

# LESSONS FROM KIOBEL V ROYAL DUTCH PETROLEUM COMPANY: DEVELOPING HOMETOWN LAWYERING STRATEGIES AROUND CORPORATE ACCOUNTABILITY

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## ABSTRACT

In April 2013, the United States Supreme Court handed down the long-awaited judgment in *Kiobel v Royal Dutch Petroleum Company*, a case alleging corporate exploitation of communities in an oil-rich area of Nigeria. The case examined the Alien Tort Statute (ATS), an old statute allowing non-US citizens to bring claims in US courts for violations of the law of nations. In its judgment, the court limited the application of the ATS. This article explores the holding and reasoning of *Kiobel* in light of previous ATS jurisprudence, and set against the geopolitical considerations of international human rights frameworks within the US, with a particular focus on what this case means for South Africa and the region. The article queries the continuing need for countries in the Global South, including South Africa, to rely on foreign courts for corporate accountability, particularly given robust domestic legal frameworks that are under-utilised. South Africa, in particular, is best placed to begin the regional dialogue regarding law reform and corporate accountability. Local lawyers and law students must be encouraged to develop creative lawyering strategies in the area of corporate accountability. Finally, the article highlights the need to support communities and individuals most affected by corporate abuse to construct and share their narratives as part of their broader quest for meaningful political and economic justice.

**Key words:** human rights, international law, corporations, jurisdiction

## I INTRODUCTION

When a state seeks to exercise jurisdiction outside of its territory, international law generally requires the state to show some connection to its territory, nationality, or national security interests. These limitations flow from fundamental international legal principles of sovereign equality and noninterference in the domestic affairs of sovereign states.

But international law has long recognized an exception to this framework for a certain set of serious crimes ...<sup>1</sup>

Anxieties about the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* should not eclipse the fact that redress can, and at times should, be secured elsewhere. A

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1 J Ku 'Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute' (2013) 107 *American J of Int Law* 835.

major effect of *Kiobel* is to adjust the aperture of transnational corporate accountability away from the United States ...<sup>2</sup>

In early 2013, many international lawyers held their collective breath, waiting for the judgment of the United States Supreme Court in the case of *Kiobel v Royal Dutch Petroleum Company*, which was handed down in April 2013.<sup>3</sup> *Kiobel* concerned the liability of particular multinational corporations for aiding and abetting the Nigerian Abacha regime, which perpetrated crimes against the Ogoni community in the heart of the Niger Delta.

The key question facing the court was whether the Alien Tort Claims Act (otherwise known as the Alien Tort Statute, ATS), could ground a claim of Nigerian nationals in the US.<sup>4</sup> The facts of the case are as compelling as the judgment. But even more significant is the extensive global fixation on this case and the underlying legal mechanism on which it is premised.

While it is important to examine the legal rationale put forth in *Kiobel*, it is equally if not more important to query the role of the ATS, as a narrow legal framework, in the quest for global justice. Why, for example, is the only forum for possible legal relief for a small, vulnerable community in Nigeria, in the US? Does this in itself reflect a power disparity between the Global North and the Global South that must be addressed and redressed? And if we want meaningful justice for the Ogoni people, and the millions like them throughout the developing world, should we consider regional and domestic forms of recourse? Given that the ATS, as a US instrument, has not proven to be an effective recourse against abuses perpetrated by the US government,<sup>5</sup> what are the alternative fora that exist for marginalised communities, anywhere in the world, to challenge the economic hegemony of states such as the US in the Global North? Finally, what are the implications of the lawyering involved in ATS litigation in building movements that create transnational narratives, and what are the lessons learnt from decades of ATS litigation for client-centred lawyering?

This article explores the decision of the court in *Kiobel* and its consequences for corporate accountability in South Africa and other African states.<sup>6</sup> It also queries whether the real challenge post-*Kiobel* – both for South Africa and the region – is the development of home-grown, domestic and regional, legal frameworks, which hold transnational corporations to account for human rights violations in Africa, by Africans.

2 M Mohan 'The Road to Songmao: Transnational Litigation from Southeast Asia to the United Kingdom' (2013) 4 *American J of Int Law* 107, e-30.

3 569 US 2013, 133 S Ct 1659 (2013). For an extensive discussion of the case, its background and analysis of the decision, see DP Stewart & I Wuerth 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort' (2013) 107 *American J of Int Law* 601.

4 28 USC s 1350.

5 The US government generally enjoys sovereign immunity, shielding it from civil lawsuits, including ATS litigation.

6 The *Kiobel* case has a particularly proximate impact on South Africa: shortly after the *Kiobel* decision was handed down, the US courts dismissed a claim by the South African Khulumani campaign, which was partially revived, and then completely dismissed in September. *Khulumani v Barclays National Bank* 1:03-CV-4524 (SD NY) (29 September 2014) 17.

The article begins with an analysis of the *Kiobel* case and the court's decision. From there, it explores the geopolitical considerations that have informed the manner in which the ATS has been utilised and adjudicated over the last 30 years, and what alternatives to ATS should be developed in the post-*Kiobel* landscape to achieve true economic and political justice. The article highlights the constructive lessons learnt from ATS litigation in respect of human rights lawyering and movements against governmental and corporate harm.

## II BACKGROUND TO *KIOBEL*

The *Kiobel* case begins in the quiet, picturesque Ogoniland in the Niger Delta. In 1956, the Netherlands-based Dutch Company, Royal Dutch Petroleum, and the British-based corporation, Shell UK (the respondents), created a joint venture in Nigeria called the Shell Petroleum Development Corporation (SPDC).<sup>7</sup> The SPDC began oil extraction and production in this oil-rich region. This was not just any ordinary oil field: the SPDC became one of Shell's biggest producers of oil and, equally important, Shell became an essential source of the Nigerian government's income. By 1994 Ogoniland had produced about US\$30-billion worth of oil.<sup>8</sup>

The Ogoni people did not benefit from this lucrative arrangement. Their share of the natural resources in their land has been minimal.<sup>9</sup> Indeed, the impact on the Ogoni people has been profoundly negative: there have been 2,976 oil spills from a poorly-maintained network of aboveground pipes (this is the equivalent of 2.1 million barrels of oil).<sup>10</sup> Soot and pollution are ever-present contaminants;<sup>11</sup> water sources are heavily toxic;<sup>12</sup> vegetation is destroyed; public health is adversely affected by petroleum hydrocarbons in the air and water, soil and sediments.<sup>13</sup>

In the early 1990s, a popular grassroots movement known as the Movement for the Survival of the Ogoni People (MOSOP) was formed to demand human rights and environmental justice. When the Ogoni population began to protest this degradation, they were met with a cruel and repressive response.<sup>14</sup> The Nigerian government, at the behest, and with the assistance, of the SPDC's

7 Shell Development Company of Nigeria <<http://www.shell.com.ng/aboutshell/shell-businesses/e-and-p/spdc.html>>.

8 S Cayford 'The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria' (1996) 43 *Africa Today* 184.

9 See J Graafland 'Profits and Principles: Four Perspectives' (2002) 45 *J of Business Ethics* 293 (discussing how the Ogoni people have largely been uncompensated by both Shell and the Nigerian government for Shell's use of their land).

10 *Ibid.*

11 *Ibid.*

12 For a detailed discussion of the environmental effects of the oil extraction and production process, see UN Environment Programme 'Environmental Assessment of Ogoniland' (2011) 37–8.

13 *Ibid.* 10.

14 See generally J Fynas 'Corporate and State Responses to Anti Oil Protests in the Niger Delta' (2001) 100 *African Affairs* 27 (describing state responses to Ogoni protesters that included the sanctioned use of violence).

holding corporations (Royal Dutch Petroleum and Shell), intervened. The Nigerian military, aided and abetted by Royal Dutch and Shell and their agents:

engaged in a widespread and systematic campaign of torture, extrajudicial executions, prolonged arbitrary detention, and indiscriminate killings constituting crimes against humanity to violently suppress this movement.<sup>15</sup>

The Nigerian government allegedly actively conspired in the murder of Ogoni writer and activist Ken Saro-Wiwa and eight other Ogoni leaders.<sup>16</sup> Saro-Wiwa was an outspoken critic of the Shell Oil regime in the Delta region of Nigeria and assisted in bringing international attention to the plight of the Ogoni people. He prompted non-violent agitation against Shell starting in the early 1990s. Shell Oil is alleged to have provided vehicles, money and other resources to the Nigerian military to carry out the torture and murder of Saro-Wiwa and other Ogoni activists. In 2009, Shell Oil settled a New York lawsuit brought against it on the basis of Saro-Wiwa's murder for US\$15.5-million.

A group of Nigerian nationals managed to escape Ogoniland and were granted political asylum in the US, where they filed a suit against the corporations involved in the Ogoniland oil extraction (the petitioners).<sup>17</sup> Because of the complicity of the Nigerian government, the Ogoni people were precluded from a fair and open judicial process in Nigeria. The petitioners included Esther Kiobel, the first petitioner, who applied individually and on behalf of her late husband, who was killed by the Nigerian authorities, for financial support and assistance from the SPDC and its shareholders, Royal Dutch Petroleum and Shell UK. The petitioners alleged that the corporation provided food, money and transport to Nigerian government agents, whilst allowing the use of their premises for attacks on those people protesting the environmental destruction wreaked by the companies.<sup>18</sup>

This matter became known as the *Kiobel* case and relied on the ATS for legal relief.

### III ALIEN TORT STATUTE

#### (a) The history of the ATS

The petitioners claimed that the respondents had 'violated the law of nations' by aiding and abetting the Nigerian government in committing a range of international law violations, including extrajudicial killings; crimes against humanity; torture and cruel treatment; arbitrary arrest and detention; violations of the right to life, liberty, security and association; forced exile; and the destruction of property.<sup>19</sup>

15 See Brief for Petitioners in *Kiobel v Royal Dutch Petroleum Co., Shell Transport and Trading Company PLC, Shell Petroleum Development Company Of Nigeria, Ltd.*, petition filed 06/06/2011 in the Supreme Court of the United States (petitioners' brief).

16 'Shell pays out \$15.5m over Saro-Wiwa killing' *The Guardian* (9 June 2009).

17 *Kiobel* (note 3 above) 2.

18 Petitioners' brief (note 15 above).

19 *Kiobel* (note 3 above) 2.

The petitioners' cause of action was based on the now infamous ATS,<sup>20</sup> which provides that the:

district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.<sup>21</sup>

The history of the ATS is curious. It was enacted in 1789 at a time when the US judicial powers were being developed. As a new country recovering from the recent war of independence, this brief paragraph was included in the US Judiciary Act of 1789, in order to carve out jurisdiction for US courts to consider claims brought by non-US citizens, who experienced a violation of the 'law of nations' or a treaty obligation of the US. In other words, where a non-US citizen experienced a form of harm that constituted a violation of the 'law of nations', such person would be able to approach the US district courts for relief, irrespective of the location of the harm – and, potentially, irrespective of the perpetrator.

Lying dormant for almost 200 years, the two-line statute was rediscovered by Rhonda Copelon and Peter Weiss, young and creative lawyers at the Center for Constitutional Rights (CCR), in the case of *Filartiga v Pena-Irala*.<sup>22</sup> Joel Filartiga's son had been tortured and killed by Paraguayan authorities (Filartiga and his son were Paraguayan citizens). Many years later, in New York, Filartiga's daughter, Dolly Filartiga, saw her brother's torturer walking down the street. She was referred to CCR, who worked through the week to draft and serve papers against Americo Norberto Pena-Irala (a Paraguayan citizen) for wrongfully causing the death of Filartiga's son, before he was scheduled to be deported to Paraguay. The Second Circuit Court recognised its jurisdiction to determine Pena-Irala's liability based on the ATS.<sup>23</sup> And thus began over three decades of human rights litigation in the US courts.<sup>24</sup> Alleged victims have invoked the law more than 150 times in the last 20 years.<sup>25</sup>

### **(b) The ATS and corporate accountability**

Litigation under the ATS flourished, and soon application of the statute was extended to private defendants, commanders, and corporations responsible for human rights violations. In 1995, the judgment in *Kadic v Karadzic* was handed down, and for the first time, the ATS was found to provide jurisdiction over claims against private actors who committed international law violations

20 28 USC s 1350.

21 Ibid.

22 *Filartiga v Pena-Irala* 630 F 2d 876 (2d Cir 1980).

23 Incredibly, the *Filartiga* decision was handed down on the same day, 30 June 1980, as one of the toughest losses of Copelon's career, the US Supreme Court judgment in *Harris v McRae*. This case was a class action on behalf of women living in poverty who needed publicly funded (Medicaid) abortions.

24 B Stephens 'Translating *Filartiga*' (2002) 27 *Yale J of Int Law* 1, 2.

25 'Companies shielded as US court cuts human rights suits' *Bloomberg* (17 April 2013).

in concert with state officials (in that case, the president of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina).<sup>26</sup>

Once again, innovative lawyers identified a gap. Because the ATS did not specify that the respondent must be a natural person, activists began to test the ATS to bring legal actions against multinational corporations for their involvement in human rights violations outside the US.<sup>27</sup>

This was an important and innovative legal approach in the globalised marketplace. Many multinational corporations operate in jurisdictions outside of their incorporation. These jurisdictions are often characterised by impoverished communities and unstable or emerging democracies and offer a combination of cheaper labour and weak governance structures. This combination tends to offer low overheads for corporations and is an attractive incentive for them to move their operations ‘off-shore’ of their home state. Put simply, multinational corporations are incentivised to seek locations where an impoverished population has limited access to justice. It is precisely in this context of limited justice in which human rights violations by corporations tend to occur and national courts are often not available sources of justice for the victims.<sup>28</sup> Against this backdrop, the ATS became a beacon of hope.

It was this statute that came before the US Supreme Court in *Kiobel*.

#### IV THE LEGAL QUESTIONS IN *KIOBEL*

There are three legal questions, which arose for the majority of the court (including Roberts J, Scalia J, Kennedy J, Thomas J and Alito J): (i) can US courts apply US law to conduct, which occurs outside the US?; (ii) what constitutes a violation of an international norm for the purposes of the ATS?; and (iii) the question whether a juridical entity, as opposed to a natural person, can be a respondent under the ATS.

##### (a) Presumption against the extraterritoriality of the ATS

The first key legal question facing the court was whether it had jurisdiction to adjudicate conduct ‘occurring in the territory of a foreign sovereign’.<sup>29</sup> This question triggered a presumption of statutory interpretation in the US known as the rebuttable presumption against extraterritoriality, ie that US legislation

26 P Hoffmann & A Quarry ‘The Alien Tort Statute: An Introduction for Civil Rights Lawyers’ (2010) 2 *Los Angeles Public Interest LJ* 129, 134.

27 See Stewart & Wuerth (note 3 above) 604.

28 B Meyersfeld ‘What are the Obligations of those who Invest in Corporations?’ (2013) *Handbook of the Philosophical Foundations of Business Ethics* 1091.

29 *Kiobel* (note 3 above) 4. See also *Morrison v National Australia Bank Ltd* 561 US 1, 5 (2010) (noting a ‘longstanding principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”’). *EEOC v Arabian American Oil Co* 499 US 244, 248 (1991) (Aramco) (quoting *Foley Brothers Inc v Filardo* 336 US 281, 285 (1949)).

will not apply to conduct which occurs outside its borders unless there is good reason to consider the presumption to have been rebutted.<sup>30</sup>

The court's analysis began with a statement that would bemuse many international relations theorists: 'the United States law governs domestically but does not rule the world'.<sup>31</sup> The court's rationale is that it should avoid making decisions, which could offend the sovereignty of a nation or be inconsistent with the US executive's foreign policy relations. This rationale is logical in isolation. In the context of legislation dealing with the rights of *aliens for violations of the law of nations* (ie international law), however, it is less compelling.

(i) *Textual method of interpreting statutes*

The court nonetheless rejected the petitioners' request to rebut the presumption against extraterritoriality for several reasons. In the first instance, the court held that 'nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality'.<sup>32</sup> On a purely textual reading, this is indeed correct; there is no language, which explicitly speaks to extraterritoriality. A textual reading, however, is only one mode of statutory interpretation and one that is much favoured by a cautious bench. An isolated reading of the text may not necessarily yield an accurate legal understanding of the statute.

To be fair, the court did consider a second method of statutory interpretation and looked at the history of the text. It noted that at the time of the enactment of the ATS, legal theorists had identified 'three principal offences against the law of nations',<sup>33</sup> namely, violation of safe conduct (safe conduct), infringement of the rights of ambassadors (ambassador rights), and piracy. The court's historical interpretation led them to the same conclusion: there is no basis for extending the court's jurisdiction to conduct that occurs within the territory of another sovereign state.<sup>34</sup>

There are several problems with this reasoning. The first is that the court relied on the writing of one theorist, William Blackstone, writing at the end of the 18th century, at a time when the law of nations was vastly less developed than it is today.<sup>35</sup> Had Congress defined the law of nations at the time, one could understand the court's delimitation of the modern law of nations to piracy, ambassadors and safe harbour. However, this delimitation is articulated by a theorist, whose theory is not cast in stone, particularly in the context of international law, which is constantly developing and morphing.<sup>36</sup> Moreover, why choose Blackstone's theory at that point in time? Indeed, the

30 *Kiobel* (note 3 above) 4.

31 *Ibid.*

32 *Ibid.* 8.

33 *Ibid.* 8.

34 *Ibid.* 10.

35 See generally *ibid.*, relying upon W Blackstone *Commentaries on the Laws of England* (1769) 68.

36 For a discussion of authoritative sources of international law principles, see H Kelsen *Principles of International Law* (2003) 307. See also B Meyersfeld *Domestic Violence and International Law* (2010) 9–11.

US would consider itself bound by many international developments that were not applicable at the time of the ATS, such as the prohibition against biological warfare or the laws regarding outer space.<sup>37</sup> Indeed, such an interpretation is at odds with the court's *own* earlier judgment in *Sosa v Alvarez-Machain*, in which it explicitly held that while the ATS is a facially jurisdictional statute that does not create a separate cause of action for all violations of the law of nations, it does permit courts to develop the federal common law and create jurisdiction for certain violations of the law of nations provided they involve norms which are universal, obligatory, specific and are not counteracted by prudential considerations.<sup>38</sup>

Therefore, even though the court used a second method of statutory interpretation, it did so in a manner that is open to criticism for being superficial.

But even on a purely textual interpretation, the court's conclusion is open to challenge. Can one conclude that because it did not exist at the time the ATS was drafted, that a modern-day violation could not be captured by the phrase 'the law of nations'? Indeed, a textual interpretation *demands* a broader understanding of the law of nations. Had Congress intended to specify the applicability of the ATS to the three violations of ambassadors, safe harbour and piracy, would it not simply have specified those particular crimes? Perhaps Congress did intend to limit the law of nations to three violations, but surely that claim involves a method of statutory interpretation that is closer to a purposive model and not a textual one. This brings us into the realm of statutory interpretation that the US Supreme Court tends to avoid.<sup>39</sup> the intent and purpose of Congress in establishing the ATS. A textual interpretation may thus have supported the opposite conclusion than that reached by the Supreme Court.

(ii) *Where the act of piracy occurs*

The second problem with the court's decision regarding extraterritoriality relates to its discussion of piracy. The petitioners claimed that the inclusion of the law of piracy in the ATS necessarily meant that the statute applied to conduct outside the US. The court rejected this argument. It held that the conduct of pirates occurs on the high seas and that both the conduct and the location of piracy fall outside any particular sovereign state (the high seas belonging to no one state). Therefore, according to the court, US district

37 See J Dugard *International Law A South African Perspective* (2005) 31.

38 *Sosa v Alvarez-Machain* 542 US 692, 729 (2004); see also P 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 & Civil Rights Law Review* 1, 41–2, 50–1.

39 *Morrison* (note 29 above) 12: '... divining what Congress would have wanted if it had thought of the situation before the court – demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.'



courts could pass judgment on piracy without infringing the sovereignty of another state.

This is incorrect, as Justice Breyer notes in his concurring opinion: ‘... murder and robbery that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies.’<sup>40</sup> According to Breyer, therefore, the crime of piracy necessarily occurs within the jurisdiction of another state. As such, the ATS arguably did envisage extraterritoriality of a kind.

(iii) *A politically conservative decision?*

One should understand the court’s view in the context of the US judiciary’s extreme reluctance to intervene in the executive arm of government.<sup>41</sup> As Julian Ku notes, *Kiobel*:

reflects the triumph of the ‘separation of powers’ critique of the ATS, which casts a skeptical (sic) eye on giving federal courts an independent role in the administration of both ATS lawsuits and cases involving international law more generally ... this separation of powers ... is a crucial reason why the Court unanimously rejected universal jurisdiction in *Kiobel*.<sup>42</sup>

For the most part, the US Supreme Court has adhered to a policy of ‘speaking as one nation’ in all matters implicating foreign policy so as not to fracture executive policy through piecemeal pronouncements from the US government.<sup>43</sup> This rigid (and possibly defeatist) approach to the separation of powers is as much an ideology as it is a principle of law for the current bench of the US Supreme Court. This results in, what Ingrid Wuerth refers to as, a ‘doctrinal mess’.<sup>44</sup> The court, in other words, adopted a rather constrained and conservative approach to decision-making.<sup>45</sup> It is therefore unsurprising that the court rejected the petitioners’ claim that the presumption against extraterritoriality should be rebutted by the ‘test, history, and purpose of the ATS’.<sup>46</sup>

40 *Kiobel* (note 3 above) 4 (Breyer J’s concurring opinion).

41 This is especially the case where foreign policy is being interpreted. See Stewart & Wuerth (note 3 above) 607 (noting that the majority applied the presumption against extraterritoriality to the ATS because the ‘danger of unwarranted judicial interference in the conduct of foreign policy’ is heightened, not diminished, in the ATS context ‘because the question is not what Congress has done but instead what courts may do’) *Kiobel* (note 3 above) 1664. See, for example, D Sloss ‘Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective’ (2007) 2 *New York Univ Annual Survey of American Law* 497 (contextualising US judicial deference to executive interpretations with regard to treaties).

42 Ku (note 1 above) 835.

43 There have been a number of cases in which courts have struck down state divestment and/or sanctions statutes as intruding on federal foreign affairs power. See, for example, *Crosby v National Foreign Trade Council* 530 US 363 (2000); *American Insurance Association v Garamendi* 539 US 396 (2003); *National Foreign Trade Council v Giannoulis* 523 F Supp 2d 731 (ND Ill 2007); *Odebrecht Constr Inc v Prasad* 876 F Supp 2d 1305 (SD FL 2012).

44 Stewart & Wuerth (note 3 above) 614.

45 See, for example, *Morrison* (note 29 above) 12 (‘Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects’).

46 *Kiobel* (note 3 above) 6.

The court's conclusion is decidedly narrow, choosing a technical interpretation of law over the pursuit of access to justice. At an international level, *Kiobel* is perhaps out of step with international trends – indeed, principle 2 of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) urges states to require corporations to apply their home state's human rights obligations extraterritorially.<sup>47</sup> This is further reflected in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles).<sup>48</sup> Regional human rights bodies have also adopted this principle.<sup>49</sup>

Given that the ATS was a beacon of hope and given that the US Supreme Court has doused its efficacy, what are the implications for corporate accountability under the ATS?

### **(b) What constitutes a violation of the law of nations?**

There is still the possibility of the extraterritorial application of the ATS.<sup>50</sup> The court identified a number of requirements, which, if fulfilled, would rebut the presumption against the extraterritorial application of the ATS.

The first requirement for extraterritorial application of the ATS is that the alleged offence constitutes a violation of the law of nations. According to the court, an offence will constitute a violation of the law of nations if it is specific, universal and obligatory.<sup>51</sup> The court expanded on this, holding that when the ATS:

claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.<sup>52</sup>

47 Principle 2 of the UN Guiding Principles states: 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.' Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework' A/HRC/17/31 (21 March 2011) 12 (Guiding Principles).

48 'Maastricht Principles on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights' (28 September 2011) <<http://www.maastrichtuniversity.nl/web/show/id=596286/langid=42>>. For a discussion of the Maastricht Principles, see O De Schutter, A Eide, A Khalfan, M Orellana, M Salomon & I Seiderman 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1085.

49 The Inter-American Commission on Human Rights holds that in relation to the American Convention on Human Rights 'jurisdiction ... [is] a notion linked to authority and effective control, and not merely to territorial boundaries'. See *Victor Saldano v Argentina*, Petition, Report No 38/99, Inter-Am CHR, OEA/Ser.L/V/ II.95 doc 7 rev 289 (1998) para 19. Similarly, the European Court of Human Rights has indicated that 'as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory'. See *Case of Al-Skeini v The United Kingdom* App no 55721/07, Eur Ct HR (2011) paras 138–9.

50 For a discussion in this regard see R Steinhardt 'The ATS after *Kiobel*' (31 January 2014) <<http://www.asil.org/blogs/ats-after-kiobel>> noting that 'one thing that the *Kiobel* presumption cannot mean is that ATS cases must be limited to tortious conduct within the United States'.

51 *Kiobel* (note 3 above) 6 (citing *In re Estate of Marcos, Human Rights Litigation* 25 F 3d 1467, 1475 Ninth Circuit 1994).

52 *Kiobel* (note 3 above) 14.

What is ‘sufficient force’? The standard of ‘sufficient force’ was not addressed by the majority judgment. Justice Alito, however, in his concurring opinion, took on this analysis.

Justice Alito recalled the 2010 *Morrison* case<sup>53</sup> where the court was asked to determine whether foreign plaintiffs could sue foreign and American defendants in the US for misrepresenting the value of securities traded on foreign exchanges. The court came out strongly against the jurisdiction of US courts in such matters, noting that the ‘focus of congressional concern’ in legislating the Securities Exchange Act of 1934 had been on deception in purchases and sales of securities *within* the US, not where the deception had originated.<sup>54</sup>

Alito also explored the types of offences that qualify as a violation of the law of nations. Believing that the ‘focus of congressional concern’ in respect of the ATS was limited to the three offences against the law of nations at the time of Blackstone’s writings, Alito found that the presumption against extraterritoriality is valid unless the foreign conduct ‘is sufficient to violate an international law norm that satisfies [the] requirements of definiteness and acceptance among civilized nations’.<sup>55</sup>

In a partially dissenting opinion, Breyer J (joined by Ginsburg J, Sotomayor J and Kagan J) agreed with the majority judgment but diverged on reasoning. Referencing foreign relations law, Breyer J identified three instances where the court would have jurisdiction under the ATS over foreign conduct: (i) where the harm occurs on American soil; (ii) where the defendant is an American national; or (iii) where the defendant’s conduct ‘substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor ... for a torturer or other common enemy of mankind’.<sup>56</sup> Where these conditions have been met, the incidental effect on foreign policy, whether during the times of piracy or now, would be of little consequence because of the weightier interest in combating impunity. For Breyer, the ATS is designed to address the following harms: ‘not becoming a safe harbor for violators of the most fundamental international norms’ and ‘compensating those who have suffered harm at the hands of, for example, torturers or other modern pirates’.<sup>57</sup> In such cases, on balance, the presumption against extraterritoriality does not apply.

Breyer concluded, however, that this test did not apply in this case because the ‘modern pirates’ in question, Shell and Royal Dutch Petroleum, are foreign corporations, with a limited and superficial presence in the US.<sup>58</sup> Indeed, on the facts before the court, Shell’s only connections to the US were an office in New York and shares traded on the New York Stock Exchange.

53 Ibid 1 (Alito J concurring).

54 Ibid, *see also Morrison* (note 29 above).

55 *Kiobel* (note 3 above) 2 (Alito J concurring).

56 Ibid 2 (Breyer J concurring in part, dissenting in part).

57 Ibid 7.

58 Ibid 14.

It is useful for a moment to consider what might constitute ‘touch and concern’ with ‘sufficient force’ for a case to rebut the presumption against extraterritoriality. Wuerth suggests that claims involving conduct such as US-based supervision or management, financing or providing a safe harbour within the US to alleged perpetrators of acts committed abroad, may fulfil the ‘touch and concern’ test.<sup>59</sup>

A window of possibility therefore remains and the US Supreme Court has not foreclosed all possibility of corporate liability for extraterritorial conduct under the ATS. For Esther Kiobel, however, that window has been closed.

### **(c) Corporate accountability: justice for whom, against whom?**

On the first two legal questions (ie the presumption against extraterritoriality and the content of the law of nations), the court held that the presumption against extraterritoriality can be rebutted only in limited instances, which involve claims which touch and concern the territory of the US with certain force such as to displace the presumption. What, if anything, did the court say about the eagerly anticipated question of whether the ATS could apply to a corporation?

The court did not engage the issue of corporate liability in this judgment and, as such, technically, corporate liability under the ATS remains possible. The court’s only reference to this question was to note that ‘corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices’.<sup>60</sup> The judgment does not, therefore, provide blanket immunity for corporations under the ATS.

Breyer J, however, asks a tantalising question:

Who are today’s pirates? Certainly today’s pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are ‘fair game’ where they are found. Like those pirates, they are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and punishment’.<sup>61</sup>

Certainly, here Breyer is re-affirming the reach of the ATS, and other US legislation, to individuals present within the territory of the US and who have been alleged to torture and commit other violations of the law of nations. Indeed, this has been the focus of ATS litigation since its dusting off in 1980, and has more recently been explicitly adopted by Congress in enacting the Torture Victim Protection Act in 1992 and the Extraterritorial Torture Statute (codifying US obligations as a state party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment) in 1994.<sup>62</sup>

59 Stewart & Wuerth (note 3 above) 608.

60 Ibid 14.

61 Ibid 5.

62 18 USC ss 2340 & 2340A. The Extraterritorial Torture Statute operates on the basis of universal jurisdiction. The first prosecution under the statute was against Charles ‘Chuckie’ Taylor, the son of former Liberian president Charles Taylor. E Keppler, S Jean & J Paxton Marshall ‘First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr.’ (2008) 3 *Human Rights Brief* 18–22.

However, this begs the question: Could the modern-day pirate be a multinational corporation, which engages in conduct that would constitute a violation of the law of nations? We are left to wonder, as Breyer J only very lightly touches upon the role of corporations in his judgment.

Certainly there are many activists and lawyers who embrace such a notion of the ‘corporate plunderer’. The romanticised ambition of an Erin Brokovich-esque victory over the Goliath piracy of Shell and Royal Dutch Petroleum is tantalising, but it is *not* accurate to label multinationals as modern-day pirates. While there is *not* doubt that Shell and Royal Dutch *at the very least* benefited from the crimes committed by the SPDC, it is *not* correct to compare them to ‘pirates of old’ who are the *hostis humani generis*, or the ‘common enemies of all mankind’. Our reasoning is not because corporations do not cause harm akin to pirates. Our reasons are different: multinationals are *not perceived* to be the common enemies of all mankind; perhaps they *should be*, but they are not. They instead occupy the status of the modern monarch of all humankind, the ruling elite who represents the legitimate and valued pursuit of wealth. Shell and Royal Dutch are the darlings – and not the pirates – of many capitalist countries, including the US. Rather than operate in stealth outside the constraints of the law, multinationals exert tremendous influence through political lobbies and gain refuge within legal frameworks that insulate, legitimise and even rationalise their activities.<sup>63</sup>

Corporate accountability under the ATS for offences committed abroad remains a possibility, although this is probably more likely to capture conduct by American corporations and not foreign corporations. The actions of foreign corporations will trigger the ATS in the unlikely situation that they ‘touch and concern’ the US with ‘sufficient force’. As Anupam Chander notes, *Kiobel* keeps alive the hope of corporate accountability for human rights violations but most realistically in respect of US corporations.<sup>64</sup>

The real question, however, is not whether such actions are possible but rather, whether they are probable. And this is where the real failing of *Kiobel* becomes clear. Why should those without political or economic capital, whether in the developing world or within the territory of the US, look for political and economic justice from US courts who have repeatedly evinced their intent to endorse the operations of corporations as ‘business as usual’? As Beth Stephens points out, the US courts are ‘plaintiff friendly’, offering

63 For a discussion of the power of multinational corporations and legal frameworks, see D Bilchitz ‘Do Corporations have Positive Fundamental Rights Obligations?’ 2010 *Theoria* 1; S Ratner ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale LJ* 443; N Jägers *Corporate Human Rights Obligations In Search of Accountability* (2002); S Deva *Regulating Corporate Human Rights Violations Humanizing Business* (2012); O De Schutter (ed) *Transnational Corporation and Human Rights* (2006); and generally B Meyersfeld ‘Institutional Investment and the Protection of Human Rights: A Regional Proposal’ in L Bouille (ed) *Globalisation and Governance* (2011).

64 A Chander ‘Reflections on *Kiobel* Unshackling Foreign Corporations: *Kiobel*’s Unexpected Legacy’ (2013) 107 *American J of Int Law* 829, 831.

contingency-fee structures, class actions and punitive damages.<sup>65</sup> But, as we discuss below, these are beguiling incentives and ones that may compromise effective justice for corporate human rights violations.

## V THE IMPACT OF *KIOBEL*: THE *REALPOLITIK* OF *KIOBEL*

The US (and similarly situated economies) does not have an incentive to hold multinational corporations to account for their rights violations elsewhere in the world; and even despite a greater incentive to hold corporations accountable for domestic violations, they often fail to do so.<sup>66</sup>

Developed world economies are deeply invested in the increasing wealth of multinational corporations and this wealth exists in large part because of the disparity between the Global North and the Global South and because of the similar exploitation of the most vulnerable within the Global North.

At two levels, *Kiobel* is problematic. On a technical level, the judgment is out of step with international legal developments and is internally inconsistent in respect of cases that ‘touch’ US soil but in which accountability for domestic conduct is politically disfavoured.<sup>67</sup> On a deeper political economy level, the judgment merely reinforces the existing global order and the impunity within which global capital operates to achieve profit and resource concentration in the Global North.

### (a) International human rights as ideology

It is important to discuss the geopolitical context within which international human rights law formally emerged in order to understand the positioning of the ATS vis-à-vis the mushrooming of corporate power and why those hoping to challenge the status quo use it.

The Cold War geopolitics, dominated by western political and cultural ideology, led to the construction of a human rights regime focused largely on civil and political rights and directed at non-democratic regimes that opposed capitalism and democracy as the benchmarks of good governance.<sup>68</sup> It was not long before liberal democratic states, international governmental and non-

65 B Stephens ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002) 27 *Yale J of Int Law* 1, 3.

66 Although there is a growing body of case law involving ATS claims for conduct based within the US, for the most part successful claims involve forced labour/human trafficking and/or cruel, inhuman and degrading treatment against private individuals who most often are not government officials. One notable exception is in the case of *Jama v INS* 343 F Supp 2d 338 (D NJ 2004), which was the first case brought under the ATS where all of the human rights abuses were committed in the US, and the first case to successfully challenge US domestic policy – the manner in which immigrants are detained – in a human rights context. See *Jama* 343 F Supp at 360–1.

67 For a critique of the conservatism of the US Supreme Court in respect of international law see R Steinhardt ‘Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink’ (2013) 107 *American J of Int Law* 841, 845.

68 C Bettinger-Lopez, D Finger, M Jain, J Newman, S Paoletti, & D Weissman ‘Redefining Human Rights Lawyering through the Lens of Critical Theory: Lessons for Pedagogy and Practice’ (2011) 18 *Georgetown J on Poverty Law & Policy* 337.

governmental organisations (NGOs) alike, directed those constructs towards the Global South, employing the human rights framework to challenge regimes assessed as non-liberal, authoritarian, and dictatorial.<sup>69</sup> The US assumed a monitoring function in respect of human rights violations abroad. Indeed, the main purpose of international human rights organisations such as Human Rights Watch and Amnesty International and others, at least initially, was to focus on human rights offences committed by foreign governments in the Communist Bloc or the Global South. There was limited, if any, focus on the possible human rights violations of the ‘western states’.<sup>70</sup>

Following the establishment of the United Nations and the adoption of the Universal Declaration on Human Rights after World War II, advocates presented their first petition to the UN challenging the domestic treatment of African-Americans, framing their struggles in light of the global fight for freedom.<sup>71</sup> But concerned with how the US campaign for racial equality would play on the world stage, Eleanor Roosevelt herself urged the leaders of the movement to keep their struggle internal to the US and not identify it as a violation of international law.<sup>72</sup> Indeed, civil rights activists were severely condemned as ‘un-American’ and ‘communist’ for linking domestic racial oppression with international human rights.<sup>73</sup>

Moreover, the very meaning of human rights became distorted as it was severed from the ‘Soviet-inspired’<sup>74</sup> pursuit for economic and social justice.<sup>75</sup> The competing legal and ideological considerations of the Cold War era led to the prioritisation of civil and political rights by capitalist states, including the US, and, in contrast, the prioritisation of socio-economic rights by communist states, including the Soviet Union.<sup>76</sup> The enduring impact of this ideological classification is that civil and political rights, which are deemed to be ‘negative’ in that they require the state to *abstain* from invasive action, have been prioritised by capitalist states. The states from which many multinational corporations hail, therefore, have inherited a tendency to reject

69 See M Matua ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard Int LJ* 201, 214–17.

70 For a balanced assessment regarding the hegemonic development of international law see, N Krisc ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *European J of Int Law* 369–408.

71 H Lewis ‘New Human Rights: US Ambivalence Toward the International Economic and Social Rights Framework’ in C Soohoo et al (eds) 1 *Bringing Human Rights Home, A History of Human Rights in the United States* (2008) 115–16; see also C Anderson ‘A “Hollow Mockery”: African Americans, White Supremacy, and the Development of Human Rights in the United States’ in Soohoo et al (eds) *ibid* 89.

72 D Thomas ‘Against American Supremacy: Rebuilding Human Rights Culture in the United States’ in Soohoo et al (eds) *ibid* 4–5.

73 Anderson (note 71 above) 90.

74 G McDougall ‘Shame in our own house’ *The American Prospect* (20 September 2004) <[http://prospect.org/cs/articles?article.shame\\_in\\_our\\_own\\_house](http://prospect.org/cs/articles?article.shame_in_our_own_house)>.

75 *Ibid*.

76 L Henkin ‘International Human Rights and Rights in the United States’ in T Meron (ed) *Human Rights in International Law Legal and Policy Issues* (1984) 25, 33–4.

the notion of obligatory positive state action to fulfil socio-economic rights, such as education, housing or health.<sup>77</sup>

While social welfare programmes expanded, there was no political constituency for framing these as human rights entitlements.<sup>78</sup> The US government signalled its hostility to economic and social matters as legal rights, preferring the language of ‘aspirations’.<sup>79</sup> The impact of this deliberate dichotomising of rights versus aspirations, along lines of civil and political as distinct from economic, social and cultural, still lingers.<sup>80</sup>

Makau Matua, a leading critical theorist of human rights discourse, identified the western approach to international human rights using the following paradigm of the ‘damning metaphor’, in which the ‘savages-victims-saviours’ triad drives the human rights paradigm.<sup>81</sup> As Matua explains, the human rights rhetoric has historically regarded governments of the Global South in a stark black and white framework, in which the ‘evil’ state, ‘expresses itself through an illiberal, anti-democratic, or other authoritarian culture’, and works as the ‘operational instrument of savagery’ when it deviates from cultural practices of the West.<sup>82</sup> The victim within the human rights metaphor is characterised as ‘a powerless, helpless innocent whose naturalist attributes have been negated by the primitive and offensive actions of the state or the cultural foundation of the state’.<sup>83</sup> And the saviour is the ‘victim’s bulwark against tyranny’. Matua elaborates:

The simple, yet complex promise of the savior is freedom: freedom from the tyrannies of the state, tradition, and culture. But it is also the freedom to create a better society based on particular values. In the human rights story, the savior is the human rights corpus itself, with the United Nations, Western governments, INGOs, and Western charities as the actual rescuers, redeemers of a benighted world. In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy.<sup>84</sup>

Matua’s metaphor provides an illustrative framework for grounding critiques of the manner in which parts of the human rights movement have focused outward – and downward – from the Global North. As long as human rights advocacy operates within the constraints of the saviour’s ‘agenda’ or

77 The literature on this issue is significant. For an overview of the development of international human rights law and politics, see P Alston & R Goodman in H Steiner (ed) *International Human Rights in Context Law, Politics, Morals* 3 ed (2007) 263.

78 Today, this discourse is beginning to change as communities in the US are re-casting basic services in the language of human rights. See, for example, M Jain ‘Bringing Human Rights Home: The DC Right to Housing Campaign’ (2010) 17 *Human Rights Brief* 3, 10–14.

79 Indeed, the US government refused to ratify the International Covenant on Economic, Social and Cultural Rights, despite its enthusiastic support for the Universal Declaration. P Aka ‘Analyzing US Commitment to Socioeconomic Human Rights’ (2006) 39 *Akron LR* 417, 436.

80 The US government’s position resonated in the historical conduct of well-respected NGOs such as the American Bar Association and Human Rights Watch (HRW). The ABA opposed the Universal Declaration because it included economic and social rights, and HRW viewed socio-economic violations as ‘misfortunes’. Aka *ibid* 437.

81 See Matua (note 69 above).

82 *Ibid* 203.

83 *Ibid*.

84 *Ibid* 204.



ideology, there is a greater comfort in calling this a legally enforceable human right. Hence, the flourishing of ATS claims against erstwhile dictators and torture claims against foreign individuals acting in concert with tyrannical governments. Indeed, these cases reinforce the image of the US courts as a beacon for global human rights, as a harbinger of hope for the downtrodden.

However, when creative lawyers started to use the same mechanism for the purpose of challenging corporate power – historically the repository of unbridled power – the traditional human rights paradigm with its ‘external’ focus shifted, upsetting the status quo. All of a sudden, courts, and indeed the public, were confronted with the awkward truth that actors much closer to home were complicit in human rights violations around the world.

US courts started to dismiss these cases on the basis that they interfere with foreign policy. This raises an anomaly. Irrespective of whether a case is against a political figure or a corporation, judgments addressing human rights violations abroad would invariably interfere with US foreign policy. Does executive deference not apply with equal force to dictators as to corporations? Clearly, the US government – through its executive and judiciary – has revealed its discomfort with enforcing a set of human rights obligations on multinational corporations. Whether or not there is intent to shield corporate power, the impact is that corporations often act with impunity, despite available legal mechanisms. This is due in part to the ideology underpinning the historic application of the international human rights framework.

### **(b) Corporate states and complicity**

The ATS is further enfeebled by the Supreme Court’s continual reaffirmation of the corporate state. In 2010, the court handed down judgment in *Citizens United v Federal Election Commission*,<sup>85</sup> which held that corporations, as juristic persons, enjoy freedom of speech protections that allow corporate funding of political campaigns. The court adopted a clear bias in favour of corporations having *rights*. In *Kiobel*, in contrast, the court did not engage the notion of a corporation having obligations.<sup>86</sup>

A review of the Supreme Court’s decisions for the 2012/13 term reveals at least five decisions, including *Kiobel*, that can be characterised as ‘pro-business’, and which continue to chip away at holding corporations accountable under a human rights framework.<sup>87</sup> Coupling this growing pro-corporate jurisprudence with the judgment in *Kiobel*, the US framework for corporate accountability is weakening. *Kiobel* incentivises a ‘race to the bottom’ as US corporations are

85 558 US 310 (2010).

86 P Weiss ‘Should corporations have more leeway to kill than people do?’ *New York Times* (24 February 2012) <<http://www.nytimes.com/2012/02/25/opinion/should-corporations-have-more-leeway-to-kill-than-people-do.html>>.

87 The cases range from creating further restrictions on class action suits, to upholding mandatory arbitration clauses, to reinforcing obstacles to patient lawsuit against drug manufacturers, to limiting company liability for workplace harassment. See *Comcast v Behrend*; *Amex v Italian Colors*; *Vance v Ball State*; *Mutual v Bartlett*. ‘The Supreme Court: corporate America’s employees of the month’ *Bloomberg Businessweek* (27 June 2013).

now further encouraged to operate offshore and move capital overseas, or to conduct joint ‘security’ operations abroad without oversight and with impunity.

This latter scenario most clearly reflects the anomaly of the ATS and its possibilities for robust human rights protection. In the post-9/11 landscape, US courts have shown their reluctance to adjudicate ATS cases consistently with international human rights norms.<sup>88</sup> As far back as 2004, in *Rasul v Bush*,<sup>89</sup> the Supreme Court held that the presumption against extraterritoriality did not apply to ATS claims arising out of a military base or detention facility over which the US exercised full legal authority and control. As described above, where the US government has exclusive control over a site, it would satisfy the ‘touch and concern’ test established in *Kiobel*. And yet, in May 2011, the US Supreme Court rejected a bid by five former prisoners to revive their lawsuit against Jeppesen Dataplan Inc (a wholly-owned subsidiary of Boeing) for arranging the CIA to send them to countries where they were tortured as part of the government’s unofficial ‘extraordinary rendition’ programme.<sup>90</sup> Further, in June 2013, US District Judge Gerald Bruce Lee dismissed the ATS case against CACI Premier Technology, Inc, where CACI was accused of having participated in torture and other ‘sadistic, blatant, and wanton criminal abuses’ of detainees at the US-run Abu Ghraib detention facility in Iraq, purportedly because the incidents happened overseas.<sup>91</sup> Despite CACI being a US corporation, and Abu Ghraib being within the exclusive control of the US government,<sup>92</sup> this case fell within a ‘blind spot’ of lawlessness – namely that corporations can operate with impunity if their conduct appears not to ‘touch and concern’ the US in a very literal manner. However, there is a glimmer of hope: on 30 June 2014, the Fourth Circuit Court of Appeals overturned Judge Lee’s decision, stating that the case has “sufficient ties to the United States” to be heard in U.S. courts.<sup>93</sup> Writing for a unanimous three-judge 4th Circuit

88 Maher Arar was a Syrian-born, Canadian citizen who was arrested in New York by the US government, in transit home to Canada, and was sent to Syria and tortured. The US government argued that the US officials, who were accused of conspiring with the Syrian government in torturing Arar, did not possess any ‘actual or apparent authority’ under Syrian law. With no ‘authority’ under Syrian law, the Torture Victim Protection Act (the companion statute of the ATS) did not apply to them. Although the *Arar* case did not make any allegations of corporate involvement, it is telling that the US court found creative ways to dance around the application of the TVPA, one can assume only because of the alleged complicity of the US government. See ‘The hypocrisy (and holes) in US torture law’ *The Huffington Post* (10 July 2010) <[http://www.huffingtonpost.com/valerie-brender/the-hypocrisy-and-holes-i\\_b\\_650716.html](http://www.huffingtonpost.com/valerie-brender/the-hypocrisy-and-holes-i_b_650716.html)>.

89 542 US 466, 480 (2004).

90 Extraordinary rendition refers to the practice of abducting suspected terrorists and sending them to secret CIA prisons or to foreign countries to be interrogated and often tortured. A Singh ‘Globalizing torture: CIA secret detention and extraordinary rendition’ *Open Society Justice Initiative* (2013) <<http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>>.

91 ‘Abu Ghraib case against CACI dismissed’ *The Washington Post* (26 June 2013).

92 The US government later criminally prosecuted the American soldiers in US military courts for their conduct at Abu Ghraib.

93 J. Stempel, ‘Abu Ghraib torture lawsuit revived by U.S. appeals court,’ 30 June 2014, available at: <http://whtc.com/news/articles/2014/jun/30/us-court-revives-abu-ghraib-detainees-torture-case/>.

panel, Circuit Judge Barbara Milano Keenan also said Congress has a “distinct interest” in not turning the United States into a “safe harbor” for torturers.<sup>94</sup>

The implications are far-reaching if one considers the growing corps of private contractors who accompany US military troops around the world, and who are effectively shielded from abuses they perpetrate.<sup>95</sup> As the attorneys litigating against CACI stated in their briefs:

[i]f this case does not survive *Kiobel*'s presumption against extraterritoriality, then possibly no case could, and the historic 1789 Alien Tort Statute ... would have been effectively abrogated, albeit *sub silentio*, by *Kiobel*. *Kiobel* intended no such result.<sup>96</sup>

And yet that is exactly what the court did. If the case survives following the Fourth Circuit's judgment, it could signal a shift in the courts' handling of such cases, by offering a chance for “real accountability of companies toward victims of torture and war crimes,” effectively once again “breath[ing] life into the [ATS].”

### (c) ATS: Do we need it?

While *Kiobel* has not sounded the death knell for all ATS cases, the question remains: Is the ATS an effective tool to achieve corporate accountability perpetrated beyond the US borders?<sup>97</sup> Given the historical legacy of political and economic inequality, what can be achieved even through the successful application of the ATS? The view that ATS serves as a tool in providing redress for human rights violations, when contextualised in the North/South economic disparity, is weakened. It is clear that the ATS is not the antidote to the problem of corporate malfeasance. *Kiobel* merely serves as a reminder that the global goliath that is the multinational corporation needs a similarly robust regulatory framework applicable to their activities in the countries in which they operate.

Multinational corporations from the Global North use labour from the Global South and politically weak communities within the Global North because it is cheap and regulations are weak. Can we really ask courts in the Global North to attenuate this global injustice? Even with its limited success in constraining corporate power, the ATS has not been able to penetrate the edifice and processes of global capital. Indeed, rating agencies continue to rate

94 Ibid.

95 See *Al Shimari et al v CACI International Inc et al* no 08-00827, US District Court (ED Va) (26 June 2013); ‘No accountability for military contractor’s role in Abu Ghraib torture, federal judge says’ Press Release, Center for Constitutional Rights (26 July 2013).

96 *Najim v CACI Premier Technology, Inc* no 08-cv-827, Plaintiffs’ Opposition to Defendant CACI Premier Technology, Inc’s Motion for Reconsideration of the Court’s Order Reinstating Plaintiffs’ Alien Tort Statute Claims [Dkt #159] Or In the Alternative to Dismiss the Alien Tort Statute Claims for Lack of Subject Matter Jurisdiction (3 May 2013) 2–3.

97 Robert McCorquodale provides a similar analysis but in respect of European courts and European companies. See R McCorquodale ‘Waving not Drowning: *Kiobel* outside the United States’ (2013) 4 *The American J of Int Law* 107, 846.

the investment potential of certain countries by how willing they are to keep their labour costs low.<sup>98</sup>

*Kiobel* was the latest casualty in a line of corporate accountability cases to be dismissed by courts in economically powerful states. After 13 years of litigation, the Ninth Circuit Court of Appeals dismissed ATS litigation against Anglo-Australian mining company Rio Tinto for complicity in human rights abuses on the South Pacific island of Bourgainville.<sup>99</sup> In the UK, courts have recently dismissed asbestosis and silicosis claims by South African workers against UK parent companies in *Chandler v Cape plc*; *Vava v Anglo-American South Africa Ltd*; and *Sindla Sigadla v Anglo American South Africa Ltd*. Turkcell, a Turkish telecommunications company, recently withdrew its ATS case against MTN, a South African corporation, despite allegations that MTN used bribery to win a lucrative cell phone licence in Iran.<sup>100</sup> Very recently, the Second Circuit Court of Appeals issued a decision in *Mastafa v Chevron Corp.*, a case filed against Chevron Corp. and BNP Paribas for making or facilitating unlawful payments to the Government of Iraq during Saddam Hussein's regime, which upheld the lower court's dismissal.<sup>101</sup>

A further casualty in the drastic curtailing of corporate accountability cases is the Khulumani case, alleging corporate complicity in perpetuating the atrocities of the apartheid regime in South Africa, which, following a flurry of litigation up and down the courts, was dismissed by the district court in New York.<sup>102</sup> Khulumani had named 78 diverse foreign and domestic corporations that represented a broad spectrum of the international economy, and whose role during the apartheid regime has evaded any accountability framework within South Africa, including the Truth and Reconciliation Commission (TRC) and the reparations scheme for apartheid victims administered by the Department of Justice.<sup>103</sup> The judge interpreted the "touch and concern"

98 For, example, Moody's Sovereign Rating for rating country worthiness includes 'labour costs' as an indicia for determining a country's credit rating. N Gaillard 'The Determinants of Moody's Sub-sovereign Ratings' (2009) *Int Research J of Finance and Economics* 194.

99 See *Order, Sarei et al v Rio Tinto Plc et al* no 02-56256, Ninth US Circuit Court of Appeals (28 June 2013) <<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/06/28/02-56256%20web.pdf>>.

100 See also *Balcero Giraldo v Drummond Company Inc* 2:09-cv-1041-RDP, US District Court (ND Ala) (25 July 2013) (dismissing a case where a US company was accused of hiring paramilitary forces knowing they would engage in human rights abuses); *Murillo v Bainn* 4:2011cv02373, US District Court (SD Tx) (19 April 2013) (dismissing a case brought against the Honduran president for human rights abuses that occurred in Honduras); *Munslag v D Teteren SA* 1:2012cv07038, US District Court (SD NY) (21 June 2013) (dismissing a case brought against a Belgian manufacturer by a Dutch citizen for intentional infliction of emotional distress).

101 S. Altschuler, "Alien Tort Case Development: The Second Circuit Assesses the Appropriate Focus of Jurisdictional Remedies," 27 October 2014, available at: <http://www.csrandthelaw.com/2014/10/27/alien-tort-case-development-second-circuit-addresses-the-appropriate-focus-of-jurisdictional-inquiries/>

102 K. Gullo, "IBM, Ford Win Dismissal of Claims They Aided Apartheid," Bloomberg, 29 August 2014, available at: <http://www.bloomberg.com/news/2014-08-29/ibm-ford-win-dismissal-of-claims-they-aided-apartheid.html>

103 'Khulumani endorses Advocate Ntsebeza's 21 June 2013 call for political will to address the plight of apartheid-era victims of gross violations' (25 June 2013) <[www.khulumani.net](http://www.khulumani.net)>.

requirement of *Kiobel* broadly to “drastically limit the viability of ATS claims based on conduct occurring abroad.”<sup>104</sup>

Yet again, therefore, ATS jurisprudence reveals how precarious it is for victims to constantly rely on the vagaries of litigation in a far-off country for justice. The concept of home state-based corporate accountability mechanisms for corporations operating in the developing world is, increasingly, a bewitching myth.<sup>105</sup> In many ways, *Kiobel* reveals that ATS litigation is akin to threading a gargantuan rope through the eye of a fine needle. It is an impossible task and one that will necessarily sacrifice the bulk of the problem. Though clever lawyers will creatively dance around the legal strictures of the *Kiobel* judgment, this will further distract the human rights community from the structural edifice of economic inequality.

#### **(d) An alternative paradigm: regional and domestic remedies**

Theorists note that the cases brought under the ATS are the result of systemic problems.<sup>106</sup> The solution lies in ‘an integrated effort to combine the resources of governments, the private sector, and the various international financial institutions’.<sup>107</sup> This position is one of the few articulated considerations in the post-*Kiobel* academic theory. It acknowledges that what is at stake is not the individual or communal human rights violations; it is the monolith of global hegemony that allows violations and exploitations to occur. The absence of justice is one manifestation of this much larger system of inequality.

Given the global disparity between the home state of many multinational corporations and the host states in which they operate, reliance on one statute in the Global North is myopic. Rather than seeking the limited justice that flows from the ATS, why is Africa not looking to embrace and strengthen its own regional power to create robust standards of engagement across the continent and, possibly, across the Global South?<sup>108</sup>

To be clear: corporate justice and accountability are not incompatible with a robust and healthy open market. There is a link, not only between trade and development, but also between market regulation and human rights. More specifically, there is a clear link between the global activities of multinational corporations on the one hand, and, on the other, a high level of poverty and

104 S. Altschuler, “Alien Tort Case Developments: Three Recent Developments,” 19 September 2014, available at: <http://www.csrandthelaw.com/2014/09/19/alien-tort-case-developments-three-recent-decisions/>

105 See, for example, J Bennett ‘Multinational Corporations, Social Responsibility and Conflict’ (2002) 55 *J of Int Affairs* 393 (discussing multinational corporations role in contributing to conflict and human rights abuses in various contexts, including Angola, DRC, Nigeria, and South America).

106 J Nolan, M Posner & S Labowitz ‘Beyond *Kiobel*: Alternative Remedies for Sustained Human Rights Protection’ (2013) 4 *The American J of Int Law* 107, e-48.

107 Ibid.

108 For an excellent analysis of litigation carefully structured first within the Asian human rights system and then followed by litigation in the UK, see M Mohan ‘The Road to Songmao: Transnational Litigation from Southeast Asia to the United Kingdom’ (2013) 4 *The American J of Int Law* 107, e-30.

a concomitant low level of effective governance in the countries in which multinational corporations operate.<sup>109</sup>

The most meaningful response to this hegemony is not a reliance on the courts of those who benefit from the current global structures. Rather, we need a revision of our understanding of the subjects of international law to include the real repositories of power: trans-border multinational corporations. Large global corporations, which are rights-bearers in international law, should constitute subjects of international law, with obligations that correspond to their political and economic prowess and, most importantly, their ability to do harm.<sup>110</sup>

Otherwise, most states will continue to lack the power to control corporate activity within their borders because of corporations' global presence, their socio-political influence, and a weak, or indeed, impotent, state.<sup>111</sup> Citing economist Joseph Stiglitz, Archbishop Desmond Tutu stated in his amicus curiae brief in the *Khulumani* litigation that such a recognition of corporate actors in international law would actually encourage confidence in consumers and markets by creating 'a more positive business climate'.<sup>112</sup>

In addition, we need to start recognising the regional strength of the Global South, both economically and politically. Powerful political collaboration can create a strong de facto system which, if well balanced, can be both an incentive for foreign capital and investment, as well as a constraint on the extent to which corporations can operate with impunity. This is particularly true of sub-Saharan Africa, where states, both individually and collectively, are the custodians of large tracts of the world's natural resources. To date, collaboration between such states has not yet been forged to create minimum

109 See Guiding Principles (note 47 above). See also General Assembly A/HRC/14/27 'The Special Representative has identified "governance gaps" that "provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation" (A/HRC/8/5, para 3). The framework is intended to help close those gaps ...'

110 The turnover of some MNCs dwarfs the economies of many countries, with the result that they have greater political influence. See Ratner (note 63 above) 461–2; S Joseph *Corporations and Transnational Human Rights Litigation* (2004) 1–14; S Chesterman 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations: The Case of Norway's Sovereign Wealth Fund' (2008) 23 *American Univ Int LR* 577, 594–5; BJ Richardson *Socially Responsible Investment Law Regulating the Unseen Polluters* (2008) 5. J Slawotsky 'Corporate Liability for Violating International Law under the Alien Tort Statute: The Corporation through the Lens of Globalisation and Privatisation' (2013) *Int Review of Law* 6.

111 M Jobson & T Madlingozi 'The significance of the successful appeal ruling in the *Khulumani* lawsuit' *Khulumani Support Group* (2007) <<http://www.medico.de/media/the-significance-of-the-successful-appeal-ruling-i.pdf>>. Jobson & Madlingozi further describe the relationship between corporations and states: '[Corporations] have become able to hold governments hostage to their economic demands and governments have been forced to accede because of their increasing reliance on foreign direct investment as development aid decreases. In return for their business investments, corporations insist that they remain free from accountability for any past, present or future human rights violations.'

112 Brief of amici curiae international human rights organisations, TRC commissioners, and others in support of plaintiffs. *Khulumani* (note 6 above).

standards of human rights compliance on the part of multinational corporations and financial institutions operating in this region.<sup>113</sup>

Several structures exist on the African continent which could spearhead the development of truly regional standards of corporate accountability: they include the African human rights system, with the African Court and Commission on Human and Peoples Rights; as well as sub-regional structures such as the Court for the Economic Community of West African States (ECOWAS) and the East African Court of Justice. Additionally, the African Commission Working Group on Extractive Industries, Environment and Human Rights could play a key role in articulating principles under the African Charter regarding corporate accountability, including further development of an interpretation of art 21, which states:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.<sup>114</sup>

Of note here is the recent establishment of the African Coalition for Corporate Accountability, a coalition of more than 89 civil society organisations from 28 African countries explicitly recognising the insufficiency of the international Ruggie principles in respect of business and human rights and the need to look beyond foreign courts to provide victims with access to meaningful remedies closer to home.<sup>115</sup>

One of the most potent tools to be utilised is that of a robust domestic accountability framework within South Africa.<sup>116</sup> In the current constitutional dispensation, South Africa boasts a vibrant culture of human rights that, through s 8 of the Constitution of the Republic of South Africa, 1996 applies

113 The Business and Human Rights Programme of the Centre for Applied Legal Studies (CALS) has adopted the Johannesburg Principles Project, which aims to bring together stakeholders within the financial sector to develop and adopt a set of principles that will define the role of financial institutions in enhancing human rights protection in South Africa. For more information, visit CALS' website <<http://www.wits.ac.za/law/cals/16858/home.html>>.

114 Article 21 of the Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights (Banjul Charter)* (27 June 1981) CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982) <<http://www.refworld.org/docid/3ae6b3630.html>>.

115 See Declaration of ACCA, established 27 November 2013 in Accra, Ghana <<http://www.theacca.org>>.

116 The South African domestic regulatory system is unique indeed. For a discussion of its potential, see D Bilchitz 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 124 *SALJ* 754. Several interesting national level responses are emerging, and may prove instructive to the South African context. For example, the UK, after extensive consultation and drafting, recently released the first state National Action Plan on implementation of the Guiding Principles. 'Good business: implementing the UN Guiding Principles on business and human rights' (September 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236901/BHR\\_Action\\_Plan\\_-\\_final\\_online\\_version\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf)>. Since then, five other countries, including Denmark, Finland, Italy, the Netherlands, and Spain, have launched their National Action Plans, and 12 other countries have committed to or are in the process of developing theirs. See <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>. In Nigeria, the government is considering legislation that would create a beneficiation system for communities in respect of petroleum extraction. 'How PIB will impact US Alien Tort Claims Act' (28 May 2013) <<http://www.vanguardngr.com/2013/05/how-pib-will-impact-us-alien-tort-claims-act/>>.

both vertically to governmental actors and horizontally to private actors. Section 7 of the Companies Act 71 of 2008 and reg 28 of the Pension Funds Act 24 of 1956 explicitly call for human rights considerations to inform decisions about investment and business operations. In the extractives industry, the Mineral and Petroleum Resources Development Act 28 of 2002 requires mining companies to submit Social and Labour Plans as a pre-requisite for the granting of mining or production rights.<sup>117</sup> Further, South Africa has enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act), which codifies its international obligations under the Rome Statute and obligates it to investigate offences of genocide, crimes against humanity and war crimes against perpetrators, arguably including private actors and corporate entities.<sup>118</sup> Each of these frameworks presents an opportunity for creative and effective human rights lawyering in the area of corporate accountability.

Why then, do we need to look abroad for legal relief?

## VI IMPLICATIONS FOR DEVELOPMENT AND BUILDING LOCAL LAWYERING CAPACITY

We cannot look to South Africa alone. It is also important to acknowledge the growing role of sub-Saharan states as *perpetrators* of economic harm and hegemony. South Africa is the veritable ‘United States of Africa’. South African corporations operating north of the country are increasingly identified as part of the pro-rich development regime that may, at times, trigger human rights violations in pursuit of profit. These corporations too should be held accountable.

The fixation on ATS as a singular remedy for corporate human rights violations can have (and has had) two further unintended consequences: it can stifle the development of local creative lawyering strategies and it can alienate survivors and victims from the presentation of their narratives and searching for justice.

First, by locating the epicentre of remedial action for corporate abuses in US courts, the ATS mechanism has created a dependency on Global North institutions for legal vindication. This simultaneously diverts the focus away from the development of home-grown legal and advocacy strategies. ATS lawyering necessarily is focused on US law and procedures, with the result that an opportunity to utilise the various corporate accountability mechanisms in the Global South has been underexplored. These opportunities include, of course, the traditional domestic courts and regional human rights system, but also extend to influencing the establishment of national action plans

117 Act 28 of 2002 Part II.

118 In a ground-breaking judgment, the South African Constitutional Court has unanimously ruled that the South African Police Service (SAPS) must investigate crimes against humanity perpetrated in Zimbabwe in 2007. See “New Release: Zimbabwe Torture Case - Victory in the Constitutional Court”, 30 October 2014, available at: <http://www.southernafricalitigationcentre.org/2014/10/30/news-release-zimbabwe-torture-case-victory-in-the-constitutional-court/>



to implement (and critique) the UN Guiding Principles, innovative multi-stakeholder initiatives, legislative advocacy, media engagement, community engagement, and building social movements.

Second, whilst ATS has always presented an important channel for limited redress, albeit in a US forum, the international nature of litigation has complicated the efforts of social movements to develop transnational narratives with only American judges as the intended audience. Of course, that is not to discount the importance of having an international platform on which to raise awareness about local human rights violations. For example, Dolly Filártiga wrote about the importance of being able to pursue justice on behalf of her brother by using the ATS mechanism. She recalls that the night her brother was brutally murdered in Paraguay, the chief inspector, Américo Peña-Irala, told her ‘to take the body home and never talk about what had happened. I remember telling him, “Tonight you have power over me, but tomorrow I will tell the world”’.<sup>119</sup> She recalled her efforts in vain to pursue justice in the courts of Paraguay, including that her lawyer was severely harassed and had his law licence retracted. Although she and her family were only able to obtain a civil judgment under the ATS, Dolly Filártiga highlighted the fact that in Paraguay, the case ‘remains a symbol of the injustice of the Stroessner dictatorship’, and that her brother ‘is considered a martyr for human rights’.<sup>120</sup> She also highlighted the ‘protection’ offered by the ATS judgment in that the Paraguayan government would not retaliate against her family knowing that the American legal system was ‘on our side’.<sup>121</sup>

With the recent filing of a new ATS case against a former Chilean army officer, Barrientos, charged with murdering Víctor Jara, a popular folk singer, shortly after the 1973 military coup, Dolly Filártiga’s sentiments are again echoed by Jara’s widow, Joan Jara.<sup>122</sup> She has dedicated the past 40 years to ‘rescuing Víctor from being merely a victim’. Since Joan Jara first filed a criminal lawsuit in Santiago in 1978, the case has been handled by half a dozen judges. It was then closed and later reopened and Víctor Jara’s remains were exhumed for forensic analysis and reburied in 2009. The details about his killing have also painstakingly been extracted from witnesses, with no co-operation from the army. Joan Jara’s objectives in pursuing an ATS lawsuit are not monetary compensation, but ‘to use the only available legal tool in the United States to hold Mr. Barrientos accountable’.<sup>123</sup>

Thus, the ATS has provided a rare avenue to achieve a measure of justice for victims and their families. Such international attention can also spearhead

119 ‘Dolly Filártiga American courts, global justice’ *The New York Times* (30 March 2004) <<http://www.nytimes.com/2004/03/30/opinion/american-courts-global-justice.html>>.

120 Ibid.

121 Ibid.

122 ‘Chilean’s family files suit in US over his torture and death in ’73’ *The New York Times* (5 September 2013) <<http://www.nytimes.com/2013/09/06/world/americas/family-of-slain-chilean-folk-singer-files-suit-in-florida.html>>.

123 Ibid.

or amplify domestic efforts at advocacy. As Almudena Bernabeu, one of the attorneys in the Jara case confirms:

[a]lthough ideally justice should be achieved in the home country, international justice efforts are at the service of the victims and by pursuing them, we can support and invigorate justice at home.<sup>124</sup>

The symbolic value of the ATS may differ, however, in the corporate context, perhaps based on the perception of corporate actors as less directly culpable than individuals, and with more attenuated involvement in perpetuating human rights abuses. With corporate accountability cases, often the focus of the ATS litigation is to unravel the complex layers of corporate relationships protected by and hidden behind the corporate veil.

For example, as discussed above, human rights support group Khulumani lodged a class action using ATS more than ten years ago on behalf of 85,000 families of apartheid victims. Khulumani sued corporations with significant US-based operations, for their direct support to the apartheid security agencies. The corporate defendants had either directly, or indirectly through their South African subsidiaries, provided the equipment (bullets, vehicles and technology) used by the South African apartheid security agencies in committing extrajudicial killings, torture, prolonged and arbitrary detention, indiscriminate shooting, rape and the racial classification of the people of South Africa that determined their life prospects over decades.<sup>125</sup>

None of the companies being sued engaged with the TRC or applied for amnesty. None of them acknowledged the TRC's findings concerning the business community's complicity with the apartheid regime that: '[b]usiness was central to the economy that sustained the South African state during the apartheid years'; '[b]usiness failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule'; and 'banks that gave financial support to the apartheid state were accomplices to a criminal government that consistently violated international law'. Furthermore, none of these companies engaged in any programme of reparations for victims of gross human rights violations.<sup>126</sup>

Over a decade after the litigation was launched, in August 2013, US courts dismissed the *Khulumani* litigation in what was described by the Khulumani Support Group as a 'major blow' to victims of oppression all over the world.<sup>127</sup> Although the courts partially revived the case for a while, it suffered a fatal blow recently.

124 Ibid.

125 'US circuit court dismisses apartheid litigation' Press Release (22 August 2013) <<http://www.khulumani.net/khulumani/statements/item/826-joint-press-release-us-circuit-court-dismisses-apartheid-litigation.html>>.

126 Jobson & Madlingozi (note 109 above).

127 Press Release (note 123 above). General Motors did enter into a settlement agreement of US\$1.5-million in shares with some of the Khulumani applicants, through which it tacitly admitted some responsibility. 'General Motors concedes to Khulumani in apartheid reparations case' *AllAfrica* (1 March 2012).

The symbolic importance that the ATS came to represent for the Khulumani Support Group cannot be overstated, especially at a time when pleas for corporate accountability fell on deaf ears within South Africa. The ATS was perceived as ‘one of the only effective tools’ by which to reign in ‘the extraordinary transnational power of corporations’ and to retain some measure of national accountability.<sup>128</sup> Indeed, the ATS remained one of the few mechanisms to ensure that victims/survivors were not doubly victimised, first by the particular international human rights violation, and second by the lack of access to a meaningful remedy for that violation/those violations.<sup>129</sup>

The fact, however, that *Khulumani* languished in US courts for years, and through two presidential tenures in South Africa, potentially diluted the strength with which victims and survivors could focus on local advocacy strategies to tell their stories and raise public awareness about the alleged complicity of business in the perpetuation of the apartheid state. The overly technical aspects of the ATS scheme have suppressed the full unfolding of the human narratives involved, and as a result, did not deliver the proverbial ‘day in court’ for victims and survivors. Arguably, this delay has also had an impact on the narrative in South Africa regarding corporate accountability. This is one of the deficiencies we must acknowledge in the ATS: not only must the narratives conform to satisfy the formal requirements of legal proceedings and the forum in which the court is situated, but they also must travel transnationally, distancing affected communities and individuals from the forum in which their story is told, how it is told, and how it fits into the broader relief they seek.

Reminiscent of Matua’s ‘damning metaphor’, Tshepo Madlingozi cautions that one pitfall of the ATS litigation movement may be to incentivise a transitional justice ‘industry’ which produces victims. He poignantly asks:

What kinds of politics are (re)produced when a transitional justice expert seeks out the victim, elects to rescue him from his marginality, categorizes him and represents him on the world stage? More specifically, given the fact that transitional justice experts legitimize their existence on the basis of speaking about and for victims, is it ever possible for the expert to exercise ‘responsibility’ to the victim’s story in ways that contribute to the genuine empowerment of the victim? ... [I]f ‘the story’ is the main point of encounter between the authoritative expert and the marginalized victim, ‘responsibility to the story’ should mean more than being nice to victims or adhering to rigorous scientific and ethical standards; it should also, if not principally, be about redistribution of resources and power. In exercising responsibility to the story experts need to dismantle trusteeship and reproduction of colonial relations.<sup>130</sup>

128 Jobson & Madlingozi (note 109 above).

129 See ‘Brief of amicus curiae international law and human rights experts, alien tort statute practitioners, and torture victim advocacy organisations in support of plaintiffs-appellants’ *Saleh et al v Titan Corporation et al* no 08-7008 consolidated with no 08-7009, DC Court of Appeals (11 September 2008) <[http://ccrjustice.org/files/9 11.08%20Amicus%20Brief%20International%20Law%20and%20Human%20Rights%20Experts%20on%20ATS%20and%20TVPA%20w.%20disclaimer.pdf](http://ccrjustice.org/files/9%20Amicus%20Brief%20International%20Law%20and%20Human%20Rights%20Experts%20on%20ATS%20and%20TVPA%20w.%20disclaimer.pdf)>.

130 See T Madlingozi ‘On Transnational Justice Entrepreneurs and the Production of Victims’ (2010) 2 *J of Human Rights Practice* 208–28.

This cautionary note is relevant to all lawyering, be it in the US or South Africa. Lawyers who act on behalf of survivors of harm are far more effective when their approach is integrated with the psycho-social imperatives that beset survivors of violence. It is also vital, in our view, that legal solutions to corporate abuse must be aligned with social movements and empowerment of the individuals and communities directly impacted by corporate abuse. Litigation is but one tool of many to achieve political and economic justice. As the legal profession, we must be cognisant not to reproduce victimhood through our representation, but to recognise the law as a tool that serves an important, but limited, purpose in the quest for meaningful justice on behalf of our clients. This includes a robust and respectful engagement with affected communities to garner real political and economic power on their own terms, and to define a collective vision of justice. The Khulumani Support Group is a case in point; post-*Kiobel* the work of the movement continues in other forums and with other advocacy tools, focusing on the lived realities and needs of those whose voices initiated the ATS litigation.

## VII CONCLUSION

Perhaps the most important lesson we can draw from the *Kiobel* judgment is the imperative to consider and develop local and regional responses to corporate human rights violations. This requires powerful political, economic and legal collaboration within the region. Homegrown and mutually supportive frameworks in sub-Saharan Africa have the potential to create an attractive investment location for multinational corporations to operate in the region, and simultaneously, to operate as a constraint on the extent to which powerful non-state actors can exploit impoverished states.

The pursuit of justice for corporate violations in sub-Saharan Africa should not be dependent on courts abroad. This is not to reject such forms of accountability but there is no reason why we should not take *Kiobel* as an incentive to rectify global governance gaps in Africa. The legal profession and the legal academy should seize the opportunities this gap provides in developing creative lawyering strategies to support more robust corporate accountability. Central to the strategies developed must be recognition of the necessity to support communities affected by corporate exploitation in developing and sharing their narratives at home and as part of a broader quest for economic and political justice.

Local solutions and regional standards to address corporate exploitation are imperative. Without them, we will continue to write about cases where artful judgments are lyrically penned, tap dancing around legal principles and leading us through elaborate footwork that takes us further away from – and not closer to – justice.