Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'

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Abstract

In April 2013, the United States Supreme Court handed down its decision in *Kiobel v Royal Dutch Petroleum*, a ruling of great significance for those seeking to hold multinational corporations responsible for human rights violations in developing countries. For some time, non-US nationals have brought civil claims against corporations for violations of international law under an antiquated jurisdictional provision known as the '*Alien Tort Statute*'. The success or failure of these actions has often turned on the various US District and Circuit courts' interpretations of this provision. Finally, after years of inconsistent application among lower courts, the Supreme Court in *Kiobel* has ruled that the *Alien Tort Statute* does not overcome the 'presumption against extraterritoriality', and will therefore not permit actions unless the circumstances of the case sufficiently 'touch and concern' the territorial jurisdiction of the United States. This paper considers the implications of this decision, and argues that certain questions carefully left open by the Court are likely to be answered, in the future, in further constraint of *Alien Tort Statute* jurisdiction. As a result, human rights plaintiffs are likely to shift their focus towards bringing common law tort claims in alternative forums. This paper explores the difficulties faced by plaintiffs seeking to do so in US state courts, Australia or the UK. If such difficulties can be overcome, however, for example through 'foreign direct liability' litigation, tort law does however provide plaintiffs with a number of advantages over the *Alien Tort Statute*. Indeed, history suggests that pursuing multinational corporations in common law tort may be more successful than *ATS* litigation has ever been in obtaining tangible redress for claimants.

I Introduction

In April, the United States Supreme Court handed down its decision in *Kiobel v Royal Dutch Petroleum*.[1] This case concerned the operation of 28 USC § 1350, a single-provision federal statute widely known as the *Alien Tort Statute* ('*ATS*'), which in its entirety provides that:

> [t]he 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.[2]

Famously described by Judge Friendly as a 'legal Lohengrin' (since 'no one seems to know whence it came'),[3] the *ATS* lay largely unused for more than 170 years following its

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1 133 S Ct 1659 (2013) ('*Kiobel*').

2 *Judiciary Act* 1979 § 20.9(b), 1 Stat 73, 77 (codified as amended at 28 USC § 1350 (2006)).

enactment in 1789.[4] Since its rediscovery, however, it has been increasingly deployed by human rights litigants to bring US and non-US defendants, including multinational corporations, before US federal courts.

In 2011 in *Sarei v Rio Tinto*, the Ninth Circuit held on the basis of the *ATS*[5] that a US court may assert jurisdiction over foreign companies for civil actions alleging violations of international law, despite the fact that the neither the plaintiff nor the defendant are US citizens, and that the alleged violations were committed abroad (a so-called 'foreign-cubed' case). Accordingly, there have been great expectations of holding irresponsible multinational corporations accountable for their misdeeds, wherever occurring, under the *ATS*.[6] It has even been suggested that the *ATS* could provide a mechanism by which major carbon emitting corporations could be haled before US courts for violations of international law.[7] The Supreme Court's decision to hear *Kiobel*, however, illustrated that the *ATS* has long caused headaches for lower courts as they attempt to apply an antiquated jurisdictional rule in the context of modern international commercial activity.

The *Kiobel* Court's narrow reading of the *ATS* makes clear that it will no longer be the powerful weapon desired by plaintiffs and human rights groups. In addition, the Court left significant questions unanswered, leaving open the possibility that it may further limit the sphere of *ATS* litigation in the future. In particular, the Court failed to decide whether corporations may be sued under the *ATS*, and did not consider: (i) whether accessorial (or 'aiding and abetting') liability falls within the scope of the *ATS*; (ii) whether a plaintiff must first exhaust all remedies in their domestic jurisdiction before bringing suit under the *ATS*; or (iii) whether principles of 'prescriptive comity' should be applied when considering the reach of the *ATS*. In light of *Kiobel* and the prospect of unfavourable rulings on these open questions, it is likely that litigants seeking to hold multinational corporations accountable for violations of human rights abroad will now look to alternative ways and forums in which to bring suit.

Part II of this article provides a brief history of the *ATS* and its emergence as an increasingly important basis of suit in US courts. Part III critically considers the Supreme Court's decision in *Kiobel*. Part IV considers the implications of *Kiobel* and the various questions left unanswered by the Supreme Court's decision. Part V considers the prospect of a shift to human rights claims in common law tort, and the potential difficulties faced by plaintiffs in US state courts, Australia and the UK. Finally, Part VI considers the advantages that such a shift may have for plaintiffs, and compares the historical success of *ATS* claims versus human rights tort litigation.

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3 *IIT v Vencap Ltd*, 519 F 2d 1001, 105 (2nd Cir, 1975).

4 Mark K Moller, 'Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in *Sosa v Alvarez-Machain*' in Mark K Moller (ed), *CATO Supreme Court Review, 2003–2004* (Cato Institute, 2004) 209, 209.

5 *Sarei v Rio Tinto*, 671 F 3d 736 (9th Cir 2011) ('*Sarei*').

6 See, eg, Hugh King, 'Corporate Accountability under the *Alien Tort Claims Act*', (2008) 9 *Melbourne Journal of International Law* 472, 480, citing Gary Clyde Hufbauer and Nicholas K Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Institute for International Economics, 2003).

7 See, eg, Rosemary Reed, 'Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress under the Alien Tort Claims Act?' (2002) 11 *Pacific Rim Law & Policy Journal* 399; cf Eric A Posner, 'Climate Change and International Rights Litigation: A Critical Appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925.

II A Brief History of the *Alien Tort Statute*

The *ATS* is in terms jurisdictional;[8] in other words, it provides a basis of jurisdiction in federal courts. However, it does more than this, as it effectively provides non-US citizens with access to a cause of action under federal common law where that action is based on a defendant's violation of the 'law of nations'.[9] Since the history of *ATS* litigation has been considered exhaustively elsewhere,[10] this article provides merely a brief history to put *Kiobel* in the context of its precedents. Originally enacted to provide non-US plaintiffs with an action in US courts for acts of piracy, violations of safe conduct and infringements of ambassadorial rights,[11] the amorphous and expanding sphere of the 'law of nations' gave the *ATS* a potential breadth that has only lately become apparent, with implications for multinational corporations and those individuals (usually in developing, 'host' nations) affected by their actions.

The use of the *ATS* as a plaintiff's weapon began in 1980, with the landmark case of *Filartiga v Pena-Irala*,[12] in which two Paraguayan nationals brought an action against a former Paraguayan government official (by then domiciled in New York), alleging that the defendant had been responsible for the kidnap and torture of their family member in Paraguay in retaliation for the political activities of the victim's father.[13] The Second Circuit held that the *ATS* extended the jurisdiction of federal courts, enabling them to consider acts of torture (a 'violation of the law of nations') committed anywhere in the world.[14] The success of this bold and creative suit precipitated numerous cases in which the *ATS* was relied on as the operative jurisdictional provision.

At least initially, however, *ATS*-based actions were brought solely against individuals, and mostly for actions committed while in a position of state authority.[15] This changed in 2002 with the Ninth Circuit's decision in *Doe v Unocal*,[16] which revealed the full threat of the *ATS* to multinational corporations operating in developing countries. This case concerned a complaint brought under the *ATS* that Unocal, a US oil and gas corporation, had committed a violation of the 'law of nations' in being complicit in the Burmese military's exploitation, rape, torture and murder of villagers. For the first time, a US Circuit Court of Appeal expressly held that *corporations* are amenable to the exercise of jurisdiction

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8 *Sosa v Alvarez-Machain*, 542 US 692, 712 (2004) ('*Sosa*').

9 In *Sosa*, 542 US 692, 724 (2004), the Court noted that the *ATS* was enacted on the understanding that that common law would provide a cause of action for the modest number of international law violations'.

10 See, eg, Odette Murray, David Kinley and Chip Pitts, 'Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel' (2011) 12 *Melbourne Journal of International Law* 1, 57; Julian Ku, 'The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2010) 51 *Virginia Journal of International Law* 353 (2010).

11 *Sosa*, 542 US 692, 715 (2004); see also, Eugene Kontorovich, 'Implementing *Sosa v Alvarez-Machain:* What piracy reveals about the limits of the Alien Tort Statute' (2004) 80 *Notre Dame Law Review* 111, 137.

12 630 F 2d 876 (2nd Cir, 1980) ('*Filartiga*').

13 *Filartiga*, 630 F 2d 876, 877 (2nd Cir, 1980). The plaintiff, Dolly Filartiga, had previously brought a criminal case in Paraguay, but claimed that her attorney had been arrested, threatened with death and disbarred without just cause.

14 *Filartiga*, 630 F 2d 876, 880 (2nd Cir, 1980). Dolly Filartiga was ultimately awarded approximately USD10.4 million in damages.

15 See, eg, *Kadic*, 70 F 3d 232 (2nd Cir, 1995); *Trajano v Marcos* 878 F 2d 1439 (9th Cir, 1989); *Forti v Suarez-Mason*, 694 F Supp 707 (ND Cal, 1988); *Guinto v Marcos*, 654 F Supp 276 (SD Cal, 1986). See also, Julian G Ku, 'The Third Wave: The Alien Tort Statute and the War on Terrorism' (2005) 19 *Emory International Law Review* 205, 208.

16 395 F 3d 932, 947–56 (9th Cir, 2002).

by federal courts under the *ATS*.[17] Since then, numerous cases concerning corporate liability under the *ATS* have been considered by different Circuit Courts, and judicial views on whether corporations are amenable to suit under the *ATS* have differed markedly.[18] Nevertheless, numerous US District and Circuit Courts have agreed with the finding in *Unocal*,[19] either expressly or by assumption.[20] Many of these cases have involved foreign corporations alleged to have aided or abetted a foreign government's violations of international law;[21] that is, 'foreign-cubed' cases alleging secondary liability, with no obvious connection to US territory.[22]

In the landmark case of *Sosa v Alvarez-Machain*[23] in 2004, the Supreme Court for the first time laid down rules regarding the application of the *ATS*. This case involved a claim brought by an alleged member of a Mexican drug cartel, after the US Drug Enforcement Agency allegedly instructed his abduction from Mexico to the US. The Supreme Courtheld that the *ATS*, although in terms jurisdictional, provides a cause of action based on either treaty or a very limited category of offences defined by the 'law of nations' and recognised at federal common law.[24] In cases where there is no enforceable treaty applicable, the

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17 A number of courts had previously held corporate defendants liable under the *ATS* without directly considering the question of whether the *ATS* extends to apply to corporate conduct. See, eg, *Abdullah v Pfizer Inc*, 562 F 3d 163, 174–5, 187–8 (2nd Cir, 2009); *Licea v Curacao Drydock Co* 584 F Supp 2d 1355, 1366 (SD Fla, 2008); *Doe v Exxon Mobil Corp*, 473 F 3d 345, 357 (DC Cir, 2007); *Roe v Bridgestone Corp* 492 F Supp 2d 988, 1012–15 (SD Ind, 2007); *Mujica v Occidental Petroleum Corp*, 381 F Supp 2d 1164, 1183 (CD Cal, 2005); *Bigio v Coca-Cola Co*, 239 F 3d 440, 449 (2nd Cir, 2000); *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88, 92 (2nd Cir, 2000).

18 See, eg, *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111 (2nd Cir, 2010); *Doe v Unocal*, 395 F 3d 932, 947–56 (9th Cir.2002); *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88, 92 (2nd Cir, 2000); *Ibrahim v Titan Corp*, 391 F Supp 2d 10, 14 (DDC, 2005) (holding that 'the question is whether the law of nations applies to private actors like the defendants in the present case. The Supreme Court has not answered that question … but in the DC Circuit the answer is no'); cf *Romero v Drummond Co Inc*, 552 F.3d 1303, 1315 (11th Cir, 2008) (finding that the text of the *ATS* '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'); *Flomo v Firestone Natural Rubber Co,* 643 F 3d 1013, 1013, 1021 (7th Cir, 2011) (holding that the *ATS* extends to corporations); *In re XE Services Alien Tort Litigation*, 665 F Supp 2d 569, 588 (ED Va, 2009) (finding that '[n]othing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations'); *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F 3d 244, 261 n 12 (2nd Cir, 2009) (assuming, without discussion, that corporations may be held liable under the *ATS*); *Mujica v Occidental Petroleum Corp*, 381 F Supp 2d 1164 (CD Cal, 2005) (holding, without discussion, that corporations may be held liable under the *ATS*); 504 F 3d 254, 270, 282 (Katzmann J) (2nd Cir, 2007) (noting that because the defendants did not raise the issue, there was no need to decide whether corporations can be held liable under the ATS); *Doe VIII v Exxon Mobil Corp,* 654 F 3d 11, 11, 15 (DC Cir, 2011) (finding that 'neither the text, history, nor purpose of the *ATS* supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations').

19 See, eg, *Khulumani v Barclay National Bank Ltd*, 504 F 3d 254 (2nd Cir, 2007) ('*Khulumani*'); *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F 3d 244 (2nd Cir, 2009) ('*Talisman II*'); *Romero v Drummond Co Inc*, 552 F 3d 1303 (11th Cir, 2008); *Flomo v Firestone Natural Rubber Co*, 643 F 3d 1013 (7th Cir, 2011); *Doe v Exxon Mobil Corp*, 654 F.3d 11, 39–57 (DC Cir, 2011).

20 See *Khulumani*, 504 F 3d 254, 282–3 (Katzmann J) (2nd Cir, 2007) (noting that, in the majority of cases, the question of whether corporations may be held liable for violations of the 'law of nations' was not directly considered). See also Ku, above n 10, 372 (noting that, since many courts finding corporate liability under the *ATS* have relied on decisions which did not expressly consider the question, the argument for corporate liability under the *ATS* essentially 'rests on the failure of US courts even to spot the issue for decades').

21 See, eg, *Khulumani*, 504 F 3d 254 (2nd Cir, 2007); *Talisman II,* 582 F 3d 244 (2nd Cir, 2009); *Doe v Exxon Mobil Corp*, 654 F.3d 11, 39–57 (DC Cir, 2011); *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88, 92 (2nd Cir, 2000); *Sarei*, 671 F 3d 736 (9th Cir, 2011); *Baintulo v Daimler AG* (2nd Cir, No 09-2778-cv, 21 August 2013).

22 Governments of the United Kingdom and Northern Ireland and the Kingdom of the Netherlands, *Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as* Amici Curiae *in Support of the Respondents*, *Kiobel v Royal Dutch Petroleum*, 569 US _ (2013) 5.

23 *Sosa*, 542 US 692, 712 (2004).

24 Ibid.

question for the court is whether the defendant can be said to have violated the 'law of nations' for the purposes of the *ATS*. If so, the *ATS* provides the US federal court with jurisdiction and the plaintiff with access to a cause of action at federal common law.

The *Sosa* Court further held that the 'law of nations' is to be defined by reference to norms of customary international law.[25] However, with a nod to the often uncertain nature of such norms, the Court held that the *ATS* makes actionable only those claims resting on 'a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms' of international law,[26] those '18th century' paradigms being: (i) 'violations of safe conducts'; (ii) 'offenses against ambassadors'; and (iii) 'individual actions arising out of prize captures and piracy'.[27] In other words, US federal courts may only recognise a present-day norm of customary international law under the *ATS* insofar as it is 'specific, universal and obligatory'.[28] The *Sosa* Court also noted that federal courts should, for a number of reasons, exercise 'great caution' when considering whether a norm meets this requirement for clear definition.[29]

However, *Sosa* left important questions unanswered. First, the Court did not rule on the extraterritorial reach of the *ATS*; that is, the extent to which the *ATS* permits federal courts to exercise jurisdiction over persons and conduct beyond US borders. It therefore remained to be determined (at the Supreme Court level) whether the *ATS* could offer a jurisdictional basis in a foreign-cubed case. Second, the *Sosa* Court did not consider whether corporations are capable of violating the 'law of nations' for the purposes of the *ATS*. In the absence of Supreme Court authority on these (and other) *ATS* questions,[30] and in the face of polarised interpretation by different federal courts, the issues of extraterritoriality and corporate liability became the focus of argument before the Supreme Court in *Kiobel*.

III *Kiobel v Royal Dutch Petroleum*

Kiobel concerned a claim for damages brought by plaintiffs from the Ongoni region of Nigeria against Dutch, British and Nigerian oil companies. The plaintiffs alleged that these companies had committed violations of the 'law of nations' for the purposes of the *ATS* by aiding and abetting the Nigerian government's violent response to local protests about the defendants' oil exploration and extraction activities. The lead plaintiff, Esther Kiobel, claimed that her husband was executed by Nigerian forces with the backing of Royal Dutch Petroleum.

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25 Ibid 728.

26 Ibid 724–5.

27 Ibid 720.

28 Ibid 732.

29 Ibid 725–38 (noting that a judge determining the norms of international law will, given their uncertain nature, 'find a substantial element of discretionary judgment in the decision'. Although federal courts have a role in deciding on jurisdictional rules which may have implications for the country's foreign relations, the general practice has been to look to legislative guidance before 'exercising innovative authority' over substantive law; any decision to create a private right of action is more appropriately left to the legislature. Also, federal courts have no congressional mandate to 'seek out and define new and debatable violations of the law of nations'); See also, *Flores v Southern Peru Copper Corp*, 343 F 3d 140, 154 (2nd Cir, 2003).

30 Hugh King, 'Corporate Accountability Under the Alien Tort Claims Act' (2008) 9 *Melbourne Journal of International Law* 472, 480; Brad R Roth, '*Sosa v Alvarez-Machain; United States v Alvarez-Machain*' (2004) 98 *American Journal of International Law* 798, 804.

A majority of the Second Circuit rejected the plaintiffs' claim on the basis that corporations cannot be held liable for violations of the 'law of nations' and are therefore not amenable to suit under the *ATS*.[31] In 2012, the Supreme Court granted certiorari to consider this question on appeal. During oral arguments, however, it became clear that a number of justices were interested in considering a preliminary question; namely, whether and in what circumstances the *ATS* allows US courts to hear an action based on violations of the law of nations occurring within a foreign sovereign territory.[32] So, in an unusual step, the Court relisted the matter for supplementary argument on the question of extraterritoriality.[33] And, in April 2013, the Court rejected the plaintiffs' claim in a 9:0 decision on the basis that the *ATS* does not operate extraterritorially to permit a cause of action based solely on circumstances occurring within the sovereign territory of another country. It is therefore now settled that foreign-cubed cases do not fall within the scope of the *ATS*. Although it was unanimous in its rejection of the plaintiffs' claims, the Court split along ideological lines on the extent to which the *ATS* operates extraterritorially in respect of other *ATS* cases.

The relevant test for whether US legislation operates extraterritoriality was laid down by the Supreme Court in *Morrison v National Australia Bank*,[34] an earlier case considering the foreign application of US securities legislation. Since *Morrison*, courts will apply a 'presumption against extraterritoriality', according to which a court will presume that a statute is 'primarily concerned with domestic conditions' unless 'there is the affirmative intention of the Congress clearly expressed' to give the statute extra-territorial effect.[35] This intention may be found in either the text or legislative history of the statute.[36]

In *Kiobel*, a majority of the Supreme Court, led by Chief Justice Roberts, held that the presumption against extraterritoriality applies to claims under the *ATS*, and nothing in the statute's text rebuts that presumption.[37] Although the *ATS* provides a cause of action to 'aliens', Roberts CJ noted that conduct affecting aliens 'can occur either within or outside the United States'.[38] Nor, in in the majority's opinion, did the historical context of the enactment of the *ATS* suggest that the statute was intended to have extraterritorial application, since two of the three principal offences against the 'law of nations' identified when Congress passed the *ATS* — violations of safe conduct and infringements of the rights of ambassadors — necessitated no extraterritorial application. And, in light of the history of the *ATS*'s adoption, the statute was directed at such offences committed *within* the United States.[39] In respect of the third offence — piracy — the majority held that, although piracy occurs on the high seas and therefore beyond US territory, applying the

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31 *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111, 149 (2nd Cir, 2010).

32 Transcript of Oral Argument, *Kiobel*, 133 S Ct 1659 (No 10-1491) (2013).

33 The Supreme Court ordered the parties to brief for reargument on the question, '[w]here and under what circumstances the Alien Tort Statute, 28 USC § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States' (*Kiobel v Royal Dutch Petroleum* Co, 132 S Ct 1738 (2012) (mem)).

34 *Morrison v National Australia Bank*, 130 S Ct 2869 (2010) ('*Morrison*').

35 See *Morrison*, 130 S Ct 2869, 2877 (Scalia J) (2010); *EEOC v Arabian American Oil* Co, 499 US 244, 248 (1991); *Foley Bros Inc v Filardo*, 336 US 281, 285 (1949).

36 *Morrison*, 130 S Ct 2869, 2879 (2010) (holding that the presumption does not impose a 'clear statement rule'. Rather, 'context can be consulted as well').

37 Kiobel, 133 S Ct 1659, 1669 (2013).

38 Ibid 1665.

39 Ibid 1666–7.

law to pirates 'does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign'.[40] Pirates were fair game wherever found, by any nation, since they generally did not operate within any jurisdiction.[41]

The majority therefore concluded that the *ATS* does not allow US courts to recognise a cause of action, such as that in *Kiobel*, involving foreign-cubed circumstances.[42] Although jurisdiction could exist under the *ATS* if 'claims touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application',[43] the Chief Justice made clear that 'mere corporate presence' would be insufficient to do so.[44] Having so ruled on this preliminary question, the majority did not need to, and did not, go on to answer the original question of whether corporations are amenable to suit under the *ATS*.

In a concurring opinion, Breyer J (with whom Ginsburg, Sotomayor and Kagan JJ joined) agreed that the plaintiffs' claims should be rejected, but disagreed with the majority's use of the presumption against extraterritoriality. Justice Breyer expressed the view that other limiting principles, including exhaustion, *forum non conveniens* and the principles of prescriptive comity, could be deployed to curb judicial overreaching of the statute.[45] Breyer J's concurrence held that the *ATS* permits a federal court to exercise jurisdiction where

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest … includ[ing] a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[46]

Breyer J noted that the US has an interest in not providing 'safe harbor' for the 'pirates of today' (that is, those who are responsible for violations of international law), and that the *ATS* may extend to cases in which the defendant is domiciled in the US.[47] Nevertheless, since the facts of *Kiobel* did not fall within even these (more permissive) bounds, Breyer J held that the plaintiffs' claim must be rejected.[48]

In another concurring opinion, Thomas and Alito JJ took an even more restrictive approach than Roberts CJ, holding that in order for the *ATS* to provide a basis for jurisdiction, there must be sufficient conduct occurring within the local forum such that the presumption against extraterritoriality would not apply.

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40 Ibid 1667.
41 Ibid 1667–8.
42 Ibid 1669.
43 Ibid.
44 Ibid.
45 Ibid 1674.
46 Ibid.
47 Ibid 1671.
48 Ibid 1677–8.

IV Implications of *Kiobel* for *ATS* Litigation and the Unanswered *ATS* Questions

A *Implications of Kiobel for ATS litigation*

The implications of *Kiobel* for *ATS* litigation have been immediate and profound. First and most obviously, those *ATS* cases pending before US courts needed to be considered in light of the Court's ruling. In the aftermath of *Kiobel*, the dismissals and withdrawals of foreign-cubed *ATS* claims happened quickly. In May 2013, Turkish mobile services company, Turkcell, dropped its *ATS* suit against its South African-based competitor, MTN Group. Turkcell had (rather ambitiously) argued that, in winning a contract to provide mobile services in Iran, MTN Group had engaged in violations of international law in the form of corporate corruption.[49] In August 2013, the Second Circuit of Appeal relied on *Kiobel* in remanding (for dismissal) a long-running *ATS* claim against Ford, Daimler and IBM, in which the plaintiffs alleged that the defendant companies had facilitated human rights violations in South Africa during apartheid.[50] The following month, produce giant Chiquita Brands International relied on *Kiobel* in its application for the dismissal of consolidated claims brought by thousands of Colombian nationals whose relatives were killed in the Colombian civil war,[51] during which Chiquita (by its own admission) funded the activities of a right-wing Colombian paramilitary group over a seven-year period. The Supreme Court has also remanded *Sarei* to the Ninth Circuit for reconsideration in light of *Kiobel* and, given the lack of connecting factors to the US in that case, the plaintiffs' case will likely be dismissed. This is not an exhaustive list of affected claims,[52] and other dismissals are likely to follow soon.

For the numerous other *ATS* cases pending against corporations in US courts, plaintiffs will need to show, at the very least, more than the 'mere corporate presence' of the defendant within the US.[53] Plaintiffs are therefore likely to refocus their *ATS* arguments to emphasise the parts of the complained of conduct (if any) that occurred within the US. Such arguments will likely rely on corporate decision-making taking place in the forum — for example, in directing the activities of a branch or subsidiary in a host country — that directly led to the commission of human rights violations. In at least two pending *ATS* cases, *Doe v Cisco Systems Inc*,[54] and *Doe v ExxonMobil Corp*,[55] corporations are accused of engaging in conduct in the US that aided and abetted international law violations abroad. On the basis of Roberts CJ's majority opinion, and Breyer J's concurrence, in *Kiobel*, it remains possible that such cases would satisfy the Court's

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49 See 'Joint Motion to Lift Stay', *Turkcell Iletisim Hizmetleri AS v MTN Group Ltd* (DDC, Case No 1:12-cv-0049-RBW, 5 May 2013).

50 *Baintulo v Daimler AG* (2nd Cir, No 09-2778-cv, 21 August 2013).

51 Chiquita Brands International Inc and Chiquita Fresh North America LLC, 'Defendants' Memorandum in Support of Consolidated Motion to Dismiss Amended Complaints', *In re Chiquita Brands International Inc, Alien Tort Statute and Shareholder Derivative Litigation*, (SD Fla, Case No 08-MD-01916, 9 April 2010).

52 Trey Childress, 'Another Alien Tort Case Dismissed and a Preliminary Scorecard', *ConflictofLaws.net* (22 August 2013) <http://conflictoflaws.net/2013/another-alien-tort-statute-case-dismissed-and-a-preliminary-scorecard/> (noting that, as at August 2013, 12 courts have dismissed *ATS* cases on extraterritoriality grounds post-*Kiobel*).

53 It is not clear whether this will apply equally to individuals so that it will be insufficient to show individual presence in the jurisdiction. If so, this could have significant consequences for plaintiffs seeking to bring *ATS* cases against individual violators of international law (for instance, in cases similar to *Kadic*, 70 F 3d 232 (2nd Cir, 1995)).

54 (ND Cal, No, 5:11- cv-02449, 19 May 2011).

55 473 F 3d 345 (DC Cir, 2007).

requirement that the factual circumstances of an *ATS* claim must sufficiently 'touch and concern' US territory.[56]

Ultimately, however, the future of *ATS* litigation cannot be known until the Supreme Court rules on certain unanswered questions regarding the reach and interpretation of the *ATS* — questions which the Court in *Kiobel* was 'careful to leave open'.[57] Of these, this article considers five: (i) whether corporations are amenable to suit under the *ATS*; (ii) in what circumstances will a claim touch and concern the US with sufficient force to 'displace' the presumption against extraterritoriality; (iii) whether corporate secondary liability exists under the *ATS* and, if so, what standard is required for such claims; (iv) whether principles of prescriptive comity should be applied in *ATS* cases; and (v) whether plaintiffs must exhaust local remedies in their domicile before bringing suit under the *ATS*.

Some commentators have read the Court's comments in *Kiobel* to variously imply that (i) anything more than corporate presence in the US is sufficient;[58] (ii) corporations are, indeed, amenable to suit;[59] and/or (ii) the door to 'foreign-squared' *ATS* cases (ie cases in which the conduct and plaintiff may be located outside, but the defendant is located within, the US) remains ajar .[60] Although each of these arguments can be supported by a close reading of the Roberts CJ opinion in *Kiobel*, *Sosa* shows that it is hopeful indeed to think that the Court's failure to decide an issue suggests that it will decide it liberally on its next consideration. On the contrary, this article predicts that the Supreme Court is likely, upon future consideration of these questions, to further constrain the reach of the *ATS*. Ominous for human rights plaintiffs is the *Sosa* Court's lingering note, that the 'requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law'.[61]

B *The Unanswered Question of Corporate Liability*

As noted, the *Kiobel* Court did not consider whether corporations, as opposed to individuals, are amenable to suit under the *ATS*. Given the strong case that corporate liability has not yet been accepted at customary international law to the level required by *Sosa*, it is likely that, when the Court does finally consider this question, it will hold that corporate conduct falls outside the reach of the *ATS*. This is not to say that, from a normative perspective, corporations *should not* be liable at international law for violations of the law of nations. Rather, it is axiomatic that, since the *ATS* is inextricably tied to the development of international law, the actions available under the *ATS* cannot exceed the boundaries of the contemporary state of customary international law. Although the *Sosa* Court held that the door is not closed 'to further independent judicial recognition of actionable international norms' dictated by 'the present-day law of nations',[62] implicit in

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56 However, the concurring opinion of Alito and Thomas JJ suggests that this might not even be enough of a connection with the US to fall within the sphere of the ATS (*Kiobel*, 133 S Ct 1659, 1669–70 (Alito and Thomas JJ) (2013) .

57 *Kiobel*, 133 S Ct 1659, 1669 (Kennedy J) (2013).

58 Gillian Stoddard Leatherberry, 'Post-Kiobel ATS Cases: Does the proverbial ATS door now have a screen?' *International Rights Advocates* (8 August 2013) <http://www.iradvocates.org/blog/post-kiobel-ats-cases-does-proverbial-ats-door-now-have-screen>.

59 O Hathaway and Carlton Forbes, 'The door remains open to "foreign squared" cases', *Scotusblog* (18 April, 2013).

60 Ibid.

61 *Sosa*, 542 US 692, 733 n 21 (2004).

62 Ibid 729.

this statement is that the scope of the *ATS* is tied to, and circumscribed by, international law.

The start and end point for the unanswered question of corporate liability is therefore whether corporations are capable of violating customary international law norms. Commentators,[63] Circuit courts,[64] and eminent judges within courts,[65] havedisagreed on this difficult question, which requires federal courts to engage in an (often unfamiliar) review of public international law.

In the *Sosa* Court's famous 'footnote 20', the Supreme Court made clear that, when considering whether a norm is sufficiently accepted at international law so as to provide a cause of action under the *ATS*, the court must look to customary international law not only to identify the given norm, but also to determine the scope of liability.[66] This is a two-stage enquiry. First, the Court must consider whether the violation complained of (for example, torture) is sufficiently established at international law. If 'yes', the Court must then consider whether *international law* extends the scope of liability for a violation of that norm to the perpetrator being sued (for example, to 'a corporation or individual').[67] In order to fall within the scope of the *ATS*, the norm and its scope of application must be sufficiently well accepted as to be 'specific, universal and obligatory'.[68]

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63 Stephen Ratner, 'Corporations and Human Rights; A Theory of Legal Responsibility' (2011) 11 *Yale Law Journal*, 443, 461–5; Jordan J Paust, 'Human Rights Responsibilities of Private Corporations', (2002) 35 *Vanderbilt Journal of Transnational Law*, 801, 802; Harold Hongju Koh, 'Separating Myth From Reality About Corporate Responsibility Litigation', (2004) 7 *Journal of International Economic Law* 263, 264; Beth Stephens, 'Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts', in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* 209, 219 (Kluwer, 2000); cf Jonathan Bush, 'The Prehistory of Corporations and Conspiracy in International Law: What Nuremburg Really Said', (2009) 109 *Columbia Law Review* 1094, 1102–3; Michael Koebele, 'Corporate Responsibility Under the Alien Tort Statute: Enforcement of International Law Through US Torts' 196 (Martinis Nijhoff, 2009); Ku, above n 10; Beth Stephens, 'Translating *Filartiga*: A comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations (2002) 27 *Yale Journal of International Law* 1, 56.

64 *Presbyterian Church of Sudan v Talisman Energy Inc*, 374 F Supp 2d 331, 335 (SD NY, 2005) (holding that the 'argument that corporate liability under international law is not supported by sufficient evidence and is not sufficiently accepted in international law to support an [*ATS*] claim is misguided'); *In re 'Agent Orange' Product Liability Litigation*, 373 F Supp 2d 7, 52–8 (ED NY, 2005) (noting that '[a] corporation is not immune from civil legal action based on international law'); *Iwanowa v Ford Motor Co*, 67 F Supp 2d 424, 445 (D NJ, 1999) (holding that '[n]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law'); *Khulumani*, 504 F 3d 254, 282–3 (Katzmann J) (2nd Cir, 2007) (holding that 'we have repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether individuals may be); cf *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 119 (2nd Cir, 2010).

65 *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 119 (Cabranes J) (2nd Cir, 2010) (holding that, '[f]rom the beginning … the principle of individual liability for violations of international law has been limited to natural persons — not "juridical" persons such as corporations'); *Khulumani,* 504 F 3d 254, 282–3 (Katzmann J) (2nd Cir, 2007); cf *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 176 (Leval J) (2nd Cir, 2010) (looking to domestic law to provide a remedy for an international norm and, on this basis, finding that corporations are amenable to suit under the *ATS*); *Khulumani*, 504 F 3d 254, 291, 326 (Korman J) (2nd Cir, 2007).

66 *Sosa,* 542 US 692, 732 n 20 (2004); cf *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 791–5 (Edwards J) (CA DC, 1984) (finding insufficient consensus at international law in 1984 that torture by private actors violates international law); with *Kadic*, 70 F.3d 232, 239–1 (C.A.2 1995) (finding sufficient consensus at international law that genocide by private actors violates international law).

67 *Sosa*, 542 US 732 n 20 (2004); *Khulumani*, 504 F.3d 254, 270 (Katzmann J) (2d Cir, 2007).

68 *Sosa*, 542 US 732 (2004).

From a review of customary international law,[69] it may reasonably be concluded that the principle of corporate civil liability, as opposed to individual liability, is neither sufficiently specific nor universal at customary international law to sustain a cause of action against corporations under the *ATS* in respect of any norm or international law. When identifying international norms and their scope of liability, the decisions of international tribunals should 'exercise considerable influence as an impartial and considered statement of [international] law by jurists of authority'.[70] It is therefore significant that no international tribunal has ever held a corporation liable, either criminally or civilly,[71] for a breach of customary international law.[72] Nor have tribunals been empowered to impose corporate liability for a breach of customary international law.[73] Nor do international

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69 In *The Paquete Habana*, 175 US 677, 700–1 (1900), the Supreme Court held that those sources listed in art 38 of the International Court of Justice Statute are authoritative for the purposes of identifying international norms. Of greatest authority are: (i) international tribunals; and (ii) international conventions (see also *United States v Smith*, 18 US (5 Wheat) 153, 160–1 (1820); *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 132 (2nd Cir, 2010); *Flores v Southern Peru Copper Corp*, 343 F 3d 140, 170 (2nd Cir, 2003); *Filártiga v Peña-Irala* 630 F 2d 876, 880–1 n 8 (2nd Cir, 1980)). See also, *Restatement (Third) of Foreign Relations Law*, § 103 (international law may be evidenced, albeit to a lesser extent, by the work of eminent jurists and the decisions of national tribunals).

70 *Khulumani*, 504 F 3d 254, 278 (2nd Cir, 2007); see also, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Peace* (Oxford University Press, 9th ed, 1992) vol 1, 41.

71 Some judges have held that only sources of *civil liability* at international law should be considered for the purposes of the *ATS*, and that international tribunals dealing with criminal liability should be disregarded (see, eg, *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 1760 (Leval J) (2nd Cir, 2010)). There a number of reasons to treat this approach with skepticism. In the first place, as noted by Judge Katzmann in *Khulumani*, 504 F 3d 254, 270 n 5 (2nd Cir, 2007), US case law has 'consistently relied on criminal law norms in establishing the content of customary international law for the purposes of the [*ATS*]'. For instance, in *Kadic*, 70 F 3d 232, 241 (2nd Cir, 1995) the Second Circuit Court pointed to individual criminal liability at international law as supporting the proposition that individuals may be sued for violations of the 'law of nations' under the *ATS*. Second, as noted by the Supreme Court in *Sosa*, 542 US 692, 718 (2004), the use of the term 'torts' in the *ATS* was 'innovative', and may have been intended by its drafters merely to distinguish actions permissible under the *ATS* from commercial suits. Third, the *ATS* sought to provide a civil remedy for what were, at the time, criminal violations of the law of nations, such as diplomatic offences (*Sosa*, 542 US 692, 724 (2004) (noting that 'a private remedy was thought necessary for diplomatic offences under the law of nations'). And, as Judge Katzmann stated in *Khulumani*, 504 F 3d 254, 270 (2nd Cir, 2007), citing *Sosa*, 542 US 692, 762–3 (Breyer J) (2004), international law does not maintain a 'hermetic seal between criminal and civil law'.

72 The *London Charter* instituting the post-World War II Nuremburg International Military Tribunal is widely recognised as foundational for developing principles of customary international law (see *Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal*, 82 UNTS 280 (signed and entered into force 8 August 1945) ('*London Charter*'; *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111,132 (2nd Cir, 2010); *Kadic*, 70 F 3d 232, 241 (2nd Cir, 1995)). The *London Charter* gave the Tribunal no jurisdiction to prosecute corporations for violations of international law. In fact, the Tribunal expressly declared that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' (*The Nuremburg Trial*, 6 FRD 69, 100 (IMT at Nurnberg 1946). Later, ruling in the trial of corporate directors of IG Farben, the Tribunal stated that 'the corporate defendant, Farben … cannot be subjected to criminal penalties in these proceedings' (*G Farben Case*, 7 Trials of War Criminals Before the Nuremburg Military Tribunals under the Council Law No 10 6, 1153 (1952); Chief Prosecutor for the United States at Nuremburg, Justice Robert H Jackson, reinforced this position, stating '[The Nuremberg trials] for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression … and that to persecute, oppress, do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, or deport civilian populations, is an international crime, *and that for the commission of such crimes individuals are responsible*' (emphasis added) (Robert H Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial* (1946), reprinted in (1946) 20 Temple Law Quarterly 338, 342; *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111,127 (Cabranes J) (2nd Cir, 2010)).

73 The drafters of the *Rome Statute* expressly rejected a proposal to extend jurisdiction of the International Criminal Court to corporations (see *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*') art 25(1); Kai Ambos, 'Individual Criminal Responsibility; Article 25 Rome Statute', in Otto Trifferer (ed) *Commentary on the Rome Statute of the International Criminal Court;*

conventions,[74] nor the 'teachings of the most highly qualified publicists',[75] support a general norm of corporate liability for violations of the 'law of nations'.

In the face of strong evidence that corporate liability for international norms is not yet accepted at international law, some judges and scholars have argued that, while international law provides the relevant norm under the *ATS*, US domestic law should determine the scope of liability.[76] This approach bends *Sosa* beyond breaking point, since it is quite clear that the *Sosa* Court intended both the norm and its scope to be determined by reference to customary international law. While it may be accepted that the *enforcement* of international law violations is left to domestic law, questions of enforcement should not be blurred with those of scope. For example, questions of remedy are clearly matters of 'enforcement', to be dealt with by domestic law. By contrast, questions of the scope of a norm — including to whom a norm is to be applied, or not applied — are matters of 'scope' falling squarely within *Sosa*'s footnote 20 and, as such, must be answered solely by reference to the state of international law.

At the same time, some judges have read the reference to a 'corporation or individual' in *Sosa*'s footnote 20 to be a statement that both private individuals *and* corporations can

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Observer's Notes, Article by Article (2nd ed, 2008) 743 [4]; Albin Esser, 'Individual Criminal Responsibility', in Antonio Cassese, Paolo Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 1, 767, 801 (the accomplice 'must know as well as wish that his assistance shall facilitate the commission of the crime'). Further, neither the International Criminal Tribunal for Rwanda nor the International Criminal Tribunal for Yugoslavia was instituted with jurisdiction to prosecute corporations (see UN Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)* UN Doc S/25704 art 7(1) (3 May 1993); SC Res 955, UN Doc S/RES/955 art 6(1) (8 Nov 1994)).

74 In finding that corporations may be held liable under the *ATS*, Judge Schwartz at first instance in *Presbyterian Church of Sudan v Talisman*, 244 F Supp 2d 289, 315–19 (SDNY, 2003) ('*Talisman I*'), emphasised that a number of modern, specialised treaties subject corporations to criminal liability. The highly restricted scope of these treaties, however, raises concerns with relying on such instruments as authorities for a general proposition that corporations can be held liable for violations of the 'law of nations'. More pertinent specific treaties, such as the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 4, are expressly limited to natural, rather juridical persons.

75 According to art 38(1)(d) of the *Rome Statute*, the may be referred to as a 'subsidiary means' of determining whether a rule has become international law. The *Sosa* Court held that juristic works may be referred to only as evidence of what international law 'really is', not what it ought to be (*Sosa*, 542 US 692, 741 (2004); *The Paquete Habana*, 175 US 677, 700 (1900)). Eminent jurists have cogently argued that customary international law does not currently recognize corporate liability for violations of international law (See, eg, Ku, above n 10; Jonathan Bush, 'The Prehistory of Corporations and Conspiracy in International Law: What Nuremburg Really Said', 109 *Columbia Law Review* 1094, 1102–3 (2009); Michael Koebele, *Corporate Responsibility Under the Alien Tort Statute: Enforcement of International Law Through US Torts* (Martinis Nijhoff, 2009) 196.

76 *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 175 (Leval J) (2nd Cir, 2010); Mara Theophilia, '"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After *Kiobel v Royal Dutch Shell Petroleum Co*' (2011) 79 *Fordham Law Review* 2859, 2906; Chimène I Keitner, 'Conceptualizing Complicity in Alien Tort Cases' (2008) 60 *Hastings Law Journal* 61, 80–1; William R Casto, 'The New Federal Common Law of Tort Remedies for Violations of International Law' (2006) 37 *Rutgers Law Journal* 635, 644 (2006). See also, Government of the United States of America, *Brief as Amicus Curiae Supporting the Petitioners, Kiobel v Royal Dutch Petroleum* 569 US _ (2013) 14, 16 (arguing that '[w]hether a federal court should recognize a cause of action in such circumstances is a question of federal common law that, while informed by international law, *is not controlled by it*' (emphasis added)) and that the Second Circuit in *Kiobel* had confused the threshold limitation in *Sosa* 'with the question of how to enforce that norm in domestic law (which does not require an accepted and sufficient defined practice of international law)'); Brennan Center for Justice at NYU School of Law, *Brief Amicus Curiae in Support of Petitioners*, *Kiobel v Royal Dutch Petroleum* 569 US _ (2013), 20–3 (arguing that, even if it is assumed that corporate liability has not yet been incorporated into customary international law, the Second Circuit in *Kiobel* should have 'exercised its duty … to shape the *procedures, remedies and defences* available in the courts of the United States in connection with the judicial enforcement of customary international law claims, including rules governing derivative liability, participatory liability, and contribution' (emphasis added)).

be held liable for all sufficiently definite international law norms.[77] This is clearly an incorrect reading, as it renders the answer to the 'scope' question effectively answered before one considers the norm in question. What the reference to 'corporation or individual' in *Sosa*'s footnote 20 does do, by contrast, is distinguish between private individuals and corporations,[78] and require that the scope of liability be decided by reference to the particular norm in issue. It also recognises that the scope of liability may change over time as international law develops.

Ultimately, given the absence of supporting authority, corporate liability for violations of international law is, at best, highly debatable. It is therefore likely that the Supreme Court will, when it finally answers this question, endorse the view that 'corporate liability … is simply not accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms'. As stated in *Sosa*, 'whatever may be said for the broad principle advanced by the petitioner, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity' required by the *ATS*.[79]

C *The Unanswered Question of Secondary Liability*

As noted, *ATS* suits have been brought successfully against multinational corporations in lower courts on the basis of secondary liability; [80] that is, on the basis of an allegation that the defendant corporation aided or abetted a foreign government in the commission of human rights violations. Nevertheless, there remains significant disagreement among jurists as to whether secondary liability (that is, for aiding and abetting violations of international law) is actionable under the *ATS* and, if so, what standard should apply to such claims.

As a starting point, there is a good argument that, under the current state of customary international law, it is a 'specific, universal, and obligatory' norm of international law that *individual* aiders and abettors of international human rights violations are to be held liable for their actions.[81] Thus, the recognition of aiding and abetting liability, at least in respect of individuals, is sufficiently established and defined in international law that federal court judges need not engage in any 'innovative authority' when applying this norm in *ATS*

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77 *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111,163-4 (Leval J) (2nd Cir, 2010); *Khulumani*, 504 F 3d 254, 282–3 (Katzmann J) (2nd Cir, 2007) (holding that 'we have repeatedly treated the issue of whether corporations may be held liable under the [*ATS*] as indistinguishable from the question of whether individuals may be'); *In re 'Agent Orange' Product Liability Litigation*, 373 F Supp 2d 7, 58 (ED NY, 2005); *In re XE Services Alien Tort Litigation*, 665 F Supp 2d 569, 588 (ED Va, 2009) (finding that '[n]othing in the *ATS* or *Sosa* may plausibly be read to distinguish between private individuals and corporations').

78 *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111, 129 (2nd Cir, 2010); *In re 'Agent Orange' Product Liability Litigation*, 373 F Supp 2d 7, 58 n 31 (ED NY, 2005).

79 *Sosa*, 542 US 692, 728 (2004).

80 See, eg, *Khulumani*, 504 F 3d 254 (2nd Cir, 2007); *Talisman II,* 582 F 3d 244 (2nd Cir, 2009); *Doe v Exxon Mobil Corp*, 654 F.3d 11, 39-57 (DC Cir, 2011); *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88, 92 (2nd Cir, 2000); *Sarei*, 671 F 3d 736 (9th Cir, 2011); *Baintulo v Daimler AG* (2nd Cir, No 09-2778-cv, 21 August 2013).

81 *Sosa*, 542 US 692,732 (2004) (finding that 'the recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules "that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern"'); *In re Estate of Marcos*, 25 F 3d 1467, 1475 (9th Cir, 1994); *Flores v Southern Peru Copper Corp*, 343 F 3d 140, 154 (2nd Cir, 2003); *Khulumani*, 504 F 3d 254, 270 (2nd Cir, 2007); cf *In re South African Apartheid Litigation*, 346 F Supp 2d 538, 549–51 (SD NY, 2004) (holding that defendants could not be held liable for aiding and abetting under the *ATS*); *Doe v Exxon Mobil Co*, 393 F Supp 2d 20, 24 (DDC, 2005).

litigation.[82] Conversely, it is not so clear whether secondary liability for *corporations* is a universally accepted norm at international law.[83]

Even if it is accepted that the *ATS* is broad enough to capture corporate secondary liability, there remains substantial uncertainty regarding the mens rea standard to be applied in such cases. In particular, it is not settled whether a plaintiff must show that the defendant corporation acted with the *purpose* of facilitating,[84] or merely with *knowledge* that its actions would facilitate,[85] the commission of a human rights violation. Again, federal courts have differed markedly in answering this question, in part becauseinternational tribunals have, at different times, alternatively adopted both the 'knowledge' and the 'purpose' test.[86]

Nevertheless, there exists a core group of aiders and abettors — those who act with the *purpose* of facilitating the human rights violation — for which liability is universally accepted at international law.[87] In other words, there is:

> no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize the imposition of such liability on a party who acts with purpose of facilitating that violation.[88]

The 'purpose' test is therefore consistent with *Sosa*'s requirement of clear definition. By contrast, the 'knowledge test' would extend the scope of liability in a manner that does not

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82 *Khulumani*, 504 F 3d 254, 270 (2nd Cir, 2007). The well-established practice of holding aiders and abettors liable in customary international law is evidenced by the repeated articulation and continued recognition of such a norm in the statutes establishing the authoritative international criminal tribunals of the modern era (see, eg, the *London Charter*, the *Rome Statute* and the statutes creating the International Criminal Tribunal for the Former Yugoslavia (SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (26 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th metg, UN Doc S/RES/1877 (7 July 2009)) and the International Criminal Tribunal for Rwanda (SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RE/955 (8 November 1994) annex). The *London Charter* extended liability for crimes within its jurisdiction to 'accomplices participating in the formulation or execution of a common plan or conspiracy to commit' any of the triable crimes. The *Rome Statute* similarly provides for liability for non-principal actors, stating that a person is liable for punishment when that person '[f]or the purpose of facilitating the commission of such crime, aids, abets or otherwise assists in its commission').

83 National Association of Manufacturers and Professors of International and Foreign Relations Law and Federal Jurisdiction, *Brief as Amicus Curiae in Support Defendants-Appellees*, *Doe v Nestle* (9th Cir, No 10-56739, 7 January 2011) 8; *Khulumani*, 504 F 3d 254, 321–6 (Korman J) (2nd Cir, 2007).

84 *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F 3d 244 (2nd Cir, 2009); 504 F 3d 254, 277 (Katzmann J), 333 (Korman J) (2nd Cir, 2007); *Aziz v Alcolac* (4th Cir, 10-1908, 19 September 2011) slip op 18. The drafters of the *Rome Statute* debated the issue of which standard to adopt, and explicitly chose to adopt the higher burden of proof given by the 'purpose' test (Kai Ambos, 'Individual Criminal Responsibility; Article 25 Rome Statute', in Otto Trifferer (ed), *Commentary on the Rome Statute of the International Criminal Court; Observer's Notes, Article by Article* (2nd ed, 2008) 743 [4]). Similarly, the *London Charter* extended individual responsibility for crimes within its jurisdiction to 'accomplices participating in the formulation or execution of a common plan or conspiracy to commit' a triable crime (*Khulumani*, 504 F 3d 254, 271–2 (2nd Cir, 2007).

85 *Doe VIII v Exxon Mobil Corp*, 654 F 3d 11, 14-19 (DC, Cir, 2011); *Doe v Unocal*, 395 F 3d 932, 951 (9th Cir, 2002); *Khulumani*, 504 F 3d 254, 287-8 (Hall J) (2nd Cir, 2007).

86 Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', (2008) 6 *Northwestern University Journal of International Human Rights* 304.

87 Similarly, in *United States v Smith*, 18 US (5 Wheat) 153, 161, the Supreme Court recognised that a 'diversity of definitions' could exist when the law of nations is the source of law used to determine the scope of liability for the crime of piracy. In this case, while determining how piracy is defined within the law of nations, the Supreme Court concluded that '[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature, and whatever may be the diversity of definitions, in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, animo furandi, is piracy'.

88 *Khulumani*, 504 F 3d 254, 277 (2nd Cir, 2007).

enjoy the universality of acceptance required by *Sosa*. In light of this, there is a significant possibility that the Supreme Court may, in the future, further limit the scope of the *ATS* by holding either that secondary liability for corporations does not meet the high threshold of universal acceptance as laid down by *Sosa*, or that the mens rea standard for such actions is the more restrictive 'purpose' test.

D *The Unanswered Question of 'Sufficient Force'*

In closing, Roberts CJ in *Kiobel* suggested that jurisdiction could exist under the *ATS* if 'claims touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application'.[89] This statement may raise more questions than it answers, since the application of the presumption against extraterritoriality is ill-fitting in *ATS* cases. In the first place, the presumption against extraterritoriality has, until *Kiobel*, been applied only to substantive laws.[90] The Chief Justice himself recognised this, noting that the *ATS* 'does not directly regulate conduct or afford relief'.[91] Nevertheless, the Court has now made clear that the application of the presumption against extraterritoriality means 'foreign-cubed' cases fall outside the scope of the *ATS*, as do cases in which the only connecting factor to the US is the 'mere corporate presence' of the defendant.[92] Beyond this, the Chief Justice did not elaborate on what factual matrices will 'touch and concern' the US 'with sufficient force' to displace the presumption and therefore be actionable under the *ATS*.

It is not at all clear what the Roberts CJ majority meant by a claim 'displacing' the presumption against extraterritoriality. We may presume that His Honour did not mean to state that the facts of a case must rebut the presumption,[93] since only the text and legislative history of the legislation can do this.[94] It is perhaps most likely that, by this, the Roberts majority intended to state that the circumstances of an *ATS* claim must touch and concern the territorial jurisdiction of the US with sufficient force such that the *ATS* is not being applied extraterritorially. This would be consistent with Alito J's concurrence,[95] in which his Honour held that

> a putative *ATS* cause of action will fall within the scope of the presumption against territoriality — and therefore will be barred — unless the *domestic conduct* is sufficient to violate an international law norm that satisfies [the] requirements of definitiveness and acceptance among civilized nations.[96]

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89 *Kiobel*, 133 S Ct 1659, 1669 (2013).

90 Ibid (noting that 'we typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad'); *EEOC v Arabian American Oil* Co, 499 US 244, 246 (1991).

91 *Kiobel*, 133 S Ct 1659, 1664 (2013).

92 Ibid 1669 (noting that corporations 'are often present in many countries, and it would reach too far to say that mere corporate presence suffices').

93 Nevertheless, this view has already been adopted by one district court. In *Mwani v Bin Laden* (DDC, Case No 99-125-JMF, 29 May 29 2013), Facciola MJ held that 'the question for me today is whether the events that occurred in and around the grounds of the United States Embassy in Nairobi, Kenya on August 7, 1998, "touched and concerned" the United States with "sufficient force" to displace the presumption against extra-territorial application of the *ATS*'.

94 *Kiobel*, 133 S Ct 1659, 1665 (2013) (Roberts CJ noting that, 'to rebut the presumption, *the ATS* would need to evince a clear indication of extra-territoriality' (emphasis added)).

95 K Myles and J Rutten, 'Answers … and more questions' *Scotusblog* (18 April 2013) <http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions/>.

96 *Kiobel*, 133 S Ct 1659, 1665 (2013) (emphasis added).

This has been the Second Circuit's interpretation of *Kiobel*; in remanding the case of *Balintulo v Daimler AG* in August 2013, the Second Circuit rejected the plaintiffs' argument that 'the *ATS* still reaches extra-territorial conduct when the defendant is an American national'.[97] The Court noted that

> [b]ecause the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law … the defendants cannot be vicariously liable for that conduct under the ATS.[98]

It is therefore likely that federal courts will henceforth require at least some of the complained of conduct to occur in the US.[99] This does not necessarily preclude actions based on the complicity of multinational corporations in human rights violations abroad. It may be enough for a plaintiff to show that there were relevant managerial decisions or directives to this effect made in the US, but this, too, is uncertain following *Kiobel*.

E *The Unanswered Question of Prescriptive Comity*

Even if *Kiobel* does not bar 'foreign-squared' cases, or does not bar all cases in which the *ATS* can be said to operate extraterritorially,[100] it is possible that the Court will apply an additional limiting principle — prescriptive comity — to further constrain the reach of the *ATS*.[101] Where the application of a statutory provision would have extraterritorial implications in a given case, the principles of prescriptive comity counsel a court to construe the statute, so far as possible, in a manner consistent with international law.[102] More specifically, this enquiry directs the courts to consider the extent to which the US is justified in regulating particular conduct abroad, given the regulatory interests of other nations. If it would be unreasonable for the US to regulate the conduct, or if another state has a clearly greater interest in regulating the conduct, it is said that the US does not have 'prescriptive jurisdiction' and the statute should be read down accordingly.[103]

Current members of the Court, both liberal and conservative, have shown a willingness to adopt the principles of prescriptive comity,[104] consistent with the Supreme Court's long

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97 (2nd Cir, 09-2778-cv(L), 11 September 2013) slip op 20.

98 Ibid slip op 24.

99 Cf *Mwani v Bin Laden*, No 99-125-JMF, 2013 WL 2325166 (DDC May 29, 2013) (in which a federal district court in Washington DC permitted an *ATS* claim, concerning an attack on the US Embassy in Nigeria, to proceed on the basis that '[o]ne could read [*Kiobel*] as the Court suggesting that, in some limited circumstances, an act occurring outside the United States could so obviously "touch and concern" the territory of the United States that the presumption against extra-territorial application of the ATS is displaced' and that 'an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here').

100 This view was recently adopted by a federal district court in Massachusetts. In permitting the *ATS* claim at issue to proceed, despite *Kiobel*, in *Sexual Minorities Uganda v Lively* (D Mass, Case No 12-cv-30051-MAP, 14 August 2013) 5, Ponsor J held that 'Kiobel makes clear that its restrictions on extraterritorial application do not apply where a defendant and his or her conduct are based in this country'.

101 See Professors of Civil Procedure and Federal Courts, *Brief as Amici Curiae on Reargument Supporting Petitioners, Kiobel*, 569 US __ (2013) 10-13.

102 *EEOC v Arabian American Oil* Co, 499 US 244, 265 (1991); *Sosa*, 542 US 692, 761 (Breyer J) (2004); *Hartford Fire Insurance v California,* 509 US 764, 813–18 (1993) ('*Hartford Fire*').

103 This principle is a 'canon of construction, or a presumption about a statute's meaning, rather than upon Congress's power to legislate' (*Morrison v National Australia Bank*, 130 S Ct 2869, 2877 (2010), citing *Blackner v United States*, 284 US 421, 437 (1932) and *EEOC v Arabian American Oil* Co, 499 US 244, 248 (1991)).

104 *Hartford Fire*, 509 US 764, 818 (1993) (holding that, once the presumption against extraterritoriality is overcome or held not to apply, the Court should then consider whether the application of the statute in a given context would

endorsement of the use of international law to limit the extraterritorial reach of statutes.[105] As Breyer J noted in *Sosa*, considerations of comity are 'necessary to ensure that *ATS* litigation does not undermine the very harmony it was intended to promote'.[106]

Should the Supreme Court endorse this approach in respect of the *ATS*, this could involve formally approving, as did Breyer J in *Kiobel*,[107] §§ 402-3 of the *Restatement (Third) of Foreign Relations Law of the United States*.[108] To do so would severely limit the reach of the *ATS* in cases that affect the interests of other sovereign nations. Although this does not mean that the *ATS* could *never* apply to conduct occurring overseas, or involving a foreign defendant, but it would require plaintiffs to show that the US has an interest in regulating the complained of activity (and a regulatory interest that is not clearly inferior to that of another state), before US courts will open their doors to *ATS* litigation.

F *The Unanswered Question of Exhaustion of Local Remedies*

It is possible that the Supreme Court will also impose upon *ATS* plaintiffs a requirement to first exhaust all remedies in their local forum. The *Sosa* Court strongly suggested this, noting that it would 'certainly consider this requirement in an appropriate case'.[109] Justice Breyer's concurring opinion in *Kiobel* similarly appeared to endorse an exhaustion requirement under the *ATS*.[110]

Before and since *Sosa*, federal courts have differed on whether there is an exhaustion requirement for *ATS* suits.[111] To exacerbate the uncertainty for litigants, the Ninth Circuit in *Sarei* adopted a complex middle ground, holding that *Sosa* counselled for a 'prudential' exhaustion requirement, such that

> [w]here the 'nexus' to the United States is weak, courts should carefully consider the question of exhaustion, particularly but not exclusively with respect to claims that do not involve matters of 'universal concern'.[112]

In other words, under the *Sarei* formula, the exhaustion requirement is not absolute but becomes more onerous as the connection between the forum and the circumstances of the case become weaker and the complained of conduct is of less than 'universal concern'.

Although the exhaustion requirement in some human rights cases may be moot, since plaintiffs may be able to avail themselves of a 'futility' exception where they are unable to

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comport with principles of 'prescriptive comity'); *Sosa*, 542 US 692, 761 (Breyer J) (2004) (expressing the view that the extraterritorial reach of the *ATS* should be considered in light of the principles of international comity); *Sosa*, 542 US 692, 733 n 21 (Souter J) (2004) (noting that 'there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy').

105 *Lauritzen v Larsen*, 345 US 571 (1953); *F Hoffmann-La Roche Ltd v Empagran* SA 542 US 155, 164 (2004).

106 *Sosa*, 542 US 692, 761 (Breyer J) (2004).

107 *Kiobel*, 133 S Ct 1659, 1673 (2013).

108 *Sosa*, 542 US 692, 761 (Breyer J) (2004); *Hartford Fire*, 509 US 764, 818 (Scalia J) (1993).

109 Sosa, 542 US 692, 733 n 21 (Souter J) (2004).

110 133 S Ct 1659, 1674 (2013).

111 The Seventh Circuit and the DC Circuit have each held exhaustion requirements will apply to *ATS* suits (*Enahoro v Abubakar*, 408 F 3d 877, 879 (7th Cir, 2005); *Flomo v Firestone Natural Rubber,* 643 F 3d 1013, 1025 (7th Cir, 2011); *Rasul v Myers*, 512 F 3d 644, 661 (DC Cir, 2008)). The Eleventh Circuit on the other hand, has held that no exhaustion requirement exists (*Jean v Dorelian*, 431 F 3d 776, 781 (11th Cir, 2005)).

112 *Sarei v Rio Tinto*, 550 F 3 d 822, 824 (9th Cir, 2008).

seek a remedy in their local forum,[113] in some cases the pursuit of a local remedy will not be 'futile' but merely inadequate or unfavourable. In these cases, the exhaustion requirement, if applied, may be fatal to *ATS* suits brought by foreign plaintiffs.

V Barriers to US state and Non-US Human Rights Litigation

In light of the severe constraints put on the *ATS* by the Supreme Court's decision in *Kiobel*, and the likelihood that it will be further limited in the future, it is probable that a shift will occur toward litigating human rights cases in non-US state courts, or in foreign courts, on the basis of common law tort. Although human rights-based common law tort actions are not new,[114] they have been outnumbered and overshadowed by *ATS* cases in recent decades. It is now likely that *Kiobel* will be the catalyst for a refocusing of attention on this potentially effective means of holding corporations accountable.

On first blush, it may appear that the significance of the Supreme Court's decision in *Kiobel* is magnified by the apparent barriers, in alternative forums, to bringing civil actions against multinational corporations on the basis of human rights violations. The value of the *ATS* to litigants was that it allowed US courts to exercise long-arm jurisdiction and, at the same time, granted the claimant access to a cause of action based on public international law per se. Indeed, Leval J's dissenting opinion in the Second Circuit's decision in *Kiobel* expressed the fear that a failure to extend the *ATS* to corporations would

> [offer] to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy — all without civil liability to victims.[115]

This Part considers the disadvantages and advantages for plaintiffs commencing human rights-based litigation in common law tort in US state, Australian and UK courts, and argues that, although there exist barriers to such proceedings against foreign-based

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113 Regina Waugh, 'Exhaustion of Remedies and the Alien Tort Statute' (2010) 28 *Berkeley Journal of International Law* 555, 570.

114 Liesbeth Francisca Hubertine Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of tort law in promoting corporate social responsibility and accountability* (Eleven International, 2012) 77 (noting that '[i]t may be argued that the socio-legal trend towards bringing civil liability suits against (parent companies) of multinational corporations for damage caused in host countries before Western society courts … took off in the United States in the 1990s'); Christopher Whytock, Donald Earl Childress III and Michael D Ramsey, 'Foreword: After Kiobel — International Human Rights Litigation in state courts under State Law' (2013) 3 *UC Irvine Law Review* 1, 5, citing Paul L Hoffman, 'The Application of Human Rights in state courts; A View from California', (1984) 18 *International Law* 61; Paul Hoffman and Beth Stephens, 'International Human Rights Cases Under State Law and in State Courts' (2013) 3 *UC Irvine Law Review* 9, 10; see, eg, *Connelly v RTZ Corporation*, 1998 AC 534 (HL) (claim brought by a Scottish cancer sufferer who had previously been employed at Rio Tinto's uranium mine in Namibia); *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (UK High Court, 11 April 1995) (claim brought by South African plaintiffs alleging that Thor Chemicals had negligently exposed its employees to dangerously high levels of mercury); *Dagi v BHP* [1997] 1 VR 428 (claim brought by Papuan New Guinean nationals against Australian mining giant in respect of pollution to Ok Tedi river caused by its mining activities); *Lubbe v Cape PLC* [2000] UKHL 41(claim brought by South African plaintiffs alleging that Cape PLC had been negligent in its supervision of its subsidiary's South African asbestos mining operations); *Guerrero v Monterrico Metals Plc* [2010] EHWC 3228 (claim brought by Peruvian nationals against British mining company, Monterrico Metals, and its Peruvian subsidiary, alleging the companies' accessorial liability in the Peruvian police's torture and mistreatment of the plaintiffs following a 2005 environmental protest at the company's Rio Blanco mine).

115 *Kiobel v Royal Dutch Shell*, 621 F 3d 111, 150 (Leval J) (2nd Cir, 2010).

multinational corporations, these may be overcome where it is possible to point to the negligence of a parent company, in the forum, in its supervision of the activities of a subsidiary in a foreign host state (so-called 'foreign direct liability' litigation).

A *The Problems of Establishing Jurisdiction*

US state courts are able to hear claims brought in respect of foreign torts, so long as the court has general personal jurisdiction over the defendant.[116] Although each US state applies its own individual rules on personal jurisdiction, there exist certain constitutional limits to the exercise of general personal jurisdiction. The Due Process Clause requires that a defendant:

> not present within the territory of the forum … [has] certain minimum contacts with the [forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. [117]

It is likely that the Supreme Court has recently made this test even more difficult to satisfy in respect of foreign corporations by holding that:

> a court may assert general personal jurisdiction over foreign (sister-state or foreign country) corporations to hear any and all claims against them when their affiliations with the State are so *continuous and systematic as to render them essentially in the forum State* (emphasis added).[118]

In Australia, a claim based on a violation of human rights will generally need to be brought as a common law tort in an Australian state court. Jurisdiction relies on the valid service of the originating process on the defendant, which requires either: (i) the presence of the defendant corporation within the forum at the time of service;[119] (ii) the submission of the corporation to the jurisdiction of the court; or (iii) the service of the writ outside the forum. Service may be effected outside Australia (by which the Court exercises 'extended jurisdiction')[120] only with the leave of the Supreme Court of the state or territory in which suit is brought. [121] The court rules of each state and territory enumerate limited bases upon which a court may exercise extended jurisdiction, each requiring some significant degree of

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116 Hoffman and Stephens, above n 114, 11; *Burnham v Superior Court*, 495 US 604, 611 (1990).

117 *International Shoe Co v Washington*, 326 US 310, 316 (1945); *World-Wide Volkswagen v Woodson*, 44 US 286, 292 (1980); *Asahi Metal Industries Co v Superior Court*, 40 US 102 (1987).

118 *Goodyear Dunlop Tyre Operations SA v Brown*, 131 S Ct 2846, 2851 (2011).

119 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725, 730–5 (holding that a foreign corporation may be served within the forum if it carries on business within the forum through its own office or an agent acting on its behalf, that office or agent has a fixed address within the forum, and the business has continued for a sufficiently substantial period of time).

120 This was previously referred to as 'exorbitant' or 'long-arm' jurisdiction: Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (Butterworths, 8th ed, 2010) 33 n 57.

121 In Western Australia, leave is required before the writ for service outside Australia is issued (*Rules of the Supreme Court 1971* (WA) O 5 r 9). In New South Wales, Tasmania, South Australia, Victoria and the Northern Territory, the plaintiff may serve the originating process on the foreign defendant without leave, but must obtain leave to proceed if the defendant fails to appear (*Uniform Civil Procedure Rules 2005* (NSW) r 11.4, *Supreme Court Rules 2000* (Tas) Div 10; *Supreme Court Civil Rules* (SA); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.04; *Supreme Court Rules* (NT) r 7.04). In Queensland, the plaintiff may serve the originating process on the foreign defendant and proceed without leave, but the defendant may apply for service to be set aside on the basis that the claim does not fall within one of the enumerated categories permitting exercise of extended jurisdiction (*Uniform Civil Procedure Rules 1999* (Qld)).

connection between the action and the forum. The court will 'approach with some circumspection the grant of leave to serve outside the jurisdiction',[122] and must be 'positively persuaded that it should do so'.[123] At least one judge has referred to the grant as 'an exceptional measure'.[124] Therefore, where a foreign company has committed human rights violations abroad and does not carry on business or conduct operations within Australia, it may not be possible to overcome the jurisdictional requirement of effective service.

In the UK, the *Brussels I Regulation* governs matters of jurisdiction where, amongst other things, the defendant is domiciled in the EU.[125] By reason of *Brussels I*, a UK court will rarely have jurisdiction to hear a claim brought in common law tort against a foreign (EU) company for conduct occurring abroad.[126] Where the defendant company is domiciled in a non-EU country, *Brussels I* will not apply, and the UK will apply its domestic rules on jurisdiction.[127] Jurisdiction over foreign, non-EU defendants is based on service of an originating process (or 'claim form') in accordance s IV of pt 6 of the *Civil Procedure Rules 1988*,[128] which, similar to the rules applicable in Australia, requires a significant degree of connection between the cause of action and the forum.

In part to overcome these jurisdictional difficulties, common law tort litigants in the US and elsewhere may seek to bring 'foreign direct liability' actions, in which an allegation is made that a parent company, with a domicile in the forum, was *itself* negligent in failing to exercise due care and diligence in oversight of its subsidiary's activities in the foreign host country.[129] In such cases, it may be possible to show that conduct giving rise to the cause of action,[130] such as managerial decisions or directives from a parent to a subsidiary, took place within the forum.[131] In the US, this should circumvent difficulties in showing 'minimum contacts' between the defendant and the forum for the purposes of establishing the court's general jurisdiction, since the case should fall within the state courts' 'specific' jurisdiction.[132] In Australia, all states and territories permit a court to grant leave for service

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122 Davies, Bell and Brereton, above n 120, 37 n 87; *Humane Society International Inc v Kyodo Senpaku Kaishu Ltd* (2006) 154 FCR 425, [42]; *Quinlan v Safe International Fakrings AB* [2005] FCA 1362, [27]; *ICI Operations Pty Ltd v Kiddle-Graviner Ltd* [1999] WASCA 65, [2].

123 Davies, Bell and Brereton, above n 120, 37; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ('*Voth*').

124 *Quinlan v Safe International Fakrings AB* [2005] FCA 1362 [27].

125 *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2001] OJ L 12/1 ('*Brussels I Regulation*').

126 Under the *Brussels I Regulation*, a UK court will have jurisdiction to hear a common law tort claim concerning matters of human rights violations if: (i) the defendant is domiciled in the forum (art 2(1)); (ii) the harmful event occurred or may occur in the forum (art 5(3)); (iii) the claim is for damages or restitution arising out of a criminal proceeding in the forum (art 5(4)); or (iv) one or more joint defendants is domiciled in the forum (art 6).

127 *Brussels I Regulation* art 4(1).

128 *Civil Procedure Rules 1988* (UK) r 6.36.

129 See, eg, *Dagi v BHP* [1997] 1 VR 428; *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (UK High Court, 11 April 1995) (in which a motion to strike out was denied). See *Motto v Trafigura* [2011] EWCA Civ 1150; *Connelly v RTZ Corporation*, 1998 AC 534 (HL); *Lubbe v Cape PLC* [2000] UKHL 41.

130 Patrick J Borchers, 'Conflict-of-Laws Considerations in State Court Human Rights Actions' (2013) 3 *UC Irvine Law Review* 45, 57.

131 Cf Anthony Gray, 'Getting It Right: Where is the Place of the Wrong in a Multinational Torts Case?' (2008) 30 *Sydney Law Review* 537 (arguing that, in the context of a claim in negligence in relation to work-place related injuries, the place of the wrong should be where the employee was exposed to the dangerous working environment).

132 *Helicopteros Nacionales de Colombia v Hall*, 466 US 408, 414 (1984), citing *Shaffer v Heitner*, 433 U S 186, 433 US 204 (1977) for the proposition that '[w]hen a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential

outside the jurisdiction where the proceedings are 'founded on' or 'based on' a tort committed within the forum.[133] Similarly, the UK *Civil Procedure Rules* permit 'service out' where damage was allegedly sustained as a result of an act committed within the forum.[134] For these reasons, foreign direct liability litigation has already proved to be a successful tactic in establishing jurisdiction in common law tort claims.[135] Nevertheless, the theory of foreign direct liability has been expressly approved only in the UK (and there only at the Court of Appeal level),[136] in large part because common law tort claims based on allegations of human rights violations rarely proceed to trial.[137]

B *The Problem of Forum Non Conveniens*

Although each US state will apply its own *forum non conveniens* rules,[138] these rules tend to accord with the Supreme Court's decisions in *Gulf Oil Co v Gilbert*[139] and *Piper Aircraft v Reyno*,[140] according to which the court will weigh various 'public' and 'private' factors in an assessment of whether a trial in the local forum would be 'oppressive and vexatious to the defendant ... out of all proportion to the plaintiff's convenience', or whether the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal concerns'.[141] In a famous instance of dismissal on *forum non conveniens* grounds, the Court of Appeals for the Second Circuit of New York dismissed the Indian plaintiffs' common law tort claims against Union Carbide following the 1984 Bhopal gas plant disaster, on the basis that Indian courts would be better situated to hear the claim.[142]

Nevertheless, a plaintiff's vulnerability to dismissal on *forum non conveniens* grounds in US state courts is not necessarily a disadvantage vis-à-vis *ATS* litigation. After all, a number of *ATS* suits have been dismissed on this basis.[143] Rather, this will depend on the particular *forum non conveniens* rules of the state in which the common law tort suit is brought (which

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foundation of in personam jurisdiction'). See also Arthur T von Mehren and Donald T Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 *Harvard Law Review* 1121, 1144–64.

133 *Court Procedure Rules 2006* (ACT) r 6501(1)(k); *Uniform Civil Procedure Rules 2005* (NSW) Sch 6(d); *Supreme Court Rules* (NT) r 7.01(1)(j); *Uniform Civil Procedure Rules 1999* (Qld) r 124(1)(k); *Supreme Court Civil Rules* (SA) r 40(1)(f)(i); *Supreme Court Rules 2000* (Tas) r 147A(1)(c); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.01(1)(h)(i); *Rules of the Supreme Court 1971* (WA) O 10 r 1(1)(k).

134 *Civil Procedure Rules 1988* (UK) r 6.36; Supreme Court of the United Kingdom, *Practice Direction 6B — Service Out of the Jurisdiction*, [3.1(9)b)].

135 See, eg, *Dagi v BHP* [1997] 1 VR 428; *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (UK High Court, 11 April 1995) (in April 1997, Thor Chemicals agreed to settle the plaintiffs' claim for £1.3 million); *Motto v Trafigura* [2011] EWCA Civ 1150; *Connelly v RTZ Corporation*, 1998 AC 534 (HL); *Lubbe v Cape Plc* [2000] UKHL 41.

136 *Lubbe v Cape PLC* [1998] CLC 1559 (the plaintiffs alleged that Cape PLC had been negligent in its supervision of its subsidiary's South African asbestos mining operations. In refusing an application to strike out the suit, the Court of Appeal held that the evidence 'went well beyond a clear evidential basis' for the parent company's liability).

137 Richard Meeran, 'Tort Litigation against Multinational Corporations for Violations of Human Rights' (2011) 3 *City University of Hong Kong Law Review* 1, 6; Enneking, above n 114, 46.

138 Borchers, above n 130, 59.

139 330 US 501 (1947).

140 454 US 235 (1981).

141 *Piper Aircraft v Reyno*, 454 US 235, 248-252 (1981); *Gulf Oil v Gilbert*, 330 US 501 (1947); *Koster v Lumbermens Mutual Casualty Co*, 330 US 518 (1947).

142 *In re Union Carbide Corporation Gas Plant Disaster at Bhopal*, 634 F Supp 842 (SDNY, 1986); 809 F 2d 195 (2nd Cir, 1984).

143 See, eg, *Canadian Overseas Ores Ltd v Compania de Acero del Pacifico SA*, 528 F Supp 1337 (SDNY, 1982); *Aguinda v Texaco Inc*, 303 F 3d 470 (2nd Cir, 2002); *United Bank of Africa PLC v Coker* (SDNY, Case No 94 Civ-0655, 26 November 2003); *Fagan v Deutsche Bundesbank*, 438 F Supp 2d 376 (SDNY, 2006); *Mastafa v Australian Wheat Board Ltd* (SDNY, No 07 Civ 7955, 25 September 2008); *Aldana v Del Monte Fresh Produce NA Inc*, 578 F 3d 1283, 1286, 1300 (11th Cir, 2009); *Turedi v Coca-Cola Co*, 343 F App'x 623, 626 (2nd Cir, 2009)).

may, in fact, present forum shopping opportunities for plaintiffs). It should also be noted that defendant corporations may be reluctant to bring *forum non conveniens* dismissal applications in light of the huge US$18 billon award recently made against Chevron in Ecuador for alleged pollution of the Amazon.[144]

UK courts are now unable to dismiss a claim on *forum non conveniens* grounds in favour of another EU forum,[145] but may still apply domestic *forum non conveniens* principles where the defendant corporation is domiciled in a non-EU state (as is often the case in human rights-based litigation, since violations often occur in developing countries). Domestic *forum non conveniens* principles require the defendant to show that there is a 'more appropriate forum' to hear the claim.[146] Particularly in cases where the defendant, conduct and evidence are located abroad, there is a good chance that a tort claim commenced in the UK will be dismissed in favour of another available forum. *Forum non conveniens* applications can also take years to resolve, such as in tort claims brought against Cape Plc, Thor Chemicals and Rio Tinto.[147] However, the UK *forum non conveniens* rules are arguably friendlier to foreign-based tort actions since the House of Lords' decision in *Connelly v Rio Tinto*,[148] in which the Court held that the plaintiffs' inability to fund the litigation in the host state (Namibia) meant that the UK case should not be dismissed on *forum non conveniens* grounds.[149]

By contrast to the US and UK position, Australia has plaintiff-friendly *forum non conveniens* rules, which may be an advantage over *ATS* litigation (see Part VI below).

Foreign direct liability litigation may again provide a solution to *forum non conveniens* concerns, since a local court, whether in the US, Australia, UK or elsewhere, will be more reluctant to dismiss a case on *forum non conveniens* grounds where the named defendant is domiciled in the forum.

C *The Problem of Symbolism*

The *ATS* is unusual in providing plaintiffs with access to a cause of action based on a violation of international law per se. To date, no US state court has accepted that such a cause of action exists at common law. Nor do civil causes of action based on violations of international law per se exist in Australia or the UK. It is therefore necessary for claimants in these forums to characterise the complained of human rights violations as a 'garden-variety' wrong in order for it to be actionable in common law tort.[150] Doing so, however, sacrifices the powerful symbolic force of *ATS* suits.

The *ATS* has been of great value to those advocating for an enforceable body of international human rights law. The importance of such symbolism should not be understated. A judicial finding that a corporation has engaged in a violation of human

144 Bernard Vaughan, 'Chevron Protests Amazon Pollution, Says Ecuadorian Courts Used Bribes to Win $18 Billion Judgment', *Huffington Post* (online), 14 October 2013 <http://www.huffingtonpost.com/2013/10/14/chevron-amazon-pollution-ecuador-_n_4096123.html>.

145 *Owusu v Jackson* [2005] ECR 1383.

146 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

147 Meeran, above n 137, 11.

148 *Connelly v RTZ Corporation* [1998] AC 534 (HL).

149 Meeran, above n 137, 11, 28–30.

150 Enneking, above n 114, 271; Hoffman and Stephens, above n 114, 21; *Xuncax v Gramajo*, 886 F Supp 162, 183 (DC Mass, 1995).

rights is a denunciation of such conduct on an international scale, in marked contrast to a finding that the corporation is liable for 'wrongful detention' or 'assault and battery', or that the multinational corporation has been negligent in its supervision of its subsidiary's activities in a host state. In this way, common law tort law may be an 'inadequate placeholder' for an enforceable body of international human rights law.[151] Although tort-based cases have been successful in achieving out-of-court settlements for victims, they have rarely proceeded through trial to a judicial finding of liability. As a result, common law tort-based claims not only lack the powerful declaratory symbolism of cases like *Filartiga* and *Sarei*, there is also a dearth of precedent, particularly in foreign direct liability litgation.[152]

D *The Problem of Governing Law*

In the US, most state courts considering matters in common law tort follow the *Restatement (Second) of Conflict of Laws*, and accordingly apply the substantive law of the forum with the 'most significant relationship to the occurrence and the parties'.[153] In matters of personal injury in these states, it is presumed that this is law of the place where the harm was suffered (that is, the *lex loci damni*), unless some other forum has a more significant relationship to the occurrence and the parties.[154] As most claims for human rights violations will involve injury in a foreign host state, which may have less rigorous protective laws, this choice of law approach can be a disadvantage for plaintiffs. Kentucky and Michigan courts apply the law of the forum (*lex fori*) in all international torts.[155] Other US states, however, variously apply a 'significant contacts',[156] 'better law'[157] or 'interest' analysis to conflict of law questions in tort,[158] permitting these courts discretion to apply the law of the forum. Although in many foreign tort cases the local forum will have no interest in regulating the complained of conduct, where the plaintiff can show that the defendant or injury is substantially connected with the forum[159] that state court may decide to apply its own substantive tort law.[160] The savvy human rights litigant will therefore forum shop among US state courts for the best available choice of laws rules for their claim.[161]

Australian courts apply the law of the place where the tort was committed (the *lex loci delicti*) rule to 'all matters of substance' in both interstate and international torts,[162] and take

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151 *Xuncax v Gramajo*, 868 F Supp 162, 183 (D Mass, 1995).

152 Meeran, above n 137, 10.

153 *Restatement (Second) of Conflict of Laws*, § 145. See Symeon C Symeonides, 'Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey' (2013) 61 *American Journal of Comparative Law* 217, 284–5.

154 *Restatement (Second) of Conflict of Laws*, § 146.

155 Symeonides, above n 153, 284–5.

156 Ibid (Indiana and North Dakota).

157 Ibid (Arkansas, Michigan, New Hampshire, Rhode Island and Wisconsin).

158 Ibid (District of Columbia and California).

159 Borchers, above n 130, 50 (noting that, in states that apply an interest analysis, '[t]he best hope for applying the forum state's law would be if one or more of the parties were a citizen of the forum state — perhaps a corporate defendant with its headquarters in the forum state').

160 Ibid 53; *Hurtado v Superior Court*, 522 P 2d 666, 672 (Cal, 1974).

161 There are, however, constitutional limits to the application by a state of its own substantive law. In *Allstate Insurance Company v Hague*, 449 US 302, 313 (1981), the Supreme Court held that a state court may own apply its own substantive law to a dispute if there is 'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'

162 *John Pfeiffer Pty Ltd v Rogerson* (2003) 203 CLR 503, 544; *Regie National des Usines Renault v Zhang* (2002) 210 CLR 491.

an unusually strict approach in this regard.[163] Similar to the *lex loci damni* approach, where the alleged tort is constituted by conduct in a foreign host country, this will generally lead to the application of the substantive law of that country. By contrast to the UK and most US states,[164] however, the Australian High Court recently (and controversially) endorsed *renvoi* in respect of international torts,[165] such that the Court may apply the choice of law rules of the foreign forum in determining the governing law of the tort. Nevertheless, in human rights tort cases where the defendant is a citizen of the host state, and the complained of conduct occurred in that forum, it is unlikely that the conflict of law rules of that host country will lead to the application of any law other than that of the host country.

In the UK,[166] the *Rome II Regulation* applies to matters of governing law in events giving rise to non-contractual liability.[167] Article 4(1) provides a general rule that, in cases concerning tort, the governing law will be the *lex loci damni*, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[168] *Rome II* does provide two relevant exceptions to the general *lex loci damni* rule. First, where the plaintiff and defendant both have their habitual residence in the same country at the time the damage occurs, the law of that country shall apply.[169] This exception, where applicable, is unlikely to assist foreign plaintiffs who suffered damage in the host country, for it will be an even stronger indication that the law of the host country shall apply. Second, where it is clear from all the circumstances of the case that the tort is 'manifestly more closely connected' with another country, the law of that country will apply.[170] This is effectively a 'flexible exception rule', not present in Australian jurisprudence.[171]

Since nearly all countries have some form of tort law (and it is often not the content of the host country's tort laws that are concerning, but their lack of enforcement),[172] perhaps more critical than the issue of which law governs the available tort claims will be question of which law governs the assessment of damages. Applying the law of the host country to the quantification of damages can be seriously disadvantageous to plaintiffs; in nearly every

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163 The High Court of Australia has rejected the English 'flexible exception rule' (*John Pfeiffer Pty Ltd v Rogerson* (2003) 203 CLR 503, 538; *Regie National des Usines Renault v Zhang* (2002) 210 CLR 491; cf *Boys v Chaplin* [1971] AC 356). The strict Australian approach has been frequently criticised (see, eg, R Anderson, *International Torts in the High Court of Australia* (2002) 10 Torts Law Journal 132, 140–1; *A Gray, Flexibility in Conflict of Laws in Multistate Tort Cases: The Way Forward in Australia* (2004) 23 *University of Queensland Law Journal* 435, 462–3; Reid Mortensen, 'Homing Devices of Tort Law: Australia, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 863 (noting 'the reasons for [the rejection of the flexible exception rule] are obscure').

164 Davies, Bell and Brereton, above n 120, 317, citing, *Restatement (Second) of Conflict of Laws*, § 8; *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations* [2007] OJ L 199/40, art 24 ('*Rome II Regulation*').

165 *Regie National des Usines Renault v Zhang* (2002) 210 CLR 491; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 342.

166 And throughout the EU, excluding Denmark.

167 *Rome II Regulation* arts 31, 32. Previously, questions of governing in law in tort were governed by the *Private International Law (Miscellaneous) Provisions Act 1995* (UK), which provided that claims in tort were generally to be governed by the substantive law of the place where the events constituting the tort occurred. This general rule could be displaced if, in all the circumstances, it was substantially more appropriate to apply the substantive law of another country.

168 *Rome II Regulation*, art 4(1).

169 Ibid art 4(2).

170 Ibid art 4(3).

171 See above n 163.

172 Meeran, above n 137, 15.

case, the host country's approach to assessment of damages is likely to be less favourable than the forum's (particularly in the US, where punitive damages may dwarf compensatory damages).[173] The law applicable to the assessment of damages will turn on whether the forum treats the assessment of damages as a substantive matter (and therefore to be governed by the substantive law applicable to the cause of action) or a procedural matter (and therefore to be governed by the *lex fori*). In the US, the general rule is that heads of damages are substantive, whereas the quantification of those damages is procedural.[174] Similarly, in Australia, the general rule is that the *lex loci delicti* will govern the assessment of damages.[175] In the UK, *Rome II* expressly provides that the substantive law applicable by operation of the *Regulation* will 'extend to the basis of liability', and 'the existence, nature and the assessment of damage or remedy claimed'.[176]

Again, foreign direct liability suits present a potential solution for the problems faced by plaintiffs in respect of governing law. Where the alleged tort is committed by a parent within the forum, Australian courts applying a *lex loci delicti* approach are likely to apply their own substantive law.[177] In the UK and in many US states, also, the law of the forum may apply to a foreign direct liability claim in tort, despite the fact that damage may have been suffered abroad, if the local law it is 'manifestly more closely connected' (or has a 'more significant relationship') with the occurrence;[178] this is much more likely to be the case where the plaintiff can point to conduct occurring within the forum.

VI Advantages of Human Rights Tort Litigation

Despite the clear challenges to bringing human rights-based common law tort claims, there are a number of reasons to expect that a shift toward human rights tort litigation will present advantages for plaintiffs. In fact, history suggests thatan action brought in common law tort is more likely than an *ATS* claim (even prior to *Kiobel*) to obtain tangible redress for victims.

A *The Advantages of Tort Characterisation*

By bringing suit in common law tort, litigants are saved the difficulties, under the *ATS*, of bringing their cause of action within the 'very limited category [of norms] defined by the law of nations and recognized at common law'.[179] Tort laws in US states and elsewhere are generally broad enough to encapsulate conduct that constitutes a human rights violation.[180] For instance, torture may be actionable as 'assault and battery', unlawful execution as

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173 See John Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 *Columbia Journal of Transnational Law* 391.

174 Borchers, above n 130, 52.

175 *John Pfeiffer Pty Ltd v Rogerson* (2003) 203 CLR 503, 544 (holding that 'all questions about the kinds of damage, or the amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti'); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

176 *Rome II Regulation* art 15(a),(c).

177 Davies, Bell and Brereton, above n 120, 427, citing *Bittugeig v Universal Terminal and Stevedoring Corp* [1972] VR 626; *D'Ath v TNT Australia Pty Ltd* [1992] 1 Qd R 369; *ICI Australian Operations Pty Ltd v Kidde-Graviner Ltd* [1999] WASCA 65; *Porter v Bonojero Pty Ltd* [2000] VSC 265.

178 In *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (UK High Court, 11 April 1995), Judge Stewart QC held that, by reason of the connections between the claim and the defendant's factory in England, English, rather than South African law was likely to apply.

179 *Sosa*, 542 US 692, 712 (Souter J) (2004).

180 Borchers, above n 130, 50.

'wrongful death' and slavery as 'false imprisonment'. In fact, it has been noted that 'theories of liability in state court tort cases are likely to be more expansive and less contested that they have been in *ATS* litigation'.[181] Many *ATS* cases are already routinely accompanied by parallel tort claims under state law in federal or state courts.[182] There is usually no question that corporations may be liable in tort and corporate aiding and abetting liability is generally well-established under common law tort, including in the US,[183] Australia and the UK. Also, by characterising the claim as a tort, the plaintiff will not be required to exhaust local remedies before the claim is commenced,[184] which, as noted above, may be fatal to an *ATS* plaintiff's action.

B *Advantageous Pleading Requirements in US State Courts*

The Supreme Court's recent decision in *Aschroft v Iqbal*,[185] in which it adopted a stringent application of plausibility pleading requirements,[186] is likely to be another reason why it may be advantageous for plaintiffs to shift their attention to bringing human rights claims in US state courts or elsewhere. According to the Federal Rules of Civil Procedure in the US, a complaint must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief'.[187] In particular, *ATS* plaintiffs will be required to plead a claim that is plausible on its face by establishing that a defendant violated a specific international law norm.[188] Providing such a level of factual specificity at the pleading stage may impose significant difficulties on plaintiffs, as shown by the Eleventh Circuit's dismissal of an *ATS* claim on plausibility pleading grounds in *Sinaltrain v Coca-Cola Co.*[189] By contrast, each US state court will apply its own pleading requirements, which are generally less stringent than those set down in *Iqbal*.[190]

C *Advantageous Forum Non Conveniens Rules*

Unlike the UK and many US state courts, Australia applies strongly homeward-leaning and plaintiff-friendly *forum non conveniens* rules. In order for a proceeding to be stayed on *forum non conveniens* grounds, the applicant must show that the Australian court is a 'clearly inappropriate forum'.[191] According to this test, an Australian court is not an inappropriate

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181 Hoffman and Stephens, above n 114, 19.

182 Ibid 14–15; *Filartiga*, 630 F 2d 876 (2nd Cir, 1980); *Doe v Unocal Corp*, 963 F Supp 880, 883–4, 892 (CD Cal, 1997)*; Doe v Exxon Mobil Corp,* 654 F 3d 11 (DC Cir, July 8, 2011); *Abdullah v Pfizer Inc*, 562 F 3d 163, 169–70 (2d Cir, 2009).

183 Hoffman and Stephens, above n 114, 19; *Halberstam v Welch*, 705 F 2d 472, 477–8 (DC Cir, 1983).

184 Hoffman and Stephens, above n 114, 18.

185 556 US 662 (2009).

186 See also, *Bell Atlantic Corp v Twombly*, 127 S Ct 1995 (2007).

187 *Federal Rules of Civil Procedure* r 8(a)(2).

188 Christopher Whytock, Donald Earl Childress III and Michael D Ramsey, 'Foreword: After Kiobel — International Human Rights Litigation in State Courts under State Law' (2013) 3 *UC Irvine Law Review* 1, 3; *Ashcroft v Iqbal*, 556 US 662, 678–9 (2009).

189 (11th Cir, Case No No. 06-15851, Aug 11, 2009); Chiquita Brands International has also recently applied to dismiss *ATS* claims brought against it, on the basis of the plaintiff's alleged failure to meet the plausibility pleading standards laid down in *Iqbal* (Chiquita Brands International Inc and Chiquita Fresh North America LLC, 'Defendants' Memorandum in Support of Consolidated Motion to Dismiss Amended Complaints', *In re Chiquita Brands International Inc, Alien Tort Statute and Shareholder Derivative Litigation*, (SD Fla, Case No 08-MD-01916, 9 April 2010).

190 Hoffman and Stephens, above n 114, 18.

191 *Voth* (1990) 171 CLR 538.

forum merely because another is more appropriate,[192] and 'the mere fact that the balance of convenience favours another another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay'.[193] Moreover, the mere fact that the tort might be governed by a foreign law is not a relevant factor in deciding whether the court should stay on *forum non conveniens* grounds.[194] This approach has been widely criticised,[195] but the fact remains that, once jurisdiction is established, Australian *forum non conveniens* rules tend to operate in a plaintiff's favour.[196]

D *A Historical Analysis of Success*

As human rights advocates grieve the loss of the *ATS* in foreign-cubed cases (and possibly beyond), it is worth comparing the historical success of *ATS* versus human rights tort litigation. While there is no doubt that the *ATS* has had symbolic value for those advocating for an enforceable body of international human rights law, it is not possible to measure what effect this has had on discouraging multinational corporations from engaging in human rights abuses. We must therefore measure the redress to victims. This measure is both significant in its own right and, on the assumption that corporations will act to avoid potential costs, a reasonable proxy for measuring the effect such litigation will have on the behaviour of corporations.

It is reasonably clear that tort-based human rights litigation has been more successful than *ATS* litigation in obtaining redress for victims. As mentioned above, common law tort claims under US state law are routinely brought in parallel to *ATS* actions. In a number of these cases, the tort claims have been more successful in obtaining redress for plaintiffs.[197] Where judgment is awarded in favour of an *ATS* plaintiff, the fact that the foreign defendant may not have assets in the forum often means that the plaintiff may never receive the awarded sum. Despite decades of *ATS* litigation, it has been noted that 'hardly any money' has reached victims.[198] In light of this, the *ATS* has been criticised for achieving merely 'symbolic victories' for victims.[199]

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192 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 503 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

193 *Voth* (1990) 171 CLR 538, 554; *Puttick v Tenon* (2008) 238 CLR 265, 281.

194 *Puttick v Tenon* (2008) 238 CLR 265, 278.

195 Richard Garnett, 'Stay of Proceedings in Australia: A Clearly Inappropriate Test' (1993) 23 *Melbourne Journal of International Law* 30; Lawrence Collins, 'The High Court of Australia and Forum Conveniens: The Last Word?' (1991) 107 *Law Quarterly Review* 182, 187; Ellen Hayes, 'Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation' (1992) 26 *University of British Columbia Law Review* 41, 54.

196 *Voth* (1990) 171 CLR 538.

197 Hoffman and Stephens, above n 114, 14. In *Martinez v City of Los Angeles*, 141 F, 3d 1373, 1376 (9th Cir, 1998) for instance, the plaintiff was able to obtain an out-of-court settlement of his tort claims in State Court, whereas his parallel *ATS* claim was dismissed by the Ninth Circuit; In *Abu Zeineh v Federal Laboratories Inc*, 975 F Supp 774 (WD Pa, 1994), the plaintiffs re-filed in State Court in tort after their *ATS* claims were dismissed and plaintiffs ultimately achieved a out-of-court settlement of their tort claims. The plaintiff's state law claims were also settled in *Abdullah v Pfizer Inc*, 562 F.3d 163, 169–70 (2d Cir, 2009) after the Second Circuit's decision in *Kiobel*.

198 Eric Posner, 'The United States Can't Be the World's Courthouse: Why the Supreme Court Just Killed off a Whole Category of Human Rights Suits', *Slate* (online), 24 April 2013 <http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html>.

199 Ibid.

It also appears that plaintiffs have generally been more successful in obtaining higher out-of-court settlement sums where the case is brought in common law tort. In a 2013 article,[200] Michael D Goldhaber and Jonathan Drimmer reviewed approximately 180 *ATS* cases filed against corporations. Of these, only two resulted in default judgments in favour of the plaintiff(s), and 13 in settlements,[201] with an estimated average settlement of US$13.5 million.[202] By comparison, common law tort litigation has been markedly successful in achieving sizeable settlements in favour of plaintiffs. In 1994, 30 000 Papua New Guinean plaintiffs brought a foreign direct liability suit against BHP in the Supreme Court of Victoria,[203] arguing that the Australian company had been negligent in its oversight of its subsidiary's gold and copper mining operations (that is, a foreign direct liability claim), resulting in the pollution of the Ok Tedi river. In a notably large settlement, BHP agreed to pay US$28.6 million in financial compensation[204] in addition to making a commitment to undertake environmental restoration activities anticipated to cost US$350–450 million.[205]

In the UK case of *Motto v Trafigura*,[206] 30 000 plaintiffs from Cote d'Ivoire brought suit against Trafigura Beheer BV in the UK, alleging that the Dutch oil trader had been negligent in respect of the M/V *Probo Koala* oil spill in 2006. This claim was settled out of court in 2009, after Trafigura reportedly agreed to pay the plaintiffs approximately £28 million.[207] In 2011, it was reported that Nigerian villagers had settled their UK-based claim against Shell Petroleum Development in *Bodo Community v Shell Petroleum Development Company of Nigeria*[208] for over £250 million (although this sum was disputed by the company as 'massively in excess of the true position').[209] Also in 2011, British mining

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200 Michael D Goldhaber, 'Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard' (2013) 3 *UC Irvine Law Review* 127.

201 Ibid 128, citing *In re Xe Services Alien Tort Litigation*, 665 F Supp 2 d 569 (ED Va, 2009); *Shiguago v Occidental Petroleum Corp* (CD Cal, Case No 2:06cv04982, 25 August 2009); *Mainawal Rahman Building and Construction Co v DynCorp International* (ED Va, Case No 1:08-cv-01064, 23 January 2008); *Aguilar v Imperial Nurseries* (D Conn, Case No 3-07-cv-193, 28 May 2008; *Xiaoning v Yahoo! Inc*, (N D Cal, No C07-02151 CW, 28 November 2007); *Government of the Dominican Republic v AES Corp*, 466 F Supp 2 d 680 (E D Va, 2006); *Does v Gap Inc* (D N Mar, Case No CV-01-0031, 1 Sept 2003); *Abdullah v Pfizer Inc*, 562 F 3d 163 (SDNY, 2001); *Doe v Reddy*, No C 02-05570 WHA, 2004 WL 5512966 (ND Cal, 2004); *Wiwa v Royal Dutch Petroleum* Co, 226 F 3d 88 (2nd Cir, 2000); *Eastman Kodak Co v Kavlin*, 978 F Supp 1078 (S D Fla, 1997); *Bodner v Banque Paribas*, 114 F Supp 2d 117 (EDNY, 1997); *Doe v Unocal Corp*, 395 F Supp 932 (CD Cal, 1996).

202 Goldhaber, above n 200, 129 n 11; *Doe v Unocal*, 395 F 3d 932 (9th Cir, 2002) (under the terms of a confidential settlement in 2005, Unocal agreed to provide compensation to Burmese plaintiffs, as well as funding for social programs); *Wiwa v Royal Dutch Shell Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88, 92 (2nd Cir, 2000) (In 2009, Royal Dutch Shell agreed to compensate plaintiffs in the amount of US$15.5 million, including US$5 million into trust for the benefit of the Nigerian plaintiffs.)

203 *Dagi v BHP* [1997] 1 VR 428.

204 It has been suggested, however, that the financial compensation component of the settlement may have been US$40 million (Enneking, above n 114, 89), or even as high as US$150 million (Mark Baker, 'Parting Company: "Brothers" No More' *Sydney Morning Herald* (online), 13 October 2012 <http://www.smh.com.au/national/parting-company-brothers-no-more-20121012-27ik0.html>).

205 Stuart Kirsch, 'Cleaning Up Ok Tedi: Settlement Favors Yongom People' (Fall 1996) 4 *Journal of the International Institute* 1; Baker, above n 204.

206 [2011] EWCA Civ 1150.

207 Avril Ormsby, 'Trafigura to Settle for £28m over Toxic Waste Dumping', *The Independent* (online), 21 September 2009 <http://www.independent.co.uk/news/world/africa/trafigura-to-settle-for-16328m-over-toxic-waste-dumping-1790723.html>.

208 [2012] EWHC (QB) HQ11X01280.

209 Silvia Pfeifer and Jane Croft, 'Shell's Nigeria Pay-Out Could Top £250 million', *Financial Times* (online), 3 August 2011 <http://www.ft.com/cms/s/0/4209f536-bde8-11e0-ab9f-00144feabdc0.html#axzz25RHY8Jas>; Mitiu

company Monterrico Metals settled, for an undisclosed sum, a claim brought by Peruvian nationals against the company and its subsidiary, alleging the companies' complicity in the Peruvian police's torture of environmental protestors in 2005.[210] Out-of-court settlements have also been obtained in favour of South African factory workers exposed to high levels of mercury while in the employ of Thor Chemicals,[211] Italian and South African employees of British asbestos producer, Cape Plc,[212] and 23 South African miners suffering incurable lung conditions caused by working in the gold mines of Anglo American.[213]

In light of these successes, there is a good argument that the common law tort approach to human rights litigation has been more effective than *ATS* litigation ever was in obtaining tangible redress for victims of human rights violations abroad.[214]

VII Conclusion

The light is quickly dying for human rights litigation founded on long-arm *ATS* jurisdiction. Not only does the Supreme Court's decision in *Kiobel* make clear that foreign-cubed cases will no longer be actionable under the *ATS*, it also leaves open the possibility — and, indeed, the likelihood — that further constraints will be imposed on the *ATS* in the future. For this reason, victims of corporate human rights abuses in developing countries are likely to shift their focus towards bringing common law tort claims in alternative forums. Although difficulties exist for plaintiffs seeking to bring common law tort actions against foreign multinational corporations in the US, Australia or UK, the majority of these challenges may be overcome where it is possible to identify negligence on the part of a parent company in the local forum. In addition, common law tort law does tend to present certain substantive and procedural advantages over *ATS* litigation, and may permit victims to obtain more significantcompensatory outcomes. Absent legislative action, international cooperation or a dramatic development in the state of customary international law, common law tort litigation is therefore most likely to be the best means of obtaining redress for the victims of foreign corporate misconduct in this present, imperfect world.

Sunmonu, 'An Open Letter on Oil Spills from the Managing Director of the Shell Petroleum Development Company of Nigeria Ltd' (Media Release, 8 April 2011) <http://www.shell.com.ng/aboutshell/media-centre/news-and-media-releases/archive/2011/open-letter-04082011.html>.

210 *Guerrero v Monterrico Metals Plc* [2010] EHWC 3228; Business and Human Rights Resource Centre, 'Case profile: Monterrico Metals Lawsuit (re Peru)', *Business-Humanrights.org* <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/MonterricoMetalslawsuitrePeru>.

211 *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (UK High Court, 11 April 1995) (in April 1997, Thor Chemicals agreed to settle the plaintiffs' claim for UK£1.3 million: Ian Burrell, 'Mercury Poisoning Victims Win 1.3 Million in Landmark Case', *Independent* (online), 12 April 1997 <http://www.independent.co.uk/news/mercury-poisoning-victims-win-pounds-13m-in-landmark-case-1266578.html>.

212 Cape Plc agreed to pay a one-off payment of £7.5 million to the 7,500 claimants. A separate settlement was reached between the claimants and Cape's successor, Gencor, in the amount of £3 million (Meeran, above n 137, 30–7).

213 Marcus Leroux, 'Anglo American Settles Claim with South African Miners over Lung Condition', *The Times* (online), 26 September 2013 <http://www.thetimes.co.uk/tto/business/industries/naturalresources/article 3879303.ece>.

214 Goldhaber, above n 200, 127–8.