Europees en Belgisch IPR

Extraterritoriality and private international law

Geert VAN CALSTER [1]
hoogleraar Instituut voor Europees Recht KU Leuven

Charlotte LUKS [2]

1 KU Leuven and DLA Piper.

2 Hampshire College. Thanks are due to the EuroScholars program for their assistance in enabling the research which led to this article.

'Extraterritoriality' takes different forms in private international law. This includes courts of some of the EU Member States claiming jurisdiction to hear cases not even remotely connected with their territory (in particular, on the basis of the nationality of the plaintiff), [1] and the potential introduction of a 'forum necessitatis' in the review of the Brussels Regulation. [2]- [3]

This contribution reviews the use of private international law in the debate on corporate social responsibility, leading directly to extraterritoriality concerns. It highlights the general challenges in both claiming jurisdiction to hear facts which have taken place outside one's territory, and further, to have one's laws applied to such facts. It compares the US approach on the issue in the light of recent case-law, with the EU's stance.

The role of Private International Law in operationalizing Corporate Social Responsibility

The EU is seeking ways to impose European law on activities carried out abroad. This is especially the case in the environmental and human rights fields, which are core elements of the so-called 'Corporate Social Responsibility' (CSR) Agenda. The European Commission ('EC') has previously defined Corporate Social Responsibility (CSR) as '*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'*. [4] It has in the meantime changed this to '*the responsibility of enterprises for their impacts on society.*' [5] This is undoubtedly an attempt to re-align the EU approach to CSR, with international developments, in particular the *Ruggie* report. Indeed the United Nations, too, has optimistically referred to the extraterritorial application of national law as being a key element in operationalizing human rights, labour rights and environmental protection. On the other hand, the United States case-law on the Alien torts Act, often cited as the textbook example of employing national and international law, applied by national courts, to further the international community, has recently, as we shall see below, been reversed by the same circuit which launched its application. Appeal with the United States Supreme Court is underway.

Extraterritorial application of national law raises specific difficulties in each of the three steps of Private International Law: jurisdiction of national courts to

1 More detail in VAN CALSTER, G., European Private International Law, Oxford, Hart, forthcoming (2012).

2 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2001] L 12/1.

3 More on this review in VAN CALSTER, G., and VERHULST, M., 'Recente ontwikkelingen in het Europese IPR', in *Recht in Beweging*, 18de VRG Alumni-dag, Antwerpen, Maklu, 2011, 93-119. I.a. Belgium's Private International Law Act already includes such (sparingly used) forum necessitatis.

4 COM (2001) 366.

5 COM (2011) 681.

hear the case; the choice of law to apply to the facts at issue; and the foreign recognition and enforcement of any resulting judgments. Adequate national /international private law scenarios are suggested as offering faster and less complex solutions than interstate disputes involving State responsibility and International Public Law issues. [6] Since the path-breaking *Doe* v. *Unocal* litigation in 1997, more than 50 cases have been brought in the United States against companies under the Alien Tort Statute alleging corporate involvement in human rights abuse abroad. [7] Amendments to EU Private International Law instruments are being suggested to increase jurisdiction for European courts in cases involving companies without European corporate 'roots', and to expand the application of European law to acts carried out outside of the EU. [8]

Reviewing the suitability of employing private international law as a way forward for what are essentially disputes with a high potential for upsetting inter-State relations, is particularly relevant in light of recent developments in case-law involving the Alien Tort Statute. In *Kiobel* v *Royal Dutch Petroleum*, the United States Court of Appeals for the Second Circuit held that corporations cannot be sued under the Alien Tort State for violations of customary international law because *"the concept of corporate liability […] has not achieved universal recognition or acceptance of a norm in the relations of States with each other*." [9] In denying re-hearing, Chief Judge Jacobs argued in February 2011 that

> *All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors–and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them–and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance–the very opposite of the universal consensus that sustains customary international law.*

6 BIRNIE, P., BOYLE, A., REDGWELL, C., *International Law & the Environment*, 3rd ed., Oxford, OUP, 2009; 303.

7 RUGGIE, J., United Nations Human Rights Council, 22 April 2009, Report of the Special Representative, John Ruggie on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf, 26.

8 AUGENSTEIN, D., "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union" (2010), available via http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf.

9 17 September 2010, at 49. See further references below.

Judge Jacobs' frank assessment of the respective roles of public and private international law are particularly interesting when one considers the roots of modern private international law.

The United States: Litigation based on The Alien Tort Statute

The Alien Tort Statute, a product of the United States' first congress, creates a domestic forum for violations of international law. The relevant text reads,

> "*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*." [10]

Though there has been some debate over the original intention of Congress in creating the statute, the accepted use of ATS litigation, in its broadest terms, has become one in which aliens may bring suit against other foreign nationals or American citizens for breach of commonly accepted international norms. The statute remained unused in the courts for roughly 200 years after its creation until *Filartiga v. Pena-Irala* (1980). [11] The United States Second Circuit Court of Appeals, the court that serves Connecticut, New York and Vermont, upheld the claims of the defendants, Paraguayan nationals, that the rights of their family member, as defined by international law, were violated when another Paraguayan tortured and killed him. Following the success of the trial, ATS litigation has had an increased presence in US courts, though the vast majority of claims do not find the success that *Filartiga* did. The original trial also set a precedent for the use of ATS in cases regarding human rights. A few notable cases have arisen in the last few decades and have helped to further define the goal of ATS litigation, though not to an extent that has made the statute any less controversial.

The ATS case most commonly cited in scholarly attempts to define the statute and its acceptable uses is *Sosa v. Alvarez-Machain* (2004). [12] In *Sosa*, a Mexican national claimed violation of his right to be free from arbitrary detention when he was abducted and detained overnight by other Mexican nationals. Though the court determined that one night of detention followed by being turned over to lawful authorities and a prompt arraignment was not a major violation of international norms, the results of the case significantly narrowed the scope of jurisdiction in ATS cases. The court held that in order to qualify for ATS, a plaintiff must provide significant evidence for the violation of well-defined and universally accepted norms of common international law. The *Sosa* court made clear the argument that the Statute was not intended to be read broadly and as such, future courts should be conservative in terms of recognizing new violations of international law. The Court writes, "*The judicial power*

10 Alien Tort Statute, 28 U.S.C. §1350(2000).
11 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
12 SOSA v. Alvarez-Machain, 124 S. Ct. 2739, 2769 (2004).

should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today [13]- [14]."

Post *Sosa,* plaintiffs are burdened with the task of not only proving that a defendant has violated international law, but that the international law in question is amply defined as well as a universally accepted and documented international norm. In the original text of the 1789 statute, there were three requirements: the plaintiff had to be an alien, allege a tort, and offer evidence towards the defendant's guilt in violation of 'the law of nations'. The specific 'law of nations' was not further defined in the original text of the document but with the 200 year gap in cases using ATS, the language did not become controversial until recent years. After the *Sosa* decision, plaintiffs were saddled with the burden providing evidence for a law's validity by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." [15] The plaintiff also had to demonstrate a level of consensus among nations as well as international treaties and statutes to demonstrate the validity of an international norm, however the *Sosa* decision drastically narrowed the scope of documents that may be used to claim common international law. [16] For 200 years the Alien Tort Statute was an ill-defined, unused piece of legislation. Now more commonly used, each case brought before US courts employing ATS litigation further restricts the acceptable use of the statute.

Corporate Liability Under ATS

Whether corporations may be held liable for violations of international human rights law has long been a topic of debate in the legal community. The debate extends back to the post-Nazi era and the Nuremberg Trials. At the trials, various German industrialists were convicted of war crimes including the use of slave labour. [17] However, while the Nuremberg Courts were allowed to find organizations guilty of war crimes, they could do so only through the trial of an individual. Essentially, a corporation could be found criminal but could not be tried separately, only through an individual who facilitated the corporation's criminal enterprises. [18] The Nuremberg trials are relevant to American ATS litigation in that their precedents are often consulted by judges in ATS cases. Notably, in a recent case brought before the second circuit, *Kiobel v. Royal*

13 See Sosa.

14 CARON, D.D., and BUXBAUM, R.M. "The Alien Tort Statute: An Overview of Current Issues" (2010) 28:2 Berkeley Journal of International Law 514.

15 MORRIS, S.M. "The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa" (2010) 41 Columbia Human Rights Law review 281.

16 Ibidem, 283.

17 CASSEL, D., "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts" (2008) 6:2 Northwestern Journal of International Human Rights 306.

18 Ibidem, 315.

Dutch Petroleum [19] (2010), the verdict relied heavily on precedents set by international tribunals, including the Nuremberg trials, in relation to corporate liability for violation of international law. [20]

In recent years, the debate has become more focused to the question of corporate culpability for violations of human rights rather than simply corporate liability. Multinational corporations are often in the position of violating human rights because they form partnerships with developing countries for their cheap labour, lax governmental regulation and unexploited resources. [21] Though governments themselves can be responsible for these violations of international norms and human rights, bringing suit against governments comes with a variety of obstacles including questions of sovereign immunity, lack of personal jurisdiction and in the event of a successful trial, enforceability. [22] For these reasons plaintiffs often find corporations a more desirable opponent as they do not have sovereign immunity and if the trial is successful, corporations' resources can more readily be used to compensate plaintiffs.

There have been a series of cases tried before various federal courts which have revolved around questions of corporate culpability, particularly to what extent corporations can be held liable before the law. *Kiobel* found that, due to what it perceived as a lack of precedent in international law, corporations cannot be held liable for violations of customary international law in US courts under ATS litigation. [23] However this decision only adds to a growing list of corporate ATS cases with incongruent results. In *Doe I v. Unocal Corporation* (2002), [24] the Ninth Circuit Court unanimously decided that corporations can be sued for aiding and abetting foreign human rights violators. Similarly in *Khulamani v. Barclay National Bank Limited* (2007), [25] the court agreed that corporations can be held liable for aiding and abetting in violations of international law. [26] This lack of congruency among ATS cases involving corporations is largely due to the fact that most of the cases are presented before the circuit courts rather than the Supreme Court. Any decisions the Supreme Court makes regarding ATS then becomes law for all of the lower courts, but without this guidance, each Circuit Court may continue to operate independently of the other Circuit Courts. Without a singular ruling judicial body to set cohesive

19 KIOBEL v. Royal Dutch Petroleum Co., 621 F. 3d 111 (2d Cir. Sept. 17, 2010).

20 CROOK, J.R,. "Contemporary Practices of the United States Relating to International Law: International Human Rights: Second Circuit Panel Finds Alien Tort Statute Does Not Apply To Corporations" (2011) 105 American Journal of International Law 139.

21 ABADIE, P., "A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations" (2010) 34:3 Environmental Law Journal 745.

22 AINSCOUGH, C., "Choice of Law and Accomplice Liability Under the Alien Tort Statute" (2010) 28:2 Berkeley Journal of International Law 589.

23 CROOK, note 20 above, 139.

24 DOE I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003), *and vacated and appeal dismissed following settlement*, 403 F. 3d 708 (9th Cir. 2005).

25 KHULUMANI v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

26 CASSEL, note 17 above, 319.

standards for ATS litigation, the question of whether or not corporations can be held liable for human rights violations will remain unanswered.

The answer to this question may be decided upon sooner rather than later. The *Kiobel* plaintiffs recently filed a petition to appeal the results of the trial at the United States Supreme Court. The court has accepted the case, which leaves two main concerns that need to be addressed. First, the actions of the Circuit Court would need to be reviewed. None of the lower courts in the trials prior to the last appeal had addressed the issue of corporate liability on a subject matter jurisdictional basis, yet the Circuit Court ruled that corporations cannot face charges under ATS litigation. Therefore it would be up to the Supreme Court to determine if the question of corporate liability is a merits question, as the consensus had been before the case was brought to the Circuit Court, or an issue of subject matter jurisdiction. The second question that would come before the Supreme Court would be the more substantive issue of corporate liability; whether or not corporations can be held responsible for their violations of international law before US Courts under the Alien Tort Statute. [27] If the USSC upholds the ruling of the Circuit Court, the results would effectively remove an important path to justice for victims of corporate human rights abuse. If the court overturns the ruling, it could perhaps usher in a new era of corporate responsibility.

Standard Operating Procedure or a Lack Thereof

There is currently a noticeable gap, as far as ATS litigation is concerned, in terms of a standard operating procedure. There has been as noted little Supreme Court involvement in ATS litigation and this lack of guidance by the Court has led to immense diversity in how the lower federal courts handle cases. In the one relevant ATS case tried by the Supreme Court, it has set a standard for determining actionable norms, but has offered the lower courts nothing in the way of practical guidance. [28] This case, *Sosa,* addressed jurisdiction but did little to clarify the substantive questions associated with ATS litigation. The few notable cases tried before the Supreme Court have broadly defined the act's jurisdiction but have not dealt with substantive issues such as, "what constitutes an international norm under the act," or "how to assess vicarious liability for corporate actors." [29] As such, until the Supreme Court or congress step in with clearly defined boundaries of ATS litigation, it is up to the lower courts to establish a body of precedent.

There is not only extreme diversity among the lower courts in terms of judicial procedure but also in determining liability for corporations. As clarified in the

27 KIOBEL v. Royal Dutch Petroleum Co., 621 F. 3d 111 (2d Cir. Sept. 17, 2010) Cert. Filed (U.S. June 6, 2011).

28 WAUGH, R., "Exhaustion of Remedies and the Alien Tort Statute" (2010) 28:2 Berkeley Journal of International Law 557.

29 O'GARA, R.T., "Procedural Dismissals Under the Alien Tort Statute" (2010) 52 Arizona Law Review 797.

previous section, each district court confronted with an ATS case of corporate liability has handled it differently. It is therefore necessary for the Supreme Court, as the singular ruling body of the American judicial system, to step in with unambiguous standards for corporate liability. [30]

International or Domestic Law

There has been some contention in the courts over whether ATS decisions should be based on international or domestic law. Though ATS litigation should, according to the statutory provision, employ only international standards, such a goal is fairly impossible to achieve due to the fact that ATS litigation is so unique and can therefore not mimic international law. The text of the statute creates jurisdiction for violations of international customary law and US treaties, but in terms of how to process relevant complaints, many gaps exist in the text. In previous cases, courts have used international laws and norms to judge alien tort claims and domestic law to determine judicial procedure. However, depending on the reading of the original statute, this could be seen as a violation of the drafters' intent, "*while in practice an American court would be inclined to apply American standards…a court holding true to the ATS's text should resist this impulse and look solely to customary law*." [31] Yet from another perspective, applying domestic procedure to ATS litigation could create a more consistent standard for these cases, leaving only the judgment of alleged crimes in the realm of international law. This type of consistency in judgment would be beneficial to plaintiffs with no other forum to turn to who are often denied justice due to confusion about source law.

Despite the language in the Statute that calls for the sole use of international law in ATS trials, many circuit courts have relied on domestic law in their proceedings, adding further confusion to the question of source law. In *Bowota v. Chevron* [32] (2010) the Ninth Circuit Court determined that California substantive law should be applied to the proceedings, despite claims from the defendants that Nigerian law should be applied. The court found that, "*California's interest in ensuring that its corporations behave in an appropriate manner outweighed Nigeria's regulatory interests*." [33] The decision to do so adds to the inconsistency among lower courts in terms of whether to use international or domestic law to rule on ATS cases.

ATS litigation exists to offer a forum to victims of abuse of international law to present their case where they might not be able to do so in the country where the offense took place. However, in many cases the violations they allege are not considered common international law and their claims are dismissed. This

30 CASSEL, note 17 above, 325.
31 MORRIS, note 15 above, 297.
32 BOWOTA v. CHEVRON, 621 F.3d 1116 (9th Cir. 2010).
33 CHILDLESS, D.E. III, "The Alien Tort Statute, Federalism and the Next Wave of International Law Litigation" (2011) 9 Pepperdine University School of Law Legal Studies Research Paper Series 40.

was the case recently in the aforementioned *Kiobel* (2010) holding, in which the Second Circuit Court determined that, until it became an international norm to do so, corporations could not be tried for violations of human rights. This is problematic because US courts may well have been the last forum that would hold corporations responsible for their actions, but *Kiobel* effectively removed the courts' power to do so. [34] This decision was based on international norms despite the fact that the US justice system allows corporations to be convicted of crimes. [35] In the case of *Kiobel,* the court's reliance on international rather than domestic law narrowed the scope of crimes the courts could try under ATS litigation.

Had *Kiobel* been tried in the ninth circuit, rather than the second, the plaintiffs might have found that the court had a more favourable approach to the question of source law. In this regard there has also been a lack of consistency among the lower courts as a result of minimal guidance from the Supreme Court. In *Doe I v. Unocal* (2002), [36] Judge Reinhardt argued that courts should apply domestic common law principles when necessary, to fill in the gaps present in the text of the Statute. He continued to write that without a statutory mandate, courts should use established federal common law rather than the principles of international law. [37]

This approach would allow for corporations to be held liable for their actions in ATS cases as the Statute itself makes no comments on the matter and established federal law allows for corporate liability. The Supreme Court decided that the word 'individual' is synonymous with 'person', a word which has a broader legal definition than common definition, and "considering that a corporation is a juridical person that has no particular immunity under domestic law and possesses the ability to sue and be sued, and that a corporation is generally viewed as a person in other areas of the law, a statutory reference to 'individual' or 'person' shouldn't exclude corporations" [38]. This inconsistency in terms of how to treat corporations is symptomatic of the larger problem that the future of ATS litigation faces.

Obstacles to Justice

The noticeable lack of clear direction under which federal courts operate when dealing with the Alien Tort Statute has created an atmosphere in which it is common to dismiss cases on procedural grounds to avoid a more substantive ruling. While the ruling in *Sosa* established a need for defendants to demonstrate a violation of international norms and customary laws, the Court did not establish a standard by which to judge the validity of an international law nor

34 CROOK, note 20 above, 143.
35 CASSEL, note 17 above, 315.
36 See Doe I.
37 AINSCOUGH, note 22 above, 592.
38 CHRISTENSEN, D.D., "Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After *Sosa v. Alvarez-Machain*" (2005) 62 Washington and Lee Law Review 1238.

did it mandate the sources from which these laws could be drawn. [39] The vagueness of the instructions handed down from the Court post-*Sosa* has contributed to the common use of procedural dismissals in the early stages of the proceedings on the basis of forum non conveniens. Cases can also be dismissed on more political grounds via the doctrine of international comity and the act of state doctrine. These represent significant obstacles to justice for the plaintiffs in ATS cases. Even the defendants suffer from the lack of standard definition as they spend significant money trying to fight claims presented to the courts under a vague statute.

Procedural Dismissal

One of the most common reasons for dismissal of an ATS case is the doctrine of forum non conveniens. Essentially, courts decide not to try a case, "*if an adequate alternate forum exists and the balance of private and public interest factors weigh strongly in favor of the alternate forum adjudicating the case*". [40]

In deciding whether or not to apply forum no conveniens dismissal, courts apply a two-art analysis. First the court must determine whether an alternate forum is available and, should that be the case, whether the alternate forum is adequate. [41] While it is the burden of the defendant to convince the court that another forum would be more appropriate, courts are reluctant to declare foreign courts inadequate and often dismissal results. [42] Even without this political influence, defendants are usually able to build a strong case for use of another forum as, more often than not, the alleged crime has taken place abroad and the cost of bringing in evidence and witnesses is a burden that could be avoided by trying the case in a domestic court rather than within the US. [43] The doctrine has been used in a series of cases that could've been crucial in defining the role of ATS litigation in corporate culpability for violation of international law had the cases not been dismissed on procedural grounds.

In the case of *Aguinda v. Texaco* [44](2001), Ecuadorian and Peruvian plaintiffs brought suit against the Texaco oil corporation claiming that Texaco had polluted the Ecuadorian Amazon, endangering both the environment and the health and livelihoods of those living in the rainforest. [45] This suit had the potential to be a landmark case in terms of defining the boundaries of ATS litigation; it raised questions concerning the extent to which corporations can be held responsible for the destruction caused by their contractors as well as to what extent environmental damage and resulting health concerns violates customary inter-

39 O'GARA, note 29 above, 803.
40 BALDWIN, J.E., "International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens" (2007) 40 *Cornell International Law Journal* 750.
41 ABADIE, note 21 above, 768.
42 O'GARA, note 29 above, 804.
43 BALDWIN, note 40 above, 757.
44 AGUINDA v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002).
45 BALDWIN, note 40 above, 760.

national law. However the case was dismissed on the grounds of forum non conveniens, a decision that was confirmed upon appeal.

Political Dismissal

The Alien Tort Statute is by definition entangled with political issues beyond the scope of the judicial system. This has created tensions between the three branches of the US government, most recently in 2002 when the Bush administration expressed concerns about the Act's potential for creating strain between the US and foreign governments. [46]

These concerns were addressed long before the Bush administration however. For example, the political question doctrine stems from the Supreme Court's 1803 ruling in *Marbury v. Madison.* [47] The doctrine essentially asserts that a federal court may decline to hear a dispute if its content would best be addressed by other branches of government, [48], "*under this doctrine, US courts are precluded from adjudicating a case which may require them to take positions on quintessential political questions related to the foreign policy choices of the executive branch.* [49]" This is a common concern in ATS litigation because cases presented under the statute are concerned with actions that take place within the jurisdiction of governments outside of the US.

Under this doctrine, courts accept 'statements of interest' from the executive branch; taking into consideration the political implications of trying a case. [50] However the decision of whether or not to allow trial to proceed remains with the courts. The case of *Sarei v. Rio Tinto* [51](2000) represented the first time in the history of ATS litigation that a trial proceeded despite a recommendation for dismissal from the Executive branch. In the case, residents of Bougainville Island in Papua New Guinea sued an international mining group for "destroying their island's environment, harming the health of their people and inciting a ten year civil war." The government of Papua New Guinea stated its objections and in response the US Department of Justice sent a letter to the district judge in charge of the case "highly [inviting]" him to consider the possible US-PNG foreign relation implications. [52] Judge W. H. Taft responded, "*It is [the court's] responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding*." [53] The Ninth Circuit asserted its independence in *Sarei* but the political question doctrine remains a valid option for dismissal and a considerable obstacle to justice.

46 O'GARA, note 29 above, 810.
47 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
48 O'GARA, note 29 above, 811.
49 ABADIE, note 21 above, 770.
50 O'GARA, note 29 above, 812.
51 Sarei v. Rio Tinto PLC, 221 F.Supp.2d 1116, 1121 (C.D. Cal. 2002).
52 ABADIE, note 21 above, 770.
53 O'GARA, note 29 above, 812.

Another doctrine with the potential for political dismissal in ATS cases is that of international comity. The doctrine of international comity considers the jurisdiction of foreign court's as well as the sovereignty of foreign nations in making decisions within their own borders. While not mandated by any means, courts look to international comity as a means of respecting foreign nations when the alleged actions before the court are not as black and white as torture or murder but fall into a grey area, as drilling for oil with potential for health risks to native populations might. Similar to the international comity doctrine, the act of state doctrine, "*bars courts from questioning the validity of foreign nations; sovereign acts that occur within their own jurisdictions*." [54]

This doctrine played a large role in the denial of an en banc claim as requested by the plaintiffs in Kiobel. [55] In denying the claim, Chief Judge Dennis Jacobs not only found that the ruling in the original case was sufficient, but that trying corporations in US courts was problematic in terms of the policies of foreign nations. Judge Jacobs argued that foreign corporations operate under the regulations and laws of the country's wherein they reside and that

> "*[He] cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them--and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees*." [56]

Despite his opinion, this is precisely the intention of the Alien Tort Statute, to try foreign nationals in US courts for violations of international law. The reasons for the dismissal are decidedly political and fall under the doctrine of international comity. As with any political motive for dismissal, use of international comity or act of state as a reason for declining to hear a case looks suspicious for a body that is supposed to be impartial to political trends. [57]

Early dismissals of ATS cases on both procedural and political grounds create obstacles not only to justice but to further definition of what ATS litigation covers. On a case by case basis, dismissals deny plaintiffs their 'day in court'. On a larger scale, when cases don't reach the ruling stage, the Statute cannot be further defined by increased precedent and its boundaries remain ambiguous, harming future defendants who may be unclear as to what they may be held accountable for. While it is understandable that federal courts would rather dismiss cases early rather than run the risk of interpreting the statute in a way that might harm future proceedings, continual dismissals only keeps the act from reaching its full potential as a means of bringing justice to victims of human rights violations.

---

54 ABADIE, note 21 above, 770.
55 See KIOBEL.
56 KIOBEL et al v. Shell, 06-4800-cv & 064876-cv (2nd cir. 2011).
57 O'GARA, note 29 above, 814.

Conclusion on the United States

Alien Tort legislation is seen by many as one of the last great hopes for effective enforcement of human rights violations internationally. While the need for a more extensive list of cases tried is evident, as more cases are tried before US courts the statute's potential decreases significantly. Rather than increasing the understanding of the act, new cases have either narrowed the scope of ATS litigation or left the statute's definition stagnant through procedural dismissals prior to more substantive proceedings. In these cases plaintiffs must navigate a proverbial legal obstacle course to avoid procedural dismissal before the trial can even begin. Should a case make it all the way to trial, there remains debate and confusion in terms of standard operating procedure, legal sources, and whether corporate liability exists in the present forum. ATS may indeed be a bright hope for the eventual goal of corporate culpability for human rights violations, but until the Supreme Court or Congress step in to further define the statute, very little progress will be made.

The European Union

In European Private International Law, as with the ATS, the two main concerns that arise when addressing matters of corporate violation of rights are whether or not EU member state courts have jurisdiction and, if so, what laws, national or international, apply. [58]

Jurisdiction

General jurisdictional rule: Article 2 JR. Following the Brussels I Regulation, it is enough for a court in an EU Member State to establish jurisdiction, if the defendant is domiciled in an EU Member State. Consequently truly multinational corporations may in theory at least be quite easily pursued in the courts of an EU Member State, even for actions committed outside of the EU: the principal jurisdictional ground of the defendant's domicile, included in Article 2 of the JR, operates independently of the activities to which the action relates.

Pursuing a holding company which were to have domicile in the EU, may be possible from the jurisdiction point of view however will be more challenging with respect to applicable law (see below). However corporate reality of course dictates that even though the firms concerned may operate under one global brand, in practice they are organised in separate corporate entities. As a result, one will find that International Business Inc. is actually made up of most probably as many separate corporate entities as the countries in which it operates: this will rule out jurisdiction under the Brussels I Regulation, it may however

58 AUGENSTEIN, note 8 above, 16. See also VAN DEN EECKHOUT, V., "Promoting Human Rights within the Union: The Role of European Private International Law", *European Law Journal*, 2008, (105) 127.

pave the way for jurisdiction under national rules of the Member States, for instance in those Member States which operate a *forum necessitatis* rule (see also the discussion below, on the forum necessitatis rule mooted in the review of the Brussels I Regulation).

Special jurisdictional rule: Article 5(5) JR: operations arising out of a branch. In the case of corporations, jurisdiction extends to branches of international companies by virtue of Article 5(5)'s special jurisdictional rule:

> *A person domiciled in a Member State may, in another Member State, be sued: (...)*
> *5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated; (...)*

The use of the words 'arising out of' however indicates the limited potential for this rule in the case of international litigation in a CSR context.

> *'This concept of operations (...) also comprises (...) actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.'* [59]

It can hardly be said that the non-contractual obligations of International Business Ruritania Ltd can be allocated to International Business [EU Member State]; they do not 'arise out of' the operation of the EU Member State, and moreover, would require International Business Ruritania Ltd to be domiciled in another EU Member State: Article 5(5) concerns only defendants domiciled in a Member State (Article 5), that is, companies or firms having their seat in one Member State and having a branch, agency or other establishment in another Member State. Companies or firms which have their seat outside the Community but have a branch, etc. in a Member State, are covered by Article 4 JR.

Special jurisdictional rule: Article 5(3) JR: Tort. The special jurisdictional rule for tort may potentially be triggered by the *Bier* [60] extension to the locus delicti commissi, in cases where plaintiff is able to show that International Business [EU Member State] is behind the actions which led to the tort. One would have to convince a court in an EU Member State that either direct instructions or negligent lack of oversight by International Business [EU Member State] led to the damage at issue. This comes with a considerable burden of proof.

Special jurisdictional rule: Article 5(4) JR. Courts which have jurisdiction in a criminal procedure, also have jurisdiction for the civil leg of the prosecution.

Review of the JR – The 'international dimension' of the Regulation. The review of the Brussels I Regulation, includes a proposed introduction of both an as-

59 Case 33/78, *Somafer*, [1979] ECR 2183, at para 13.
60 Case 21/76, *Mines de Potasse d'Alsace*, [1976] ECR 1735.

sets-based jurisdictional rule, and a forum necessitatis option.[61] These may have an impact on the issue discussed here.

Applicable law

Establishing jurisdiction leaves open the question of what law to apply to the fact at issue — as also illustrated by the challenges hitting the application of the ATS. The EU does not operate an ATS-like system, which employs *international* law to advance the case of plaintiffs seeking 'justice' in environmental or human rights cases. The route which must be followed in the EU, is one of *Gleichlauf* between having a court in the EU hear the case, and having that court apply the human rights, environmental… law of that forum, as a benchmark for deciding the merits of the action.[62]

The most likely route to pursue a corporation in a court in the EU, is via an action in tort. This generally, under the Rome II Regulation,[63] entails the application of the lex loci damni: the law of the place where the damage occured. Given that plaintiffs generally shy away from pursuing the case on the basis of tort law of Ruritania, the general rule of the Rome II Regulation in all likelihood is not the goal of the plaintiffs concerned.

Might any of the exceptions in the Rome II Regulation apply? If both parties are habitually resident in the same country when the damage occurs, the law of that country applies (Article 4(2) Rome II). This may be relevant in exceptional cases, however the more standard CSR scenario is for victims resident in the locus damni, outside of the EU, to sue in the EU. Article 4(3) more generally includes an escape clause: when it is clear from the circumstances of the case that it is '*manifestly*' more closely connected with a country other than the one indicated by 4(1) or 4 (2), the law of that country shall apply instead. *'The'* tort has to have that manifestly closer relationship: in particular in the CSR context, this is problematic given the occurrence of the damage abroad.

Finally, Article 7 Rome II contains a special rule for environmental damage:

61 VAN CALSTER and VERHULST, note 3 above.

62 Given the high degree of harmonisation of environmental law, as well as (to a slightly lesser degree) of occupational health and safety laws, and of course the impact of the European Convention on Human Rights as well as the EU's Charter of Fundamental Rights, the relevant law of an EU Member State will not differ in great substance.

63 Regulation 864/2007 on the law applicable to non-contractual obligations, OJ [2007] L199/40.

Article 7
Environmental damage
The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

This Article ties in with one of the options for establishing jurisdiction for an EU court, as highlighted above: one would have to convince a court in an EU Member State that either direct instructions or negligent lack of oversight by International Business [EU Member State] led to the damage at issue and hence constitute 'the event giving rise to the damage'. It is noteworthy that the additional rule on 'rules of safety and conduct' of Article 17 arguably have less of a calling for environmental litigation than may be prima facie assumed. [64]

Conclusion

Applying EU law or, in the case of US ATS case-law, international law to acts committed outside of the EU cq the US, throws both practical as well as conceptual difficulties. In both jurisidictions there are important ongoing developments - best watch this private international law space.

64 Contra: VAN DEN EECKHOUT, V., 'Corporate Human Rights Violations and Private International Law', working paper July 2011, available via SSRN (last consulted 20 December 2011).