

CORPORATE HUMAN RIGHTS ACCOUNTABILITY: THE OBJECTIONS OF WESTERN GOVERNMENTS TO THE ALIEN TORT STATUTE

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Abstract The almost two decade-long bonanza of civil litigation concerning gross human rights violations committed by corporations under the US Alien Tort Statute 1789 was scaled back by the US Supreme Court in *Kiobel v Royal Dutch Petroleum* in April 2013. The court restricted the territorial reach of human rights claims against transnational corporations by holding that the presumption against extra-territoriality applied to the Act. Thus Shell, the Dutch/British defendant, and the role it played in the brutal suppression by the Nigerian military of the Ogoni peoples' protest movement against the environmental devastation caused by oil exploration, lay outside the territorial scope of the Act. Legal accountability must lie in a State with a stronger connection with the dispute. While this article briefly engages with the Supreme Court decision, its main focus is on the attitude of Western governments to the corporate human rights litigation under the ATS as articulated in their amicus briefs. In these briefs they objected to the statute's excessive extraterritoriality and horizontal application of human rights to artificial non-State actors. In these two respects corporate ATS litigation created significant inroads into the conventional State-centric approach to human rights and thus provided an opportunity for more effective human rights enjoyment. This article tests the validity of the objections of Western governments to corporate human rights obligations under the ATS against the norms of public international law and against the substantive demands arising out of the shortfalls of the international human rights enforcement.

Keywords: Alien Tort Statute, amicus briefs, artificial non-State actors, extraterritorial enforcement, horizontal enforcement, human rights, jurisdiction, *Kiobel*.

I. INTRODUCTION

Corporate human rights litigation under the US Alien Tort Statute (ATS) during the last two decades has challenged the traditional State-centric human rights framework in two major ways: first, through the application of international human rights law to companies, i.e. non-State corporate actors

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(horizontal application) and, secondly, through the adjudication of activities occurring outside of the adjudicating State (extraterritorial application).¹ Both developments promised to significantly promote more effective global human rights enforcement by addressing the behavioural excesses of transnational corporations (TNCs) which the State-centric human rights framework is poorly equipped to deal with.² Yet European and other Western governments ie the UK, the Netherlands, Germany, Switzerland, Canada, Australia [hereafter, referred to as the Western governments] watched ATS litigation with extreme unease. Considering their ostensible commitment to the cause of human rights, this article examines the reasons for the refusal of Western governments to endorse US corporate human rights developments or to emulate them on their own soil keeping in mind that these are also the very same governments that have, contemporaneously, been vocal supporters of the UN Human Rights Council's *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011).³ The Principles prioritize the need for remedies and call on States to provide

¹ J Rehman, *International Human Rights Law: A Practical Approach* (2nd edn, Pearson 2010) 12: 'The progression of human rights law has generally been in the direction of according protection to the individuals against their States with the 'anti-State' stance flowing from the assumption that individual persons must be protected from the abuse of power of parliaments, governments and public authorities' (internal marks omitted).

² There is a vast amount of literature on this topic; for a small selection, see S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart 2004); S Bottomley and D Kinley (eds), *Commercial Law and Human Rights* (Ashgate 2002) chs 3 and 5; JG Frynas and S Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave 2003); D Kinley, *Human Rights and Corporation* (Ashgate 2009); International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (February 2002) chs 4 and 7, <<http://www.ichrp.org/>>; International Commission of Jurists, *Final Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (September 2008) <<http://www.icj.org/>>; Council of Europe, *Human Rights and Business* (27 September 2010) <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12594&Language=EN>>; UN Human Rights Council, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (22 April 2009) <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>>. For an excellent collection of critiques on the corporate person see Corporate Accountability and Legal Liability: On the Future of Corporate Capitalism (2010) 34 *Cambridge Journal of Economics* <<http://cje.oxfordjournals.org/content/34/5.toc>>. For alternative approaches to regulating TNCs, see J Dine, 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' (2012) 3 JHRE 44 (critiquing the under-regulation of TNCs via a critique of national company law and the legal non-recognition) and R McCorquodale and P Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598 (examining when home States may incur human rights responsibility for the activities of their companies abroad).

³ The UN Human Rights Council 'Protect, Respect and Remedy' Framework, A/HRC/8/5 (7 April 2008) developed under the guidance of John Ruggie, UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and operationalized in UN Human Rights Council, *The Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* A/HRC/RES/17/4 (6 July 2011).

effective judicial remedies for human rights violations by corporations: ‘States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy’ (Principle 26).

The attitudes of Western governments to ATS litigation are articulated in the amicus briefs which they submitted in the Supreme Court case of *Kiobel v Royal Dutch Petroleum* (2013)⁴ (hereafter *Kiobel*), but are also set out in the earlier Supreme Court case of *Sosa v Alvarez-Machain* (2004)⁵ as well as the Second Circuit court case of *Presbyterian Church of Sudan v Talisman Energy Inc* (2010).⁶ In these briefs they objected, on the one hand, to the extraterritorial application of *civil* law to events that have an insufficient connection with the US and the outright illegitimacy of universal civil jurisdiction both as being inconsistent with international law and, on the other hand, to the recognition of civil or criminal *corporate* liability under international law. The position adopted by the European Commission for the European Union was more moderate, acknowledging the possibility of universal civil jurisdiction provided it was restricted along the same lines as universal criminal jurisdiction, including the procedural requirement of

⁴ *Kiobel v Royal Dutch Petroleum Co* 569 US __ (17 April 2013), affirmed 621 F3d 111 (2d Cir 2010). The Briefs examined here: Brief of Federal Republic of Germany as Amicus Curiae in Support of Respondents, *Kiobel v Royal Dutch Petroleum Co* No 10-1491 (2 February 2012) [German *Kiobel* Brief]; Brief of the European Commission on behalf of the European Union in Support of Neither Party No 10-1491 (13 June 2012) [European Commission *Kiobel* Brief]; Supplemental Brief of Volker Beck and Christoph Strasser, Members of Parliament of the Federal Republic of Germany as Amici Curiae in Support of Petitioners, *Kiobel v Royal Dutch Petroleum Co* No 10-1491 (11 June 2012) [German MP *Kiobel* Brief]; Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Respondents, *Kiobel v Royal Dutch Petroleum Co*, No 10-1491 (3 February 2012) [UK/Netherlands *Kiobel* Brief 1]; Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v Royal Dutch Petroleum Co*, No 10-1491 (11 July 2012) [UK/Netherlands *Kiobel* Brief 2]; Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v Royal Dutch Petroleum Co*, No 10-1491 (June 2012) [US *Kiobel* Brief];

⁵ *Sosa v Alvarez-Machain* 542 US 692 (2004). The Briefs examined here: Brief of Amicus Curiae European Commission in Support of Neither Party, *Sosa v Alvarez-Machain* No 03-339 (23 January 2004) [European Commission *Sosa* Brief]; Brief of the Government of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner, *Sosa v Alvarez-Machain* No 03-339 (23 January 2004) [Australian, Swiss, UK *Sosa* Brief].

⁶ *Presbyterian Church of Sudan v Talisman Energy Inc* 582 F3d 244 (2nd Cir 2009) (dismissal on the ground of failure to establish purposeful complicity of the defendant in the human rights abuses; appealed to the Supreme Court which denied the review in 4 October 2010.) The Briefs examined here: Diplomatic Note from the Embassy of Canada to the Department of State (described in *Presbyterian Church of Sudan v Talisman Energy Inc* (2005) WL 2082846 (SDNY)) [Canadian *Talisman* Diplomatic Note]; Brief of Amicus Curiae Professor James Crawford in Support of Conditional Cross-Petitioner *Presbyterian Church of Sudan v Talisman Energy Inc* No 09-1418 [Crawford *Talisman* Brief].

‘exhaustion of local and international remedies or, alternatively, the claimant’s demonstration that such remedies are unavailable or their pursuit is futile’.⁷

While the US Supreme Court in *Kiobel* reigned in the extraterritoriality of the ATS, it did so by focusing on the Act’s history and purpose rather than on any demands of international law and thus did not explicitly validate these objections. Nonetheless, Western governments have, in effect, had broadly what they asked for, ie foreclosing the enforcement of international human rights law against their transnational corporate actors through US courts. The discussion in this article briefly analyses the Supreme Court judgment in *Kiobel* and then examines the validity of each of the two main objections of the Western governments to ATS litigation—against the norms of international law as well as against the wider demands, or failings, of the international human rights framework.

II. THE BACKGROUND: THE ATS AND THE SUPREME COURT IN *KIOBEL*

The Alien Tort Statute 1789 simply provides that the ‘district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.⁸ The Act had an uneventful 200-year history, being successfully only invoked three times,⁹ before it came into its own as a platform for international human rights actions in the last two decades. Following *Filártiga v Peña-Irala* (1980),¹⁰ where a court allowed an ATS tort claim to be brought by the relative of a victim in respect of the torture and killing of a Paraguayan national by a Paraguayan police officer in Paraguay (and both of whom were in the US at the time of action), its reach gradually expanded, first, to non-State individual actors in *Kadic v Karadžić* (1995)¹¹ and then to non-State corporate actors in *Doe I v Unocal Corp* (1997).¹² The latter case concerned the knowing involvement of Union Oil Company of California (as well as others, including the French oil company Total SA) in atrocious human rights abuse—including forced labour,

⁷ European Commission *Kiobel* Brief (n 4) 30.

⁸ 28 USC section 1350.

⁹ *Moxon v The Fanny* 17 F Case 942, 948 (D Pa 1793) (dismissing a claim by shipowners for the seizure of their ship because it involved restitution, not ‘a tort only’), *Bolchos v Darrell* 3 F Case 810 (DSC 1795) (concerning the claim of a French captain over slaves in a US port seized from a Spanish vessel vis-à-vis that of a British stakeholder with a mortgage over the slaves) and *Adra v Clift* 195 F Supp 857 (D Md 1961) (concerning the claim of a Lebanese man that his ex-wife used forged passports to bring their child to the US) discussed in Jeffrey Davis, *Justice Across Borders: The Struggle for Human Rights in U.S. Courts* (CUP 2008) 27.

¹⁰ 630 F2d 876 (2d Cir 1980); ‘*Filártiga v. Peña-Irala*, has been to global human rights litigants what *Brown v. Board of Education* was for advocates of racial integration domestically.’ JG Ruggie, (UN Secretary-General’s Special Representative for Business and Human Rights), ‘*Kiobel* and Corporate Social Responsibility’ (4 September 2012) *Issues Brief: Harvard Kennedy School*, 1ff, <[http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20\(3\).pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf)>.

¹¹ 70 F3d 232 (2nd Cir 1995).
¹² *Doe I v Unocal Corp* 963 F Supp 880 (CD Cal 1997); see also *Doe I v UNOCAL Corp* 395 F3d 932 (9th Cir, 2002).

murder, rape, torture— by the Myanmar military against the local population in the course of providing ‘security’ for the construction of the Yadana gas pipeline. The case prompted many other claims against Western transnational corporations, alleging complicity in human rights abuses, often of the most egregious kind, committed by host governments for their benefit.¹³

What makes the ATS exceptional—given the context of fairly well established international *criminal* responsibility for egregious human rights abuses—is that it allows *civil* actions for compensation as a result of such violations of international law. One effect of this is that it takes the instigation of an action outside the scope of public prosecutorial discretion, which is significant considering that the underlying allegations in ATS claims are often politically highly sensitive vis-à-vis the abusive host state (given the frequent involvement of the host state in the abuses) and the Western home state of the corporation (given its economic interests in the activities of the corporation). Not surprisingly, ATS litigation has triggered strong and hostile reactions from US and foreign companies and various governments. The ATS is also unusual, perhaps unique, in providing an *alien* with a remedy for a breach of the *law of nations* ie customary international law.¹⁴ For example, in the UK, while ordinary tort actions have been brought against TNCs for their activities abroad,¹⁵ so far no court has ruled on the possibility of a civil action based on a breach of customary international law.¹⁶ The ATS gives foreigners the benefit of the US court system to enforce laws that have been created by the community of States as a whole, provided they have been injured by

¹³ Examples of the more high-profile cases: *Presbyterian Church of Sudan v Talisman Energy Inc* 582 F3d 244 (2nd Cir 2009) see (n 6); *Abdullahi v Pfizer Inc* 562 F3d 163 (2d Cir 2009); *Sinaltrainal v Coca-Cola* 578 F3d 1252 (11th Cir 2009); *Sarei v Rio Tinto plc* No. 02-56256, WL 5041927 (9th Cir, 25 October 2011). For a comprehensive overview of the ensuing case law, see Joseph (n 2) ch 2.

¹⁴ Note, although the law of nations would generally be understood to refer to public international law, given that the ATS refers to treaties separately, the reference to the ‘law of nations’ in the ATS has been interpreted as referring to customary international law.

¹⁵ For example, *Chandler v Cape plc* [2012] EWCA Civ 525 (discussed below); *Guerrero v Montecarlo Metals Plc* [2009] EWHC 2475; [2010] EWHC 3228; *Lubbe v Cape Plc* [2000] UKHL 41; *Sithole v Thor Chemicals Holdings & Desmond Cowley* (2000) WL 14211831; *Connelly v RTZ Corporation plc* [1997] UKHL 30; *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* (10 November 1995) TLR; discussed in R Meeran, ‘Tort Litigation against Multinational Corporations for Violations of Human Rights: An Overview of the Position outside the United States’ (2011) 3 City University of Hong Kong Law Review 1.

¹⁶ Some civil tort actions have strongly touched upon questions of international law: *Al-Adsani v Kuwait* (1996) 107 ILR 536, affirmed in *Al-Adsani v United Kingdom* (2002) 34 EHRR 273 and *Jones v Saudi Arabia* [2006] UKHL 26, affirmed in *Jones and others v United Kingdom* [2014] ECHR 32, both of which held that upholding State immunity in civil claims arising out of the torture, either against the State or its officials is a legitimate and proportionate restriction on the right of access to court and not incompatible with art 6 of the European Convention of Human Rights—even where such immunity might not exist in criminal actions eg *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] AC 147, paras 47–48, 51. See also S Baughen, ‘Holding Corporations to Account: Drafting ATS Suits in the UK?’ (2013) 2 British Journal of American Legal Studies 533, 563.

a breach of that law.¹⁷ This raises the question which was in fact at the heart of *Kiobel*: do ATS actions need to have any connection with the US, either by virtue of the Act itself, that is US domestic law, or by virtue of public international law. As will be seen, the Supreme Court insisted on a nexus with the US on the basis of the Act's history and purpose, while Western governments argued that this was a requirement of public international law. Although the practical effect of their positions was the same in *Kiobel*, the wider implications of those arguments are very different, particularly in terms of commenting on the permissible reach of national enforcement of human rights. Incidentally, US courts have always insisted on ordinary personal jurisdiction requirements being satisfied in ATS claims, that there is the minimum link between the defendant and the US that would make it legitimate for the defendant to be 'haled into' a US court to defend proceedings.¹⁸

In *Kiobel* a class action was brought by the widow of one of the leaders of the protest movement of the Ogoni people against Shell's persistent environmentally damaging operations in the Niger delta and which was brutally suppressed by Nigerian military forces in 1993–95. The army was accused of massacring villagers, raping, plundering and looting in the region. The plaintiffs claimed that Royal Dutch/Shell, the Dutch and UK parent companies, and their Nigerian subsidiary aided and abetted these human rights abuses by providing transportation, food and payment to ultra-violent Nigerian soldiers and were also instrumental in the sham trials, and death sentences, of nine Ogoni leaders, including Barinen Kiobel and Ken Saro-Wiwa. The alleged underlying crimes for which a civil remedy was sought against Shell were extrajudicial killing; crimes against humanity; torture and cruel treatment; arbitrary arrest and detention; violations of the rights to life, liberty, security and association; forced exile and property destruction. The Supreme Court heard an appeal from the Second Circuit court which had dismissed the case on the basis that all the elements of an ATS cause of action had to have a basis in international law and thus it was not merely an issue of *what* behaviour international law condemned but also *who* it recognized as a potential perpetrator. The Second Circuit held that while international law recognizes individuals as possible perpetrators of certain human rights abuses, it does not recognize corporate defendants. (As shown below, this is probably correct but, contrary to the arguments of the Western governments, it does not follow from this that States—as a matter of national law—would be prohibited

¹⁷ On the background of the ATS, see *Sosa v Alvarez-Machain* 542 US 692, 715 (2004): '[a]n assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war ... It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.' and US *Kiobel* Brief (n 4) 4ff: where the 'individual torturer was found residing in the United States, ... this country would be perceived as harboring the perpetrator'.

¹⁸ See eg *Wiwa v Royal Dutch Petroleum Co* 226 F3d 88 (2d Cir 2000).

from attaching responsibility to corporate wrongdoers for international law offences.) The Supreme Court in *Kiobel*, having heard oral arguments on this issue in February 2012, decided that the more important question was the extent to which the ATS could be applied to conduct outside the US, and it was only on this issue that it passed judgment.¹⁹

All nine Supreme Court judges agreed that the case should be dismissed for lack of a sufficient connection with the US and, importantly for the purposes of this article, all nine Justices did so principally by reference to the purpose of the ATS and its history, rather than as a consequence of restrictions under international law. The five-judge majority (Robert CJ, Scalia, Kennedy, Thomas and Alito JJ) decided that the ATS was subject to the domestic presumption against the extraterritorial application of US law, and according to which laws are assumed to be inapplicable to conduct abroad unless there was clear language to the contrary. The Supreme Court decided that the presumption was applicable even though the ATS is a jurisdictional statute and does not itself create a cause of action (the latter lies in US federal law as informed by international law). So here the presumption operates to territorially limit judicial 'law-making' in so far as it limits the judiciary's ability to hear claims that have an insufficient connection with the US, even if under international law (and therefore US federal law) a wrong has been committed. In the eyes of the majority this made the presumption all the more pertinent: 'the danger of unwarranted judicial interference in the context of foreign policy is magnified in the context of the ATS because the question is not what Congress has done but instead what courts may do'.²⁰ Nothing in the Act rebutted the presumption, given that in its current form the ATS could apply to conduct 'either within or outside the United States'²¹ and historical precedent supported a territorially circumscribed application. The applicability of the ATS to piracy on the high seas could not prove its more general extraterritorial applicability given that the high seas is beyond the jurisdiction of any State and thus not comparable to scenarios where the wrong occurred on a State's territory. Contrary to the argument of the Western government

¹⁹ In 2012 the Supreme Court decided that the Torture Victim Protection Act (which frequently provided a parallel cause of action to the ATS) only applied to natural persons, as it refers to 'individuals' as perpetrators: *Mohamad v Palestinian Authority* 566 US, 132 S Ct 1702 (2012).

²⁰ *Kiobel v Royal Dutch Petroleum Co* 569 US _ (17 April 2013) 5. Note the founding fathers of the ATS opted for a judicial rather than a political solutions to cases with foreign-policy implications, see A D'Amato, 'The Alien Tort Statute and the Founding of the Constitution' (1988) 82 AJIL 62, 65ff: 'the Alien Tort Statute was an important part of a national security interest in 1789. Acutely recognizing that denials of justice could provide a major excuse for a European power to launch a full-scale attack on our nation, the Founding Fathers made sure that any such provocation could be nipped in the bud by the impartial processes of federal courts ... By providing for an impartial system of federal courts that had jurisdiction over such controversies, the new Government could shun political entanglements and no-win situations. The "law of nations" would serve as an impartial standard, acceptable to all nations, and torts committed by American citizens in violation of that law would be redressed through its application by federal courts.'

²¹ *Kiobel v Royal Dutch Petroleum Co* 569 US _ (17 April 2013) 7.

regarding the excessive extraterritoriality of ATS litigation under international law, the majority's decision simply held that Congress did not intend to give the ATS extraterritorial application. The four-judge minority (Breyer, Ginsburg, Sotomayor and Kagan JJ) came to the same conclusion, by taking a different route: they held that the ATS was clearly intended to apply extraterritorially—given its explicit references to 'alien', 'treaties' and 'the law of nations' and given its application to pirates 'because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies'.²² Having decided this, they then proceeded to lay down the connections with the US which they considered to be required for actions to go ahead (see below).

For the purposes of this discussion, the judgments are important for two reasons. First, the majority, and (to a lesser extent) even the minority, broadly followed the pervasive trend of States to impose territorial limits on human rights enforcement. As argued below, these limits go beyond those demanded by international law and are not helpful in the human rights context, particularly where universal jurisdiction could be invoked. By the same token, while the presumption against extraterritoriality is normally rationalized on the basis of preventing clashes with foreign law,²³ this would not apply in the context of the ATS since the applicable law is customary international law. Thus the majority justified the applicability of the presumption on the unusual basis of pre-empting 'diplomatic strife' and the possibility that foreign nations might hale US citizens into their courts in respect of conduct occurring in the United States.²⁴

Second, neither the majority nor the minority entirely rejected the possibility of human rights claims, including extraterritorial claims, being brought against corporations. The majority concluded:

On these facts, all the relevant conduct took place outside the United States. And even where the claims *touch and concern the territory of the United States*, they must do so with *sufficient force* to displace the presumption against extraterritorial application . . . Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.²⁵

Which scenarios would 'touch and concern' US territory 'with sufficient force' to invoke the ATS in extraterritorial cases is left open by the majority, but this is addressed by the minority. Certainly, the majority reasoning is rather curious: if the presumption is not displaced in relation to the ATS as a whole

²² *ibid* 4.

²³ See eg WS Dodge, 'Understanding the Presumption against Extraterritoriality' (1998) 16(1) *Berkeley JIntL* 85, 90.

²⁴ For a critique of this aspect, see I Wuerth, '*Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute' (2013) 107 *AJIL* 601.

²⁵ *Kiobel v Royal Dutch Petroleum Co* 569 US _ (17 April 2013) 14 (emphasis added).

as a result of their being a clear legislative statement to this effect ('[w]hen a statute gives no clear indication of an extra-territorial application it has none'²⁶), it seems unlikely that it could be displaced in any particular case which arises under it. One solution to this paradox could be that some foreign harm may be so closely linked to US actors and their activities on US soil that the case is not essentially 'extraterritorial', but is one that falls within the Act's territorial ambit. A better solution is provided by the (partly complementary) reasoning of the minority. Proceeding from the argument that the presumption against extraterritoriality is rebutted in the ATS, they argue that Congress was likely to have intended its jurisdictional limits, just like its substantive reach, to be bounded by international law, ie the jurisdictional rules of international law—as *further limited* by 'both the ATS's basic purpose (to provide compensation for those injured by today's pirates) and *Sosa's* basic caution (to avoid international friction).'²⁷ Given the latter concern, the minority insisted that, in addition to other restrictive principles such as exhaustion of local remedies, *forum non conveniens* and comity, the ATS provided jurisdiction 'only where distinct American interests are at issue'.²⁸ Such interests arise 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, and that includes 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.²⁹

The first two heads are consistent with the territoriality and the nationality principles of jurisdiction under international law, while the third is a catch-all category which appears to be an amalgamation of other jurisdictional heads recognized under international law. It allows the ATS to be invoked in certain cases vis-à-vis *foreign* defendants for torts on *foreign* soils—as for example, when a foreign perpetrator's 'presence' on US soil may make the US vulnerable to accusations of harbouring an enemy of mankind. For that 'presence' to be satisfied in the case of a corporation more is needed than simply maintaining an office in the US (as was the case in *Kiobel*) even if that 'minimal and indirect' presence would normally be enough to assert personal jurisdiction in tort cases.³⁰ This reasoning completes the circle where the majority and minority meet, in so far as the minority appears to elaborate on the majority's test, ie in what circumstances does a case 'touch and concern' US territory 'with sufficient force' to invoke the ATS. However, it remains unclear why the normal jurisdictional requirements for civil cases have to be 'topped up' by a 'distinct American interest' in ATS litigation: what makes

²⁶ *Morrison v National Australia Bank Ltd* 561 US (2010) 6.

²⁷ *Kiobel v Royal Dutch Petroleum Co* 569 US _ (17 April 2013) 7.

²⁸ *ibid* 7; see also 13ff.

³⁰ *ibid* 14ff.

²⁹ *ibid* 1ff (emphasis added); see also 7.

these foreign claims so very different from normal tort claims with a foreign element which—as argued below—are outside the jurisdictional rules of international law? More importantly, the wider context of the concern at becoming a safe harbour for enemies of mankind stems from the universality principle, a jurisdictional principle of international law, according to which a State—with respect to a fairly small set of particularly heinous crimes (such as those alleged in *Kiobel*)—is under an obligation to ‘extradite or prosecute’ (*aut dedere aut judicare*) should the offender be present on its soil, *regardless* of whether that State is otherwise connected with the offender or the offence.³¹ So if there is no extradition request, the obligation to prosecute kicks in. The idea is that the offender must not be able to slip the net of justice in the case of these serious international crimes. This wider context expressly underpins the third category of the minority judgment.³² Yet what is conspicuous by its absence is any reference to the fact that Shell would not face any civil or criminal accountability outside the US, ie in its home States or host State, for its involvement in the Ogoni suppressions.³³ By implication, and in line with the European Commission’s *Kiobel* Brief, it would have been arguable that the plaintiffs had exhausted any remedies in the States with a nexus based on territory or nationality.³⁴ Thus perhaps Shell’s presence within the US, however minimal, should after all have been sufficient to allow the civil action to go ahead.

Despite the general scaling back of the ATS, the Supreme Court decision is still a triumph in that it retains the possibility of civil human rights claims being brought against US corporations, and in certain cases against foreign corporations, in respect of alleged gross abuses abroad, particularly in developing countries. In providing an international law-based civil remedy in such circumstances, the US is still a long way ahead of judicial practice elsewhere and thus continues to champion a less State-centric conception of human rights than is adopted under the European Convention of Human Rights (see below).

III. THE WESTERN GOVERNMENTS’ OBJECTIONS TO EXTRATERRITORIALITY IN CIVIL PROCEEDINGS

Western governments objected to ATS litigation in general, and *Kiobel* in particular, on the basis that it represents an undue exercise of extraterritorial jurisdiction by US courts; with slight variations, they asserted that jurisdictional claims under the ATS were excessive (1) where there was not a sufficient

³¹ L. Reydam, *Universal Jurisdiction—International and Municipal Legal Perspectives* (OUP 2003) 28–38. ³² *Kiobel v Royal Dutch Petroleum Co* 569 US _ (17 April 2013) 1ff.

³³ But see *Akan and Vereniging Milieudefensie v Royal Dutch Shell plc and Shell Petroleum Development of Nigeria Ltd* LJN BY9854 (District Court of the Hague, 30 January 2013), discussed below (n 87), where a Dutch court held that Shell’s Nigerian subsidiary was responsible for oil pollution in the Niger delta. The case did not raise Shell’s involvement in the brutal suppression of the protests by the Nigerian military in the early 1990s.

³⁴ European Commission *Kiobel* Brief (n 4) 30ff.

nexus with the US (ie territoriality or nationality) which international law requires for civil actions just as much as it does for criminal proceedings or (2) where jurisdiction was based on universal jurisdiction (ie where international law does not require there to be a nexus) because international law does not recognize such jurisdiction in civil proceedings.³⁵ In addition, they also argued (3) that public international law does not recognize any direct criminal or civil liability for corporations even where it exists for natural persons (see next section).

What the above legal objections have in common is that they largely arise as a result of the almost unbroken silence of customary international law on the issues rather than on the basis of conflicting state practice/*opinio juris* concerning a prohibitive rule. Silence is of necessity ambiguous given that it can indicate either an unwillingness to engage in a particular course of action because of its perceived illegality; because of its undesirability even if legal; or because of a simple disinterest in the subject matter.³⁶ This raises the question of how silence should be interpreted: does international law, like national law, operate from the assumption that ‘anything that is not prohibited is allowed’ or from the contrary assumption that ‘anything that is not permitted is prohibited’? The first approach means that where international law is silent on a particular issue States are free to do as they please, rather than having to bring their actions within a permissive rule. This approach was famously expressed by the Permanent Court of International Justice in *Lotus* in 1927³⁷ and subsequently strongly criticized.³⁸ Yet it has recently been drawn on in the Advisory Opinion on the Declaration of Independence of Kosovo (2010),³⁹ where the ICJ concluded that it only needed to establish whether ‘international law prohibited the declaration.’⁴⁰ Judge Simma in the same case rejected this perspective as an ‘old, tired view of international law’.⁴¹

by upholding the *Lotus* principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law. The Court

³⁵ For example, UK/Netherlands Kiobel Brief 2 (n 4) 11–18, but also, particularly on the general need for a nexus: German Kiobel Brief (n 4) 16ff; Australian, Swiss, UK Sosa Brief (n 5) 3–10 and 20ff; European Commission Sosa Brief (n 5) 12ff.

³⁶ The ambiguities arising from silence are reflected in some domestic rules. For example, silence is only in limited circumstances taken as an acceptance of an offer or as a ratification of an unauthorized act by an agent.

³⁷ *The Case of the SS Lotus, France v Turkey* (1927) PCIJ (Ser A) No 10, 18, para 46

³⁸ V Lowe and C Staker, ‘Jurisdiction’ in MD Evans (ed), *International Law* (3rd edn, OUP 2010) 313, 318ff. For a commentary, see also C Ryngaert, *Jurisdiction in International Law* (OUP 2008) 36ff.

³⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (ICJ Advisory Opinion) 22 July 2010, <<http://www.icj-cij.org/docket/files/141/15987.pdf>>.

⁴⁰ *ibid* para 56.
⁴¹ *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* (ICJ, Declaration by Judge Simma) 22 July 2010, <<http://www.icj-cij.org/docket/files/141/15993.pdf>> para 2.

could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule⁴²

The Advisory Opinion suggests that international law has still not, once and for all, settled how to deal with the absence of a prohibitive rule on a given issue, and possibly shows a continued preference for such a rule as a prerequisite for illegality. In any event, it shows that silence in customary international law cannot simply be equated with the absence of a permissive rule and the significance of silence must, perhaps, be examined on a case-to-case basis. How does this relate to the legal claims made by Western governments in support of their objections to the ATS litigation?

A. The Silence of Public International Law on Extraterritorial Civil Proceedings

In respect of the first two claims concerning the extraterritorial reach of civil proceedings under the ATS (either concerning less serious human rights abuses generally or in the few situations giving rise to universal jurisdiction), one question which arises is whether public international law is interested in *civil* proceedings at all and, if so, whether it imposes any jurisdictional restrictions on them. Western States categorically argued in favour of its being both interested and there being such restrictions. For example, Australia, Switzerland and the UK argued in their Sosa Brief that '[i]nternational law does not, however, recognise universal civil jurisdiction for *any* category of cases *at all*, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law'.⁴³ This is supported by reference to treaties that establish *crimes* that are subject to universal jurisdiction⁴⁴ and which are silent on the topic of civil proceedings. Similarly, concerning abuses other than those universally condemned, the UK/Netherlands Kiobel Brief contended 'that it is *now widely accepted* that an internationally recognized principle must be identified before a State can exercise extraterritorial civil jurisdiction . . . It is *clearly* established that the basis of jurisdiction is *always* grounded in a sufficiently close nexus to the forum State.'⁴⁵ This categorical statement is supported with reference to the writing of one academic and case law decided by the ICJ concerning a State's entitlement not to recognize the grant of nationality by another State and the reach of a State's territorial waters.⁴⁶ Both cases concerned the relationship

⁴² *ibid* para 3.

⁴³ Australian, Swiss, UK Sosa Brief (n 5) 6 (emphasis added).

⁴⁴ *ibid* 6, note 8.

⁴⁵ UK/Netherlands Kiobel Brief 2 (n 4) 11ff (emphasis added, internal citations omitted).

⁴⁶ Respectively, *The Nottebohm Case, Liechtenstein v Guatemala* (1955) ICJ 4 and *Anglo Norwegian Fisheries Case, UK v Norway* (1951) ICJ 116. In addition they also mention a number of academic treaties that do not specifically refer to civil proceedings. UK/Netherlands Kiobel Brief 2 (n 4) 11, note 14.

of States with each other and are silent on the legitimacy of proceedings between private parties.⁴⁷

This silence on civil jurisdiction makes sense if one considers the nature and purpose of public international law; it is predominantly concerned with the actions of, and relations between, States. From the mid-nineteenth century ‘there came to be a separation between public and private international law. As part of this separation, the private law components of the law of nations—the law merchant, conflict of laws, and maritime law—gradually were absorbed into domestic law. The law of nations came to regulate primarily the relations among states, not the rights and duties of individuals.’⁴⁸ Criminal law/prosecutions are considered to be an exercise or manifestation of state sovereignty, delineating the relationship between the individual and the State and therefore in the transnational context potentially affecting the sovereign rights of other States to do likewise: they are therefore more obviously of legitimate concern to public international law than civil law. In civil proceedings the State, at least in theory, provides individuals simply with a platform or mechanism through which to sort out disputes between themselves. At the very least this again raises doubts about the ‘the wide acceptance’ of the application of public international law to ATS cases, all of which are civil in nature.

This disinterest of public international law in the sphere of private law is further documented in a number of academic treatises. Akehurst wrote in his seminal article on ‘Jurisdiction in International Law’ (1972/73):

[A]re there any rules of public international law which limit the jurisdiction of a State’s courts in civil trials? Some writers have answered this question in the affirmative. Brownlie even says that ‘there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens’. This is a rather an extreme view; as John Bassett Moore argued *à propos* of the *Cutting* incident, ‘the rules governing the jurisdiction in civil and in criminal cases are founded in many respect on radically different principles, and . . . an assumption of jurisdiction over an alien in the one case is not to be made a precedent for like assumption in the other’; and one might add conversely that limitation in criminal cases cannot be cited as authority for the existence of likely limitations in civil cases. Of course, rejection of analogies drawn from criminal trials does not necessarily mean that international law imposes no limitation whatever on jurisdiction in civil cases – the limitations might simply be of a different kind. But it is worth remembering that Dicey believed that the only

⁴⁷ But on the nature of the obligations between States, see eg J Crawford, ‘Responsibility to the International Community as a Whole—Lecture given in honour of Earl Snyder (5 April 2000), < [http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/papers/Snyderlect00\(f\).pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/papers/Snyderlect00(f).pdf)> 12: according to ‘[c]lassical international law . . . international law obligations were “civil” and not criminal — at any rate, they were not criminal. States cannot commit crimes, only individuals can commit crimes, as the Nuremberg Tribunal said’.

⁴⁸ FF Martin, SJ Schnably and RJ Wilson, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (CUP 2006) 195.

limitation on jurisdiction in civil trials was contained in the principle of effectiveness; and when one examines the practice of States...one finds that States claim jurisdiction over all sorts of cases and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic protests.⁴⁹

There are numerous recent examples demonstrating the continuing validity of Akehurst's observations on the liberty which States exercise to hear civil disputes that have hardly any connections with them, and at times no connection whatsoever, and that this is tolerated by other States. In *Kuwait Airways Corp v Iraqi Airways Co* [2002] the House of Lords decided that it had, and would exercise, jurisdiction in respect of a claim between two foreign parties concerning a conversion that took place entirely abroad: 'it is an action in tort which has nothing whatever to do with England save that England has made itself available as the forum for litigation'.⁵⁰ Lord Hope made it even plainer: '[t]here is nothing in this case which connects the laws of this country with the events constituting the alleged tort'.⁵¹ Still the case was decided in England and, in contrast to ATS litigation which invokes international law and often concerns *jus cogens* norms, it concerned very parochial matters of English law. This judicial willingness to entertain entirely foreign civil claims is not restricted to the UK and has been also been applied to civil claims for human rights abuses. In 2012 a Dutch court awarded damages in a civil case brought by a Palestinian against a Libyan official for torture that occurred in Libya.⁵² As a side note, this mismatch of attitudes between the Dutch court and the Netherlands government in the *Kiobel* Briefs mirrored the divergence of opinion between US courts in ATS claims and the US government in its amicus briefs concerning the statute.⁵³ However, there is also some evidence concerning the application of international law to civil actions: some academics have argued that jurisdictional principles under public international

⁴⁹ M Akehurst, 'Jurisdiction in International Law' (1972–73) 46 BYIL 145, 170 (emphasis in original, internal citations omitted). See also G Fitzmaurice, 'The General Principles of International Law' (1970) 92 *Recueil des Cours* 1, 218; G Mutz, 'Private International Law' in R Bernhardt (ed), *Encyclopaedia of Public International Law* (Nort-Holland 1987) vol 10, 330, 334; M Shaw, *International Law* (8th edn, CUP 2008) 652.

⁵⁰ *Kuwait Airways Corp v Iraqi Airways Co* [2002] 3 All ER 209, para 174 (Lord Scott of Foscote); discussed in JM Carruthers and EB Crawford, '*Kuwait Airways Corporation v Iraqi Airways Company*' (2003) 52 ICLQ 761. See also *Berezovsky v Michaels and Others* [2000] UKHL 25 or *The Vishva Ajay* [1989] 2 Lloyd's Rep 558.

⁵¹ *Kuwait Airways Corp v Iraqi Airways Co* [2002] 3 All ER 209, para 166 (Lord Hope of Craighead).

⁵² BBC, 'Dutch Court compensates Palestinian for Libya jail' (28 March 2012) <<http://www.bbc.co.uk/news/world-middle-east-17537597>>; E Kontorovich, 'Kiobel (IV): Precedent-setting Dutch Civil Universal Jurisdiction Case' (28 March 2012) *Opinio Juris* <<http://opiniojuris.org/2012/03/28/precedent-setting-dutch-civil-universal-jurisdiction-case/>>.

⁵³ While the US government's attitude to the litigation has varied, in *Kiobel* it supported corporate ATS litigation in principle but in much more narrowly defined circumstances and thus advocated against allowing the *Kiobel* claim: US *Kiobel* Brief (n 4). In that Brief, the Government made repeated calls for the home State to allow actions against their companies.

law apply to all law/proceedings, whether civil or criminal.⁵⁴ Finally, there are also the recent civil cases concerning the issue of State immunity for violations of *jus cogens* norms, where the International Court of Justice and the European Court of Human Rights have refused to treat civil cases as being outside the scope of the immunity under customary international law, even where this might be the case for equivalent criminal prosecutions.⁵⁵ However, it may be argued that the immunities question concerns the evolution of a ‘civil claim’ exception to what has traditionally been considered an absolute prohibition under customary international law and cautiousness in the development of the law would err on the side of its non-recognition. In contrast, in the jurisdictional context discussed here, the starting point is the ‘wide discretion’ by States to assume jurisdiction over foreign events and thus arguments for the evolution of a restrictive jurisdictional regime in civil cases, would—taking an equally cautious approach—err on the side of retaining the wide discretion.

The main point here is not to argue that public international law can conclusively be shown to be unconcerned with civil law/proceedings, but rather that the relative silence on the topic is at the very least ambiguous. There is certainly no incontrovertible evidence of a prohibitive rule or the absence of a permissive rule, which is as cut and dried as the Western governments sought to present it. The UK/Netherlands Kiobel Brief 2 claimed that ‘the ICJ has recognised that the type of universal jurisdiction argued for by the plaintiffs in ATS cases “has not attracted the approbation of States generally.”’⁵⁶ In fact, three judges (out of 16) in a *Separate Opinion* in the *criminal* case (Case Concerning the Arrest Warrant of 11 April 2000 (2002)) made an *obiter* observation about ATS litigation, which furthermore could be read as approbation of the start of a new era:

In civil matters we *already* see the *beginnings* of a very broad form of extraterritorial jurisdiction. Under the Alien Torts Claim Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violation of international law, perpetrated by non-nationals overseas . . . While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.⁵⁷

⁵⁴ FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Recueil des Cours* 1, 73ff; FA Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ (1984) 186 *Recueil des Cours* 9, 20ff, 67ff; J Crawford, *Principles of Public International Law* (7th edn, OUP 2012).

⁵⁵ *Germany v Italy: Greece Intervening* (2012) ICJ Reports 99, para 91; *Al-Adsani v United Kingdom* (2002) 34 EHRR 273; *Jones and others v United Kingdom* [2014] ECHR 32, paras 205–215; contrast to the criminal case of *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] AC 147.

⁵⁶ UK/Netherlands Kiobel Brief 2 (n 4) 16 (emphasis added).

⁵⁷ *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium* (ICJ, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 14 February 2002 <<http://www.unhcr.org/refworld/docid/3c6cd39b4.html>> para 48 (emphasis added).

To use this statement to support the existence of customary international law that restricts the exercise of jurisdiction in civil proceedings would mean that the mere fact of States making a protest against the ATS is taken to prove the very issue under contention at the protest. In contrast to its State counterparts, the European Commission in its *Sosa* and *Kiobel* Briefs at least acknowledged the uncertainty surrounding universal civil jurisdiction: '[u]niversal civil jurisdiction has received less attention than universal criminal jurisdiction and its existence and scope are not well established under international law'.⁵⁸ The Commission then notes the conflicting messages coming from, for example, the comments of the International Criminal Tribunal for the former Yugoslavia, the ICJ, the text of the UN Convention against Torture and differing academic opinions.⁵⁹

In the light of these ambiguities and the relatively onerous requirements for the establishment of a rule of customary international law, one may conclude that at this stage there is insufficient evidence of an international consensus that the jurisdictional rules of public international law extend to civil proceedings. In this respect, the Supreme Court in *Kiobel* rightly framed its dismissal as a matter of national legislative intent, rather than as being inconsistent with jurisdictional principles under international law.

B. The Substantive Case in Favour of the Extraterritorial Enforcement of Human Rights

In addition to questioning the accuracy of their arguments from a public international law perspective, the jurisdictional objections made by Western governments to ATS litigation can also be criticized for failing to take account of the human rights basis of the litigation. These juridical objections are weakened by their being made in this peculiar context given that human rights are internationally recognized and thus ATS human rights litigation cannot create clashes with foreign law. In addition, human rights law suffers from weak enforcement mechanisms and its enforcement through domestic courts should therefore be welcomed, not hindered—as explicitly endorsed in the UN Human Rights Council's *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011), in particular Principle 26 that encourages 'State-based Judicial Mechanisms'.

Turning to the first point, in ATS cases US courts do not apply *national* law in respect of foreign events, but customary *international* law, ie norms which are uniform across the globe and recognized by all States as legally binding.⁶⁰

⁵⁸ EC *Sosa* Brief (n 5) 17. EC *Kiobel* Brief (n 4) 17.

⁵⁹ EC *Sosa* Brief (n 5) 17–20.

⁶⁰ Strictly speaking the ATS does not enforce international law; it allows federal courts to enforce federal common law which provides a cause of action for breaches of customary international law: *Sosa v Alvarez-Machain* 542 US 692, 724 (2004). But see Wuerth (n 24) 619ff.

This is very different from the aggressive extraterritorial antitrust law enforcement by the US which has attracted opposition from States—and rightly so, as this represents the US seeking to impose its own peculiar vision of anti-trust matters on the rest of the world.⁶¹ By implication, rulings on extraterritoriality from anti-trust cases such as *F Hoffman-La Roche Ltd v Empagran SA* (2004)⁶² have little to contribute to the very different context of human rights.⁶³ Here the US does not force its domestic law on other States, but simply enforces law which everyone has agreed upon. Few areas of international law have, in their general contours, attracted as much consensus as international human rights law. The Universal Declaration of Human Rights 1948 and the International Covenants on Civil and Political and on Social, Cultural and Economic Rights have enjoyed wide international approval, and been substantially replicated in regional agreements, such as the European Convention on Human Rights, the African Charter on Human and Peoples' Rights and Inter-American Convention on Human Rights. Although there has been substantial debate by the US judiciary and in academia about which treaty-based human rights are also reflective of customary international law,⁶⁴ the US Supreme Court in *Sosa v Alvarez-Machain* (2004) insisted that any new cause of action under the ATS based on 'the present-day law of nations [has] to rest 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 we have recognized'.⁶⁵ As these requirements would appear to be at least as strict as those necessary to find a new rule in customary international law, Western States can hardly object to this aspect of the litigation, and they have not. As seen above, their objection was of a more fundamental nature: they argued that US courts should not apply international human rights law *at all* in cases which have no connection with the US.

Why would it be objectionable for an 'unconnected' domestic court to hear a civil claim concerning a violation of international human rights law? The objecting States did not elaborate on their concerns, other than referring to a 'substantial risk of jurisdictional conflict' or the 'unreasonable interference with the sovereign authority of other nations'.⁶⁶ Under public international

⁶¹ See eg AV Lowe (ed), *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Grotius Publications 1983).

⁶² 542 U.S. 155 (2004). For the same reason the Supreme Court judgment in *Morrison v National Australia Bank Ltd* 130 S Ct 2869 (2010) which deals with the extraterritorial ambit of US federal securities law is very different from ATS cases where the applicable law is customary international law.

⁶³ For reliance on such cases, see eg UK/Netherlands Kiobel Brief 1 (n 4) 29ff; Australian, Swiss, UK *Sosa* Brief (n 5) 9ff.

⁶⁴ See Joseph (n 2) 25ff.

⁶⁵ *Sosa v Alvarez-Machain* 542 US 692, 692 (2004); see also *Filártiga v Peña-Irala* 630 F2d 876 (2nd Cir 1980).

⁶⁶ UK/Netherlands Kiobel Brief 1 (n 4) 2, 30 respectively; see also UK /Netherlands Kiobel Brief 2 (n 4) 24–30 and German Kiobel Brief (n 4) 2; note the Canadian Talisman Diplomatic Note (n 6) 1, expresses concern about the impact of the US litigation on the activities of Canadian firms in Sudan and on relevant foreign policy initiatives by the Canadian government.

law, a jurisdictional link (eg territoriality or nationality) is necessary first and foremost where the law to be applied differs from State to State and so claiming jurisdiction over persons or activities entails the rights to prescribe and apply one's own particular laws to them. For a State to apply its laws to activities and persons entirely unconnected with it would be rather high-handed. Where, on the other hand, the activity is uniformly condemned, the issue of international friction becomes—at least in principle—less prominent.⁶⁷ For a subset of uniformly condemned activities, international law recognizes universal jurisdiction: and here there is no need for the prosecuting State to show a nexus with the dispute at all.⁶⁸ Again, in the words of the House of Lords in *Pinochet*: '[c]rimes against humanity are crimes not against a state but against individuals and are triable anywhere'.⁶⁹ In the case of corporate human rights litigation under the ATS, the alleged activities are at the very least uniformly condemned and many of them fall within the subset of norms which are subject to universal jurisdiction.⁷⁰ Indeed, it would seem that 'unconnected' States are the ideal solution for international human rights enforcement; only when the State has no link with the case are its courts capable of acting impartially and without any conflict of interest. Having said that, in today's interconnected global world the instances of a truly neutral national adjudication would be rare. Most of the corporate human rights litigation under the ATS has had some connection with the US, if only in so far as the defendant TNCs are often heavily engaged in delivering their products and services to the US market (eg Shell has 14,000 petrol stations in the US⁷¹) and many of their shareholders are US banks, investment and insurance companies.

The principal objection to the extraterritorial nature of much ATS litigation could have been that a national adjudication unavoidably imports the domestic law (eg procedural rules⁷²) and a domestic interpretation of international law into the process by a State that does not have any connection with the events and actors. In *Kiobel* the events leading up to the claim occurred in Nigeria and the defendants were the Shell parent companies, headquartered in the

⁶⁷ There may be residual concerns given that procedures and penalties often vary.

⁶⁸ Generally, however, the 'unconnected' State acquires a connection by virtue of having arrested the alleged perpetrator. Note too, not all uniformly condemned activities (eg theft or murder) attract universal jurisdiction; the activity must be of 'mutual' and not just 'several' concern to States (eg *Filártiga v Peña-Irala* 630 F2d 876, 888 (2nd Cir, 1980)). Universal jurisdiction applies to heinous conduct and to conduct outside any State's jurisdiction and in both cases is designed to ensure that the wrongdoer does not slip the net of justice.

⁶⁹ *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] AC 147, 157.

⁷⁰ The latter subset consists of *jus cogens* norms to which, some have argued, the ATS should be restricted: DD Christensen, 'Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute after *Sosa v Alvarez-Machain*' (2005) 62 Washington & Lee Law Review 1219, 1245ff. See also *Doe v Unocal* 110 F Supp 2d 1294, 1304 (CD Cal 2000).

⁷¹ Shell US, Retail, <<http://www.shell.us/aboutshell/shell-businesses/retail.html>>.

⁷² The US is, for example, particularly plaintiff-friendly in some procedural matters, see Joseph (n 2) 16ff.

UK and the Netherlands, and their Nigerian subsidiary. In addition, the domestic judgment creating localized international law itself becomes a source of international law—as an example of State practice and *opinio juris* and as a source for identifying the existence and the content of the rules⁷³—and thus goes towards defining duties for all States.⁷⁴ Although this objection is not without merit, it is not as persuasive in the light of the growing practice of national courts to interpret and apply international law⁷⁵—a practice which has long been advocated by academics in order to fill the enforcement gap of international law:

Scholars have long recognized the pivotal role that national courts could play in international law's enforcement – the Achilles' heel of international law – given their advantages of accessible jurisdiction and enforceable judgements. This has resulted in call for national courts to act as 'guardians' or 'agents' of the international legal order, impartially enforcing international law without regard for national interests. Yet, in the past, many international lawyers have lamented this potential as unrealized due to the tendency of national courts to refuse to apply, or to skew the interpretation of, international law in order to protect national interests. The prevailing wind appears to be changing, however.⁷⁶

National courts are frequently getting involved in the interpretation and enforcement of international law as, for example, in the UK in *Pinochet* (2000)⁷⁷ and *Jones v Saudi Arabia* (2006).⁷⁸ As international tribunals are a relatively recent occurrence, domestic courts have always had some role to play in enforcing international law; in the words of the House of Lords in *Pinochet*: '[u]ntil recently there were almost no international tribunals so international crimes could be tried only before a national court'.⁷⁹

The second reason why the extraterritorial enforcement of human rights is desirable lies in that whilst international law generally suffers from the lack of effective enforcement mechanisms, human rights law is especially affected by this shortcoming. It is different from the bulk of international law, in so far as it is not concerned with the relationships of States with each other but with the relationship of the State with individuals. This is significant because when it comes to the enforcement of these international obligations, firstly,

⁷³ Art 38(1)(a), (b) and (d) of the Statute of the ICJ, discussed in A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57, 61ff.

⁷⁴ Wuerth (n 24) 618: 'ATS litigation has the potential to play an important role in the development and enforcement of customary international law. Decisions of national courts can constitute state practice and evidence of *opinio juris*'.

⁷⁵ Roberts (n 73) 59.

⁷⁶ Ibid 58ff (internal marks omitted).

⁷⁷ *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] AC 147.

⁷⁸ *Jones v Saudi Arabia* [2006] UKHL 26.

⁷⁹ *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] AC 147, 157, discussed in EA Engle, 'Alien Torts in Europe? Human Rights and Tort in European Law' (2005) Zentrum für Europäische Rechtspolitik an der Universität Bremen, Diskussionspapier 1/2005 <<http://www.geocities.ws/eric.engle/V.pdf>>.

the primary stakeholders, ie the individual victims, are no match for the violating State. This differentiates human rights law from the rest of international law, where it is States themselves which are the parties to a dispute and which is thus *prima facie* more evenly balanced. By the same token, the wrongdoing State itself is not well positioned to act in an independent fashion in human rights complaints brought by its own citizens against itself; this is all the more so, the greater the scale and depth of the alleged abuse.⁸⁰ Where human rights enforcement is most needed, it will be least forthcoming. US courts have shown sensitivity to this concern. The doctrine of *forum non conveniens*, which had been used to bounce actions back to the violating States, has been interpreted in a way that acknowledges the realpolitik of bringing human rights complaints in the State of the alleged abuses—especially where the claim against the corporation also implicates the government of that state in genocide, torture and crimes against humanity. It would be foolish to hold that such a case could be pursued ‘more effectively and fairly’ in the country where that alleged abuse occurred.⁸¹ The court in *Presbyterian Church of Sudan v Talisman Energy* noted ‘[i]t would be perverse to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them’.⁸² By the same token, such abusive States would hardly—as the UK/Netherlands Kiobel Brief 1 asserted—be deterred from taking their human rights commitment seriously because another State has already dealt with the abuse: ‘States might be given reason to downplay even ignore their own international human rights law obligations. They will also not come under

⁸⁰ Exceptionally, remedies may be available where there has been a regime change, as eg in South Africa; for the objection of the South African government to ATS litigation concerning human rights abuses during the apartheid see Government of South Africa, *Declaration Concerning In Re South African Apartheid Litigation* and *In Re Khulumani & Others* (11 July 2003), discussed in UK/Netherlands Kiobel Brief 2 (n 4) 25ff, but later withdrawn; see South Africa’s Minister of Justice to the US Judge hearing the revised case (1 September 2009) <<http://www.khulumani.net/khulumani/documents/file/12-min.justice-jeff-radebe-letter-to-us-court-2009.html>>: ‘the Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York, is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law’.

⁸¹ *Wiwa v Royal Dutch Petroleum Co* 226 F3d 88 (2nd Cir 2000). In addition, there is also a host of practical problems that make civil actions in third world countries, even if theoretically available, much less feasible than in developed world; Joseph (n 2) 98, notes that very few cases are litigated after being dismissed in the US on the basis of *forum non conveniens*; one such exception was the action brought by the Indian government against the US parent company in the 1984 Union Carbide’s Bhopal disaster in India which killed 2000 and injured 200,000.

⁸² *Presbyterian Church of Sudan v Talisman Energy* (2013) 244 F Supp 289, 336 (SDNY 2003); see generally Joseph (n 2) 87ff. Contrast to the assertion in the Australian, Swiss, UK Sosa Brief (n 5) 24 (arguing that the Ninth Circuit has ‘not shown any particular sensitivity’ to the practical realities surrounding the cases). See also *Lubbe and Others v Cape plc* [2000] 4 All ER 268, where the House of Lords held that it should be considered within the *forum non conveniens* inquiry whether or not substantial justice would be obtained in the foreign forum, and the availability of funding may well feed into this inquiry.

pressure to provide a remedy, and indeed prevent abuses, if plaintiffs have recourse to redress elsewhere.⁸³ Such sentiments are disingenuous, as ATS litigation invariably only addresses some of the abuse (ie that committed by the private party⁸⁴) and this would not let a violating State ‘off the hook’ or reduce the pressure upon it to provide more systematic remedies; in fact it may well create international awareness and additional public pressure on the State to do so. So interpreting the private international law concept of *forum non conveniens* and the public international law concept of exhaustion of local remedies in the light of the political and economic context of the claims makes them both meaningful. Notably, the US government (much in line with Western governments) in its *Kiobel* Brief expressed its displeasure with this anti-formalistic trend.⁸⁵

States that have a connection with the dispute based on the nationality of the parent company (in *Kiobel*, the UK and the Netherlands) also have no real interest in holding the parent accountable for its or its subsidiary’s behaviour abroad which injures people to whom they are not politically accountable. Proceedings could be economically and politically damaging, as the company’s local investors and customers would suffer and the company itself might respond by relocating to a more hospitable State. It is notable that the amicus briefs of the UK and Netherlands governments in *Kiobel* never asked that US courts surrender jurisdiction over Shell in order for *them* to take actions against *their* companies.⁸⁶ Nigerian farmers had a dubious victory in January 2013 in *Akpan and Vereniging Mileudefensie v Royal Dutch Shell plc and Shell Petroleum Development of Nigeria Ltd*⁸⁷ when a Dutch court considered the liability of Shell and its Nigerian subsidiary in a negligence claim for oil spills in Nigeria brought by Nigerian farmers and a Dutch environmental NGO. Applying Nigerian law as the applicable law, the Dutch court held that in all but one case the spillage was due to the sabotage of third parties and could not be attributed to the Shell subsidiary. In one case, however, the Shell subsidiary had negligently failed to take the necessary preventive measures and thus incurred liability. Under Nigerian tort law, the Shell parent companies

⁸³ UK/Netherlands *Kiobel* Brief 1 (n 4) 25ff.

⁸⁴ The violating States and its officials would generally be protected by the doctrine of state immunity.

⁸⁵ US *Kiobel* Brief (n 4) 22–7, esp 24ff.

⁸⁶ UK/Netherlands *Kiobel* Brief 1 (n 4) 25, where the governments propose ‘guidelines’ ie non-binding recommendations for corporations, which in fact already exist, see (n 3) and accompanying text.

⁸⁷ *Akpan and Vereniging Mileudefensie v Royal Dutch Shell plc and Shell Petroleum Development of Nigeria Ltd* LJN BY9854 (District Court of the Hague, 30 January 2013) <<http://uitspraken.rechtspraak.nl/#ijn/BY9854>> (in Dutch), see Asser Institute Centre for International and European Law, ‘Dutch Judgements on Shell’s Liability’ (30 January 2013) <http://www.asser.nl/default.aspx?site_id=7&level1=12218&level2=12255&level3=13072&textid=40622>. Note, the claim by the Dutch NGO was disallowed by under Nigerian law the oil spills in Nigeria do not infringe its rights. See also Leigh Day, ‘11,000 Nigerians sue Shell in London Courts’ (22 March 2012) <<http://www.leighday.co.uk/News/2012/March-2012/11,000-Nigerians-sue-Shell-in-London-Courts>>. See also Baughen (n 16) 558ff.

have no responsibility to prevent subsidiaries from harming third parties abroad. Whether a Nigerian court would be willing to enforce this judgment against the Shell subsidiary is doubtful given that the Nigerian farmers had recourse to foreign legal systems precisely because their own would not provide them with a remedy.⁸⁸ In addition, this case did not raise the far more serious allegations that were made against Shell and its subsidiary in *Kiobel*. While the German government in its *Kiobel* Brief made claims about the existence of effective remedies in Germany,⁸⁹ the separate Brief submitted by some German MPs noted that the government was ‘deceptively omitting important details regarding the openness of German courts to such claims’.⁹⁰ Thus it was not misconceived for the US courts to be wary of the claims made by the corporate defendants that there were more appropriate venues in which to bring actions than the US.⁹¹

Finally, unconnected States have no obvious economic or political interest in monitoring these obligations towards foreign citizens to whom they are not legally or politically accountable. The reverse is often the case: any interference could cause diplomatic tensions and have a negative impact on trade relations—a concern partially (but not entirely) addressed by doctrines such as ‘state immunity’ and ‘political question’.⁹² Nevertheless, regardless of these disincentives, States, even in Europe,⁹³ have taken action in respect of foreign human rights violations, perhaps simply because it is the right thing to do.⁹⁴

⁸⁸ In 2005, a Nigerian Court ruled that Shell’s oil extraction methods involving flaring of natural gas was illegal and contravened the Nigerian Constitution guaranteeing citizens the right to life and human dignity. IRIN – Humanitarian News and Analysis, ‘NIGERIA: In key ruling, court deems gas-flaring illegal’ (15 November 2005) <<http://www.irinnews.org/report/57165/nigeria-in-key-ruling-court-deems-gas-flaring-illegal>> By 2012 the gas-flaring practices continued: IRIN – Humanitarian News and Analysis, ‘NIGERIA: Gas flares still a burning issue in the Niger Delta’ (8 March 2012) <<http://www.irinnews.org/report/95034/nigeria-gas-flares-still-a-burning-issue-in-the-niger-delta>>.

⁸⁹ German *Kiobel* Brief (n 4) 11–12.
⁹⁰ German MP *Kiobel* Brief (n 4) 9; see also Engle (n 79) 37ff, commenting on the unsuccessful case of *Malenkovic* LG Bonn (10 October 2003, Az 1 O 361/02) on the right of remedy which accrues to a State, not an individual under international law.

⁹¹ *Wiwa v Royal Dutch Petroleum Co* 226 F3d 88 (2nd Cir 2000) where the court noted: ‘[w]e regard the British courts as exemplary on their fairness and commitment to the rule of law’ but nevertheless rejected the *forum non conveniens* argument.

⁹² As shown by the numerous objections and amicus briefs filed in ATS litigation, generally by the home States of the companies, but also occasionally by the host States, eg the Nigerian government filed an objection to the *Wiwa* litigation, *ibid*.

⁹³ MW Hanna, ‘An Historical Overview of National Prosecutions for International Crimes’ in M Cherif Bassiouni (ed), *International Criminal Law – Vol III* (3rd edn, Martinus Nijhoff 2008) 297, 327.

⁹⁴ Or as in the ATS cases, allow actions by private parties to proceed. In many ways, all of human rights law is *prima facie* contrary to State interest as it entails external restrictions on State activity, and is thus predicated on mobilizing public opinion, and this holds true for its internationalization. T Risse and K Sikkink, ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’ in T Risse, SC Roop and K Sikkink (eds), *The Power of Human Rights* (CUP 1999) 12: ‘the diffusion of international norms in the human rights area crucially depends on the establishment and the sustainability of networks among domestic and

Given the difficulties faced in pursuing a remedy for a human rights violation at the national level, the international human rights enforcement mechanisms have become somewhat more developed than those for other international law violations. Apart from the monitoring bodies such as the UN Human Rights Committee, the more formal and effective enforcement options are regional and international courts, such as the European Court of Human Rights, the Inter-American Court of Human Rights or the International Criminal Court,⁹⁵ the existence of which implicitly acknowledges that State ‘self-regulation’ is in itself insufficient to ensure effective human rights remedies. Their transnationality means that no State directly sits in judgement of the actions of another, in an area of law that is particularly sensitive because of the inroads it creates into national sovereignty that are not necessitated by a competing State interest but are ‘merely’ intended to answer the demands of a higher moral order.⁹⁶ However, even disregarding the many hurdles faced by those seeking to access these tribunals, the territorial scope and State-centric focus of the regional Conventions would in all but exceptional circumstances preclude the possibility of transnational/extraterritorial claims relating to corporate activities outside of the relevant region. The European Convention of Human Rights, for example, applies, subject to minor exceptions, only in the territories of its Member States—albeit with a slight shift towards a less territorially focused approach emerging from the European Court of Human Rights in *Al-Skeini and others v United Kingdom* (2011) where the jurisdictional link was established through the UK soldiers’ exercise of ‘authority and control over individuals killed in the course of ... security operations’ carried out in Basrah.⁹⁷ Nonetheless, in its general scope the Convention perpetuates, on a regional level, the territorial paradigm of the traditional human rights framework at national level. Thus it would not provide an avenue for attributing, for example, partial fault to the UK and Netherlands governments for failing to hold the Shell parent company and their subsidiary accountable for their role in the Niger delta human rights abuses in the early 1990s—as neither State owes any duties to the Ogoni people. The effect of the strict territoriality of human rights protection allows Western States to reap

transnational actors who manage to link up with international regimes, to alert Western public opinion and Western governments’.

⁹⁵ Note too the non-permanent UN tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

⁹⁶ These norms have their origin in the Enlightenment belief (see eg John Locke) that all people are equal and have an equal entitlement to certain basic minimum rights that enable their human flourishing.

⁹⁷ *Al-Skeini and others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011) para 149, see also 130–50, interpreting art 1 of the ECHR. One might even argue that in this case, the very ‘abuse’ was in itself taken as an indicator of the control and authority the UK had over the victims—an argument which, if accepted, would dispense with the need for an a priori jurisdictional link. See also Australian, Swiss, UK *Sosa* Brief (n 5) 24.

the benefits of corporate activity abroad without shouldering any responsibility for the corporate methods that produced them.⁹⁸

Given the systemic weaknesses of the enforcement mechanisms of international human rights law, the decisions by courts of home and third party States to take a more proactive role, however improbable, cannot but be welcomed, especially when the wrongdoing falls within the ambit of universal jurisdiction and the alleged human rights abuse is of such a scale that it is unlikely that a remedy is to be had within the violating State.⁹⁹ For this reason, ATS litigation filled a significant gap in the human rights enforcement landscape, especially vis-à-vis corporate defendants.

IV. THE OBJECTIONS OF THE WESTERN GOVERNMENTS TO CORPORATE LIABILITY

A. *The Silences of International Law on Corporate Criminal and Civil Liability*

Western governments also objected to ATS human rights litigation on the basis that it created liability for companies and that such corporate liability was not recognized under customary international law even where equivalent liability existed for natural persons.¹⁰⁰ As with the issue of extraterritoriality, this objection was framed as the absence of a permissive rule rather than the existence of a prohibitive rule, and thus arguably goes counter to the approach taken by majority in the ICJ's Advisory Opinion on Kosovo (2010).¹⁰¹ However, unlike the above objections, here the silences of public international law in respect of corporate criminal liability and corporate civil liability are of a different kind and bring to mind Judge Simma's reflection on the permission/prohibition dichotomy in the same ICJ case:

by moving away from '*Lotus*', the Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of *toleration*, something which breaks from the binary understanding of permission/prohibition and which allows for a range

⁹⁸ Examples of environmental degradation at the hands of Western TNCs in third world countries abound. In 2009, West African children were found to be exposed to toxic electronic waste collected from British municipal dumps and shipped to countries, such as Nigeria and Ghana. Similarly, the suppression of social protest by governments as supported by TNCs, has been well documented, for example, in the case of Shell (headquartered in the UK and the Netherlands) against Ogoni people in southern Nigeria. Again, Shell's practices in Nigeria would not have passed the first EIA in the UK or the Netherlands. In light of these examples, the rhetoric of universality is unhelpful by disguising inequalities even at the point of standard setting.

⁹⁹ As would be accommodated by principles *forum non conveniens* (private international law) and exhaustion of local remedies (public international law); see US Kiobel Brief (n 4) 22ff; German Kiobel Brief (n 4) 14ff.

¹⁰⁰ It is a matter of debate whether the issue of which type of actor may be liable under international law pursuant to the ATS should be resolved by reference to domestic law or international law. See eg EC Sosa Brief (n 5) 10.

¹⁰¹ See text accompanying nn 39 and 40.

of non-prohibited options. That an act might be ‘tolerated’ would not necessarily mean that it is ‘legal’, but rather that it is ‘not illegal’. In this sense, I am concerned that the narrowness of the Court’s approach might constitute a weakness, going forward, in its ability to deal with the great shades of nuance that permeate international law. Furthermore, that the international legal order might be consciously silent or neutral on a specific fact or act has nothing to do with *non liquet*, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate. There would be no wider conceptual problem relating to the coherence of the international legal order.¹⁰²

Applying this to the corporate ATS context, it is at least plausible that the silence of international law on direct corporate criminal liability reflects a true lack of consensus within the community of States on this issue (ie non-recognition/prohibition), while the silence on corporate civil liability indicates the same disinterest public international law has shown for jurisdictional issues in civil proceedings and thus is entirely permissive.

1. Corporate criminal liability under international law

Starting with the question of direct corporate criminal liability under customary international law, the UK/Netherlands Kiobel Brief 1 stated: ‘In international criminal law, where individuals can be subjected to criminal liability, States have *never* agreed, and *no* determination has ever been made, that corporations should be made similarly liable.’¹⁰³ But have they agreed that companies should not be liable? This they supported by the *absence* of corporate prosecutions by the various war crimes tribunals and the *absence* of provisions for such liability in treaties.¹⁰⁴ As mentioned above, the absence of relevant activity is not necessarily an indication of disapproval, at least if there are no signs that the actors have actually engaged with the issue and then rejected the imposition of liability. Such evidence is indeed present here, as Western governments were eager to point out: the negotiations concerning the International Criminal Court Statute touched upon corporate criminal liability and rejected it on the basis of there being a lack of ‘universally recognized common standards for corporate liability’¹⁰⁵ given the divisions amongst

¹⁰² *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* (ICJ, Declaration by Judge Simma) 22 July 2010, <<http://www.icj-cij.org/docket/files/141/15993.pdf>>, para 9 (emphasis in the original).

¹⁰³ UK/Netherlands Kiobel Brief 1 (n 4) 13 (emphasis added). Also Judge Posner in *Flomo v Firestone Natural Rubber Co* 643 F3d 1013 (7th Cir 2011) notes that in fact in the Nuremberg trials two sanctions were directly aimed at corporations.

¹⁰⁴ UK/Netherlands Kiobel Brief 1 (n 4) 13–16.

¹⁰⁵ K Ambos, ‘Article 25. Individual Criminal Responsibility’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal* (2nd edn, Beck 2008) 475, 478; see also

States on whether and how criminal sanctions can be applied to companies as juridically complicated creatures.¹⁰⁶ While common law countries have increasingly imposed criminal law sanctions on corporate bodies, in many civil law systems companies are still considered incapable of criminal acts and thus exclusively within the domain of administrative law sanctions.¹⁰⁷ This makes an international consensus on the issue difficult, particularly in respect of crimes such as war crimes and crimes against humanity where criminal intent is paramount.¹⁰⁸ The most likely explanation for the reluctance of States to create international corporate criminal liability is economic protectionism. Be that as it may, it is clear that States have considered the issue of corporate criminal liability and not reached agreement on it and in light of this broken silence, it seems not unreasonable to argue that States have disallowed corporate criminal liability at the international level in situations where criminal liability would be endorsed for individuals.

2. Corporate civil liability under international law

On the topic of corporate civil liability (with which the ATS is concerned) customary international law is again silent; yet this silence is of a different type. The UK/Netherlands Brief 1 treats the issue as one of domestic law which international law only interferes with by limiting its territorial scope. One might deduce, in the words of Judge Simma, that this is one of the 'areas where international law has not yet come to regulate, or indeed, will never come

UK/Netherlands Kiobel Brief 1 (n 4) 14 and 18ff, also 6 'It is also of particular significance that the creators of the International Criminal Court deliberately confined its jurisdiction to individuals.' But see A Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 JICJ 899. See also discussion by Baughen (n 16) 550ff. For the lack of consensus on corporate liability under customary international law, see also J Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2010) 51 VaIntl 353.

¹⁰⁶ These jurisprudential reasons though should not be overstated; notably in the context of the entitlement of companies to human rights they are regularly underplayed.

¹⁰⁷ See, for example, in relation to the Rome Statute establishing the International Criminal Court, Ambos (n 105) 478: 'The final proposal presented to the Working Group was limited to private corporations, excluding states and other public and non-profit organizations. Further, it was linked to the individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities. Despite this rather limited liability, the proposal was rejected for several reasons . . . The inclusion of collective liability would detract from the Court's jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, there are not yet universally recognized common standards for corporate liability'.

¹⁰⁸ But, as noted above, many countries now consider companies capable of committing serious crimes, such as manslaughter.

to regulate'¹⁰⁹ and is thus permissive. This conclusion is supported by the International Commission of Jurists:

The ICJ Report on Civil Remedies does not even attempt to identify an international law regime of civil liability for corporations. Instead, the Panel explores the potential application of the law of civil remedies to some of the types of business interaction and interplay which can give rise to allegations of complicity by comparing the differences between civil and common law national regimes in that respect. The complete absence of any international law analysis of corporate civil liability clearly indicates that after its three-year study, the panel itself could not identify any such concept in international law.¹¹⁰

The ICJ Report concludes by encouraging the development of civil liability in this area; thus it treats the absence of international law not as restrictive but rather as an opportunity to develop appropriate remedies.¹¹¹ Such interpretation is consistent with the arguments above on the likely disinterest of public international law in determining jurisdictional limits in civil matters. Corporate civil liability has not come up for discussion at the international level because it has not been of interest; given the nature of the wrongdoing in the spotlight, such as genocide, criminal responsibility certainly seems more appropriate.

3. *Corporate civil or criminal liability within the discretion of States*

Just because there is no consensus on there being international criminal obligations for companies and a lack of interest in creating some form of international civil accountability, does not mean that the community of States rejects the idea of corporate accountability for extraterritorial human rights violations at the national level. It is simply left within the discretion of each State to decide on whether and, if so, what form such liability should take. Edwards J in *Tel-Oren* (1984) observed that while the violation occurs under international law the cause of action arises in domestic law: 'It is unnecessary that international law provide a *specific* right to sue. International law does not require any particular reaction to violations of law.... Whether and how the United States wished to react to such violations are domestic

¹⁰⁹ See (n 102).

¹¹⁰ Crawford Talisman Brief (n 6) 14 (internal citations omitted); International Commission of Jurists (ICJ), *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability, Vol 3: Civil Remedies* (2008), <<http://icj.wpunet.net/dna-cdn.com/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf>> 28.

¹¹¹ *ibid.* See also Ruggie (n 10), noting that 'the most consequential legal development in business and human rights is the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards' (internal marks omitted).

questions.¹¹² Similarly Judge Leval, dissenting in the Second Circuit decision in *Kiobel* stated:

Civil liability *under the ATS* ... is awarded in U.S. courts because the law of nations has outlawed certain conduct, leaving it to each State to resolve questions of civil liability, and the United States has chosen through the ATS to impose civil liability. The majority's ruling defeats the objective of international law to allow each nation to formulate its own approach to the enforcement of international law.¹¹³

Consistently, a number of States 'when incorporating the Rome Statute into their domestic law, imposed criminal liability on legal persons for the group of crimes included in the Rome States, viz. genocide, crimes against humanity and war crimes'.¹¹⁴ While this practice by States is, of course, 'not sufficient evidence to conclude that there is a positive rule of international law *imposing* direct criminal liability on legal persons'¹¹⁵ (as argued by the UK and Netherlands), it *is* evidence as to the type of implementation in which international law acquiesces. The approach of leaving the precise implementation of a widely framed duty vis-à-vis companies to the discretion of States has been expressly adopted in, for example, the OECD Anti-Bribery Convention (1997).¹¹⁶ In short, there are precedents in international law where States have been given leeway as to whether and, if so, how to translate an international obligation into an obligation for the corporate person.

Again, the point here is not to argue that international law recognizes direct corporate liability contrary to the Western governments' Briefs, but rather to present a more nuanced picture of international law. International law can certainly be said to acquiesce to varying forms of domestic implementation of international obligations by States in respect of corporate actors, thereby reflecting and accommodating different national jurisprudential traditions.

B. The Substantive Case in Favour of the Horizontal Enforcement of Human Rights against Companies

Western States did not object to ATS litigation on the ground that it involved the horizontal enforcement of human rights per se, but on the ground that it was companies which were at the receiving end of this horizontal litigation.¹¹⁷

¹¹² *Tel-Oren v Libyan Arab Republic* 726 F2d 774, 779 (1984) (internal marks omitted).

¹¹³ *Kiobel v Royal Dutch Petroleum Co* 21 F3d 11, 175 (2nd Cir, 2010) (emphasis in the original). See also Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8(3) JICJ 895, 898.

¹¹⁴ UK/Netherlands *Kiobel* Brief 1 (n 4) 20.

¹¹⁵ *ibid* 20 (emphasis added).

¹¹⁶ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); see also International Convention for the Suppression of the Financing of Terrorism (1999).

¹¹⁷ See eg UK/Netherlands *Kiobel* Brief 1 (n 4) 17ff (for a defence of the vertical application of human rights 20ff).

In other words, the issue was not the wider question of whether and when horizontal human rights duties should be recognized and directly enforceable but the following narrow issue: in situations where horizontal human rights duties *are* recognized by international criminal law, should corporate offenders be treated differently from human offenders? While the objection to corporate offenders was framed purely as one of the strict letter of international law which, as shown above, is more permissive than was made out in the Briefs, this section examines the law within the wider context of corporate human rights accountability.

Are companies juridically so different as to be unsuited to international criminal law? In many ways, of course, they are. For example, it is difficult to translate the criminal law concepts of *mens rea* and *actus reus*, designed for individuals, to artificial actors: when is it appropriate to attribute the acts of individuals acting for the company to the company itself? Such adaptation is done routinely in commercial transactions and other civil liabilities; contractual notions such as ‘meeting of two minds’ have long been extended to companies without any difficulties. In the criminal field, however, those legal extensions have proven more controversial because of the heightened seriousness of the alleged breaches and concomitant heavier sanctions used to penalize them.¹¹⁸ There are notable exceptions, such as the criminalization of corporate anti-competitive activity under the US Sherman Act since 1890. Beyond such economic crimes, numerous States have, in recent years, been willing to overcome theoretical difficulties and created corporate manslaughter offences in order to meet the demands of justice, especially in relation to industrial accidents that had previously seen large public companies as well as their managers escape liability even when there was gross negligence.¹¹⁹ Similarly, exempting companies from international criminal liability for their activities in situations where individuals would incur such liability¹²⁰ means that the corporate actor can be used as a device to pursue profits without the legal encumbrances that would restrict the similar action of human actors individually (and individual responsibility within the company may be too diffuse to justify individual accountability). This is all the more problematic in the light of evidence suggesting that companies are not restrained by moral/social norms comparable to individuals in the absence of legal restraints.¹²¹

¹¹⁸ Again, this area has attracted a lot of literature in recent years; for a good summary of key arguments, see J Gobert and M Punch, *Rethinking Corporate Crime* (Butterworths 2003) ch 2.

¹¹⁹ *ibid.* Approaches that recognize corporate liability only if there is individual wrongdoing at board level have proven particularly inadequate in dealing with the criminality of large public companies.

¹²⁰ In many of these situations individual responsibility within the company could not be established given the diffuse decision-making structure of large public companies, see Gobert and Punch (n 118).

¹²¹ As exemplified by the failings of the concept of Corporate Social Responsibility, see eg M Blowfield and A Murray, *Corporate Responsibility: A Critical Introduction* (OUP 2008) 345ff.

So the company provides a device that allows moral and legal responsibility to be deflected. In the words of Dine, 'appointing a company to achieve objectives which would be ethically deplored in an individual means that we can conveniently blame others while reaping the reward of their behaviour... it is precisely the no-obligations, no-responsibility nature of corporate income rights which enables their owners to relax on sofas, blissfully ignorant of and interested in precisely how the dividends and interest accruing to them is generated'.¹²²

In the specific context of international criminal law, this means that corporate bodies can be used to avoid accountability for crimes that are so heinous as to be otherwise transcending the normal ordering by the State. In respect of such crimes the corporate actor is arguably a more legitimate target of criminal sanctions than the individual, given the collective nature of the criminal activity and the subordination of the individual within this collectivity:

It could be typical of crimes falling under the jurisdiction of the ICC that the offender is not acting individually in a similar sense as the offender committing a 'normal' murder or robbery. Instead, the offender is likely to belong to a collective, sharing group values... In such situation, the offender may be less likely to break the group values than the criminal norms. The commitment of crimes may be encouraged not just by material benefits but also by various techniques affecting the offender's judgement as to what constitutes prohibited conduct. That way the actor may be manipulated, lured or indoctrinated to commit the crimes. Or he is among the leaders, those that manipulate, lure or indoctrinate.¹²³

The company typifies this type of collectivity which may impose strong group values on the individuals within it, with the company itself assuming the role of the indoctrinating leader.¹²⁴

Last but not least, the case for holding corporate actors accountable under international criminal law along the same lines as individuals is strengthened by the fact that they have increasingly been granted human rights privileges. One might argue that a company is less suited to being the recipient of such rights, as human rights were created to protect humans *qua* human beings, rather than as economic or legal actors. Yet in Europe and elsewhere companies have successfully challenged State interferences by invoking rights, such as freedom of expression, privacy or the right to a fair trial—despite legitimate concerns about the rationality of such extensions and the

¹²² J Dine, *Companies, International Trade and Human Rights* (CUP 2005) 44 (internal marks omitted, quoting Paddy Ireland).

¹²³ I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561, 573.

¹²⁴ On specific corporate values and cultures and the effect on individuals see eg JD Knottnerus, and JS Ulsperger, 'Exposing Enron: Media Representations of Ritualised Deviance in Corporate Culture' (2006) 2(2) Crime Media Culture 177.

ramifications for competing human rights of individuals.¹²⁵ To the extent that both human rights and criminal responsibilities rely on the idea of the company as an autonomous actor whose behaviour and ‘mind-set’ are sufficiently distinct from its human protagonists to justify attaching separate legal consequences to it,¹²⁶ granting them human rights cannot but weaken their case against corporate criminal responsibility.

V. CONCLUSION

This discussion has shown that the legal arguments made in support of a restricted version of the ATS by various Western governments in *Kiobel* and previous ATS cases—either based on excessive extraterritoriality in civil claims or on the unprecedented extension of international law to corporate actors—have at best a weak basis in customary international law. At worst they are unsustainable in the light of the almost unbroken silence of international law on civil law/proceedings. The evidence that punctuates that silence in the case of extraterritoriality shows that domestic courts regularly exercise jurisdiction very liberally in entirely foreign civil disputes and that that exercise has been met with disinterest by other States, bar a few exceptions. Similarly, the evidence that punctuates the silence of international law on corporate accountability under international criminal law shows that States have deferred decisions on the precise form that such accountability should take to the domestic stage, without imposing any restrictions. The feebleness of the legal arguments advanced by the Western governments is particularly unfortunate given that they are likely to have played a part in the Supreme Court’s decision to curtail the ATS’s reach in order to minimize ‘diplomatic strife’ and thereby limits its potential for making significant inroads into the State-centric conception of international human rights law. By situating well-known transnational corporate actors squarely within some of the most egregious human rights abuses of recent times, ATS litigation pointedly exposed the role of corporate actors within the human rights landscape and the realpolitik between host State and their corporate guests and promised the latter’s growing accountability.

This is, of course, the very backdrop against which the UN Human Rights Council commissioned John Ruggie, UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations

¹²⁵ M Emberland, *The Human Rights of Companies* (OUP 2006); U Kohl, ‘The Sun, Liverpoolians and ‘The Truth’: A Corporate Right to Human Rights?’ in C Harding, U Kohl and N Salmon, *Human Rights in the Market Place* (Ashgate 2008); A Grear, ‘Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights’ (2007) 7 HRLRev 511. For a recent US case, see *Citizens United v Federal Election Commission* 558 US 310 (2010) where the Supreme Court held that the First Amendment prevents the government from restricting corporations and unions from spending on election-related communications.

¹²⁶ See eg C Wells, ‘Corporate Crime: Opening the Eyes of the Sentry’ (2010) 30 LS 370, 383.

and other business enterprises, to develop the ‘*Protect, Respect and Remedy*’ Framework (2008) implemented by *The Guiding Principles on Business and Human Rights* (2011)¹²⁷ according to which ‘States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy..’ and such barriers certainly exist where ‘claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim’.¹²⁸ In *Kiobel* and previous cases, the same governments that strongly supported these Principles¹²⁹ vehemently argued that the ATS should be restricted in scope without proffering an alternative remedy for the human rights victims of their corporations. The US government alluded, in its *Kiobel* Brief, to the unwillingness of the home States of corporate parents to hold their corporate actors accountable: ‘other more appropriate means of redress would often be available in other forums, such as the principal place of business or country of incorporation. And if foreign nations with a more direct connection to the alleged offence or the alleged perpetrator choose not to provide a judicial remedy, the United States could not be faulted by the international community for declining to provide a remedy under U.S. law.’¹³⁰ Indeed.

What emerges, ever so quietly, as a narrative tying together the litigation and amicus briefs, is that the different arms of government do not necessarily pull in the same direction. While US courts were willing to modernize the old statute to meet the demands of modern times and still are, albeit more restrictively, the US State Department in many of its amicus briefs, not unlike the European governments, called for a much narrower, historically bound reading of the Statute—as was in fact endorsed by the Supreme Court under not insignificant external pressure. Similarly, as noted above, at the very time when the Netherlands government objected to the excessive extraterritoriality of ATS cases, a Dutch court allowed a human rights claim that had no connection whatsoever with the Netherlands and another Dutch court recognized the civil liability of Shell’s Nigerian subsidiary for oil pollution.¹³¹ In the UK in *Chandler v Cape plc* (2012) the Court of Appeal held that the English parent company (Cape plc) owed a duty of care to the employees of its English subsidiary for its systemic failures on health and safety, as it could be shown that the subsidiary and its employees relied on the parents’ superior knowledge

¹²⁷ See (n 3).

¹²⁸ Commentary on Principle 26.

¹²⁹ On the support of the UK Government of these Guidelines see UK Parliament – Foreign Affairs Committee, ‘The FCO’s Human Rights Work 2010–11: 3 FCO Commercial Work and Human Rights’ <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaft/964/96407.htm>> para 106: ‘In the 2010 FCO [Foreign and Commonwealth Office] Report, the department said that it was “keen” to see the HRC adopt the guidelines, and the Foreign Secretary welcomed the HRC’s decision to do so’ (internal marks omitted).

¹³⁰ US *Kiobel* Brief (n 4) 20; see also 5, 26.

¹³¹ See text accompanying nn 52 and 87, respectively.

on those matters, in this case the dangers of asbestos.¹³² Although the court stressed that this did not in any way involve piercing the corporate veil,¹³³ and although this was a normal tort case in a domestic setting, it undoubtedly opens the door to greater parent company accountability for systemic corporate irresponsibility, especially in the transnational setting.

All in all, there appears to be a greater willingness within the judiciary to engage with international human rights abuses committed by TNCs than there is within the executive or legislature. An obvious reason is that the latter are much more exposed to countervailing political/economic forces and disincentives. Although the presumption in *Kiobel* is designed to shift foreign policy judgments away from courts and towards the executive, this being, arguably, a ‘politically accountable actor with greater expertise in foreign affairs’¹³⁴ and while one could neutrally conclude that such shifting legal patterns externalize the ‘social conflict underlying the doctrinal uncertainty [which] is resolved differently by different state organs acting at different times’,¹³⁵ the above discussion suggests that the judiciary is by far the more reliable ally, and at times unexpected champion, of the human rights cause.

¹³² [2012] EWCA Civ 525, para 80.

¹³⁴ Wuerth (n 24) 612.

¹³³ *ibid* para 69.

¹³⁵ *ibid* 621.