

# **The Global Enforcement of Human Rights: The Unintended Consequences of Transnational Litigation**

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## **Abstract**

The capabilities approach places the individual as a holder of basic rights at the core of the process of development. The redress of basic rights violations is a crucial step toward the realization of the human capabilities. In the last few years, because of the lack of reasonable redress in their countries, individuals whose basic rights are violated have filed transnational human rights claims in foreign countries, where such preconditions exist, namely the United States and the United Kingdom. Although valuable because often providing the only redress for human rights violations, transnational claims are problematic for the following two reasons:

- 1) They undermine development by discouraging foreign companies from investing in countries that are sources of transnational claims and by weakening local governments and judiciaries;
- 2) The conflict resolution process is inadequate because financial and practical constraints prevent stakeholders from directly participating in the process, and because assessing damages and enforcing award judgments will likely be unfair.

The path to be taken involves developing a stronger rule of law, stronger local institutions and independent judiciaries in those developed countries where the violations of basic human rights take place. Wealthier nations have thus a moral obligation to act.

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### **I. MORAL DUTIES AND LEGAL LIMITATIONS**

Violations of human rights raise both ethical and legal challenges. Sen and Nussbaum have persuasively argued that the respect of human rights are an essential aspect of development and that their violation is morally wrong and that jeopardizes the development process. The capabilities approach places the individual as a holder of basic rights at the core of the process of development. Rather than seeing the individual aspects of the civil and political human freedoms as opposed to the collective aspects of the social and economic human rights, the two are approached as an integrated and mutually interdependent whole. This broad approach emphasizes the relevance of the whole array of human capabilities in development processes. Among the, social, cultural and economic capabilities such as the right to health, the right to food and the right to livelihood. This moral command is often breached, and the law may provide practical tools to translate these ethical precepts into daily practices. Legal systems may in fact provide the environment where social and economic human rights grow as integral part of development. The capabilities would in fact be moot if its holder could not make a claim to secure her basic freedoms and rights.<sup>2</sup> Within the ethical framework of the capabilities approach, the redress of basic rights

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<sup>2</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000 HUMAN RIGHTS AND HUMAN DEVELOPMENT 20 (2000).

violations thus becomes a crucial steps toward the realization of the human capabilities and the development process.<sup>3</sup>

In the last few years, individuals of countries that do not afford these such basic human rights – in most cases less developed countries (“LDCs”) – have increasingly sought legal redress by filing transnational human rights claims. Because of a weak rule of law and the lack the domestic legal institutions that can provide reasonable redress to those claims, individuals whose basic rights are compressed pursue their claims in foreign jurisdictions where such preconditions exist. Thus, British judges have adjudicated claims brought by South-African asbestos miners because of their asbestos-related injuries and U.S. judges have adjudicated claims brought by groups of Burmese, Latin and Central American workers for the violations of their basic rights while working in their countries for U.S. and European companies. Transnational litigation has thus become a peculiar way to provide legal redress to the victims of human rights violations in LDCs, and arguably a key element in the implementation of the capabilities approach. In fact, it often provides the only avenue to stop the violators from infringing upon individuals’ rights and to provide economic and non-economic compensation to the victims of those violations.

This paper will discuss transnational human rights litigation in the light of its moral implications. The paper argues that, although a valuable tool to redress human rights violations, overtime it may in fact have a negative impact on the same individuals and societies who benefit from theses lawsuits today. Among the unintended, negative consequences, transnational litigation may in fact undermine the development of LDC by rendering those countries less competitive from a legal standpoint and by weakening local governments and judiciaries. Furthermore, transnational litigation is an inadequate dispute resolution process. As alternative, a stronger, local rule of law and judiciaries would better protect the victims of human rights violations and enhance local government as independent and stronger international actors.

## **II. TRANSNATIONAL HUMAN RIGHTS LITIGATION**

Foreign citizens have been able to bring civil actions against foreign investors in foreign courts for negligent actions an omissions committed in the country where they reside seeking compensation of the infringements of their basic rights.. Thus, in the past few years, foreign victims of human rights

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<sup>3</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 38-41 (Alfred A. Knopf 1999).

violations in the workplace have filed claims both the United States and in the United Kingdom. Such peculiar litigation strategy falls within the notion of “transnational law,” i.e., “all law which regulates actions or events that transcend national frontiers,” as defined by Phillip Jessup.<sup>4</sup>

These claims involve a mix of direct application of national law and extrapolation of principles and rules of public international law. In fact, although the complaint states a claim based on U.S. and U.K. tort laws, its substance is commonly derived from the rules and principles of international law. Furthermore, the plaintiff avails herself of the adjudication systems of foreign countries. The adjudication is in fact carried out by foreign institutions, by judges appointed by foreign governments who apply their procedural law.

U.S. and U.K. tort laws provide the avenue for filing the claim. U.S. law allows federal courts to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>5</sup> British common law allows foreigners to file their claims in British courts unless the defendant can show that the foreign forum is more suitable “for the interests of all the parties and the ends of justice.”<sup>6</sup> The next two sections will discuss examples of transnational lawsuits brought under those laws.

#### **A. THE UNITED STATES : LITIGATION UNDER THE ALIEN TORT CLAIMS ACT (“ATCA”)**

The Alien Tort Claims Act (“ATCA”) allows foreign plaintiff to file tort claims in U.S. Federal Courts. “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>7</sup> Thus, ATCA grants U.S. courts jurisdiction over foreign defendants in tort actions where plaintiffs assert a tort claim that violates a U.S. treaty or the “law of nations.”<sup>8</sup>

Beginning with *Filartiga*,<sup>9</sup> the long-dormant ATCA increasingly presented the prospect of enforcing international human rights standards through the U.S. federal courts. In *Filartiga*, a torture claim was brought against a former official of the government of Paraguay. The Second Circuit Court of

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<sup>4</sup> PHILLIP JESSUP, TRANSNATIONAL LAW 4-5 (Yale University Press 1956).

<sup>5</sup> 28 U.S.C. § 1350, codifying Judiciary Act of 1789, § 9 (Sep.24 1789).

<sup>6</sup> *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460, 476.

<sup>7</sup> 28 U.S.C. § 1350.

<sup>8</sup> *Id.*

<sup>9</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

Appeal held that an alien could sue in U.S. federal court for a “tort” that violates the “law of nations.”<sup>10</sup> The court found that torture violated the law of nations, and avoided the necessity of ruling on whether a private party could be liable since the defendant had been a state actor when the violations occurred.<sup>11</sup>

The first lawsuit seeking redress for violations of human rights in the workplace was filed in September 1996 by a groups of Burmese against a U.S. company, Unocal.<sup>12</sup> Plaintiffs alleged that Unocal is liable for international human rights violations perpetrated by the Burmese military by knowingly using forced labor to construct a natural gas pipeline across the Tenasserin region of Burma, which was created to natural gas from oil fields off the coast of Burma to the Thai border. Although plaintiffs’ claims had been initially dismissed on summary judgment by District Court, in September 2002, the Ninth Circuit Court of Appeals rendered a landmark decision against Unocal, allowing plaintiffs to proceed to trial in federal court.

While the allegations against Unocal for using slave labor in Burma are litigated, a series of cases have been brought under the ATCA and the Torture Victim Protection Act (“TVPA”) alleging that some of the largest American corporations have knowingly participated in human rights violations while operating business in foreign countries. Thus, Exxon Mobil was named defendant by a group of Indonesian citizens for allegedly committing violations of human rights by recruiting one or more military units to provide security for its gas extraction and liquification project.<sup>13</sup> Plaintiffs’ theory of liability is that Exxon is liable either because the members of the military units were either employees of the defendant or on *respondeat superior* or vicarious liability. Moreover, Coca-Cola was named defendant in a lawsuit filed by five Colombian nationals and a Colombian labor union for tortuous acts allegedly consisting in using paramilitaries to engage anti-union violence.<sup>14</sup> Fresh Del Monte Produce was named defendant in a lawsuit filed by five former union leaders who were allegedly tortured and detained in Guatemala.<sup>15</sup> Finally, DynCorp was named defendant in a lawsuit filed by the International Labor Rights Fund on behalf of more than 10,000 Ecuadorian citizens who are “suffering health effects as a result of

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<sup>10</sup> Id. at 887.

<sup>11</sup> Id. at 889-90.

<sup>12</sup> Unocal Corporation and Union Oil Company of California are collectively known as Unocal.

<sup>13</sup> *John Doe v. Exxon Mobil, Co.*, NO 1:01CV01357 (D. D.C. filed June 20, 2001)(filed under ATCA provisions). The violations imputed to Exxon include genocide, murder and torture.

<sup>14</sup> *Sinaltrainal v. Coca-Cola*, NO. 01-03208-CIV (S.D. Fla. filed July 21, 2001)(alleging violations of ATCA, RICO and the common laws of Florida and Republic of Colombia). The District Court later granted a motion for summary judgment filed by the defendants and dismissed a number of allegations. *See, Sinaltrainal v. Coca-Cola*, 2003 U.S. Dist. LEXIS 7136 (S.D. Fla. decided March 28, 2003).

<sup>15</sup> *Villeda Aldana v. Fresh Del Monte Produce*, NO. 1-3399-CIV (S.D. Fla. filed Aug. 30, 2001).

the company's spraying of a toxic herbicide on their communities as part of a larger operation to eradicate coca plants in Columbia."<sup>16</sup>

All these cases allege blatant violations of human rights that raise important legal issues of whether U.S. courts have jurisdiction over all the claims, whether the defendants owed a duty of care to the foreign victims of human rights violations and, finally, whether the American corporate parent should be held liable for the actions of the foreign subsidiary. All these issues have been major procedural barriers to foreign plaintiffs in ATCA litigation, and courts are in the process of addressing them as they are presented in courts.

Although predicting the future of ATCA litigation is difficult, both advocates for and against ATCA litigation<sup>17</sup> share the common view that U.S. courts are increasingly favorable to transnational claims and that it is reasonable to assume that, in the next five years, ATCA cases will be increasingly filed and U.S. courts asked to adjudicate them. Given the sympathetic support of U.S. courts, it is also foreseeable that plaintiffs will overcome today's procedural barriers, and that judges and juries will be eventually asked to define the scope of the actionable violations and the standard of liability.

Today the scope of ACTA litigation has been certainly limited to certain major human rights violations. Courts have held that "ATCA . . . provides a cause of action as "plaintiffs . . . allege a violation of 'specific, universal, and obligatory' international norms as part of [their] ATCA claim."<sup>18</sup> Defining the substance of the "law of nations" is a however complex tasks that U.S. courts still have to perfect. In *Filartiga*, the seminal opinion opening the door to ATCA litigation, the Second Circuit held

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<sup>16</sup> Terry Collingsworth, *Boundaries in the Filed of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM RTS. J. 183, 195. The complaint, cited in the article, is *Aria v. DynCorp*, NO. 1:01CV01908 (D. D.C. filed Sep. 11, 2001) (filed under ATCA, TVA and international human rights law).

<sup>17</sup> In the United States, both advocates pro and against ATCA claims have raised their voices. See Adam Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, August 3, 2003. The U.S. Government opposes such litigation as one representative of the Department of State recently said in Senate testimony.

The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer and damaging to foreign policy and national security goals of this country.

*Benefits for U.S. Victims of International Terrorism*, Hearing before the Committee on Foreign relations, United States Senate, One Hundred Eighth Congress (1st session July 17, 2003)(testimony of William H. Taft IV, Legal Adviser of the Department of State), cited in Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire*, *supra* note 17.

<sup>18</sup> *John Doe v. Unocal Corp*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002) (citing *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (emphasis added). See also, *In re Estate of Ferdinand E. Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

that “[t]he law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’”<sup>19</sup> A scholar defined the law of nations,

a system of rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.<sup>20</sup>

Judge Edwards of the D.C. Circuit pointed out that deriving concrete *standards of liability* from “amorphous” international law norms places “an awesome duty on federal courts.”<sup>21</sup> If there is some agreement that torture, murder, slavery, rape and genocide are within the notion of “law of nations,” international consensus is lacking on many issues crucial to human rights concerns such as a living wage, minimum health and safety standards, maximum hours, and sexual harassment.<sup>22</sup> However, “[ATCA] presents the potential to address claims involving intentional physical or mental harm, but is not likely to reach less extreme but much more common claims, including abominable working conditions.”<sup>23</sup> In other words, the scope of the notion of “law of nations” is evolving and expanding overtime, eventually providing a transnational too to the redress of human rights violations that are much more closer the notion of human capabilities as defined by the UNDP and by Amartya Sen and Martha Nussbaum.

When cases will reach a stage where courts or juries will be required to make a determination of liability, the central question will be under which standard of liability should the defendants be tried. Notwithstanding the general notion of “law of nations” as “general usage and practice of nations” analyzed above, it is very likely that the law of the forum – U.S. law in ATCA cases – will become the law to be applied to the facts of the case. Most of ATCA cases are, in fact, tort cases, thus requiring a determination of whether or not the defendant knowingly or negligently breached the duty of care owed to foreign victims of human rights violations. Although, under the majority rule, “ATCA not only confers jurisdiction but also creates a cause of action,”<sup>24</sup> U.S. federal judges will be very likely to find those standards in domestic law, especially of the plaintiff’s legal system provide very limited protection to the victims. They will do either in bench trials or in instructing juries, or in deciding over an appeal as in the

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<sup>19</sup> *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. 153, 160-61, 5 L. Ed. 57 (1820)).

<sup>20</sup> W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND vol.4, at 66 (University of Chicago Press 1979).

<sup>21</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984).

<sup>22</sup> Terry Collingsworth, *Boundaries in the Field of Human Rights*, at 202.

<sup>23</sup> *Id.*

<sup>24</sup> *Papa*, 281 F.3d at 1013. But see, *Tel-Oren*, 726 F.2d at 774.

Unocal case. Signs that this process is taking place may be found in the opinions already written. Thus, in September 2002, the Ninth Circuit defined “forced labor” – which the judges considered to be a violation of the “law of nations” – by making reference *only* to U.S. case law and to the U.S. Constitution, without even trying to capture a more widespread, supranational notion of “forced labor.”<sup>25</sup> Furthermore, jurors will also tend to make their determination by using the mindset of the average American citizen. Furthermore, the actors of the litigation process are invariably lawyers and judges trained in domestic law, admitted in the domestic jurisdiction, and daily practicing domestic law. In sum, defendants’ actions will be found “reasonable” if complying with American standards. In sum, if U.S. courts will ever deal with the substance of ATCA claims, in the absence of clear agreement of international lawyers and scholars, American corporation will likely to be held liable as if they were conducting business in the United States or any other developed country.

**B. THE UNITED KINGDOM: THE SOUTH-AFRICAN ASBESTOS LITIGATION (LUBBE V. CAPE)<sup>26</sup>**

English common law allows similar, transnational human rights claims. “Traditionally English courts did little to discourage litigants from choosing to litigate in England, when the case was brought there consistent with English jurisdictional rules.”<sup>27</sup> In 1972, Lord Denning stated that,

No one who comes to these courts asking for justice should come in vain. To rights to come here is not confined to Englishmen. It extends to any friendly foreigner.<sup>28</sup>

Although this liberal view has eroded over the past two decades, foreign claimants will be denied the access to British courts only if the defendant can show that the foreign forum is more suitable “for the interests of all the parties and the ends of justice.”<sup>29</sup> Such limitation is known as the doctrine of *forum non conveniens*.

This jurisdictional barrier for foreign plaintiffs did not dissuade a group from filing personal injury lawsuits in the English High Court. Thus, in February 1997, five miners from Prieska and Penge

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<sup>25</sup> *John Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002) (citing the Thirteenth Amendment of the US Constitution and federal cases).

<sup>26</sup> C. G. J. Morse, *Not in the Public Interest? Lubbe v. Cape Plc*, 37 TEX. INT’L LJ. 541-557 (2002).

<sup>27</sup> *Id.* at 542.

<sup>28</sup> *The Atlantic Star* [1973] 1 Q.B. 364, 381-81 (Eng. C.A. 1972).

<sup>29</sup> *Spiliada Maritime Corp.*, [1987] A.C. at 476.

filed claims to recover damages in court for personal injuries caused by the exposure to asbestos fibers in the course of their employment. “The claims were based principally on the negligent control of the company’s world-wide asbestos business from England and failure to take measures to reduce asbestos exposures to a safe level.”<sup>30</sup> The complaint alleged that the defendant as a parent company had failed to discharge its duty to ensure the compliance with proper health and safety standards by its overseas subsidiaries.

The defendant was Cape Ltd., an English corporation and a long time player in the asbestos industry in both England and South Africa. Initially, Cape directly owned some of its South African operation. By 1948 the company had restructured, so that its mining and manufacturing operations were owned by South African subsidiaries. In 1979, Cape sold its South African asbestos mining subsidiary, and, in 1989, its remaining interests in the manufacturing subsidiaries.<sup>31</sup>

The parties litigated a series of procedural barriers, essentially challenging the claimants’ ability to bring their claims in U.K. courts. In fact, the defendant opposed a jurisdictional challenge based on the doctrine of *forum non conveniens*. Two Court of Appeal and two House of Lords decisions were necessary to establish the right of South African miners to have their cases heard by a U.K. judge. First, the Court of Appeal held in 1998 that five claimants could sue in the High Court. After 3,000 new claimants joined the proceedings, a second, different Court of Appeal held that the five and the group of new plaintiffs should sue Cape in South Africa and not in the United Kingdom.

In February 2000, the House of Lords gave plaintiffs leave to appeal this decision, which was heard in June 2000. On appeal in front of the House of Lords, the plaintiffs eventually succeeded in establishing the English court’s jurisdiction. A unanimous House of Lord ruled that, although South African courts were clearly the more appropriate forum for the trial, substantial justice would not have been served if the claims were litigated in South Africa. Under the governing law, claims should be dismissed on *forum non conveniens* arguments if a two-prong test is satisfied: first, only the foreign forum is more appropriate and, second, justice is likely to be served in the appropriate forum. The defendant’s argument failed under the second prong because the justices had two were the main concerns. First, there was no evidence that legal aid would have been available to the miners. Lord Bingham noted that,

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<sup>30</sup> Richard Meeran, *Liability of Multinational Corporations: A Critical Stage* (1999), at <http://www.labournet.net/images/cape/campanal.htm>.

<sup>31</sup> Patrick M. Hanlon & Matthew M. Hoffman, *Availability of U.S. Courts for Asbestos Actions Arising out of NON-U.S. Exposures*, A.L.I.-A.B.A. CONT. LEGAL ED. 33, 38-39 (2001).

If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence that would be essential if these claims were to be justly decided. This would amount to a denial of justice.<sup>32</sup>

Furthermore, there was evidence that suggested that, under the circumstances of the case, legal representation would be likely not available if the claims were to be litigated in South Africa. Second, South African law does not provide specifically for group actions, thus raising suspicions about the ability of South African claims to provide an adequate and fair setting for the trial.

Although plaintiffs successfully established their right to have their claims heard by U.K. judges, the over 7,500 claims were never litigated, nor in England neither in South Africa. The parties eventually settled the case in December 2001 after long negotiation.<sup>33</sup> Under the settlement agreement,

[The defendant] has agreed to pay a total of £21 million into a Trust fund to be established in South Africa which will make payments to those who may show that they have suffered from asbestos-related disease . . . as a result of working at, or living in the vicinity of, one of Cape's former mining, milling, or manufacturing operations in South Africa.<sup>34</sup>

Under the agreement, compensation is available not only to the claimants who took part in the English litigation, but also to all victims who satisfy the conditions set by the trust. The level of compensation is linked to the severity of the disease: “[M]esothelioma awards being the highest (about £5,250 total maximum); asbestosis (about £3,250 total max); pleural thickening/pleural effusion (about £1,600 total max), pleural plaques (about £700 total max).”<sup>35</sup>

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<sup>32</sup> Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others and Cape PLC. and Related Appeals, 4 All E.R. 268 (H.L. 2000):

If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice.

<sup>33</sup> Richard Meeran, *Justice at Last for Asbestos Victims as Epic London Legal Battle Ends*, at <http://www.leighday.co.uk/current.html#London> (Dec. 21, 2001) (reporting that the following organizations and individuals have contributed in supporting the claims: the South African Government, national and provincial; NUM, the successors to the Anti-Apartheid Movement, a number of British politicians, Amnesty International and the Transport and General Workers Union, the Legal Services Commission for England and Wales, and the newly appointed Chairman of Cape, Paul Sellars).

<sup>34</sup> *Ibid.* (“The Trust will symbolically be called the ‘Hendrik Afrika Trust’ after one of the victims”).

<sup>35</sup> *Ibid.*

Although the litigation and the negotiation were successful, enforcing the settlement has proven to be a complex task. Under the agreement, the £21 million will not be paid in one lump sum, but the defendant was supposed to make available the first £11 million in June 2002 only if various conditions are satisfied, the most important being the South African Government's commitment of not funding future legal claims against Cape and of not pursuing Cape "for any cost of rehabilitating its former asbestos mines."<sup>36</sup> Under threat of bankruptcy, Cape failed to pay the settlement for several months. However, in June 2003, the High Court eventually approved the compensation settlement at the end of the hearing, Cape handed over bankers' drafts for £7.5 million, which victims to receive payments during summer 2003.<sup>37</sup>

### III. THE UNINTENDED CONSEQUENCES OF TRANSNATIONAL LITIGATION

The point of views of the citizens of those LCDs where the violations took place should be the cornerstone of the analysis, at least in my mind, because transnational human rights cases are litigated in the *their* interest and they are the stakeholders with the greatest interest in dispute resolution process. By citizens, I refer both to the victims of the violations and to the rest of the population that does not actively take part to the litigation. Methodologically, my analysis will now focus on the point of view.

From the point of view of the LDC citizens, these cases have certainly the great merit of providing judicial redress of violations that, without the involvement of foreign judicial systems, would be unheard in courts, victims would have access to justice and receive compensation, and the perpetrators would not be held accountable. However, if one takes into consideration the citizens' perspective in a longer period of time, many questions of whether the redress offered by foreign courts is the best avenue available for the future arise. The next section will thus critically assess the ability of transnational human rights litigation to be the dispute resolution process that better serves the interest of LDC citizens. I will argue that transnational human rights litigation affects development in at least in two regards. First, it discourage foreign companies from investing in countries that are sources of transnational claims. Second, it weakens local governments and judiciary. Each argument is examined separately.

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<sup>36</sup> *Ibid.* ("Another condition is that Cape obtains the approval of its bankers and shareholders for the deal and that is able to raise the necessary finance."). Cape will then make the other £10 millions available into the Trust over a period of 10 years at an annual rate of £1 million.

<sup>37</sup> Leigh Day & Co., South African asbestos victims finally get their money (Press release June 30, 2003), at <http://www.leighday.co.uk/doc.asp?cat=850&doc=108>. The same law firm is now bringing a claim in English courts on behalf of 650 Kenyan women who were allegedly raped by British army. Recently the lawyers scored a success by obtaining legal aid for the Kenyan clients, which will cover for the legal expenses of the case. See, Martin Plaut, *Defending Africa's downtrodden*, BBC NEWS (July 3, 2003) at <http://news.bbc.co.uk/1/hi/world/africa/3039944.stm>.

**A. TRANSNATIONAL CLAIMS UNDERMINE DEVELOPMENT BECAUSE COUNTRIES THAT ARE SOURCES OF TRANSNATIONAL LITIGATION ARE LESS COMPETITIVE**

In a long term perspective, transnational human rights litigation may have a negative impact on development. Countries that are sources of transnational litigation may become, overtime, less competitive than countries that afford domestic, legal redress to human rights violations.<sup>38</sup>

As many commentators suggest, this litigation is moving its early steps, but, in future, courts will be increasingly asked to adjudicate those kind of claims. As I argued earlier in the paper, overtime Eastern courts will likely hold Western companies accountable for their actions and omission in LDCs under the legal standards of the United States and other industrialized countries. In other words, Western corporations will be held accountable to identical standards whether investing in developed countries or in LDCs that are sources of transnational claims. For instance, if the South African case had been tried rather than settled, the English judges would have been asked to decide whether or not Cape was negligent in exposing South African miners to an unreasonable risk. The lawyers would have probably borrowed information – medical link between asbestos and several diseases, knowledge of asbestos toxicity, availability of safer technologies – largely from the earlier asbestos litigation in U.K. courts. And the judges would have likely adapted those information to the circumstances that the negligent actions and omissions took place in South Africa and would have held the defendants liable for the various injuries caused to the plaintiffs and their relatives based on U.K. tort law rather than South African negligence principles.

This suggestion logically leads to question its implications on the LDCs involved. Let's assume that other LDCs that redress human rights violations domestically (thus not being a source of transnational litigation), exist. These countries would have legal and judicial systems capable to hold domestic and foreign violators of human rights accountable for their misconducts. Because both the rule of law and politically independent judiciaries are in place, their systems work and local policymakers would ideally be able to draft less rigorous standards than Western democracies,<sup>39</sup> in a fashion that will attract foreign investors without compromising the basic individual freedoms that are at the core of the capabilities approach. These countries may thus make *use of their legal systems as tools attracting foreign investors*. In the other hand, LDCs that are sources of transnational human rights litigation in the

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<sup>38</sup> “Competition” is intended in a legal dimension as ability of one legal system to attract business over another because of the rules and regulation that are in place in each of them.

<sup>39</sup> The underlying assumption is that legal standards should protect a core of basic human freedoms and then provide an increasing protections directly proportional to the level of economic development of the country.

past or where the lack of rule of law and of an independent judiciary strongly suggest that, in case of human rights violations, lawsuits will be filed in the country where the parent company has its headquarters, are *not* in the position to attract foreign investors, who will be likely to be held accountable in their home courts based on more rigorous standards. Overtime, the latter countries would attract less investments, thus undermining their economic development. In sum, countries with a weaker rule of law and institutions and high risk of generating transnational lawsuits will attract less investments than countries where a greater level of domestic redress is afforded to citizens whose human rights have been violated. Western investors will in fact be likely attracted to LDCs with lower – yet respectful of basic human rights – standards of liability for workplace misconducts.

**B. TRANSNATIONAL CLAIMS UNDERMINE DEVELOPMENT BY WEAKENING LOCAL GOVERNMENTS AND JUDICIARIES**

Transnational human rights litigation may weaken local institutions of the LDCs whose citizens bring the claims in a foreign court. It may in fact reduce their ability to regulate domestic matters and to negotiate matters of foreign policy with the governments of the countries where the litigation takes place.

The aim of filing a transnational claim is to have a foreign judge making a determination of whether or not a violation of a human right took place in the country where the negligent actions and omissions occurred. In order to conclude that a violation took place, foreign judges shall determine what the defendants should have done to avoid violating a human right. “[T]ransnational public law litigation . . . is an exercise in extraterritorial jurisdiction: courts in one jurisdiction sit in judgment on the propriety and legality of behaviour in another jurisdiction.”<sup>40</sup>

The foreign judge may do so by making reference to various sources, namely the “laws of nations,” to the legal standards of either countries involved, or to international law and agreements. However, whichever legal basis the court adopts, the political significance of its action does not change. Foreign judges are in essence making a normative assessment of the other legal system. In other words, they are stating what the law of the country where the violation took place implicitly should be. These activities thus have a direct impact on the institutions of the LDC involved in the litigation, to regulate internal matters.

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<sup>40</sup> Jan Klabbbers, *Doing the Right Thing? Foreign Tort Law and Human Rights*, in TORTURE AS TORT. COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 556 (Craig Scott ed.) (Hart Publishing 2001).

The second point I made early in this paragraph is that transnational human rights litigation weakens the role of LDC governments in shaping foreign policy. The argument has been made from the United States' perspective, by saying that ATCA litigation undermines U.S. foreign policy. Recently, Curtis Bradley, visiting professor at the University of Virginia School of Law, commented that,

The use of the statute for human rights litigation, including these corporate suits, inherently *involves policy decisions that are better made by the executive and legislative branches*, not the judicial branch . . . There's a real danger that these lawsuits, if they continue to expand as they have, could truly interfere with relations that we have with foreign governments.<sup>41</sup>

This is certainly an important issue. Over the years, several ATCA lawsuits have brought to the defendant stand several foreign government officials. From a constitutional point of view, the relationship between the United States and foreign governments is left to, and better served, by Congress and the President rather than federal courts. If this argument does not *directly* affect the interests of the main stakeholders of the process, i.e. LDC citizens, the reverse does. By adjudicating on the liability of western companies and local governments though, foreign courts step in foreign policy affairs, thus limiting the role of local governments in the shaping their foreign policy. Governments of LDCs generating ATCA claims are in fact not in a position of negotiating with foreign governments trade agreements and other matter of foreign policy involving trade issues because foreign judges eventually have the last word on the matters to be negotiated.

### **C. TRANSNATIONAL HUMAN RIGHTS LITIGATION IS AN INADEQUATE CONFLICT RESOLUTION PROCESS**

The success of transnational claims has often be praised as a great victory for the victims of the violations. It is irrefutable that this form of litigation often provides with only avenue for redress available. Without access to foreign courts, many people around the world would be deprived of a chance to have their claims heard, the damages would not be compensated, and the violations not be prevented from happening again. However, is transnational litigation the best dispute resolution process available for the future?

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<sup>41</sup> Dan Eggen & Charles Lane, *White House Seeks to Curb Rights Cases From Abroad U.S. Fears Effect On Diplomatic Ties*, WASH. POST at A01 (May 30, 2003)(emphasis added).

Several factors suggest it is an inadequate dispute resolution process.<sup>42</sup> Key aspects of the adjudication process in foreign courts support my argument that local policymakers and international organizations and lawyers should direct their effort towards strengthening domestic dispute resolution rather than relying on transnational litigation to redress human rights violations.

### **1. Participation**

Dispute resolution scholarship points out that participation of the victims in the dispute resolution process should not be overlooked. Studies show that litigants in the United Kingdom and in the United States are overall dissatisfied with the litigation process and that their judgments are based on their perception of the fairness of the procedures used in reaching decisions.<sup>43</sup> In fact, the empirical literature shows that the opportunities to comprehend and actively take part in proceedings and whether they have control over the procedure and the outcome influence the claimants' perception of the process.

Transnational litigation offers little possibility to meet those (procedural) needs. Both financial and practical constraints prevent stakeholders from directly participating in the process. Moreover, even if in the material conditions to attend the trial, claimants would be in the difficult position of understanding a process that takes place in a different language and that is that expression of different cultural, political and legal traditions. These reasons alone raise concerns of adequacy of the process, and of procedural justice of transnational litigation. Furthermore, the lead actors of the process are foreign lawyers, judge, and jurors, interpreting the process with their own Western, cultural value.

### **2. Damages**

American or English courts will soon be required to make a determination of liability and, if liability is established, to award reasonable compensation to the victims. As discussed above, such determination involves important issues of what standards of liability foreign judges should apply. They will likely apply standards that are commonly shared in the communities where they live and exercises

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<sup>42</sup> The analysis however ambitiously assumes that a domestic redress mechanism serves as reasonable alternative to litigation in foreign courts.

<sup>43</sup> William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC. REV. 137 (1988); Robin L. Pinkley, *Dimensions of Conflict Frame: Disputant Interpretations of Conflict*, 75 J. APPLIED PSYCHOLOGY 117 (1990); Jonathan D. Casper, *Having their day in court: Defendant evaluations of the fairness of their treatment*, 12 LAW & SOC. REV. 237 (1978); John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

their professions.<sup>44</sup> Similarly, once the court finds the defendants liable, it will assess compensation by awarding the damages that are generally awarded in similar circumstances in the jurisdiction where the trial takes place. Courts could not act differently. As a consequence, the liquidated damages will be much higher than those that the claimants could recover by litigating the same claims in their national court.

This conclusion creates practical and theoretical problems. From a practical standpoint, this system provides an incentives for forum shopping and race to Western jurisdictions generating concerns of efficiency of the dispute resolution arrangement and of allocation of resources. From a theoretical standpoint, the awards raise issues of fairness with respect to the victims of the jurisdiction where the litigation takes place. They would receive relatively smaller amounts if compared to their economic losses. Assuming the harm inflicted is equal, LDC victims would in fact enjoy a greater difference between the damages awarded and the extent of the economic loss suffered than victims situated in similar positions and living in the jurisdiction where the litigation takes places.<sup>45</sup>

### **3. Enforcement**

Lastly, transnational litigation potential raises issues of enforcement of the judgment. Enforcement is a process aimed to materialize the practical results of a judgment. In the case of damage awards, the enforcement process aims to transfer the amount of liquidated damages from the pockets of the liable defendant to the plaintiff. If enforcement of a foreign judgment is sought, the general principle of international law applicable in such cases is that a foreign state claims and exercises the right to examine judgments for four causes: (1) to determine if the court had jurisdiction; (2) to determine whether the defendant was properly served; (3) to determine if the proceedings were vitiated by fraud; and (4) to establish that the judgment is not contrary to the public policy of the foreign country.<sup>46</sup>

Although enforcement has not been an issue in transnational cases so far because all of them in earlier stages of the litigation process or have been settled, transnational litigation raises issues of enforcement of the judgment. If the litigation were to take place in the countries where the victims reside, the final judgment would be enforced locally. However, the defendants' largest assets are commonly in the United States or in the United Kingdom, thus creating the need for a transnational enforcement. In this

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<sup>44</sup> As argued earlier, it creates its own disadvantages to LDC.

<sup>45</sup> The issue is then what are "similar" conditions. My argument assumes, as means of comparison, that the harms occurred are "similar," but the economic loss that is proximately caused by the negligent conduct is much higher in a Western society than in a LDC society.

<sup>46</sup> *Hilton v. Guyot*, 159 U.S. 113 (1965); 47 AM JUR 2D, Judgments, Section 1214 et seq.

scenario, the judgment would be deemed “foreign” by U.S. and U.K. courts, thus triggering their right to examine the judgments.

On the other, litigating claims in the jurisdiction where the defendant has the majority of its assets certainly facilitates damage awards’ enforcement. The assets of the liable defendant are easy to locate, and the judgment has power to be enforced without further scrutiny. Nonetheless, this process may raise pressing issues. First, allocating the money in the defendant’s pocket to foreign claimants may jeopardize the ability of domestic victims of tortious acts of recovering damages awarded in their favor. Thus, compensating citizens of other countries for negligent actions and omissions that took place outside the jurisdiction and depriving domestic victims creates a tension between the social and the individual dimension of justice. In past few years, several large American and British companies have filed for bankruptcies as a result of the large number of personal injury lawsuits filed, mostly by domestic plaintiffs, against them.<sup>47</sup> If transnational litigation targets “at risk of bankruptcy” companies, damages awards in favor of foreign victims – although technically “domestic” - would raise issues of fairness. In fact, if considered in its social dimension rather than the perspective of the individuals actors involved, scholars have pointed out that the tort system allegedly accomplishes goals of social justice. And those ends would be partially frustrated by compensating foreign victims. Although not frequent, tensions between domestic and foreign plaintiffs have already emerged in two U.S. bankruptcy proceedings.<sup>48</sup> The best way to proceed should probably be found in favoring domestic resolution of controversy and in improving the system of satisfaction of transnational creditors whose monetary entitlements arise out of domestic judgments. Furthermore, LDC could request to secure the potential liability following a finding of tort liability for violations of human rights to foreign investors *at the time* of the initial investment.<sup>49</sup>

#### **IV. CONCLUSION: STRENGTHENING THE RULE OF LAW**

Infringing basic human rights is despicable, and simply morally wrong. The capabilities approach provides a powerful, impregnable framework to impose a moral duty to stop and redress those violations,

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<sup>47</sup> Recent examples are offered by bankruptcies filed as a result of the need or the risk to have to pay out numerous victims of negligent exposure to asbestos or consumers of products such as breast implants.

<sup>48</sup> I am referring to compensation of Australian customers in the Silicon Breast Implant Litigation and to the compensation of British victims in the Chapter 11 proceeding involving Federal Mogul, who had bought the British Turner and Newall soon before it filed for bankruptcy.

<sup>49</sup> The World Bank or another international body or organization could act as neutral administrator supervising the transaction.

and to prevent them from happening in the future. Shaping mechanisms to translate the ethical commands into practical actions is a problematic task. Legal redress seems to be, at least in Western commentators' and lawyers' mind, the mechanism that best serves these moral ends.

Thus, in the last few years, individuals of countries that do not afford basic human rights have increasingly sought redress by filing transnational human rights litigations. Because of the lack the rule of law and legal institutions that can reasonably provide redress to those claims, individuals whose basic rights are compressed pursue their claims where such preconditions exist. In the paper, I argued that, although transnational claims benefit LDC victims in the present time – because their harms would otherwise not be redressed – overtime they create unintended consequences in terms of weakening the economic and institutional development process of LDC and by providing an inadequate dispute resolution process.

Transnational litigation should thus not be seen as the optimal mechanism of redress of human rights violations in LDC in the future. By contrary, local redress would better serve the moral goals that the capabilities approach proposes. Building stronger local institutions and judiciaries and a stronger rule of law in LDC is thus not only the best policy solution but is also a moral obligation of the parties involved in the process whether from the North or the South. In this regards, both stakeholders – local and international NGOs and foreign investors – and international organization – the UN and the World Bank above all – should be fully engaged in investing in institution and capability building in order to create the precondition for local redress of basic human rights violations, a redress able to stop and prevent those violations from happening again.