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CHAPTER I

The aim of this chapter is to introduce the concept of the Tort of Negligence and examine the arguments on the limitations, benefits and legal drawbacks on the applicability of the US Alien Tort Claims Act (ATCA) to corporate human rights violations and environmental damages. The ATCA, which allows for suits to be brought forward in the US by aliens for torts in violation of the law of nations or treaties of the United States, was enacted in 1789.[1] However, use of the ATCA remained dormant until 1980, when a federal court in *Filartiga v Pena-Irala*[2] allowed a Paraguayan woman to bring a suit against a Paraguayan government official who had tortured and killed her brother. Built on the *Filartiga v Pena-Irala* case, this chapter further assesses the federal court jurisprudence on corporate accountability under the Act, which has developed over the years, and reflects on the impact that the current uncertain state of the ATCA has on multinational corporate misconduct overseas. It concludes that *Kiobel*[3] does not mark the end of the ATCA. This is because the analysis of the ATCA in this book shows that it is not the end but rather the next step in the evolutionary process to develop a new concept of corporate liability through the Tort of Negligence. Thus, the chapter will first explain the notion of human rights law, the nature of human rights law and the rights protected under international human rights law before examining the application of the Tort of Negligence and the ATCA.

Definition of Human Rights Law

Even though the specific phrase 'human rights' is mostly traced back to the aftermath of World War II,[4] the idea is as old as humanity itself, and inevitably intertwined with the history of justice and law.[5] Human rights are rights that individuals have by virtue of being human.[6] The essence of human rights revolves around the question of what it is about being 'human' that gives rise to rights.[7] Human beings, thus, support the 'bottom-up' approach to human rights, starting from the essence of being human.[8] In this understanding, human rights are viewed as moral principles and as legal principles rooted in morality. Deriving from these moral and legal principles are the overarching and interrelated principles of 'human dignity' and 'equality'.[9]

As a consequence, human dignity as a concept is twofold. On the one hand, it serves as the foundational premise of human rights. On the other hand, it is a legal term, for instance serving as a tool for interpretation. This last strand is often criticised for its use in methods of interpretation and application of specific human rights because of its lack of clear content or meaning.[10] For the present purposes of human dignity, human rights law is referred to as the foundation of all human beings. These rules are fundamental rights that protect human beings and societies.[11] A possible implication of this is that 'human dignity is understood as an affirmation that every human being has an equal and inherent moral value or status',[12] a view shared by Kant, who stated that no human being could be used merely as a means, but must always be used at the same time as an end in his classic work *The Metaphysics of Morals*.[13]

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[1]Jeffrey M Blum, and Ralph G Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala' (1981) 22 Harvard International Law Journal 53.
'The Alien Tort Statute (ATS)'; also known as the Alien Tort Claims Act refers to 28 USC. § 1350. Also see: *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Sosa v Alvarez-Machain,* 542 US 692 (2004).
[2]*Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
[3] *Kiobel v Royal Dutch Petroleum* Co., 133 S.Ct. 1659 (2013).
[4]Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press USA 2008).
[5]Reis A Monteiro, *Ethics of Human Rights* (Springer Science & Business Media 2014).
[6]James Griffin and James Thomas Griffin, *On Human Rights (*Oxford University Press 2008).
[7]Dinah L Shelton, ed. *Advanced Introduction to International Human Rights Law* (Edward Elgar Publishing 2014).
[8]*Ibid.*
[9]James Griffin and James Thomas Griffin (n 335).
[10]Justin Bates, 'Human Dignity an Empty Phrase in Search of Meaning?' (2005) 10 (2) Judicial Review 165, 168.
[11]Dinah L Shelton (n 336).
[12]Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 (4) European Journal of international Law 655, 724.
[13]Immanuel Kant, *Moral Law: Groundwork of the Metaphysics of Morals* (Routledge 2013).

The concept of human dignity also has value as a true legal proposition.[14] Human dignity serves as one of the most fundamental concepts of international human rights law, exemplified by its widespread appearance in almost all human rights instruments and regular application by human rights bodies.[15] It is a principle recurring in binding human rights treaties as well as in jurisprudence.[16] The European Court of Human Rights (ECtHR)[17] for instance affirmed that 'the very essence' of the European Convention on Human Rights (ECHR) was 'respect for human dignity', as evidenced by the application of Article 3 of the ECHR.[18] Human dignity is also explicitly present in the other regional human rights documents.[19] The notion of human dignity not only provides for a measuring or interpretational tool in the application of civil rights but also has a role to play in respect of economic and social life in answering the question on the benefits needed for a dignified life.[20]

Similarly, the concept of equality is inherently linked with human dignity, as exemplified by a reading of Article 1 of the Universal Declaration of Human Rights (UDHR) 1948: 'All human beings are born free and equal in dignity and rights.'[21] The moral principle underlying human rights is that we are all moral persons and therefore deserve equal respect, fittingly named 'the principle of equal respect.'[22] What is essentially being said here could be interpreted as the consequence of equality, which means a foundational principle that most human rights must be balanced against the rights of others. Equality holds in it a right of non-discrimination which is perceived as 'the most fundamental of the rights of man, the starting point of all other liberties.'[23] Such reasoning indeed lies at the foundation of the international concept of human rights, which is found for example in the abolition of slavery, minority rights and the right to self-determination.[24]

In this understanding, when considering human rights in legal terms we imagine that 'rights' exist as a counterpart of duties. Classically states are seen as the main duty holders in this regard since they exercise authority over persons and have the power to exercise a great degree of influence on them. However, when one keeps the moral foundations of human rights in mind we may imagine that states are not the only actors in the international sphere which have the power to exercise authority over individuals and the scope of duty bearers may thus be expanded,[25] an argument traced back to the moral foundation of human rights. In a more elaborate argument on human dignity, following up on Kant's views, Dworkin stipulates that human dignity has two faces: the intrinsic value of every human being and the moral responsibility to realise a successful life, which confirms the close interrelation of moral rights and moral duties. 'Based on this moral conception of human dignity, it leads to the argument that human rights constitute the legal face of human beings.[26] That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation.'[27]

To conclude this passage, as Shelton states: 'human rights exist because human beings exist with goals and the potential for personal development based upon individual capacities which contribute to that personal development. This can only be accomplished if basic needs which allow for existence are met and if other persons refrain from interfering with the free and rational actions of the individual. Recognition of the fact that there are rational and legal limits to individual, corporate or state conduct that would interfere unreasonably with the free

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[14]Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 (2) American Political Science Review 303, 316.

[15]Dinah Shelton, ed. *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013). Mentioning in international human rights treaties see for instance Art. 10 ICCPR, Art. 13 ICESCR and preambles of CERD, CEDAW, CRC and CRPD.

[16]Dinah L Shelton (n 336).

[17]Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury Publishing 2004).

[18]2 ECtHR (Merits), 29 April 2002, *Pretty v The United Kingdom*. App. No. 2346/02, para. 65; ECtHR (Judgment) 8 November 2011, VC v Slovakia, App 18968/07, para. 105.

[19]African charter on Human Rights and Peoples' Rights, OAU Doc CAB/LEG./ 67/3/Rev 5 reprinted in 21 ILM 59 (1982), preamble; Revised Arab Charter on Human Rights, May 22 2004, unofficial English translation 12 Int'L Hum Rts Reps 893, preamble, arts 3, 17, 20, 40;ASEAN Declaration on Human Rights, 18 Nov 2013 <www.asean.org/news/asean-statement-communiques/item/aseanhuman-rights-declaration> Accessed 3 June 2018.

[20]*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, No. 155/96. Furthermore: German Federal Constitutional Court, 9 February 2010, BverfGE 125, 175 at 222 with comment by Inga T Winkler and Claudia Mahler, 'Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?' (2013) 13 (3) Human Rights Law Review 388, 401.

[21]Universal Declaration of Human Rights (UDHR), 1948, UNGA res 217 A, article 1.

[22]Dinah L Shelton (n 336).

[23]Hersch Lauterpacht, *An International Bill of the Rights of Man* (OUP Oxford 2013).

[24]Manouchehr Ganji, *International Protection of Human Rights* (No. 133. Geneve: Librairie E. Droz 1962).

[25]Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006).

[26]Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Northeastern University Press 1991).

[27]Manfred Nowak, 'On the Creation of World Court of Human Rights' (2012) 7 National Taiwan University Law Review 257.

aims and life projects of others is a basic idea underlying contemporary understanding of human rights.'[28] Deriving from the moral foundation of human dignity, the main characteristics of human rights as they are known today stipulates that they are inherent, interdependent, and indivisible. This means first that they are of such a nature that they cannot be granted or taken away, a concept rooted in human dignity. Second, interdependence means that the enjoyment of one right influences the enjoyment of another right. This holds true not only when considering the rights of one person, but also when balancing the rights of one against the rights of another, a promulgation of the principle of equality. And third, human rights are indivisible which means that they must all be respected without exception. Though the notion of human rights throughout history has been founded in a social contract between individuals and the state,[29] it is only since World War II that human rights have become a part of the realm of international law, forming the 'international human rights law' branch of international law.

A possible implication might be that the 'term 'human rights' is used to denote a broad spectrum of rights ranging from the right to life to the right to a cultural identity. They involve all elementary preconditions for a dignified human existence.'[30] 'These rights can be ordered and specified in different ways.'[31] 'At the international level, a distinction has sometimes been made between civil and political rights on the one hand, and economic, social and cultural rights on the other.'[32] 'One classification used is the division between 'classic' and 'social' rights.'[33] ''Classic' rights are often seen to require the non-intervention of the state'[34] (negative obligation), and 'social 'rights''[35] as requiring active intervention on the part of the state.'[36] 'Classifying human rights in terms of negative and positive obligations may have its own defects for a certain right may involve both negative and positive obligations for its effective realisation.'[37] 'In other words, classic rights entail an obligation for the state to refrain from certain actions, while social rights oblige it to provide certain guarantees.'[38]

Legal scholars and 'lawyers often describe classic rights in terms of a duty to achieve a given result ('obligation of result') and social rights in terms of a duty to provide the means ('obligations of conduct').'[39] 'The evolution of international law, however, has led to this distinction between 'classic' and 'social' rights becoming increasingly awkward.'[40] Classic rights, such as civil and political rights, often require considerable investment by the state.'[41] 'The state does not merely have the obligation to respect these rights, but must also guarantee that people can effectively enjoy them.'[42] 'Hence, the right to a fair trial, for instance, requires well-trained judges,

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[28]Dinah L Shelton (n 4).

[29]Alfons Söllner, 'Jean-Jacques Rousseau, Du Contrat Social ou Principes du Droit Politique, Amsterdam 1762' in *Key Works of Political Science* (VS Verlag for Social Sciences 2007).

[30]<https://www.abyssinialaw.com/about-us/item/943-theories-of-human-rights-and-justification> accessed 18 May 2016.

[31]<https://www.abyssinialaw.com/about-us/item/943-theories-of-human-rights-and-justification> accessed 18 May 2016 and Olivier De Schutter, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (2010) Report Submitted by the Special Rapporteur on the Right to Food UN General Assembly.

[32] <https://www.abyssinialaw.com/about-us/item/943-theories-of-human-rights-and-justification> accessed 18 May 2016 and Kenneth Roth, 'Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 Human Rights Quarterly 63.

[33]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf > Accessed 9 May 2016.

[34]<https://www.abyssinialaw.com/about-us/item/943-theories-of-human-rights-and-justification> accessed 18 May 2016.

[35]*Ibid.*

[36]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

[37]<https://www.abyssinialaw.com/about-us/item/943-theories-of-human-rights-and-justification> accessed 18 May 2016 and Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights' (2007) 7 Human Rights Handbook

[38] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[39]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and David John Harris, *Cases and Materials on International Law* (Sweet & Maxwell 1998).

[40]Paul Sieghart, *The International Law of Human Rights* (Oxford University Press 1983) and Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.

[41] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[42]Gerard Quinn and Philip Alston, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights; *Economic, Social and Cultural Rights* (Routledge 2017) and Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.

prosecutors, lawyers and police officers, as well as administrative support. Another example is the organisation of elections, which also entails high costs.'[43]

'On the other hand, most 'social' rights contain elements that require the state to abstain from interfering with the individual's exercise of the right.'[44] 'As several commentators note, the right to food includes the right for everyone to procure their own food supply without interference; the right to housing implies the right not to be a victim of forced eviction; the right to work encompasses the individual's right to choose his/her own work and also requires the state not to hinder a person from working and to abstain from measures that would increase unemployment; the right to education implies the freedom to establish and direct educational establishments; and the right to the highest attainable standard of health implies the obligation not to interfere with the provision of health care.'[45] 'In sum, the differentiation of 'classic' rights from 'social' rights does not reflect the nature of the obligations under each set of rights.'[46]

Also, the term 'civil rights' is often used by legal scholars and practitioners 'with reference to the rights set out in the first 18 articles'[47] of the Universal Declaration of Human Rights 1948 '(UDHR), almost all of which are also set out as binding treaty norms in the International Covenant on Civil and Political Rights 1966 (ICCPR).'[48] 'From this group, a further set of 'physical integrity rights' has been identified, which concern the right to life, liberty and security of the person, and which offer protection from physical violence against the person, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one's privacy and right of ownership, restriction of one's freedom of movement, and the freedom of thought, conscience and religion.'[49] Therefore, 'the difference between 'basic rights' and 'physical integrity rights' lies in the fact that the former include economic and social rights, but do not include rights such as protection of privacy and ownership.'[50] 'Although not strictly an integrity right, the right to equal treatment and protection in law certainly qualifies as a civil right.'[51] 'Moreover, this right plays an essential role in the realisation of economic, social and cultural rights. Another group of civil rights is referred to under the collective term of 'due process rights''.[52] '(Many modern due process cases deal with what is called procedural due process (fair process and procedures). Due process procedures do not guarantee that the result of government action will be to a citizen's liking. However, fair procedures do help prevent arbitrary and unreasonable decisions. Due process requirements vary depending on the situation.'[53] 'At a minimum, due process means that a citizen who will be affected by a government decision must be given notice of what the government plans to do and have a chance to comment on the action').[54]

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[43]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and David Weissbrodt, 'The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights' (2002) 21 Refugee Survey Quarterly.

[44]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.

[45]Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 (1) Human Rights Quarterly 81, 124 and Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.

[46]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.

[47]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019.

[48]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019 and Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press USA 1991).

[49]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019 and Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?' (1999) 36 (1) Journal of Peace Research 95, 118.

[50]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019 and Rhoda Howard, 'The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights-Evidence from Sub-Saharan Africa' (1983) 5 Human Rights Quarterly 467.

[51]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019 and Obinna B Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 (2) Human Rights Quarterly 141.

[52]*Ibid.*

[53]<http://webcache.googleusercontent.com/search?q=cache:yvDLcREIJPUJ:www.lincoln.edu/criminaljustic > Accessed 10 April 2016.

[54]Victor VRamraj, 'Four Models of Due Process' (2004) 2 (3) International Journal of Constitutional Law 492, 524. Also see, Henry Julian Abraham and Barbara Ann Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (Oxford University Press USA 1994). Also see: <http://webcache.googleusercontent.com/search?q=cache:yvDLcREIJPUJ:www.lincoln.edu/criminaljustic > Accessed 10 April 2016.

'These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the 'presumption of innocence', the *ne bis in idem* principle, and legal'[55] assistance[56] '(see Articles 9, 10, 14 and 15 of the ICCPR).'[57] 'Although the fundamental purpose of human rights is the protection and development of the individual (individual rights), some of these rights are exercised by people in groups (collective rights).'[58] For example, freedom of association and assembly, freedom of religion and, more especially, the 'freedom to form or join a trade union, fall into this category. Thus, the collective element is even more evident when human rights are linked specifically to membership of a certain group, such as the right of members of ethnic and cultural minorities to preserve their language and culture.'[59] Therefore, 'one must make a distinction between two types of rights, which are usually called collective rights: individual rights enjoyed in association with others, and the rights of a collective. The most notable example of a collective human right is the right to self-determination, which is regarded as being vested in peoples rather than in individuals (Articles 1 of the ICCPR and the ICESCR).'[60] 'The recognition of the right to self-determination as a human right is grounded in the fact that it is seen as a necessary precondition for the development of the individual. It is generally accepted that collective rights may not infringe on universally accepted individual rights, such as the right to life and freedom from torture.'[61]

Political rights

'In general, political rights are those set out in Articles 19 to 21 of the UDHR 1948[62] and also codified in the ICCPR. They include freedom of expression, freedom of association and assembly, the right to take part in the government of one's country, and the right to vote and stand for election at genuine periodic elections held by secret ballot (Articles 18, 19, 21, 22 and 25 of the ICCPR).'[63]

Economic and social rights

'The economic and social rights are listed in Articles 22 to 26 of the UDHR 1948,[64] and further developed and set out as binding treaty norms in the'[65] International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).[66] 'These rights provide the conditions necessary for prosperity and well-being. Economic rights refer, for example, to the right to property, the right to work, the 'right to a fair wage,'[67] 'a reasonable limitation of working hours, and trade union rights. Social rights are those rights necessary for an adequate standard of living, including the right to health, shelter, food, social care, and education (Articles 6 to 14 of the ICESCR).'[68]

[55]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019.
[56]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf>
Accessed 9 April 2019 and Bas Van Bockel, *The Ne Bis In Idem Principle in EU Law* (Vol. 72. Kluwer Law International 2010).
[57]Johann Bair, *The International Covenant on Civil and Political Rights and Its (first) Optional Protocol: A Short Commentary Based on Views, General Comments, and Concluding Observations by the Human Rights Committee*. (Peter Lang Publishing 2005).
[58] <https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf > Accessed 30 April 2017.
[59]*Ibid.*
[60]*Ibid.*
[61]*Ibid.*
[62]Articles 19 to 21 of the UDHR 1948, Article 19.
[63]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf>
Accessed 9 April 2019 and Nahuel. Maisley, 'The International Right of Rights? Article 25 (a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28 (1) European Journal of International Law 89, 113.
[64]Articles 22 to 26 of the UDHR 1948. Article 22.
[65]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf>
Accessed 9 April 2019.
[66]Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (No. 3. Intersentia-Hart 1999).
[67]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf>
Accessed 9 April 2019 and Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute.
<https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.
[68]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019 and Egbert W Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69, 105.

Cultural rights

The UDHR 1948 lists cultural rights in Article 27 – '(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' – and Article 28 – 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised'. 'These include the right to participate freely in the cultural life of the community, to share in scientific advancement, and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author (Article 15 of the ICESCR and Article 27 of the ICCPR).'[69]

The Assumption and Contradiction between Civil and Political Rights, and Economic, Social and Cultural Rights

Traditionally, it has been argued that there are fundamental differences between economic, social and cultural rights, and civil and political rights. These two categories of rights have been seen as two different concepts and their differences have been characterised as a dichotomy. According to this view, civil and political rights are considered to be expressed in a very precise language, imposing merely negative obligations which do not require resources for their implementation, and which, therefore, can be applied immediately. On the other hand, economic, social and cultural rights are considered to be expressed in vague terms, imposing only positive obligations conditional on the existence of resources and therefore involving a progressive realisation.

'As a consequence of these alleged differences, it has been argued that civil and political rights are justiciable whereas economic, social and cultural rights are not. In other words, this view holds that only violations of civil and political rights can be adjudicated by judicial or similar bodies, while economic, social and cultural rights are 'by their nature' non-justiciable. Over the years, economic, social and cultural rights have been re-examined and their juridical validity and applicability have been increasingly stressed.'[70] 'During the last decade, the world has witnessed the development of a large and growing body of case-law of domestic courts concerning economic, social and cultural rights.'[71] 'This case-law, at the national and international level, suggests a potential role for creative and sensitive decisions of judicial and quasi-judicial bodies with respect to these rights.'[72]

The Nature of Human Rights and the Law

Moving on, international human rights law is the structuration of human rights in the international legal order. The great leap of said structuration became apparent in the post-WWII period.[73] International human rights law has become an area of international law that encompasses a set of individual entitlements of persons against governments.[74] These entitlements – human rights – range from civil to political rights such as the right to be free from arbitrary deprivation of life, torture and other ill-treatment, to the right to freedom of thought, conscience and religion, and to social and economic rights such as the right to health and education. Likewise, Globalisation has reconfigured the territoriality and sovereignty that has traditionally been associated with states.[75] Economic actors, such as transnational corporations, have become powerful actors within the world's economy and they are increasingly using their economic power to influence the actions of states.[76] Transnational corporations' business operations also directly affect the enjoyment of human rights by individuals, especially women.[77] One such case

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[69] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[70]<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf>
Accessed 9 April 2019.

[71]Kenneth Roth, 'Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 Human Rights Quarterly 63 and
<https://hrc.upeace.org/files/human%20rights%20reference%20handbook.pdf> Accessed 9 April 2019.

[72]*Ibid.*

[73]Paul Sieghart, *The International Law of Human Rights* (Oxford University Press 1983).

[74]Schachter Oscar, *International Law in Theory and Practice* (Vol. 13. Martinus Nijhoff Publishers 1991).

[75]Wolfgang Kaleck and Miriam Saage-Maass, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and Its Challenges' (2010)8 (3) Journal of International Criminal Justice 699.

[76]David L. Richards, Ronald D Gelleny and David H Sacko. 'Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries' (2001) 45 (2) International Studies Quarterly 219.

[77]Augustine Ikelegbe, 'Engendering Civil Society: Oil, Women Groups and Resource Conflicts in the Niger Delta Region of Nigeria' (2005) 43 (2) Journal of Modern African Studies 241.

which is considered in the literature is that of the Bangladesh textile manufacturing factories,[78] which produces clothes for some of the world biggest retailers. As the case demonstrates, transnational corporations are increasingly escaping liability for abuses which happen within their corporate structures and supply chains.[79]

Substantively, international human rights law can be found in many different sources of moral and legal rules. These rules are either conventional or customary; some are binding, while others are non-binding, and these non-binding rules are the so-called 'soft' law.[80] Therefore, international human rights law has evolved both on the international and regional planes through several binding treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and Convention on the Elimination of All Forms Racial Discrimination 1965 (CERD), centred around state obligations and rights for individuals. Nowadays, a change in the international legal order can be perceived and the involvement of other actors is increasingly recognised.[81]

Now that the importance of human rights has been recognised in this book, the next question is: what is the law? Cassese identifies three steps toward legal positivism.[82] These steps are: identifying the substance of the rights, establishing binding duties for the protection of those rights and, finally, enforcing those duties.[83] The first step has been taken by the Universal Declaration of Human Rights 1948,[84] the second by the emergence of binding human rights treaties at the United Nations, the first of which was the Convention on the Elimination of All Forms Racial Discrimination (CERD) in 1965,[85] closely followed by the International Covenant on Civil and Political Rights (ICCPR) in 1966[86] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.[87] The last stage of enforcement is the most difficult one to take in the realm of international law; and it was made more difficult by the polarisation of the international community during the Cold War. Thus, international human rights law is a part of 'public international law, which is traditionally governed by and for sovereign states.[88] However, the role of other actors and the individual at the centre of international human rights law is undeniable.'[89] 'Indeed it is a field of law that is subject to constant evolution.'[90] 'However one conceives human rights law, it is surely not static. Human rights law is driven, not by the steady accretion of precedents and practice, but rather by outrage and solidarity.'[91] Nevertheless, the international legal system remains primarily governed by states.

In addition, human rights enforcement is a long-standing dilemma. Therefore, to address the irregularities in the in the current legal rules, human rights law should be enjoyed by everyone in the world. This enjoyment should also provide a mechanism for the enforcement of these rights. However, 'as the international community becomes increasingly integrated, the fundamental question that needs to be asked is how can the diversity and integrity of human rights be respected in all jurisdictions? Is global human rights enforcement inevitable?'[92] 'If so, is the world ready for it? How could'[93] an emerging global human rights mechanism 'based on and guided by human dignity and tolerance'[94] be accepted by all state parties? 'These are some of the issues, concerns and

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[78]Mohammad Ali and Mamun Habib, 'Supply Chain Management of Textile Industry: A Case Study on Bangladesh' (2012) 1 (2) International Journal of Supply Chain Management.
[79]Zeenath Reza Khan and Gwendolyn Rodrigues, 'Human before the Garment: Bangladesh Tragedy Revisited. Ethical Manufacturing or Lack Thereof in Garment Manufacturing Industry' (2015) 5 (1) World.
[80]Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006).
[81]Antonio Cassese, ed. *Realizing Utopia: The Future of International Law* (Oxford University Press 2012).
[82]*Ibid.*
[83]Christian Tomuschat, *Human Rights: between Idealism and Realism* (OUP Oxford 2014).
[84]UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) <http://www.refworld.org/docid/3ae6b3712c.html> Accessed 3 June 2018.
[85]UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195 <http://www.refworld.org/docid/3ae6b3940.html> Accessed 3 June 2018.
[86]UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195 <http://www.refworld.org/docid/3ae6b3940.html> Accessed 3 June 2018
[87]UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3
<http://www.refworld.org/docid/3ae6b36c0.html> Accessed 4 June 2018.
[88]Andrew Clapham (n 25).
[89]Dinah L Shelton (n 4).
[90]Sophie Schiettekatte, Y Haeck, and A.Van Pachtenbeke, 'Do We Need a World Court of Human Rights? (2016) Universit Gent.
[91]*Ibid.*
[92]Sophie Schiettekatte, Y Haeck, and A.Van Pachtenbeke, 'Do We Need a World Court of Human Rights? (2016) Universit Gent.
[93]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.
[94]*Ibid.*

questions underlying the debate over universal human rights and the belief in effective enforcement.'[95] Relativism of enforcement 'is the assertion that human values, far from being universal, vary a great deal according to the different human rights perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different jurisdictions and ethnic and religious traditions.'[96] 'In other words, according to this view, human rights are'[97] related to the perception of a state party rather than universal.[98]

Taken to its extreme, the notion that human rights enforcement should be based on state discretion 'would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the last few decades.'[99] If state discretion and jurisdiction alone govern a nation's' 'compliance with international standards, then the widespread disregard, abuse and violation of human rights would be given legitimacy.'[100] 'Accordingly, the promotion and protection of human rights is perceived as'[101] a state obligation and should only be subject to national discretion on the grounds of security and public health. 'By rejecting or disregarding their legal obligation to promote and protect universal human rights, states advocating jurisdictional differences could raise their human rights norms and particularities above international law and standards.'[102] However, 'largely through the ongoing work of the United Nations, the universality of human rights has been clearly established and recognised in international law. Human rights are emphasised among the purposes of the United Nations as proclaimed in its Charter',[103] 'which states that human rights are 'for all without distinction'. Human rights are the natural-born rights of every human being, universally. They are not privileges.'[104] Yet, 'an account of human rights enforcement by means of individual access to justice will be discussed later on in this book. After briefly explaining human rights law and its ramifications, the next section of this book will be devoted to the tort law doctrine and the ATCA.'[105]

Introduction into the Neighbourhood Principle under English Tort Law Doctrine

This section describes the neighbourhood principle under English tort law doctrine. The neighbourhood principle establishes conduct that falls below the standards of behaviour established by law for the protection of others against an unreasonable risk of harm.[106] A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances; if so, then a duty of care might exist, which is a doctrine established in the English legal system.[107]

The English legal system is a Common Law system. One of the most significant differences between Common Law, Religious Law[108] and Canon Law systems[109] and the Civil Law system (the principal legal system

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[95] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[96]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal Syste Sophie Schiettekatte, Y Haeck, and A.Van Pachtenbeke, 'Do We Need a World Court of Human Rights? (2016) Universit Gent.m Research Institute.
<https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[97]*Ibid.*

[98]Sophie Schiettekatte, Y Haeck, and A.Van Pachtenbeke, 'Do We Need a World Court of Human Rights? (2016) Universit Gent.

[99] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[100] *Ibid.*

[101]*Ibid.*

[102] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[103]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and Samuel Totten, *United Nations Charter; The Prevention and Intervention of Genocide* (Routledge 2008).

[104]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and Sophie Schiettekatte, Y Haeck, and Van A Pachtenbeke, 'Do We Need a World Court of Human Rights? (2016) Universit Gent.

[105]Sophie Schiettekatte, Y Haeck, and Van A Pachtenbeke, 'Do We Need a World Court of Human Rights? (2016) Universit Gent.

[106]Cornelius J Peck, 'Negligence and Liability Without Fault in Tort Law' (1971) 46 Wash. L. Rev. 225.

[107]Robert FV Heuston, 'Donoghue v. Stevenson in Retrospect' (1957) 20 (1) Modern Law Review 1.

[108]Kent Greenawalt, 'Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance' (1998) 71 Southern California Law Review 781.

[109]James A Brundage, *Medieval Canon Law* (Routledge 2014).

in continental Europe) is that former judicial decisions are binding on both the lower courts and on the court that made the decision. This is known as a system of precedent.[110]

The English legal system is divided into two: Public law and Private law.[111] Private Law is divided between Property Law and the Law of Obligation, with the law of obligation consisting of Contract, Tort, and Restitutions. The rationale behind this approach is that, introducing tort law in this section will help to understand the advantages of corporate accountability under the neighbourhood principle ('in the law of negligence, the neighbour principle enunciated by Lord Atkin in *Donoghue v Stevenson* (1932) AC 562, 580 provides an adequate basis on which to resolve duty of care questions'). It will offer an understanding into the concept of duty of care and how this can be applied to corporations in this book and in courts.

What Is Tort Law?

At its simplest, tort is the law of non-criminal wrongs.[112] The plural 'wrongs' here is deliberate. Tort law is the name given to the diverse collection of legal wrongs, such as negligence, trespass to land, assault, battery, libel, etc. (Rudden in 'Torticles' in the early 1990s counted 70 individual torts.[113]) Also, the boundaries between torts are fluid and the popularity of any individual tort can change. Old torts die out (the rule in *Rylands v Fletcher*[114] may be a case in point here) while new ones emerge (such as the tort of misuse of private information in *Vidal-Hall v Google Inc.*[115]). Tort law covers a lot of ground, so it could provide an appropriate mechanism for corporate accountability.

What is not clear is the extent to which the various individual torts (and the law of tort as a whole) share common features, principles, and justifications in relation to corporate accountability. The best view may be Weir's, who observed that 'tort is what is in the tort books, and the only thing holding it together is the binding.'[116] Weir's view is noted in tort cases, such as *Bourhill v Young*,[117] *Osman v United Kingdom,*[118] and *Hall v Simons*.[119] Therefore, in comparing tort law to international law and human rights law, tort law has the ability to address a variety of corporate human rights violations and cases of environmental damage.

Also, in comparison to contract law (traditionally tort law's other half in the Law of Obligation),[120] which is grounded, *inter alia,* in the morality of promise-keeping, tort law appears to lack any such common theme or ambition, and resembles little more than a miscellaneous collection of relatively self-contained wrongs. Also, in recent years one particular tort, the tort of negligence,[121] has gained prominence and started to gain ground on other, older torts. This has extended the old tort of negligence to cover cause beyond the normal duty of care, in cases such as *Montgomery v Lanarkshire Health Board*[122] and *Caparo Industries v Dickman.*[123] If this development continues, it may be possible that national judicial systems will end up with a law of tort sharing a similar unity and coherence as is found in contract law. However, this move has not been universally welcomed.

The description of tort law as a collection of civil wrongs for which the law provides a remedy, as Cane suggests, is a way of protecting people's interests through 'a system of precepts about how people may, ought and ought not to behave in their dealing with others.'[124] This prompts another question: what wrongs or interests are protected under tort law? Does tort law protect rights under human rights law?

Tort law is concerned with civil wrongs, while criminal law is concerned with criminal conduct.[125] Unquestionably, the major (and most dynamic) field of law within tort is the law of negligence. In the context of personal injury claims, the injured person will be able to sue for negligence,[126] although there are other regimes that are relevant. Negligence in the English legal system expanded throughout the nineteenth and twentieth

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[110]Catherine Elliott and Frances Quinn, *English Legal System* (Pearson Education 2008).
[111]Richard Ward, Amanda Akhtar and Amanda Wragg, *Walker & Walker's English Legal System* (Oxford University Press 2011).
[112]Dan B Dobbs, *The Law of Torts* (Vol. 2. West Group 2001).
[113]Bernard Rudden, 'Torticles' (1991) 6 /7 Tulane European and Civil Law Forum 105.
[114]*Rylands v Fletcher* [1868] UKHL 1.
[115]*Vidal -Hall & Ors v Google Inc* [2014] EWHC 13 (QB) (16 January 2014). <http://www.bailii.org/ew/cases/EWHC/QB/2014/13.html> Accessed 30 October 2016.
[116]Tony Weir, *An Introduction to Tort Law* (Oxford University Press 2006).
[117]*Bourhill v Young* [1943] AC 92.
[118]*Osman v United Kingdom* [1998] EHRR 101.
[119]*Arthur Hall v Simons* [2000] 3 WLR 543.
[120]Robert Stevens, *Torts and Rights* (OUP Oxford 2007).
[121]Frederick Pollock, *The Law of Torts: Treatise on The Principles of Obligations Arising from Civil Wrongs in The Common Law* (Banks & Brothers 1892).
[122]*Montgomery v Lanarkshire Health Board* (2015) UKSC 11.
[123]*Caparo Industries plc v Dickman* (1990) UKHL.
[124]Peter Cane, *The Anatomy of Tort Law* (Bloomsbury Publishing 1997).
[125]Henry M Hart, *The Aims of the Criminal Law* (1958) 23(3) Law and Contemporary Problems 401, 441.
[126]Richard A Posner, 'A Theory of Negligence' (1972) 1(1) Journal of Legal Studies 29.

centuries, reflecting the pressures that arise out of an industrialised and urban society. It has been brought to bear upon the traditional groups of legal redress for interference with protected interests.[127] A possible implication of this might be that the orthodoxy approach to redress restricts the protected rights that should be enjoyed by victims of human rights violations. These relationships may partly be explained by the flexibility it brought to the legal system. The flexibility allows the courts to find liability in a novel context to establish liability and effective remedy. However, for the court to make a finding of negligence, the claimant must prove a number of things, the primary one being that the defendant owed the claimant a duty of care. In this view, it is adequate to claim that tort law covers the rights derived from international law and human rights law.

Protected Rights Under Tort Law

Tort law might arise where someone has suffered an unwanted harm. Some cases involve physical injury, like the damage caused by an elderly resident getting her foot caught in a hole (*Sutherland Shire Council v Heyman*[128]). Another example is the case of the pedestrian killed by the speeding motorist (*Fitzgerald v Lane*[129]). In other examples, the harm can be psychological injury (*Page v Smith*[130] and *White v Chief Constable of South Yorkshire*[131]). Clearly not all cases involve physical or mental injury to the potential claimant; other types of harm include damage of property, for example the cause of explosion at the oil refinery (*Simaan General Contracting Co. v Pilkington Glass Ltd*[132]), financial loss, for example in the case of the buyer whose house is not worth as much they thought, or, more controversially, in the example of the student who has not been recognised as dyslexic (*Junior Books v Veitchi Co. Ltd*[133]).

In some of these examples, such *as Fitzgerald v Lane* and *White v Chief Constable of South Yorkshire* (this latter case arising 'from the disaster that occurred at Hillsborough football stadium in Sheffield during the FA Cup semi-final match between Liverpool and Nottingham Forest in'[134] 1989), there appears to be no damage or harm. However, even assuming, for the sake of argument, that ramblers walk over a farmer's land without causing damage (they do not, for example, tear at or pick flowers) or a drunk student's housemate unlocks the bathroom door before the drunk student wakes up the next morning and so is unaware of having been locked in all night, these can still be classified as interferences with the individual rights. Other relevant cases include *Mitchell and Another v Glasgow City Council,*[135] *Stovin v Wise,*[136]*Norwich City Council v Harvey*,[137]and *Carmarthenshire County Council v Lewis*.[138] Thus, you have a right to determine who has access to or makes use of your land. The law says that you get to control the use of your land and the rights others have to your property. Similarly, each of us has a right to bodily freedom and autonomy; others are not entitled to touch us or confine our movement (subject to certain exceptions) without consent. Even though the farmer or the drunk student may not have been harmed, in the sense of being worse off, as a result of this action, it can be said that there had been wrong-doing.

As such, tort law is not only or primarily concerned with harm as much as it is with rights. Therefore, the question is: how are these rights protected and respected? The understanding of tort law as a system of rules protecting rights and interests will allow one to identify and apply tort law to fundamental human rights principles. Tort law presents the legal system with a neat, linear form of protecting rights and interests. It also involves a description of the way distinct torts are arranged and interrelated. Some torts exist and are defined to protect a single interest. For example, defamation protects the person and their reputation, and nuisance protects individual interests in enjoying their land. The tort of negligence offers protection to all legally recognised rights and interests.[139] Often, for any single harm or injury, there will be more than one tort upon which a claim may be founded. So, if someone hits another person, it may be possible to bring a claim in battery or negligence, as well as a criminal claim, depending on the circumstances of the case.[140]

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[127]Simon F Deakin, Angus Johnston and Basil S Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2012).
[128]*Sutherland Shire Council v Heyman* (1985) HCA 4.
[129]*Fitzgerald v Lane* (1989) 1 AC 328.
[130]*Page v Smith* (1996) 1 AC 155.
[131]*White v Chief Constable of South Yorkshire* (1998) 3 WLR 1509.
[132]*Simaan General Contracting Co v Pilkington Glass Ltd* (1988) CA 17.
[133]*Junior Books Ltd v Veitchi Co Ltd* (1983) 1 AC 52.

[135]*Mitchell v Glasgow City Council* (2009) UKHL 11.
[136]*Stovin v Wise* (1996) 3 WLR 389.
[137]*Norwich City Council v Harvey* (1988) 45 BLR 14.
[138] *Carmarthenshire County Council v Lewis* (1955) AC 549.
[139]Harold Luntz, David Hambly and Robert Alexander Hayes, *Torts: Cases and Commentary* (Butterworths 1992).
[140]Kenneth Mann, 'Punitive Civil Sanctions: The Middle ground between Criminal and Civil Law' (1992) Yale Law Journal 1795, 1873, William Geldart, *Introduction to English Law* (D.C.M. Yardley ed., 9th ed. 1984) 146 and Paul Skolnick and Jerry I Shaw, 'The OJ Simpson Criminal Trial Verdict: Racism or Status Shield?' (1997) 53(3) Journal of Social Issues 503, 516.

The concept that established the duty of care was generalised in the famous case of *Donoghue v Stevenson*.[141] Tort law plays a role in deterring future tortious activity. The imposition of liability in relation to a particular activity enables others to regulate their behaviour accordingly. Thus, it is argued, the tort law case of *Woodroffe-Hedley v Cuthbertson* (also known as *Hedley v Cuthbertson*: Unreported, 20 June 1997), which was heard in the Queen's Bench Division of the High Court and where the claimant was a six-year-old child whose father had died in a mountaineering accident and the defendant was the victim's mountain guide who was found guilty of negligence,[142] has led to mountain guides being more likely to use two ice screws rather than risk liability by relying on one. Likewise, one might think that anything that encourages safe practice is, in itself, a good thing. Therefore, it seems that the effect of the imposition of tortious liability in such circumstances is not to deter potentially negligent conduct but to stop the activity altogether. Thus, could this be a mechanism to deter corporate human rights violations? The function of tort is often coupled with the idea of gaining publicity about what has happened to stop it from ever happening again. This is often the line claimants take if they have suffered as a result of someone's negligent actions; see the case of *Woodroffe-Hedley v Cuthbertson*[143] where Gerry Hedley's wife brought a negligence action against the defendant for the death of the claimant.[144]

Aims of Tort Negligence

Tort law seeks to protect an individual's interests both prospectively by deterring future harm, and retrospectively through the provision of compensation for past harm and the distribution of losses. Tort law has a number of disparate functions or purposes typically identified under the broad reading of compensation, deterrence, corrective justice and, less often, an inquiry and/or publicity.[145] The tort of negligence is the most frequently used of all torts and is therefore perhaps the most important. It has flourished in the latter part of the twentieth century, rising to a dominant position because of the flexible nature of its rules that allows judges to expand the tort to protect any claimants who would otherwise have been left unprotected by the law.[146] This combination of findings provides some support for the conceptual premise that applying this principle to corporate accountability could have the potential to restore the victims of corporate human rights abuses to the place they were prior to the wrongdoing or before the violations happened to them; however, this is not clear yet.

Torts are divided into three categories: Intentional,[147] Negligent[148] and Nuisance.[149] This book focuses on negligence, because it will provide victims of human rights violation with a mechanism to bring lawsuits against corporations. The tort of negligence forms one of the most dynamic and rapidly changing areas of liability in modern law.[150] It is defined as a careless behaviour with no intention of causing damage.[151] This careless behaviour makes others suffer, and as a result, the victim may be entitled to reparations and damages. That is the main concern of negligence,[152] hence why this book opts to focus exclusively on this aspect of tort law.

Definition of Negligence

The tort of negligence has been defined as 'a breach of a legal duty to take care which results in damage to the claimant.'[153] The tort is not usually concerned with harm inflicted intentionally on the claimant. Rather, it is a concern with injuries inflicted accidentally on the claimant or through a duty of care. However, establishing

[141] Neil MacCormick, 'Donoghue v Stevenson and Legal Reasoning' in Burns P ed., *Donoghue v. Stevenson and The Modern Law of Negligence*, (Continuing Legal Education of British Columbia, Vancouver 1991).
[142] Alistair Duff, '5 Legal Liability' (2003). <http://platform.rgs.org/NR/rdonlyres/A1732337-720E-4FCC-950D_0BC094B57FDA/0/06ch5.pdf> Accessed 30 October 2016.
[143] *Woodroffe-Hedley v Cuthbertson* [1997] QBD.
[144] Gary Younge 'Go Tell It on The Mountain' (1997) *The Guardian*; see also: Kirsty Horsey and Erika Rackley *Kidner's Casebook on Torts* (Oxford University Press USA 2015).
[145] Kirsty Horsey and Erika Rackley, *Kidner's Casebook on Torts* (Oxford University Press USA 2015).
[146] Paula Giliker and Silas Beckwith, *Tort* (Sweet and Maxwell 2000).
[147] Peter Handford, 'Intentional Negligence: A Contradiction in Terms? (2010) 32 Sydney Law Review 29.
[148] Greg Walsh, *Tort of Negligence definitions* (2011).
[149] Nuisance in the form of smells , *Wheeler v JJ Saunders* (1996) Ch 19, Encroachment by tree branches or roots, *Lemmon v Webb* (1894) 3, Nuisance noise *Kennaway v Thompson* (1981) QB 88, Cricket balls – *Miller v Jackson* (1977) 3 WLR 20 and Disturbance from a brothel *Thompson-Schwab v Costaki* (1956) 1 WLR 335. *Sedleigh-Denfield* v O' Callaghan (1940) AC 880.
[150] Simon Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (Oxford University Press 2005).
[151] Joseph Carman Smith, *Liability in Negligence* (Carswell Legal Publications 1984).
[152] Robert A Leflar, 'Negligence in Name Only' (1952) 27 New York University Law Review 564.
[153] William Vaughan Horton Rogers and John Anthony Jolowicz, *Winfield and Jolowicz on Tort* (Sweet & Maxwell 2010).

negligence involves much more than simply showing that the defendant behaved carelessly, as careless behaviour is only one ingredient of negligence.

To establish an intentional tort, the claimant must prove three things:

a. The defendant owes the claimant a duty of care;
b. The defendant has acted in breach of that duty;
c. As a result, the claimant has suffered damage that is not too remote a consequence of the defendant's actions.

In order to impose a duty of care on the defendant, the claimant must make sure that the defendant has satisfied the above test. It is imperative to consider each element of the tort in turn. Rarely in practice, however, will disputes ever involve all three elements. Moreover, the court has a tendency to blur the distinction between each separate element of negligence, as shown in *Henderson v Merrett Syndicates Ltd*.[154] Quite often, a judgment may indicate each of the defendants liable but may not make it clear which of the three separate requirements of the tort has not been fulfilled,[155] which stems from the fact that the concept of reasonable foreseeability is used by the court in establishing all three elements of the tort.

The Application of Negligence

The tort of negligence covers such a wide range of factual situations that the search for a single set of rules applicable to all types of negligence cases is extremely difficult. The correct approach is to focus on the type of interest which the claimant is trying to use the tort to protect (physical, the safety of property, financial, livelihood, well-being, or psychological well-being), and then think about the policy reasons as to why the courts have felt either able or unable to extend the scope of negligence to protect that interest in a particular situation.[156] Therefore, the language of the judges and the pattern of their decision-making in corporate human rights violations will only begin to make sense when considered alongside the political and economic landscape, which in turn motivates decisions in negligence cases.

When one looks at what negligence is trying to achieve within society – the redistribution of certain risks within day-to-day activities – it becomes clear why the judges have difficulties in formulating workable rules for the tort. The point to grasp is that negligence is essentially concerned with conflicts of values/interests within society. In essence, therefore, in order to decide the question of negligence in corporate human rights abuses, the judge must make a political and moral value judgment as to the relative merit of safety and protecting rights in society. So, the problem of corporate human rights violations is one of social, economic, and financial policy, not legal personality or treaty. Negligence exists to protect society from harm caused by any entity, including corporations.

Critical Overview of Negligence

In 1932, in the landmark *Donoghue v Stevenson*[157] case, Lord Atkin formulated a general principle known as the neighbour principle by which the existence of a legal duty to take care could be determined, thus effectively inventing the modern tort of negligence. The main strength of this argument is that Lord Atkin's general principle contained the logic that the limits of tort obligation could be confined.

As the tort of negligence developed, the courts sought to qualify Lord Atkin's general principles with a number of complexities, often inherently vague, and sometimes rather arbitrary rules. The courts have struggled to determine the proper scope of negligence, and have used the three elements of duty, breach, and causation as a control mechanism to try to set a limit to the tort.

The multifaceted approach can sometimes be rather confusing, but what is clear is that in recent times there has been a marked tendency to deal with the question of liability by reference to the scope of the duty of care. Logically, establishing the existence of a duty of care is the first hurdle a claimant must overcome.

In many situations, it will be obvious from case law that the defendant owes the claimant a duty of care. The real problem for the courts is how to decide whether a duty should be owed in a novel factual situation which is not covered by precedent. Because of the political and economic considerations involved, the courts have found

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[154]*Henderson v Merrett Syndicates Ltd* (1994) UKHL 5.
[155]*Sam (aka- Al-Sam) v Atkins* (2006) EWCA Civ 152, (2006) R.T. R14.
[156]Paula Giliker and Silas Beckwith (n 372).
[157]*Donoghue v Stevenson* (1932) UKHL 100 (26 May 1932).
<http://www.bailii.org/uk/cases/UKHL/1932/100.html> Accessed 31 October 2016, or (1932) UKHL 100, 1932 SC (HL) 31, (1932) AC 562, [1931] UKHL 3.

it difficult both to decide this question and to express their decisions in the appropriate language.[158] In order to limit the scope of the duty of care, the courts have repeatedly asserted the importance of the relationship between the defendant and the claimant. This approach, however, has not resulted in a universally applicable test for determining the existence of a duty of care. The qualification on Lord Atkin's neighbourhood principle has become so frequently used that the House of Lords has been forced to abandon the search for a single workable test. In *Caparo v Dickman*,[159] Lord Roskill concluded 'it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer'.

However, critics of tort law argue that it created uncertainty and is unpredictable when one considers the requirements of the rule of law.[160] Although the legal principles that developed in relation to the imposition of a duty of care provide flexibility in the law, this book contests that the critics' views are invalid. The duty of care enables the incremental development of tort law in order to meet changing social needs. This development is not unconstrained, which provides for a level of consistency in negligence law. Furthermore, this book argues that critics' views of tort law are unjustified for two significant reasons. First, sceptical views of tort law lack robustness because, ultimately, judicial decisions in negligence cases are legitimate legal developments. Secondly, if one agrees with Fish, author of *There's No Such Thing as Free Speech: And It's a Good Thing, Too*, one may argue that judges are merely engaging with the incremental development of the law with relevance to existing doctrine.[161] Hence, such judicial activism merely develops the liability rules in conjunction with the purposes of tort law and social need. Finally, the imposition of a duty of care is an interpretive task due to the inherent ambiguities of language.

It is suggested here that the tort of negligence does not have a specific formula for each case, hence the concept of the tort of negligence is decided case-by-case, based on its merit. Bearing this in mind, it is perfectly acceptable to state that the tort of negligence offers a flexible approach to imposing a duty of care on an entity such as a corporation. Additionally, this book shall closely examine the historical development of duty of care, and the modern approach in *Caparo v Dickman*[162], to decide whether corporations can be held accountable under this principle.

Why Tort Law (Tort of Negligence)?

On the most basic level of corporate human rights accountability, the global human rights responsibility on all actors, including non-state actors in the international arena, overlaps with straightforward concepts of tort liability and civil responsibility for the wrongs one person causes another.[163] Tort law remedies provide crucial elements for the enforcement of international law both at international and domestic levels.[164] The analysis of the relationship between tort remedies and international law and human rights law is the multi-faceted nature of human rights legal process.[165] As noted by Coliver, Green and Hoffman, under the overlapping functions of The Alien Tort Statute 28 U.S.C. § 1350 (ATCA) and the Torture Victim Protection Act of 1991 (TVPA) in the US, a claimant can sue perpetrators, civilian and military superiors, and corporations and corporate officers for violations including genocide, war crimes, crimes against humanity, extrajudicial executions, disappearances, torture, slavery and forced labour, and human trafficking.[166]

The purpose of a lawsuit under ATCA/TVPA includes holding individuals and corporate perpetrators accountable for human rights violations.[167] Tort law provides the victims with official and legal acknowledgement and remedy for the harm caused to them.[168] This development has contributed to the development of international human rights law, building a legal pathway in the US to support tort litigation under the auspices of international

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[158]Dominick R Vetri, *Tort Law and Practice* (LexisNexis/Matthew Bender 1998).
[159]*Capara v Dickman* (1990) 2 AC 605, [1990] UKHL 2, (1990) 1 All ER 568.
[160]Christopher L Kutz, 'Just Disagreement: Indeterminacy and Rationality in The Rule of Law' (1994) 103(3) Yale Law Journal 997, 1030.
[161] Stanley Fish, *There's No Such Thing as Free Speech: And It's a Good Thing, Too* (Oxford University Press 1994).
[162] *Ibid.*
[163]Beth Stephens, Michael Ratner, Judith Chomsky, Jennifer Green and Paul Hoffman, *International Human Rights Litigation in US Courts* (Irvington-on-Hudson New York: Transnational publishers 1996).
[164]George P Fletcher, *Tort Lability for Human Rights Abuses* (Bloomsbury Publishing 2008).
[165]Craig Forcese, 'ATCA's Achilles Heel: Corporate Complicity, International Law and The Alien Tort Claims Act' (2001) 26 Yale Journal of International Law 487.
[166]Jennie M Green, Sandra Coliver, and Paul Hoffman, 'Holding Human Rights Violators Accountable by Using International Law in US Courts: Advocacy Efforts and Complementary Strategies' (2005) 19 Emory International Law Review 169.
[167]Mark W Bina, 'Private Military Contractor Liability and Accountability after Abu Ghraib' (2004) 38 John Marshall Law School Law Review 1237.
[168]Beth Stephens, Michael Ratner, Judith Chomsky, Jennifer Green, and Paul Hoffman, *International Human Rights Litigation in US Courts* (Irvington-on-Hudson, New York: Transnational publishers 1996).

law.[169] Similarly, tort litigation has added to a climate of deterrence, including supporting or catalysing efforts in other states for human rights accountability and remedy.[170] Minow in '*Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*'[171] explains how legal proceedings have promoted reconciliation and healing in a conflicted society.[172]

The concept of tort law allows victims of human rights violations and environmental damages or surviving family members to bring ligation against a perpetrator. This can provide an opportunity for financial remedy[173] that, while perhaps seeming routine and insufficient to victims, does provide an avenue for redress and an opportunity for remedy to help injured victims get back to where they were before the tort occurred.[174]

The enforcement of legal rights in tort law gives the victims the opportunity to have a court validate their claims by providing a formal legal judgment.[175] As stated by Haynes and Boone LLP 'in the case of punitive damages, a claimant will receive the added benefit of a public statement that reflects on the gravity of what the victims, survivors or their lost family member(s) have suffered.'[176] An implication for the defendants is that court proceedings will provide public accountability for what they have done, and for those who might be tempted to commit similar human rights violations and environmental damages in future. This will serve as a warning that any individual or corporation that violates human rights or damages the environment may face serious financial and reputational consequences for their actions.

Tort law also provides a duty of care for one person to avoid causing harm to another.[177] The notion of duty of care has developed jurisprudence on the doctrine of reasonable care, foreseeable harm, and duty of care.[178] It seems that the purpose of encouraging appropriate future corporate behaviour overlaps with the multiple functions of human rights law that contribute to the development of human rights norms and the deterrence of future human rights violations.[179] Another important aspect of tort law is that tort theory transcends legal systems and is commonly included in statutory or common law around the world.[180] In other legal systems, victims of human rights violations may be able to seek remedies both to punish the perpetrators of the abuse through criminal and civil remedies and receive compensation in a mechanism that is linked to their criminal claim.[181] For example, in the civil law system in France, the criminal system is the dominant system, with individuals able to be a *partie civile*, or civil party, to the criminal action.[182]

Also, Stephens, in her analysis of whether there were parallel options for human rights victims to the Alien Tort Statute in other countries, raised the notion of 'translation' among the different legal systems.[183] 'Translation of a legal concept from one system to 'another does not require identical implementation',[184] but rather requires 'adherence to the same underlying concept''.'[185] 'The mechanical transfer of legal procedure from one system to another is rarely effective.'[186] The common goals of a legal principle must be realised through

[169]Brian C Free, 'Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation' (2003) 12 (2) Pacific Rim Law & Policy Journal 467.

[170]Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998.).

[171]Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17 Chicago Journal of International Law 447.

[172]*Ibid*.

[173]Avihay Dorfman, 'What is The Point of The Tort Remedy?' (2010) 55 (1) American Journal of Jurisprudence 105.

[174]Roger Paul Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations* (2011).

[175]George P Fletcher, *Tort Liability for Human Rights Abuses* (Bloomsbury Publishing, 2008).

[176]William R Casto, 'The New Federal Common Law of Tort Remedies for Violations of International Law' (2006) 37 (3) Rutgers Law Journal 635. Also see, <Flaux-ting the Rules: Punitive Damages in English Law - Lexology> Accessed on 25 November 2017.

[177]*Ibid.*

[178]Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (Vol. 2. Pluto Press 1998).

[179]Leon Gettler, 'Liability Forges a New Morality' *The Age* (3 August 2005).

[180]Paula Giliker, *Vicarious Liability in Tort–A Comparative Perspective* (Cambridge University Press 2010).

[181]Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations* (2002). Explaining that the division between the civil and criminal actions should be eliminated by states, Robert C Thompson, Anita Ramasastry and Mark B Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes* (2009).

[182]Charles Howard, 'Compensation in French Criminal Procedure' (1958) 21 Modern Law Review 387.

[183]*Ibid.*

[184] Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 447.

[185]*Ibid.*

[186]*Ibid.* Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 447. < https://cjil.uchicago.edu/publication/corporate-torts-international-human-rights-and-superior-officers> Accessed 17 May 2017

procedures appropriate to each national judicial system and its universal applicability at international level.[187] It can thus be suggested that, at the core of judicial interpretation of legal rules, lies the commonalities.[188]

'Victims of human rights abuses around the world seek comparable results through varied procedural models, tailored to the requirements of their local legal systems, which is relevant to the principle in tort law.'[189] This can be seen in UN treaties and conventions which state 'the legal obligation is reaffirmed for all states to promote'[190] 'universal respect for, and observance and protection of, all human rights and fundamental freedoms for all.'[191] 'It is clearly stated 'that the obligation of states is to promote universal respect for and observance of human rights.'[192] 'Not selective, not relative, but universal respect, observance and protection.'[193] Thus, the enforcement of human rights law through the notion of tort law is a 'universal respect for, and observance and protection of, all human rights and fundamental freedoms for all', not a departure from the fundamental principles of the state's duties.[194]

The extensive critical analyses in this book have explored the common denominator of providing remedies to victims of corporate human rights violations in these multiple sources of law. However, it is acknowledged that to properly compare and translate the concept of corporate liability across jurisdictions, it is necessary to focus on the common core of parallel tests in international and domestic systems rather than the differences in implementation of tort law throughout the different systems. This book argues that tort law can facilitate corporate liability for corporate human rights abuses and accountability for its supply chain and subsidiaries' misconduct, and that this concept is consistent with parallel standards in US law, such as ATCA and TVPA.[195] This notion also follows the obligation that are 'established for all states, in accordance with the Charter of the United Nations and other instruments of human rights and international law.'[196] 'No state is exempt from these obligations. All member states of the United Nations have a legal obligation to promote and protect human rights, regardless'[197] of the differences between the states' legal systems. 'Universal human rights protection and promotion are asserted in the Vienna Declaration as the 'first responsibility' of all governments.'[198] These findings suggest that common types of actions have resulted in common types of liability. Thus, there is an availability of remedies to victims of human rights violations, and of enforcement of human rights standard of tort principles through the concept of a duty of care.[199]

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[187]Craig M Scott, *Translating Torture into Transnational Tort: Conceptual Divides in The Debate on Corporate Accountability for Human Rights Harms* (2001).

[188]Beth Stephen (1123).

[189]Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 447. <https://cjil.uchicago.edu/publication/corporate-torts-international-human-rights-and-superior-officers> Accessed 17 May 2017 and Robert C Thompson and Anita Ramasastry, and Mark B Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes* (2009).

[190] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[191]Philip Alston, ed. *The United Nations and Human Rights: a Critical Appraisal* (Ardent Media 1996) and Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.

[192] Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[193]*Ibid.*

[194]James Frederick Green, *The United Nations and Human Rights* (Brookings institution 1956).

[195]Matthew H Murray, *Torture Victim Protection Act: Legislation to Promote Enforcement of The Human Rights of Aliens in US Courts* 25 Columbia Journal of Transnational Law 673 (1986).

[196]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and Julie A Mertus and Dimitris Bourantonis, *The United Nations and Human Rights: a Guide for a New Era* (Routledge 2010).

[197]*Ibid*.

[198]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute and Arjun Sengupta, 'The Human Right to Development' (2004) 32 (2) Oxford Development Studies 179, 203.

[199]Philip Mariani, 'Assessing The Proper Relationship between The Alien Tort Statute and The Torture Victim Protection Act' (2008) 156 (5) University of Pennsylvania Law Review 1383.

Link between Tort Duty of Care, International Human Rights Law, and International Criminal Law

'Human rights are the'[200] birth rights of 'every person. If a state dismisses universal human rights on the basis of'[201] the disparities that exist in its legal system, 'then rights would be denied to the persons living under that state's jurisdiction. The denial or abuse of human rights based'[202] on the existing difference in legal rules is wrong, regardless of the violator's link to the home or the host state. This is because the issue of the enforcement of human rights and remedies for victims have coexisted in many jurisdictions. For instance, in a common law jurisdiction, widespread acceptance of the relationship between tort and criminal law means that tort law provides remedy while punishment is primarily the role of the criminal system.[203] In jurisdictions such as the US and UK, punitive[204] remedies are for gross misconduct.[205] The awarding of a punitive remedy in this situation becomes more blurred because the goal of punitive damages is 'punishment; punitive damages also have the purpose of deterring future violations[206] and of naming and shaming the tortfeasor',[207] which enhance both the intentions of deterrence and the declarative function of the foundation of law.[208] Also, one of the most important questions being asked in recent decades surrounds the distinction between the criminal and tort law principles. This is due to the fact that crimes are considered to be committed against society as a whole.[209] Similarly, in civil legal systems, these functions are linked when a private party is able to join a criminal action.[210] It is possible, therefore, that the nature of human rights violations further blurs the common distinction between the criminal and civil legal systems.

What is clear in the development of tort and criminal liability law is that both have been set against each other in a way that can be seen as an attempt to avoid any accountability. Therefore, there is a valid argument for finding a legal basis for holding corporations liable in a tort lawsuit for international human rights law violations. As has been observed by Posner, 'those standing against criminal liability contend that there is no need for it because of civil liability'.[211] 'In a common law system such as the UK, tort and criminal law may complement each other and serve as different levers in building accountability within a particular jurisdiction, across national systems, and in the international legal system itself'.[212] For instance, states such as the US allow a claimant to bring tort claims alleging corporate responsibility for human rights violations and environmental damages in the last thirty years. However, there is still no provision for corporate liability for human rights violations in the US federal criminal code.[213]

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[200]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material' (2009) Prepared under the Sponsorship of the Justice and Legal System Research Institute.
[201]*Ibid.*
[202]*Ibid.*
[203]Duff RA, *Repairing Harms and Answering for Wrongs, in Philosophical Foundations of Tort Law,* 212, 16 (John Oberdiek, ed., Oxford University Press, 2014); and Duff RA, 'Torts, Crimes, And Vindication: Whose Wrong Is It?' *In Unravelling Tort and Crime 148-50* (Matthew Dyson ed., 2014).
[204]Clarence Morris, 'Punitive Damages in Tort Cases' (1931) 44 Harvard Law Review 1173 and *Rookes v. Barnard* [1964] AC 1129.
Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29.
The House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789 over-ruled the decision of the Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507. Also see: *Rookes v. Barnard* [1964] AC 1129.
[205]Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) Yale Law Journal 1795.
[206]John C Coffee, 'Paradigms Lost: The Blurring of The Criminal and Civil Law Models. And What Can be Done About it' (1992) 101(8) Yale Law Journal 1875; Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) 43(3) Columbia Law Review 753; and John C. Coffee, 'Does "Unlawful Mean Criminal"?: Reflections on The Disappearing Tort/Crime Distinction in American Law' (1991) 71 Boston Law Journal 193.
[207]Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17 Chicago Journal of International Law 447.
[208]*Ibid.*
[209]Johannes Andenaes, *Punishment and Deterrence* (University of Michigan Press 1974).
[210]Mann Kenneth (n 871).
[211]*Flomo v Firestone Nat. Rubber Co.,* LLC, 643 F.3d 1013 (7th Cir. 2011). Also see, Curtis A. Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) Yale Law Journal 202, and William Blackstone, *Commentaries on The Laws of England* (Vol. 2. Collins & Hannay 1830).
[212] Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17 Chicago Journal of International Law 447 and Lillian Aponte Miranda, 'The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability under International Law' (2007) 11 Lewis & Clark Law Review 135.
[213]Yadh Ben Achour to Pamela Hamoto, Permanent Representative of The United States to the United Nations (Oct. 6, 2015). <https://perma.cc/Z9HG-9C43> Accessed 3 September 2017.

Posner has mentioned several important treaties as examples that show the position of civil and administrative remedies where criminal remedies are unavailable.[214] The author cited the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[215] the UN International Convention for the Suppression of the Financing of Terrorism,[216] and the UN Convention Against Transnational Organized Crime.[217] These treaties permit civil and administrative remedies as substitutes to criminal liability.[218] Similarly, in some legal systems, tort standards may lead to criminal consequences or accountability for human rights violations.[219] Also, legal scholars such as Payne and Pereira have observed that there is a new development in how countries transitioning from dictatorships and/or civil conflicts have addressed corporate complicity.[220] Although 'transitional justice'[221] legal cases against state officials have been mainly criminal prosecutions, when it comes to corporate complicity, civil trials have outnumbered criminal trials.[222]

This observation supports the hypothesis that tort remedies do not contain the same restrictions as criminal prosecutions. Therefore, its application to corporations will breach the restrictions in the criminal law principle. The flexibility offered by tort law will allow courts to find legal responsibility for corporations and their subsidiaries' misconduct. Where tort liability is established by the courts at both national and international level, effective remedies should be awarded to the victims. However, the significant difference in the balance of competing interests within a governmental office can serve as an impediment to the universal application of tort law.[223] Nonetheless, a note of caution is due here, as survivors of human rights violations may be able to secure private or public interest lawyers to file tort and civil claims on their behalf. Thus, these claims are more likely to overcome the political limitations than criminal prosecutions.[224]

There are several possible explanations for this legal reasoning. One of these is that the number of cases brought under the ATCA and TVPA far outstripped the number of criminal prosecutions for international human rights violations.[225] This is evident in the US government's prosecution and deportation of Nazi war criminals, as well as the prosecution of those accused of human rights violations for immigration fraud.[226] Nevertheless, only one person, Charles 'Chuckie' Taylor,[227] was criminally prosecuted for the underlying human rights violations he

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[214]Jennifer M Green, 'The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment Through the Alien Tort Statute' (2014) 35 (4) University of Pennsylvania Journal of International Law 1085.

[215] Organisation for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Paris, November 20, 1997: 1–8 (1998) 3 Trends in Organized Crime 77, 82.

[216] UN General Assembly, *International Convention for The Suppression of The Financing of Terrorism*, 9 December 1999, No. 38349.
<http://www.refworld.org/docid/3dda0b867.html > Accessed 3 September 2017.

[217] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.
<http://www.refworld.org/docid/4720706c0.html> Accessed 3 September 2017. The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organised crime. 'It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003'. <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>
Accessed 30 October 2017.

[218]*Flomo v Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1020 (7th Cir. 2011).

[219]Letter from Yadh Ben Achour to Pamela Hamoto, Permanent Representative of The United States to The United Nations (Oct. 6, 2015). <https://perma.cc/Z9HG-9C43> accessed 4 September 2017.

[220]Leigh A Payne and Gabriel Pereira, *Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation? In the Economic Accomplices to The Argentine Dictatorship: Outstanding Debts* (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2016) 29, 44.

[221] Ruti G Teitel, *Transitional Justice* (Oxford University Press on Demand 2000). See also: 'The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse to learn more. <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> Accessed 15 May 2017.

[222]Leigh A Payne and Gabriel Pereira (n 1148).

[223]Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39 (2) Government and Opposition 159.

[224]Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 (4) American Journal of International Law 888.

[225]Douglas Donoho, 'Human Rights Enforcement in The Twenty-First Century' (2006) 35 Georgia Journal of International & Comparative Law 1.

[226]Kate Connolly, 'Trial of Man Deported from US to Germany for Nazi War Crimes to Begin' (London, 29 November 2009) The Guardian. See also: Jean Ancel, The History of The Holocaust in Romania (2016).

[227] Elise Keppler, Shirley Jean and Paxton J Marshall, 'First Prosecution in The United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr' (2008) 15 (3) Human Rights Brief 4. See also: Alpha Sesay, United States Court of Appeals Judges Uphold Charles Taylor Jr.'s (Chuckie Taylor) Convictions And 97 Years Jail Sentence (2010). < https://www.ijmonitor.org/2010/07/united-states-court-of-appeals-judges-uphold-charles-taylor-jr-s-chuckie-taylor-convictions-and-97-years-jail-sentence/> Accessed 20th June 2017.

committed in Liberia.[228] In fact, no corporation or corporate official has been prosecuted in the US for international human rights violations except under the ATCA as a tort suit.[229] According to these findings, tort cases have the potential to provide remedies for human rights victims while moving the law forward and giving added impetus to criminal prosecutions.

In addition to the flexibility offered by tort law, it is important to note that criminal prosecutions around the world vary according to the level of participation afforded to those harmed 'by the violations.'[230] 'Some countries, such as the US, Australia, Belgium, Canada, France, India, Indonesia, and South Africa give prosecutors complete enforcement discretion',[231] 'with little or no official participation by victims or their representatives.'[232]Contrarily, other countries, such as Argentina, Germany, Japan, the Netherlands, Spain, and Ukraine, allow higher levels of participation by victims, including participation in the criminal proceedings to the court decision and to the appeal of decisions not to prosecute.[233]

Lastly, one of the most vital assessments of the standards applied in human rights tort cases, the jurisprudence on human rights claims, looks to international criminal law to inform analysis in civil cases. For instance, in rulings on the definitions of human rights norms, US courts have frequently cited international criminal tribunal judgments to inform their rulings about the content of customary international law,[234] specifically in cases brought under the ATCA and TVPA.[235] International criminal law has been a primary source of developing standards, and US and other national courts have looked to international criminal tribunal jurisprudence for guidance when they are ruling on tort cases.[236] It can thus be suggested that in the international and national legal systems, accountability for human rights victims has integrated principles from the international criminal system as well as other sources of law. Therefore, including the concept of tort law into national legal system is not problematic, but rather an innovative approach to the development of a binding accountability concept for corporations.[237] Tort law remedies will reflect on the 'dynamic, coordinated efforts of the international community to achieve and advance a common standard and international system of law to protect human dignity.'[238]

The Application of Tort Law in Other Jurisdictions

In theory, 'the legal systems in most countries should offer victims of human rights violations the opportunity to seek tort and civil redress'[239] against the perpetrator(s).[240] Legal developments in the European Union, most notably the introduction of a unified private international law framework, suggest that European courts are better equipped and more likely to allow human rights victims access to justice in foreign-cubed scenarios.[241]

In *Lubbe*, the plaintiffs were employees of an English corporation with a South African subsidiary.[242] The plaintiffs alleged that the defendant had breached its duty of care by allowing the employees to be exposed

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[228]The US federal extraterritorial torture statute, 18 USC. § 2340A (1994).

[229]Yolanda S Wu, *Genocidal Rape in Bosnia: Redress in United States Courts Under The Alien Tort Claims Act* (1993).

[230]Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17 Chicago Journal of International Law 447 and Leigh A Payne and Gabriel Pereira (n 1148).

[231]Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17 Chicago Journal of International Law 447.

[232]*Ibid*.

[233]*Ibid.*

[234]Andrea Bianchi, 'International Law and US Courts: The Myth of Lohengrin Revisited' (2004) 15 (4) European Journal of International Law 751.

[235]Eric Engle, 'The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge' (2004) 67 Albany Law Review 501.

[236]Harold Hongju Koh, 'International Law as Part of Our Law' (2004) 09(1) American Journal of International Law 43.

[237]Doreen J. McBarnet, Aurora Voiculescu and Tom Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009).

[238]Demelash Shiferaw and Yonas Tesfa, 'Human Rights Law Teaching Material (200) Prepared under the Sponsorship of the Justice and Legal System Research Institute. <https://chilot.files.wordpress.com/2011/06/human-rights-law.pdf> Accessed 28 May 2016.

[239]Amnesty International, 'Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse' (2017). <https://www.amnesty.org/download/Documents/POL3070372017ENGLISH.PDF> Accessed 06 April 2018.

[240]Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations* (2002).

[241]Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse by Multinational; Does European Civil and Commercial Litigation Provide an Answer?' (2015) 9 (1) New Zealand Journal of Research on Europe.

[242]*Lubbe v Cape Plc* (2000) 1 WLR 1545 (HL) and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New

to asbestos, despite *Lubbe* knowing that exposure 'was gravely injurious to health'.[243] The House of Lords granted the employees' claim for jurisdiction before the UK courts, even though all relevant conduct took place entirely in South Africa.

In *Akpan*, a Nigerian farmer, Friday Akpan, and a Dutch non-governmental organisation (NGO) *Milieudefensie,* jointly sued Royal Dutch Shell Plc (RDS), which was headquartered in The Hague, and its Nigerian subsidiary, Shell Petroleum Development Company (SPDC), for tortious damage before The Hague District Court.[244] After applying Dutch procedural rules, the Hague District Court found that it had jurisdiction to hear the case against both RDS and the Nigerian subsidiary.

However, this has not happened in cases such as *Dakota Access Pipeline (DAPL),*[245] *Aguinda v Texaco, Inc*., 850 F. Supp. 282 (SDNY 1994)[246] and *Coca-Cola*. 'Coca-Cola Company also leads in the abuse of workers' rights, assassinations, water privatisation, and worker discrimination.'[247]

'Between 1989 and 2002, eight union leaders from Coca-Cola bottling plants in Colombia were killed after protesting the company's labour practices.'[248] Hundreds of other Coca-Cola workers who joined or considered joining the Colombian union 'SINALTRAINAL have been kidnapped, tortured, and detained by paramilitaries who were hired to intimidate workers to prevent them from unionising.'[249]

In *Dow Chemical Co. v United States*, 476 US 227 (1986), 'the company, Dow Chemical, has been destroying lives and poisoning the planet for decades.'[250] 'The company is best known for the health disasters inflicted on millions of Vietnamese people'[251] – as well as many US army veterans – by its lethal Vietnam War-era defoliant, Agent Orange. Dow also developed and perfected napalm, the brutal chemical weapon that burned many innocents to death during the Vietnam War and other wars.[252] In 1988, Dow provided pesticides to Saddam Hussein despite warnings that they could be used to produce chemical weapons.[253]

Nestle USA is involved in illegal and forced child labour, which is rampant in the chocolate industry. More than 40% of the world's cocoa supply comes from the Ivory Coast, a country that the US State Department estimates had approximately 109,000 child labourers working in hazardous conditions on cocoa farms.[254] In 2001, Save the Children Canada reported that 15,000 children between 9 and 12 years old, many from impoverished Mali, had been tricked or sold into slavery on West African cocoa farms, many for just $30 each.[255]

Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[243]*Ibid.*

[244]*Akpan v Royal Dutch Shell Plc Arrondissementsrechtbank* Den Haag (District Court of The Hague) C/09/337050/HA ZA 09-1580, 30 January 2013.

[245]Sam Levin, 'Dakota Access Pipeline: Native Americans Allege Cruel Treatment' *The Guardian* (31 October 2016) <https://www.theguardian.com/us-news/2016/ oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses> Accessed 6 August 2017.

[246]*Aguinda v. Texaco*, *Inc*., 850 F. Supp. 282 (SDNY 1994) and Judith Kimberling, 'Indigenous Peoples and The Oil Frontier in Amazonia: The Case of Ecuador, Chevron Texaco, and Aguinda v. Texaco' (2005) 38 New York University Journal of Law & Business 413.

[247]Terry Collingsworth, 'Separating Fact from Fiction in The Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations' (2002) 37 (3) USFL Review 563.

[248]Lesley Gill, 'Right There with You Coca-Cola, Labor Restructuring and Political Violence in Colombia' (2007) 27(3) Critique of Anthropology 235 and <https://www.malaysia-today.net/Blog-e/2005_12_16_MT_BI_archive.htm > Accessed 05 April 2016.

[249]Jonathan Hills and Richard Welford, 'Coca-Cola and Water in India' (2005) 12(3) Corporate Social Responsibility and Environmental Management 16 and
<https://www.malaysia-today.net/Blog-e/2005_12_16_MT_BI_archive.htm> Accessed 05 April 2016.

[250]<https://www.malaysia-today.net/Blog-e/2005_12_16_MT_BI_archive.htm>
Accessed 30 June 2018 and Rebecca S Katz, 'The Corporate Crimes of Dow Chemical and The Failure to Regulate Environmental Pollution' (2010) 18 (4) Critical Criminology 295 and <https://www.malaysia-today.net/Blog-e/2005_12_16_MT_BI_archive.htm > Accessed 05 April 2016.

[251]<https://www.malaysia-today.net/Blog-e/2005_12_16_MT_BI_archive.htm>
Accessed 30 June 2018

[252]Susan Schultz Huxman and Denice Beatty Bruce, 'Toward a Dynamic Generic Framework of Apologia: A Case Study of Dow Chemical, Vietnam, and the Napalm Controversy' (1995) 46 (1-2) Communication Studies 57.

[253]Takeshi Uesugi, 'Is Agent Orange a Poison? Vietnamese Agent Orange Litigation and the New Paradigm of Poison' (2013) 24 The Japanese Journal of American Studies.

[254]Adeline Zensius, *Inside The Cocoa Pod: An Analysis of The Harkin-Engel Protocol in Cote d'Ivoire* (Georgetown University 2012).

[255]Elliot J Schrage and Anthony P Ewing, 'The Cocoa Industry and Child Labour' (2005) 18 Journal of Corporate Citizenship, Ambika Zutshi, Andrew Creed and Amrik Sohal, 'Child Labour and Supply Chain: Profitability or (mis) Management' (2009) 21 (1) European Business Review 42, and Amanda A Humphreville, 'If The Question Is Chocolate-Related, The Answer Is Always Yes: Why Doe v. Nestle Reopens The Door for Corporate Liability of US Corporations Under The Alien Tort Statute' (2015) 65 American University Business Law Review 191.

'Pfizer is the largest pharmaceutical company in the world; it is also one of the worst'[256] abusers of the human right of universal access to HIV/AIDS medicine.[257]

In September 2005, the International Labour Rights Fund filed a lawsuit on behalf of Wal-Mart supplier sweatshop workers in China, Indonesia, Bangladesh, Nicaragua and Swaziland.[258] The workers were denied minimum wages, forced to work overtime without compensation, and were denied legally mandated health care.[259] Other worker rights violations that have been found in foreign factories that produce goods for Wal-Mart include locked bathrooms, starvation wages, pregnancy tests, denial of access to health care, and workers being fired and blacklisted if they try to defend their rights.[260]

The limitations of these cases observed above have shown that the vast majority of human rights abuse victims still have no or limited access to judicial remedy in the domestic court and at the international level.[261] Taken together, these findings do support strong recommendations to examine the law for bringing a claim and specifically focus on ATCA, which is the source for all human rights violation litigation. Other states have also instigated claims against perpetrators, but these have involved the filing of criminal complaints, which demand prosecution rather than a true tort and civil lawsuit.[262] Ensuring appropriate judicial systems, remedy, and support for victims of corporate human rights violations and environmental damages should be a priority for both domestic and international legal systems. Taken together, these findings of the ATCA suggest that the U.S. Federal Courts have relied on distinctive sources of authority to decide civil claiming arising from human rights violations committed abroad.[263]

The Alien Tort Statute is 'a unique, but ancient jurisdictional statute that authorises US federal courts to hear claims of violations against the'[264] ''law of nations' committed abroad against foreigners.'[265] Victims are able to bring civil lawsuits based on breaches of international law against private entities. For successful plaintiffs, US courts provide the gateway to potentially exorbitant remedy. Despite promises of the US as a legal forum for corporate accountability for human rights abuse victims, this book argues that the all too prevalent practice of resorting to US courts is not, in fact, the best way for human rights abuse victims to seek access to remedy and justice. This is because, in *Kiobel*, the Court was adamant to ensure that the fact pattern of the claim was suitable for the ATCA. In deciding whether the case could be brought under the ATCA, the Supreme Court's sole concern was to preserve the US foreign affairs interests.[266] Even the dissenting opinion's reference to victims deserving remedy for violations of the law of nations was subordinate to the preservation of the good international relations of the United States with other States.[267] The Court paid no regard to the availability (or lack thereof) of alternative forums for the victims of the human rights abuses in the case.

It is evident that the Court did not find the claimants' access to justice to be a matter of its responsibility. In the English legal system, 'on the other hand, Lord Bingham was anxious to ensure that the litigants did not face a denial of justice and refused a grant to stay in light of the risk that the litigants'[268] 'would not have adequate

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[256]<https://www.malaysia-today.net/Blog-e/2005_12_16_MT_BI_archive.htm>
Accessed 30 June 2018

[257]Michael A Santoro, 'Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS drugs' (2006) 31 North Carolina Journal of International Law and Commercial 923.

[258]Molly Selvin, 'Wal-Mart Faces Suit by Labor Group' (2005) Los Angeles Times

[259]Naomi Jiyoung Bang, 'Unmasking the Charade of The Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases' (2013) 35 Houston Journal of International Law 255.

[260]Kevin Kolben, Labour Rights as Human Rights? (2009) 50 (2) Virginia Journal of International Law 449 and *Wal-Mart v Dukes*, 564 US 338 (2011).

[261]Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Pres USA 2015).

[262]Luc Reydams, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice* (1996) 4 European Journal of Crime, Criminal Law and Criminal Justice 18.

[263]The Alien Tort Claims Act (ATCA) of 1789, 28 USC. § 1350; ATS.

[264] Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[265]Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe and *Smith Kline & French Labs Ltd v Bloch* [1983] 1 WLR 730 at 733

[266]Eugene Kontorovich, 'Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends' (2014) 89 Notre Dame Law Review 1671 and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe.

[267]*Kiobel v Royal Dutch Petroleum Co.* (n 810).

[268]Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

funding to represent their claim properly in South Africa.'[269] Claims under tort law are common and while violations of the Alien Tort Claims Act (ATCA) may be framed as a violation of statutory law '(e.g. torture as battery) such redefining mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden variety municipal tort.'[270] 'Accordingly, the severity of the victim's harm may not be properly recognised by the'[271] ATCA and the 'stigma attached to the defendant as'[272] an alien is 'significantly less than if they were citizens'[273] of the home state, for instance. For the purposes of the study in this book, it is 'asserted that the most important factor for a human rights abuse'[274] victim is establishing jurisdiction. Therefore, framing atrocious abuse as a combination of garden variety torts, while unsatisfying, may be necessary in order to ensure that the victims have the right access to remedy and justice.[275]

It is argued in this book that tort litigation can create certainty in corporate accountability lawsuits, independence, and impartiality. It will also help to limit the restrictions on the presumption against extraterritorial jurisdiction, and help the enforcement of human rights law, health and safety legislation, and environmental protection. Thus, *Kiobel*, where the plaintiffs, citizens of Nigeria, claimed that Dutch, British, and Nigerian oil-exploration corporations aided and abetted the Nigerian government in the 1990s to commit violations of customary international law. '(The power to make a law having extraterritorial operation is conferred only on Parliament and not on the state legislatures. Hence an Act of the State Legislature, if it gives extra-territorial operation to its provisions, can be successfully challenged in the court, unless extra-territorial operation can be sustained on the ground of territorial nexus. It means that although the object to which the law applies may not physically be located within the territorial limits of a State, yet the State law will be valid if there exists a connection or nexus between the state and the object.)'[276] Corporate liability and territorial nexus are two unsettled areas in ATCA litigation. However corporate liability is unquestioningly accepted under the Brussels I Regulation, which considers the jurisdictional issues that arise when litigation has a foreign element. It sets out the rules which determine whether the English court will have jurisdiction, both under the common law and the European regime, including the Recast Brussels Regulation.[277]

In addition, following the minority judgment in *Kiobel*, it is unclear whether ATCA plaintiffs will also need to prove exhaustion of local remedies, or be precluded from attaining jurisdiction on the basis of *forum non conveniens* or international comity. The minority was not 'clear in identifying the other avenues that plaintiffs could pursue.'[278] The ATCA is a 'unique jurisdictional statute that assesses liability in accordance with international law'[279], and 'the lack of guidance is disconcerting. The requirement that a claimant exhaust local remedies, especially when the home state may have a corrupt judiciary, imposes additional costs on the claimant, who is already likely to be of limited means.'[280] 'There is also no guarantee that their claim will, in fact, be heard under the ATCA. On the other hand, member state courts do not have such requirements and cannot stay proceedings in favour of any other court on the grounds of *forum non conveniens*.'[281] This common law doctrine

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[269]*Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL) and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[270]William S Dodge, *Alien Tort Litigation: The Road Not Taken* (2014) and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[271]*Ibid.*

[272]*Ibid.*

[273]*Ibid.*

[274]*Ibid.*

[275]Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations* (2002).

[276]<http://www.proud2bindian.in/indian-law-judiciary/4579-what-territorial-nexus. html> Accessed 8 January 2016 and Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press 2007).

[277]Brussels I Regulation. Recital 2; Case C-75/63 *Mrs MKH Hoekstra (Née Unger) v Bestur der Bedriifsvereniging voor Detaijhandel en Ambachten* [1964] ECR I-01519.

[278] Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[279]*Ibid.*

[280]Micaela L Neal, 'The Niger Delta and Human Rights Lawsuits: A Search for The Optimal Legal Regime' (2011) 24 Pacific McGeorge Global Business & Development Law Journal 343 and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[281]*Ibid.*

allows a court to dismiss a civil action (even though the forum or venue is proper and the court has jurisdiction over the case and the parties) where an appropriate and more convenient alternative forum exists in which to try the action.[282] This is undoubtedly a critical and devastating obstacle for human rights plaintiffs.

'Foreign legislatures may try to thwart plaintiffs' access to justice by enacting laws prohibiting litigation of certain claims.'[283] Additionally, the ability to sue parties related to a foreign government's human rights abuses is far from certain under the ATCA given the United States Supreme Court's foreign policy concerns.[284] This discrepancy could be attributed to the fact that, when human rights abuse originates from a foreign government, national courts may be overly cautious when ruling on the question of jurisdiction, and dismiss a case entirely, even where corporate bodies played a role in the human rights abuse.[285] The possible interference of the national government in ATCA claims cannot be ruled out here. To the further disappointment of corporate human rights abuse plaintiffs, it is not clear whether they can sue corporations, especially where they have little or no connection to the United States. The inability to invoke the ATCA following state sanctioned human rights abuses severely compromises its utility for human rights abuse and environmental damage victims in the host country, seeking an impartial forum for their case. Furthermore, the US federal courts are constrained by foreign policy considerations when determining the question of jurisdiction.[286] Nonetheless, the problematic substantive law is not an issue in ATCA claims because ATCA jurisprudence has determined that applicable substantive law is customary international law and this is common to all countries. This combination of findings provides some support for the conceptual premise that the ATCA by far is the only mechanism that has the potential to provide remedies for corporate human rights abuses. Nevertheless, it still falls short.

The relationship between tort law, the ATCA and human rights principles forms the foundation of court decisions in corporate human rights abuse cases, particularly in understanding and approaching tort law rules and remedies for human rights violations. This is because, it could increase the propensity of claimants relying on human rights legislation, for example, in individual claims against the corporations. Legal practitioners should encourage the court to take into account tort law principles when deciding cases of corporate human rights violations. The court should consider attempts made by lawyers, as observed in *Daniels v Walker*, 'where the defendant appealed against the decision of the High Court judge refusing the defendant permission to obtain and rely upon the evidence of his care expert in response to a care report jointly obtained in a personal injury action brought by the claimant.'[287] Arguably, this case led to an expansion of tort law in common law, as it adapts a judicial interpretation that could be seen as meeting the dynamics of the modern world.

Moreover, if a plaintiff has relied on the breach of human rights where the negligence claim has failed earlier, then the judicial court may consider common law to balance the rights and interests of the associated parties. As shown in *X (Minors) v Bedfordshire County Council,*[288] the House of Lords held that children who had been subjected to prolonged physical and emotional abuse by their parents had no claim in the tort of negligence against a social services authority for alleged negligence in failing to take them into local authority care. The claimant, *X (Minor)*, forwarded the matter to the European Court of Human Rights (ECtHR). The Court re-iterated that Article 3 of the European Convention enshrines one of the most fundamental values of democratic societies. It prohibits in absolute terms torture or inhuman or degrading treatment of punishment. 'The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment,

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[282]Paxton Blair, 'The Doctrine of Forum Non Conveniens in Anglo-American law' (1929) 29 (1) Columbia Law Review 1, 34.

[283]Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019 and Angela Walker, 'The Hidden Flaw in Kiobel, Under The Alien Tort Statute The Mens Rea Standard for Corporate Aiding and Abetting is Knowledg*e'* (2011) 10 Northwestern University Journal of International Human Rights 119; and Micaela L Neal, The Niger Delta and Human Rights Lawsuits: A Search for The Optimal Legal Regime' (2011) 24 Pacific McGeorge Global Business & Development Law Journal, 343.

[284]Beth Stephens, 'The Curious History of The Alien Tort Statute' (2014) 89 (4) Notre Dame Law Review 1467, and David Cole, Jules Lobel and Harold Hongju Koh, 'Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos' (1988) 12 Hastings International & Comparative. Law Review 1; *Trajano v Marcos*, 978 F 2d 493; See *Filartiga v Pena-Irala,* 630 F.2d 876 (2d Cir.1980).

[285]Danielle Olson, 'Corporate Complicity in Human Rights Violations Under International Criminal Law' (2015) 1 International Human Rights Law Journal.

[286]Louis Henkin, 'The Foreign Affairs Power of the Federal Courts: Sabbatino' (1964). 64 (5) Columbia Law Review 805.

[287]*Daniels v Walker* (2000) 1 WLR 1382 CA. Also see: <https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2000/05/daniels-v-walker-c-a> Accessed 14 May 2016.

[288]*X (Minors) v Bedforshire County Council* (1995) 2 AC 633.

including such ill-treatment administered by private individuals'[289] (See *A v the United Kingdom* judgement of 23 September 1998, Reports of Judgements and Decisions 1998-VI, para 22). 'These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.'[290]

The Alien Tort Claims Act (ATCA) of 1789

The ATCA was enacted in 1789, 'and provides that district courts shall have original jurisdiction of any civil action by an alien for Tort only, committed in violation of the law of nations or a treaty of the United States.'[291] Therefore, the ATCA provides the US federal courts with subject matter jurisdiction over claims, provided that three basic requirements are met: (1) the claimant is an alien; (2) the defendant is liable for the tort; and (3) the tort violates the law of nations or a treaty to which the US is party.[292] Despite this, the ATCA remains ambiguous because the statute fails to provide clarity on the scope of the law, and courts have failed to provide consistent direction for parties to follow.[293]

In *Sosa v Alvarez-Machain*, the Supreme Court held that the detention of a foreign national, who was transferred to the custody of law enforcement officials in less than one day, did not clearly violate any norms of customary international law. Therefore, the plaintiff failed to establish a cause of action under the ATCA.[294] However, on appeal, a three-judge panel on the Ninth Circuit Court affirmed the ATCA judgment against *Sosa* but reinstated the claim against the US government. Preceding the *Sosa* case, some commentators read the ATCA as a jurisdictional grant and nothing more.[295] Hence, it is possible to suggest that, a federal claim under the ATCA must identify the source of a private right to sue to make out a cause of action, which is very difficult in practice because the act lacks clarity and consistency. This is partly because there is no uniform guideline of the text or case law that set out corporate accountability under the ATCA.[296]

An alternative approach located a new cause of action within the statute itself.[297] The Supreme Court in *Sosa* focused closely on the words of the statute as well as the intent behind the law.[298] The Court ultimately held that the ATCA does not create a statutory cause of action and merely grants subject matter jurisdiction.[299] Furthermore, the Court instructed district courts to exercise caution when deciding to hear claims allegedly based on the present day law of nations under the ATCA.[300] The Court required that any claim based on present day law of nations must also rest on a norm of international character accepted by the civilised world and defined with specificity comparable to the features of the eighteenth-century paradigms.[301] Moreover, comparing *Filártiga v Peña-Irala* in light of the *Kiobel* case, the Supreme Court concluded with the contrary.[302]

In *Filártiga v Peña-Irala* the Second District Court held that the ATCA merely provides federal jurisdiction over international law claims.[303] The court articulated that the ATCA does not grant new rights to aliens, but simply allows adjudication of the rights already recognised by international law.[304] This approach assumes international law can independently support a cause of action in federal court.[305]

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[289]< https://works.bepress.com/john_knox/1/download/> Accessed 8 April 2016.

[290]<http://www.dcya.gov.ie/documents/Publications/SixthRapporrteurReport.pdf> Accessed 24 March 2018.

[291]<https://law.unimelb.edu.au/files/dmfile/download156e1.pdf> Accessed 27 October 2018 and 28 USC. § 1350; ATS.

[292]Jeffrey M Blum and Ralph G. Steinhardt, 'Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala' (1981) 22(5) Harvard International Law Journal 3.

[293]Emily M Nellermoe, 'Balintulo v Daimler AG, 727 F. 3d 174 (2013): Second Circuit Closes the Door for Victims of International Rights Violations' (2014) 11 *South Carolina Journal of International Law and Business* and *Balintulo v Daimler AG*, US Dist. Lexis 17474 (2d Cir. Aug. 21, 2013).

[294]*Sosa v Alvarez-Machain*, 542 US 692, 738 (2004). 'The facts and procedural history are detailed in the first of the two *Alvarez-Machain* Supreme Court decisions, *United States v Alvarez-Machain*, 504 US 655, 657–59 (1992), and summarised in the recent opinion, *Sosa v Alvarez-Machain*, 542 US 692, 697–98 (2004)'.

[295]Beth Stephens, '*Sosa v Alvarez-Machain*-The Door Is Still Ajar for Human Rights Litigation in US Courts' (2004) 70 (5) Brooklyn Law Review, 33

[296]Hannah R Bornstein, 'The Alien Tort Claims Act in 2007: Resolving The Delicate Balance between Judicial and Legislative Authority' (2007) 82 Indiana Law Journal 1077.

[297]*Ibid.*

[298]*Ibid.*

[299]*Sosa v Alvarez-Machain*, 542 US 692, 712 (2004).

[300]*Ibid.*

[301]*Ibid.*

[302]*Ibid.*

[303]*Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

[304]*Ibid.*

[305]*Ibid.*

Moreover, according to the *Sosa* holding, District Courts must determine issues of international law.[306] This, inevitably, will require District Courts to use their judgment regarding whether it is a good policy to make a cause of action available to victims of corporate human rights violations who bring their claim to the US federal court.[307] Therefore, it is vital when deciding whether a court, in absence of any treaty or any controlling executive or legislative act or judicial decision, should resort to the customs and usages of civilised nations to establish jurisdiction. This has not been the case in *Kiobel*.[308] The evidence from this study suggests that for the ATCA to meet the requirement of present international law and human rights law, the court must survey works of jurists and commentators for the actual application of substantive law.

The court, therefore, must consider whether the claimant identifies 'a specific, universal and obligatory norm of international law', and not a link with the US.[309] The following conclusions can be drawn from here: in order to trigger an effective ATCA jurisdiction, 'civilised nations'[310] must generally accept a clearly and unambiguously defined international norm.[311] Therefore, it is possible that global application of the ATCA requires a caution for several reasons.

First, the eighteenth-century understanding of both federal common law and the role of federal courts must change in order for the ATCA to meet the current dynamics of globalisation. Second, federal courts must avoid recognising new causes of action where Congress has not provided clear guidance on its global application. Thirdly, the Constitution assigns foreign affairs to the Executive and Legislative branches, and these cases often stray into this realm. This is because only the Executive and Legislative branches of government have authority over foreign affairs and international politics. Lastly, 'Congress does not broadly support the idea that private rights of action provide the appropriate enforcement mechanism for international law norms.'[312] Consistent with this analysis, lower courts addressing the choice-of-law question have generally held that ATCA claims involve federal common law. This observation has also contributed to the uncertainty and the lack of clarity surrounding the ATCA.[313]

ATCA jurisdiction in US federal courts remained unchanged until the revolutionary case of *Filártiga v Peña-Irala* (1980).[314] In this case, the family of a Paraguayan man who had been tortured to death brought a civil action against the alleged perpetrators whilst his body was physically present in the US. The US Second Circuit Court of Appeals held that the ATCA provided the court with subject matter jurisdiction over the case. Ever since *Filártiga,* claimants have brought numerous civil lawsuit cases against perpetrators of human rights abuses committed on foreign soil through the ATCA. Likewise, many claims have been brought against high-ranking former and current foreign government officials, including presidents and ministers, as well as against MNCs.[315]

The federal courts have also entered judgments against Bosnian Serb President Radovan Karadzic;[316] Armando Fernandez-Larios,[317] a member of the Chilean army death squad known as the 'Cavaran of Death';[318] and Lui Qi, the former mayor of Beijing.[319] The US Supreme Court offered its first substantive opinion on the ATCA in *Sosa v Alvarez-Machain* in 2004.[320]

One source of weakness with the ATCA is the meaning of the term 'violations of the law of nations', and what constitutes an actionable violation of that law. This was never clarified or explained in any of the cases discussed above. In *Filártiga*, the court held that this phrase refers to 'international law not as it was in 1789, but

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[306]*Sosa v Alvarez-Machain* (n 1210).
[307]*Ibid.*
[308]David P Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) 107 (3) American Journal of International Law 601, 621.
[309]Emily M Nellermoe (n 938).
[310]Rudolf B Schlesinger, 'Research on The General Principles of Law Recognized by Civilized Nations' (1957) 51 (4) American Journal of International Law 734, 753.
[311]*Ibid.*
[312]<https://www.lexisnexis.co.uk/legal/search?query=enforcement%20mechanism%20for%20international%20law%20norms> Accessed 9 October 2017.
[313]*Sosa v Alvarez-Machain* (n 1177).
[314]Gabriel M Wilner, 'Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights' (1981) 11 Georgia Journal of International & Comparative Law 317.
[315]Natalie L Bridgeman, 'Human Rights Litigation under The ATCA as a Proxy for Environmental Claims' (2003) 6 Yale Human Rights & Development Law Journal 1.
[316]Sean D Murphy, 'Award of Damages Against Bosnian Serb Leader Radovan Karadzic' (2001) 95 (1) American Journal of International Law 143.
[317]Francisco Rivera, 'Inter-American Justice: Now Available in a US Federal Court Near You' (2005) 45 Santa Clara Law Review 889.
[318]Patricia Verdugo, Marcelo Montecino, and Paul E, Sigmund. *Chile, Pinochet, and The Caravan of Death* (North-South Center Press 2001).
[319]Beth Stephens, Michael Ratner, Judith Chomsky, Jennifer Green and Paul Hoffman, *International Human Rights Litigation in US Courts* (Irvington-on-Hudson New York: Transnational Publishers 1996).
[320]Beth Stephens, 'Sosa v. Alvarez-Machain-The Door Is Still Ajar for Human Rights Litigation in US Courts' (2004) 70 Brooklyn Law Review 533.

as it has evolved and exists among the nations of the world today'[321]; thus, the court found that torture qualified because its prohibition was universally recognised, clear, and unambiguous.[322]

Furthermore, later courts adopted this standard and added extrajudicial killing, crimes against humanity, genocide, disappearance, unpaid forced labour, and prolonged arbitrary detention.[323] This is an indication that the ATCA does not confine itself to any universal principle of international law. Following a vigorous examination of congressional intent in 1789, the Supreme Court in *Sosa* categorised what had formerly been agreed in a court argument that the phrase 'violations of the law of nations' was indeed related to international law. It was found that federal common law gives a cause of action for violations of international law and human rights law, and that the ATCA gives the federal courts jurisdiction to hear such cases.[324] In addition, *Sosa* established a new condition for accountability for human rights violations. The violation must be accepted by the civilised world and must be comparable to three eighteenth-century cases of abuse Congress had in mind when it enacted the ATCA: '(1) abuse of safe behaviour; (2) breach of ambassador rights; and (3) piracy'.[325] However, the court did not explain a list of modern norms that met these conditions, leaving this assignment to the lower courts on a case-by-case basis but advising them to exercise control.[326] Nonetheless, the analysis here shows that US foreign affairs hold supremacy over the application of the ATCA.[327] The lower courts were able to interpret the new standards to be consistent with the outcome of the case in *Filártiga* and applied it before *Sosa.*[328]

Likewise, the lower courts have reconfirmed a number of human rights abuses that are actionable under the ATCA, such as 'torture; cruel, inhuman, or degrading treatment; extrajudicial killing; a crime against humanity; genocide; and prolonged arbitrary detention.'[329] Therefore, a future lawsuit under the ATCA is likely to develop this list created by the lower courts, even though *Sosa* clearly indicates that the list should remain short.[330] The results of this study indicate that the ATCA allows victims of egregious human rights abuses committed abroad to sue those responsible in US federal courts.[331] Thus, the ATCA allows victims of human rights violations to bring forward lawsuits, which may be brought for serious violations of international law such as terrorism, state-sponsored torture and extrajudicial killings, war crimes, crimes against humanity, and genocide.[332] Taken together, this suggests that when the ATCA was drafted in the eighteenth century, international law dealt primarily with regulating diplomatic relations between states and outlawing crimes such as piracy. However, international law in the twenty-first century has expanded to include the protection of human rights.[333] In the 70-plus years since the signing of the Universal Declaration of Human Rights in 1948, universal human rights have moved from being an aspirational concept to a legal reality.[334]

This extraordinary evolution gave the ATCA renewed significance in the late twentieth century, allowing victims of human rights abuse to bring cases in US courts. Today, the ATCA gives survivors of egregious human rights abuses, wherever committed, the right to sue the perpetrators in the United States, while other jurisdictions do not allow the victims to exercise their legal rights when their human rights are violated.[335] The ATCA can be seen as promoting the US goals of protecting human rights and denying safe haven to human rights abusers. Thus, it could be said that the modern goal of the ATCA is to protect human rights and this should not be negated by US foreign affairs interests.[336]

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[321]630 F 2d at 878,881, 884.

[322]Ralph G Steinhardt, 'Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against The Estate of Ferdinand Marcos' (1995) 20 Yale Journal of International Law 65 (1995).

[323]Armin Rosencranz and David Louk, 'Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch' (2005) 8 Chapman Law Review 135; *Doe I v Unocal Corp*., 395 F.3d 932, (9th Cir.2002); *Kadic v Karadzic*. 70 F.3.d 232 (2d Cir.1992); *Haliao v Marcos,* 25 F.3 1467 (9th Cir. 1994); *Trajano v Marcos,* 978 F.2d. (9th Cir. 1992).

[324]542 U.S at 724-25.

[325]*Ibid* at 725.

[326]*Ibid*; see also *South Africa Apartheid*., 346 F. Supp. 2d 538, 547 (S.D.Y.2004).

[327]Harlan Grant Cohen, 'Supremacy and Diplomacy: The International Law of The US Supreme Court' (2006) 24 Berkeley Journal of International Law, 273 (2006).

[328]*Sare v Rio,* PLC, 487 F. 3d 1193, 1201-02 (9th Cir. 2007).

[329]*Calbello v Armando Fernandez-Larios*, 402 F. 3d 1148 (11th Cir.2005); *Almog v Arab Ban*, PLC 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Doe v Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal 2004); *Doe v Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D.N.Y. Cal. 2004); also see, *Aldana v Del Mont Fresh Produce*, N.A., Inc., 416 F. 3d 1242 (11th Cir. 2005) (Cruel, inhuman, or degrading treatment claims not actionable).

[330]*Sosa v Alvarez-Machain*, 542 US 692 (2004).

[331]William S Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'* (1996).

[332]Kenneth C Randall, 'Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute' (1985) 18 New York University Journal of International Law and Politics 1.

[333]Thomas H Lee, 'The Safe-Conduct Theory of the Alien Tort Statute' (2006) Columbia Law Review 830.

[334]UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <http://www.refworld.org/docid/3ae6b3712c.html> Accessed 6 August 2017.

[335]Curtis A Bradley, 'The Alien Tort Statute and Article III' (2001) 42 Virginia Journal of International Law 587.

[336]Marc Rosen, 'The Alien Tort Claims Act and The Foreign Sovereign Immunities Act: A Policy Solution' (1998) 6 Cardozo Journal of International and Comparative Law 461.

Even so, the ATCA does not provide universal jurisdiction over human rights abuses and the ATCA lawsuits typically apply ordinarily rules of civil liability. Therefore, ATCA lawsuits generally cannot be brought against foreign states.[337] However, without the ATCA, similar lawsuits would simply be brought in state courts and would result in confusing and conflicting rules that may not provide effective remedies for victims of human rights violations.[338] Likewise, ATCA cases that are legally unsound or factually unsupported could be dismissed by the courts.[339]

The ATCA allows MNCs from most industries to be sued, including Coca-Cola (accused of aiding murders by Colombian paramilitary groups);[340] ExxonMobil (accused of aiding human rights abuses by the Indonesian military);[341] General Motors (accused of aiding South Africa's apartheid government);[342] and Yahoo (accused of sharing subscriber data with the Chinese government).[343] Almost all of these suits are based on 'aiding and abetting' abuses by foreign governments, rather than direct offences.

Comparing the effectiveness of the ATCA in corporate human rights violations to countries such as France,[344] Germany,[345] and the Netherlands,[346] it is argued here that the ATCA provides a better forum for corporate human rights abuses victims than the judicial systems in these states.

It can be inferred that international law does not allow courts of one country to exercise jurisdiction in civil cases over offences in other countries.[347] For this reason, foreign governments, including many close US allies, have filed more than 20 complaints with the State Department and Federal Courts in ATCA suits over the past decade.[348] The British, Dutch, and German governments are all strong advocates for human rights, and filed briefs in the *Kiobel* case, arguing that applying the ATCA to acts that take place in other countries and have no other connection to the United States is a violation of international law.[349] This has cast a cloud over the current dimension of the ATCA and its application in the international arena.

The current development in the courts suggests that the courts reject many proclaimed international law abuses, including temporary detention, parental abduction, sexual relations with a minor, wartime use of defoliants, and different types of environmental problems.[350] Could this be that the court thinks that national courts should have an applicable mechanism for these violations? What about a scenario where the national court is paralysed and has no power to enforce any human obligations in its jurisdiction?

One can argue that the court's view is too narrow and fails to adequately engage the issues facing most victims of human rights violations. Perhaps the appropriate question for the court should be, is there a particular relationship between the victims and the perpetrators to establish a duty of care? Is there any distinction between the acts of the perpetrators which give rise to the violations other than foreign affairs issues? Corporations should be liable for the violations of the former abuses but not those of the latter, which are related to foreign affairs. Likewise, the violations must be preferable to the relationship between the defendant, the tort, and the victims.

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[337]Julian Ku and John Yoo, 'Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute' (2004) Supreme Court Review, 153.

[338]Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press USA 2015).

[339]Joanna E Arlow, 'The Utility of ATCA and The Law of Nations in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large-Scale Environmental Destruction' (2000) 7 Wisconsin Environmental Law Journal 93.

[340]Terry Collingsworth, 'Separating Fact from Fiction in The Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations' (2002) 37 (3) US Florida Review 563.

[341]Brian C Free, 'Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation' (2003) 12 (2) Pacific Rim Law & Policy Journal 467.

[342]Ariadne K Sacharoff, 'Multinationals in Host Countries: Can They Be Held Liable under The Alien Tort Claims Act for Human Rights Violations?*'* 23 (3) Brooklyn Journal of International Law 927 (1997).

[343]Chimène I Keitner, *Conceptualizing Complicity in Alien Tort Cases* (2008).

[344]William Laurence Craig, 'Application of The Trading with The Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy' (1970) Harvard Law Review 579.

[345]Eric Engle, 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations' (2006) 20 (2) John's Journal of Legal Commentary 287.

[346]Arthur H Dean, 'The Role of International Law in a Metropolitan Practice' (1955) 103(7) University of Pennsylvania Law Review 886.

[347]David Wallach, 'The Irrationality of Universal Civil Jurisdiction' (2014) 46 Georgetown Journal of International Law 803.

[348]Daniel Prince, 'Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?' (2011) 8 Seton Hall Circuit Review 43.

[349]John B Bellinger III, 'Why the Supreme Court Should Curb the Alien Tort Statute' *The Washington Post* (Washington, 22 February 2012)

[350]*Sosa,* 542 US at 734-38, *Vietnam Asus'n for Victims of Agent Organ v Dow Chemical Co.,* 517 F. 3d 104 (2d Cir. 2008); *Taveras v Taveraz,* 477 F. 3d 767 (6th Cir. 2007); *Cisneros v Aragon,* 485 F.3d 1226 (10th Cir. 2007); *Flores v S. Peru Copper Corp.,* 343 F.3d 140 (2d Cir. 2003).

The Application of International Law and Human Rights Law in TVPA and ATCA Cases

In 1992, the US enacted the Torture Victim Protection Act (TVPA),[351] which provides authority for a civil action against an individual who, under the rule of law of any foreign state, tortured or summarily executed another person unlawfully.[352] The TVPA is a narrowly tailored law that authorises civil suits against foreign government officials for acts of torture or murder committed in their countries,[353] but the suits are subject to numerous procedural limitations.[354] The US Supreme Court limited the scope of the TVPA with regards to corporate liability and has effectively terminated claims made against corporations under the Act for allegations of aiding and abetting torture and extrajudicial killing committed abroad.[355]

This narrow statute is unprecedented in international law and risks reciprocal lawsuits against US officials and was specifically intended by Congress to apply to acts in other countries.[356] The advocates of the TVPA's application to organisations and corporations primarily argued that the TVPA was enacted to extend the Washington DC Circuit Court's *Tel-Oren v Libya Arab Republic* 'decision to US citizens. Here, plaintiffs who were foreign citizens and 'survivors or representatives of persons murdered in a foreign country filed suit against defendants seeking compensatory and punitive damages.'[357] The plaintiffs alleged that the 'defendants were responsible for multiple tortious acts resulting from violations of the law of nations, United States' treaties, United States' criminal law and the common law. The trial court dismissed the plaintiffs''[358] 'actions for lack of subject matter jurisdiction and for being time barred under the applicable statute of limitations.'[359]

Without a clear congressional mandate, 'the Supreme Court should not interpret the ATCA, which was enacted for a different purpose, to allow US courts to sit in judgment over acts that take place in foreign countries.'[360] Thus, the TVPA lays down four conditions: '(1) the defendant must have committed torture or extrajudicial killings; (2) the defendant must act under actual or apparent authority, or under the law of the foreign state; (3) the claimant is a victim, his or her legal representative, or a person who may be a claimant in a wrongful death action; and (4) the claimant must exhaust all available legal procedures and remedies at the national court where the violation giving rise to the lawsuit took place.'[361]

Congress did not intend the TVPA to be jurisdictional in nature, but rather to create a substantive cause of action. Similarly, the TVPA defines its cause of action with further details. Section 3 contains an in-depth definition of extrajudicial killing and torture.[362] The TVPA also contains an exhaustive list of remedies provision, requiring that the claimant exhausts all 'adequate and available remedies in the place in which the conduct giving rise to the claim occurred.'[363] A House of Representatives Report explains the need for this requirement, which 'ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture

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[351]The Torture Victims Protection Act (TVPA) 1991.
[352]*Cisneros v Araon*, 485, F. 3d 1226 (10th Cir. 2007); *Flore v S. Peru Copper Corp.,* 343 F. 3d 140 (2d Cir. 2003).
[353]Jennifer Correale, 'The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?' (1994) 6 Pace International Law Review School of Law 197.
[354]Robert F Drinan and Teresa T Kuo, 'Putting The World's Oppressors on Trial: The Torture Victim Protection Act' (1993) 15 (3) Human Rights Quarterly 605.
[355]*Mohamad v Palestinian Authority* 566 US (2012).
[356]Christopher W Haffke, 'The Torture Victim Protection Act: More Symbol Than Substance' (1994) 43 Emory Law Journal 1467.
[357]Jennifer Hagerman, 'Navigating the Waters of International Employment Law: Dispute avoidance Tactics for United States-based Multinational Corporations' (2006) 41 Val. UL Rev 859.
[358]Jennifer Hagerman, 'Navigating the Waters of International Employment Law: Dispute avoidance Tactics for United States-based Multinational Corporations' (2006) 41 Val. UL Rev 859.
[359]*Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774 – 1984, Jennifer Hagerman, 'Navigating the Waters of International Employment Law: Dispute avoidance Tactics for United States-based Multinational Corporations' (2006) 41 Val. UL Rev 859 and
<http://www1.downloadmienphi.net/?tm=1&subid4=1614612095.0015547531&kw=Single+Click+Software+Download&KW1=Download%20from%20Cloud%20File%20Services&KW2=Download%20from%20High%20Security%20Cloud%20File%20Storage&KW3=Upload%20to%20Cloud%20File%20Sharing%20Services&searchbox=0&domainname=0&backfill=0> Accessed 9 October 2017.
[360]<https://www.washingtonpost.com/gdpr-consent/?next_url=https%3a%2f%2f www.washingtonpost.com%2fopinions%2fwhy-the-supreme-court-should-curb-the-alien-tort-statute%2f2012%2f02%2f21%2fgIQA1leZWR_story.html> Accessed 19 November 2018.
[361]Jessica Grunberg, 'The Torture Victim Protection Act: A Means to Corporate Liability for Aiding and Abetting Torture' (2012) 61 Catholic University Law Review 235.
[362]Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 USC. § 1350 (1994) (hereinafter referred to as TVPA).
[363]*Ibid.*

or killing occurred'.[364] This also 'avoids[s] exposing US courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.'[365] Furthermore, the TVPA subjects claims to a ten year statute of limitations so that the courts 'will not have to hear stale claims.'[366] In this regard, in terms of form, the TVPA and the ATCA differ greatly.[367] Although the ATCA is short and unclear in nature, the TVPA provides more guidance on human rights accountability. While the ATCA does not provide definitions for what constitutes a 'law of nations' or a 'tort committed in violation' of that law, the TVPA contains a detailed definition of extrajudicial killing and torture as discussed above. In contrast, while the TVPA has a statute of limitation, the ATCA does not contain an express exhaustion of remedies requirement or a statute of limitations provision.[368]

Unlike the ATCA legislative history, which is largely unknown,[369] the TVPA has an extensive record of codification. Specifically, 'the House and Senate Reports list three main purposes for the TVPA'.[370] Unfortunately, the House and Senate Reports do not expressly clarify the relationship between the TVPA and the ATCA. Incidentally, 'however, the legislative history provides some guidance as to the interaction between the'[371] ATCA 'and the TVPA. Thus, the fact that the TVPA was codified'[372] as a note to the ATCA implies that they are intended to interact closely. The legislative history states that the ATCA 'has other important uses and should not be replaced'.[373] Both the Senate Report and the House Report state that the ATCA 'claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350'. Accordingly, the statute should remain intact.[374]

These results provide further evidence that courts in different circuits diverge in their reading of the legislative history. Some courts have cited it in support of the suggestion that the TVPA and the ATCA provide two separate claims for torture and extrajudicial killing while other courts have interpreted it as weakening this proposition.[375] The minority view holds that claims for torture and extrajudicial killing must be brought exclusively under the TVPA. The United States Seventh Circuit Court endorsed this view in *Enahoro v Abubakar*. The Seventh Circuit held that all torture and extrajudicial killing claims should be brought under the TVPA[376] and plaintiffs must comply with all requirements of this statute. Thus, it found that the two statutes do not provide 'two bases for relief against torture and extrajudicial killing.'[377] 'In *Enahoro*, plaintiffs brought a suit against a general of the military junta in Nigeria for atrocities committed from 1993 to 1999.'[378] 'The plaintiffs only brought claims under the ATCA and did not make a simultaneous claim under the TVPA.'[379] 'The district court, following precedents from other circuits, held that the plaintiffs did not need to plead their case under the TVPA, suggesting that the two statutes offer two separate bases for remedy.'[380] Nonetheless, 'the Seventh Circuit disagreed with this proposition and overturned the decision of the district court. The US Seventh Circuit declared that unless the TVPA'[381] 'occup[ied] the field' for torture claims, it would be 'meaningless'.[382] The court further stated that '[n]o one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law.'[383] The court discussed the limitations the TVPA imposes in requiring exhausting the remedies in the jurisdiction where the conduct occurred and bringing the claim within ten years. The court also

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[364]John W Brooker, 'Ford v. Garcia: A Puzzling Fusion of the Command Responsibility Doctrine with the Torture Victim Protection Act' (2002) 28 North Carolina Journal of International Law and Commercial Regulation 701, and House Representative 2092, 102nd Congress (1991-1992).
[365]*Ibid.*
[366]TVPA § 2(c).
[367]Philip Mariani, 'Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act' (2008) 156 (5) University of Pennsylvania Law Review 1383.
[368]Eric Engle, 'The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles' (2006) 14 (1) Willamette Journal of International Law and Dispute Resolution 1.
[369]*Sosa v Alvarez-Machain*, 542 US 692, 718-19 (2004).
[370]<https://scholarship.law.berkeley.educgi/viewcontent.cgi?article=1396&context=bjil > Accessed 29 June 2019 and House of Representatives Report No. 102-367, at 4. II and Senate Report No. 102-249, at 3(1991).
[371]<https://scholarship.law.berkeley.educgi/viewcontent.cgi?article=1396&context=bjil > Accessed 29 June 2019.
[372]*Ibid.*
[373]*Ibid.*
[374]Senate Report. No. 102-249, at 5.
[375]*Enahoro v Abubakar,* 408 F.3d 877, 884 (7th Cir. 2005).
[376]*Ibid.*
[377]*Ibid.*
[378]<https://www.lexisnexis.co.uk/legal/search?query=enforcement%20mechanism%20for%20international%20law%20norms> Accessed 9 October 2017 and Philip C Aka, 'Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations under President Olusegun Obasanjo' (2003) 4 San Diego International Law Journal 209.
[379]*Ibid.*
[380]*Ibid.*
[381]<https://www.lexisnexis.co.uk/legal/search?query=enforcement%20mechanism%20for%20international%20law%20norms> Accessed 9 October 2017.
[382]*Ibid* at 884.
[383]*Ibid.*

found support for its interpretation of the relationship between the ATCA and the TVPA in the legislative history of the TVPA and in *Sosa v Alvarez-Machain*.

The US Seventh Circuit interpreted the House and Senate Reports stating that the ATCA should 'remain intact' to mean that 'the enactment of the Torture Victim Protection Act did not signal that torture and killing are the only claims which can be brought under the Alien Tort Statute'.[384] Other claims can still be brought under the ATCA. The majority also interpreted *Sosa* as confirming the preclusive effect of the TVPA.[385] The court argued that since the US Supreme Court directed courts to exercise 'great caution' and 'vigilant door keeping' in finding what claims are allowed under the ATCA, and since the court also stated that 'a clear mandate' for suits for torture and extrajudicial killing exists under the TVPA,[386] in *Sosa* the court did not approve of utilising the ATCA for torture claims.[387]

The US Seventh Circuit then remanded the case to the district court because plaintiffs had to plead under the TVPA.[388] There are two main advantages to the US Seventh Circuit interpretation of the relationship between the ATCA and the TVPA. First, this interpretation clarifies the relationship between the two statutes in a very straightforward way.[389] By submitting that the TVPA 'occup[ies] the field' of claims for torture and extrajudicial killing, it becomes clear that all restrictions contained in the TVPA, such as the exhaustion of remedies and the statute of limitations, always apply. This simplifies the position taken in other circuits, which allows for claims to be brought under both of the statutes but which reads certain conditions from the TVPA into the ATCA in an ambiguous way.[390] Second, requiring all claims for torture and extrajudicial killing to be submitted under the TVPA ensures consistent treatment of aliens and US citizens.[391] 'The TVPA applies equally to aliens and US citizens while the ATCA applies only to aliens. Non-US citizens can circumvent the requirements under the TVPA by bringing claims under the ATCA. The US Second Circuit interpretation remedies this problem.'[392] 'In the dissenting opinion, Judge Cudahy disagreed with the majority holding'[393] in *Enahoro v Abubakar*. He argued that the legislative history of the TVPA shows Congress meant to expand the TVPA's reach to US citizens and not restrict the application of the ATCA to foreign citizens, on the grounds that the ATCA applies only to aliens.[394]

Consequently, the TVPA is not 'meaningless', as the majority asserted. Besides, the plain text of the TVPA did not contain any implicit amendment to the ATCA, and since repeals by implications are disfavoured, the relationship between the TVPA and the ATCA should not be interpreted as preclusive.[395] In addressing the Seventh Circuit argument that *Sosa* supports the majority holding, Judge Cudahy noted the majority 'stands *Sosa* on its head' by using it as a support.[396] Nothing in *Sosa* suggests the preclusive effect of the TVPA. Thus, Judge Cudahy argued that the two statutes 'are meant to be complementary and mutually reinforcing.'[397] The majority of circuit courts in the US have also rejected the view followed by the Seventh Circuit in *Enahoro*. They have ruled that the TVPA and the ATCA can be used simultaneously for claims of torture and extrajudicial killing.[398] More expressly with reference to the torture claims, the Eleventh Circuit has ruled that 'a plaintiff may bring distinct claims for torture under each statute'.[399] The Eleventh Circuit supported this interpretation of the relationship between the two statutes through an analysis of the plain meaning of the statutes, canons of statutory interpretation discouraging repeals by implication, *Sosa*, and the legislative history of the TVPA.[400]

The TVPA and the ATCA could be seen to share much in common. They serve similar purposes and the TVPA was enacted as a note to the ATCA.[401] In a critical examination, it could be argued that the TVPA was

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[384]*Ibid* at 885.
[385]Michael Garvey, 'Corporate Aiding and Abetting Liability under The Alien Tort Statute: A Legislative Prerogative' (2009) 29 BC Third World Law Journal 381.
[386](n 1252) at 885.
[387]Eugene Kontorovich, 'Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute' (2004) 80 (1) Notre Dame Law Review 111.
[388]*Ibid.*
[389]Matt A Vega, 'Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery under The Alien Tort Statute' (2009) 31 Michigan Journal of International Law 385.
[390]Curtis A Bradley, *International Law in the US Legal System* (Oxford University Press USA 2015).
[391]*Ibid.*
[392]*Enahoro v Abubakar,* 408 F.3d 877, 886-88 (2005) (Cudahy, J., dissenting in part) and <https://scholarship.law.berkeley.educgi/viewcontent.cgi?article=1396&context =bjil > Accessed 29 June 2019.
[393]*Ibid.*
[394]*Ibid.*
[395]*Ibid* at 887.
[396]*Ibid* at 889.
[397]*Ibid* at 888.
[398]*Cabello v Femandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).
[399]*Aldana v Del Monte Fresh Produce*, N.A., Inc, 416 F.3d 1242, 1249-50 (11th Cir. 2005).
[400] *Ibid.* see also: *Sosa v Alvarez-Machain*, 542 US 692, 734 (2004) (citing Paquete Habana, 20 S.Ct. 290, 299 (1900).
[401]Ekaterina Apostolova, 'The Relationship between the Alien Tort Statute and the Torture Victim Protection Act' (2010) 28 Berkeley Journal of International Law 640.

intended to codify the judgment from the *Filártiga* court's interpretation of the ATCA in a clear judicial basis, which gives the foundation for a civil claim against a wrongdoer. The TVPA, unlike the ATCA, covers only torture and summary execution, but it gives aliens and the US citizens the foundation to bring a civil action against individuals that violate it.[402]

The US courts have acknowledged that a defendant need not physically commit a given violation to be held liable under ATCA or TVPA.[403] Thus, both statutes can be applied to military and civilian leaders who fail to prevent, or punish, violations by subordinates under the doctrine of superior or command responsibility.[404] The courts have also looked at both international and national military law in deciding the definition of superior responsibility, which is close to that applied in the international criminal tribunals.[405]

The Nuremberg Court also confirmed that a defendant may aid and abet human rights abuses committed by others by giving assistance or moral support.[406] This has proven to be an important notion of accountability in cases against MNC defendants that might be connected with human rights violations by local governments or paramilitaries. The definition of aiding and abetting[407] human rights abuses is drawn from international law, in particular, International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence and federal common law.[408] Likewise, the ICTY has also upheld claims that the defendant engaged in a conspiracy with others to commit actionable abuses.[409] In condoning the court's approach to ATCA and TVPA jurisdiction, the court is also confirming that the US is not obliged to entertain claims that would otherwise arise under universal civil jurisdiction or by virtue of forum of necessity laws. However, providing some 'silver lining', the court in the ATCA and TVPA cases itself appeared to address the potential ill-effects of its decision, which suggests that perhaps the United States should consider obliging courts to provide access to compensation in cases of this kind by endowing them with jurisdiction.

Overview of ATCA in Human Rights cases

The US ATCA 1789 is a classic example of a domestic law with extraterritorial jurisdiction that is capable of holding MNCs liable for human rights violations in a foreign country.[410] Examples include the executives at the banana company Chiquita Brands International Inc. who pleaded guilty in 2007 to making payments to Colombian paramilitary groups and were ordered to face US lawsuits claiming they had played a role in the torture or killing of thousands of Colombians. Relatives of the victims could pursue their claims under the TVPA, a federal judge in West Palm Beach, Florida, ruled. The families claimed Chiquita paid $1.7 million to the United Self-Defense Forces of Colombia, or AUC, to quell labour unrest and prevent leftist sympathisers from infiltrating banana-plantation unions.[411] 'Another example saw residents of the island of Bougainville in Papua New Guinea (PNG) file suit against Rio Tinto under the ATCA in the' 'US federal court in 2000. The plaintiffs alleged that: Rio Tinto was complicit in war crimes and crimes against humanity committed by the PNG army during a secessionist conflict on Bougainville; environmental impacts from Rio Tinto's Panguna mine on Bougainville harmed their health in violation of international law; and that Rio Tinto'[412] 'engaged in racial

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[402]28 USC. § 1350 (2006).

[403]Penny M Venetis, 'The Broad Jurisprudential Significance of Sosa v Alvarez-Machain: An Honest Assessment of The Role of Federal Judges and Why Customary International Law Can Be More Effective Than Constitutional Law for Redressing Serious Abuses' (2011*)* 21 Temple Political and Civil Rights Law Review 41; *Doe v Exxon Mobil Corp*., 654 F.3d 11, 39-57 (D.C. Cir. 2011); *Romero v Drummond Co*., 552 F.3d 1303, 1315 (11th Cir. 2008); *Flomo v Firestone Natural Rubber Co.,* 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Sarei v Rio Tinto*, PLC, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).

[404]Koji Kudo, *Command Responsibility, and the Defence of Superior Orders* (Diss. University of Leicester 2007).

[405]*Ford v Garcia*, 289 F.3d 1283, 1283, 1287-94 (11th Cir. 2002); *Doe* v *Liu Qi*, 349 F. Supp. 2d at 1328-34 (2004) (acknowledging that doctrine applies to military and civilian superior).

[406]Koji Kudo, *Command Responsibility and the Defence of Superior Orders* (DPhil thesis, University of Leicester 2007).

[407]George R Wright, 'Negotiating the Terms of Corporate Human Rights Liability Under Federal Law' (2016).

[408]*Khulumani v Barclay Nat. Bank Ltd* 504 F.3d 260, 270-82 ((2d Cir. 2007) (allegations that defendants aided South Africa's Apartheid-era government); *SAREI* v *Rio Tino* (9th Cir.2006) 487 F.3d at 1202-03 (9th Cir. Cal., 2007) (allegations that the defendant aided Papua New Guinea military); *Talisman Energy,* 453F. Supp. 2d at 665-68 (S.D.N.Y. 2006) (allegations that defendant aided Sudan).

[409]*Talisman Energy v Presbyterian Church of Sudan*, 453 F. Supp. 2d at 663-64 (S.D.N.Y. 2006) (citing *Hamdan v Rumsfeld*, 548 US 557, 609-10 (SC. 2006) *Cabello v Fernandez-Larios,* 402 F. 3d at 1159-60 (11th Cir. 2005).

[410]Alien Tort Claim Act 28 USC § 1350. <https://www.law.cornell.edu/uscode/pdf/uscode28/lii_usc_TI_28_PA_IV_CH_85_SE_1350.pdf> Accessed on 29 June 2015.

[411]Douglas M Branson, 'Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation' (2011) 9 Santa Clara Journal of International Law 227.

[412] <https://www.businesshumanrights.org/en/Categories/Lawlawsuits/Lawsuits regulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea/?sort_on=effective> Accessed 02 March 2016.

discrimination against its black workers at Panguna.'[413] In *Doe v Unocal*, the complaint alleged that Myanmar's military subjected villagers to forced labour, rape, torture and murder with the knowledge and support of Unocal, the US oil and gas corporation, which created liability under the ACTA; 'whether to be liable under ATCA a non-state actor must engage in state action; whether Unocal was liable for aiding and abetting the Myanmar military in subjecting villagers to forced labour, rape, murder and torture; Scope of the legal liability of transnational corporations for violations of human rights under ATCA.'[414]

Relating to those 'kidnapped or killed by terrorists in attacks against Israeli citizens overseas',[415] *Jesner v Arab Bank*, *PLC* saw the 'surviving aliens and the families of those who perished in the attacks accuse Arab Bank, PLC, a bank corporation headquartered in Jordan',[416] 'of financing and facilitating the various terrorist organisations involved in the attacks. The survivors sued Arab'[417] Bank in the New York federal court under the Alien Tort Statute (ATS), which provides for the federal district court jurisdiction over civil actions brought by aliens. 'Arab Bank moved to dismiss the ATS claims under the US Court of Appeals for the Second Circuit's decision in *Kiobel v Royal Dutch Petroleum Co.*'[418] In that case, the appellate court held that the ATS did not authorise claims against foreign corporations.[419] The ATCA permits US District Courts to hear civil proceedings of foreign citizens for damages caused by the business operations of MNCs 'in violations of the law of nations or a treaty of the [United States].'[420] Nonetheless, it is questionable whether victims of corporate human rights violations and environmental damages will be unable to bring a claim for harm under domestic law that they would otherwise be able to under the ATCA. This is because claims under the ATCA must amount to breaches of customary international law that are 'specific, universal and obligatory.'[421]

Hence, it is likely that, with respect to member states of the UN, 'courts are likely to be critical of any nation that does not recognise equivalent liability in tort for such serious conduct.'[422] Therefore, 'state courts have the option of finding that this lack of recognition constitutes a violation of their mandatory public policy rules, and accordingly substitute their laws *(lex fori*)' [423] for the *lex loci damni*. '(*Lex loci damni* refers to the law of the place where the injury occurs.) 'In other words, if an injury appears in another country, the laws of that country govern.'[424] However, this rule is only applied if the tortfeasor had foreseen that the damage would have occurred there. This is a general rule applied under conflict of laws. *Nippon Fire & Marine Ins. Co. v M.V. Tourcoing,* 167 F.3d 99 (2d Cir. N.Y. 1999)'[425] is 'manifestly incompatible with the public policy of the forum'.[426]

Similarly, it is questionable whether it is fair to criticise the application of *lex loci damni* over international law considering the US Supreme Court's enthusiastic use of the presumption against extraterritoriality

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[413]Stuart Kirsch, 'Mining and Environmental Human Rights in Papua New Guinea' (Palgrave Macmillan UK 2003) and <https://www.business-humanrights.org/en/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea/?sort_on=effective> Accessed 02 March 2016.

[414]*Doe v Unocal*, 395 F.3d 932, <https://www.business-humanrights.org/en/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea/?sort_on=effective> Accessed 02 March 2016 and <https://www.escr-net.org/caselaw/caselaw_results.htm?focus=13675,13939,13961&order=dateDESC> Accessed 18 June 2017.

[415]<https://law.utexas.edu/humanrights/projects/bibliography-on-natural-resource-governance-inequality-and-human-rights/> Accessed 17 October 2018.

[416]*Ibid.*

[417]*Ibid.*

[418]The Bernard and Audre Rapoport Center for Human Rights and Justice, 'Bibliography on Natural Resource Governance, Inequality, and Human Rights' (2017). <https://law.utexas.edu/wp-content/uploads/sites/31/2017/06/Bibliography-NRG-Inequality-and-HR-Final-170825-1.pdf.> Accessed 18 April 2021.

[419]*Jesner v Arab Bank, PLC* 584 U.S. (2018) 138 S. Ct. 1386; 200 L. Ed. 2d 612. Several alien individuals were injured.

[420]Beth Stephens et al (eds), *International Human Rights Litigation in US Courts* (2nd ed., Martinus Nijhoff 2008).

[421]*Sosa*, 542 US at 734-38. <https://www.escr-net.org/caselaw/2009/john-doe-i-et-al-v-unocal-corp-et-al-395-f3d-932-9-cir-2002 > Accessed 29 June 2016.

[422]Simon Baughen, 'Holding Corporations to Account: Crafting ATS Suits in the UK' (2013) 2 British Journal of American Legal Studies 533 and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. <Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[423]Albert A Ehrenzweig, 'The Lex Fori - Basic Rule in the Conflict of Laws' (1960) 58 (5) Michigan Law Review 637 and also see, Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland. ac.nz)> Accessed 13 May 2019.

[424]<https://definitions.uslegal.com/l/lex-loci-damni/ >accessed 20 June 2018.

[425]<https://definitions.uslegal.com/l/lex-loci-damni/> Accessed 8 April 2020.

[426]Ted M. De Boer, 'Party Autonomy and Its Limitations in The Rome II Regulation' (2007) 9 Yearbook of Private International Law 19, and *Nippon Fire & Marine Ins. Co. v M.V. Tourcoing*, 167 F.3d 99 (2d Cir. N.Y. 1999).

in *Kiobel*.[427] Since the US Supreme Court has acknowledged that the presumption against extraterritoriality applies to substantive statutes, it follows that the ATCA is recognised as the US substantive law when it applies international law.[428]

Perhaps if the '*lex loci damni* applied instead, the US federal courts would be less concerned about imposing US law on other states. Courts, therefore, could not apply the presumption against extraterritoriality to the ATCA. According to the international legal scholar Dodge, choosing international law over *lex loci damni* as the substantive law under the ATCA provides'[429] the 'doctrinal hook'[430] for the US Supreme Court to enforce the presumption against extraterritoriality.[431] However, the presumption against extraterritoriality may not be very encouraging, as the disadvantage of *lex loci damni* is that domestic law, while applicable under the ATCA, may not be under international law. A 'claimant may be disadvantaged if they cannot frame a tortious claim under *lex loci damni* because domestic law does not recognise the relevant tort.'[432]

By contrast, there are a number of disadvantages that claimants in European member states and other states 'face compared to claims in the United States.'[433] 'First, for injuries occurring after January 2009, damages are assessed in accordance with the law of the state where damage arose.'[434] 'One can, therefore, envisage a situation where the damage occurred in a developing state that rewards modest compensation, without the possibility of suing for punitive damages, such that it becomes uneconomical to sue before a foreign European forum.'[435] For 'some African nations, restorative redress, such as apologies,'[436] are valued more than monetary damages.[437]

Secondly, some member states in the European Union have introduced additional funding hurdles for plaintiffs by limiting the amount of legal aid they can claim.[438] However, the United States, in comparison, adopts a 'user pays' system such that it encourages victims of human rights violations to bring their case to court. Indeed, the financial advantages offered by the American legal system have been cited as a major reason why plaintiffs choose the United States as a forum.[439] On the other hand, litigation under the ATCA in the United States is likely to be higher than in the European Union because of the delays and inefficiencies in its legal system.[440] The additional uncertainties raised by the US Supreme Court Judgement in *Kiobel* will only add to the delays and expenses as lower courts struggle to apply the Supreme Court's cryptic decision.[441] Furthermore, ATCA lawsuits are a 'high risk-high return' investment based on the minuscule proportion of successful cases.[442]

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[427] *Kiobel v Royal Dutch Petroleum* Co., 569 U.S. *108 (2013).*

[428] Odette Murray, David Kinley, and Chip Pitts, 'Exaggerated Rumours of The Death of an Alien Tort: Corporations, Human Rights and The Peculiar Case of Kiobel' (2011).

[429] <https://definitions.uslegal.com/l/lex-loci-damni/> Accessed 13 April 2016.

[430] Tara M Stuckey, 'Jurisdictional Hooks in The Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce' (2006) 81 Notre Dame Law Review 2101.

[431] William S Dodge, *Alien Tort Litigation: The Road Not Taken* (2014).

[432] Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019 and Jonathan Fitchen, 'Choice of Law in International Claims Based on Restrictions of Competition: Article 6 (3) of the Rome II Regulation' (2009) 5(2) Journal of Private International Law 337.

[433] Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019 and Simon Baughen, 'Holding Corporations to Account: Crafting ATS Suits in the UK' (2013) 2 British Journal of American Legal Studies 533.

[434] Rome II Regulation, art 32 and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[435] *Ibid.*

[436] *Ibid.*

[437] Patrick J. Borchers, 'Conflict-of-Laws Considerations in State Court Human Rights Actions' (2013) 3 U.C. Irvine Law Review 45.

[438] Michael D. Goldhaber*,* 'Corporate Human Rights Litigation in Non-US Courts: A Comparative Score Card' (2013) 3 U.C. Irvine Law Review 127.

[439] David P Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013 107 (3) American Journal of International Law 601, 621.

[440] Samuel R Gross, 'The American Advantage: The Value of Inefficient Litigation' (1987) 85 Michigan Law Review 734.

[441] David P Stewart and Ingrid Wuerth, 'Kiobel v Royal Dutch Petroleum Co.: The Supreme Court and The Alien Tort Statute*'* (2013) 107 (3) American Journal of International Law 60.

[442] Michael D Goldhaber (n 1328).

Moreover, there may be less favourable disclosure requirements in accordance with the Member State forum's law as opposed to the United States. This is noted in *Akpan*, *Milieudefensie*,[443] a case where Nigerian farmers and Friends of the Earth filed suits against Royal Dutch Shell (Shell) and its Nigerian subsidiaries in a 'Dutch court seeking compensation for damage claimed to have been caused by leaking oil pipelines and an oil well in Nigeria. Initially, the Dutch Civil Procedural Code's restrictive discovery rules meant that it could not access vital documents held by Shell.'[444] 'In *Akpan, 'Milieudefensie* it was alleged that disclosure of those documents would prove Shell's liability; hence disclosure requirements may play a significant role in the outcome of a case.'[445] Overturning a lower court decision, the Court of Appeal of the Hague ruled that Dutch courts have jurisdiction to consider the claims. It also directed Shell to provide the plaintiffs with access to documents pertaining to the oil spills.

Lastly, if a claim is regarding a truly foreign-cubed state of affairs, the Brussels and Rome Regulations – The Rome I Regulation can be distinguished from the Brussels Regime which determines which court can hear a given dispute, as opposed to which law it should apply. The regulation applies to all EU member states except Denmark, which has an opt-out from implementing regulations under the area of freedom, security and justice. The Danish government planned to join the regulation if a referendum on 3 December 2015 approved converting its opt-out into an opt-in, but the proposal was rejected – like the ATCA, are of no benefit. Nevertheless, claims can still be pursued under the Member State's national private international law rules. This is not a completely limiting disadvantage because of the willingness of Member State[446] courts to secure claimants' access to justice, as evidenced by *Lubbe*[447] and *Akpan*.[448]

In spite of the advantages offered by European civil and corporate human rights abuses jurisprudence, only a handful of claimants have pursued the ATCA compared to lawsuits in European courts.[449] A possible explanation for this might be that the cultural dichotomy between Europe and the US is different. In the US, it is commonplace that harm done to a person is redressed 'privately through tort.'[450] Consequently, the 'US legal system recognises punitive damages and generally rewards higher overall compensation compared to other developed countries.'[451]

Contrarily, the prevailing belief in European cultures is that the State should be accountable for prosecuting wrongdoers through the criminal justice system, as opposed to private individuals through the civil system.[452] Even though tortious lawsuits have the ability to change social and legal practices in the US, historically they may have had little effect in European countries. Therefore, tort has not been acknowledged as the most effective way to remedy wrongs in European society.[453] With the increase in the number of MNCs since the advent of globalisation, however, this research argues that there is no reason victims should not utilise European civil and commercial litigation to secure effective redress.

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[443]A.*F. Akpan v Royal Dutch Shell, plc,* Court of Appeal of The Hague (18 December 2015).

[444]Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019 and Arthur S Hartkamp, 'Judicial Discretion under The New Civil Code of The Netherlands' (1992) 40 (5) American Journal of Comparative Law 554. See also: Dutch Civil Procedural Code's, Book 1 Litigation before the District Courts, the Courts of Appeal and the Supreme Court. Title 1 General provisions. Section 1 Jurisdiction of Dutch courts.

[445] Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[446]Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001].

[447]*Lubbe v Cape Plc* [2000] UKHL 41.

[448]A.*F. Akpan v Royal Dutch Shell, plc,* Court of Appeal of The Hague (18 December 2015).

[449]Michael D Goldhaber (n 1294). See also Liesbeth Enneking, 'The Future of Foreign Direct Liability: Exploring the International Relevance of The Dutch Shell Nigeria Case' (2014) 10 Utrecht Law Review 44.

[450]Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[451]Vivian Grosswald Curran, 'Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.' (2013) 28 (1) Maryland Journal of International Law 76 and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[452]*Ibid.*

[453]Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45(1) International & Comparative Law Quarterly 52.

Accordingly, the traditional differences between a civil lawsuit brought in the US compared to one brought in European legal systems are merely interesting reflections and should have little bearing on a claimant's choice of forum. Overall, the biggest problem facing activists of human rights claims against MNCs is uncertainty. The ATCA provides a possible avenue for bringing international human rights claims before the US Federal Courts. Nonetheless, the ATCA was enacted in 1789, a time very different from today, which means it requires innovation. Rather than expanding the decision on its applicability, the US Supreme Court has progressively restricted its scope. This has resulted in a frustrating journey for ATCA claimants who face numerous setbacks at the jurisdiction stage of the lawsuit. However, the US judicial system might have favourable legal fee rules and the ability to recover enormous damages, but examination should first and foremost be directed towards the plaintiff's ability to effectively pursue a claim for remedy.

Also, following *Filártiga*,[454] the ATCA's usefulness as a vehicle for securing human rights may have been 'somewhat inflated'.[455] A point of caution is due here, as only a small number of plaintiffs clear the jurisdictional hurdles. Even then, corporate defendants frequently encourage settlements (even though there exists uncertainty regarding corporate liability under the ATCA).[456] In regards to reparations, plaintiffs and their legal counsel should pursue a substitute avenue, such as tort lawsuit in another international court or the European Union Courts. This is because the U.S. judicial system is complex, especially regarding the division between federal and state courts. It is respectfully contested that there are no advantages to suing before U.S. federal courts over EU Member State courts or any other international forum. Furthermore, and significantly, other international fora and the Member State Courts can offer some extra certainty if the ATCA is not innovated to meet the current dynamics of international law.

Racketeer Influenced and Corrupt Organisations Act (RICO) and TVPA

In 1970, the U.S. passed the Racketeer Influenced and Corrupt Organisations Act (RICO), a federal law designed to combat organised crime in the US.[457] The Act permits prosecution and civil penalties for racketeering activity performed as part of an ongoing criminal enterprise.[458] Such action may include illegal gambling, bribery, kidnapping, murder, money laundering, counterfeiting, embezzlement, drug trafficking, slavery, and a host of other illegal business practices.[459] Thus, US federal laws allow proceedings in US courts for violations of human rights in a foreign country, such as the Racketeer Influenced and Corrupt Organizations Act (RICO)[460] and the TVPA,[461] which offer some extraterritorial capability in regard to human rights violations, but only indirectly with regard to RICO.[462]

Consequently, the RICO Act provides both criminal and civil penalties for victims of human rights abuses.[463] Claims can potentially be brought by prosecutors on behalf of the government, or by private individuals.[464] Nonetheless, to succeed in RICO criminal prosecutions, the jury must be convinced of the defendant's guilt 'beyond a reasonable doubt'. This is the highest burden of proof that exists in the US legal standard.[465] Violations are punishable by up to 20 years in prison.[466] The sentence can be increased to life in prison if authorised by the underlying legislation or statute. Similarly, other offenders may also face a fine of either $250,000 or double the amount of the proceeds earned from the activity.[467]

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[454]Farooq Hassan, 'A Conflict of Philosophies: the Filartiga Jurisprudence' (1983) 32 (1) International & Comparative Law Quarterly 250.
[455]Nicola Jägers, Katinka Jesse, and Jonathan Verschuuren, 'The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell' (2014) 1 American Journal of International Law 36.
[456]Michael D Goldhaber (n 1328).
[457]Peter D Schellie, 'Racketeer Influenced and Corrupt Organizations Act (RICO)' (1986) Business Lawyer 1023.
[458]Robert G Blakey, and Brian Gettings, 'Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies' (1980) 53 Temple Law Review 1009.
[459]Jeff Atkinson, 'Racketeer Influenced and Corrupt Organizations, 18 U.S.C. 1961-68: Broadest of The Federal Criminal Statutes' (1978) Journal of Criminal Law and Criminology 1.
[460]Racketeer Influenced and Corrupt Organizations Act, Title IX of Organised Crime Control Act (1970) PubLNo 91-452, 84 Stat. 922.
[461]Torture Victim Protection Act of 1991 Pub LNo 102-256, 106 Stat. 73 (1992) (codified at 28 USC. § 1350 (1994).
[462]Katie W Wood, 'Racketeer Influenced and Corrupt Organizations Act-Private Cause of Action-No Injury Required beyond Those Caused by Predicate Offenses for Section 1964 (c) Claim' (1985) 55 Mississippi Law Journal 167.
[463]Lan Cao, 'Illegal Traffic in Women: A Civil RICO Proposal' (1987) 96 Yale Law Journal 1297.
[464]Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 2016).
[465]Gerard E Lynch, 'RICO: The Crime of Being a Criminal, Parts I & II' (1987) 87(4) Columbia Law Review 661 and Susan W Brenner, 'RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law' (1993) 2 (2) William & Mary Bill of Rights Law School Journals 239.
[466]Craig M Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 Iowa Law Review 837.
[467]Paul H Rubin and Robert Zwirb, 'The Economics of Civil RICO' (1986) 20 UC Davis Law Review 883.

'In general, liability for a RICO violation requires that a person be involved in an enterprise that operates through a pattern of racketeering activity.'[468] This raises a couple of questions that will prove important to anyone defending or pursuing a RICO case. The first is what qualifies as an 'enterprise'? Could the element requiring an enterprise be corporations, partnerships, and other businesses? Or can corporations, partnerships, and other businesses qualify as enterprises? What about informal organisations, like street gangs and rebels? The Supreme Court considered the issue of enterprises, and stated that an enterprise can be any group with members who are associated in a relationship in order to achieve a common purpose, provided the relationship lasts long enough to allow them to pursue that purpose. In this view, the meaning of enterprises in RICO law indicates that groups are known as 'association-in-fact' enterprises.[469]

Second, what constitutes 'a 'pattern' of racketeering activity? The RICO Act itself defines the term 'pattern' as 'two or more acts of'[470] 'racketeering activity within a 10-year period.'[471] 'The Supreme Court has considered this issue as well. According to the Court, to qualify as a pattern, criminal activities must be 'related and continuous.'[472] RICO law crimes have comparable features, with many including the same perpetrators, victims, and methods of commission. Therefore, continuity will be established if the crimes occurred over a substantial period of time. Some courts have interpreted this to mean at least one year.[473] This lack of consistency and contradiction questions the effectiveness of the RICO in combating human rights abuses, which does not even mention the high standards of proof required by the prosecution to establish liability.

Additionally, the US Supreme Court holds that private civil RICO suits must allege a 'domestic injury'.[474] In *Morrison v National Australia Bank Ltd*,[475] the US court sought to limit the circumstances in which US law can be invoked to render foreign conduct actionable in the United States.[476] The US Supreme Court found that federal statutes do not apply in *Morrison*, beginning with the premise that federal statutes do not apply extraterritorially unless Congress has provided a clear indication of overcoming that presumption.

The Court applied that principle both to the provisions of the statute that define prohibited conduct and to the provisions that authorise a private cause of action.[477] The Court in its decision, through a majority of four Justices, decided that the RICO's 'civil remedy[478] is not consistent with §1962's substantive provisions', and therefore requires separate consideration.[479] The Court noted that 'a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.'[480] Several lines of evidence also suggest that the Supreme Court perceived that permitting private claimants to bring claims for foreign injuries under civil RICO, including high damages, presents a 'danger of international friction'.[481] For these explanations, the US Supreme Court scrutinised §1964(c) and decided that it did not overcome the presumption against the extraterritorial application of US law. Considering this evidence, it seems that to sustain future civil RICO claims, claimants must have to assert and prove a domestic injury first before a claim under the Act can be established.

The Supreme Court's ruling may have numerous consequences for corporations that conduct their business operations outside the United States. However, it fails to address a number of essential questions; the first notable characteristic of the Court's verdict is its methodical framework.[482] Instead of examining the

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[468]RICO Law Racketeer Influenced and Corrupt Organizations Act.
<https://www.hg.org/rico-law.html> Accessed 22 December 2017.
Gregory T Magarity, 'RICO Investigations: A Case Study' (1979) 17 American Criminal Law Review 367.
[469]David B Smith and Terrance G Reed, *Civil RICO* (LexisNexis 1987).
[470]< https://www.hg.org/rico-law.html> Accessed 09 March 2017.
[471]Dorean Marguerite Koenig, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 44 Wayne Law Review 1351.
[472]<https://www.hg.org/rico-law.html> Accessed 09 March 2017 and Barbara Black, 'Racketeer Influenced and Corrupt Organizations (RICO)-Securities and Commercial Fraud as Racketeering Crime after Sedima: What Is a Pattern of Racketeering Activity?' (1985) 6 Pace Law Review 365.
[473]James L. Pray, 'Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations' (1982) 8 Journal of Corporation Law 411.
[474]*RJR Nabisco Inc. v European Community*, 136 S. Ct. 2090 (2016).
[475]*Morrison v National Australia Bank Ltd*, 561 US 247 (2010).
[476]*Ibid.* William S Dodge, 'Presumptions Against Extraterritoriality in State Law' (2019) 53 UC Davis Law Review1389.
[477]Daniel R Peacock, 'RICO's Extraterritorial Application: From Morrison to RJR, Nabisco, Inc' (2017) 65 Drake Law Review 555.
[478]18 USC. §1964(c).
[479]*Morrison v National Australia Bank Ltd* (n 1358).
[480]*Ibid.*
[481]*Ibid.*
[482]Genevieve Beyea, 'Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws' (2011) 72 Ohio State Law Journal 537 and *Morrison v National Australia Bank Ltd.*, US, No. 08-1191 (decided June 24, 2010).

extraterritorial applicability of RICO in its entirety, or based solely on the 'substantive' terms of the statute that prohibit specified unlawful conduct, the Supreme Court distinctly measured the scope of each statutory provision.[483] In examining each important section or subsection, the Supreme Court applied a two-step analysis outlined in *Morrison*.[484] First, the court determined whether Congress clearly provided for the statute's extraterritorial application. Second, the court did not assess whether a case was founded on a domestic application of the law.[485] The important themes that emerge from the studies, discussed so far, is that the method used by the US Supreme Court may generate supplementary prospects for perpetrators of human rights abuses to challenge the geographic reach of US statutes, especially in a civil lawsuit. An implication of this might be that such efforts will focus on whether a law prohibits foreign violations. They will also focus on other relevant components of any complex statutory scheme, which may include terms authorising causes of action, other enforcement mechanisms or remedies.

Likewise, the *RJR Nabisco* decision supports two related strategies for corporations looking for a way to resist RICO liability.[486] Undeniably, the Court's ruling is consistent with the position that the Justice Department advanced in its amicus brief.[487] It is likely that prosecutors will be considerably restricted, as compared to private claimants, in their use of RICO to target conduct occurring outside the United States, particularly in cases where much emphasis was placed on business undertakings of legitimate business operations.[488]

Moreover, given the extent to which criminal RICO cases are founded on established wrongdoings happening outside US borders, the courts will have to conclude whether the statutes barring such conduct apply extraterritorially, just as in the civil context.[489] Conceivably, even more prominently, courts will have to continue considering whether the offences alleged in civil or criminal cases call for the extraterritorial application of a specific statute, or whether claimants and prosecutors have to assume that the offences produce sufficient domestic injuries. Lawsuits surrounding these subjects will consequently continue and will not subside until the courts or Congress provide greater clarity on RICO.

RICO law closes any perceived loopholes that exempt individuals or organisations from prosecution who ordered or assisted others in a crime, but did not necessarily commit the crime outright. RICO also provides the US attorney prosecuting power to seek a pre-trial preventive order to temporarily seize a defendant's assets and other forfeitable property. The attorney may require the defendant to put up a performance bond, which ensures that there is something for the law enforcers to seize in case of a guilty verdict.[490] These procedures and sanctions satisfied the elements of an effective remedy.

However, the US judicial system remains unwilling to allow civil RICO claims. This is because of the fear that there would be deluge of plaintiffs bringing civil claims under RICO, where normal class civil actions would suffice.[491] Nonetheless, this research observes that even though RICO has achieved some crucial accountability for Racketeer Influenced and Corrupt Organisations Act offences,[492] it is restricted and cannot be the appropriate mechanism for corporate human violations and environmental damages.[493]

Other States with Extraterritorial Application and ATCA

A key strength of ATCA's accountability mechanism for corporate human rights violations and environmental damages is found in the enactment of implementing law dealing directly with corporate activities

[483] *Ibid.*
[484] *Morrison v National Australia Bank Ltd* (n 1358).
[485] Katherine J Florey, 'State Law, US Power, Foreign Disputes: Understanding the Extraterritorial Effect of State Law in the Wake of Morrison v National Australia Bank' (2012).
[486] Franklin A Gevurtz, 'Building a Wall against Private Actions for Overseas Injuries: The Impact of RJR Nabisco v. European Community' (2017) 23 U.C. Davis Journal of International Law & Policy 1, *Morrison v National Australia Bank Ltd.,* 561 U. S. 247, 255 and *Morrison* and *Kiobel v Royal Dutch Petroleum Co.*, 569 U. S.
[487] *Ibid.*
[488] Richard G Strafer, Ronald R Massumi and Holly R Skolnick, 'Civil RICO in The Public Interest: Everybody's Darling' (1982) 19 American Criminal Law Review 655.
[489] Jed S. Rakoff and Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* (Law Journal Press 2017).
[490] Richard D Hartley, *Corporate Crime: A Reference Handbook* (ABC-CLIO 2008).
[491] U.S. Department of Justice. (2009). Criminal RICO: 18 USC. 1961-1968: *A Manual for Federal Prosecutors. Washington, D.C.: US Dept. of Justice, Criminal Division, Organized Crime and Racketeering Section*, 2 (23) 12.
[492] Arthur F Mathews, *Civil RICO Litigation* (Law & Business/Harcourt Brace Jovanovich 1985); Lee Coppola and Nicholas DeMarco, 'Civil RICO: How Ambiguity Allowed the Racketeer Influenced and Corrupt Organizations Act to Expand Beyond Its Intended Purpose' (2012) 38 New England Journal on Criminal and Civil Confinement 241.
[493] Michael N Glanz, *RICO and Securities Fraud:* 'A Workable Limitation' (1983) 83 Columbia Law Review 1513 (1983).

in a foreign country. This is also enshrined in Australia's common law[494] and in UK law.[495] However, none of these laws have yet to make it into the statute books; the reason why is still unclear. It could be said that the refusal of developed countries to allow their national courts to become a platform for bringing litigation proceedings against corporations poses a significant obstacle to the application of the ATCA. This is because the US courts run the risk of being seen as an international forum for corporate liability,[496] thus overloading US courts and putting US corporations at a disadvantage.[497] These findings suggest that, in general, the international legal system may require a new international legal forum besides the ATCA and the US legal forum to hold corporations accountable for human rights abuses and environmental damages.[498]

Belgium distinguished between universal jurisdiction,[499] which is exercised by a State in the interests of the international community, and other types of extraterritorial jurisdiction, such as those deriving from the principle of protection or from the nationality of the perpetrator or of the victim.[500] Belgium also considered that there are customary obligations which require States to incorporate rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the international community as a whole,[501] such as grave crimes under international humanitarian law.[502]

Finally, in Belgian opinion, customary law enables States which are not parties to the 1984 Convention Against Torture to prosecute persons suspected of torture who are present in their territory, in view of the nature of the prohibition against torture as a peremptory norm of international law.[503] Similarly, customary law authorises States to exercise universal jurisdiction against persons suspected of acts of piracy, slavery, or trafficking of persons.[504] Thus, the argument that territorial connections also define the scope of extraterritorial jurisdiction is most obvious with respect to the Belgian court's 'effective control' cases, which turn on the premise that jurisdiction flows from the state's functional control over territory outside its borders.[505]

Belgium is one of the creators of universal jurisdiction with respect to grave crimes under international humanitarian law.[506] However, the application of this very far-reaching law gave rise to a number of problems in practice, including that it interferes with foreign politics[507] and that it trumps the sovereign rights of a state.[508] Additionally, it has been observed that courts in Belgium have the capability to hear cases of human rights violations by or against any person, anywhere in the world.[509] Nevertheless, the Belgian legislature repealed

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[494]Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) Australian Journal of Human Rights 2, Sarah Pritchard, 'The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice' (1995) 2(1) Australian Journal of Human Rights 3, *Workplace Relations Act 1996* (Cth) (WRA), the *Race Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth) (SDA), (Cth) (Affirmative Action Act) and the *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOC Act) (Norris 2000: 132) and Sarala Fitzgerald, 'Corporate Accountability For Human Rights Violations in Australian Domestic Law' (2005) 11 (1) Australian Journal of Human Rights 2.

[495]Geoffrey Tweedale and Laurie Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004' (2007) 8 (2) Enterprise & Society 268, 296, *Lubbe v Cape Plc* [2000] UKHL 41 and *Guerrero v Monterrico Metals plc* [2009] EWHC 2475 (QB).

[496]Caroline Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law' (2016) 49 George Washington International Law Review, 351; Elizabeth T. Lear, 'National Interests, Foreign Injuries, and Federal Forum Non Conveniens' (2007) 41 UC Davis School Law Review 559.

[497]Elliot J. Schrage, 'Judging Corporate Accountability in The Global Economy', (2003) 42 Columbia Journal of Transnational Law 153.

[498]Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction; International Law Forum Du Droit International* (Vol. 7. No. 4. Brill Academic Publishers 2005).

[499]Kenneth C. Randall, 'Universal Jurisdiction under International Law' (1987) 66 Texas Law Review 78.

[500]Mark Summers, 'The International Court of Justice's Decision in Congo v Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals' (2003).

[501]Luc Reydams, 'Criminal Jurisdiction Universal Jurisdiction Crimes Against Humanity Immunity of Former Head of State Incorporation of Customary Law into Municipal Criminal Law Prescription (statutes of limitation)' (1999) 793(3) American Journal of International Law.

[502]Claus Kress, 'Universal Jurisdiction over International Crimes and The Institut de Droit International' (2006) 4(3) Journal of International Criminal Justice 561.

[503]Christine M. Chinkin, 'In Re Pinochet. United Kingdom House of Lords. Regina v. Bow Street Stipendiary Magistrate Ex Parte Pinochet Ugarte' (1999) American Journal of International Law 703.

[504]Stephen Macedo, ed. *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2006).

[505]Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under The European Convention' (2009) 20(4) European Journal of International Law 1223.

[506]Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?' (2003) 25 Cardozo Law Review 247. Also see:
<https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf> Accessed 05 April 2016.

[507]*F. Hoffman-La Roche Ltd. v Empagran S.A.*, 542 US 155, 164 (2004).

[508]Zachary D Clopton, 'Replacing the Presumption against Extraterritoriality' (2013) 1 Boston University Law Review 94.

[509]*Total lawsuit in Belgium.* In April 2002, four Myanmar refugees filed a lawsuit against TotalFinaElf (now Total).

provisions for extraterritorial corporate liability in 2003.[510] Earlier in 2003, Belgium offered jurisdiction over all humanitarian claims regardless of the crime's connection to the country, the nationality of the plaintiffs or defendants, or the absence of defendants from the proceedings.[511] However, this concept has come under constant attack about its scope and application. This has forced the Belgian court to accept a review of a case against *Total Fina Elf* that was based on the same facts underlying a claim brought in the French court.[512]

Similarly, following the outcomes 'of other controversial claims against high-ranking foreign officials,'[513] 'the US threatened to move the NATO headquarters out of Brussels unless Belgium revoked the rules.'[514] Without 'the extraterritorial jurisdiction that they had offered, the Belgian court could no longer adjudicate the case against *Total*.'[515] Similarly, it would not be able to pursue allegations brought by Burmese citizens against a French company for human rights violations in Burma.[516]

Also, when Spanish courts presented a forum for extraterritorial claims, the Spanish Parliament acted to restrict the jurisdiction over human rights cases in 2009.[517] Under the former provisions in Spain, which had been in force since 1985, allegations of the most serious crimes in violation of international law triggered jurisdiction, no matter where the actions had taken place.[518] Controversial cases against individuals followed, including against Augusto Pinochet, raising diplomatic concerns.[519] The new rules now require claims to allege either Spanish victims or perpetrators that are present in Spain before jurisdiction can arise.[520] The legal theoretical implications of these findings are unclear. However, what is clear is that the ATCA and the application of extraterritorial jurisdiction at present suffer from political interference and the unwillingness of states to prosecute.

Following this examination, the ATCA offers an anachronistic jurisdiction for human rights violations by MNCs because it has allowed cases such as *Turedi v The Coca-Cola Co.*,[521] *Roe v Bridgestone Corp.,*[522] *Abdullahi v Pfizer Inc.*,[523] *Sarei v Rio Tinto PLC*,[524] and *re South African Apartheid Litigation*.[525] However, the increasing caseload of the ATCA demonstrates that it is likely the US court will limit the application of the law to corporate human rights violations in the future.[526] It can also be noted that its jurisprudence is fragmented, lacks consistency, and is too ambiguous.[527] Nonetheless, no case has been decided on its merit and the US Supreme Court has not determined the scope of the ATCA and its practical content. The reason for this is yet to become clear and has created uncertainty around the ATCA application.

Previous studies of business and human rights accountability and remedy have also paid particular attention to the US ATCA,[528] which enables foreign nationals to bring claims in US Federal Courts for violations

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[510]Steven R Ratner, 'Belgium's War Crimes Statute: A Post-mortem' (2003) 97(4) American Journal of International Law 888.
[511]Roemer Lemaitre, 'Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities' (2000) 37 (2) Jura Falconis 255.
[512]Jodie A. Kirshner, 'Why is The US Abdicating the Policing of Multinational Corporations to Europe? Extraterritorialism, Sovereignty, and The Alien Tort Statute' (2011).
[513]<https://www.lexisnexis.co.uk/legal/search?query=enforcement%20mechanism%20for%20international%20law%20norms> Accessed 9 October 2017 and
Marlise Simons, 'Sharon Faces Belgian Trial after Term Ends' (2003) The New York Times and 'New War Crimes Suits Filed Against Bush, Blair in Belgium' *Deutsche Presse Agentur* 20 June 2003,
<http://archives.dailytimes.com.pk/national/20-Jun-2003/war-crimes-suits-filed-in-belgiumagainst-bush-blair> Accessed 8 August 2017.
[514]Lorna McGregor, 'The Need to Resolve The Paradoxes of The Civil Dimension of Universal Jurisdiction' (2005) 99 American Society Of International Law Reviews 125.
[515]Antonio Cassese, 'The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case' (2003) 1 Journal of International Criminal Justice 437.
[516]*Universal Jurisdiction in Europe, The State of The Art*, Human Rights Watch 37, 38. <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf> Accessed 9 June 2006.
[517]Organic Law (L.O.P.J. 1985, art. 23.4), Ignacio de la Rasilla Del Moral, 'The Swan Song of Universal Jurisdiction in Spain' (2009) 9 (5) International Criminal Law Review 777.
[518]Joaquin Gonzalez Ibanez, 'Legal Pedagogy, The Rule of Law, and Human Rights: The Professor, The Magistrate's Robe, and Miguel de Unamuno' (2012) 7 (4) Interdisciplinary Journal of Human Rights Law 147.
[519]Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 New England Law Review 311.
[520]Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and The Transitional Prosecution of International Crimes' (2011) 105 (1) American Journal of International Law 1.
[521]*Turedi v The Coca-Cola Co*., 2009 US App. Lexis 14794 (2d Cir. July 7, 2009).
[522]*Roe v Bridgestone Corp*., 257 F.R.D. 159, 172-73 (S.D. Ind. 2009).
[523]*Abdullahi v Pfizer Inc.,* 562 F.3d 163, 187 (2d Cir. 2009).
[524]*Sarei v Rio Tinto* PLC, 2009 WL 2762635 (C.D. Calif. July 31, 2009).
[525]*South African Apartheid Litigation,* 617 F. Supp. 2d 228, 296 (S.D.N.Y. 2009).
[526]David P Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) 107(3) American Journal of International Law 601-621.
[527]Robert J. Delahunty and John Yoo, 'Against Foreign Law' (2005) 29 Harvard Journal of Law & Public Policy 291.
[528]Alien Tort Statute, 28 USC. § 1350.

of customary international law or treaties to which the US is a party.[529] Following the ATCA, recent developments in European Union[530] human rights cases make such expositions unsatisfactory because it seems the US Supreme Court has ended most transnational claims under the ATCA, as seen in *Kioble v Royal Dutch Petroleum Co*.[531] The Supreme Court's application of the 'presumption against extraterritoriality' in the *Kiobel* case[532] will have a direct and immediate effect on future ATCA claims pending in the US courts, specifically in cases involving corporations accused of complicity in international human rights violations overseas. The Supreme Court issued a summary order in another large ATCA case, *Rio Tinto PLC v Sarei*, No. 11-649,[533] a claim for alleged corporate responsibility for human rights abuses in Bouganville, Papua New Guinea. The US Court of Appeals for the Ninth Circuit held in 2011 that these violations are claims under the ATCA. In 2013, the Supreme Court granted Rio Tinto's *certiorari* petition and vacated the Ninth Circuit's 2011 decision, remanding the case to the Ninth Circuit 'for further consideration in light of *Kiobel*.'[534]

The most interesting thing about the *Kiobel* case[535] is that the US Supreme Court did not address other questions affecting corporations' conduct in international law. For instance, the US Second Circuit clearly acknowledged in *Kiobel* that international treaties may impose liability on corporations in certain subject matters, such as the prevention of bribery or organised crime. However, the Supreme Court's opinion did not address these specific policy areas. In *Kiobel*, the court was not asked to examine the potential international lawsuits that might be made in US courts in cases of expropriation by foreign governments.[536] Also, the court decision is likely not to deter current initiatives by international bodies and NGOs aimed at modifying corporate conduct in countries with substantial human rights records.

This may partly be the reason why the literature continues to address the concept of corporate accountability and the impact of the ATCA on MNCs.[537] Consequently, this is the beginning of a new accountability concept, rather than the end. In summary, the ATCA remains relevant to the understanding of the modern relationship between corporate and international law. It also explains the relationship between home and host states holding corporations accountable for human rights abuses. Even though it could be argued that the ATCA is outdated because it is an old legal doctrine, these two dimensions set a legal platform for holding corporations accountable for violations of international law.

However, the ATCA's aim to hold corporations accountable for human rights abuses abroad does suffer from a number of technical and practical limitations. Primarily, the act was enacted 200 years ago, and as such, was never designed to hold corporations accountable for human rights abuses.[538] Likewise, it is common that national courts, such those as in the UK[539] and in the Netherlands,[540] have extraterritorial application. Although it is less substantial for the operation of the ATCA, the cost is also a limiting factor.[541] The third restriction on the ATCA is that courts adopt a narrow interpretation of human rights violations that fall within their jurisdiction. For

[529]Sarah H. Cleveland, 'Alien Tort Statute, Civil Society, and Corporate Responsibility' (2004) 56 Rutgers Law Review 971.

[530]Markus Mayr, 'Extraterritorial Application of The European Convention on Human Rights and The Access to The Court for Victims of Human Rights Violations of ESDP Missions' (2010) BSIS Journal of International Studies 7 and Fiona Robertson, 'Access to Justice for Victims of Human Rights Abuse By Multinational Corporations: Does European Civil and Commercial litigation Provide and Answer? (2015) 9 (1) New Zealand Journal of Research on Europe. < Microsoft Word - ONLINE Access to justice for victims of human rights abuse by multinational corporations_FINAL (auckland.ac.nz)> Accessed 13 May 2019.

[531]*Kioble v Royal Dutch Petroleum Co*., 133 S.Ct. 1659 (2013).

[532]*Kiobel v Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-67 (S.D.N.Y. 2006), *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2011), *Kiobel v Royal Dutch Petroleum Co.* No. 10–1491 (Breyer J., concurring), slip op. at 7-8 (US Apr. 17, 2013) (quoting *Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) and citing Pierre Leval, 'The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court' (2013) 92 *Foreign Affairs*.

[533]*Sarei v Rio Tinto, PLC*, 671 F.3d 736 (2011).

[534]The Supreme Court granted certiorari in *Daimler Chrysler AG v Bauman, et al*. (docket 11-965).

[535]*Kiobel Case* (n 1151).

[536]See 28 USC. § 1605(a) (3). Also see, e.g., *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 663 (W.D. Mich. 1985). <https://www.jdsupra.com/legalnews/us-supreme-court-greatly-restricts-scop-34703/> Accessed 08 February 2016.

[537]Bejamin Thompson, 'Was Kiobel Detrimental to Corporate Social Responsibility: Applying Lessons Learnt from American Exceptionalism' (2014) 30 Utrecht Journal of International and European Law 82 (2014).

[538]Luisa Antoniolli, 'Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law before U.S. Federal Courts' (2005) 12 (2) Indiana Journal of Global Legal Studies 651.

[539]Aleksandra Dorich, *Parent Company Responsibility of Corporations for the Acts of Their Overseas Group Subsidiaries* (The European Union/United Kingdom Perspective 2015).

[540]Larissa van den Herik, 'The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia' (2009) 9 (1) International Criminal Law Review 211, 226.

[541]Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 (3) Journal of Business Ethics 493.

instance, Joseph and McBeth[542] stress that while some egregious human rights abuses fall within the realm of legislation, such as torture, summary executions, sexual assault, war crimes, crimes against humanity, forced labour, and slavery, others are included only if they are methodical, and some are not included at all, such as environmental damage, forced prison labour, expropriation of private property and restriction of freedom of speech.[543] This means that the application of *jus cogens* (customary international norms) does not have as significant an effect on the ATCA as it does for other national and international laws.

The ATCA is also restricted by State action requirements. Thus, non-state actors can only be accountable under the ATCA if they did not act in accordance with a state official or with significant state assistance.[544] This is a significant setback for the ATCA, because the establishment of state action requirement and state assistance is problematic in most ATCA cases. A possible explanation for this might be that state sovereignty and immunity from prosecution or liability[545] allow the corporation to escape liability where it acts under state authority.[546] The final limitation of the ATCA is that the court's ability to establish jurisdiction over foreign perpetrators (as with all courts) is limited under foreign relations and politics.[547] The US courts have the authority to decide whether or not there is a sufficient link between the foreign corporation(s) against which the case is brought. However, the majority of cases have been dismissed because of the lack of a close relationship between the parent company and its subsidiaries.[548] This approach by the courts is dismissed in this study because the supply chain and subsidiary's role in limiting liability is economically inefficient.[549]

In a more positive vein, the subsidiary is more than a device to limit liability; it is an extraordinarily powerful conflict device in the law of international business organisations. This aspect of the supply chain and subsidiary is independent of its risk-shifting function.[550] The subsidiary structure operates as a conflict device by minimising the number of forums in which a suit may be brought. A unitary firm that has 'minimum contacts'[551] with several forums is usually subject to jurisdiction in each of these forums. A firm may, however, conduct activities in one of these jurisdictions through a supply chain or subsidiary. If a suit against the firm 'arises from the subsidiary's activities, the firm is only subject to suit in this one jurisdiction, despite activities in other forums. The subsidiary thus serves a purpose similar to the one served'[552] by the *forum non conveniens* doctrine,[553] but yields far more predictable results.[554] It is possible therefore that limited liability is certainly justifiable at the shareholder level, but not at the parent corporation liability level. For these reasons, the US Supreme Court wrongly ruled on these facts.

The ATCA is also subject to political and international relations between state governments.[555] In *Rendell-Baker v Kohn*,[556] Justice Marshall observed that '[t]he decisions of this Court clearly establish that where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributable to the State'.[557] Consequently, uncertainty concerning the precise scope of state action has seen the doctrine of '*proximate cause*'[558] invoked by several circuit courts particularly in the Ninth Circuit as a key component of §1983 proceedings. As the Ninth Circuit put it in *Van Ort v. Estate of Stanewich*, 'although state

[542]Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010).
[543]*Ibid.*
[544]*Ibid.*
[545]Joanne Foakes, *Immunity for International Crimes?: Developments in The Law on Prosecuting Heads of State in Foreign Courts* (Chatham House 2011), *Ex-King Farouk of Egypt v Christian Dio*r (1957) 24 I.L.R. 228; *Jimenez v Aristeguieta* (1962) 311 F.2d 547 and *Hatch v Baez* (1876) 7 Hun 596.
[546]Alan O Sykes, 'Corporate Liability for Extraterritorial Torts under The Alien Tort Statute and Beyond: An Economic Analysis' (2011) 100 Georgetown Law Journal 2161.
[547]Curtis A Bradley, 'The Costs of International Human Rights Litigation' (2001) 2 Chicago Journal of International Law 457.
[548]*Presbyterian Church of Sudan v Talisman Energy*, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003), *Sinaltrainal v Coca-Cola Company*, 578 F.3d 1252 (11th Cir. 2009) and *Bowoto v Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010).
<https://www.abyssinialaw.com/about-us/item/943-theories-of-human-rights-and-justification> Accessed 23 May 2016.
[549]*Lemon v Kurtzman*, 403 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).
[550]*In International Shoe Co. v Washington*, 326 US 310 (1945).
[551]Ibid.
[552] Joseph H Sommer, 'The Subsidiary: Doctrine without a Clause' (1990) Fordham L aw Review59 227.
[553]*Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474, 482-85 (1984).
[554]*Ibid.*
[555]Matthew E Danforth, 'Corporate Civil Liability under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations' (2011) 44 (3) Cornell International Law Journal 659, *Smith v Hooey* 513 US 374, 378 (1995) (*citing, Edmonson v Leesville Concrete Co.*, 500 US 614, 632 (1991)), *Gallagher v Neil Young Freedom Concert*, 49 F.3d 1442, 1448-51 (10th Cir. 1995), *Sandoval v Bluegrass Regional Mental Health-Mental Retardation Bd.*, 2000 US App. Lexis 17949 (6th Cir., 2011), *Lugar v Edmondson Oil Co.,* 457 US 922, 937 (1982), *Terry v Adams*, 345 US 461 (1953), *Marsh v Alabama*, 326 US 501, *Jackson v Metro. Edison* Co., 419 US 345, 352 (1974) and *Adickes v S.H. Kress & Co*., 398 US 144, 170 (1970).
[556]*Rendell-Baker v. Kohn* 488 F.Supp. 764 (1980).
[557]*Rendell-Baker v Kohn* 457 US 830, 847 (1982).
[558]*Pawsey v Scottish Union & National Insurance Company* [1908] UKPC 60.

action and causation are separate concepts, elements of the causation analysis have been used in determining state action.'[559]

The US political and international relations limitation was relevant in the Supreme Court decision in *United States v Curtiss-Wrights Export Corp*.[560] The court establishes by majority opinion that 'the President [is] the only organ of the US government in the field of international relations',[561] hence the ultimate decision maker. This means that it is only the President that has a *de facto* capacity to act in the name of a State. Thus, the ATCA is not applicable to State conduct because the State is immune from liability. The view on federal government power creates a conflict between the ATCA and the powers of the State to be use it as a full accountability mechanism for human rights violations. However, this is not the case as most MNC cases can be linked to State immunity.

A possible way to overcome this obstacle is by allowing the ATCA an element of extraterritorial jurisdiction that permits the US District Court judges and the Supreme Court Justices to hear cases that may have an element of international relations. However, this would be very difficult to implement in practice because of the jurisdictional difference that exists at state level,[562] the fear that the state will become the new legal forum for corporate human rights violation cases,[563] and the foreign policy and political relations of the state.[564] As the recent *Kiobel* case has shown, the court has limited the jurisdiction of the ATCA in cases that may have the potential to upset foreign policy, international relations and the security of the federal government.[565] Furthermore, the ATCA does not offer a comprehensive solution for human rights violations by MNCs more broadly, especially when there is the likelihood of the defendant raising *forum non conveniens* as a defence mechanism.[566]

Černič and Ho argued that the US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co*.[567] signalled the end of future transitional human rights abuse claims under the ATCA.[568] However, this study has taken a contrary view; it is not the end of the ATCA, but rather the beginning of a new legal concept of tort liability under the duty of care. This is also seen in the literature, as it continues to address the concept of corporate accountability through the ATCA on the statute of corporate liability.[569] The ATCA remains relevant for developing corporate accountability and corporate legal liability for human rights abuses. The development can be seen in two dimensions: the first is that the ATCA is the only mechanism that is capable of offering accountability for the victim of human rights violation; and the second is that the ATCA has the ability to offer an effective sanction on corporations irrespective of the state in which the violation happened. The indication for this is that the ATCA provides a basis for considering the relationship between the state, the corporation, society, international law, and legal norms, whereas the voluntary mechanism does not. This relationship can be summarised in two dimensions: the first is the state duty within international human rights law, which can be seen through tort and civil law liability as a duty of care; and the second is the relationship between the home and host states in holding corporation accountability for human rights abuses, which can be seen in the positive duty of states not to allow third parties to harm anyone in their jurisdictions.

A possible way of building on the success of the ATCA and its fundamental principles is to advocate a new paradigm for bringing an action against the corporation in the form of a tort and civil law principle (the Neighbourhood Principle), which has its route in the application of the tort of negligence. This principle is based purely on the Neighbourhood Principle under the English tort law system and other common law jurisdictions, such as Australia, Canada, Nigeria, South Africa, and New Zealand.[570] This approach has the potential to breach

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[559]*Van Ort v Estate of Stanewich* 92 F.3d 831, 836 (9th Cir. 1996) and *Arnold v IBM* 637 F.2d 1350, 1355 (9th Cir. 1981).
[560]*United State v Curtiss-Wrights Export Corp*., 299 US 304 (1936). See also: Pierlings JT Menzel and J Hoffmann, *United States v Curtiss-Wright Export Corporation*, 299 US 304 (2005).
[561]*United State v Curtiss-Wrights Export Corp*., 299 US 304 (1936).
[562]John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to The Legal Systems of Europe and Latin America* (Stanford University Press 2007).
[563]John B. Bellinger, 'Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches' (2009) 42 Vanderbilt Journal of Transnational Law 1.
[564]Donald Earl Childress, 'The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation' (2012) 100 Georgetown Law Journal 709.
[565]Julian G Ku, 'Kiobel and The Surprising Death of Universal Jurisdiction under The Alien Tort Statute' (2013) 107(4) American Journal of International Law 835.
[566]John R. Wilson, 'Coming to America to File Suite: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation' (2004) 65 Ohio State Law Journal 659.
[567]*Kiobel v Royal Dutch Petroleum* Co., 133 S. Ct. 165.
[568]Jernej Letnar Černič and Tara Van Ho Draft (eds), 'Human Rights and Business: Direct Corporate Accountability for Human Right' (2015).
[569]Julian G. Ku, 'Kiobel and The Surprising Death of Universal Jurisdiction under The Alien Tort Statute' (2013) 107(4) American Journal of International Law 835, 841 and Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2017).
[570]Jenny Steele, *Tort Law: Text, Cases, and Materials* (Oxford University Press 2010).

the accountability gap in corporate liability under international law. The neighbourhood principle[571] would provide victims with reparations; it would also put strong pressure on corporations to comply with international human rights laws and standards. It would also provide a standard to examine and develop accountability that will ensure adequate and effective protection for individuals and societies. By taking a tort and civil law approach to accountability, the principle could enhance the understanding of the human rights duties of corporations by assessing both underlying concepts as well as case studies that question and highlight the inadequacy of the current concept of corporate accountability.

Reasons for Accountability under Tort Law and Civil Law System

Following the discussion in this chapter so far, it is noted that the US ATCA has its limitations[572] and the current voluntary mechanism has failed to offer an appropriate solution for corporate human rights violations.[573] Additionally, international law has failed to both impose human rights obligations on corporations and provide a mechanism to regulate corporate conduct in the sphere of human rights.[574] A possible explanation for this might be that international law and international human rights law have solely addressed the affairs of states[575] while excluding private entities from human rights obligations.[576] There is no doubt that the current human rights accountability mechanism does not offer any remedy for the victims of corporate human rights abuses. There is no doubt corporate accountability should follow tort law and civil law systems. This is because corporate liability cannot be viewed through the current international law mechanisms, as it does not provide an adequate remedy for corporate human rights abuses.[577]

Tort and civil laws can offer two alternative approaches to corporate accountability and award remedy. The first is that remedy awarded by the court can be governed by different jurisdiction laws in tort and civil law principles. This is because tort and civil law can be enforced in most judicial systems and its legal principle is familiar to some states.[578] The second is that corporate accountability and remedy can be awarded through the domestic and international judicial system. These are particularly important because international law structured in relation to civil liability has no specific stance on the appropriate mechanism for corporate accountability, but rather permits each state to take its stance and apply the law accordingly. This means that the state has the freedom to apply and enforce the principle in their jurisdiction without any significant constraint on the interpretation of the legal rule. The next chapter will address the concept of accountability and the role it can play in holding corporations liable for human rights violations.

[571] *Donoghue v Stevenson* (1932) AC 562, 580.

[572] Romesh J Weeramantry, 'Time Limitation under The United States Alien Tort Claims Act' (2003) 85 (851) International Review of the Red Cross 627, Forti *et al. v Suarez-Mason* (hereafter '*Forti'*) and *Estate of Winston Cabello v Fernandez-Lorios*.

[573] Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 (2) Northwestern Journal of Human Rights 222.

[574] *Ibid.*

[575] Tagle de Gonzalo Sánchez, 'The Objective International Responsibility of States in The Inter-American Human Rights System' (2015) 7 (2) Mexican Law Review 115.

[576] Sabina Anne Espinoza, *Should International Human Rights Law be Extended to Apply to Multinational Corporations and Other Business Entities?* (UCL University College London 2015).

[577] Barbara A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in The Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153.

[578] Oliver Wendell Holmes, *The Path of The Law* (The Floating Press 2009).