
**THE GATHERING STORM AROUND CORPORATE LIABILITY IN NATURAL RESOURCE
INVESTMENT: RE-EXAMINING THE RECENT PAST**

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There is a growing body of support that transnational companies involved in the extraction of natural resources need to be held to account for violations of social, economic and moral norms in countries of operation. The United States of America has been at the forefront of this development. A number of cases based on the Alien Tort Statute have found jurisdictional basis to decide a company's culpability for acts committed extraterritorially. This trend spells hope that resource investment decisions can no longer afford a 'business as usual approach' but have to consider the methods and moral integrity on which such business is conducted.

I INTRODUCTION

In 2011 Shell accepted liability for pollution caused by two massive oil spills, which occurred in 2008 in the Ogoniland region of the Niger Delta, following a community class action launched in London on behalf of local communities.¹ The pollution devastated a 20 kilometre network of creeks and inlets on which many communities in the area depended and damaged mangrove forests and the water table, affecting the livelihoods of the Ogoni community. Initially the company denied responsibility and refused to clean up the spilled oil. Shell stood to pay potentially hundreds of millions of dollars.² While the settlement figure was not quite in the order of magnitude predicted,³ the case against Shell in Ogoniland shows increasing interest in two things: firstly, in collective claims by agrarian populations challenging land rights and land use by the extractive industry; and secondly, in the potential to expand the scope of extraterritorial jurisdiction to find corporate liability for wrongs committed.

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¹ John Vidal, 'Shell accepts liability for two oil spills in Nigeria', the guardian (online), 3 August 2011 <<http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria>>.

² Ibid.

³ In 2015, Shell settled on a cumulative 55 million GBP to fisherman suffering economic losses and the community: BBC News, *Shell agrees \$84m deal over Niger Delta oil spill* (2015), <<http://www.bbc.com/news/world-30699787>>.

Legal liability and its associated costs – both reputational and monetary – has gathered a growing body of support that transnational companies involved in the extraction of natural resources need to be held to account for violations of social, economic and moral norms in countries of operation. Corporations are intimately involved in international law processes, yet often without a concomitant level of liability. Such involvement should not go unchecked.⁴ This paper explores the rising legal liability of multinationals in courts and suggests that corporate liability for wrongs committed in the resource trade should form part of a developing international corporate criminal law.

The genesis of corporate legal personality, which gave corporations similar rights to individuals, was not initially matched by their accountability. Individuals can be held liable for a multitude of crimes, irrespective of where they are committed and irrespective of which court prosecutes them. But it is not the same for corporations, who may slip between the legal lines of jurisdiction. Certain criminal acts should be justiciable irrespective of the nationality of the crime or the nationality of the corporation. If citizens can be prosecuted for criminal or illegal acts abroad, so too should companies. Jurisdiction exists over individuals where there is a connection to the territory, for example where the person is a national. By way of example, in June 2010, the sons of Patrice Lumumba, the first democratically elected president of the Democratic Republic of the Congo (DRC), launched a claim in Belgium against various Belgium officials, who had worked in the DRC at the time, for being conspirators in the assassination of their father.. The case went before the courts, illustrating the precedent that countries have jurisdiction over their own nationals' conduct, even where the conduct had taken place in another country.⁵ In this article, the term 'third court' will be used to describe such exercise of jurisdiction, that is, by a court neither chosen by the parties, nor a court exercising universal jurisdiction. Non-forum courts exercising extra-jurisdictional privilege on the basis of nationality or the existence of a territorial nexus, are often discussed under the rubric of international law. Terming these courts 'third courts' may slightly alter the perception that somehow that jurisdiction must be justified. In the author's opinion, the exercise of such jurisdiction today needs little justification.

In another example, in July 2010, a Federal Appeals Court of the 11th US Circuit Court of Appeals upheld the 2008 torture convictions and 97-year sentence imposed on the son of former Liberian President Charles Taylor, Charles McArthur Emmanuel.⁶ It also upheld the constitutionality of a law allowing the United States of America (US) to prosecute for torture cases abroad, providing a direct example of third court jurisdiction as Emmanuel was a US citizen.⁷ It is something of a quandary why there is such debate over whether courts are able to exercise jurisdiction against national, or nationally-registered, companies whose misdeeds are carried out abroad, under a form of corporate personality jurisdiction.

Other factors associated with the ephemeral liability of multinational corporations are forum shopping (jurisdictional privilege), legal standing of either individual or collective claimants (interesting considering the increasing prevalence of class action litigation), and lack of political proactivity of the State in monitoring abuses of market power and abuses of political power by corporations. Whilst not discussed in this article, these other issues are potential

⁴ Karsten Nowrot, 'Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?' (2011) 18 *Indiana Journal of Global Legal Studies* 803, 817, 822.

⁵ Andrea Bottorff, *Belgium officials accused in murder of former Congo leader* (22 June 2010) JURIST <<http://jurist.org/paperchase/2010/06/belgian-officials-accused-of-congo-war-crimes.php>>.

⁶ *United States of America v Roy M. Belfast, Jr.*, 09-10461 1,1 (11th Cir, 2010).

⁷ *Ibid.*

sources for altering the jurisdictional reach of various judicatures. The problem is jurisdiction over companies and their actions: can one file a claim of action if a company does something wrong? Worse, if a group of extractive industries get together and design a pro-forma contract, or carry on other collaborative cartel activities, how is one to prosecute? Conglomerations or collections of transnational companies seem to escape the law at every turn. Plunder and international cartelization should be criminalized and international bodies should enforce international law as it applies to international and transnational bodies. Several tools could aid this including: (i) the jurisdiction to interfere on grounds of good conscience; (ii) the expansion of the jurisdiction of third and international courts; or (iii) the criminalization of plunder.

This article reflects upon the developments of extraterritorial jurisdiction where there are serious human rights violations, specifically with regards to extractive industry operations in countries which may not have enforceable and/or adequate liability regimes and where the perpetrators have some affiliation to the country pursuing accountability. It begins with a review of African examples where judicial action has been ineffective or inadequate at holding foreign enterprises accountable and the problems of interference in state sovereignty. It then examines the attempts made in recent history of expanding the jurisdiction of third courts, that is, the limits to extraterritorial jurisdiction, with a specific focus on the United States as being a forerunner in this regard under the *Alien Tort Statute (ATS)*⁸ with the application of the territorial nexus test. A comparison with the United Kingdom and Australia is made, who have implemented their own measures being direct corporate liability and implementation of International Criminal Court (ICC) crimes under the Australian Criminal Code. It is suggested that an international crime of plunder may aid the development of greater juridical extraterritoriality. Finally, requirements of corporate due diligence and the implementation and enforcement of national codes of conduct may add to checking the power of extractive industries, in particular those who operate in conflict zones away from the purview of judicial eyes.

This article is not intended as a major analysis or review of the pre-eminent cases, including *Kiobel v Royal Dutch Petroleum (Kiobel)*⁹ which has been dissected elsewhere.¹⁰ Furthermore, it is not an in-depth analysis of any particular judicial decision. Rather, it is intended as an overview of judico-political developments, both comparatively and globally, offering an approach that ties European, American, Australian and African jurisdictions and interests in the highly significant area of extractive industry operations and their responsibility for invoking or perhaps creating incentives for the perpetration of human rights violations.¹¹ It is in covering a wide array of content in one article, bringing together the multi-national caselaw and transnational geopolitical components which might better reflect the reach of the extractive industry, that it hopes to offer a pertinent cross-jurisdictional perspective of cases that may impact or influence the industry. I note this article makes no

⁸ (US) 28 USC § 1350.

⁹ *Kiobel v Royal Dutch Petroleum*, 569 US 1659 (2013).

¹⁰ Ziad Haider, 'Corporate liability for human rights abuses: analyzing *Kiobel* & alternatives to the Alien Tort Statute' (2012) 43(4) *Georgetown Journal of International Law* 1361; Sarah Cleveland, 'After *Kiobel*' (2014) 12(3) *Journal of International Criminal Justice* 551; Robert Cryer, 'Come Together?: Civil and Criminal Jurisdiction in *Kiobel* from an *International Law Perspective*' (2014) 12(3) *Journal of International Criminal Justice* 579.

¹¹ Africa is increasingly seen as an attractive, even necessary, investment option for extractive industry, see for example the Chatham House Report: Alex Vines, Lillian Wong, Markus Weimer and Indira Campos, *Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola* (Report, Chatham House, August 2009) Chatham House.

attempt to place blame or offer a view on the factual substantiality of human rights violations alleged to be created by extractive operations. It only supposes that, in a free marketplace, the attraction of capital investment and profit may create such a situation.

II EXTRATERRITORIAL JURISDICTION WHERE THERE IS A FAILURE OF DOMESTIC ACCOUNTABILITY

The influence of private companies on domestic court action may prevent justice being done, even where the country has shown decisive action in acting in the interests of its population. In the Kilwa (eastern DRC, Katanga province) incident in 2004, it was alleged that Anvil Mining (Anvil) had aided a military operation which committed human rights abuses and left at least 73 dead in suppression of a small rebellion, through allowing use of company vehicles.¹² In 2007 a case for complicity in war crimes was brought against 3 employees of Anvil (as well as 9 Congolese soldiers) to a Congolese military court.¹³ According to Global Witness 'obstruction by high level business interests prevented justice from taking its course; the judges failed to take into account strong eye-witness testimony at the trial and witnesses were intimidated.'¹⁴ The defendants were acquitted, the trial having been derailed. The ineffective operation of justice in the DRC was noted by Tomlinson J in *Katanga Mining*.¹⁵ In this case, the evidence did not permit a finding that the DRC was a forum in which the case could be tried suitably for the interests of all the parties and for the ends of justice.¹⁶ That was particularly so where a party reasonably felt inhibited about traveling to the DRC and where there was a real risk of attempted interference with the integrity of the trial.¹⁷ Third court interference in this case was deemed acceptable when 'attempted interference with the integrity of justice is apparently widespread and endemic.'¹⁸ Interfering in a case could therefore be justified on the grounds of good conscience.

In other cases, government actions to hold various entities and individuals accountable are far from adequate. The Ugandan Porter Commission, set up to examine involvement of the government in illicit extraction of resources in the DRC, failed to produce any real outcome. The mandate of the Commission was restricted and did not examine human rights abuses. The report issued was criticized as being too lenient on the government of Uganda, who in turn had rejected the findings of official involvement but named some individuals for further investigation.¹⁹ Interference then has a double-meaning, referring both to negative interference by the national governments where unreasonable exploitation is occurring and positive interference by a third court where claimants are not able to recover their rights in their home country.

¹² Action Contre l'Impunité pour les Droits Humains, *Anvil Mining Limited and the Kilwa Incident: Unanswered questions* (20 October 2005) Rights and Accountability in Development <<http://www.raid-uk.org/sites/default/files/qq-anvil.pdf>>; Jonathan Rhein, *Congo military court seeks war crimes trial for foreigners involved in Kilwa incident* (16 October 2006) JURIST <<http://jurist.org/paperchase/2006/10/congo-military-court-seeks-war-crimes.php>>.

¹³ Ibid.

¹⁴ Global Witness, *Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993 to 2003; A Global Witness briefing paper* (Report, Global Witness, 17 December 2009) Global Witness, 23-24.

¹⁵ *Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679 (Comm).

¹⁶ Ibid [2].

¹⁷ Ibid.

¹⁸ Ibid [34] (Tomlinson J).

¹⁹ Global Witness, above n 12, 24.

Interference in the judicial system of a country may be perceived as a threat to State sovereignty. While State sovereignty and territorial integrity are concomitant in international law discourse, judicial sovereignty is often ignored. State sovereignty — the ability to govern the citizens of a country, to create laws, to tax — may not be synonymous with judicial sovereignty. Non-interference in the government of another country should not be confused with interference with a judicial system. Indeed where a judiciary is absent (or not capable of acting in the interests of justice), then there may not be any organ with which to interfere. Conversely, the lack of a judicature may have no bearing on the existence or right of State sovereignty. In an age of globalized justice with the increasing importance of constitutionalism²⁰ and existence of international law, both of which mandate justice as existing above statehood such that States are subject to a higher law, what is the limit on judicial sovereignty? If States are not accountable to a higher law, either because it does not exist, or has been corrupted and is subservient to the State, then the exercise of sovereignty cannot be checked.

Where national courts are unwilling or unable to hold companies and their individuals accountable for their role in resource plunder and the conflict surrounding it, courts of ‘third’ nations or international courts and tribunals should hold such entities accountable. The US has been a leader in allowing foreign claimants who cannot seek effective remedy in their home country pursuing a claim in the US under the *ATS*.

III EXPANDING THE JURISDICTION OF THIRD COURTS: EXTRATERRITORIAL JURISDICTION, UNIVERSAL CRIMES AND DIRECT CORPORATE LIABILITY

A *Extraterritorial jurisdiction for violation of universal international norms: the lead of the United States*

The US has been at the forefront in finding ‘third court’ jurisdiction over corporate conduct abroad where proceedings are against a multinational by some form of a collective (either an ethnic group or a collection of individuals).²¹ A debate has arisen over whether the *ATS*, which can be used by non-nationals to launch proceedings in US courts, enables extraterritorial jurisdiction over corporations for violations of international human rights norms committed overseas.

A number of cases, at both district and appellate level, have found a jurisdictional basis to decide a company’s liability and culpability for acts committed on another territory. These are discussed below. Under international law, jurisdiction over specific corporate conduct abroad (such as aiding and abetting the crime of genocide) is granted to US courts because there can be no immunity for violations of universal international norms (such as genocide); that is, no derogation of the international standard is permissible under the *jus cogens* rule of international law. The jurisdictional grounds could thus be considered both an application of universal jurisdiction over widely accepted international norms from which no derogation is permissible, and/or extraterritorial application of US law, where international law has been incorporated into US law thereby granting subject matter jurisdiction. This means the

²⁰ Particularly in Africa: see H. Kwasi Prempeh, ‘Africa's "constitutionalism revival": false start or new dawn?’ (2007) 5(3) *International Journal of Constitutional Law* 469.

²¹ See the leading case of *Sosa v Alvarez-Machain*, 542 1 US 692 (2004); *John Doe v Exxon Mobil Corporation*, 654 F3d 11 (DC Cir, 2011); *Boimah Flomo, v Firestone Natural Rubber Co, LLC*, 643 F3d 1013 (7th Cir, 2011); *Alexis Holyweek Sarei v Rio Tinto*, No. 02-56256 19331 (9th Circuit, 2011).

jurisdictional basis of application could as much be considered extraterritorial jurisdiction of US law, as universal application of international law.

The case of *John Doe v Exxon Mobil Corporation (John Doe)*²² decided in July 2011 found that the *ATS* does not support corporate immunity for torts committed by agents in violation of international law. This case found that there can be extraterritorial application of the *ATS* where acts are committed by US citizens abroad or committed on US soil in the course of business which had an effect abroad. *John Doe* also found aiding and abetting a well-established jurisdictional basis under the *ATS*. The court found 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...We conclude...that Exxon's objections to justiciability are unpersuasive and that the district court erred in ruling that appellants lack prudential standing to bring their non-federal tort claims and in the choice of law determination.²³

The finding that corporations are not immune from liability for violation of international norms justiciable under the *ATS* was reiterated in *Boimah Flomo v Firestone Natural Rubber (Flomo)*.²⁴ In *John Doe* 'jurisdictional spoilers' such as the appearance on the claim of an inappropriate party (under the *ATS* there must be jurisdictional diversity where parties who are citizens from the same country cannot appear on either side of the dispute) did not impede the finding of jurisdiction.²⁵ Furthermore, the district court in this case had refused to dismiss claims on the basis that the appellants had failed to exhaust local (in this case Indonesian) remedies as 'it was apparent that such efforts would be futile.'²⁶

Two major decisions previously had decided the contrary. In *The Presbyterian Church of Sudan v Talisman Energy (Talisman)*,²⁷ a claim was made against Talisman Energy in 2001 in the US for alleged human rights abuse complicity, amounting to genocide, in Sudan, when buffer zones were created around its oil fields resulting in displacement, kidnapping, killing and rape of civilians.²⁸ Firstly, the court ruled that there were no grounds for applying federal law against a foreign corporation. In fact, neither the company nor the major plaintiff was American. Talisman is a Canadian company and the major plaintiff was the Presbyterian Church of Sudan. Secondly, the case was dismissed for lack of admissible evidence that the company had acted with the intention of harming civilians. It was found that the company needed to purposefully violate the law of nations, the court limiting liability for aiding and abetting to circumstances where the company sought to advance the violation. Although the Court of Appeal dismissed the appeal in favour of the company, it affirmed the decision in the pre-eminent case of *Sosa v Alvarez-Machain (Sosa)*.²⁹ Per Dennis Jacobs, Chief Judge:

We hold that under the principles articulated by the United States Supreme Court in *Sosa v Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), the standard for imposing accessorial liability under the *ATS* must be drawn from international law; and that

²² *John Doe v Exxon Mobil Corporation*, 654 F3d 11 (DC Cir, 2011).

²³ *Ibid* 14.

²⁴ *Boimah Flomo v Firestone Natural Rubber*, 643 F s3d 1013 (7th Cir, 2011). Although this case decided in favour of the corporation, Firestone and rejected the appeal.

²⁵ *John Doe v Exxon Mobil Corporation*, 654 F3d 11, 71 (DC Cir, 2011).

²⁶ *Ibid* 17.

²⁷ *The Presbyterian Church of Sudan v Talisman Energy*, 82 F 3d 244 (2nd Cir, 2009).

²⁸ Krista-Ann Staley, *Federal judge allows genocide case to proceed over US, Canadian objections*, JURIST< <http://jurist.org/paperchase/2005/08/federal-judge-allows-genocide-case-to.php>>.

²⁹ *Sosa v Alvarez-Machain*, 542 US 692 (2004).

under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses. Applying that standard, we affirm the district court's grant of summary judgment in favor of Talisman, because plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan.³⁰

In other words, for a tort to be recognised under the *ATS*, it must be an established violation of international law norms. In order to establish corporate liability, it must be proven that the company: (i) provided practical assistance to the principal (for example, the supply of vehicles to the company agent) which has a substantial effect of perpetration of crime and (ii) had the intention or purpose of aiding or facilitating, that is; for aiding and abetting a violation of international law; the *mens rea* is purpose not simply knowledge.³¹ For a claim to come under the jurisdiction of the *ATS*, *Talisman* cemented the criteria needed, applying the *Flores*³² standard that “plaintiffs must (i) be 'aliens,' (ii) claiming damages for a 'tort only,' (iii) resulting from a violation 'of the law of nations' or of 'a treaty of the United States.’”³³ These findings were repeated in the case of *Kiobel*³⁴ in February 2011.

The recent appeal heard in the *Kiobel* case³⁵ added no additional insight to the liability of corporations under the *ATS*. Although the 2011 decision specifically addressed whether the *ATS* applied to corporations, this appeal was rather concerned with the *ATS* extraterritorial application more generally. Some argue that the *Kiobel* case has not limited the potentiality of the *ATS* in its extraterritorial application and may still yield positive results for egregious crimes.³⁶ The court was reluctant to intrude upon territorial sovereignty of another nation, refusing to consider the *ATS* as having extraterritorial reach (that the presumption against extraterritorial application remained intact), thus leaving other cases more relevant to answering the current state of this issue. The opinion of Breyer J, whilst concurring with the court, disagreed that the *ATS* had no extraterritorial application, rather noting that the *ATS* was developed specifically for extraterritorial application. This limited its application in a similar way to other cases concerning its application only to the most morally questionable of international crimes.³⁷ Breyer J noted the importance and pre-eminence of *Sosa* and other cases both before and after which have not discounted the possibility of extraterritorial application of the *ATS* – although *Sosa* may yet leave room for determining which acts are ‘specific, universal and obligatory’ under the *ATS*.³⁸ The position of the earlier court decision, in so far as corporations are concerned, has therefore not been compromised or further articulated with this latest decision.

Overall, *Talisman* and *Kiobel* have proved to be disappointing. In response to the earlier decision in *Kiobel*, *John Doe* stated:

Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct

³⁰ *The Presbyterian Church of Sudan v Talisman Energy*, 82 F 3d 244, 248 (2nd Cir, 2009).

³¹ *Ibid* 41.

³² *Flores v Southern Peru Copper Corporation*, 414 F 3d 233 (2nd Cir, 2003).

³³ *The Presbyterian Church of Sudan v Talisman Energy*, 82 F3d 244, 255 (2nd Cir, 2009).

³⁴ *Kiobel v Royal Dutch Petroleum Co*, 642 F 3d 268 (2nd Cir 2011).

³⁵ *Kiobel v Royal Dutch Petroleum Co*, 569 US 1659 (2013).

³⁶ Sarah Cleveland, ‘After *Kiobel*’ (2014) 12(3) *Journal of International Criminal Justice* 551, 577.

³⁷ *Kiobel v Royal Dutch Petroleum*, 569 US 1659, 1670–1671 (2013).

³⁸ Robert Cryer, ‘Come Together? Civil and Criminal Jurisdiction in *Kiobel* from an *International Law Perspective*’ (2014) 12(3) *Journal of International Criminal Justice* 579, 592.

of their agents in lawsuits brought for "shockingly egregious violations of universally recognized principles of international law." *Zapata v Quinn*, 707 F.2d 691 (2d Cir. 1983). The analysis of the majority in *Kiobel*, 621 F.3d at 130-35, by overlooking the distinction between norms and technical accoutrements in searching for an international law norm of corporate liability in customary international law, misinterpreting *Sosa* in several ways, and selectively ignoring relevant customary international law, is unpersuasive.³⁹

Thus, exempting corporations from liability under the *ATS* was found to be legally incorrect. More importantly, leaving corporations free from liability for any reason seems inherently morally abhorrent. The dissent in the earlier *Kiobel* case by Judge Leval proved quite powerful on this issue, stating:

According to Judge Jacobs, exempting corporations from liability under the law of nations has no serious adverse consequences because: (1) Corporations do not behave badly except in the rarest of instances, amounting to one or two per century; (2) natural persons who do behave badly do not adopt the corporate form; and (3) under our holding in *Talisman*, liability may be imposed only in cases of the most serious abuses...I have no idea what is the basis of the Chief Judge's confidence that corporations do not behave badly, or that business enterprises based on the abuse of human rights do not utilize the business advantages provided by corporate and other juridical forms. I do not share Judge Jacob's confidence that, if corporations other than I.G. Farben, the Peruvian Amazon Company, and the Abir Congo had violated human rights during the last two centuries, they would have seen to it that the world be informed of their abuses. While I do not purport to have any better information on the subject than the Chief Judge, it is my impression that those who conduct heinous and illegal businesses, such as slave trading, do not publicize that fact. Indeed, one of the many reasons why they might wish to conduct such businesses behind the veil of a juridical entity is to secure greater anonymity.⁴⁰

Indeed Judge Leval's dissent later had concurrence and was applied in *Sarei*.⁴¹ It was noted:

Rio Tinto urges us to hold that the *ATS* bars corporate liability. This is a view that is to some extent supported by the recent Second Circuit majority opinion in *Kiobel v Royal Dutch Petroleum Co.*, holding that customary international law as a whole "has not to date recognized liability for corporations that violate its norms." 621 F.3d 111, 125 (2d Cir. 2010). We, however, conclude the sounder view is that expressed in Judge Leval's concurrence. *Id.* at 153 (Leval, J., concurring) ([HN12] "No principle of domestic or international law supports the majority's conclusion that the norms enforceable through the *ATS*--such as the prohibition by international law of genocide, slavery, war crimes, piracy, etc.--apply only to natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned through such acts.")⁴²

Sarei effectively summarized the grants of jurisdiction under the *ATS*. The *ATS* essentially grants extraterritorial jurisdiction to US courts over a certain small number of violations of international law norms, genocide being one. As the norms being applied though are international not domestic norms (*jus cogens* norms), it could also be a form of universal jurisdiction, (although such norms satisfy US subject matter jurisdiction through incorporation into federal US law). *Sosa* notes that "[i]nternationally accepted norms must be specific, universal, and obligatory".⁴³ There can be no such thing as corporate immunity from such violations because there is no allowable derogation from *jus cogens* norms.

³⁹ *John Doe v Exxon Mobil Corporation*, 654 F.3d 11, 57 (DC Cir, 2011).

⁴⁰ *Kiobel v Royal Dutch Petroleum Co.*, 642 F.3d 268, 274-5 (2nd Cir 2011).

⁴¹ *Alexis Holyweek Sarei v Rio Tinto*, No. 02-56256 19331, 19339 (9th Circuit, 2011).

⁴² *Ibid* 19339.

⁴³ *Ibid* 19341.

...there is no bar to the ATS's applicability to foreign conduct because the Supreme Court in *Sosa* did not disapprove these seminal decisions and Congress, in enacting the Torture Victim Protection Act, implicitly ratified such law suits...⁴⁴

Sarei stated the *ATS* granted jurisdiction over any amorphous entity who committed violations of *jus cogens* norms such as genocide, including corporations.⁴⁵ On the other hand, *Sarei* stated that cases raising political questions were non-justiciable, which may explain the reluctance of the court in *Talisman* to consider claims that asserted violations of law through actions that accompany natural resource development generally. In reaffirming the determination of the district court, *Talisman* found:

The activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry.⁴⁶

This could effectively mean that natural resource development, without consultation, always takes precedent over human rights and community preferences. Less disastrously, perhaps this is a statement about refraining from judicial activism.

The one major lack of consideration in the *Talisman* case - which is approached from a business as usual perspective in its strict judicial interpretation of the relevant law - is the proclivity which the presence of extractive players and their domination over land and natural resource wealth has towards exacerbating local tensions and in incentivising human rights abuses. The argument advanced by plaintiffs that forced displacement was known to *Talisman Energy* was disregarded because a government has the right to regulate use of land and resources, implying that forced displacement is not a violation of international law. The court stated:

Resource extraction in particular is by nature land-intensive: land is needed for exploration and engineering, equipment, rigs or mines, offices and dormitories in remote areas, transportation infrastructure, and so on. Under the best circumstances, these facilities might require relocation from a development area. But GNPOC was not operating in the best of circumstances. Sudan's oil was located in an area heavily contested in a civil war, in a region of the country that had suffered through four decades of violence before *Talisman* arrived. The oil facilities came under frequent rebel attack and oil workers were killed during the relevant time. Safe operation of the oil facilities therefore required tightened security; and displacing civilians from an "area within the security ring road" was not in itself unlawful.⁴⁷

B *Extraterritorial jurisdiction where there is a territorial nexus*

Contrariwise, a succinct statement of the reasons for finding jurisdiction over activities by corporations abroad was made in *Bauman*:⁴⁸

[P]olicy is providing a forum to redress violations of international law by defendants who have enough connections with the United States to be brought to trial on our shores, even though the injury is to aliens and occurs outside our borders -- "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filartiga v Pena-Irala*, 630 F 2d

⁴⁴ Ibid 19335.

⁴⁵ Ibid 19362–5.

⁴⁶ *The Presbyterian Church of Sudan v Talisman Energy*, 82 F 3d 244, 260 (2nd Cir, 2009).

⁴⁷ Ibid 263.

⁴⁸ *Barbara Bauman v Daimler Chrysler Corporation*, 644 F 3d 909 (9th Cir, 2011).

876, 890 (2d Cir. 1980). American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses.⁴⁹

These cases argue about application of universal jurisdiction by third courts. It is legitimate that such jurisdiction should exist because a government should be responsible for ensuring the moral conduct of a national company. Typically:

Home governments have failed to show moral leadership in holding to account companies based in their countries that engage in trade which benefits the warring parties and leads to human rights abuses. They have fallen back on voluntary codes of conduct and other non-binding guidelines, resisting calls for stronger action to control the corporate sector.⁵⁰

In questioning the appropriateness of the forum, *Bauman*⁵¹ found that a court may find jurisdiction over a foreign parent company if a subsidiary has continual operations in the forum, that is, there must be a real connection to the US through an agent. However, the bar to showing jurisdictional appropriateness is low.⁵² The importance of a territorial nexus in finding corporate liability also perhaps explains the outcome in *Talisman*. As noted, *Talisman* was actually a Canadian company.

Despite *Talisman*'s eventual withdrawal from Sudan, not completed until 2002, it was accused of being complicit in forcible displacement and human rights abuses in the south western part of the country.⁵³ Despite the large body of evidence supporting the accusation, Canada failed to pursue serious legal action of *Talisman*.

C *Direct Corporate Liability: the lead of the United Kingdom*

More generally, the ability of courts to prosecute companies for acts done in foreign countries, under its own national laws according to national standards of the prosecuting country, may be broadly termed direct corporate liability (DCL). DCL is used to describe the liability of a company, attributable independent of any vicarious liability owing to the acts of its agents. In the author's opinion, aspects of corporate management such as due diligence and sufficiency of knowledge of a business environment may contribute to a company either performing or evading its corporate responsibilities and hence a finding of direct corporate liability.

Jurisdictional rights may only be possible when the company in question has a territorial link to the prosecuting country. The crime of piracy, to which the crime of plunder may be likened, is 'predicated on the presence of the accused on the territory of the forum state. States may try pirates only after apprehending them, hence only when the pirates are on their

⁴⁹ Ibid 927.

⁵⁰ Global Witness, 'Faced With a Gun, What Can You Do? War and the Militarisation of Mining in Eastern Congo' (Report, Global Witness, July 2009) 8.

⁵¹ *Barbara Bauman v Daimler Chrysler Corporation*, 644 F3d 909, 911 (9th Cir, 2011). Reversing the decision of the District Court, the 9th Circuit found: '[T]hat, in light of defendant's pervasive contacts with the forum state through the domestic subsidiary, including the subsidiary's extensive business operations, the forum state's interest in adjudicating important questions of human rights, the court's substantial doubt as to the adequacy of Argentina as an alternative forum, defendant failed to meet its burden of presenting a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice.' *Barbara Bauman v Daimler Chrysler Corporation*, 644 F3d 909, 911 (9th Cir, 2011).

⁵² Ibid.

⁵³ Human Rights Watch, 'Sudan, Oil, and Human Rights' (Report, Human Rights Watch, 2003) 65.

territory or at any rate under their physical control'.⁵⁴ Likewise with DCL, a territorial nexus is supplied because the company is registered and/or operating in the prosecuting country.

In the United Kingdom (UK), a notable precedent for third court jurisdiction is *Katanga Mining*.⁵⁵ In this case an English court took over jurisdiction from the DRC even though the Tribunal de Grande Instance of Kolwezi in the province of Katanga in the DRC, was to be given exclusive jurisdiction under the contract. The contractual provisions regarding elected jurisdiction were overridden because the selected jurisdiction was found not to be an appropriate forum, unable even to guarantee a minimum level of safety to its citizens.⁵⁶ The justification for the UK court finding jurisdiction was here effectively determined by two principles: (i) the ability and willingness of the home (domestic) court to act, and act in a way such that justice will be done, that is, that the home court is an available forum; and (ii) the existence of a real connection with the jurisdiction of the third court, that cannot be impeded or invalidated by a finding of more suitable jurisdiction in a country able and willing to act.⁵⁷

Third court jurisdiction therefore could be said to rest on the satisfaction of these two principles. In *Katanga Mining*, Tomlinson J was not satisfied that the DRC was an appropriate forum⁵⁸ because the state of affairs within the country was such that there was no demonstrable ability or will to restore the rule of law.⁵⁹ Evidence of a lack of state infrastructure, and functioning judicial system was found to compromise the interests of the parties and the ends of justice being met.⁶⁰ Furthermore, a trial in England was likely to be overwhelmingly more convenient than a trial in the DRC, where a party reasonably felt inhibited about traveling to the DRC and where there was a real risk of attempted interference with the integrity of the trial.⁶¹

The argument for appropriate forum was also considered in the prosecution of cartel conduct against subsidiaries in England in the case of *Provimi Limited v Aventis Animal Nutrition SA (Provimi)*.⁶² Provimi had purchased vitamins from a global cartel. The company's English and German subsidiaries had suffered loss and the company wanted to pursue litigation in England alone rather than in multiple jurisdictions. It thus sued a subsidiary of the cartel company, located in England. The High Court of Justice of England and Wales found that all entities within a corporate structure, including subsidiaries, that behave as one economic unit, with the subsidiary undertaking or implementing measures adopted by the parent, in this case agreeing to implement a cartel.⁶³ The court claimed wide jurisdiction to hear claims for damages for competition law violations even by non-English parties against an English subsidiary, where there was no contractual relationship between the purchasing company and the English subsidiary, because of the tortious nature of the claim.⁶⁴ The jurisdictions of the

⁵⁴ Antonio Cassese, 'When may senior state officials be tried for international crimes? Some comments on the Congo v. Belgium case' (2002) 13(4) *European Journal of International Law* 853, 857.

⁵⁵ *Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679 (Comm).

⁵⁶ Ibid [33] (Tomlinson J).

⁵⁷ See the discussion about Canadian jurisdiction, ibid [21–23] (Tomlinson J).

⁵⁸ Ibid [2] (Tomlinson J).

⁵⁹ Ibid [33] (Tomlinson J).

⁶⁰ Ibid [2] (Tomlinson J).

⁶¹ *Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679 (Comm) [34] (Tomlinson J).

⁶² *Provimi Limited v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm). The scope of application of this case has been challenged in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864, though this case found *Provimi* not directly applicable, see [47].

⁶³ *Provimi Limited v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm), [27] (Aikens J).

⁶⁴ Ibid [42] (Aikens J).

contract (Switzerland, France and Germany) were found to be insufficiently wide to hear the cause of complaint.⁶⁵ Accordingly, foreign companies can bring claims of loss suffered by cartel conduct against a cartel's subsidiaries located in England.

This case could be considered similar, though not strictly the same, to that required for extraterritorial jurisdiction, which grants territorial jurisdiction over a foreigner accused of crimes in another country where the judicial authority has the 'accused' (or an affiliate of) within their territorial limits. The distinction is between the territoriality over a person accused in one instance and a subsidiary accused – for example, where subsidiary and parent operate as one entity – in the other. This is different to universal jurisdiction in that only the companies with such a territorial link to the prosecuting country can be prosecuted. Under US law, foreign cartellists can be directly sued with minimum territorial nexus, utilizing universal jurisdiction under the *ATS*. Universal jurisdiction ought to be used by third courts applying international standards, as has been done under the *ATS*, where no company-country nexus is found to the prosecuting country or where the prosecuting country standards are not severe enough to curtail illegitimate operations. Under the increasing allowances made for universal jurisdiction, national courts may be able to try breaches of universal values, where there is no connection either of a personal nor territorial nature.⁶⁶

D *Implementation of ICC Crimes: Australia takes the lead*

This form of corporate accountability may also be fostered by national implementation of universal ICC crimes without any bar to pursuing corporate entities as well as individuals. The Australian implementation of ICC crimes, within the *Criminal Code Act 1995* (Cth) (*Criminal Code*), eschews any distinction between natural and legal persons so that it is likely that corporate entities will also come under jurisdiction of the courts for extraterritorial corporate crime in the same way individuals are accountable.⁶⁷ Division 268 of the *Criminal Code* could be considered as giving to Australian courts universal jurisdiction over extraterritorial corporate criminal conduct amounting to genocide, crimes against humanity or war crimes as defined under the *Rome Statute*.⁶⁸ Even though the *Rome Statute* crimes do not apply internationally to corporations (which seems remiss of international law), Australia has the possibility of extending jurisdiction to corporations because the *Criminal Code* equally applies to legal as well as natural persons.⁶⁹ Other jurisdictions have similar universal jurisdiction applicable to legal, as well as natural, persons.⁷⁰ In future, the application of universal crimes to corporate criminal conduct by various nations may become part of international custom. What may provide a short term remedy, though perhaps drastic, is to make plunder, well-defined, a crime against humanity to undeniably bring it within the purview of universal jurisdiction. This could be aided by the international criminalization of plunder through an international treaty.

IV INTERNATIONAL COURTS AND THE INTERNATIONAL CRIME OF PLUNDER

⁶⁵ Ibid [128] (Aikens J).

⁶⁶ Cassese, above n 52, 859.

⁶⁷ See generally Joanna Kyriakakis, 'Australian prosecution of corporations for international crimes: the potential of the Commonwealth Criminal Code' (2007) 5 (4) *Journal of International Criminal Justice* 809.

⁶⁸ Ibid 818–9.

⁶⁹ Ibid 815–8.

⁷⁰ Ibid 819.

The development of the international crime of plunder may prove a useful aid to expanding the jurisdiction of third and international courts and tribunals. Clearly needed would be a distinction between licit and illicit mineral extraction, perhaps dependent on defrauding peoples of a country of the freedom to dispose of their mineral wealth as incorporated in the first article of the *International Covenant on Civil and Political Rights*. Security Council resolution 1457 both condemned the plunder in the DRC, linking it to the conflict there and effectively defined plunder as the illegal exploitation of natural resources. It added that mineral 'exploitation should occur transparently, legally and on a fair commercial basis, to benefit the country and its people.'⁷¹ Where this is not the case, prosecution should occur. The Security Council demanded States investigate companies found in potential breach though there has been a general lack of political will to do so.⁷²

However, the International Court of Justice in 2005 ruled that Uganda was guilty of plundering DRC's gold, diamonds and timber and ordered reparations. In the *Case Concerning Armed Activities on the Territory of the Congo (Case Against Uganda)*,⁷³ (the DRC contended that the plunder of its resources constituted a violation of its sovereignty and territorial integrity over its natural resources,⁷⁴ citing various resolutions including *General Assembly resolution Permanent Sovereignty over Natural Resources*.⁷⁵ Whilst the court did not find a Ugandan government agenda to exploit,⁷⁶ finding that there was nothing in the General Assembly resolutions which made it applicable to the current situation, where a member of the army looted during military occupation,⁷⁷ the court did find enough evidence to conclude that plunder by the Ugandan army took place.⁷⁸ The court found that acts of Ugandan armed force members were attributable to Uganda⁷⁹ and as such 'Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources.'⁸⁰ Uganda was responsible for the conduct of its army as a whole and for individual members of the army, irrelevant of whether these individuals acted ultra vires.⁸¹

Furthermore, Uganda was responsible for the actions of their armed forces whether in territory under occupation or not.⁸² The court found that Uganda was responsible for looting, plunder and exploitation committed by the Ugandan army in the DRC and for all actions of plunder committed in Ituri from August 1998 to 2 June 2003 as an occupying power in that region.⁸³ The court relied heavily on findings of the Porter Commission which recognized looting since before 1998⁸⁴ by 'senior army officers working on their own and through

⁷¹ Human Rights Watch, 'The Curse of Gold: Democratic Republic of Congo' (Report, Human Rights Watch, 2005) 120.

⁷² Ibid 120-2.

⁷³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgement)* [2005] ICJ Rep 168.

⁷⁴ Ibid 226.

⁷⁵ *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), 17 UN GAOR Supp No 17 at 15, UN Doc A/5217 (14 December 1962).

⁷⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgement)* [2005] ICJ Rep 168 242.

⁷⁷ Ibid 244.

⁷⁸ Ibid 242.

⁷⁹ Ibid 245.

⁸⁰ Ibid 246.

⁸¹ Ibid 243.

⁸² Ibid 245.

⁸³ Ibid 250.

⁸⁴ Ibid 241.

contacts inside the DRC,⁸⁵ by individual soldier's and private individuals resident in Uganda,⁸⁶ including omissions to act in the particular example of General Kazini who was in charge of the occupation.. Uganda's obligation to prevent plunder was thus extended to the conduct of private persons, in areas where it was an occupying power. Uganda was found to be an occupying power in Ituri⁸⁷ and was therefore culpable for the pillage carried out by businesses and businessmen in that area.⁸⁸ Under Article 43 of the *Hague Regulations of 1907*, Uganda was under an obligation to restore law and order and respect the laws in force in the DRC including international human rights and humanitarian standards which includes protecting the inhabitants against acts of violence by a third party. Contrariwise, Uganda was not found responsible for looting done by rebels as they were not found to be in effective control of these groups and therefore not responsible for their actions.⁸⁹

Finding furthermore that Uganda had violated the principles of non-interference in the sovereignty of another nation,⁹⁰ the decision not only points to a precedent for the international crime of plunder but also re-establishes the importance of non-interference, allowing as part of the concept of territorial wholeness, compensation for the removal of property. The court made a definitive statement that acts of pillage are prohibited in article 47 of the *Hague Regulations of 1907* and article 33 of the *Fourth Geneva Convention 1949*.⁹¹ It also noted that the African Charter applied, particularly referencing article 21 which entitles a dispossessed people the right of reclamation and compensation for natural resources taken.⁹² The court considered it a well-established international legal principle that a culpable state should make full reparation for the injury caused.⁹³ Friendly relations at one time existent between two nations did not prevent one raising a pre-existing claim against the other.⁹⁴ Any waiver of claims or rights by the party injured could not be implied on the basis of conduct alone but rather must be unequivocal.⁹⁵

International Court of Justice (ICJ) jurisdiction relies on the consent of the governments in disputes. In this sense it is surprising yet positive that Uganda would consent to ICJ jurisdiction. Nevertheless it has not implemented any of the recommendations to compensate the DRC. Contrarily, Rwanda, also allegedly heavily involved in the illicit extraction of natural resources from the DRC, did not consent to the ICJs jurisdiction when there was a case submitted against it by the DRC.⁹⁶ Thus, while the DRC instigated similar proceedings against Rwanda the court did not find jurisdiction to adjudge.

It appears, therefore, that there is some development in international jurisprudence of an international crime of plunder. However, the clarity of its definition and its international acceptance is questionable.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid 178.

⁸⁸ Ibid 248.

⁸⁹ Ibid 247.

⁹⁰ Jeannie Shawl, *ICJ rules Uganda violated sovereignty, rights in Congo* (Press Release 19 December 2005) <<http://jurist.org/paperchase/2005/12/icj-rules-uganda-violated-sovereignty.php>>.

⁹¹ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgement)* [2005] ICJ Rep 168, 245.

⁹² Ibid.

⁹³ Ibid 259.

⁹⁴ Ibid 294.

⁹⁵ Ibid 293.

⁹⁶ Global witness, above n 12, 24.

V EXTRATERRITORIAL JURISDICTION FOR FAILURE TO EXERCISE DUE DILIGENCE: OPERATIONS IN CONFLICT ZONES

Demands have increased for corporations to carry out significant due diligence in order to demonstrate and ensure that their sourcing practices do not contribute to armed violence and human rights abuses. In carrying out due diligence, companies can help to create a legitimate mining sector that increases rather than decreases the security of the people living locally. Companies have a responsibility, both moral and socio-economic, that they choose their source countries wisely. Where they choose to source from countries such as the DRC, they must be held to a higher standard of corporate awareness.⁹⁷

Corporate complicity in plunder in central Africa has been well documented, most notably by Global Witness and Human Rights Watch,⁹⁸ and most specifically in relation to the DRC. In the DRC, ‘foreign companies...are perceived as playing a predatory role and ‘stealing’ the country’s natural resources’⁹⁹ and ‘...75 per cent of mining resources in the DRC are owned by foreign companies...The profit is only going to the companies, not the Congolese [sic] people’.¹⁰⁰ The associated perpetuation of human rights abuses goes largely unreported in international press.¹⁰¹

In June 2000, the U.N. Security Council set up an independent Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo to examine links between the trade in minerals and conflict in the DRC. The group published a report in October 2002, listing 85 companies in violation of business norms under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, and 29 companies and 54 individuals against whom it recommended travel and financial restrictions.¹⁰² Its final report in October 2003 recommended that 33 companies be investigated.¹⁰³ Although the conclusions of the panel stressed that conflict will continue to be fueled by the mineral trade unless national and international action was taken, the Security Council terminated the group’s mandate and no serious investigation into corporate conduct was initially forthcoming.¹⁰⁴ In time, Belgium and the UK launched investigations into possible breaches of international business norms by corporations registered in their respective territories. The clarity needed around multinational corporations (MNCs)’ playing a direct role in sourcing from the DRC has also been met by a

⁹⁷ Africa Confidential, ‘Congo-Kinshasa: 8 ways to clean up minerals’ (2010) 51 (16) *Africa Confidential*.

⁹⁸ See for example: Tim Raemaekers, ‘Network War: An Introduction to Congo’s Privatised War Economy’ (Report, International Peace Information Service, October 2002) 4, 9; Tim Raemaekers and Jeroen Cuvelier, ‘Contributing to the War Economy in the DRC; European Companies and the Coltan Trade’ (Report, International Peace Information Service, January 2002) 4; Raf Custers, Jeroen Cuvelier and Didier Verbruggen, ‘Culprits or scapegoats? Revisiting the role of Belgian mineral traders in eastern DRC’ (Report, International Peace Information Service, May 2009) 3; Human Rights Watch, ‘The Curse of Gold: Democratic Republic of Congo’ (Report, Human Rights Watch, 2005); Human Rights Watch, ‘Sudan, Oil, and Human Rights’ (Report, Human Rights Watch, 2003).

⁹⁹ Global Witness, ‘Digging in Corruption: Fraud, abuse and exploitation in Katanga’s copper and cobalt mines’ (Report, Global Witness, July 2006) 34.

¹⁰⁰ Denis Tougas, staff member of l’Entraide Missionnaire, cited in Gwalgen Geordie Dent (May 26 2007) *Mining the Congo: Canadian mining companies in the DRC* (26 May 2007) The Dominion <<http://www.dominionpaper.ca/articles/1195>>.

¹⁰¹ Anneke Van Woudenberg ‘A New Era for Congo?’ (Report, Human Rights Watch, October 2006) 7.

¹⁰² Human Rights Watch, above n 71, 119.

¹⁰³ Van Woudenberg, above n 101, 5.

¹⁰⁴ Ibid.

new law in the US, the *Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)*,¹⁰⁵ passed by the United States Congress which makes it compulsory for US registered companies sourcing from the DRC to state the measures they have taken to exclude conflict minerals from their supply chains.

Section 1502 of the *Dodd-Frank Act* sets out important rules. This includes that US electronic equipment producers are required to carry out due diligence on their source material to ensure their products do not contain DRC conflict minerals.¹⁰⁶ Within 270 days, the Securities and Exchange Commission must publish regulations that require companies who report to it to disclose each fiscal year whether they source any of four listed conflict minerals (coltan, cassiterite, wolframite, gold or other mineral determined to be financing conflict) from the DRC or an adjoining country and, if so, what they have done to check that their source and chain are conflict-free.¹⁰⁷ The Secretary of State must publish, every six months, an updated map of which armed groups control which mines in eastern Congo.¹⁰⁸

Some argue that the *Dodd-Frank Act* is impractical in seeking to track the origins of all metal and will lead to an effective embargo on DRC minerals, leading to job loss and adding to insecurity.¹⁰⁹ Nevertheless, the message sent is strong and, ultimately, if there is nothing to gain from controlling mine sites and illegitimately trading in their minerals, perhaps a new system of accountable mineral exploration can emerge. Even an effective embargo on the DRC serves the people there no less than the current system - where it has been reported they are exploited and abused.

NGO Global Witness has been a staunch advocate of implementing greater obligations on companies to ensure that their suppliers do not source minerals from conflict zones, particularly the DRC. They advocate holistic supply-chain due diligence, so that the company is aware of the exact origin of the mineral they are purchasing, and penalties placed on those sourcing from conflict zones.¹¹⁰ Other various schemes have been discussed for the DRC including trading centers, geological fingerprinting, the Tin Supply Chain Initiative and Certified Trading Chains which encourage buyers to use independent auditors.¹¹¹

Increasingly, governments are involving themselves more in the conduct of business enterprises operating overseas.¹¹² In 2008, the British government found DAS Air, a UK

¹⁰⁵ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub.L.111-203.

¹⁰⁶ Ibid 1502; See also Andrea Bottorff, *Rights group sues UK government over failure to report DRC conflict minerals trade* (27 July 2010) JURIST <<http://jurist.org/paperchase/2010/07/rights-group-sues-uk-government-over-failure-to-report-drc-conflict-minerals-trade.php>>.

¹⁰⁷ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub.L.111-203, Sec 1502, (a)(1)(A), (e) 4.

¹⁰⁸ Africa Confidential, above n 95.

¹⁰⁹ Doug Bannerman, 'One Step Forward for Conflict Minerals, but What Impact on Congo?' on Doug Bannerman, *GreenBiz* (10 August 2010) <<http://www.greenbiz.com/blog/2010/08/10/one-step-forward-conflict-minerals-what-impact-congo>>.

¹¹⁰ Global Witness, above n 48.

¹¹¹ An extensive list of corporate compliance programs are outlined in Africa Confidential, above n 96.

¹¹² The Committee on Economic, Social and Cultural Rights held that states should take steps to prevent violations of the ICESCR rights by their citizens and companies of individuals and communities elsewhere, see Michael Dennis and David Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 (3) *American Journal of International Law*, 462, 499. See also the judgment of the African Commission on Human and Peoples' Rights in Decision Regarding Communication 155/96, (*Social and Economic Right Action Center/ Center for Economic and Social*

based cargo company, in breach of the OECD guidelines for transporting conflict minerals from eastern DRC. The case set a precedent which continues to be pursued, for holding companies responsible for operating blindly in areas of conflict where their actions lead to human rights abuses.¹¹³

A growing number of investigations may hint at such a jurisdiction being more widely accepted by third courts in other countries in time to come. In June 2010, Sweden's prosecutor began an investigation into the role of Lundin Petroleum in the unrest in Sudan, in response to a report released by the European Coalition on Oil in Sudan which stated that civilians had been forcibly displaced so Lundin could have access to land for oil drilling.¹¹⁴ Although not directly responsible it was alleged that by carrying out activity in an unstable area, the company contributed to the inhumane treatment of civilians.¹¹⁵ In yet another example, the Australian Federal Police began investigating whether there was sufficient evidence of Anvil's complicity in crimes against humanity in the Kilwa incident under the *Criminal Code*.¹¹⁶ That investigation ceased when the court in the DRC acquitted the Anvil employees.¹¹⁷ If the Australian investigation had gone ahead it could have proved important for defining the limits of corporate liability for extraterritorial conduct.

The Canadian judiciary also examined the Kilwa case in an action brought by the Canadian Association Against Impunity against Anvil.¹¹⁸ In April 2011, the Superior Court of Quebec, Canada, found it had jurisdiction to hear a case against Anvil brought by the Canadian Association Against Impunity as a class action on behalf the collective interests of the Congolese survivors of the Kilwa massacre for human rights violations in the DRC.¹¹⁹ The court found that should jurisdiction be denied, the victims would have no other forum for redress having already been denied justice in the two more appropriate forums – the DRC and Australia.¹²⁰ Unfortunately, this decision was later overturned by the Court of Appeal.¹²¹

Rights v Nigeria), where the Commission concluded that under the African Charter, the Nigerian government had a duty to monitor and control the activities of multinational corporations: *Social and Economic Right Action Center/ Center for Economic and Social Rights v Nigeria (Communication)* (African Commission, Case No ACHPR/COMM/A044/1, 27 May 2002).

¹¹³ Larry Catá Backer, 'Rights and accountability in development (RAID) v Das Air and Global Witness v Afrimex: Small Steps towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations' 10 *Melbourne Journal of International Law* 258. See also Rights and Accountability in Development (RAID) (2008, July 21) 'Government Condemns British Aviation Company for Fueling Congo's War' (Oxford) <www.oecd.org/investment/mne/43750985.pdf>.

¹¹⁴ Hillary Stemple, *Sweden prosecutor to probe possible oil company complicity in Sudan war crimes* (21 June 2010) JURIST <<http://jurist.org/paperchase/2010/06/sweden-prosecutor-to-probe-possible-oil-company-complicity-in-sudan-war-crimes.php>>.

¹¹⁵ Ibid.

¹¹⁶ Jonathan Rhein, *Congo military court seeks war crimes trial for foreigners involved in Kilwa incident* (16 October 2006) JURIST <<http://jurist.org/paperchase/2006/10/congo-military-court-seeks-war-crimes.php>>.

¹¹⁷ Business & Human Rights Resource Centre, *Anvil Mining lawsuit (re Dem. Rep. of Congo)* (30 June 2014) Business & Human Rights Resource Centre <<http://business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo?page=1>>.

¹¹⁸ *Association canadienne contre l'impunité v Anvil Mining Ltd.* (2011) QCCS 1966.

¹¹⁹ Ibid.

¹²⁰ Ibid [38–39]; see also International Crimes Database, *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd.* (2013) International Crimes Database <<http://www.internationalcrimesdatabase.org/Case/210/CAAI-v-Anvil-Mining/>>.

¹²¹ Global Witness, 'No Justice in Canada for Congolese Massacre Victims as Canada's Supreme Court Dismisses Leave to Appeal in Case Against Anvil Mining', (Press Release, 6 November 2012) <<http://www.globalwitness.org/archive/no-justice-canada-congolese-massacre-victims-canadas-supreme-court-dismisses-leave-appeal/>>; Business & Human Rights Resource Centre, *Anvil Mining lawsuit (re*

Governments of countries where international mineral traders are established (such as the US and Belgium) can also play an advisory and sensitizing role vis-à-vis extractive companies liabilities under international and national law, particularly when operating in a conflict zone.¹²² This may also enhance such governments' credibility as peace-brokers in the region and adjust the persistent perception among many local stakeholders that foreign business interests are more valuable than peace.¹²³ The State should act as bulwark against excessive corporate power and countries should be held accountable for failure to hold their corporations to account.

VI THE ROLE OF NATIONAL CODES OF CONDUCT: STATE AS ENFORCER

There is a growing NGO movement calling for western governments to live up to their dedication to alleviate poverty by investigating on their own volition the mining contracts over which they have jurisdiction.¹²⁴ Global Witness sued the UK government in 2010, claiming it turned a blind eye to British firms who traded in Congolese conflict minerals. It claimed that the government was in violation of UN resolutions 1857 and 1896 which required countries to report companies, involved in the DRC mineral trade and believed responsible for the violence there, for sanctions.¹²⁵

In February 2007, Global Witness made a specific complaint to the UK National Contact Point (NCP), established to examine breaches of the OECD Guidelines,¹²⁶ against Afrimex, a company who has traded in minerals (coltan and cassiterite) from the DRC since 1996. It is alleged the 'tax' payments made by the company to an armed group in control of mines in the Kivus (eastern DRC), the Rassemblement Congolais pour la Démocratie-Goma, contributed directly to human rights abuses, including forced labour and that the company should have known what its tax payments were being used for.¹²⁷ The complaint provided a platform for the UK government to demonstrate its seriousness in holding national companies to account.

Dem. Rep. of Congo) (30 June 2014) Business & Human Rights Resource Centre <<http://business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo?page=1>>.

¹²² Raf Custers, Jeroen Cuvelier and Didier Verbruggen, 'Culprits or scapegoats? Revisiting the role of Belgian mineral traders in eastern DRC' (Report, International Peace Information Service, May 2009) 3.

¹²³ Ibid.

¹²⁴ Global Witness, 'NGOs fear that DRC mining contract review process has been hijacked', (Press Release, 4 February 2008) <<https://www.globalwitness.org/archive/ngos-fear-drc-mining-contract-review-process-has-been-hijacked/>>.

¹²⁵ Andrea Bottorff, *Rights group sues UK government over failure to report DRC conflict minerals trade* (27 July 2010) JURIST <<http://jurist.org/paperchase/2010/07/rights-group-sues-uk-government-over-failure-to-report-drc-conflict-minerals-trade.php>>; Global Witness, 'Global Witness takes UK government to court for failing to list UK companies trading Congo conflict minerals for UN sanctions', (Press Release, 26 July 2010) <<https://www.globalwitness.org/archive/global-witness-takes-uk-government-court-failing-list-uk-companies-trading-congo-conflict/>>.

¹²⁶ The OECD Guidelines for monitoring corporate behavior in conflict zones is adopted by governments in all thirty OECD member countries and by eight non-members. Whilst the guidelines are voluntary and not binding on companies, it is a government-supported mechanism and the states parties are required to implement the guidelines through National Contact Points (NCPs) which are able to examine specific instances of company misconduct.

¹²⁷ Global Witness, 'Afrimex (UK) Democratic Republic of Congo: Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises' (Report, Global Witness, 20 February 2007); Global Witness, 'Global Witness calls upon the UK Government to hold British company Afrimex to account for fuelling conflict in the Democratic Republic of Congo', (Press Release, 21 February 2007) <<https://www.globalwitness.org/archive/global-witness-calls-upon-uk-government-hold-british-company-afrimex-account-fuelling/>>.

The NCP found the company guilty of breaching the OECD Guidelines by purchasing minerals from a conflict zone in the DRC; carrying out insufficient due diligence on its supply chain; and failing to exert correct influence on the practice of its suppliers, who had made tax payments to the rebel group, to ensure the business respected human rights and did not contribute to human rights abuses.¹²⁸

As a result of this, a precedent is on the way to being established that companies can no longer operate in a business as usual approach where they are likely, through their operations, to influence the continuation and proliferation of war. The outcome of this investigation, that knowledge is a sufficient criterion, is distinctive to the judicial reasoning in the *Talisman* case, where that US court held that knowledge alone was not sufficient; there had to be the satisfaction of purpose also, that is, that the conduct in question had to support the criminal purpose, in this case to support the abuse of human rights.¹²⁹ In this the UK appears more progressive and liberal in its finding of corporate culpability.

Many companies now impose their own voluntary codes of conduct under corporate social responsibility programs, yet these programs have questionable positive impact.¹³⁰ This is obvious when one considers that business is guided by profit which means corporate social responsibility becomes a saleable marketing tool rather than one encouraging or denoting 'moral responsibility.'¹³¹ Corporate networks operate beyond the national realm and can choose its place of regulation.¹³² Yet if multinationals in the new order have the power, monetarily, politically and in terms of their ability to organize society (for example through means such as offering employment) as the old order States and Empires, then the global population ought to be demanding that these new powers take on responsibilities proportionate with this power.¹³³ Unless corporate accountability is aided by national legislation on due diligence standards, the legal function and importance of international corporate instruments¹³⁴ is unclear, other than an attempt at appeasing civilian accountability and transparency requirements.

Where international instruments such as the OECD Guidelines hold companies accountable to supranational law¹³⁵ then perhaps altering state accountability to the multinational enterprise is not so negative. Backer notes that the OECD Guidelines aid in providing a

¹²⁸ National Contact Points, 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd', (Report, National Contact Points, 28 August 2008) 13; Global Witness, 'UK company Afrimex broke international guidelines, says British government' (Press Release, 28 August 2008) < <https://www.globalwitness.org/archive/uk-company-afrimex-broke-international-guidelines-says-british-government/>>. See also Global Witness, 'Afrimex (UK) Democratic Republic of Congo: Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises' (Report, Global Witness, 20 February 2007).

¹²⁹ *The Presbyterian Church of Sudan v Talisman Energy*, 82 F 3d 244, 259–61 (2nd Cir, 2009).

¹³⁰ Jędrzej G. Frynas, 'Corporate Social Responsibility and International Development: Critical Assessment' (2008) 16 (4) *Corporate Governance: An International Review* 274.

¹³¹ Paul Kapelus, 'Mining, Corporate Social Responsibility and the "Community": The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi' (2002) 39 *Journal of Business Ethics* 275,281.

¹³² Larry Catá Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order' (2011) 18 *Indiana Journal of Global Legal Studies* 751, 763–4.

¹³³ *Ibid* 777.

¹³⁴ For example: OECD Guidelines for Multinational Enterprises; U.N. Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights; Extractive Industries Transparency Initiative; the Natural Resource Charter; and African Charter.

¹³⁵ See especially Backer, above n 132, 773 and 779.

supranational system for corporate regulation,¹³⁶ however, regulation is not the same as accountability. Where Backer argues that multinationals are becoming new self-regulating autonomous systems of transnational governance,¹³⁷ this does not denote accountability of those entities. Corporate social responsibility could be said to be a product of consumer and shareholder interest and/or media pressure; this is the collective interest which is the basis of power for corporations. Governments and other public entities have (theoretically at least) social accountability as part of their make-up, that is, part of their continued legitimate existence.

This situation is complicated in the case of international companies who, as Morse points out ‘are often urged to act in the national interest as if it and the private interest were closely similar’.¹³⁸ Even where a corporation is compelled to act in a *national interest*, what premise is there that such a company ought to act in the interest of the country hosting its operations, for example in the case of an international miner? Morse asks: ‘But why is it assumed that an impersonal corporate personality should be the agent of the national interest of the investor country and not of the host country?’¹³⁹ Morse’s answer is that the investor country lies not in a ‘higher moral claim to the company’s loyalty, but in its stronger political claim.’¹⁴⁰ Further, Morse suggests:

There is no permanent basis for this stronger political claim. It reflects a historical asymmetry in private-public power relationships which lies at the root of many current problems, particularly in the sphere of private international investment in natural resources.¹⁴¹

The author argues that there is another basis for a stronger claim which is that the investor state often includes the residencies of major backers and therefore has a stronger economic claim. Either way, in noting this current dynamic and the increasing role of multinational corporations, the State is still hugely important, not as part of the dynamic of a hybrid international governance structure, or even less as a secondary regulator, as Backer would have,¹⁴² but rather as a contesteer of multinational corporate power. As Backer notes ‘public functions of private enterprises in weak governance zones remains contentious’,¹⁴³ in other words, we cannot guarantee that private corporations who have other vested interests will carry out their corporate functions with an eye to the public good, particularly in areas where governance structures are fragile.

VII CONCLUSION

This article has reflected upon the willingness of judicial bodies, particularly those of the US (who may be seen as the current watchdog of international corporate conduct), to exercise extraterritorial jurisdiction where there are serious human rights violations, specifically with regards to extractive industry operations in countries which may not have enforceable and/or adequate liability regimes, and where there is sufficient territorial nexus. Despite the

¹³⁶ See generally Backer, above n 113; Backer, above n 132, 767.

¹³⁷ Backer, above n 132, 756.

¹³⁸ Chandler Morse, ‘*Potentials and Hazards of Direct International Investment in Raw Materials*, 367-414, in Marion Clawson (Ed) ‘*Natural Resources and International Development* (The Johns Hopkins Press, 1964) 414.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Morse, above n 138.

¹⁴² Backer, above n 132, 769–770 and 788.

¹⁴³ Ibid 774.

problematic and various interpretations given to ‘territorial nexus’ there is scope for third courts to bring companies before the courts for suspected egregious acts. In the future, following the model of the UK, a form of direct corporate liability, where certain acts are impermissible and must be prosecuted when discovered, may develop. The author suggests that such liability ought to occur even irrespective of location and territorial ties, purely because as a global world order emerges, accountability and liability must occur at the transboundary level for transboundary acts. Finally, an international crime of plunder may aid the development of greater juridical extraterritoriality, as may the increasing use and validation given to requirements of corporate due diligence and the implementation and enforcement of national codes of conduct.