supreme Court precedent,\textsuperscript{115} and the 2nd Circuit’s own precedents over the past 30 years, “In ATS suits alleging violations of customary international law, the scope of liability – who is liable for what – is determined by customary international law itself.”\textsuperscript{116} On 4 February 2011, the ATS suffered a setback regarding its jurisdiction to hold corporations liable for human rights violations. The Second Circuit refused to hear en banc a lawsuit claiming that Royal Dutch Shell, Plc., was complicit with the Nigerian government’s violations of human rights in Nigeria. Thus, the decision in \textit{Kiobel v. Royal Dutch Petroleum} has been upheld – that is, corporations cannot be held liable for human rights violations – representing a severe blow to sustaining corporate liability under the ATS.\textsuperscript{117} This concurred reasoning has considerably narrowed down the contentious cause of action. As the Court of Appeals for the Eleventh Circuit held, “The text of the Alien Tort Statute provides no express exception for corporations and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.”\textsuperscript{118}

5.2.5 Post \textit{Kiobel}

On 17 April 2013, the Supreme Court held that the presumption against extraterritoriality applies to claims under the Alien Tort Statute (ATS).\textsuperscript{119} The \textit{Kiobel} Court addressed when courts may recognize a cause of action under the ATS ‘for violations of the law of nations occurring within the territory of a sovereign other than the United States’.\textsuperscript{120} Apparently, the Supreme Court limited its extraterritorial application,\textsuperscript{121} and reinforced the \textit{Morrison} approach in the context of prescriptive jurisdiction questions relating to the ATS.\textsuperscript{122} Applying the ATS to these facts would make the U.S. “uniquely hospitable” to the

\textsuperscript{114} Ku, \textit{supra} note 97.\textsuperscript{115} ‘Sosa v Alvarez-Machain’, \textit{supra} note 106.\textsuperscript{116} \textit{Kiobel v. Royal Dutch Petroleum}, \textit{supra} note 111, slip op. at 2 (Anderson concurring).\textsuperscript{117} Scheffer and Kaeb, \textit{supra} note 96.\textsuperscript{118} \textit{Romero v. Drummond Co., Inc.}, 552 F.3d 1303 (11th Cir. 2008); C. Hioureas, ‘\textit{Kiobel v. Royal Dutch Petroleum}: Is corporate liability under the Alien Tort Statute on its way out?’, 9 \textit{Publicist} (2011) 11.\textsuperscript{119} \textit{Kiobel v Royal Dutch Petroleum Co.}, 133 S. Ct. 1659 (2013).\textsuperscript{120} \textit{Ibid.}\textsuperscript{121} \textit{Ibid.}\textsuperscript{122} 28 U.S.C. para. 1350 (2012); \textit{Kiobel v. Royal Dutch Petroleum}, 133 S. Ct. 1659, 1663–1665 (2013), \textit{Kiobel} solidified Morrison’s congressional intent approach to prescriptive jurisdiction, in
enforcement of international norms in its courts and would have significant foreign policy implications.\(^{123}\) The Court's concerns with international comity, or rather the fear that over-intrusion into the jurisdiction of other sovereigns would provoke a similar and unwanted intrusion into US jurisdiction over its territory and citizens, are also evident.\(^{124}\) The Court concluded that the statute was not intended to apply to foreign parties engaged in conduct occurring entirely abroad.\(^{125}\)

The narrower reading of the ATS has represented a substantial blow to international law and its undertaking to protect fundamental human rights.\(^{126}\) The Kiobel Court did not explicitly resolve the ATS’ applicability in this arena, which may have left the door theoretically open to ATS cases. The case of Balintulo v Daimler AG relates to allegations of human rights abuses committed by the German company’s Argentine subsidiary. The Second Circuit held that Kiobel absolutely barred ATS suits based on conduct occurring abroad, even those against US defendants.\(^{127}\) It was held that the alleged overseas conduct by American defendant failed to surmount the Kiobel threshold. The Balintulo Court virtually upheld the ‘avoidance of foreign policy consequences’, that is, Kiobel’s foreign policy implications of ATS cases.\(^{128}\) In line with overarching principles articulated by the Kiobel Court,\(^{129}\) the decision once again discomforts future ATS litigation by eliminating the possible extraterritorial jurisdiction that ATS could provide.\(^{130}\) It remains to be seen whether Balintulo would have set out a clear path for future ATS litigation.\(^{131}\)

\(^{123}\) Kiobel v. Royal Dutch Petroleum, supra note 119.

\(^{124}\) Kiobel v. Royal Dutch Petroleum, supra note 119, at 1668–1669.

\(^{125}\) Kiobel v. Royal Dutch Petroleum, supra note 119, at 1665–1669.

\(^{126}\) Kiobel v. Royal Dutch Petroleum, supra note 119; L. Bilsky, R. Citron and N. Davidson, ‘From Kiobel back to structural reform: the hidden legacy of Holocaust Restitution Litigation’, 2 Stanford Journal of Complex Litigation (2014) 138–184, at 140.

\(^{127}\) Balintulo v Daimler AG, 727 F.3d 174 (2d Cir. 2013).

\(^{128}\) ‘International Law-Alien Tort Statute-Second Circuit holds that Kiobel bars common law suits alleging violations of customary international law based solely on conduct occurring abroad’, 127 Harvard Law Review (2014) 1493–1500.

\(^{129}\) Ibid.

\(^{130}\) Ibid., at 1496.

\(^{131}\) Ibid.
The Supreme Court’s decision in *Kiobel* has not ended future debate about the scope and impact of the ATS.\(^{132}\) It is also argued that *Kiobel* preserves a limited ability for the ATS to continue advancing *Filartiga*’s promise of a borderless regime of accountability as a matter of last resort for egregious human rights violators.\(^{133}\) In *Al Shimari v Caci*, the Fourth Circuit Court of Appeals ruled that the presumption against extraterritoriality does not bar claims against a US contractor for torture and mistreatment of foreign nationals in Iraq.\(^{134}\) The Court held that the corporate defendant had a much more significant connection to the United States than mere presence.\(^{135}\) It became the first appellate court to hold that the plaintiffs’ claims sufficiently “touch and concern” US territory to displace the presumption.

The ‘touch and concern’ test leaves open the possibility of extraterritorial application of the ATS. The lower court, while confirm that ‘foreign-cubed’ cases against corporations must be dismissed, may bear the newly-created responsibility to define the variables of *Kiobel*’s ‘touch and concern’ test. It can be inferred that the new test will create inconsistent decisions among the circuit courts of appeals given the limited guidance provided by the Supreme Court.

### 5.3 Uncertain Prospects: The Lack of a Bright-Line Rule from the Supreme Court

Federal courts have produced an array of conflicting responses regarding jurisdictions over MNCs, which renders the current legal status quo inconsistent in this regard. The issue of jurisdiction under ATS is far from certain because in *Sosa*, the Supreme Court cautioned federal judges against expanding the reach of ATS without a clear showing of legislative intent.\(^{136}\) The Supreme Court’s decisions did not provide a clear standard that could give rise to a claim under the ATS. In the absence of a well-developed body of authority, the extent to which corporate liability for aiding and abetting foreign violation of human rights is actionable remains vague under the ATS.\(^{137}\) There will be

---

\(^{132}\) J. Ku, ‘*Kiobel* and the surprising death of universal jurisdiction under the Alien Tort Statute’, *107 American Journal of International Law* (2013) 835–841.

\(^{133}\) S. Cleveland, ‘After *Kiobel*’, *12 Journal of International Criminal Justice* (2014) 551–577.

\(^{134}\) *Suhail Al Shimari v CACI Premier Technology, Inc.*, 13-1937 (4th Cir. 2014).

\(^{135}\) *Kiobel v. Royal Dutch Petroleum*, supra note 119, at 1669; P. Hoffman, ‘*Kiobel v. Royal Dutch Petroleum Co.*: First impressions’, *52 Columbia Journal of Transnational Law* (2013) 28–52, at 35.

\(^{136}\) Sosa v Alvarez-Machain, supra note 106.

\(^{137}\) D. Cassel, ‘Corporate aiding and abetting of human rights violations: Confusion in the courts’, *Northwestern University Journal of International Human Rights* (2008) 304–326.
substantial practical difficulties in bringing these claims and enforcing judgments overseas.\textsuperscript{138}

States have been generally reluctant to exercise extraterritorial jurisdiction.\textsuperscript{139} There is no consensus among states that the universal jurisdiction extends to aiding and abetting the commission of violations.\textsuperscript{140} The US Congress is slow in adopting basic international legal standards into its legislation, even though an interstitial creation of a cause of action against corporations for violations of the law of nations would effectuate congressional intent.\textsuperscript{141} If Congress did adopt basic international legal standards, there might be a serious risk of judicial interference in terms of foreign relations.

5.3.1 International Relations Concerns

To some extent, the ATS litigation runs afoul of the jurisdictional constraints on the application of domestic substantive law to foreign corporations.\textsuperscript{142} Guidance in exercising jurisdiction with obvious potential at least affects foreign relations.\textsuperscript{143} Exercising universal jurisdiction may have detrimental collateral consequences to foreign relations.\textsuperscript{144} Such rulings are only enforceable against MNCS that have assets and do business in the United States. There may be concerns from an MNC’s home state about respecting other legal systems’ jurisdiction as a result of such ambitious extensions. The ATS suits against MNCS for aiding and abetting will inevitably call into question the conduct of foreign governments on their own soil, thereby complicating U.S. foreign relations.\textsuperscript{145} The Supreme Court may also have concerns about the political sensitivity of such lawsuits against foreign governments, as well as hegemonic

\textsuperscript{138} S. Morris, ‘The Intersection of equal and environmental protection: A new direction for environmental Alien Tort Claims after Sarei and Sosa’, \textit{41} Columbia Human Rights Law Review (2009) 275–353.

\textsuperscript{139} Duruigbo, \textit{supra} note 64.

\textsuperscript{140} K. Magraw, ‘Universally liable? Corporate-complicity liability under the principle of universal jurisdiction’, \textit{18} Minnesota Journal of International Law (2009) 458–497.

\textsuperscript{141} N. Vora, ‘Federal common law and Alien Tort Statute Litigation: why federal common law can (and should) provide aiding and abetting liability’, \textit{50} Harvard International Law Journal (2009) 195–229.

\textsuperscript{142} A. Mamolea, ‘The future of corporate aiding and abetting liability under the Alien Tort Statute: A roadmap’, \textit{51} Santa Clara Law Review (2011) 79–152.

\textsuperscript{143} \textit{Sosa v. Álvarez-Machain}, \textit{supra} note 106, para. 62.

\textsuperscript{144} L. Boyd, ‘Universal jurisdiction and structural reasonableness’, \textit{40} Texas International Law Journal (2004) 1–45.

\textsuperscript{145} \textit{American Isuzu Motors Inc. v. Lungisile Ntsebeza}, brief for the U.S. as Amicus Curiae Supporting Petitioners, at 12–14, 18–22, aff’d for lack of quorum (12 May 2008).
implications of extending U.S. jurisdiction over alien tort claims that arise entirely outside of U.S. territory.¹⁴⁶ For instance, the German government explicitly argued that “the plaintiffs claim against Daimler should be heard in Germany, not that corporations cannot be held accountable for these claims.”¹⁴⁷ The United States may also be concerned about foreign policy repercussions of trials based on universal jurisdiction, as well as the diversion of judicial resources, because the evidence and witnesses are typically located abroad.¹⁴⁸

5.3.2 A Long-Standing Principle to Interpret Statutes

Ideally, the ATS’ extraterritorial application would give not only subject-matter jurisdiction but also the underlying cause of action necessary to allow the court to grant a relief, with whichever type of offense explicitly ascertained.¹⁴⁹ To prevent jurisdictional overreach, in the absence of a clear statement by Congress, the law is ordinarily presumed not to reach foreign conduct.¹⁵⁰ The Supreme Court recently reaffirmed against implied extraterritorial jurisdiction that “when a statute gives no clear indication of an extraterritorial application, it has none.”¹⁵¹ In addition, the U.S. Security and Exchange Commission’s (SEC’s) statutory authority is sufficient to require listed companies to disclose how those firms are dealing with human rights issues at home and abroad.¹⁵² Although it seems that the explicit creation of a cause of action would ensure that human rights are adequately vindicated in federal courts, there is no need for Congress to create a new cause of action for victims of human rights abuses

¹⁴⁶ ‘Developments in the Law: Extraterritoriality’, 124(5) Harvard Law Review (2011) 1225–1314, at 1233–1245.
¹⁴⁷ Balintulo v Daimler AG, brief of Amici Curiae International Law Scholars in Support of the Plaintiffs-Appellees, at 15, No. 09-2778-CV(2d Cir. 22 December 2009).
¹⁴⁸ Ratner, supra note 49, at 536.
¹⁴⁹ C. Crockett, ‘The role of federal common law in Alien Tort Statute Cases’, 14 Boston College International and Comparative Law Review (1991) 29–51.
¹⁵⁰ Morrison v National Australia Bank Ltd., supra note 122; W. Dodge, ‘Understanding the presumption against extraterritoriality’, 16 Berkeley Journal of International Law (1998) 85–125, at 86.
¹⁵¹ Morrison v National Australia Bank Ltd., supra note 122.
¹⁵² O. de Schutter, ‘Human Rights and the rise of international organizations: the logic of sliding scales in the law of international responsibility’ in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds), Accountability for Human Rights Violations by International Organisations (Antwerp: Intersentia, 2010), pp. 51–129.
abroad and establish an explicit standard for holding MNCs liable for aiding and abetting violations.\textsuperscript{153}

Although in the longer term Western MNCs will be better positioned in competing with those in undeveloped regimes in terms of human rights protections, the ATS may place corporations with substantial ties to the United States at a disadvantage in the short run, especially when those corporations collaborate with human rights abusers in conflict zones. The aggressive use of the ATS would deter those MNCs from the potential risk of seeking opportunities in exploiting natural resources or engaging in foreign direct investment. However, it is imperative to give clarity to MNCs pursuing overseas business opportunities because they face uncertainty in assessing the risk of exposure to ATS litigation. Apart from the uncertainties, another subtler issue arises about how state-owned and state-controlled enterprises should be accountable for their behavior.

\section*{6 The Gray Area in Subject Matter: Differentiate a State-Owned Enterprise}

MNCs have become more global and even more independent of government control\textsuperscript{154} and now have the power to negate or destruct human rights. Notably, Chinese SOEs have funded 80 percent of all Chinese foreign direct investment, which motivates the direct, high-level relationships between senior leaders in China and African governments.\textsuperscript{155} Chinese MNCs have been linked to actual human rights perpetrations because they supply goods to and buy raw materials from conflict zones with repressive governments. The MNCs may thus aid a perpetrator in committing grave breaches of human rights, which constitutes corporate complicity. For example, international human rights organizations have condemned China National Petroleum Corporation (CNPC) for its indirect involvement in the Darfur genocide, by dealing in resources that have been placed under sanctions and by selling goods in conflict zones in violation of sanctions.\textsuperscript{156} Apparently, CNPC has worked in tandem with the host

\begin{flushright}
\begin{footnotesize}
\begin{enumerate}
\item A.S. Nichols, ‘Alien Tort Statute accomplice liability cases: Should courts apply the plausibility pleading standard of \textit{Bell Atlantic v Twombly}?’, 76 \textit{Fordham Law Review} (2008) 2177–2225.
\item Charney, \textit{supra} note 10, at 748, 788.
\item D. Rice, ‘China’s Play for African Gold: At What Cost?’ \textit{CNNMoney} (31 October 2012).
\item Keenan, \textit{supra} note 29, at 89.
\end{enumerate}
\end{footnotesize}
\end{flushright}
government in abusing human rights. It remains uncertain whether the CNPC should be legally responsible for participation in human rights violations.

6.1 Abuse of Human Rights: Aiding and Abetting
Chinese MNC activities are generally seen positively, providing investments in conflict zones in need of economic development. Nevertheless, Chinese investment has been highly controversial, with the particularly contentious issue of overlooking notions of democracy and human rights. The MNCs must operate in a socially and environmentally responsible manner to avoid association with human rights abuse by their economic activities. A sustainable investment should integrate long-term environmental, social, and governance assessment into the decision-making process, with an aim to generate superior risk-adjusted financial returns.

The Chinese MNCs’ practice of applying social and environmental standards varies across jurisdictions, depending on each host country’s regulatory levels. China has generally been accused of serious environmental damages. Throughout the extraction of the minerals in host countries, the resulting environmental damage and pollution have jeopardized local people’s living conditions and threatened biodiversity by killing local wildlife and plants. The Chinese presence in conflict zones around the continent also grants Chinese actors first-mover advantages in these “frontier markets.” The Chinese projects are often contracted to Chinese firms rather than to local businesses, which escalates tensions in the local employment market. Furthermore, general abuses are characterized by low wages, long working hours, and an ignoring of labor laws. Nevertheless, few Chinese MNCs have been directly alleged to have committed violations of international human rights law. Rarely have Chinese MNCs directly engaged in egregious violations of human rights. At worst, they have been alleged to have been complicit in such violations.

It remains contentious whether Chinese MNCs’ involvement in a host government’s misconduct constitutes a universal jurisdiction offense under international law. An MNC facilitating (e.g., through aiding or abetting) the violation of human rights is more likely to be motivated by profit. For example,

157 N. Shaxson, Poisoned Wells: The Dirty Politics of African Oil (New York, NY: Palgrave Macmillan, 2007).
158 ‘Responsible Investment’ White Paper Report (World Economic Forum Annual Meeting, Davos-Klosters, Switzerland, 26–30 January 2011), available online at http://www3.weforum.org/en/sessions/.../responsible-investingc672.html.
159 P. Carmody and I. Taylor, ‘Flexigemony and force in China’s resource diplomacy in Africa: Sudan and Zambia compared,’ 15 Geopolitics (2010) 496–515.
since the CNPC was a “corporate sponsor” of the Khartoum regime that was allegedly responsible for genocide in Darfur, China’s support through the CNPC has enabled Sudan to avoid the sanctions that would typically accompany the kind of human rights abuses that have occurred in Darfur. Kristof has accused China of “abetting genocide in Darfur and in effect undermining U.N. military deployment there... In exchange for access to Sudanese oil, Beijing is financing, diplomatically protecting, and supplying the arms for the first genocide of the 21st century.”

Determining whether jurisdiction extends to aiding and abetting the commission of violations would require clarification before litigation to proceed. Normally, U.S. courts cannot use only ATS to impose aiding and abetting liability. As Judge Kleinfeld held in Sarei v. Rio Tinto: “Converting the statute into a device for benevolent imperialism to advance human rights enmeshes our country in foreign conflicts outside of this court’s authority.” The imminent issue seems to demand a prompt resolution, especially where MNCs have assisted in sustaining some of the perpetrators of serious human rights abuses. These MNCs do have a duty to avoid complicit relationships.

6.2 Unique Ownership Structural Relationship

State-owned MNCs are actually the organ of a state. Chinese MNCs have close ties to the Chinese government, and their operation is arguably perceived as the extension of the state and as implementing a state’s will. The MNC is likely to assume a highly involved participation by the Chinese government. Compared to private companies, Chinese state-owned and state-controlled MNCs are in a much stronger position to advance China’s strategic economic and geopolitical interests with their global presence. The ties between the government and the SOE play a decisive role in determining the obligations of the firm, and even whether the state has violated international law. The state-owned MNC has, prima facie, a greater set of obligations in the area of human rights when it has close ties to the government, as the latter may act through its MNCs in breaching its international obligations. A contentious point is whether the state itself should be held legally responsible for the SOE’s abuses. Unlike

160 N. Kristof, ‘China’s Genocide Olympics’ New York Times (24 January 2008).
161 M. Ramsey, ‘International law limits on investor liability in human rights litigation’, 50 Harvard International Law Journal (2009) 271–321, at 273.
162 Sarei v Rio Tinto, Court of Appeals, 9th Circuit 2010, per Judge Kleinfeld at 17573.
163 Ratner, supra note 49, at 497.
164 D. Bodansky and J. Crook, ‘Symposium: The ILC’s state responsibility articles: Introduction and overview’, 96 American Journal of International Law (2002) 773–791.
state itself, the MNCs lack sovereign immunity. Nevertheless, the state cannot “absolve itself from responsibility by delegating its obligations to private bodies.”\(^{165}\) In this regard, it is worth ascertaining whether there are rationales for holding the state-owned MNCs responsible.

It is important to understand the intricate nature of China’s SOEs. The possibility of joint liability in human rights violations with the Sudanese government remains, despite CNPC’s defense that only PetroChina was operating in Sudan. This fundamental question needs to be addressed before any responsibility or accountability for misconduct can be established. Due to their public–private dichotomy, SOEs can be used in either governmental or private commercial activities.\(^{166}\) The influence can be deducted from the practice of corporate policies; indirect funding; the appointment of board members, supervisors, or management; and the prerogative of CCP members in key positions.\(^{167}\) In the case of PetroChina, the possibility of CNPC’s direct liability is an option, due to the lack of due care through the control over PetroChina’s behavior in Sudan. A joint liability of CNPC and PetroChina could be established, even though the latter is a legally independent enterprise. It remains unclear to what extent PetroChina is operating independently, even without a direct connection to CNPC or the Chinese government by means of a state organ (i.e., the State Asset Supervision and Administration Commission). The lack of transparency of the corporate structure of both PetroChina and CNPC needs to be edified by the Chinese government, as CNPC is the largest stakeholder and therefore owner of PetroChina.

### 6.3 Should Chinese State-Owned MNCs be held Liable?

In view of the intertwined objectives embedded in a state-owned MNC, it seems justified to impose a complicity liability on an SOE violator. The state may face allegations of complicity in human rights violations committed by its MNCs. Claims would be brought against Chinese MNCs for knowingly investing in countries with abusive regimes and thereby contributing to those regimes’ ability to continue in power.\(^{168}\) A theory of complicity with state action suggests that the non-state actor owes international duties, irrespective of its

\(^{165}\) Costello-Roberts v United Kingdom, 247 Eur. Ct. H.R. (ser A) 50, 58 (1993).

\(^{166}\) C. Chinkin, ‘A critique of the public/private dimension’, 10 European Journal of International Law (1999) 387–395.

\(^{167}\) C. McNally, ‘Strange bedfellows: Communist party institutions and new governance mechanisms in Chinese state holding corporations’, 4 Business and Politics (2002) 91–115.

\(^{168}\) Ramsey, supra note 161 at 280.
status as a representative or agent of a state. For instance, claims have been filed that the Chinese MNCs knowingly enhanced the Sudanese government’s ability to commit abuses by increasing the Sudanese government’s oil revenues. The lack of reliable transnational legal venue may explain why courts have only been willing to extend liability beyond states for those most serious and widely accepted jus cogens norms. International law should provide for international duties on corporations, and the scope of these obligations must be determined in light of the nature of corporate activity. Due largely to predominant arm’s length transaction between the state and state-owned or state-controlled MNCs, China should take primary responsibility for the behavior of its MNCs based on its uniquely competent control for the sake of ownership. In this vein, a contentious issue is whether the state should be held responsible for failing to prevent an MNC’s violation of human rights. Some claims appear to rest on little more than allegations that the defendant’s operations aided the host country’s economy.

6.3.1 **Mens Rea**

*Mens rea* means that a defendant acts with knowledge of the underlying act in facilitating the commission of the offences. If an MNC materially contributes to a violation of human rights by the host government with knowledge of that activity, it has a duty not to form such complicit relationships with the host state. If MNCs substantially aided or abetted the commission of human rights violations, it would violate human rights. The Special Representative of the United Nations Secretary-General on Business & Human rights, John Ruggie, recently submitted a report, which implies, “The weight of international legal opinion suggests that the relevant standard is knowingly providing practical assistance or encouragement that has a substantial effect on the commission

---

169 E. Brown Weiss, ‘Invoking state responsibility in the twenty-first century’, 96 *American Journal of International Law* (2002) 798–816.
170 E. Criddle and E. Fox-Decent, ‘A fiduciary theory of Jus Cogens’, 34 *Yale Journal of International Law* (2009) 331–387.
171 Ratner, *supra* note 49, at 449.
172 A.M. Sende, ‘The responsibilities of states of transnational corporations affecting social and economical rights: A comparative analysis of the duty of protect’, 15 *Columbia Journal of European Law* (2009) 33–39.
173 Ramsey, *supra* note 161, at 271; E. Kontorovich, ‘A Tort Statute, with aliens and pirates’, 107 *Northwestern University Law Review* (2012) 100–114.
174 Vora, *supra* note 141, at 199.
of a crime.” Judge Pregerson’s opinion in Unocal, finding a broad view of indirect liability, was based on knowledge of the primary violation and the MNC’s substantial contribution to it. The issue seems focused on whether the MNC’s mere awareness of likely human rights violations suffices. Presbyterian Church of Sudan v. Talisman Energy, Inc. held that aiding and abetting, or secondary liability, is actionable under the ATS court. When a plaintiff alleged that Talisman had aided and abetted the government of Sudan in the commission of violating human rights, the defendant retorted that “petitioners’ knowledge standard is insufficiently specific to permit a federal court to create a cause of action in ATS cases.”

Similarly, the CNPC was arguably involved indirectly in human rights violations in the notorious Darfur genocide. Thus, the CNPC would be liable for the acts of those violators where it knew or consciously disregarded information that clearly indicated the commission of human rights abuses. Precisely, the defendants, who must have shared the mens rea of the perpetrators in the sense of positive intention to commit the violations, would be subject to aiding and abetting liability. Although the Sudanese government violated customary international law, and even though the CNPC benefited indirectly from the host government’s violation of human rights, there was no substantive evidence that CNPC acted with the purpose to support the government’s offenses. Chief Judge Dennis Jacobs held that “under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offence.” Judge Katzmann argued, “Those who assist in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability.” In the absence of a positive intention to commit, claims would be dismissed if the plaintiff failed to allege sufficient ties between abuses and the defendant. The difficulty might not be addressed by a victim through ascribing a certain knowledge standard to the

175 UN Special Representative of the Secretary-General, Business and Human Rights: Further Steps toward the Optionalisation of the “Protect, Respect and Remedy” Framework (UN Doc. A/HRC/14/27, 9 April 2010).
176 Doe v Unocal Corp., supra note 98.
177 Presbyterian Church of Sudan v Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.NY. 2003).
178 Brief of Talisman Energy Inc. in opposition to Petition for a Writ of Certiorari.
179 Keenan, supra note 29 at 89.
180 Rome Statute of the International Criminal Court, Art 28(b) (UN Doc. A. CONF/189/9, 17 July 1998).
181 Khulumani v Barclay National Bank Ltd., 504 F.3d 254, 276 (2d Cir. 2007).
182 Ibid., at 247, 259.
183 Ibid., at 254, 276.
The Second Circuit went further, referring to international law: “[The] mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone. . . . Purpose standard has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard.” Such a legal opinion has been ascertained in the International Criminal Court statute in relation to the nature of the assistance and its link to the commission of a human rights offense, rather than to the mental state of the aider and abettor.

6.3.2 The Principle of Attribution to Inhibit Victims
Victims of business-related human rights abuses face substantial legal obstacles. Most of these claims have been dismissed for lack of subject-matter jurisdiction under the ATS and on the ground of forum non conveniens. Courts have become increasingly vigilant about the application of these safeguards to regulate purely extraterritorial activity by foreign companies. The doctrine of separate legal entity prima facie shields liability from parent companies. Plaintiffs seek to hold the parent companies liable on the basis that MNCs, as a whole, should be held accountable for violations of human rights. But MNCs always defend that the parent is only held liable for its own violation, rather than for the violations of its subsidiaries as different legal entities. The extent to which the defendant has controlled the operation is essential in determining the liability. A distinct issue that still remains unaddressed is under what circumstances parent corporations can be liable for harms caused by their subsidiaries. The attribution of responsibility within the corporate group depends on the degree of control exercised by the corporation over its subsidiaries involved in the abuses.

---

184 F. Forrest Martin, S.J. Schnably, R. Wilson, J. Simon and M. Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (Cambridge: Cambridge University Press, 2006) 145.

185 *Presbyterian Church of Sudan v Talisman Energy, Inc.*, supra note 177.

186 ICC Statute Article 25(3) (c): “A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person. . . . (c) For the purpose of facilitating the commission of such crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”; K. Gallagher, ‘Achieving corporate accountability for egregious international law violations through the Alien Tort Statute: A response to Professor Branson’, 9 *Santa Clara Journal of International Law* (2011) 261–271.

187 *Abdullahi v Pfizer, Inc.*, 562 F.3d 170 (2d Cir. 2009).

188 Ratner, *supra* note 49, at 525; P. Blumberg, ‘The increasing recognition of enterprise principles in determining parent and subsidiary corporation liabilities’, 28 *Connecticut Law Review* (1996) 295–346.
subsidiary might be total, requiring the former to assume responsibility for all of the latter’s act. But corporate structures differ from country to country, as do rules of attributing liability within such structures or piercing through such structures to parent corporations. It remains inherently difficult to determine how a court may attribute the actions of a subsidiary to a parent business entity via “piercing the corporate veil” and whether a home state ought to hold parents accountable for subsidiary actions.

Similarly, human rights may give rise to a variety of obligations of state. The state, serving as a principal to MNCs, should be responsible for the acts of its organs, even if they act beyond their given authorities. As the International Law Commission stated, “The conduct of an organ of a State or an entity empowered to exercise elements of the government authority is an act of the state even if it exceeds its authority or contravenes instructions.” This clearly infers that the state should take responsibility if an MNC is “in fact acting on the instruction of, or under the direction or control of that State in carrying out the conduct.” Explicitly, the state is responsible if an MNC more broadly exercises governmental authority as empowered by the law of the state or in the absence or default of official authorities. Ratner observed that when an MNC acts on behalf of the state, it is liable as the state for violations of human rights. A subsequent issue is whether entities include subsidiaries of MNCs. In order to scrutinize the ties between the state and MNCs to determine whether the corporation’s act violates international law for the sake of applying the ATS, the U.S. federal courts held that “if a private actor is functioning as the government, that private actor becomes the state for purposes of state action.” It is far from clear on both conceptually and functionally with regard to the state action and the dichotomy of the public and private actors.

189 Lubbe v Cape Plc., [2000] 1 WLR 1545; [2000] 4 All ER 268.
190 H. Anderson, ‘Piercing the veil on corporate groups in Australia: The case for reform’, 33 Melbourne University Law Review (2009) 333–367.
191 International Law Commission, 53rd Session, Part I, Art. 7, (UN Doc A/53/10, 2001).
192 Ibid., Part I, Article 8.
193 Ibid., Part 1, Articles 5 and 9.
194 Ratner, supra note 49, at 498.
195 H. Collins, ‘Ascription of legal responsibility to groups in complex patterns of economic integration’, 53 Modern Law Review (1990) 731–744.
196 Gorenc v Salt River Part Agric. Improvement & Power Dist., 869 F.2d 503, 508 (9th Cir. 1989); Terry v Adams, 345 U.S. 461, 469–70, 73 S.Ct. 809, 813–14, 97 L.Ed. 1152 (1953); ‘Developments in the Law’, supra note 133, at 1248, 1314.
197 C. Black Jr., ‘The Supreme Court, 1966 Term—Foreword: ‘State action,’ equal protection, and California’s Proposition 14’, 81 Harvard Law Review (1967) 69–262, at 70.
Furthermore, *forum non conveniens* plays an important role in transnational corporate litigation,¹⁹⁸ and based on this, the court may dismiss a case.¹⁹⁹ The doctrine of *forum non conveniens* has been invoked by MNCs resisting civil suits relating to harms that have occurred overseas. A defendant may assert that a court should decline jurisdiction of a matter unless it is a home court of an MNC or a court in the country where the violation occurred.²⁰⁰ Such an assertion may be challenged under no circumstances in which both home and host court could be relied upon to provide reasonable access to justice for plaintiffs – for instance, if there was an obvious lack of control over the government committing the human rights violations.²⁰¹ However, the judiciary has begun to recognize exhaustion of local remedies as a necessary prerequisite to ATS standing,²⁰² even though local remedies would be futile and therefore need not be exhausted.²⁰³

6.3.3 An Unaddressed Issue under the ATS Jurisdiction

It is critical for a victim to gain appropriate remedies against an MNC. There is a slim possibility that a plaintiff could succeed in alleging the breach of the Chinese government because the accused MNCs operate as quasi-state actors serving de facto governmental authorities. Although the court agreed that “no logical reason exists for allowing corporations to escape liability for universally condemned violations,”²⁰⁴ it did not address whether corporate defendants were liable if they were found to be de facto state actors. Such a ruling seems to have been upheld in *Doe v. Exxon Mobil Corp.*, in which plaintiff’s ATS claims had been rejected, even though the defendants were de facto state actors.²⁰⁵ In his concurring statement, Judge Leval held:

The *Sosa* footnote refers to the concern of Tel-Oren and Kadic – that some forms of noxious conduct are violations of the law of nations when done by or on behalf of a State, but not when done by a private actor

---

¹⁹⁸ *Lubbe v Cape Plc.*, supra note 177. The *Lubbe* claimants finally overcame *forum non conveniens* and continued with their claim in England three years later.

¹⁹⁹ *Wiwa v Royal Dutch Petroleum Co.*, supra note 91.

²⁰⁰ R. Meeran, 'Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States', 3 City University of Hong Kong Law Review (2011) 1–41.

²⁰¹ *Doe v Unocal Corp.*, supra note 98.

²⁰² *Sarei v Rio Tinto, Plc.*, supra note 102.

²⁰³ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, supra note 177.

²⁰⁴ *Iwanowa v Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J.1999).

²⁰⁵ *Doe v Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).
independently of a State. . . . If the violated norm is one that international law applied only against States, then “a private actor, such as a corporation or an individual,” who acts independently of a State, can have no liability for violations of the law of nations because there has been no violation of the law of nation.\textsuperscript{206}

This approach has touched on the issue but has failed to provide a further analysis of whether a state-owned MNC could be a proper plaintiff under the ATS. There is a legitimate expectation that a regime of responsibility to govern the state-owned MNCS be developed for violations those corporations have committed.\textsuperscript{207}

A subsequent issue is whether the state should be rendered liable for the SOE’s behavior. It is worth exploring whether it would make more sense to hold states accountable in order to address MNCS’ abuse of human rights. International law is not only concerned with enforcement and negotiation in states\textsuperscript{208} In this capacity, state-owned MNCS can be considered more similar to states than to individuals.\textsuperscript{209} The ATS per se does not provide reliable remedies, let alone resolutions to the specific subject of the SOEs. Growing concerns over the social impacts of globalization and the increasingly powerful role played by MNCS has necessitated a reassessment of the framework for safeguard mechanisms for regulating non-state actors. As analyzed above, litigation may not be an ideal path for addressing MNCS’ overseas violations. It seems that transforming the controversy into a human rights issue is hardly a cure-all.\textsuperscript{210}

Due to the lack of an international court in which multinational violators can be sued, it is worth exploring how to secure adequate remedies for those individual victims as a result of human rights violations. China has formed a new pattern of global engagement through its MNCS, who are participants advancing China’s combined strategic interests; there is a growing importance

\begin{thebibliography}{9}
\bibitem{206} Kiobel, supra note 108, at 30–31.
\bibitem{207} A. Shinsato, ‘Increasing the accountability of transnational corporations for environmental harms: The petroleum industry in Nigeria’, 4 Northwestern Journal of International Human Rights (2005) 186–209.
\bibitem{208} M. McDougal and G. Leighton, ‘The rights of man in the world community: Constitutional illusions versus rational action’, 59 Yale Law Journal (1949) 60–74.
\bibitem{209} L. Wenar, ‘Responsibility and Severe Poverty’, in T. Pogge (ed.), Freedom from Poverty as a Human Right: Who Owes What to the Very Poor? (Oxford: Oxford University Press, 2007), pp. 255–274.
\bibitem{210} Ratner, supra note 49, at 543.
\end{thebibliography}
for introducing international normative frameworks to regulate these non-state, but powerful, economic actors.\(^{211}\)

## 7 Transnational Initiatives against Human Rights Abuses

International communities have focused considerable attention upon the protection of human rights in the context of global business. MNCs are now participants in the evolution of modern international law. Their accountability becomes increasingly dependent upon a sophisticated, multilayered regime of compliance.\(^{212}\) There has been an increased proliferation of soft law initiatives attempting to curb corporate abuses. There have also been a number of significant soft law initiatives that propose global policies to ensure best practices and international norms of corporate responsibility for violations of human rights. It is essential to elaborate on the implications of international soft initiatives, as well as hard law, for states and MNCs, as well as to establish potential legal avenues for holding multinationals responsible for complicity in human rights violations.

### 7.1 Context

In the absence of an effective forum for dispute resolution relating to human rights claims, there is a demand for a transnational regime to fill the void left by according greater respect to human rights.\(^{213}\) Soft standards at the international level aim to affect corporate decision making, which elaborates upon corporate duties through soft law instruments. They are conducive to ascertaining the current status of transnational soft initiatives with respect to MNCs and their potential accountability for violations of human rights, which may play a complementary role interacted with hard laws.

The Organization for Economic Cooperation and Development's (OECD's) “Guidelines for Multinational Enterprises" represent a more global and coherent response to new challenges to human rights. The OECD's “2000 Code of Conduct for MNCs" urges companies to "respect the human rights of those affected by their activities consistent with the host government's international

---

211 C. Jochnick, 'Confronting the impunity of non-state actors: New fields for the promotion of human rights', 21 Human Rights Quarterly (1999) 56–79.
212 Scheffer and Kaeb, supra note 96.
213 H.H. Koh, 'Why do nations obey international law?', 106 Yale Law Journal (1997) 2599–2659.
obligations and commitments.” Notably, the OECD guidelines make no distinction between private and state-owned enterprises in regard to the applicability of the norms they espouse. MNCS’ corporate responsibility to respect human rights requires businesses to act with due diligence to avoid infringing on the rights of others. The UN Global Compact advocates that the MNCS should respect human rights “within their sphere of influence” and should avoid being complicit in human rights abuses.

7.2 A UN Blueprint for Human Rights Protection

Although basic human rights norms are universal, the enforcement thereof varies greatly. The principle that MNCS have a responsibility to protect human rights has been rapidly evolving in the international community. In order to ensure a level playing field in shaping business behavior, John Ruggie embraced a business and human rights framework that broadly conceives of distinct responsibilities for states and businesses to contribute to the goal of preventing human rights abuses. The UN’s “Protect, Respect, and Remedy” initiative rests on three distinct, yet complementary pillars:

1. The state’s duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulations, and adjudication;
2. The corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and
3. Greater access by victims to effective remedy, both judicial and non-judicial.

Toward better governance and respect for human rights, the framework was designed to ensure that corporations and states comply with their human rights obligations in the context of transnational business.

214 OECD, OECD Guidelines for Multinational Enterprises (Paris: OECD, 2008), available online at http://www.oecd.org/dataoecd/56/36/1922428.
215 Ibid.; P. Muchlinski, ‘Changing face of transnational business governance: Private corporate law liability and accountability of transnational groups in a post-financial crisis world’, 18 Indiana Journal of Global Legal Studies (2011) 665–706, at 697.
216 United Nations, supra note 39.
217 J. Ruggie, ‘Global governance and “new governance theory”: Lessons from business and human rights’, 20 Global Governance (2014) 5–17.
7.2.1 State’s Primary Duty to Addressing MNCs’ Human Rights Abuses

The OECD Guidelines for Multinational Enterprises dictates the steps that governments should take to foster corporate respect for human rights.218 Governmental organs should possess an adequate awareness of the state’s human rights obligations. Put differently, both MNCs host and home states should strive to achieve law and policy coherence and effectiveness, and they have a duty to ensure that victims have access to effective judicial remedies for the violation of an international norm. Unexceptionally, the state has a duty to protect against human rights abuses by MNCs. Because government is supposed to be set up to protect individual rights,219 any tolerance of human rights abuses actually violates such a state duty.220 It seems that host states should bear the primary responsibility for ensuring adherence to human rights norms. The state’s duty to protect reflects obligations imposed by international law, including protecting individuals from human rights abuses. Under the International Covenant on Civil and Political Rights (ICCPR), for instance, states must not only merely refrain from participating for the sake of the avoidance of abuses, but also respect and ensure the rights in the ICCPR, which include the obligation to provide an “effective remedy” in the event of a violation of human rights.221

States must also protect against human rights abuses by third parties within their jurisdictions through effective policies, legislations, regulations, and adjudication.222 Domestic law may be inadequate, due largely to the lack of either the institutional capacity or resources to live up to its international obligations.223 Nevertheless, there are serious concerns for those host states that fail to promptly and effectively address their urgent human rights situations. There are higher risks of complicity in the undermining of human rights,

218 OECD, OECD Guidelines for Multinational Enterprises 2011 (Paris: OECD, 2011), available online at http://www.oecd.org/daf/inm/nme/48004323.pdf.
219 J. Locke, Two Treatises of Government, P. Laslett (ed.) (Cambridge, Cambridge University Press, 1988), at p. 271.
220 Ratner, supra note 49, at 470.
221 The International Covenant on Civil and Political Rights was adopted on 19 December 1966, Articles 2(1), 2(3)(a), S. Exec. Doc. E, 95–2, at 24, 999 UN Treaty Series (1978) 173–174.
222 United Nations Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (A/HRC/17/31, 21 March 2011), available online at http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf.
223 L. van den Herik and J. Letnar Černič, ‘Regulating corporations under international law: From human rights to international criminal law and back again’, 8 Journal of International Criminal Justice (2010) 725–743.
especially if the “parent” state of the SOE demonstrates weak human rights performance. It is critical especially when an effective remedy in the host state proves unavailable. The host state’s laws may not provide sufficient protection for human rights; the country’s weak governance may make access to remedies insufficiently available. Thus, the host state’s laws may neither create domestic regimes nor proscribe more hard or soft international law.

MNCs are becoming increasingly powerful global actors, and some host states may lack the resources or the will to control the behavior of MNCs. These host states may also not be able or willing to impose a higher-standard regulatory framework. Host states may have serious concerns about the imposition of higher regulatory standards, which may deter foreign investment and slow economic growth. Host states have adjusted domestic laws to make themselves more attractive to MNCs. Thus, they may be unwilling to abide by internationally recognized principles or may lack the capacity to prosecute the violation, especially under circumstances in which powerful MNCs are operating in weak jurisdictions. Some host states have turned a blind eye to or have even given judicial recognition of Chinese MNCs’ violations of human rights in exchange for capital injections. The compromise is generally conceived as a driver of economic growth, as well as an infusion of Chinese technology, but it also crystallizes the race to the bottom. In this vein, the conduct of Chinese MNCs is unlikely to be properly policed by the state in which they operate. Much worse, local remedies are impossible, because those who suffer from human rights violations are often victimized by their own governments. Thus, plaintiffs often stand little chance of obtaining justice in the country where the violations occurred.

7.2.2 The Corporate Responsibility to Respect Human Rights

MNCs’ responsibilities to respect human rights are embodied in a wide range of soft law instruments. At the international level, it is a standard of expected

---

224 UN Global Compact, Working with SOEs, available online at http://human-rights.unglobal-compact.org/dilemmas/working-soe/#_ftn3.
225 Ratner, supra note 49, at 461.
226 Q. Bu, ‘Multinational companies’ new approach to CSR in Congo: Is the leverage turning to China?’, 5 International Business Law Journal (2010) 485–501.
227 J. Rawls, The Law of Peoples (Cambridge, MA: Harvard University Press, 1999), pp. 89–120.
228 E. Emeseh, R. Ako, P. Okonmah and L. Ogechukwu, ‘Corporations, CSR, and self-regulation: What lessons from the global financial crisis?’, 11 German Law Journal (2010) 230–259.
229 J. Dunoff and J. Trachtman, ‘Economic analysis of international law’, 24 Yale Journal of International Law (1999) 54–55.
230 Fellmeth, supra note 89, at 247.
conduct acknowledged in virtually every voluntary and soft law instrument related to corporate responsibility. The responsibility to respect human rights is expressed as a foundational principle: “Business enterprises should respect human rights, which means to avoid infringing on the human rights of others and to address adverse human rights impacts they may cause or contribute to.” MNCS should respect internationally recognized human rights; they should not only avoid contributing to adverse human rights impacts through their own activities, but should also seek to prevent or mitigate such impacts that are linked to their operations. This is in line with Ruggie’s Report, which creates a complicity-based duty. The term responsibility (rather than duty) to respect is meant to indicate that respecting rights is not an obligation that current international human rights law imposes directly on companies, although elements may be reflected in domestic laws.

MNCS are subject to regulations by home and host states. Due to the absence of acceptance of a universal jurisdiction, MNCS ought to abide by the positive law that is by no means lower than well-established international standards, in whichever sovereign state they happen to be physically located. They should also seek to adopt a legal compliance approach with relevant international standards. Where national law conflicts with international standards, the company is expected to fill the void. Although companies have a fundamental responsibility to comply with the laws of all host states, blind compliance with local law might expose companies to complicity in state violations of international human rights norms. Such an authoritative approach will enable businesses to respect human rights with due regard to the role of existing governance structures by integrating human rights into

---

231 Ruggie, supra note 217.
232 Ibid.
233 J. Ruggie, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Clarifying the Concepts of “Sphere of Influence” and “Complicity” (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/16, 15 May 2008), paras 30–31.
234 Cassel, supra note 137.
235 Karp, supra note 58.
236 UN Global Compact Human Rights Working Group, Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements (Adopted 13 June 2011), available online at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/Conflict_of_Laws_GPN.pdf.
237 UN Special Representative, supra note 175, at para. 66.
238 Ibid., at para. 75.
their management infrastructure. MNCs will also need to internalize norms in their decision making.

7.2.3 The Impact and Limits

The UN Guiding Principles on Business and Human Rights (hereafter Guiding Principles) act as a set of benchmarks for all stakeholders to gauge business respect for human rights. They elaborate and clarify how states, businesses, and other stakeholders can operationalize the tripolar framework by taking practical steps to address business impacts on human rights. The Guiding Principles do not raise issues of particular note regarding the liability of MNCs beyond their responsibilities under national law; rather they encapsulate the commitment to “principled pragmatism,” reflecting the universal fundamental human rights expectations in a balanced way that takes account of the varied and complex global business landscape. This soft law is not legally enforceable, largely because it does not give rise to any discernible cause of action. The Guiding Principles, per se, do not create new international law obligations; such an international initiative endeavors to resolve conflicts over MNCs’ human rights violations rather than through the court. The resulting tripolar framework has proven to be increasingly influential. As the benchmark for how MNCs should address the implications of existing human rights standards for business, this framework has already influenced the OECD’s “Guidelines for Multinational Enterprises” of May 2011. The report has significant implications for global business practices, as it represents a concerted effort to consolidate and codify international customary and legal expectations with respect to the human rights arena of businesses. These norms represent a positive response to new challenges to human rights.

The states are supposed to provide monitoring and judicial cooperation in pursuing and punishing breaches of human rights commitments. MNCs suspected of abusing human rights should face the full force of transnational legal regimes, particularly in the least-developed areas of the world, which

---

239 J. Ruggie, ‘Business and human rights: The evolving international agenda’ 101 American Journal of International Law (2007) 819–839.

240 M. Lipton and K. Schwartz, A United Nations Blueprint to Promote Human Rights (2 December 2010), available online at http://blogs.law.harvard.edu/corpgov/2010/12/02/a-united-nations-blueprint-to-promote-human-rights/.

241 Scheffer and Kaeb, supra note 96, at 338.

242 The May 2011 OECD Guidelines for Multinational Enterprises contain an important new part on human rights, with the OECD secretary-general stating that the new human rights recommendations “benefitted greatly from the work of [Professor Ruggie] and are in line with the [Guiding Principles].”

---
lack adequate legal remedies. Notably, Ruggie’s framework does not go as far in that it does not recognize MNCs as international legal personalities having the same obligations to human rights as states have.\textsuperscript{243} The nonbinding codes of corporate responsibility do not specifically address the role and responsibilities of corporate entities.\textsuperscript{244} As Kelly observed, a transnational mechanism has been perceived as a complex matrix comprising national and transnational governance regimes.\textsuperscript{245} The challenge is in how to fill the gaps and resolve the conflicts and ambiguities in the transnational regulatory arena.\textsuperscript{246} The judicial vacuum exists because of a nonfunctioning or corrupt government.\textsuperscript{247} Thus, it is worth exploring whether MNCs should be held liable for silent complicity in human rights abuses,\textsuperscript{248} in both international and domestic arenas.

8 The Impact on China’s Efforts in Protecting Human Rights

China is increasingly zealous in reassuring the world of its desire to confer legitimacy on the global stage. The activities of some Chinese MNCs have not only undermined international human rights law, but have also tarnished China’s image as a responsible stakeholder in its ambitious overseas expansion. China has made certain progresses toward improving its MNCs’ overseas behaviors, ranging from hard laws employing legal sanctions to soft regulations,\textsuperscript{249} such as using financial incentivization. In the absence of an international regulatory

\begin{itemize}
\item \textsuperscript{243} S. Emedi, ‘Utilizing existing mechanisms of international law to implement human rights standards: States and multinational corporations’, 28 Arizona Journal of International and Comparative Law (2011) 629–658.
\item \textsuperscript{244} Ruggie, supra note 239.
\item \textsuperscript{245} J. Kelly, ‘Multinational businesses and the matrix of human rights governance networks’, 12 Journal of the Federalist Society Practice Groups (2011) 51–57.
\item \textsuperscript{246} D. Danielsen, ‘How corporations govern: Taking corporate power seriously in transnational regulation and governance’, 46 Harvard International Law Journal (2005) 412–428.
\item \textsuperscript{247} J. Wouters and C. Ryngaert, ‘Litigation for overseas corporate human-rights abuses in the European Union’, 40 George Washington International Law Review (2009) 939–975, at 940.
\item \textsuperscript{248} J.I Paul, ‘Holding multinational corporations responsible under international law’, 24 Hastings International and Comparative Law Review (2001) 285–296, at 293.
\item \textsuperscript{249} China signed off on ISO’s new CSR framework, ISO 26000, and the standard was published in Chinese at the end of 2011, and a few large enterprises are already using it for guidance in CSR management and reporting; S. Zadek, M. Forstater and K. Yu, Corporate Responsibility and Sustainable Economic Development in China: Implications for Business (Washington, DC: U.S. Chamber of Commerce. March 2012), available online at http://www.uschamber.com/sites/default/files/international/files/17296_China%20Corp%20Social%20Responsibility_Opt.pdf.
\end{itemize}
and enforcement mechanism, however, the Chinese MNCs negatively affect individual human rights. For instance, China has no equivalent statute resembling the U.S. ATS,\textsuperscript{250} even in China’s newly enacted tort law.\textsuperscript{251} Thus, China has no jurisdiction over violations of international human rights taking place overseas by its MNCs. Bad press can directly impact an MNC’s profitability and sustainability in the global market. Apart from the potential loss of reputation and denial of access to foreign markets, MNCs remain at risk of liability suits in U.S. courts for their human rights violation abroad.\textsuperscript{252} Thus, China has a strategic interest in promoting protections of human rights overseas, because the violations have posed genuine challenges to the legitimacy of the ruling CCP domestically. It is more meaningful to establish a process for enabling remediation of any adverse human rights, and it would be more effective to integrate international law principles into domestic legal systems. International law does not prescribe how that law should be applied or enforced at the national level: “The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.”\textsuperscript{253} In this regard, a state may integrate its international obligations for human rights into domestic laws that can be directly applicable to business, thus providing effective access to remedy. Among other approaches, it is essential to implement human rights due diligence mechanisms.

\subsection*{8.1 Human Rights Due Diligence}

The introduction of human rights due diligence represents the most significant development in which MNCs are required to assess the actual and potential human rights impacts of their business activities, encapsulating not only their own operations but also any directly linked impacts.\textsuperscript{254} Due to their collective might and resources, MNCs, including their subsidiaries and supply chains, must have in place a due diligence process to identify, prevent, and mitigate their impacts on human rights. MNC management may need to con-

\begin{itemize}
\item \textsuperscript{250} Alien Tort Statute, 28 U.S.C., para. 1350 (2006).
\item \textsuperscript{251} The Tort Liability Law 2010 was passed at the 12th Session of the Standing Committee of the 11th National People’s Congress on 26 December 2009, and came into force on 1 July 2010.
\item \textsuperscript{252} J. Ruggie, \textit{Kiobel and Corporate Social Responsibility} (4 September 2012), available online at http://www.ihrb.org/pdf/Kiobel-and-Corporate-Social-Responsibility.pdf.
\item \textsuperscript{253} \textit{Kadic v Karadzic}, 70 F.3d 232, 246 (2d Cir. 1995).
\item \textsuperscript{254} M. Taylor, ‘The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility’, \textit{5 Nordic Journal of Applied Ethics} (2011) 9–30.
\end{itemize}
Chinese Multinational Companies in Africa

African Journal of Legal Studies 8 (2015) 33–86

sider human rights implications of long-term investment projects. Chinese MNCs’ exposure to charges of corporate complicity may be augmented under the development of normative standards of business and human rights, which are particularly spotlighted under the UN’s “Protect, Respect, and Remedy” framework.255 As a member of the UN Human Rights Council, China endorsed the UN Guidelines on Business and Human Rights. Complicity in the framework context refers to the indirect involvement of companies in human rights abuses under a circumstance in which the MNCs themselves do not actually carry out the abuse. In principle, complicity may be alleged in relation to knowingly contributing to any type of human rights abuse.256 In this vein, Chinese MNCs have a responsibility not to be complicit in host states’ violation of human rights. With the framework moving toward institutionalization at the international level, China’s engagement in economic activity with the implications of human rights violations may expose its MNCs to charges of corporate complicity.257 The Guiding Principles may also help Chinese MNCs elaborate and clarify how they can operationalize the framework by taking practical steps to address business impacts on the human rights of individuals. The potential application of the framework will definitely reshape the playing field within which economic globalization operates. However, China may not follow it, dismissing emerging soft law governance frameworks, like the UN’s “Protect, Respect, and Remedy” framework, as not binding as a matter of law.258

A sophisticated mechanism for the incorporation of human rights needs to be integrated into the institutionalized governance behaviors of states and corporations. Conducting due diligence can mitigate potential negative impacts of business operations and should help MNCs address the risk of legal claims by helping them show that they have taken every reasonable step to avoid involvement with an alleged human rights abuse. Otherwise, human rights may be adversely impacted, serious corporate value erosion will occur, and disclosure requirements and directors’ duties may be implicated.259 Nevertheless, it should not be assumed that conducting human rights due diligence will

255 United Nations Human Rights Council, supra note 222.
256 Ruggie, supra note 233.
257 Magraw, supra note 140.
258 L. Catá Backer, ‘On the evolution of the United Nations’ ‘protect-respect-remedy’: The state, the corporation and human rights in a global governance context’, 9 Santa Clara Journal of International Law (2010) 37–81.
259 UN General Assembly Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development (UN Doc. A/HRC/14/27, 14th Session, Agenda Item 3, 9 April 2010), available online at http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf.
automatically and fully absolve them from liability for causing or contributing to human rights abuses.\textsuperscript{260} The due diligence should interplay with hard laws, which will also help companies lower their risk of legal noncompliance.

8.2 **Hard Laws: Coercing MNCS into Compliance with the Law**

National courts have been increasingly put under pressure to hear cases against MNCS operating in foreign jurisdictions. China attempts to take appropriate measures to redress business-related human rights abuses within its jurisdiction through effective adjudication. The domestic law, at least, suggests a baseline standard of conduct in prosecuting MNCS for human rights abuses committed abroad. A potential web of liability should be created by the integration of international laws and initiatives into a wide range of domestic legal systems to facilitate the protection of human rights.

Chinese domestic law alone cannot effectively constrain state action. Internalization is critical to successful implementation of international norms in human rights.\textsuperscript{261} China may need to internalize the international soft initiatives, as well as international law, into its domestic legal systems. The local courts must look to international law to determine the relevant substantive law, no lower than international standards.\textsuperscript{262} To make sure no MNC’s behavior falls below acceptable levels, Chinese courts may look to the soft initiatives as a standard of reasonable care in tort law, to clarify standards of corporate responsibility and accountability with regard to human rights, and to elaborate on the state’s role in this area. For instance, Company Law 2006 (CL 2006) states: “In the course of doing business, a firm must comply with laws and regulations, conform to social morality and business ethics, act in good faith . . . and undertake social responsibility.”\textsuperscript{263}

It is also generally held that liability upon firms deters better than liability on individuals, because directors may not be able to bear the penalty costs.\textsuperscript{264} This provision resonates with both the United Kingdom’s Companies Act 2006\textsuperscript{265} and the Continental European approach – that is, “the corporation

\textsuperscript{260} Ruggie, *supra* note 217.  
\textsuperscript{261} H.H. Koh, ‘Bringing international law home’, \textit{35 Houston Law Review} (1998) 623–681.  
\textsuperscript{262} \textit{Presbyterian Church of Sudan v Talisman Energy, Inc.}, \textsuperscript{supra} note 177.  
\textsuperscript{263} People’s Republic of China, Company Law 2006, Article 5.  
\textsuperscript{264} R. Kraakman, ‘Corporate liability strategies and the costs of legal controls’, \textit{93 Yale Law Journal} (1984) 857–898.  
\textsuperscript{265} \textit{CA 2006 s172}; G. Clark and E. Knight, ‘Implication of the UK Companies Act 2006 for institutional investors and the market for corporate social responsibility’, \textit{11 University of Pennsylvania Journal of Business Law} (2009) 259–296.
is foremost a social institution and is treated as such in corporate law.”

Although the pleas for integrating social responsibility considerations into CL 2006 are aligned with the Guiding Principles, the provision does not explicitly address the problem of corporate compliance with human rights standards. Despite the lifting of the corporate veil on a statutory basis, it remains vague whether the Chinese courts could employ this provision to hold a parent company liable for human rights violations by its subsidiary. It is essential to make human rights issues an integral part of an MNC’s business strategy and to conduct sustainability impact assessments before and after investment agreements are signed.

8.3 Creating Financial Incentives

MNCs are encouraged to promote human rights, especially when they operate in conflict zones where violations of human rights are prevalent. It is worth examining possible incentives that China could launch to foster protection of human rights. In order to ensure that China’s MNCs are not committing human rights violations abroad, the Chinese government has reshaped the rule scheme through direct political or economic pressure on MNCs. The China Export-Import Bank (EXIM) and China Development Bank (CDB) are the largest suppliers of loans to MNCs attempting to invest in Africa. Both banks seek to leverage their financial resources to secure China’s need to fuel its continued economic rise. These banks embody the intertwining of governments’ and MNCs’ commercial objectives in their efforts to profitably support China’s strategic priorities. In addition to reinforcing state’s objectives for energy security, the loans help diversify China’s foreign exchange reserves by taking advantage of the global financial crisis. However, neither bank has had a publicly disclosed policy on human rights. The Guiding Principles maintain that SOEs,

266 M. Kerr, R. Janda and C. Pitts, Corporate Social Responsibility: A Legal Analysis (Markham, ON: LexisNexis, 2009), pp. 119–129.
267 P. Redmond, ‘Transnational enterprise and human rights: options for standard setting and compliance’, 37 International Lawyer (2003) 69–73.
268 CL 2006, Article 20.
269 M. Wu, ‘Piercing China’s corporate veil: Open questions from the company law’, 117 Yale Law Journal (2007) 329–338; P. Blumberg, ‘Asserting human rights against multinational corporations under United States Law: Conceptual and procedural problems’, 50 American Journal of Comparative Law (2002) 493–527.
270 Scheffer and Kaeb, supra note 96, at 335.
271 D. Bach, Abraham Newman and Steven Weber, ‘The international implications of China’s fledgling regulatory state: From product maker to rule maker’, 11 New Political Economy (2006) 499–518.
such as finance institutions, have both a state duty to protect human rights and a corporate duty to respect human rights: “An abuse of human rights by the [state-controlled] business enterprise may entail a violation of the State’s own international law obligations,” while such institutions “are also subject to the corporate responsibility to respect human rights.”

International Communities have created accountability mechanisms to ensure that the projects are developed and implemented in accordance with environmental, labor, and human rights policy. The Guiding Principles note in particular that SOEs should require human rights due diligence, especially for transactions that pose significant human rights risks. The primary suppliers should use loans for overseas investment to incentivize socially responsible corporate conduct.

8.4 Is It Possible for Western and Chinese Models of Foreign Aid to Exist in Tandem?

8.4.1 Building Capability

There are enormous challenges for development policy in determining how Africa’s natural resources can be governed to deliver inclusive growth while also ensuring their sustainability. Good governance is not just about the absence of corruption; it is also about the presence of capacity to deliver change and the capacity to deliver public services, such as health, education, and infrastructure. A state’s lack of institutional ability to govern its wealth in a more sustainable way may explain why past investment has done little to improve economic and social conditions in most conflict zones. States with stronger institutional capabilities handle their resource wealth more effectively than do those with weaker ones. More significantly, the sustainable development reached via building effective systems of governing should be given overwhelming priority in the future. What Africa highly demands is the chance to enhance its capability to govern its economy in a more sustainable way, such as through market-oriented reforms and opening market competition. The widening recognition of the need for sustainable development will

272 United Nations Human Rights Council, supra note 222.
273 A. Gurría, Harnessing Africa’s Resources for Sustainable and Inclusive Growth (4 October 2012), available online at http://www.oecd.org/about/secretarygeneral/harnessingafricasresourcesforsustainableandinclusivengrowth.htm.
274 G. Teskey, What Exactly Is ‘Governance’ Anyway? (3 November 2010), available online at http://blogs.worldbank.org/governance/what-exactly-is-governance-anyway.
275 M. Norman, ‘The challenges of state building in resource rich nations’, 10 Northwestern Journal of International Human Rights (2012) 173–190.
fundamentally change cross-border investment models. It seems that a positive step forward would be to reaffirm the right to development as an integral part of human rights.276

It is essential to take a realistic approach that suits Africa’s own needs within the framework of its unique culture and national priorities. For example, according to the Corporate Council for Africa (CCA), “Africa’s future success depends upon the ability of its entrepreneurs and business people to create and retain wealth through private enterprise.”277 Thus, it is vital to enhance a host state’s capacity to build its own policies. Governments should adopt national policies regarding how revenues from natural resource contracts will be used in facilitating national strategic development plans. Without building an effective capacity for delivering practical items and providing a path for release from aid dependency, aid can only ever be a palliative, rather than transformative.278 The major impetus must come from Africans themselves. The compatibility with the political and social settings of conflict zones depends, at least in part, on whichever model can incentivize and equip the states to develop their own economies.279

On the one hand, the potentially positive economic effects of China’s investments have resulted in the creation of jobs and the spread of technology, which benefits local businesses by sparking innovation and increasing efficiency. On the other hand, China’s model appears to strengthen autocratic regimes and to delay or prevent transitions to democracy,280 with a particular concern about enhancing the ability of market participants. Chinese MNCs should assume an independent responsibility to observe internationally recognized human rights, but the rule of law and an independent judiciary are largely absent. Another difference from the United States is that China exhibits a greater tendency to mediate disputes than to resolve through litigation. Hom referred to

276 S. Marks, ‘The human right to development: between rhetoric and reality’, 17 Harvard Human Rights Journal (2004) 137–168.
277 CCA, Mission Statement, available online at http://www.africacncl.org/About_CCA/index.asp.
278 T. Blair, Not Just Aid: How Making Government Work Can Transform Africa (16 December 2010), available online at http://www.tonyblairoffice.org/speeches/entry/not-just-aid-how-making-government-work-can-transform-africa/.
279 UN Global Compact, Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors (2010), available online at http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.
280 J. Ulfelder, ‘Natural-resource wealth and the survival of autocracy’, 40 Comparative Political Studies (2007) 995–1018, at 1012.
the “conventional narrative of China’s legal tradition” as including a “preference for informal settlement of disputes.”

Despite a general sensitivity to human rights, it is also significant to foster corporate cultures that respect human rights. Due to China’s weak legal infrastructure and underdeveloped governance, violations of domestic laws resulting from MNCs’ human rights abuses are poorly enforced by weak or even corrupt courts. In view of China’s unique legal regime, public enforcement is generally preferred to private litigation as a deterrence mechanism against overseas corporate abuse of human rights. Administrative and criminal prosecutions may send a stronger accountability signal and may contribute more to deterrence than civil suits would. Facing such challenges, the West needs to do more to support, not just exhort, leaders in Africa to do the right thing. Of utmost importance is to effectively engage with Africa, such as by assisting in Africa’s access to the world market, tackling deep-rooted poverty, and attracting sustainable investment, in order to build strong economies for the future. Such measures are conducive to helping make positive transformation possible, as well as making progress toward market-based economies and improving human rights to enhance the global rule of law and enforce customary international law. At this stage, it would be more promising to make extra efforts in establishing common principles on transparency and accountability on aid policy.

8.4.2 Can the Two Models Coexist?
Chinese support for political and economic repression counters the liberalizing influences of Africa’s traditional European and American partners. Against internationally recognized human rights, it remains vague whether there could be acceptable compromise when these values conflict in practice. Despite the ambitious goal of enhancing the global rule of law and maintaining international standards of decency, to date, the interpretation has not been meaningfully developed at an international level in terms of the distinction between a dignity standard and a decency standard. The full realization of

281 S. Hom, ‘Re-positioning human rights discourse on ‘Asian’ perspectives’, 3 Buffalo Journal of International Law (1996) 209–234.
282 Wouters and Ryngaert, supra note 247, at 971.
283 Blair, supra note 278.
284 N. Schriijer, ‘Paving the way towards…one world wide human rights treaty’, 29 Netherlands Quarterly of Human Rights (2011) 257–260.
285 D. Shinn and J. Eisenman, China and Africa: A Century of Engagement (Philadelphia, PA: University of Pennsylvania Press, 2012), p. 13.
all socioeconomic rights still only provides the universally agreed-upon floor below which no one should fall.\textsuperscript{286} In view of deep interdependence, there are compatible interests on major global objectives.\textsuperscript{287} Both China and Western countries could work in tandem to help develop Africa, as there is enormous space for cooperation and partnership. This would represent a win-win cooperation model for China, the West, and the target country, with the common ground embodied in the eradication of poverty. This promising aspiration may result in China and the West reshaping their foreign development aid policies. The continuing financial crisis seems to put the West under further pressure in its international development efforts, but its institutional strength would contribute intangibly to an effective approach to African development when combined with China’s infrastructural efforts.

An inherent issue that remains unclear is whether the contributions of Chinese MNCS toward addressing deep-seated social problems through developing the DRC’s public facilities will relieve or exacerbate the tension between China and the West. Another question is whether the different approaches displayed are ad hoc or whether they represent a benchmark for a strategic change in the future. The two positions on human rights development may hypothetically exist side-by-side for the long term, particularly under the current global financial meltdown. It is worth examining whether there is room for developing some common objectives in which Chinese economic gains for Africa can work side-by-side with the West’s goal of building more stability and democracy.

9 Conclusion

Economic growth must be socially inclusive. Developing a sustainable growth model has become the agenda for the 21st century. Generating superior returns while simultaneously having a positive impact is the overarching goal. Chinese SOEs have been aggressively advancing China’s political and economic interests in many conflict zones in Africa. The outbound investment presents an opportunity for China to display global citizenship and responsibility commensurate with its rising status. The controversy still remains, however, as to how China can match its growing commercial influence with responsibility. Globalization and the universal legal and rhetorical commitment of the international community to human rights have increasingly ensured that MNCS

\textsuperscript{286} Salomon, supra note 12.
\textsuperscript{287} K. Lieberthal, ‘Is China catching up with the US?’, 8 Ethos (2012) 12–16.
must comply with human rights or risk reputational harm. China may develop its own model in seeking to help Africa develop. Due largely to its general lack of tradition for respecting democracy and human rights, however, it is hardly possible to expect China to export best practices in escalating the conflict zones’ compliance levels at the current stage. Thus, it is vital for African natural resources to be used in ways that provide fair, but attractive, returns for investors, while also providing equitable benefits and development for the African people. Of utmost importance is building capacity to enable Africa to implement development plans and tackle poverty in a more sustainable way.

Regarding providing victims with greater access to effective remedies in the judicial arena, it may still take a long time to create affirmative legal mechanisms. Until the U.S. Supreme Court clarifies the binding nature of the customary international law standard, frameworks for fair and ethical natural resource exploitation agreements are needed to prevent Africa from being unfairly exploited. MNCs should be able to show how their human rights commitments are being implemented. Thus, the West, which pursues democratic development hand-in-hand with human rights, stands a better chance of achieving the sustainability of the African economic growth.

China’s strategic interest is enshrined in the observance of international human rights law abroad. The MNCs’ de facto transnationality complicates any resolution to their complicity in human rights violations. The Chinese MNCs, which operate in complex environments where human rights abuse is prevalent, should develop due diligence procedures to ensure they avoid liability. It is still unaddressed as to whether an MNC, with a particular concern about SOEs, should be liable under the ATS. The extent to which corporate liability for aiding and abetting foreign violations of human rights is actionable under the ATS remains in dispute. Multipronged approaches should be employed by a variety of stakeholders to regulate MNCs. A well-designed internal governance system is indispensable for assessing human rights impacts and for decision making. In pursuing a more global and coherent response to new challenges to human rights, a sophisticated legal regime associated with well-established soft initiatives is imminently needed to be capable of holding MNCs liable for the violation of human rights.