

however, the Swiss prosecutor issued a “no-proceedings order” announcing that an investigation would not be opened because the case was barred by the statute of limitations.<sup>55</sup> Since the decision, the NGOs and Romero’s wife have appealed the order to the cantonal criminal court, claiming that the prosecutors engaged in improper delay in reviewing the case and that the incorrect statute of limitations was applied.<sup>56</sup>

### *Conclusion*

Emerging jurisprudence in North America and Europe indicates reluctance by courts and prosecutors to proceed with litigation in cases where a corporation is alleged to have aided and abetted human rights abuses by a foreign state abroad. Far from outside the mainstream then, *Kiobel* seems to be firmly situated within this line of cases. These courts and prosecutors appear uncertain whether corporations are bound by international human rights and humanitarian norms, particularly when only an indirect connection exists to the alleged violations. Furthermore, these courts and prosecutors seem wary to sit in judgment on the activities and policies of other countries or to become embroiled in messy political disputes or international conflicts. As emphasized in *Kiobel*, “No nation has ever yet pretended to be the *custos morum* of the whole world.”<sup>57</sup> There also appears to be a significant fear of opening the courts to a stream of litigation related to conduct with, at best, a tenuous connection to the jurisdiction. These courts do not want to encourage forum shopping or the circumvention of sovereign immunity laws. For the time being, it is likely that North American and European courts and prosecutors will continue to favor reliance upon justiciability doctrines and other non-merits grounds in cases alleging corporate complicity in foreign state abuses, rather than becoming embroiled in complex disputes that could have far-reaching political and policy consequences.

## BEYOND *KIOBEL*: ALTERNATIVE REMEDIES FOR SUSTAINED HUMAN RIGHTS PROTECTION

*By Justine Nolan, Michael Posner, and Sarah Labowitz\**

Corporate accountability actions brought under the Alien Tort Statute (ATS)<sup>1</sup> tend to be grounded more in hope than in expectation. While an effective publicity tool for highlighting allegations of corporate irresponsibility and a successful approach for gaining favorable settlements in a few high-profile cases, U.S. courts have generally been reluctant to use the ATS to hold global corporations accountable for their actions outside the United States. The decision

<sup>55</sup> European Coalition for Corporate Justice, Update in the Nestlé Case: Prosecutor Under Court Review (June 14, 2013), at <http://www.corporatejustice.org/UPDATE-in-the-Nestle-Case.html>.

<sup>56</sup> ECCHR, *Update in the Nestlé Case: Prosecutor Under Court Review*, ECCHR SPECIAL NEWSLETTER, May 17, 2013, at <http://www.ecchr.de/index.php/nestle-518.html>.

<sup>57</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1668 (2013) (quoting *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)); see also *id.* at 1674 (Breyer, J., concurring) (same).

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<sup>1</sup> 28 U.S.C. §1350 (also known as the Alien Tort Claims Act (ACTA)).

of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*<sup>2</sup> reflects this judicial reticence. In *Kiobel*, the Court further restricted—though did not close the door—to future ATS litigation involving the actions taken by global companies outside the United States, especially actions against non-U.S.-based companies.

Rather than being a silver bullet, however, the ATS is, as one experienced litigator for plaintiffs in ATS cases explained, “an extremely limited, highly conditional, litigable instrument of last resort.”<sup>3</sup> After *Kiobel*, the multiple barriers to both initiating such cases and prevailing in U.S. courts have become even more formidable. Absent affirmative support by the U.S. government, or a clearer expression of legislative intent by the U.S. Congress, most U.S. courts are likely to be reluctant to provide a judicial remedy in foreign-cubed cases.<sup>4</sup>

Despite these limitations, it is important to recognize that, since the 2000 *Doe v. Unocal Corp.* case<sup>5</sup> involving the use of forced labor to build an oil pipeline in Burma, ATS litigation involving global corporations has had a significant educative impact and has helped shape the larger public debate on these issues. Judge Pierre Laval of the Second Circuit Court of Appeals noted in a 2013 article:

At the very least, keeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would be abusers. And they give substance to a body of law that is crucial to a civilized world yet so underenforced that it amounts to little more than a pious sham. The Supreme Court should continue to interpret the ATS as opening the doors of U.S. federal courts to victims of foreign atrocities who cannot get justice elsewhere, and other countries should adopt laws that open the doors of their courts as well.<sup>6</sup>

### *A Changing Corporate Culture*

The growing public demand for large companies to adopt meaningful measures to protect human rights in their global operations, as well as the associated changes in culture of some globally focused corporations, is a phenomenon that has taken shape in the last twenty-five years. An early catalyst was the 1984 disaster at Bhopal in India, in which more than three thousand people were killed and tens of thousands injured in an industrial gas leak accident at a Union Carbide pesticide plant. Litigation in response to the accident was pursued in both U.S.

<sup>2</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>3</sup> DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY 193 (2009) (citing Harold Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 269 (2004) (noting Koh’s assessment of the ATS)).

<sup>4</sup> This term refers to cases in which a foreign plaintiff sues a foreign defendant for acts committed on foreign soil.

<sup>5</sup> *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003) (en banc), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

<sup>6</sup> Pierre N. Laval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, 92 FOREIGN AFF., Mar.–Apr. 2013, at 16–17, available at <http://www.foreignaffairs.com/articles/138810/pierre-n-laval/the-long-arm-of-international-law>. The earlier split decision (2-1) of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), reveals contrasting views of the educative value and impact of the ATS. While Chief Judge Dennis Jacobs, writing for the majority, appeared dismissive of the potential longer-term effect of the ATS in reducing corporate rights violations, he subsequently summarized the views of Judge Pierre Laval as believing that the dismissal of corporate liability would likely open the door to “slavers and pirates . . . [to] rush into corporate transactions.” *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (denying petition for panel rehearing).

and Indian courts, but with limited results.<sup>7</sup> The reaction of the principal companies involved was generally denial, and they refused to take much or any responsibility for their roles in this massive industrial accident. By contrast, reaction in the United States and Europe to the tragic April 2013 collapse of a building in Bangladesh containing five garment factories, which killed more than one thousand people, has differed. Much greater attention is now being paid to the responsibilities of multinational firms outsourcing their products in these factories—even though these firms neither own nor operate such factories.<sup>8</sup>

While the UN Guiding Principles on Business and Human Rights<sup>9</sup> both affirm that companies have a responsibility to respect rights and call on governments and companies to develop meaningful remedies when rights are violated, a lack of clarity or consensus still exists about what these concepts mean in practice. Important work needs to be undertaken to provide practical guidance clarifying what “responsibility to respect” means in practice and what remedies are available to those who have been harmed. In the absence of a “hard” legal regime that compels global companies to act or not act in a particular way, the burden is falling on others to develop a series of practical remedies that will hold corporations accountable to human rights standards and that go beyond what is required by local laws.

*ATS in Context: Courts Are Only One of an Expanding Range of Remedies*

Looking forward, U.S. courts can and should continue to provide remedies to victims of gross human rights abuse abroad involving corporations in select cases. These decisions are likely to turn on factors such as whether the violations are particularly egregious, whether a clear and direct link exists between the corporate defendant and the egregious conduct, and whether the corporate defendant has a substantial presence in the United States. But the role of U.S. and other courts is only part of an expanding set of remedies and accountability measures that are helping to shape rules of the road for global companies with respect to human rights.

Logically, recourse to local law and a system of enforcement and judicial relief in the host countries where global corporations operate should be the first option for ensuring greater respect for human rights. In the case of Bangladesh, if the government had enacted robust labor and workplace health and safety laws and had built strong enforcement systems, some of the loss of life in the April 2013 factory collapse would likely have been averted. But in many countries, such laws are weak, enforcement is weaker still, and corruption is endemic, reflecting chronic failures in developing a governmental order based on the rule of law. Reliance on local

<sup>7</sup> For an overview of the Bhopal disaster, see AMNESTY INTERNATIONAL, CLOUDS OF INJUSTICE: BHOPAL DISASTER 20 YEARS ON (2004), available at <http://www.amnesty.org/en/library/asset/ASA20/015/2004/en/fa14a821-d584-11dd-bb24-1fb85fe8fa05/asa200152004en.pdf>.

<sup>8</sup> See Julfikar Ali Manik, Steven Greenhouse & Jim Yardley, *Outrage Builds After Collapse in Bangladesh*, N.Y. TIMES, Apr. 26, 2013, at A1; Dan Viederman, *Supply Chains and Forced Labour After Rana Plaza: Lessons Learned*, GUARDIAN (London), May 30, 2013, at <http://www.guardian.co.uk/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains>.

<sup>9</sup> UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31 (Mar. 21, 2011), available at [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

remedies is vitally important, but it remains a long-term proposition.<sup>10</sup> As we consider the post-*Kiobel* order, it is important to recognize and further develop these other—in many cases non-judicial—mechanisms. Available remedies include the following five avenues for pursuing corporate accountability for human rights abuse committed abroad.

### 1. *Standard setting by intergovernmental organizations*

International standards, such as those developed by the International Labour Organization (ILO), are helpful in principle but only have meaning if effective international remedies and enforcement mechanisms are put in place or taken up by local governments. The ILO with its tripartite structure (business, labor, and government) is often constrained in its efforts to implement the standards that it has created. One notable positive development is the ILO's Better Work program,<sup>11</sup> a collaboration between the ILO and the International Finance Corporation, focused on the application of labor standards in private sector development. The Better Factories Cambodia project,<sup>12</sup> launched in 2001, provides a concrete example of how international standards can usefully be combined with strong monitoring and trade incentives to form a sustainable basis for improving working conditions.

### 2. *Provision of resources by the World Bank and other international financial institutions*

Effective remedies to major systemic problems, like workplace safety issues in Bangladesh, require considerable resources. Governments in poor countries do not have the needed resources, and private companies cannot be expected to finance comprehensive solutions on their own. To fill the gap, international financial institutions such as the World Bank and international development agencies such as the United Nations Development Programme (UNDP) should be enlisted to contribute to developing and underwriting comprehensive remedial strategies. Similar challenges exist in the agricultural sector, where poor economic conditions contribute to a reliance on child and forced labor. While some international financial agencies have begun to link their performance standards with human rights,<sup>13</sup> what is lacking is an integrated effort to combine the resources of governments, the private sector, and the various international financial institutions. In addressing major structural problems like unsafe

<sup>10</sup> Recognition of the limited governmental capacity to provide a remedy to prevent further disasters is evident by the focus on encouraging companies to sign on to the privately developed accord on fire and building safety in Bangladesh, which in essence privatizes the establishment of a fire and building safety program in Bangladeshi factories. See Accord on Fire and Building Safety in Bangladesh (May 13, 2013), available at [http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf); see also IndustriALL Global Union, Bangladesh Safety Accord Implementation—Moving Forward (July 7, 2013), at <http://www.industrial-all-union.org/bangladesh-safety-accord-implementation-moving-forward>.

<sup>11</sup> At <http://betterwork.org/global>.

<sup>12</sup> At <http://betterfactories.org>.

<sup>13</sup> The International Finance Corporation (IFC) updated its Environmental and Social Sustainability Performance Standards in August 2011 and began implementing them in 2012. The IFC Performance Standards are a set of standards with which IFC borrowers, primarily corporations and states, must comply to qualify for project funding; their objective is to reduce the environmental and social risk to IFC's investments. The update included an attempted alignment with the UN Guiding Principles; however, the human rights references in the IFC Performance Standards continue to be fairly sparse. See INTERNATIONAL FINANCE CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (Jan. 2012), available at [http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES).

working conditions in Bangladesh, a combination of global resources needs to be brought to bear.

### 3. *Home-country reporting requirements*

Home countries—like the United States or Western European nations where major multinationals are based—can also provide added remedies. At a minimum, these countries can require companies to report on their global activities and on the steps taken to ensure the protection of human rights. For example, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires all listed companies to report on the sources of minerals used in their products when raw materials are acquired in the areas around the Democratic Republic of the Congo (DRC).<sup>14</sup> The purpose of this provision is to provide greater transparency in the trade in minerals fueling and funding the armed struggle in the DRC. In addition, as part of the decision to lift certain economic sanctions applicable to Burma/Myanmar, the Obama administration has established new reporting requirements for U.S. companies investing more than \$500,000 in businesses in Burma. The reporting requirements also include a provision that compels companies to outline the steps that they are taking to ensure that their commercial engagements do not contribute to human rights abuses.<sup>15</sup> At a local level, the state of California requires companies to report on their efforts to eradicate slavery and human trafficking in their global operations.<sup>16</sup>

### 4. *Home-country sanctions*

Home countries can also impose sanctions related to human rights, as the Obama administration did in 2012 in Executive Order 13606, which prohibits companies from transferring surveillance technology to Iran or Syria.<sup>17</sup> The Treasury Department explained the order as a means to advance the protection of human rights, noting that

<sup>14</sup> The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §5301 note), addresses financial transparency. Section 1504 requires all listed oil and mining companies to disclose the revenues that they pay to governments worldwide. The European Union has also recently adopted new laws aimed at increasing the transparency of government income from the oil and gas and logging industries. The 2013 EU Accounting and Transparency Directives will require European companies to report payments of more than €100,000 made to the government of the country in which they operate, including taxes levied on their income, production or profits, royalties, and license fees. Council Directive 2013/34/EU, 2013 O.J. (L 182) 19, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF> (accounting directive); Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Commission Directive 2007/14/EC, COM (2011) 683 final (Oct. 25, 2011), *available at* [http://ec.europa.eu/internal\\_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf) (transparency directive).

<sup>15</sup> *See* Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (2012); *see also* Bureau of Democracy, Hum. Rts. & Labor, U.S. Dep’t of State, Responsible Investment Reporting Requirements (2013), *available at* <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

<sup>16</sup> On January 1, 2012, the 2010 California Transparency in Supply Chains Act took effect. The act compels companies that meet certain threshold requirements to disclose their efforts to eradicate slavery and human trafficking from their supply chains. California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE §1714.43.

<sup>17</sup> *See* Exec. Order No. 13606, 77 Fed. Reg. 24,571 (Apr. 24, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-04-24/pdf/2012-10034.pdf>.

the President recognized that the commission of serious human rights abuses against the people of Iran and Syria by their governments, facilitated by computer and network disruption, monitoring, and tracking by those governments, threatens the national security and foreign policy of the United States. The [executive order] targets this activity in order to deter and disrupt such abuses.<sup>18</sup>

Sanctions also can be imposed by legislation. One important legislative model in a related but distinct area is the Foreign Corrupt Practices Act.<sup>19</sup> Adopted in 1977, it has had an important impact in the way in which U.S. businesses operate abroad and has changed the global business environment more generally with respect to corruption, especially as multilateral organizations took up efforts to the same end.<sup>20</sup> Companies have responded to global anticorruption laws by developing due diligence programs to identify proactively potential risks. The global implementation of laws to combat corruption is a useful model in assessing how more rigor could be brought to bear in applying international human rights standards to business.

### 5. *Voluntary multistakeholder initiatives*

Since the mid-1990s, another remedy has been the development of multistakeholder initiatives (MSIs), which are voluntary efforts by a group of companies working with other stakeholders, such as governments, nongovernmental organizations, social investors, and academics. These MSIs work to identify human rights issues in a particular industry, determine the standards by which company performance should be evaluated, and then work collectively to adopt operational strategies for sustained compliance with the standard. In so doing, they are going beyond an individual risk mitigation model to taking solutions-oriented action to address human rights problems.

MSIs have been formed in the apparel, athletic shoe, and electronics manufacturing sectors; the oil and mining industries; the private security industry; and the information technology sector. These efforts share several common characteristics. First, they represent efforts by commercial enterprises to collaborate, rather than compete, in developing industry human rights standards to which they will be bound. Second, they reflect a willingness by these companies to discuss implementation of common standards, not only with other firms but also with outside stakeholders, such as nongovernmental advocacy organizations, governments, universities, and other experts. Third, these MSIs start from the proposition that the underlying human rights challenges facing many of these industries are impossible for the private sector to solve on its own. Most importantly, these efforts acknowledge that global companies need to do more than simply monitor human rights problems to reduce the risks to their own brands (what has been termed “know and show” within the Guiding Principles framework).<sup>21</sup> Rather,

<sup>18</sup> See U.S. Dep’t of the Treasury, Resource Center: Frequently Asked Questions and Answers, para. 183 (Oct. 15, 2013), at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#183>.

<sup>19</sup> 15 U.S.C. §78dd-1 et seq.

<sup>20</sup> See also UN Convention Against Corruption, GA Res. 58/4, UN Doc. A/Res/58/4 (Oct. 31, 2003), available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf); Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, S. TREATY DOC. No. 105-43, 37 ILM 1 (1998), available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

<sup>21</sup> See Mazars-Shift Project, Developing Global Standards for the Reporting and Assurance of Company Alignment with the UN Guiding Principles on Business and Human Rights: A Discussion Paper 4 (May 1, 2013),

they need to make a collective commitment to be part of the solution to vexing human rights challenges.

### *Conclusion*

The *Kiobel* decision makes imperative an increased exploration of alternative nonjudicial remedies. These five options are not “either/or” alternatives, but rather are a range of strategies that should be pursued on a continuum by both governments and companies. As multinational businesses expand their global reach and grapple with issues of human rights in their core business operations, a growing need arises for those involved to pursue several objectives:

- a better definition of the practical common standards that companies in each industry should apply in addressing human rights issues in their core business operations and solid metrics for evaluating their performance;
- a reasonable assessment process to determine whether a company’s actions comply with these standards, both to help inform the company and to engage it in improving its performance; and
- practical and effective remedies in situations where companies are in serious noncompliance with these standards and, as a result, grave human rights violations are occurring.

Judicial solutions, such as those pursued against corporations under the ATS, are an important piece of the corporate accountability puzzle but are not—and have never been—the sole solution. Looking forward, it is the combination of all these potential judicial and nonjudicial remedies that will eventually lead to a system of sustained human rights protection.

*available at* <http://business-humanrights.org/media/documents/developing-global-standards-discussion-paper.pdf> (“Under the second pillar—the corporate responsibility to respect—the Guiding Principles require companies to know and show that they are respecting human rights by developing policies and processes for managing human rights . . .”).