

Introduction

The number of transnational corporations (TNCs) – including parent companies and subsidiaries – has exploded over the last forty years. In 1970, there were approximately 7,000 TNCs in the world; today, there are more than 100,000 with over 900,000 foreign affiliates.¹ TNCs are now so complex and amorphous in their structure – even compared to ten years ago – that it is difficult for even the most sophisticated legal systems to adequately hold TNCs accountable for the harms they create in countries where they operate, even as the TNCs make enormous profits at the expense of often vulnerable communities. The truth is, certain legal doctrines, often devised nearly a century ago or longer, are too outdated to sufficiently assure that TNCs are held accountable for harms they create in today’s world, where TNCs operate globally, and often have structures that transcend a single country or jurisdiction.

While some TNCs benefit host countries (those that “host” transnational businesses, including their subsidiaries) through direct investment, creation of infrastructure, increased employment, and decreased poverty, many others act in violation of international human rights or environmental laws, either directly or in conjunction with government security forces, local police, state-run businesses, or other businesses. Such behavior often wreaks havoc on local, vulnerable communities, and they are often left to absorb all the costs in terms of harm, human rights violations, and environmental degradation. Where such behavior occurs in

¹ Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 HUM. RTS. Q. 511, 517 (2015). I adopt the definition of a TNC set forth by the United Nations Conference on Trade and Development: “Transnational corporations (TNCs) are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake.” *Transnational Corporations (TNC)*, UN CONF. ON TRADE AND DEV., https://unctad.org/en/PublicationChapters/wir2014chMethodNote_en.pdf (last visited January 1, 2020).

countries with weak and fragile governments and judiciaries (“high-risk” or “fragile” countries), the victims of these violations are typically unable to obtain any compensation for the injuries which these corporations impose upon them. When they seek remedies against these corporations in the host country, these victims often find a lack of causes of action, a corrupt, ineffective, or non-independent judiciary, a lack of lawyers to take their cases, burdensome rules that make bringing a case difficult (such as “loser pays” rules), and threats of violence and other forms of intimidation.

Where the responsible party is a subsidiary that a parent corporation created or purchased in order to do business in the country, victims usually cannot obtain a judicial remedy from the parent in the parent corporation’s home country (“home country”) either, even though these parent corporations gain tremendous financial and tax benefits from the operation of the subsidiaries. Such victims often cannot seek a remedy from the parent corporation for a variety of reasons: lack of a cause of action for human rights violations, such that the court does not have subject matter jurisdiction over the claim; limited liability of shareholders (and thus, limited liability of parent corporations for acts of their subsidiaries); increasingly narrow personal jurisdiction over TNCs, even in countries where the enterprise engages in substantial business, and for a host of other legal and doctrinal reasons. Given their inability to seek a judicial remedy, these victims are left absorbing all the risks and costs to their life, health, and livelihood while TNCs enjoy immense profits.

This book, *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* identifies the barriers which victims face in seeking a remedy for business-related human rights violations, and offers solutions to those barriers. Part I describes the various legal and practical obstacles that prevent the victims of business-related human rights violations from seeking a judicial remedy for their harm, both in their own countries and in the countries where the TNCs are domiciled or operate. The first set of obstacles the book describes are those found in the countries where the victims live and the harm occurs – those countries that “host” transnational businesses (“host countries”). These obstacles include ineffective laws and weak or corrupt judicial systems, as well as a multitude of other practical barriers that make obtaining a remedy in host countries nearly impossible. The second set of obstacles include certain, nearly universal legal doctrines that make it difficult to bring lawsuits against parent companies, even in the country where they are domiciled, incorporated, headquartered, or where they conduct significant business. These locations (or forums) are typically in the West, such as in the United States, Europe, and Canada. The obstacles include limits on the type of cases a court can hear (called subject matter jurisdiction), and in the United States, judicial limits on claims when the harm occurs in other countries (extraterritorial jurisdiction); inability to bring claims against parent companies due to the doctrine of limited liability of shareholders; and limits of a court’s jurisdiction over a particular corporate defendant not domiciled in the country where the court sits, and thus, inability to hear and adjudicate a case (called *in personam* jurisdiction, or personal jurisdiction).

If the victim is lucky enough to be able to get into court in a country where a court can and will assert jurisdiction over the case, there are additional legal doctrines that make transnational cases very difficult. They include *forum non conveniens* (where a court dismisses a case because it believes another jurisdiction is a more convenient jurisdiction to hear the case), differences in which country's laws should apply to the claim (called "choice of law" or "conflict of laws"), and doctrines relating to foreign policy concerns (such as the political question doctrine, comity, and the foreign affairs doctrine), short time frames in which to bring the case (statutes of limitation), lack of clarity regarding standards for corporate and vicarious responsibility, rules that make the cost of bringing such cases prohibitive (such as loser pays rules, the prohibiting or taxation of pro bono representation, and lack of contingency fees), and practical barriers relating to evidence-gathering, discovery, and witness testimony. Such barriers not only exist for civil litigation but also for the criminal prosecution of TNCs, meaning, for victims, a lack of any kind of restitution associated with criminal convictions.²

Part II offers possible solutions in addressing many of these barriers, the majority of which are suggestions for legislative bodies (such as United States Congress, the European Union, and parliaments in other home countries) to change or revise the laws relating to these barriers. The book contains recommendations that the author considers necessary to overcome some of the most substantial barriers that were found to exist in the countries reviewed. Before moving to the specific recommendations, it should be noted that although many of the recommendations made below are directed to the unique nature of the jurisdictions reviewed, lessons common to all jurisdictions may be drawn from them. These include revisions to the protections of limited liability of parent companies for the illegal conduct of their subsidiaries; ensuring that forum states can hear claims arising from illegal extraterritorial conduct; ensuring that the prosecution of such claims are economically feasible; and ensuring appropriate criminal prosecution of a business's extraterritorial criminal violations in a manner that also allows for victim compensation.

With regard to addressing barriers in home countries, these solutions include changes to judicial and bar association rules that could incentivize bringing such claims, ensuring that causes of action exist, and drilling down on the liability of the parent corporation for acts of their subsidiaries or affiliates they control through a variety of possible legal doctrines; expanding both subject matter jurisdiction so that courts can hear human rights claims, including claims for conduct that occurs in the host country, and personal jurisdiction over TNCs and their affiliates; clarifying or changing rules relating to statutes of limitations; and making changes to better

² In certain countries, civil claims can be attached to criminal prosecutions, giving the criminal process additional significance for victims. Barriers to accessing remedy unique to prosecutions include a lack of capacity of prosecutors and lack of laws that apply to corporations as a legal person; see *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases*, INDEPENDENT COMMISSION OF EXPERTS 20 (Oct. 2016).

support victims' ability to bring legal cases, such as changes to litigation's financial and discovery rules.

Some might ask, why the focus on a judicial remedy? In today's global economy, powerful corporations operate across borders (and legal frameworks) with ease. The costs of such operations are often absorbed by the vulnerable or by those at the local and community level. An ongoing challenge is how to hold TNCs legally accountable for impacts and ensure meaningful and effective reparations to victims. While access to remedy is at the heart of international human rights law, judicial systems often fail to deliver justice and remedy to victims of business-related human rights abuse. Without effectively tackling the barriers to judicial remedy, we will never see the true realization of human rights.

Judicial remedy is the backbone of access to remedy. Moreover, other types of remedies have not been successful. Non-judicial grievance mechanisms, provided at both the state and company level, have failed to deliver effective remedy alone. These include company-level or project-level remedial schemes and government mechanisms such as the OECD's National Contact Points (NCPs).³

I also want to address what others might perceive as a limitation of this book – that it focuses primarily on the legal doctrines of the United States, and to a lesser extent, Europe and Canada. The focus on these countries is because most of the TNCs that operate globally, especially in developing countries, are incorporated or domiciled in the United States, Europe, or Canada.⁴ It is true that some large TNCs also exist in Asian countries, such as China or Japan, but the numbers pale in comparison to the other three regions. Moreover, those legal systems typically do not allow victims to bring tort claims for human rights violations that take place in the host countries. The more detailed focus on the United States exists for a very simple reason: of the three regions, it has a statute that has been used for over 30 years – the Alien Tort Statute⁵ – that allows courts to hear cases for violations of customary international law (CIL) (although, as will be seen, use of this statute has been severely restricted following two Supreme Court decisions). CIL is the source of law for international human rights claims, such as torture, rape, extrajudicial killing, genocide, prolonged arbitrary detention, slavery and trafficking, forced displacement, racial discrimination, and

³ *Remedy Remains Rare*, OECD WATCH (2015) https://www.oecdwatch.org/publications-en/Publication_4201; *Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework*, ENODO RIGHTS (2016), <http://www.enodorigths.com/assets/pdf/pillar-III-on-the-ground-assessment.pdf>.

⁴ See *The World's Top 100 Non-Financial MNEs, Ranked by Foreign Assets, 2017*, UN CONFERENCE ON TRADE AND DEV., U.N. doc. UNCTAD/WIR/2017, Annex 19, https://unctad.org/Sections/dite_dir/docs/WIR2018/WIR18_tab19.xlsx (last visited July 5, 2018) [hereinafter *World Investment Report*] (showing that countries where the majority of transnational businesses are headquartered include the United States, Canada, Switzerland, and many countries of the European Union such as Germany, France, Spain, and the Netherlands).

⁵ 28 U.S.C. § 1350 (stating that federal district courts have jurisdiction over tort claims brought by aliens for violations of the law of nations).

other similar claims.⁶ The United States also has specific statutes that grant causes of action for anti-terrorism activities, human trafficking and torture (although torture claims under the current statute can only be brought against natural persons, not corporations).

This is not to say that such claims might not be brought in other countries as well, such as various African or Asian countries, but those countries do not have the same number of TNCs operating abroad as do the United States, Canada, and Europe. Finally, such is not where my expertise lies. Thus, the scope of this book is limited to the United States, Canada, and Europe. As victims are increasingly able to bring human rights claims against corporations in their own countries, or other countries of the world, this book will become obsolete. I hope that is the case.

⁶ The Restatement of the Law (Third) The Foreign Relations of the United States lists violations of CIL norms as including genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhumane, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.