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ACCESS TO JUSTICE FOR VICTIMS OF HUMAN RIGHTS ABUSE BY MULTINATIONAL CORPORATIONS

Does European Civil and Commercial Litigation Provide an Answer?

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Abstract

This article explores how federal courts in the United States and European Union Member State courts have addressed cases involving a) alleged heinous conduct that took place overseas, b) foreign plaintiffs and c) foreign defendants. Together these three factors constitute what has become known as the "foreign-cubed scenario". The intention of this analysis is to demonstrate that recent, albeit gradual, changes in the legal world have significantly altered the means by which victims of human rights abuse can seek access to justice.

Keywords: *Kiobel*, human rights, multinational corporation, access to justice, EU Regulations, private international law, alien tort statute, violations of the law of nations, Brussels Regulation, Rome Regulations, jurisdiction, *Lubbe*, *Akpan*, *Royal Dutch Shell Petroleum*, presumption against extraterritorially

In recent times, American federal courts have attracted applicants in foreign-cubed cases "as a moth is drawn to light" for two main reasons.[1] First, the US has the (in)famous Alien Tort Statute (ATS), which is a unique, but ancient, jurisdictional statute that authorises US federal courts to hear claims of violations against the "law of nations" committed abroad against foreigners.[2] It is unique because no other country has similar legislation permitting claims alleging violations of public international law within a civil law framework; it is ancient because its origin goes back to the founding of the United States. It appears that applicants are able to bring civil suits based on breaches of international law against private parties. Secondly, for the plaintiffs that are successful, American federal courts provide the gateway to potentially exorbitant punitive awards.

Despite the attractiveness of the US as a legal forum, this article argues that the all too prevalent practice of resorting to American courts is not in fact the best way for applicants to seek access to justice. Legal developments in the European Union, most notably the introduction of a unified private international law framework, may mean that European courts are better equipped and more likely to vindicate human rights victims' access to justice in

[1] *Smith Kline & French Labs Ltd v Bloch* [1983] 1 WLR 730 at 733. On the point of litigants pursuing claims before US courts more generally, Lord Denning famously commented that "If [the plaintiff] can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side."
[2] Alien Tort Statute 28 USC § 1350.

foreign-cubed scenarios. Recent European case law, discussed below, illustrates this assertion.

The discussion opens by first explaining why US courts were the fora of choice for victims of human rights abuse by multinational corporations (MNCs). It then explains why recent Supreme Court jurisprudence has curtailed the US federal courts' ability to address foreign-cubed cases. Next, the article explores equivalent foreign-cubed scenarios that have been heard before EU Member State courts. The essay then compares the respective courts' approaches to the relevant cases in order to demonstrate that litigants' trust in the ATS to resolve human rights claims may have been misplaced. Finally, the article scrutinises the benefits and disadvantages of bringing foreign-cubed cases involving human rights abuses before EU Member State courts as opposed to US courts. It concludes by recommending European fora as the preferred vehicle for litigants pursuing claims of human rights abuses by MNCs.

The cases visited in this article gave rise to much anticipation and uncertainty among the legal community, making this topic a developing and therefore exciting area of the law. It must be borne in mind, however, that the legal issues faced by plaintiffs are very real. Their vulnerabilities, especially given the atrocities to which they claim to have been subjected, make it imperative that courts develop effective ways for resolving foreign-cubed claims and thereby securing plaintiffs' access to justice.

I US courts as litigants' forum of choice

A major prerequisite for victims of human rights abuse is finding a court that is willing to hear their case. In cases where the government is alleged to have had some involvement in the human rights abuse, it is understandably difficult for litigants to have confidence that their normative right to justice will be upheld by their domestic courts. Practically speaking, litigants must therefore often look to foreign courts in the hope that these jurisdictions will be willing to accommodate what then becomes a foreign-cubed scenario.

For some time, it seemed that US courts provided an avenue for redress for such litigants. It all started in 1980 with the landmark case, *Filartiga v Peña-Irala*.[3] In this case, determined petitioners successfully used the Alien Tort Statute, a dusty piece of legislation from 1789 that had been untouched for 170 years, to argue that the US District Courts had jurisdiction to hear the dispute between two Paraguayan parties for the kidnapping and brutal murder of the plaintiff's teenage brother by torture allegedly committed by the defendant.[4]

The ATS is a short statute, which states that:

[3] *Filartiga v Peña-Irala* 630 F 2d 876 (2d Cir 1980).

[4] In this horrific case, Peña-Irala kidnapped, tortured and ultimately murdered 17-year-old Joelito Filartiga because of his father's political opposition to the Paraguyan government. The Filartigas attempted to bring the case against Peña-Irala before Paraguyan courts but were denied jurisdiction despite cogent evidence that he committed the crime. Joelito's sister, Dolly, then located Peña-Irala in Brooklyn, New York and immediately brought a suit against him.

> The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Yet notwithstanding the ostensibly comprehensible language, its interpretation has given rise to protracted litigation and extensive debate.

The *Filartiga* plaintiffs successfully argued that the ATS authorised US district courts (exercising federal jurisdiction) to assume jurisdiction over claims involving a breach of the "law of nations" (customary international law). This result was an extraordinary achievement by the successful *Filartiga* plaintiffs because international law ordinarily operates only between states. But here the ATS was authorising private actions under customary international law. Indeed, the Second Circuit Court of Appeal's concluding comments are monumental:[5]

> In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual collective interest. Among those rights universally proclaimed by all nations, as we have noted, is the right to be free from physical torture. Indeed, for purposes of civil liability, the torturer has become–like the pirate and slave trader before him–*hostis*

[5] *Filartiga*, above n 3, at [890].

> *humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence.

Accordingly, human rights proponents saw real potential for the ATS to operate as a unique jurisdictional statute that would allow victims of human rights abuse to bring civil cases couched in the language of international law against their perpetrators for heinous actions before US courts.[6]

Despite *Filartiga* and its successors, federal courts did not develop systematic jurisprudence in regard to their jurisdiction to hear foreign-cubed claims under the ATS, especially in cases involving corporate defendants. The highly anticipated *Kiobel* decision finally provided an opportunity for the Supreme Court to provide lower courts with a clear pronouncement on the elusive Statute's application.[7]

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[6] See for example: Beth Stephens, "The Curious History of the Alien Tort Statute", *Notre Dame L Rev* 89 (2014); 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*, *Hastings Intl & Comp L Rev* 12.

[7] The Supreme Court adjudicated another case, *Sosa v Alvarez-Machain* 542 US 692 (2004), almost a decade before *Kiobel*. In *Sosa*, the Supreme Court accepted the ATS's ability to apply to a narrow set of torts committed against foreigners where the tort violated a norm of the law of nations. The Supreme Court took the view that only violations that were as "specific, universal, and obligatory" in nature as those recognised by Blackstone (violation of safe conducts, infringement of the rights of ambassadors and piracy) could be brought under the ATS, at [732]. While this interpretation provided lower courts with some guidance, they still struggled to determine the very important issue of corporate liability under the ATS. The Second Circuit Court of Appeal previously dismissed *Kiobel v Royal Dutch Petroleum Co* 621

II *Kiobel*, *Lubbe* & *Akpan*

In *Kiobel* petitioners from Ogoniland, Nigeria, filed a claim alleging that the respondents were responsible for aiding and abetting the Nigerian government to commit violations of the law of nations by beating, raping, killing and arresting residents, and destroying or looting property in Ogoniland.[8] The respondents' corporate structure comprised two parents, Royal Dutch Petroleum Co (RDPC) and Shell Transport Co plc (STCP), incorporated in the Netherlands and United Kingdom, respectively, and a Nigerian subsidiary, Shell Petroleum Development Company (SPDC).

In short, the Supreme Court's judgment made it extremely difficult for lower courts to grant jurisdiction to hear foreign-cubed cases under the ATS. The majority held that the presumption against extraterritoriality prevented federal courts from entertaining foreign-cubed claims unless they had a close territorial connection to the US "with sufficient force to displace the presumption".[9] The minority, on the other hand, did not think the presumption against extraterritoriality applied but argued that the case was too remote to engage American interests and therefore the Court did not have jurisdiction under the ATS.[10]

F 3d 111 (2d Cir 2010) at 148-149 on the basis that the ATS does not recognise corporate liability. However, Justice Leval dissented strongly against the majority's position at 152, thus indicating the gaping lack of consensus on the issue even at the appellate level of US federal courts.

[8] *Kiobel v Royal Dutch Petroleum Co* 133 US 1659 (2013)

[9] *Kiobel*, above n 8, at 1669

[10] At 1678.

Following *Kiobel*, it is virtually impossible to see how human rights victims can bring truly foreign-cubed claims before US federal courts, even where such violations of the law of nations meet the standard commonly accepted by all nations.

It would be a deplorable situation if human rights victims were stripped of their right to justice. Although there is no ATS equivalent, EU Member States apply uniform private international law rules in respect of jurisdiction and choice of law. While sparingly employed by foreign-cubed scenario litigants, EU Member State courts do provide an option of granting jurisdiction to hear such cases.

The current EU Regulations underpinning the uniform private international law rules were introduced relatively recently and as such, ATS-like cases are yet to be decided under them. However, a number of cases were decided under the predecessors to the current regulations. Two examples are *Lubbe*[11] and *Akpan*,[12] which were heard before UK and Dutch courts, respectively. While these cases do not fall squarely under the current regulations, they are useful because the courts' application of the private international law rules is likely to be consistent in future cases.

The *Lubbe* plaintiffs were employees of the English defendant company's South African subsidiary. They alleged that the defendant had breached its duty of care by allowing the employees to be

[11] *Lubbe v Cape* Plc [2000] 1 WLR 1545 (HL). *Lubbe* was decided under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (27 September 1968), which is a predecessor to the Brussels Regulation.
[12] *Akpan v Royal Dutch Shell Plc* Arrondissementsrechtbank Den Haag [District Court of The Hague] C/09/337050/HA ZA 09-1580, 30 January 2013.

exposed to asbestos despite the latter's knowing that exposure "was gravely injurious to health".[13] The House of Lords granted the employees' claim for jurisdiction before the UK courts, even though all the relevant conduct took place entirely in South Africa.

In *Akpan*, a Nigerian farmer, Friday Akpan, and a Dutch NGO, Milieudefensie, jointly sued Royal Dutch Shell Plc (RDS) with its headquarters in The Hague and its Nigerian subsidiary, Shell Petroleum Development Company (SPDC) for tortious damage before The Hague District Court. By applying Dutch procedural rules, The Hague District Court found that it had jurisdiction to hear the case against both RDS and the Nigerian subsidiary.

Ultimately, the Court found SPDC liable for negligence against Mr Akpan. The Dutch Court reached this decision by applying Nigerian substantive law – thereby adjudicating a case between two Nigerian parties using Nigerian law.

III Comparison between *Kiobel*, *Lubbe* and *Akpan*

It is submitted that a comparison between the facts of *Kiobel*, *Lubbe*, and *Akpan* is helpful for demonstrating that the cases are sufficiently similar such that a meaningful assessment can be made about the effectiveness of bringing cases against MNCs before EU fora compared with US courts under the ATS.

In each of the cases, the foreign plaintiffs alleged that the defendants were responsible for the harm they had suffered. The alleged harm also occurred in a state other than the forum state. In

[13] *Lubbe*, above n 11, at [6] per Lord Bingham.

both *Kiobel* and *Akpan*, this was Nigeria and for *Lubbe* this was South Africa. Moreover, the defendants responsible for the direct harm were domiciled in those states where the harm had occurred. It was the parent corporations (also defendants) that had some connection to the forum state. For *Lubbe* and *Akpan* this was their headquarters, while for *Kiobel*, Shell had an investor office in New York and was listed on the New York Stock Exchange.[14] Finally, the defendants were all corporations.

The US Supreme Court and EU Member State courts dealt with the three issues common among these cases, namely 1) foreign-cubed scenario, 2) corporate defendant and 3) plaintiff's access to justice, differently. It is helpful to examine their approaches within these three cases ahead of the more general assessment of EU fora over the US courts under the ATS in the next section. Following a comparison of the facts, there will be a brief discussion of the different laws underlying the claims, being the ATS for *Kiobel* and tort law for *Lubbe* and *Akpan*.

1 Foreign-cubed scenario

In each of the three cases, the plaintiffs were non-nationals of the forum state, their injuries were inflicted in a foreign state, and the legal entities in direct contact with the plaintiffs had no relationship with the forum state.

In *Kiobel*, the lack of a connection between the plaintiffs and the United States, and between the defendants and the United States,

[14] *Kiobel*, above n 9, at 1678

and the location of the harm were fatal to the petitioners' claim. On the contrary, in *Lubbe* and *Akpan*, the Courts found that the absence of a connection between the facts and the forum state was not an obstacle to the proceedings. The defendant in *Lubbe* argued for a stay of proceedings on the grounds of *forum non conveniens*, but the Court did not support this view. In *Akpan*, the Court was absolutely unconcerned with a lack of connection to the Netherlands, going so far as to permit the proceedings between the two Nigerian parties while claims against the only party with a relationship to the Netherlands, namely RDS, were dismissed.[15] Consequently, EU Member State courts appear more open to embracing suits even when the cases have tenuous links to the forum state.

2 Corporate defendants

In each of the claims, the plaintiffs were private individuals and the defendants were corporations. The fact that the defendants were corporations had no effect in *Lubbe* and *Akpan*. On the contrary, it is unclear whether corporations can be sued under the ATS. The Court's reference to a "mere corporate presence" indicates that corporations can be sued under the ATS, but the position remains unclear.[16] Its reluctance to comment on whether corporations are immune from the ATS leaves much unanswered, especially since *Kiobel* only came to the Supreme Court for a decision on the very issue of corporate liability. Obviously the ability to sue corporations

[15] *Akpan*, above n 12, at [4.6].
[16] *Kiobel*, above n 8, at [1669] (per Chief Justice Roberts) and [1678] (per Justice Breyer). Both the majority and minority judgments referred to "mere corporate presence" but neither elaborated any further on the issue of corporate liability.

is a prerequisite for any claimant seeking redress against a multinational corporation. The unclear position under the ATS therefore operates as a grave impediment.

3 Plaintiffs' right to justice

In *Kiobel*, the Court was adamant to ensure that the fact pattern of the claim was suitable for the ATS. In deciding whether the case could be brought under the ATS, the Supreme Court's sole concern was to preserve American foreign affairs interests. Even the minority's reference to victims deserving compensation for violations of the law of nations was subordinate to the preservation of the good international relations of the United States with other states.[17] The Court paid no regard to the availability (or lack) of other fora. It is evident that the Court did not find the plaintiffs' access to justice to be a matter of its responsibility. On the other hand, Lord Bingham was anxious to ensure that the litigants did not face a denial of justice and refused to grant a stay in light of the risk that the litigants would not have adequate funding to represent their claim properly in South Africa. The House of Lords in *Lubbe* may have been somewhat influenced by the fact that the South African courts did not have jurisdiction as of right since the South African subsidiary had ceased its operations there. But it is unlikely that the Court would have reached a different conclusion given the force of Lord Bingham's reasoning in the judgment.[18] In *Akpan*, The Hague District Court decided that it had jurisdiction to hear the case against

[17] *Kiobel*, above n 8, at 1673.
[18] *Lubbe*, above n 11, at [32].

RDS and SPDC jointly on the grounds of 1) a connection between the claims against the two entities, 2) efficiency and 3) the lack of evidence of procedural abuse by the plaintiffs. Furthermore, the Court held that it still had jurisdiction over claims against SPDC even if the claims against RDS were wholly dismissed. RDS argued that The Hague District Court should surrender jurisdiction over the claims against SPDC because Akpan and SPDC were both Nigerian and The Hague District Court would therefore be adjudicating a wholly foreign dispute. The Court found that the lack of relevant factors was no obstacle because "the *forum non conveniens* restriction no longer plays any role in today's private international law".[19] The Court's ruling demonstrates its willingness to secure a plaintiff's right to justice over foreign policy concerns.

4 Legal claims

One point of difference among *Kiobel*, *Lubbe* and *Akpan* is the law supporting the claims. *Kiobel* was brought under the ATS, while *Lubbe* and *Akpan* were tortious claims.

In *Kiobel*, the plaintiffs alleged that RDPC, STTC and SPDC aided and abetted the Nigerian Government to commit genocide, torture and rape. In *Lubbe*, the plaintiffs alleged that the defendant company exposed them to asbestos poisoning even after the company had learnt that such exposure was gravely injurious to their health. In *Akpan*, the plaintiff alleged that RDS and SPDC harmed his livelihood by creating a situation where an oil spill occurred that

[19] *Akpan*, above n 12, at [4.6].

polluted his fishponds and thereby his means of sustenance and livelihood. All plaintiffs therefore suffered significant harm. Nevertheless, in *Kiobel*, the plaintiffs framed their claim under the ATS as a violation of the law of nations, while in *Lubbe* and *Akpan*, the plaintiffs claimed under the common law tort of negligence.

As previously mentioned, the ATS is a jurisdictional statute that establishes causes of action based on the law of nations.[20] Once a claim falls under the ATS, customary international law is applied as the substantive law. Together, this means that claims under the ATS are framed in the language of international law. Accordingly, heinous violations of the law of nations, such as genocide and torture can be actionable claims.

On the other hand, claims under tort law are common and while violations of the law of nations may be framed as torts (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".[21] Accordingly, the severity of the victim's harm may not be properly recognised and the stigma attached to the defendant as a tortfeasor is significantly less than if they were convicted of torture, for instance.

For the purposes of this essay, however, it is asserted that the most important factor for a human rights abuse claimant is that they can establish jurisdiction. Therefore, framing heinous abuse as a

[20] William Dodge "Alien Tort Litigation – The Road Not Taken" (2014) 89 Notre Dame L Rev 1577 p. 1587.
[21] *Xuncax v Gramajo* 886 F Supp 162 (D Mass 1995) at 183.

combination of garden-variety torts, while unsatisfying, may be necessary in order to ensure that their claim is heard.

Taken altogether, the analysis above demonstrates that the claims under *Kiobel*, *Lubbe*, and *Akpan* are sufficiently similar such that *Kiobel* and other ATS claims could be brought as tort actions in the European Union instead of the ATS in the United States.

IV Advantages and disadvantages of European fora over the ATS

Due to the relatively recent introduction of the EU Regulations, it remains to be seen how they will operate in the context of ATS-like cases. This section analyses the theoretical advantages and disadvantages of bringing claims alleging human rights abuse against MNCs before EU Member State courts under the EU's unified private international law framework. It arrives at the overall conclusion in favour of EU fora as the preferred vehicle for human rights victims to assert their claims going forward. To frame the discussion, the section begins with an overview of the Regulations underpinning EU civil and commercial litigation.

A Overview of EU Civil and Commercial Litigation

European civil and commercial litigation is unified through the Brussels I, Rome I, and Rome II Regulations.[22] Under the Brussels I (Brussels) Regulation, a forum within the European Union has

[22] Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1; Regulation 593/2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/6; Regulation 864/2007 on the Law Applicable to Non-contractual Obligations [2007] OJ L199/40.

jurisdiction over any civil and commercial matter if the defendant is domiciled in a Member State.[23] Additionally, once a forum is found to have jurisdiction, it cannot stay the proceedings in favour of a non-Member State forum even if that forum is more appropriate to hear the claim.[24] In other words, jurisdiction where found is mandatory, not discretionary. The Rome Regulations dictate choice of law rules when assessing claims in contract and tort. Under the Rome II Regulation regarding the law applicable to non-contractual obligations (namely, tort or delict), the general rule is that the law of the place where the direct damage occurred, *lex loci damni*, is the applicable law.[25] But the Regulation has built-in exceptions and 'escape clauses', so it will not always be the *lex loci damni* that applies.

To bring a suit under the Brussels Regulation, the plaintiff must first establish that its claim is a civil and/or commercial matter.[26] There are a number of European Court of Justice (ECJ) cases determining the principles that may apply when making this assessment.[27] Typically, the assessment of whether a case fits within

[23] Art 2(1).
[24] See arts 27 to 29.
[25] Arts 2(1) and 4(1), and recital 16.
[26] Article 1(1). Note that a new Regulation, the Brussels (Recast) Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L35/1, began applying from 10 January 2015. There are differences between the current and new Regulations but these differences are immaterial to the discussion in this paper. Therefore the proceeding analysis of the Brussels Regulation applies equally to Regulation 44/2001 and Regulation 1215/2012.
[27] Case 29/76 *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol* [1976] ECR 1541; Case 814/79 *Netherlands State v Reinhold Rüffer* [1980] ECR 3807; Case C-172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan*

the civil and/or commercial scope becomes complex where a public authority is involved. If a public authority is acting in its role of performing public functions, it is clear that the situation cannot be a civil or commercial matter.[28] But not all actions by public authorities are shielded from the Brussels Regulation as public authorities can undertake civil and/or commercial activities.

In *Eirini Lechouritou v Dimosiotis Omospondiakis Dimokratias*, the ECJ had to rule whether a massacre of a Greek village by German soldiers could constitute a civil or commercial matter.[29] The Court held that Germany was in a state of war and the operations of its soldiers defending the state constituted "one of the characteristic emanations of State sovereignty" such that the plaintiffs could not bring the case under the Brussels Regulation.[30] Accordingly, the civil and/or commercial requirement may be a limiting factor in bringing human rights abuse claims to Member State courts, but only so far as the claims cannot be brought under the Brussels Regulation. Indeed, litigants can pursue claims in Member State courts under national private international law rules, although courts in different Member States have had mixed responses to allegations of state-sanctioned human rights abuses.[31]

Waidmann [1993] ECR I-1963; Case C-292/05 *Eirini Lechouritou v Dimosiotis Omospondiakis Dimokratias tis Germanias* [2007] ECR I-1519.

[28] *Eurocontrol*, above n 27 at [4].

[29] *Eirini Lechouritou*, above n 27.

[30] At 37.

[31] See generally Tomasz Pajor "State Liability for the Damage Caused by *Acta Iure Imperii* in Private International Law" (2011) 64 RHDI 505.

If the suit is deemed a civil and/or commercial matter, the plaintiff must then establish that the defendant is "domiciled" in the EU in accordance with art 2(1) of the Brussels Regulation. If the party causing harm is not domiciled in the EU, litigants will then have to pursue claims in individual Member States according to the State's national private international law rules, which is not necessarily fatal to the claim.[32] For instance, both *Lubbe*[33] and *Akpan*[34] proceeded under English and Dutch private international law rules, respectively. A further interesting feature of private international law is the dichotomy between procedural (*lex fori*) and substantive law (*lex causae*). Accordingly courts can adjudicate claims in accordance with the substantive law of a country other than the forum state if directed to by the *lex fori*. For example, the Dutch court in *Akpan* applied Nigerian substantive law since the *lex fori* directed that Nigerian law was the *lex causae* most closely connected with the claim.

The rationale behind the general rule of *lex loci damni* under the Rome II Regulation is that it "strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage".[35] Yet the drafters of the Regulation realised that the rule may not always produce the most appropriate *lex causae*. Accordingly, there is an 'escape clause' in art 4(3), which stipulates that another country's law shall apply "where it is clear from all the

[32] Brussels I Regulation, above n 22, art 2(2).
[33] *Lubbe*, above n 11.
[34] *Akpan*, above n 12.
[35] Rome II Regulation, above n 22, recital 16

circumstances of the case that the tort/delict is manifestly more closely connected with another country".[36] Similarly, in order to promote environmental protection, the Regulation provides a special exception in the case of environmental torts.[37] In such a tortious claim, the claimant may bring a claim under either the law determined by art 4(1) (*lex loci damni*) or "the law of the country in which the event giving rise to the damage occurred" (*lex loci delicti commissi*).[38]

B Advantages

It is argued that there are four main advantages to bringing claims before EU fora over US federal courts under the ATS: litigation certainty; independence and impartiality; no presumption against extraterritorially, and health, safety and environmental protection.

1 Litigation certainty

First, the Brussels Regulation provides certainty for the plaintiffs – a non-existent luxury under the ATS in the United States. Plaintiffs have recourse to a set of rules under the Regulation whereby provided that they meet the jurisdictional requirements, they can bring their case before a court in the European Union. To reinforce litigation certainty, a uniform and autonomous

[36] Recital 18.
[37] Art 7.
[38] Art 7.

interpretation of the Regulation throughout the European Union is mandated by the Regulation's explanatory preface.[39]

Following *Kiobel,* corporate liability and territorial nexus are two unsettled areas in ATS litigation, whereas corporate liability is unquestioningly accepted under the Brussels Regulation.[40] Moreover, European Union courts have no issue with adjudicating claims that have no substantive connection with its Member States beyond what is required by the Brussels Regulation. The introduction of the requirement that claims touch and concern the territory of the United States in ATS litigation has brought greater uncertainty to litigants, particularly because of the enormous discretion it gives lower courts, which face the task of applying the Supreme Court's substantive test. The minority in *Kiobel* held that "mere corporate presence" would not provide a sufficient connection to the United States for the minority to find jurisdiction under the ATS. But jurisdiction will be found under the Brussels Regulation if a corporation has its statutory seat, centre of administration or principal place of business in a Member State.[41] Accordingly, the Brussels Regime is flexible yet allows litigants to almost conclusively determine if their claims have jurisdiction in advance of a trial proper.

Furthermore, following the minority judgment in *Kiobel*, it is unclear whether ATS plaintiffs will also need to prove exhaustion of

[39] Brussels I Regulation, above n 22, recital 2; Case C-75/63 *Mrs MKH Hoekstra (Née Unger) v Bestur der Bedriifsvereniging voor Detaijhandel en Ambachten* [1964] ECR I-01519.
[40] For example, art 60 details the rules for determining a company's domicile under the Regulation.
[41] Article 60.

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. Given that the ATS is a *unique* jurisdictional statute for private claims that assesses liability in accordance with international law, the lack of guidance is disconcerting. The requirement that a claimant exhaust local remedies, especially when their home state has a corrupt judiciary, will impose additional cost on the claimant, who is already likely to be of limited means.[42] There is also no guarantee that their claim will in fact be heard under the ATS. 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.* It is argued that these features undoubtedly bring certainty – a crucial feature for human rights litigants.

2 Third-state forum: impartial and independent

Secondly, having jurisdiction under a Member State court is an advantage because it allows for adjudication before an impartial and independent forum. A common ATS fact pattern involves human rights abuse by the claimant's government supported by third parties.[43] Since domestic courts are likely to be biased towards the government and its co-conspirators, one of the advantages of the

[42] See Micaela Neal "The Niger Delta and Human Rights Lawsuits: a Search for the Optimal Legal Regime", *Pac McGeorge Global Bus & Dev LJ* 24 (2011), p. 346: "In 1993, the Nigerian military government actually enacted decrees eliminating national court jurisdiction over oil-spill related violations, and any adequate domestic remedy along with it."
[43] Patrick Borchers, "Conflict of Laws Considerations in State Court Human Rights Actions", *UC Irvine L Rev* 3 (2013), p. 57.

ATS is that it supposedly allows human rights victims to hold accountable the parties that aided and abetted the government.[44] As governments are usually exempt from suits in other countries under foreign sovereign immunity, plaintiffs need to sue related parties. Moreover, it is conceivable that foreign legislatures may try to thwart plaintiffs' access to justice by enacting laws prohibiting litigation of certain claims.[45]

The ability to sue parties related to a foreign government's human rights abuse is far from certain under the ATS given the Supreme Court's foreign policy concerns.[46] Consequently, where the human rights abuse emanates from a foreign government, federal courts may be overly-prudent when ruling on the question of jurisdiction and dismiss a case entirely, even where corporate bodies played a role in the human rights abuse. To the further dismay of aggrieved litigants, it is not even clear whether they can sue corporations, especially where they have no or only a nominal connection to the United States. The inability to invoke the ATS following state-sanctioned human rights abuse severely compromises its utility for litigants seeking an impartial forum.

On the other hand, the Brussels Regulation is likely to facilitate the adjudication of these claims. First, Member State courts, unlike US federal courts, are not constrained by foreign policy considerations when determining the question of jurisdiction.

[44] Thomas Lee, "The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in US Foreign Relations", *Notre Dame L Rev* 89 (2014), p. 1662.
[45] See Neal, above n 42.
[46] See Stephens, above n 6, p. 1538.

Secondly, while the Regulation precludes jurisdiction over exercises of public powers, it is likely that the actions of the aiders and abettors of the errant government will be a civil and/or commercial matter. Such conspirators are likely to provide support to the government's conduct to in turn benefit their (financial) self-interests, so they cannot hide behind the public powers shield unlike the direct perpetrator – the government. Therefore, litigants are able to pursue claims against parties for aiding and abetting under the Brussels Regulation, whereas the equivalent is unlikely to be possible under the ATS.

When determining the applicable substantive law, EU Member State courts have the ability to refuse application of foreign law under art 26 of the Rome II Regulation "if such application is manifestly incompatible with the public policy of the forum". While the Regulation's recitals indicate that courts should avail themselves of art 26 only in "exceptional circumstances", it is submitted that courts will be willing to utilise this escape if foreign legislatures deliberately attempt to thwart the claimant's access to justice.[47] The ability to have a case heard before a non-corrupt forum should provide plaintiffs with confidence that they will have proper access to justice.

Problematic substantive law is a non-issue in ATS claims because ATS jurisprudence has determined that the applicable

[47] See Rome II, recital 32; and *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883 (HL) at [27] per Lord Nicholls.

substantive law is customary international law and this is common to all countries.

Critics may question whether plaintiffs' attempts to secure the advantages above in turn transforms them into forum shoppers – a term that describes litigants who opportunistically seek fora that offer procedural or legal advantages even where the fora have little or no connection to the dispute. Admittedly, the above analysis does attempt to assess the considerations of bringing claims before different fora in order to advise plaintiffs of their best chances of a successful judgment. Nevertheless, it is asserted that there is one crucial difference between human rights litigants and forum shoppers, namely that the former are not seeking collateral advantages but merely the vindication of a legitimate expectation and human right: access to justice.

3 No presumption against extraterritorially

The third advantage is that far from reprimanding plaintiffs for bringing claims before EU courts that do not have a connection with the dispute, European fora can secure a claimant's access to justice in three ways. First, recital 1 of both the Brussels I and Rome II Regulations refers to the Community's "objective of maintaining and developing an area of freedom, security and justice". Member State courts are likely to recognise the importance of promoting justice in whatever claims they are called to adjudicate.

Secondly, Member State courts are concerned with ensuring the "proper functioning of the internal market".[48] It is submitted that encouraging human rights protection and fair business practices will promote this aim.

With reference to the internal market in the context of the ATS, international tort law academic, William Casto criticises the *Kiobel* minority's failure to include the promotion of the American market as a national interest that courts should consider when determining the merits of an ATS claim.[49] In particular, Casto argues that accepting goods derived through illegitimate business practices such as the exploitation of people and natural resources are detrimental to the market because these goods are unfairly competitive next to goods cultivated through proper practices.[50] Hence the market would be implicitly condoning the continuation of such abhorrent business conduct by rewarding unfair producers through financial gain. In an EU context, the explicit reference to the "proper functioning of the internal market" mandates Member State courts to make the above consideration, which in turn should promote litigant's access to justice.

Moreover, art 6 of the European Convention on Human Rights (ECHR) – the right to a fair trial – invariably serves as a backdrop to

[48] Treaty on the Functioning of the European Union (entered into force 9 December 2009), art 81(2).
[49] William Casto, "The ATS Cause of Action is *Sui Generis*", *Notre Dame L Rev* 89 (2014), p. 1568.
[50] At 1569.

claims in the EU.[51] Litigants are "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" by virtue of art 6 of the ECHR.[52] As the Convention has territorial application, it will apply to litigant's claims before Member State courts even where the actions giving rise to the claim occurred outside the EU.[53] Moreover, the court may consider related factors such as the litigant's limited financial means, as in *Lubbe*, when determining if their right of access to justice is recognised.

Thirdly, the European Regulations have extraterritorial application and therefore a broader reach than the ATS. The extraterritorial scope of Brussels not only covers European corporations headquartered in the EU but also European subsidiaries of US and other non-European corporations.[54] In the modern day, multinational corporations operate through a network of independent subsidiaries worldwide and the EU Regulations may have significant extraterritorial reach in holding corporations liable for torts outside

[51] See recital 1 of the Brussels I, Rome I and Rome II Regulations, above n 22: "The Community has set itself the objective of maintaining and developing an area of freedom, security and justice".
[52] Convention for the Protection of Human Rights and Fundamental Freedmons 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6. Article 6 does not give litigants an unqualified right to choose a tribunal such that they can forum shop, but it does certainly apply to all claims brought before EU Member State courts. See generally JJ Fawcett, "The Impact of Article 6(1) of the ECHR on Private International Law", *ICLQ* 56 (2007), p. 1.
[53] Article 1 of the ECHR, above n 52, states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Although there is debate over the meaning of "jurisdiction", a conservative reading of the term is that it equates to *territorial* jurisdiction. See also *Bankovic v Belgium and 16 Other Contracting States* [2001] ECHR 890 at [61].
[54] Caroline Kaeb and David Scheffer, "The Paradox of *Kiobel* in Europe", *AJIL* 107 (2013), p. 854.

the strict territory of the EU. Moreover, American ATS defendant corporations are likely to have a presence or establishment in Member States where they will be caught under the Brussels Regulation. It is argued that litigants will find it easier to convince Member State courts that they have jurisdiction over claims against EU defendants, regardless of their connection to the tort or the EU territory, than American federal courts over American defendants under the ATS. The reason is that plaintiffs before EU Member State courts do not need to establish that their claims sufficiently "touch and concern the territory" of the EU, as they do in the US under the ATS.

Additionally, courts appear receptive to finding jurisdiction even when the tort does not have a connection to the EU. In *Akpan*, for example, The Hague District Court craftily applied both the Brussels Regulation and Dutch conflict of laws rules to find jurisdiction over two defendants instead of one. The Court first applied the Brussels Regulation to find jurisdiction over the Dutch parent company. As the company was domiciled in a Member State, jurisdiction was uncontroversial. The Court then applied the Dutch Code of Civil Procedure in accordance with art 4(1) of the Brussels Regulation, to find jurisdiction over the Nigerian subsidiary. Furthermore, the Court was prepared to maintain jurisdiction even when the case became foreign-cubed – two Nigerian nationals litigating a tort that happened in Nigeria. Additionally, the European

Parliament has encouraged the application of Brussels to ATS-like cases.[55]

4 Health, safety and environmental protection

Finally, an advantage of the Rome II Regulation over the ATS is that it recognises environmental protection as an important consideration under EU law. This is relevant because claims alleging human rights abuse often involve acts of environmental degradation by the defendant, *Kiobel* and *Akpan* being clear examples. Accordingly, under art 7, the claimant has a choice of applying the *lex loci damni* under art 4(1) or the *lex loci delicti commissi*. This rule gives litigants a chance to apply the law that affords greater environmental protection. Article 7 will be most useful where the country of the place where damage occurred has lax environmental protection standards, while the country of the place where the decision to commit the environmentally damaging activity has strict environmental standards. Moreover, art 7 will be especially helpful in cases against MNCs headquartered in the EU that commit environmental degradation in developing countries. This is because although the foreign subsidiary is likely to conduct the harmful activity, the decision is likely to originate from management based in a Member State. The sheer ability to recognise claims for environmental torts is an advantage over ATS litigation, since

[55] *Resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility* European Parliament (COM (2001)) 366-C5-0161/2002/2069(COS)), 2003 OJ (C 187 E) 180, para 50, which refers to the Brussels Convention 1968 but in substance equally applies to later Brussels Regulations. See *Bancovic v Belgium and 16 Other Contracting States* (2001) ECHR 890 at [16].

"environmental torts" are "not currently in violation of international law".[56]

Additionally, plaintiffs can argue for the application of stricter rules of safety and conduct applicable in the defendant's domicile or *lex fori* by virtue of art 17, if corporations have taken advantage of lax regulation in the place where the damage occurred. It should be noted, however, that art 17 merely requires the court to take into account "as a matter of fact" rules of safety and conduct. Andrew Dickenson points out that the wording demonstrates that: [57]

> … Art 17 is not a rule of applicable law, and, secondly, that Member State courts enjoy a wide margin of appreciation in deciding whether and, if so, for what purpose and to what extent to take account of any rule identified by Art 17.

C Disadvantages

The main disadvantages of pursuing ATS-type claims under EU private international law, as purported by academics, are the applicable law, financial considerations, potential resurrection of *forum non conveniens* and disclosure requirements.

1 Applicable law: *lex loci damni*

It has been argued that one disadvantage of the Rome II Regulation is that the general rule requires the *lex loci damni* to be applied. This requirement is a shortcoming because there is no

[56] *Flores v Southern Peru Copper Corp* 343 F 3d 140 (2d Cir 2003).
[57] Andrew Dickenson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations.* Oxford: Oxford University Press, 2008, para. [15.33].

reason European parent companies should be held to a different standard than what would otherwise apply in Europe, despite the fact that the activities occurred abroad.[58] Private international law academic Veerle van den Eeckhout criticises that the "fair balance" approach described in the Preamble to the Rome II Regulation, which led to the application of *lex loci damni* under art 4(1), produces "exactly the opposite result".[59] Van den Eeckhout goes on to suggest that "non-European victims", as "weaker parties" are disadvantaged because art 4(1) precludes application of a European legal system that would have more likely been favourable to the plaintiff's claims.[60] Furthermore, it would be very difficult to convince the Member State court to apply law other than the *lex loci damni*.[61]

In light of the above, it is useful to re-examine the *Akpan* case where Nigerian law, as the *lex loci damni*, was applied.[62] Nigerian Law precluded RDS from liability and Milieudefensie (the Dutch environmental NGO) from recovering. But before one concludes that the application of the *lex loci damni* was unfavourable to the plaintiff, Nigerian law is based on English common law. The Hague District Court held that RDS was not responsible by applying an English case, *Chandler*.[63] Additionally, the Court noted that while Nigerian law

[58] Veerle van den Eeckhout, "Corporate Human Rights Violations and Private International Law", *Contemp Readings L & Soc Just* 4 (2012), p. 189.
[59] At 189.
[60] This position is especially the case where litigants come from a weaker legal system than European equivalents.
[61] van den Eeckhout, above n 58, p. 190.
[62] *Akpan*, above n 34.
[63] *Chandler v Cape* [2012] EWCA Civ 525, 3 All ER 640 (CA).

did not allow Milieudefensie to succeed; it could not have recovered under Dutch law either. Thus, one must query whether the application of Nigerian Law operated in such a way to the disadvantage of the plaintiffs as the critics purport. At the same time, however, comparative law academic, Liesbeth Enneking suggests that Dutch law may have otherwise imposed a lower standard for finding parent corporation liability such that a different conclusion regarding RDS's liability may have been drawn.[64]

It is noteworthy that, as mentioned above, art 4(1) of the Rome II Regulation is only a general rule. Accordingly, Member State courts have flexibility to apply art 4(3) as an escape; art 7, in the case of environmental damage; art 16 overriding mandatory provisions; art 17 rules of safety and conduct; or art 26 public policy consideration of the forum, in the event that *lex loci damni* does not provide a "fair balance" between the claimant and defendant. Therefore, it is submitted that the criticism fails to take account of the Regulation's attempts to ensure the "fair balance" principle is upheld.

Another disadvantage is that *lex loci damni* is *domestic* law while the applicable law under the ATS is *international* law. Consequently, the claimant may be disadvantaged if they cannot frame a tortious claim under *lex loci damni* because domestic law does not recognise the relevant tort.

[64] Liesbeth Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria* Case", *Utrecht L Rev* 10 (2014), p. 52.

It is questionable, however, whether plaintiffs will be in a situation where they are unable to bring a claim for harm under domestic law that they would otherwise be able to under the ATS. This is because claims under the ATS must amount to breaches of customary international law that are "specific, universal and obligatory".[65] Member State courts are likely to be critical of any nation that does not recognise equivalent liability in tort for such serious conduct.[66] Member State courts have the option of holding that this lack of recognition constitutes a violation of their mandatory public policy rules, and accordingly substitute their own laws (*lex fori*) to the extent that the *lex loci damni* is "manifestly incompatible with the public policy of the forum".[67]

It is additionally questionable whether it is fair to criticise the application of *lex loci damni* over international law considering the Supreme Court's zealous use of the presumption against extraterritoriality in *Kiobel.* Since the Supreme Court has recognised that the presumption applies to substantive statutes, it follows that the ATS was recognised as US substantive law when it actually applies international law. Perhaps if the *lex loci damni* applied instead, US federal courts would be less concerned about imposing US law on other states.

[65] *Sosa*, above n 7, at 732.
[66] See for example, Simon Baughen, "Holding Corporations to Account" *Br J Am Leg Studies* 2 (2013), p. 573: "It is likely that a U.K. Court would conclude that the application of Article 4 would be contrary to the public policy of the U.K. in mandating the application of another country whose domestic legal order had not incorporated the norms of customary international law."
[67] Rome II Regulation, above n 22, art 26.

Furthermore, all substantive law would originate from the place where the damage occurred; hence courts could not apply the presumption against extraterritoriality to the ATS. According to international law academic William Dodge, choosing international law over *lex loci damni* as the substantive law under the ATS provided the "doctrinal hook" for the Supreme Court to enforce the presumption against extraterritoriality.[68]

2 Financial considerations

There are a number of financial disadvantages that litigants in European Member State courts face compared to claims in the United States. First, for injuries occurring after January 2009, damages are assessed in accordance with the law of the state where damage arose.[69] One can envisage a situation where damage occurred in a developing state that rewards modest compensation, without the possibility of suing for punitive damages, such that it becomes uneconomical to litigate before a faraway European forum. Some African nations, for instance, value restorative redress through means such as apologies.[70] Secondly, some Member States have introduced additional funding hurdles for litigants by limiting the amount of legal aid they can claim.[71] The United States, in

[68] Dodge, above n 20, p. 1578.
[69] Rome II Regulation, above n 22, art 32.
[70] For example, some African law systems have an emphasis on making apologies as opposed to monetary compensation: see Borchers, above n 43, p. 52.
[71] In the United Kingdom, the operation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK) has limited the "recovery of fees and costs available to human rights plaintiffs as of April 2013": see Michael Goldhaber "Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard", *UC Irvine L Rev* 2 (2013), p. 133.

comparison, adopts a "user pays" system such that it encourages litigation. Indeed, the financial advantages offered by the American legal system have been cited as major reasons litigants choose the United States as a forum.[72] At the same time, however, it must be remembered that litigation under the ATS in the United States is likely to be costlier than in the European Union because of the delays and inefficiencies in its legal system. The additional uncertainties raised by the *Kiobel* judgment will only add to the delays and expenses as lower courts struggle to apply the Supreme Court's cryptic decision. Moreover, it is submitted that ATS litigation is a "high risk-high return" investment based on the miniscule proportion of successful cases.[73]

3 *Forum non conveniens*?

Another disadvantage that van den Eeckhout raises is the creeping in of *forum non conveniens* through the *lis pendens* rules following the Brussels Recast.[74] Van den Eeckhout argues that giving Member State courts the option to stay actions in favour of pending litigation in non-member state courts creates a backdoor for the officious doctrine to apply. It is submitted that these concerns are somewhat exaggerated and unlikely to result in the resurrection of *forum non conveniens* within the European civil and commercial

[72] Attorneys for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, "Brief for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as AmiciCuriae in Support of Neither Party, *Kiobel v Royal Dutch Petroleum Co*" (13 June 2012), p. 27–28.
[73] Goldhaber, above n 71, p. 131.
[74] van den Eeckhout, above n 58, p. 186–187.

litigation regime. Member state courts will be sceptical of abusive proceedings in foreign courts and are well equipped to decide the reasonableness of an application to stay proceedings.[75]

4 Disclosure requirements

Additionally, there may be less favourable disclosure requirements in accordance with the Member State forum's law as opposed to the United States. In *Akpan*, Milieudefensie cited that the Dutch Civil Procedural Code's restrictive discovery rules meant that it could not access vital documents held by Shell.[76] Milieudefensie 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. Finally, if a claim is regarding a truly foreign-cubed situation the Brussels and Rome Regulations, like the ATS, are of no avail. But claims can still be pursued under the Member State's national private international law rules. It is submitted that this is not a completely limiting disadvantage because of the willingness by Member State courts to secure plaintiffs' access to justice as evidenced by *Lubbe* and *Akpan*.

5 Cultural dichotomy

Despite the advantages offered by European civil and commercial litigation, only a handful of litigants have pursued ATS-like litigation in European courts.[77] One explanation is the cultural dichotomy between Europe and the United States. In the United

[75] *Lubbe*, above n 11, and *Akpan*, above n 12, are prime examples.
[76] Enneking, above n 64, p. 46.
[77] Goldhaber, above n 71, p. 131.

States, it is commonplace that harms done to a person are redressed privately through tort. Accordingly, the American legal system recognises punitive damages and generally rewards higher overall compensation compared to other developed countries.[78] In contrast, the dominant belief in European societies is that the state should be responsible for prosecuting wrongdoers through the criminal justice system, as opposed to private individuals through the civil system.[79] While tortious suits have the ability to change societal and legal practices in America, historically they have had little effect in European countries. Hence tort has not been recognised as the most effective way to remedy wrongs in European society. With the increase in the number of MNCs since the advent of globalisation, however, there is no reason victims should not utilise European civil and commercial litigation to secure effective redress. Consequently, it is submitted that the traditional differences between civil litigation in the American and European legal systems are merely an interesting observation and should have little bearing on a claimant's choice of forum.

Additionally, it must be noted that the Brussels and Rome Regulations are relatively new instruments. *Akpan*, a 2013 case, was heard under Dutch private international law rules because the incident occurred after the enactment of the Brussels Regulation but

[78] Vivian Grosswald Curran, "Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v Royal Dutch Petroleum Co.*", *Md J Intl L* 28 (2013), p. 86–88; and Vivian Grosswald Curran, "Remarks on the *GJIL* Symposium on Corporate Responsibility and the Alien Tort Statute", *Geo J Intl L* 43 (2012), p. 1019–1026.
[79] Curran "Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v Royal Dutch Petroleum Co.*", above n 78, p. 86.

before that of the Rome II Regulation. Hence, criticism of the Rome II Regulation's application to human rights claims may be unjustified since it remains to be seen how it will operate in practice. On the other hand, it may result that the Rome II Regulation is ill-equipped to accommodate human rights claims and litigants prefer to apply national private international law rules instead.[80] Given that a number of transnational tort cases have already been successfully litigated in European courts, either conclusion will not foreclose the potential for human rights claims to be framed as tortious actions in Europe.[81]

V The Preferred Approach

It is asserted that the biggest problem facing petitioners of human rights claims against MNCs is uncertainty. The ATS provided a possible avenue for bringing international human rights claims before US Federal Courts. But the ATS was enacted in 1789, a time very different from today. Rather than make an outright decision on its applicability, the Supreme Court has progressively restricted its scope. The result is a frustrating journey for ATS litigants who face numerous setbacks even at the jurisdiction stage of litigation. The United States judicial system might have favourable legal fee rules and the ability to recover enormous damages, but analysis should

[80] This would be an odd situation because national private international law principles and the Rome Regulations often point to the same result. Some member-state countries, however, may prefer their own private international rules on the basis that they consider them superior to the EU Regulations. But note that because Brussels, Rome I and Rome II are *regulations*, Member State courts are bound to apply them if the case fits within the regime.

[81] Goldhaber, above n 71 p. 136 states that: "In the five known UK disputes litigation to completion, plaintiffs have won four settlements, for a success rate of 80%."

first and foremost be directed towards the litigant's ability to successfully pursue a claim for reparation. Additionally, following the hype after *Filártiga*, the ATS's usefulness as a vehicle for securing human rights may have been "somewhat inflated".[82] Only a small number of plaintiffs clear the jurisdictional hurdles and even then, corporate defendants frequently encourage settlements (notwithstanding the patent uncertainty regarding corporate liability under the ATS).[83]

In the interests of victim reparation, litigants and their legal advisors should seek alternative avenues such as tort litigation in European Union courts. The American judicial system is complex, especially because of the division between federal and state courts. It is respectfully submitted that there are no advantages to litigating before US federal courts over EU Member State courts. Furthermore and crucially, Member State Courts can offer something extra – certainty.

VI Conclusion

Victims of human rights abuse committed by MNCs are entitled to an effective right to justice. Despite the apparent allure of bringing ATS claims before US federal courts, it is submitted that these appearances are deceptive and human rights litigants should explore alternative avenues such as European civil and commercial litigation in their quest for access to justice.

[82] Nicola Jagers, Katinka Jesse and Jonathan Verschuuren, "The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell", *AJIL Unbound* (January 2014), p. 37.
[83] Goldhaber, above n 71, p. 128.

This essay has explored why US federal courts were the fora of choice for foreign-cubed litigants, followed by a discussion on why the recent *Kiobel* decision has effectively foreclosed such litigants hope for redress against their MNC perpetrators under the ATS.

It has then compared *Kiobel* with equivalent cases heard before Member State Courts to demonstrate how different courts have historically addressed issues common to foreign-cubed scenarios. This analysis was followed by an assessment of the advantages and disadvantages of the recently unified EU Regulations governing civil and commercial litigation over the ATS as a means of securing human rights litigants' access to justice in future cases.

While *Kiobel* may not have been the fairy tale ending to the ATS's awakening in *Filartiga* that foreign-cubed litigants where hoping for, as this essay demonstrates, the decision should not have a bearing on their ability to seek justice against their corporate perpetrators. European civil and commercial litigation offers an attractive alternative and it is hoped that human rights victims will see that the ATS is merely a glow in comparison to the bright beacon of light that European Member State courts have to offer.

Fiona Robertson graduated with a Bachelor of Laws (Honours) and Bachelor of Commerce conjoint degree from The University of Auckland in 2014. Her law degree had a particular focus in public and private international law. Her law seminar honours paper examined the appropriateness of defining economic sanctions as a use of force while her dissertation analysed the recent *Kiobel* case and its implications for human rights victims to seek access to justice. She complemented her interests in public and private international law with an exchange to the Center for Transnational Legal Studies in London in her final year of study. Fiona is currently working in the Tax division of a Big 4 multinational accounting firm and has a strong interest in the social implications of tax policy. She plans to pursue a career in economic development in developing countries by helping people break the poverty cycle through economic empowerment.