ACCESS TO JUSTICE HURDLES TO HOLDING CORPORATIONS LIABLE UNDER THE ALIEN TORT STATUTE

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Abstract

The Alien Tort Statute is a 1789 US provision used for raising claims on international core crimes even when committed against foreigners, on foreign soil and with foreign corporations' complicity. Its uniqueness may permit enforcing human rights in domestic courts granting access to civil redress vis-à-vis lack of international remedies. However, most of the cases are dismissed on prudential doctrines, subject-matter jurisdiction and extraterritorial application issues. The discussion has generally become highly contested since a circuit court unprecedentedly held that corporations cannot be liable under international law, and the US Supreme Court granted a writ of certiorari hearing, subsequently, submissions on corporate immunity for international core crimes.

This work seeks to contribute to the discussion on the domestic protection of human rights. Access to justice juridical challenges for foreign victims, while suing corporations under the ATS, are analyzed through a replicable selection of cases method.

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Abbreviations

ATS	Alien Tort Statute
CAH	Crimes against Humanity
CAT	Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment
CFR	Code of Federal Regulations
CIL	Customary international law
CL	Corporate Liability
HR	Human Rights
FCPA	Foreign Corrupt Practices Act
FSIA	Foreign Sovereign Immunities Act
FTCA	Federal Tort Claims Act
ICC	International Core Crimes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEEPA	International Emergency Economic Powers Act
IL	International Law
LoN	Low of Nations
RICO	Racketeer Influenced and Corrupt Organizations Act
UDHR	Universal Declaration of Human Rights
USC	United States Code
TVPA	Torture Victim Protection Act
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States
WC	War Crimes

1. Introduction and Background

During the last thirty years, the Alien Tort Statute (ATS)[1] has been used to raise raising claims before courts in the United States (US) arising out of heinous cross-border conduct amounting to international core crimes (ICC), committed against foreigners by foreign perpetrators. Plaintiffs have made allegations of genocide, war crimes (WC) and crimes against humanity (CAH) against corporations based in different countries.

Many cases have been at standstills, often thwarted by motions to dismiss and continuous amendments without proceeding to trial and reaching the merits even after a decade of litigation. There is no exhaustive set of rules on ATS admissibility requirements nor are there any binding precedents from the US Supreme Court on corporate liability (CL) for their involvement in, for instance, the commission of ICC. This situation may represent a setback to the access to justice.

The ATS federal judiciary act reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or a treaty of the United States."[2] When it was enacted, some of the main situations ruled by the ATS were "violations of safe conducts, infringement of the rights of ambassadors, and piracy";[3] however, the Supreme Court has never addressed the scope of liability under the ATS.[4]

For decades corporations have been proper defendants ion ATS litigation. Now, the issue has come to a vibrant point. Almost ten years after the decision of the Supreme Court in *Sosa v. Álvarez-Machaín*, in the midst of a judicial split involving, up to date, 7 out of 12 federal appeals courts, the Supreme Court is taking up a case, *Kiobel v. Royal Dutch Petroleum Co.*, in which the lower court held that corporations cannot be liable under international law (IL) at all.[5] Furthermore, while writing this thesis,

[1] 28 USC 1350, 1789
[2] *Ibid.*
[3] *Sosa v. Álvarez-Machaín*, 542 US 692, 2004 [hereinafter *Sosa*] at 30, available at http://www.supremecourt.gov/opinions/03pdf/03-339.pdf
[4] *Ibid.* footnotes 20 and 21
[5] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 2010 [hereinafter *Kiobel*] at 10, available at http://www.ca2.uscourts.gov/decisions/isysquery/65d4299e-609e-4820-a028-01e385b4539f/5/doc/06-4800-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/65d4299e-609e-4820-a028-01e385b4539f/5/hilite/

defendants argued for corporate immunity for complicity in CAH and other egregious acts.[6] The Court ordered that the case be reargued requesting further elaborations on extraterritoriality.[7] Succinctly, the *Kiobel certiorari* queries are aimed at whether CL is a question of the merits or of subject-matter jurisdiction, whether corporations are immune for violations of the law of nations (LoN), and whether the case's links to the US permit ATS extraterritorial application,[8] inquiries that may underpin or entirely foreclose ATS litigation against corporations.

This research concerns on the main juridical challenges that foreign victims encounter when suing corporations. These challenges frequently arise from allegations on conducts not sufficiently recognized as violations of IL, or, if so, the circumstances presented before the courts do not establish the elements of the offences. Recurrent grounds for dismissal of ATS claims also extend to, *inter alia*, extraterritorial application and exhaustion of local remedies, as well as acts of state, *forum non conveniens*, international comity, and political question doctrines.

Prima facie, there is a legal gap on corporate human rights (HR) accountability. Corporations are not parties to HR treaties, there are almost no national laws that define their HR obligations, nor specific provisions for causes of action in national jurisdictions.[9] Nonetheless, they can act as natural persons having civil and commercial obligations and rights.

Corporations that, for instance, extract natural resources, may deal with states with no-well enforced rule of law, failed states or even repressive regimes that where the violent use of military force may be determinative to maintain not only the government but also the economy. Are such corporations susceptible to HR accountability? The terms of such transactions are not often openly manifested; the issue is rather highly contested and even brought before domestic courts as seen under the ATS.

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[6] *Kiobel*, oral argument, Supreme Court, 2012, available at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=10-1491

[7] *Kiobel*, order for re-argument, Supreme Court, 2012, available at http://www.supremecourt.gov/orders/courtorders/030512zr.pdf

[8] *Kiobel*, *certiorari* granted, Supreme Court, 2011, available at http://www.supremecourt.gov/qp/10-01491qp.pdf

[9] International Commission of Jurists (ICJ), *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability*, Vol. 1, 2 and 3 (2008); also Nystuen, Gro, Andreas Føllesdal and Ola Mestad (ed.), *Human Rights, Corporate Complicity and Disinvestment*. Cambridge University Press (2011).

However, there is an unhurried but steadfast movement on HR accountability toward broader protection at national and international levels. In that arena, under international human rights law, the obligation to address HR egregious wrongdoings is clearly established and states have clear commitments on its enforcement by, for example, complying with their duty to provide for access to justice and effective remedies.

This research seeks to contribute to the discussion of the international protection of HR in domestic jurisdictions by examining the access to justice in the US for the harm caused abroad in relation to corporate activities. The research will be carried out through an analytical study on access to justice and the corresponding *de-jure* hurdles on admissibility, standing up for corporate civil liability under the ATS for their involvement in ICC.

Generally speaking, the ATS has been seen to allow ruling on corporate misconduct while operating abroad. This does not mean to overrule IL or constitutional principles, but signifies that HR breaches can be claimed by any person using the tools available, not with a right to choose at convenience but with a reinforcement approach for human rights protection, and on the entitlement to prompt and effective judicial remedies.

As a caveat, this work will not promote the extension of the HR regime to non-state actors; it is rather an approach to corporate HR abuses, explaining how they are addressed in a national jurisdiction, even when the subject may pose extraterritorial repercussions or policy concerns. Access to justice will be analytically addressed from the international legal framework *vis-à-vis* domestic standards. Then the study will analyze the most relevant judicial decisions on the topic, extracting the main juridical hurdles that foreign victims must overcome in HR litigation.

To address the current state of access to justice by foreigners seeking to hold corporations civilly liable under the ATS, this research is focused on cases regarding ICC committed abroad against foreigners and goes through a precedent study to solve the following queries:

- Does the ATS allow ample or restricted access to justice for foreign victims seeking to hold corporations liable for their complicity in ICC committed abroad?

- What is the applicable legal framework?

- What are the main juridical hurdles to accessing justice?

1.1 Research Methodology

Employing a quantitative and qualitative replicable case analysis, this thesis scrutinizes the legal standards applied by federal Circuit Courts of Appeals to foreign victims in accessing to justice under the ATS in cases involving corporate defendants, aiming at the main juridical tests, burdens and thresholds applicable. Principal resources will approach HR obligations from international treaties and sources of hard and soft-law. Subsequently, the research work studies US domestic law and judicial opinions, analyzing recurrent practices, standards on CL and admissibility issues.

Attitudinal or legalist theories of judicial behavior are set aside, thus excluding analysis on the possible political views of judges or any other realism consideration on judicial discretion. Following a method developed by Diego Lopez,[10] this research looks at how cases are influenced by the holdings of previous cases, and the extent to which courts follow such precedents. This precedent analysis method uses content analysis techniques leading to systematic purposive sampling aimed at each decision's reasoning.

A dynamic analysis will quantitatively identify the most recent relevant cases, especially considering those controversial decisions taking sides for different solutions regarding the research enquiry, reaching the appellate level, and thus having some law making discretion and binding authority. A static analysis will shown findings on the rules settled out, *rationes decidendi* and influential *obiter dictum*. Together, these elements frame this research on whether access to justice for holding corporations liable under the ATS is broad or restricted and identifying the main juridical hurdles for foreigners.

[10] López, Diego, *El Derecho de los Jueces: Obligatoriedad del Precedente Constitucional, Análisis de Sentencias y Líneas Jurisprudenciales y Teoría del Derecho Judicial*, (2006), Chapters 3, 5 and 6.

1.2 Chapter Outline

While trying to make their rights justiciable, victims must face several challenges, including their willingness and capacity, piercing the corporate veil, and fact-finding evidentiary issues, language and translation, costs and availability of litigation abroad. However, one of the main and most difficult hurdles is establishing jurisdiction.

Chapter two will place the discussion of the ATS access to justice within the corresponding legal framework, considering international hard and soft law and giving an overview of the international HR protection system. The right to an effective remedy under IL will also be examined *vis-à-vis* international normative efforts to combat organized crime, bribery and terrorism. Additionally, municipal judicial avenues for HR torts committed abroad will be addressed looking at their constitutional and statutory sources.

A quantitative and qualitative jurisprudential analysis of judicial decisions regarding alleged corporate complicity in ICC is performed in chapter three, by excerpting the most important decisions' holdings. Although the lack of Supreme Court binding precedents directly addressing the issues under study may represent challenges for this research. ATS litigation is still outstanding for this analysis and a very "hot" issue, since concerns arise from the interpretation of a vague statute with policy implications.

In the fourth chapter, the analytical study will address the hurdles posed to the access to justice from the perspective of elements of competence *ratione personae, materiae, loci* and *temporis*. While doing so, and accordingly to the outcomes in the previous chapter, the most frequent concerns on extraterritoriality, scope of liability and corporate immunity will be emphasized. This chapter will also consider exhaustion of local remedies tests and such prudential doctrinal hurdles as international comity, acts of state, political question and *forum non conveniens*.

The ATS authorizes adjudicating claims in the US domestic jurisdiction for wrongs offending the humankind without overloading supranational bodies; it has the advantage of providing for jurisdiction over the conduct of natural and legal persons under the law of damages. Even if the US Supreme Court in a forthcoming decision in

Kiobel excludes corporations from ATS scope, the worldwide movement towards CL will continue and the ATS will still address physical individuals' civil liability.

Lastly, the final chapter will analyze the current highly contested discussions regarding the hurdles to access to justice. It will offer an appraisal on different *post-Kiobel* scenarios, supporting the well settled understanding that corporations are proper defendants under domestic tort law, and concluding with some reflections on *de-jure* access to justice restraints.

2. Legal Framework

Under international human rights law states are the most important duty bearers having the obligation to prevent, ensure, foster and fulfill human rights (HR) as well as to prosecute and punish those responsible for breaching them. However, there are other actors that also greatly impact HR matters, including corporations, the role of which is the focus of this thesis. The following subsection analyzes the legal background of ATS litigation aimed at access to justice for involvement in international core crimes (ICC) and civil liability.

2.1 Access to Justice

The broad concept of access to justice can be disaggregated into several components, such as material access to justice, which regards the physical availability and well-functioning of qualified courts and judicial operators; economic resources to raise a lawsuit, gather evidence and run judicial procedures; and bureaucratization and efficiency. From a legal perspective, the concept concerns fair trials, the judiciary's independence and competence regarding causes of action suitable for settling disputes, and the openness, simplicity and flexibility of proceedings.[11]

A legal approach to access to justice is emphasized, which examines the protection of rights and freedoms in the US *vis-à-vis* ICC committed abroad against foreigners. The concept of access to justice as a human right is understood from the entitlement of an effective, enforceable and prompt judicial remedy drawn from such international sources such as the Universal Declaration of Human Rights (UDHR), articles 8, 29 and 30; the Convention on the Elimination of All Forms of Racial Discrimination, article 6; the International Covenant on Civil and Political Rights, article 2(3); the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), art. 14; and the American Declaration of the Rights and Duties of Man, article 18, all which have been ratified by the US. Additional sources of judicial remedies include the American Convention on Human Rights, article 25; the European

[11] Francioni, Francesco, *Access to Justice as a Human Right*, Oxford University Press (2007); also Letto-Vanamo, Pia, *Access to Justice: A Conceptual and Practical Analysis with Implications for Justice Reforms*, International Development Law Organization (IDLO) - Voices of Development Jurists Paper Series, Vol. 2 No. 1, 2005

Convention on Human Rights, article 13; the Charter of Fundamental Rights of the European Union, article 47; and the Convention for the Protection of All Persons from Enforced Disappearance, article 8(2).

States are subject to established direct obligations to protect against violations, even when committed by private entities,[12] *vis-à-vis* emerging indirect corporate obligations.[13] Moreover, it is important to highlight the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International human rights law and Serious Violations of International Humanitarian Law, which provides for, *inter alia*, adequate, effective and prompt access to justice irrespective of who may be responsible for the violation, the incorporation of provisions for universal jurisdiction on ICC and for granting reparations including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as well as the removal of statutes of limitation.[14]

Although some of these international sources are understood as non-enforceable in the US given their aspirational character, in the case of the UDHR, or their non-self-executing conditions for the ICCPR,[15] they represent international commitments toward HR protection constituting an exceptional aid for the interpretation and development of domestic provisions regarding HR litigation. The ATS is suitable for the internalization of those norms and a sort of judicial furtherance of HR.

Together with the individuals' right to file complaints correlated duties are imposed on states to satisfy such legal demands and to prevent arbitrary impediments on enjoyment of rights. However, even when individuals do have rights under international law (IL), that does not necessarily entail directly enforceable remedies. Specific domestic law doctrines may hinder effective access to justice and render the remedies not fully effective.

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[12] UN Human Rights Committee, *General comment no. 31 [80], The nature of the General legal obligation imposed on States Parties to the Covenant*, 2004, CCPR/C/21/Rev.1/Add.13, Para. 8.
[13] Vázquez, Carlos, *Direct vs. Indirect Obligations of Corporations Under International Law*. Columbia Journal of Transnational Law, Vol. 43, 2005 at 927, cited in Fauchald, Kristian & Stigen, Jo, *Corporate Responsibility before International Institutions*, The George Washington International Law Review 40(4), 2009.
[14] UN General Assembly, 2006, A/RES/60/147.
[15] Henner, Peter, *Human Rights and the Alien Tort Statute: Law, History and Analysis*, (2009), at 121-122.

2.2 International Core Crimes

The ATS has served as a source for the protection of HR in US federal courts. Recurrently, violations have been alleged and recognized on genocide, war crimes (WC), and crimes against humanity (CAH);[16] offences have been considered by American judges looking at the four Geneva Conventions of 1949, ratified by the US;[17] the statutes and judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and the Rome Statute of the International Criminal Court [hereinafter Rome Statute].

The US courts have pioneered in hearing cases of ICC involving corporations. In that sense, US military courts, although lacking jurisdiction over legal persons, carried out the twelve Subsequent Nuremberg Trials holding accountable, among others, chief executives, boards of managers and owners of companies.

In 1947 the *Flick* case involved the prosecution of chief executives of a conglomerate company that owned coal and iron mines and that produced steel, for their participation in murder and torture committed by the SS, the use of forced labor, "Aryanization" of Jewish properties through plunder of public and private property, and spoliation. In the *I.G. Farben* case, similar charges were made against 24 directors of a holding of chemicals corporations that produced poison gas used at concentration camps, alleging enslavement, deportation and the use of slave labor as corporate policy. I.G. Farben was split up into the original constituent companies, "and today only Agfa, BASF, and Bayer remain". Finally, the *Krupp* case held liable twelve individuals of the managing board of an armament and ammunition industrial group, foreseeing "the possibility that in certain instances, it is the actions of the enterprise rather than the individual defendant that appears criminal."[18]

Although the extension of attribution of responsibility for legal entities remains contested, corporate complicity under the ATS has been alleged mainly regarding the

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[16] Likewise *jus cogens* violations, e.g. forced and child labor or extra judicial killings; also other offences such on environmental damage.

[17] *Supra* note 15 at 204 referring *Hamdan v. Rumsfeld* (548 US 557, 2006) "*Hamdan* seems to have assumed without actually discussing that the Geneva Conventions were self-executing and could be enforced by a private party."

[18] Beisinghoff, Niels, *Corporations and Human Rights*. Peter Lang (2009) at 37-39. See also US Holocaust Memorial Museum at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007074 ; also Benjamin Ferencz, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation* (Indiana University Press, 2002); also Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law.* International Review of the Red Cross, Vol. 88 N. 863 (2006) at 674.

aiding and abetting mode of liability, a non-pacific interpretation. Some federal courts have applied the Rome Statute standard of *purpose*, article 25(3)(c)(d)(i), while others have applied the ICTY[19] and ICTR[20] precedents with a *knowledge* approach; in any case, a general prohibition on assisting the commission of ICC has been acknowledged, a prohibition extendible even to private entities.

2.3 Civil or Criminal Liability

Independently of whether there is international corporate personhood, and whether they have standing before international instances; in both civil and common law legal systems, under domestic law, victims may be entitled to recover damages and compensation from the commission of crimes. To a certain extent, it is possible to claim reparation even when direct perpetrators are not identified. Additionally, when it comes to private law, if a natural or juridical person is liable for a civil fault or tort, the person would be obliged to compensate for damage caused not only by intentional acts but also by negligence. Liability may arise for damages caused, *inter alia,* extra-contractually, or on agency, vicarious, parent-subsidiary, or joint venture responsibility.[21] HR litigation has not escaped such eventuality, and victims throughout the world have pursued protection before criminal and civil courts.

Nowadays, there is an emerging trend of imposing HR responsibilities on investments and corporations. Even more, there is a public interest in addressing their liability for HR wrongs. In 2011, the international community reached a significant peak with the UN Guiding Principles on Business and Human Rights, acknowledging three basic

[19] *Prosecutor v. Vujadin Popović* (Judgment), IT-05-88-T, ICTY, 2010 "The accused does not need to have the intent to commit the crime. The aider and abettor does not need to know who is committing the crime. The person or persons committing the crime need not have been tried or identified, even in respect of a crime that requires specific intent. Neither does the person or persons committing the crime need to be aware of the involvement of the aider and abetter." at para. 1016; also para. 1497 "To aid and abet a crime, the accused must carry out an act, whether a positive act or an omission, to assist, encourage or lend moral support to the perpetration of a crime, and this support has a substantial effect upon the perpetration of such crime. The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."

[20] *Kalimanzira v. The Prosecutor* (Appeal Judgment), ICTR-05-88-A, ICTR, 2010 "The requisite mental element is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator." Specific intent crimes, such as genocide, require that "the aider and abettor must know of the principal perpetrator's specific intent." at para. 86.

[21] Kessedjian, Catherine [et. al], *Civil Litigation for Human Rights Violations,* International Law Association Committee on Civil Litigation and the Interests of the Public, Interim Report, 2010.

pillars: 1) the states' duty to protect HR; 2) the corporations' duty to respect HR; and 3) the victims' entitlement to an effective remedy.[22]

Regarding judicial mechanisms, the Guiding Principles stand for reduction of legal barriers regarding attribution of responsibility and removal of economic or political pressures on courts. They encourage states not only to refrain from committing or allowing the commission of violations, but also to redress such offences,[23] and the ATS is perfectly suited for it. It gives the US the opportunity once again to pioneer the prosecution of the most heinous corporate business-related crimes, this time pursuing corporations. Not aimed at physical punishment, the ATS is not a criminal provision, but at civilly condemns without excluding punitive sanctions, such as fines.

At the international level, there is a worldwide trend toward public awareness of business responsibility. At the domestic level sometimes reflected in domestic criminal and/or civil provisions. In the US corporate civil liability for complicity in ICC has already been enforceable under the ATS, and is now in the hands of the Supreme Court to keep a 1789 statute working.

Some international tools have advanced the ongoing movement toward corporate liability (CL) in either civil or criminal norms. Although these tools do not all necessarily address HR issues and can be deemed aspirational, they can strengthen states' ability to fight and redress HR violations. These include the Convention on the Suppression and Punishment of the Crime of Apartheid, article I(2); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, articles 2(14), 4(3)(4); the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, articles 2, 3(2), and 5; the Convention for the Suppression of the Financing of Terrorism, article 5; Convention against Transnational Organized Crime, articles 10, and 31(2)(d), the latter three ratified by the US in 1998, 2002 and 2005 respectively. Others providing similarly are the Council of Europe Conventions on the Prevention of Terrorism, articles 10, 11(3),

[22] UN Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" framework."* 2011 A/HRC/17/31at para. 6.; adopted A/HRC/RES/17/4, 2011 [hereinafter Guiding Principles].
[23] *Ibid.* Principles 1, 25 and 26.

and 17(3), the Convention on Cybercrime, article 12, and the Convention on Action against Trafficking in Human Beings, article 22.[24]

2.4 Domestic Remedies for Alien Torts

The international trend on CL has also had some implications at the local level. There has been, for instance, broader usage of tort law in the US applying the ATS and the Torture Victim Protection Act (TVPA) statutes. Similarly, in other latitudes access to justice has even been open to criminal, civil and administrative liability.[25]

The ATS must be analyzed harmonically and systematically together with other sources, particularly when it contains a sort of *renvoi* clause shortly referring to violations of the law of nations (LoN). It is not a claims act, since "a lawsuit cannot be maintained for violating the ATS; instead the ATS can be used only to vindicate a statutory or common law right that derives from another source."[26] As a caveat, it may also be argued that tort law has a constitutional source under section 1 of the Fourteenth amendment giving, moreover, room for tort claims in individual states.[27]

Foreigners can file suit against under the ATS in US federal courts to some extent subject to grounds for jurisdiction and principles of IL such as territorial integrity, exhaustion of local remedies, equal sovereignty and political independence of other states, as well as constitutional separation of powers principles.

The US Constitution refers to the LoN in its article 1, §8, which gives Congress power to define and punish offences against the LoN and in article 3, §2, which provides for adjudicative jurisdiction over cases concerning US citizens and "foreign states, citizens or subjects," provided that jurisdictional pre-requisites are met according to the Constitution itself, national law and treaties made.

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[24] UN Security Council, *Resolution [on threats to international peace and security caused by terrorist acts]*, 28 S/RES/1373, 2001.
[25] Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, Submission to John Ruggie (2008); also Pieth, Mark, and Ivory, Radha (Eds.), *Corporate Criminal Liability, Emergence, Convergence, and Risk (Ius Gentium: Comparative Perspectives on Law and Justice)*, English Edition Springer (2011); and Canada S.C. 2012, c.1, s.2, 13; 2012.
[26] *Supra* note 15 at 13; also *Sosa* at 18.
[27] Goldberg, John C.P. *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, The Yale Law Journal, Vol. 115, at 524, 2005; also Ana Peyro Llopis, *The Place of International Law in Recent Supreme Court Decisions*, Global Law Working Paper 04/05, NYU School of Law.

Statutory law providing for federal jurisdiction in similar terms may also be found in the 28 USC. §1331, §1332(a)(2)(3) regarding citizens of foreign states, and (c)(1) clarifying that a corporation may be deemed to be a citizen of the state where it is incorporated, or where it has its principal place of business. Some other Congressional legislative acts providing for CL and/or extraterritorial application, frequently used in conjunction with the ATS, are the Foreign Sovereign Immunities Act (FSIA), the Federal Tort Claims Act (FTCA), the Racketeer Influenced and Corrupt Organizations Act (RICO), the Foreign Corrupt Practices Act (FCPA), the International Emergency Economic Powers Act (IEEPA); and the TVPA. Additionally, compliance programs and self-report mechanisms for corporate wrongs are available under the Justice Department's Principles of Federal Prosecutions of Business Organizations and the Federal Sentencing Guidelines Manual.[28]

As a case in point, in *US v. Chiquita Brands Intl*, 2007, the US Department of Justice investigated Chiquita for its alleged illegal payments to paramilitary groups in Colombia. Criminal charges were raised under the Terrorism Material Support Statute (18 USC. §2339B), the IEEPA (50 USC. §1705 (b)), and the Global Terrorism Sanctions Regulations (31 C.F.R. §594.204).[29] Rather than face trial, the corporation pleaded guilty and was fined $25 million. Later, in June and November of 2007, February of 2008, and March of 2011, several lawsuits were filed alleging violations of the ATS and TVPA, accumulating claims for killings committed in furtherance of WC, CAH, extrajudicial killings and torture (*Doe v. Chiquita Brands International, Inc.*, 2007, seven cases consolidated in the District Court of Southern Florida).[30] This litigation is still pending (any appeals will be to the 11th Circuit Court o Appeals).

The TVPA specifically addresses HR violations. Like the ATS, it permits the recovery of damages through a civil cause of action even for torts that were committed abroad and against foreigners. It also allows American citizens to sue. However, the TVPA is limited to torture and/or extrajudicial killing, and, unlike the ATS, it can be raised only against individuals (physical persons), expressly requires exhaustion of local remedies, and contains a ten years statute of limitation.

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[28] Dubber, Markus D., *Criminalizing Complicity: A Comparative Analysis*, Journal of International Criminal Justice, Vol. 5, Issue 4, (2007).
[29] Sturm College of Law - University of Denver, *US v. Chiquita Int'l Brands, 07-055*, 2007; also Business & Human Rights Resource Centre, *Case profile: Chiquita lawsuits (re Colombia).*
[30] *In Re Chiquita Brands International, No. 08-01916-MD-MARRA*, 2011.

3. Selected Cases

Addressing the research question, it is necessary to look at the opinions of the US courts on the issue. Recurrently, lawsuits have been dismissed on different grounds, and therefore the study is focused on the admissibility hurdles for holding corporations liable. In that sense, great relevance is given to the most recent judicial decisions, although some clarification on older landmark cases is essential.

In *Filártiga v. Peña-Irala* [hereinafter *Filártiga*], the 2nd Circuit Court of Appeals held that the ATS allows US courts to hear claims for torts in violation of IL of HR, regardless of the nationality of the parties and even when committed in foreign countries.[31] After *Filártiga*, plaintiffs started a new wave of HR litigation, bringing before justice, *inter alia,* military leaders and dictatorships, such as Ferdinand Marcos (Philippines); the Argentinian Military Junta (dictatorship committee), 1976 – 1983; the Nigerian Military Junta, 1993-1999; Radovan Karadžić (first President of Republika Srpska); and the South African Apartheid Regime (1948 – 1994).

However, *Sosa* has been the latest ATS Supreme Court controlling decision. It held that foreigners can sue other non-nationals in US courts for torts committed under the ATS' scope on specific, universal and obligatory internationally accepted norms.[32] Although it did not deal with a corporate defendant, the Court set very important guidelines and, consequently, here the analysis is limited to ATS cases filed against corporations after *Sosa*.

It is remarkable that almost no ATS claims against corporations have been heard by a jury. However, a jury decided *Romero v. Drummond Co.* [hereinafter *Drummond*], a lawsuit filed in 2002 by the Colombian trade union Sintramienergética and the relatives of assassinated trade union leaders. The Corporate defendant was relieved.[33] However, the 11th Circuit is hearing a new lawsuit filed in 2009 on similar grounds.[34]

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[31] Hutchens, Kristen, *International Law in the American Courts – Khulumani v. Barclay National Bank Ltd.: The Decision Heard 'Round the Corporate World, Part II/II*, 9 German Law Journal 639-682 (2008), footnote 96 citing *Filártiga v. Peña-Irala*, 630 F.2d 876, 1980 at 653.
[32] *Supra* note 3
[33] 552 F.3d 1303, 2008.
[34] 640 F.3d 1338, 2011.

Similarly, in 2001 Coca-Cola was sued by the Colombian trade union Sinaltrainal, but this time the 11th Circuit, although allowed to consider ATS claims against corporate defendants, ruled that the alleged circumstances did not amount to war crimes (WC).[35]

In *Sosa* the Court stated that the statute is not itself a claims act, but rather a judiciary act that provides for jurisdiction. Thus, breach of the law is drawn from different legal sources, such as IL adopted through common law causes of action in the US. Still, the decision left behind some lurking questions, which have been surfacing with recent ATS litigation against corporations that began approximately in the late 1990s. Some inquiries remain, whether private actors can be held liable at all, and, if so, is some kind of immunity implied for incorporated businesses? This latter inquiry is likely to be addressed in the forthcoming decision in *Kiobel*.

3.1 Precedent Study Methodology

To attempt a systematic replicable analysis of the precedent, the jurisprudential study will be performed according to a method developed by the scholar Diego Eduardo Lopez Medina in his book "El Derecho de los Jueces".[36] This method has been mainly applied to judgments issued by highest courts, and it is run through a dynamic and static analysis.

3.1.1 Dynamic Analysis

Following Diego Lopez's method, to establish a line of precedent it is first necessary to have a dynamic analysis by:

[35] 578 F.3d 1252, 2009 [hereinafter *Sinaltrainal*] at 26, available at http://www.ca11.uscourts.gov/opinions/ops/200615851.pdf

[36] *Supra* note 10; also Hall, Mark A. and Wright, Ronald F., *Systematic Content Analysis of Judicial Opinions*, California Law Review, Vol. 96, at 63-122, (2008); and Krippendorff, Klaus, *Content Analysis: an Introduction to its Methodology*, (2004).

i) Suggesting a juridical problem: does the ATS allow ample or restricted access to justice for foreign victims holding corporations liable for their complicity in ICC committed abroad?

ii) Establishing the opposite opinions represented in some recent judgments, hence the options would be: *a)* there is ample access for foreigners suing corporations under the ATS, and *b)* the access is restricted.

Firstly, the precedent line needs to find the most recent and relevant circuit courts decisions on the issue considering analogous patterns of fact and developments on relevant concepts, and analyzing those that have some binding force. It means looking at the circuit courts, and then looking back for groundbreaking cases indicating clear patterns for later decisions. The table below shows the preliminary results in that regard.

At this initial stage, the study implies a quantitative survey on precedents referred by recent judicial opinions, casting outcomes on those more often cited by the courts. Sometimes, justices use such precedents to criticize and express disagreements, although they also may use them to support previous views on particular topics or to rely upon earlier decisions to develop articulated reasoning on similar *de-jure* questions. Whatever the approach, the review expressed in the table below quantitatively tests how often certain prior cases have been mentioned, indicating beforehand the importance given to them while studying similar material facts. The actual impact of the referred decisions will be analyzed in the second phase of the precedent study, also following Diego Lopez's method.

Recent Cases / References to Previous Cases	10/25/11 *Sarei v. Rio Tinto PLC.* (9th Cir. *en banc*)	09/19/11 *Aziz v. Alcolac Inc.* (4th Cir.)	07/08/11 *Doe VIII v. Exxon-Mobil Corp.*, (D.C. Cir.)	09/17/10 *Kiobel v. Royal Dutch Petroleum Co.* (2nd Cir.)	Total
06/30/80 *Filártiga v. Peña-Irala* (2nd Cir.)	2		9	17	**28**
04/12/83 *Halberstam v. Welch* (D.C. Cir.)			5		**5**
02/03/84 *Tel-Oren v. Libya* (D.C. Cir.)	3		16	3	**22**
05/22/92 *Siderman de Blake v. Argentina* (9th Cir.)	4				**4**
10/21/92 *In re Estate of Ferdinand Marcos* (*Marcos I*) (9th Cir.)	4		1		**5**
06/16/94 *In re Estate of Ferdinand Marcos* (*Marcos II*) (9th Cir.)	3		1	1	**5**
10/13/95 *Kadić v. Karadžić* (2nd Cir.)	5		4	4	**13**
06/03/03 *Álvarez-Machain v. US* (9th Cir. *en banc*)	2				**2**
08/29/03 *Flores v. S. Perú Copper Corp.* (2nd Cir.)		1	4	18	**23**
06/29/04 *Sosa v. Álvarez-Machaín* (Sprm. Court)	70	10	95	55	**230**
04/12/07 *Sarei v. Rio Tinto* (*Rio Tinto II*) (9th Cir.)	1		1		**2**
05/21/07 *Bell Atl. v. Twombly* (Sprm. Court)	1	1			**2**
09/17/07 *Corrie v. Caterpillar* (9th Cir.)	2		1		**3**
10/12/07 *Khulumani v. Barclay Bank* (2nd Cir.)	7	9	17	16	**49**
12/16/08 *Sarei v. Rio Tinto* (*Rio Tinto III*) (9th Cir. *en banc*)	7		4		**11**
12/22/08 *Romero v. Drummond* (11th Cir.)	1	2	2		**5**
01/30/09 *Abdullahi v. Pfizer* (2nd Cir.)			2	3	**5**
05/18/09 *Ashcroft v. Iqbal* (Sprm. Court)	1	3		2	**6**
08/11/09 *Sinaltrainal v. Coca-Cola* (11th Cir.)	1	2	1		**4**
10/02/09 *Presbyterian Church of Sudan v. Talisman* (2d Cir.)	1	12	10	7	**30**
06/24/10 *Morrison v. Nat'l Australia Bank* (Sprm. Court).	5		6	2	**13**
09/10/10. *Bowoto v. Chevron* (9th Cir.)	2	3	5	1	**11**
09/17/10 2010. *Kiobel v. Royal Dutch Petroleum* (2nd Cir.)	6		37		**43**
07/08/11 *Doe VIII v. Exxon-Mobil* (D.C. Cir.)	5	12			**17**
07/11/11 *Flomo v. Firestone Natural Rubber* (7th Cir.)	3	1			**4**

The table's survey outcomes are of great help in identifying links between earlier decisions and relevant recent ones. In this way, the research work is carried through a systematic analysis of precedent to avoid an arbitrary selection of isolated decisions,

thereby gaining an overview of the precedent line used by justices to support their opinions. The quantitative test applied in the table verifies that the leading case used by the circuit courts is *Sosa*. Since the latter cases studied here are different in circumstances and particularly on the defendants, courts have developed their rulings based upon different interpretations of the ATS and the *Sosa* holdings.

According to the chart, it is apparent that among the four most recent decisions, three having a broad interpretation of *Sosa* and ATS requirements for holding corporations liable (green), while the other decision provides for restricted interpretation and therefore grants limited access for foreigners' claims on torts committed abroad (red).

Following Lopez's method, the most recent decisions relevant to the given problem constitute an *"Archimedean* point."[37] Consequently, the cases in the table were selected based on similar patterns of facts: submissions on international core crimes (ICC) committed abroad against foreigners with the involvement of corporations. Since, highest US Court has not determined corporate liability under the ATS, it was necessary to start from two "Archimedean points" indicating diverse opinions, *Kiobel* and *Sarei*.

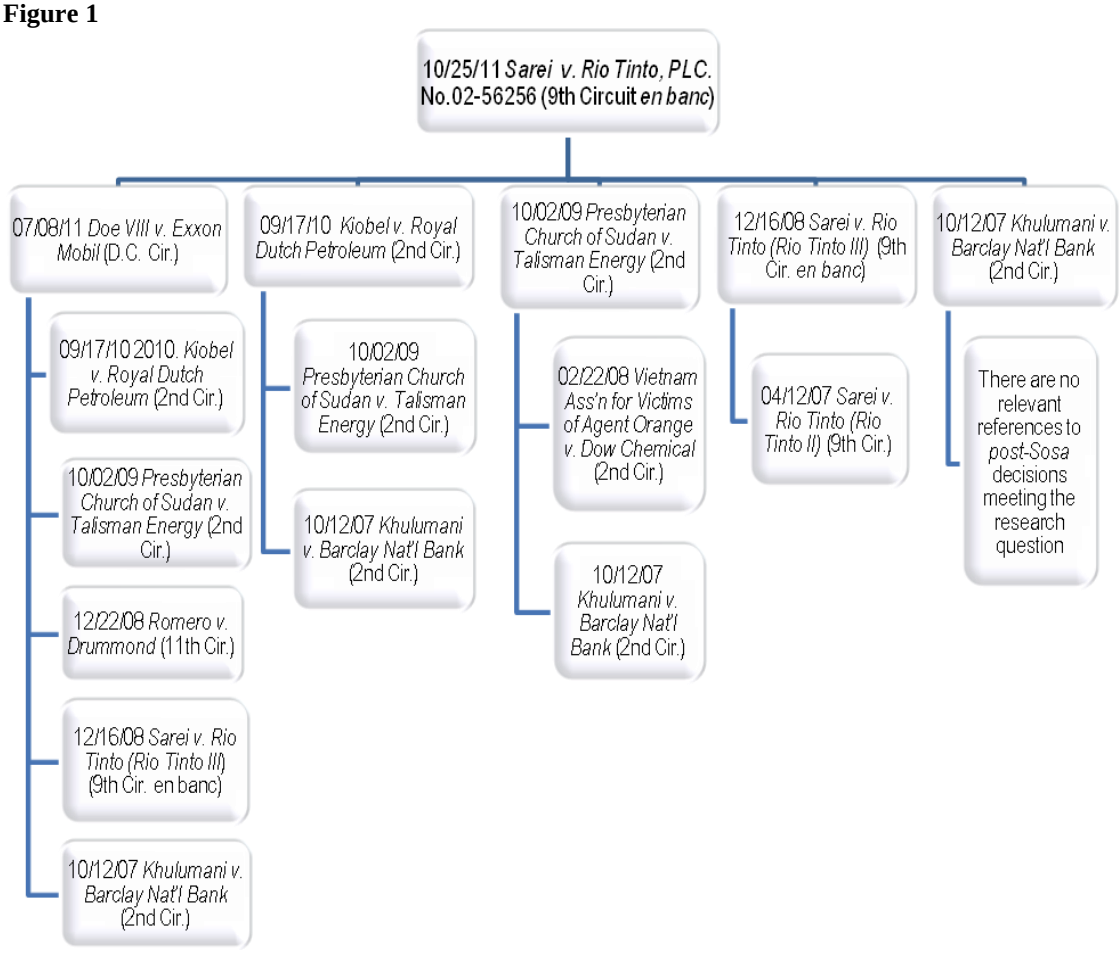
Secondly, it is possible to elaborate a *"nicho citacional"* (citations niche)[38] identifying the citation map of other relevant decisions made by the courts (selecting those most often mentioned with similar circumstances) to the point of getting a leading case in which the court started to deal with the problem. The previous table already verifies that the leading case is *Sosa*. However, since *Sosa* did not involve corporate defendants, here cases without corporate defendant or that deal with torts other than ICC (such as terrorism, child labor or pollution, as in *Flores v. S. Perú Copper*,[39] are not considered. This research looks at *post-Sosa* landmark decisions.

Given the overwhelming number of citations of judicial opinions dating back even before *Marbury v. Madison*, 1803, here are essentially those more often mentioned in *Kiobel* and *Sarei* meeting the elements of the research question, and that were rendered after *Sosa*. Furthermore, those precedents referenced in rhetoric or generic

[37] *Supra* note 10 at 168.
[38] *Supra* note 10.
[39] 414 F.3d233, 2003.

manner or just barely mentioned are not analyzed. The diagrams below show the citations niche outcomes.

Figure 1



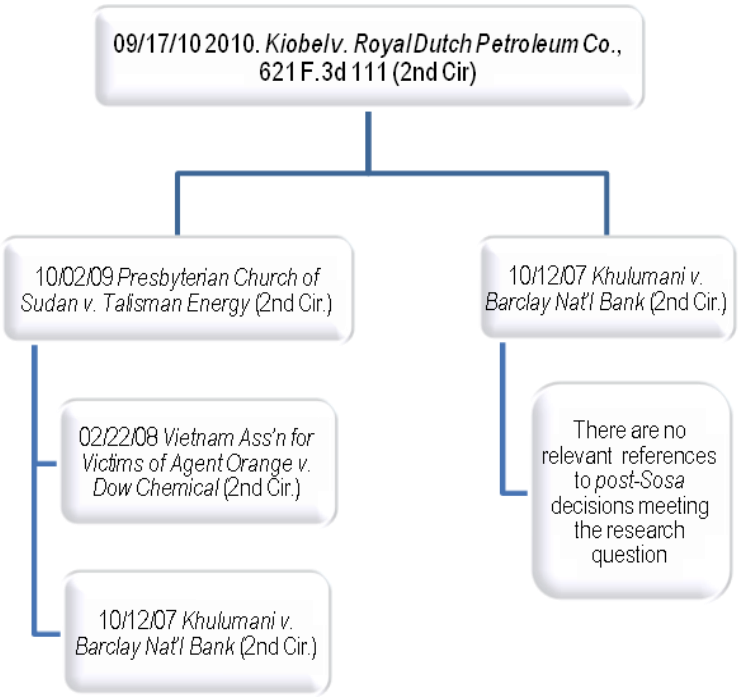
As seen in the citation niche diagram, after *Sosa*, the *Khulumani* decision[40] is the most referred by the appeals courts. It dealt with very complex juridical problems not solved before and the scope of liability for a non-individual respondent under the ATS. Then the 2nd Circuit held that aiding and abetting violations of customary international law (CIL) provides a basis for ATS jurisdiction. The Court provided remarkable clarification by considering an international criminal law category rather than other modes of civil

[40] *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254, 2007 [hereinafter *Khulumani*] available at http://www.ca2.uscourts.gov/decisions/isysquery/7855b96c-9e96-4e54-a68d-ed1f45b0942e/12/doc/05-2141-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/7855b96c-9e96-4e54-a68d-ed1f45b0942e/12/hilite/ ; part of *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 2009. Recently, one defendant agreed settlement, see Corcoran, Bill, *Apartheid victims secure GM compensation deal*, The Irish Times (2012).

liability, such as agency or parent-subsidiary liability available under federal common law.

However, the ruling was not pacific, and Judge Katzmann's concurring opinion has been the most cited by other circuit courts. He and Judge Hall wrote separately on how to establish accessorial liability.

Figure 2



3.1.2 Static Analysis

Subsequently, a static analysis examined judicial opinions that granted broader or more restricted access for foreigners suing corporations under the ATS, thus pointing out the more consistent holdings establishing the law governing the problem. In the meantime, a chart will show decisions that consolidate positions, distinguishing different possible situations, or challenge previous opinions. This precedent method attempts to show the rulings' pattern followed by the courts consistently and predictably.

By examining the most recent circuit courts decisions, it becomes clear that the issues under study are rather highly contested which has led to thoughtful opinions by several federal courts. Currently, there is a judicial split among them, involving at least seven out of twelve circuit courts, mainly regarding subject-matter jurisdiction and the scope of liability. It is expected that a polemic precedent line will be found representing the contrasting holdings and outcomes.

Stare decisis is one of the strongest doctrines applied to resolve *de-jure* questions in common law systems. In that sense, lower trial courts are bound by precedents set by higher courts in the same jurisdiction, and later cases must be treated equally and decided following similar reasoning whenever they raise similar material facts. [41]

Based upon the analysis of the relevant cases from the above citations niche diagrams, below some findings are excerpted below summarizing pertinent facts, the courts' reasoning and *rationes decidendi* aiming at their impact and contributions to the research problem. Their developments on broad or restrictive access to justice will also be tabled later. The main purpose is to identify landmark cases that address the issue and how they do so.

The following decisions pertain to admissibility, and, therefore the circumstances submitted do not constitute proven facts. Nonetheless, they are accepted by courts to address *de-jure* issues raised and to articulate corresponding holdings.

3.1.2.1 Cases

- ***Sarei v. Rio Tinto***[42]

Facts:

During the 1980s, in the midst of an armed conflict in Bougainville, Papua New Guinea, the open-pit copper mine of the corporation, Rio Tinto was, impaired to the point of closing. It is alleged that Rio Tinto induced and encouraged a governmental military response against the indigenous inhabitants (also provided helicopters and

[41] Gerhardt, Michael J. *The Power of Precedent*, Oxford University Press (2008); also Waldron, Jeremy, *Stare Decisis and the Rule of Law: A Layered Approach*, NYU School of Law, Public Law Research Paper No. 11-75 (2011).
[42] Case No. 02-56256 D.C., No. 2:00-CV-11695- MMM-MAN, 2011 [hereinafter *Sarei*], available at http://www.ca9.uscourts.gov/datastore/opinions/2011/10/25/02-56256.pdf

vehicles). The conduct purportedly amounted to genocide, torture, WC and CAH. Pollution was spread over natives' territory and a blockade of food, medicine and other essential items was set up, causing serious physical harm, starvation and death. Moreover, local workers were treated in a slave-like manner constituting systematic racial discrimination.

Holdings Justice Mary Schroeder:

The ATS may apply to conduct taking place abroad and grants jurisdiction for claims raised by foreign citizens whenever personal jurisdiction is met. The torts granting jurisdiction should be found in IL, but only those that are sufficiently specific, universal, obligatory and accepted among civilized nations can be incorporated into federal common law (*Sosa*). Corporate defendants may be held liable under a theory of aiding and abetting provided that purposeful intent is proven, at least for claims of genocide and WC.

Prudential exhaustion of local remedies is not always a jurisdictional prerequisite; it should be strict when there is no significant nexus to the US According to international comity, exhaustion may be a discretionary bar to certain claims under the ATS, but the requirement is flexible when it comes to *jus cogens* violations, such as genocide, that cannot be considered valid acts of state. Furthermore, this case does not imply any judgment on the conduct of foreign relations by the US government or of any action undertaken by it; thus, the case does not raise any political question issues.

Given the universal nature of the prohibition on WC and genocide, any actor capable of committing them can necessarily be held liable. Plaintiffs were recognized as part of a protected group since it was adequately alleged the sharing of particular positive characteristics such as ethnic identity and racial traits. It was found that allegations on medical and food blockade leading to other inhumane acts, did not sufficiently met *Sosa* requirements of specificity and international obligatory nature. Likewise, it was stated that there is no sufficiently specific and obligatory international prohibition on systematic racial discrimination to provide a cause of action under ATS.

Justice Stephen Reinhardt concurring:

Aiding and abetting CL, for ATS purposes, should be determined under domestic tort law.

Justice Harry Pregerson concurring:

The threshold *mens rea* for WC should be *knowledge* instead of *purpose* according to international sources that frame the alleged violations, except for the Rome Statute, which does not reflect CIL. Moreover, CIL does not contain a specific intent requirement.

The alleged blockade causing murder and torture is sufficient to constitute CAH providing that the ATS has jurisdiction, considering that hospitals were closed and people died, *inter alia,* from preventable diseases. Additionally, deprivation of essential supplies may also constitute a breach of the 4th Geneva Convention, article 23. Similarly, allegations that Rio Tinto, with the government authorities' connivance, regarded the native people as inferior, encouraged the blockade, housed mine workers in slave-like conditions, and relocated villagers in apartheid-like conditions amounting to systematic racial discrimination, a violation of *jus cogens*, and thus granted federal courts ATS jurisdiction. Whether a treaty is self-executing or needs execution by federal legislation is a relevant consideration but is not determinative.

Justice Margaret McKeown concurring in part and dissenting in part:

The ATS may apply to conduct taking place overseas if it meets the elements of the corresponding international norms, thus piracy is *locus* limited to the high seas, torture generally requires state action, and genocide and WC are focused on the victims without a specific perpetrator. "The proper inquiry is not whether a corporation has been *held liable* under international law, it is whether a corporation *is bound to abide* by the international norm at issue."[43] Moreover, she stated that the rulings of international criminal tribunals should not limit the ATS, since they are not civil trials.

However, it was found that the plaintiffs' status as a protected group was not well defined. Rio Tinto's role in the commission of WC was not clear enough; and the plaintiffs failed to properly allege *purpose mens rea* in aiding and abetting WC, which was considered the minimum possible international agreement regarding the scope of that mode of liability.

Justice Carlos Bea concurring and dissenting in part

A two steps test should be applied. First, strict exhaustion of domestic remedies if the US nexus to the alleged violations is weak and if the violation is less grave. If

[43] *Ibid.* at 19411.

exhaustion is required, it should be assessed by the availability and aptness of internal remedies. On the other hand, according to Bea, the incorporation of substantive IL into the ATS necessarily incorporates its traditional limitations as well, including the exhaustion of local remedies.

Justice Andrew Kleinfeld dissenting:

Justice Kleinfeld, disapproving, stated that although there is no agreement on the nature and content of the IL prohibitions, the majority opinion used universal jurisdiction to decide a case of foreigners suing foreigners for wrongs committed abroad. Therefore exercising "jurisdiction over all the earth, on whatever matters we decide are so important that all civilized people should agree with us."[44] Kleinfeld affirmed that the ATS gives jurisdiction for wrongs within the US against aliens for wrongs committed outside any foreign states' territory, but does not apply within the territory of other states, because such application undermines the LoN. There is a presumption against extraterritoriality showing respect for foreign sovereignty; the Papua New Guinea government is the only one entitled to rule on the conduct of aliens in its territory.

Justice Sandra Ikuta dissenting:

The hearing by a federal court of a case between aliens does not correspond to US law and the US Constitution. Accordingly, the ATS may grant jurisdiction only over violations of IL in cases concerning aliens and citizens.

- ***Doe VIII v. Exxon-Mobil***[45]

Facts:

During 2000-2001, Exxon-Mobil and local subsidiaries were engaged in natural gas extraction in the Aceh territory in Indonesia. Allegedly, governmental forces under Exxon-Mobil authority, provisioning and conditioning, and Exxon-Mobil's own contracted security forces, committed genocide, murder, torture, CAH, sexual assault, battery, kidnapping, extrajudicial killings, and false imprisonment and inflicted

[44] *Ibid.* at 19429.
[45] Case No. 09-7125, 2011 [hereinafter *Exxon-Mobil*], available at http://www.cadc.uscourts.gov/internet/opinions.nsf/567B411C56CD7A6F852578C700513FC8/$file/09-7125-1317431.pdf

inhumane or degrading treatment in violation of the ATS, TVPA and state tort law. Exxon-Mobil purportedly hired mercenaries to provide advice, training, intelligence and equipment to the military unit designated for the corporation's security. The Plaintiffs alleged that they were tortured, forcible removed and detained for lengthy periods of time.

Holding Justice Wilson Rogers:

According to the majority opinion the ATS may be applied extraterritorially as it would have been, it is said, implicitly approved by Congress subsequent enactment of the TVPA applicable to conduct abroad, and the Supreme Court's silence on the issue.

Regarding CL, the majority considered that the historical and present context, the content, and purpose of the ATS does not support immunity for corporate complicity in violation of the LoN, even when there is no private right of action to sue natural persons, juridical entities or states under the LoN. The lack of international rules for the award of civil damages does not mean that no one is entitled to such relief under domestic law standards. Furthermore, corporate responsibility is underpinned under the general legal principle of *respondeat superior*.

He considered that the District Court erred in its choice of law, because the defendant is a resident in four US states and holds a subsidiary in Indonesia. Particular importance should be given to the law of the place of injury. The plaintiffs alleged that the crimes were directed from the US, and injuries occurred in Indonesia entailing the application of Indonesian law for non-federal claims. Moreover, the plaintiffs demonstrated that exhaustion of local remedies in Indonesia would be futile.

According to the Nuremberg, ICTY and ICTR tribunals, the *knowledge* standard for the *mens rea* of aiding and abetting, plus *actus reus* of substantial assistance, have been elements well established as customary law (standards also adopted in several national legislations).

Justice Brett Kavanaugh dissenting:

According to Kavanaugh, there is a presumption against extraterritoriality and that the ATS content and historical purpose does not extend its scope to foreign countries. Additionally, he considers that, since the TVPA does not provide that US citizens can

hold corporations liable for aiding and abetting, the ATS should be interpreted in the same way regarding aliens.

He stressed that there may be a limited number of recognized norms of customary law for ATS purposes, acknowledging only those endorsed by *Sosa's* majority opinion plus Justice Breyer's separate opinion (torture, genocide, CAH, and WC).[46]

Lastly, I was stated that corporations cannot be held liable under ATS. CL has not been developed by international tribunals, and liability for corporate aiding and abetting in the commission of torture, extrajudicial killing and prolonged detentions has been accepted by IL. Additionally, Indonesia's rejection of the case being heard in the US may cause foreign policy issues.

- ***Kiobel v. Royal Dutch Petroleum***[47]

Facts:

This lawsuit was filed by twelve plaintiffs from the Ogoni Region of Nigeria, who were protesting the environmental effects of oil exploration, extraction and refinement in the region, against Shell Petroleum Ltd., Royal Dutch Petroleum (The Netherlands), Shell Transport and Trading Company PLC (UK), and the subsidiary Shell Petroleum Development of Nigeria Ltd. According to the plaintiffs, in 1993, the corporations called for military protection from the government, which resulted in the killings of a large number of unarmed civilians. Later that same year and during 1994, in response to the defendants' request for enhanced protection, the Nigerian forces created the Rivers State Internal Security Task Force (ISTF). The defendants allowed their property to be utilized as a staging ground for attacks and provided for helicopters, vehicles, boats, salaries, housing, equipment, and ammunition for the military personnel.

In May, 1994, the ISTF engaged in night-time raids on Ogoni towns and villages, shooting, beating, raping, forcing villagers to flee and abandon their homes, and burning, destroying or looting property. They killed at least fifty Ogoni residents. The plaintiffs and others were arrested and held in torture-like conditions without formal charges or access to a civilian court system for an extended period. The detentions

[46] *Supra* note 3.
[47] *Supra* note 5.

occurred again in 1995 in similar conditions. "The complaint alleged that the defendants 'aided and abetted,' 'facilitated,' 'participated in,' 'conspired with,' and/or 'cooperated with' the Nigerian military in alleged violations of the LoN."[48] Specifically, the plaintiffs brought claims of extrajudicial killing; CAH; torture or cruel, inhuman, and degrading treatment; arbitrary arrest and detention; violation of the rights to life, liberty, security, and association; forced exile; and property destruction.

Holding Justice José Cabranes:

The Court considered that the ATS scope of liability is determined by CIL (consisting of those specific, universal and obligatory), where no corporation has ever been held liable or named a proper subject of IL. CL has not achieved discernible or universal recognition as a norm of customary law of HR cognizable under the ATS. Therefore plaintiffs' claims lack subject-matter jurisdiction. In that sense, plaintiffs fail to allege violations of the LoN, and their claims fall outside ATS jurisdiction. "The responsibility of establishing a norm of CIL lies with those wishing to invoke it."[49]

The scope of liability is not just a question about the remedies determined by each state. Remedies refer to the relief to which one is entitled. The scope of liability determines whether such remedies can be enforced against a particular defendant. The ATS merely permits courts to recognize a remedy (civil liability) for heinous crimes universally condemned by the family of nations against individuals already recognized as subject to IL.[50]

The ATS is still open for holding civilly liable employees, managers, officers and directors of corporations, or anyone else who purposefully aids and abets a violation of CIL.

Justice Pierre Leval concurring:

The separate opinion stressed that no international tribunal has ever been empowered to decide upon the civil liability of natural persons or corporations for violations of CIL. However, IL is aimed at protecting fundamental rights, and "the fact that international tribunals do not impose *criminal punishment* on corporations in no way supports the inference that corporations are outside the scope of international law and therefore can

[48] *Ibid.* at 77.
[49] *Ibid.* at 10.
[50] *Ibid* at 47.

incur no *civil compensatory liability* to victims when they engage in conduct prohibited by international law."[51] On the contrary, it calls for courts to go further in applying domestic law.

Leval stated that it would be a novel creation to exclude corporations from claims regarding violations of CIL until international tribunals provide otherwise with regard to civil liability.

On the other hand, the plaintiffs fail to allege properly an aiding and abetting violation of the LoN, because their claim does not meet a purposive *mens rea* required to establish the violations. Similarly, lawsuits regarding ordinary offences or torts not amounting to CIL also fail adequately to plead a violation of the LoN.

- ***Presbyterian Church of Sudan v. Talisman Energy***[52]

Facts:

In the midst of an armed conflict in the Sudan, government military forces allegedly committed several egregious acts amounting to WC, CAH, and torture. At the same time, the Canadian company Talisman Energy Inc., invested in oil production blocks in the Sudan and agreed with the government for the security of its personnel and facilities. The plaintiffs allege that corporation's arrangements assisted the governmental military forces by building roads and providing airstrips, paying for and supplying fuel, supporting or facilitating the persecution of civilians near the oil concession areas in South Sudan, bombing villages, undertaking attacks and the forced movement of civilians, and the killing of church leaders. The suit sought to affirm that the company aided and abetted and conspired for the commission of the crimes.

Holdings Justice Dennis Jacobs:

The 2nd Circuit held that accessorial liability under the ATS needs to be drawn from IL, concluding that, following such rules, there should be proof that the defendant provided substantial assistance to facilitate the alleged offences. The plaintiffs failed to

[51] *Ibid.* Leval concurring at 5.
[52] 582 F.3d 244, 2009 [hereinafter *Talisman*] available at http://www.ca2.uscourts.gov/decisions/isysquery/d480037b-a3cb-430e-879e-93aa7fa55832/17/doc/07-0016-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/d480037b-a3cb-430e-879e-93aa7fa55832/17/hilite/

meet those requirements, and they did not show that Talisman acted with specific intent.

The panel stated that "[…] the *mens rea* standard for aiding and abetting liability in ATS actions is *purpose* rather than *knowledge* alone. Even if there is a sufficient international consensus for imposing liability on individuals who purposefully aid and abet a violation of international law, […] no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law. […] Only the purpose standard, therefore, has the requisite 'acceptance among civilized nations' for application in an action under the ATS. […] Therefore, in reviewing the district court's grant of summary judgment to Talisman, we must test plaintiffs' evidence to see if it supports an inference that Talisman acted with the 'purpose' to advance the Government's human rights abuses."[53]

- ***Khulumani v. Barclay Nat'l Bank***[54]

Facts:

The plaintiffs brought ATS and TVPA claims against a large number of local and foreign corporate defendants from the US, Canada and the European Union, alleging that they aided and abetted the South African Apartheid regime in committing genocide, CAH, torture, cruel and degrading treatment, slavery, sexual abuses, murder, arbitrary detentions, extrajudicial killings, forced labor, and the maintenance of a system of racial discrimination. The crimes were committed by state officials for approximately 40 years of racial apartheid system created by the South African government led by the National Party. The lawsuit sought US$400 billion in reparations for millions of people who suffered damages.[55]

Holding *per curiam*:

The Second Circuit vacated the District Court dismissal of the ATS claims, because "a plaintiff may plead a theory of aiding and abetting liability under [ATS]."[56] Additionally, following *Sosa's* prudential concerns and guidance regarding the practical

[53] *Ibid.* at 41-43, and 46.
[54] *Supra* note 40.
[55] *Ibid.* at 72.
[56] *Ibid.* at 9.

consequences of adjudicating certain claims, the Second Circuit held that it is an error to consider collateral consequences in the context of determining preliminary jurisdiction. It also stressed that "whether jurisdiction exists and whether a cause of action exists are two distinct inquiries."[57]

Justice Robert Katzmann concurring:

Katzmann found two errors in the District Court's decision regarding the incorporation of discretionary analysis in assessing its jurisdiction and its consideration of aiding and abetting recognition under IL as a bar to jurisdiction. He stated that, once the defendant's conduct meets the requirements of a violation of IL, the court can determine whether to make available a common law cause of action. After a comprehensive analysis of IL, the Court concluded that aiding and abetting is a mode of liability recognized under CIL, standing up for *actus reus* of substantial assistance with *mens rea* of *purpose* of facilitating the perpetration of a crime, without looking at the federal common law for the scope of liability.

Although the issue of a corporation as a proper defendant was not raised, Katzmann pointed out that corporations can be held liable under ATS for violations of the LoN just as can natural persons.

Justice Peter Hall concurring

Hall stated that accessorial liability must be drawn from federal common law after finding the primary violation in IL. However, leaving on remand a decision on narrow claims linking particular torts to particular defendants did not seem to him to be feasible as a matter of evidence. Hall considered that the plaintiffs alleged insufficiently that the defendants knew that their conduct would assist the crimes. Additionally, he called upon the principle of separation of powers and then stated that not every case touching foreign relations is non-justiciable.

Justice Edward Korman concurring in part and dissenting in part:

Korman considered that, under the doctrine of international comity, the case should have been dismissed in the exercise of discretionary power independent of the views of the executive branch, in favor of other elements, such as deference to a democratic

[57] *Ibid.* at 19.

country with an independent judiciary. In this case, the South African government has provided for reparations and assistance policies for apartheid victims, providing in that sense, additionally, an alternative adequate forum.

Moreover, Korman stated that the *per curiam* opinion failed to assess whether the alleged offences properly amounted to violations of the LoN. There was no inquiry on the link between particular factual allegations and specific violated norms with corporate complicity. Thus, subject-matter jurisdiction under ATS is not guaranteed.

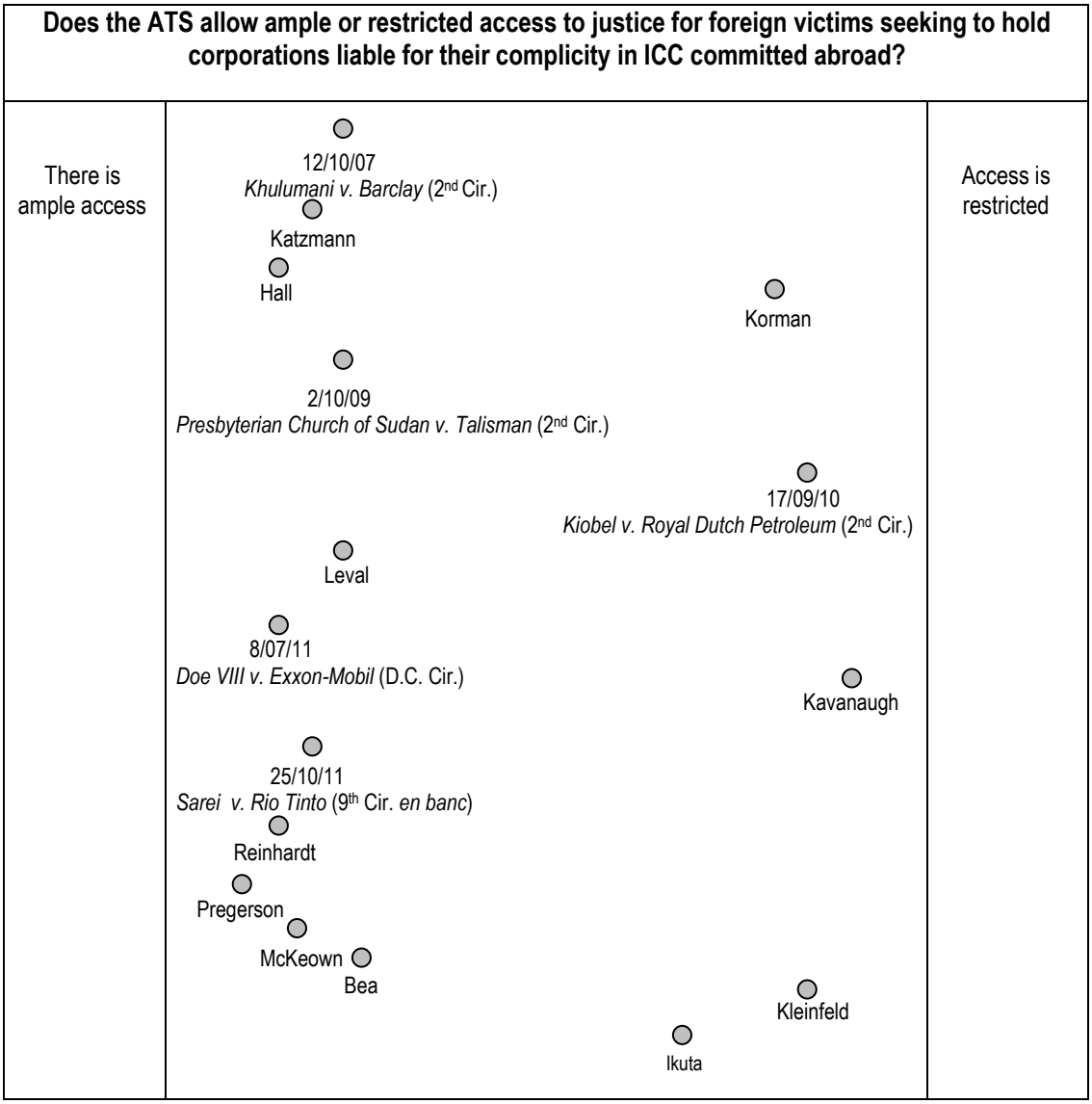
On the issue of CL, after extensive reference to IL sources, he stated that the discussion should address that, at the time of the violations, there was no sufficiently well established and universally recognized definition of aiding and abetting under customary law and that retroactive application of civil liability is presumptively inappropriate. The "movement towards recognition of CL post-dates the collapse of apartheid regime, and because the established norm during the apartheid period was that corporations were not responsible legally for violations of norms proscribing CAH, the complaints are subject to dismissal on this grounds alone."[58] He added that a broad standard for substantial assistance may imperil US interests. Additionally, he highlighted that it is a congressional attribution to provide for civil aiding and abetting liability.

3.1.3 Precedent Line

To this point, the research outcomes has taken a quantitative and qualitative approach to the recent ATS litigation against corporations, stressing the earlier decisions that justices bear in mind while handling a new challenging case and offering notable features on the judicial decisions' structure, backstage and reasoning, from a precedent approach.

Based on the excerpted main holdings and separate opinions, the diagram below on the precedent line shows their impact on the research question, giving an overview of the analyzed decisions and whether they stand for broad or restrictive access to justice for foreigners seeking to hold corporations civilly liable in US courts.

[58] *Ibid.* at 126.



Decisions that offer ample access to justice are mainly those acknowledging extraterritorial application of the ATS, holding that corporations can be held liable under IL or common tort law, and siding with recognition of WC, CAH and genocide as violations of the LoN justiciable under US civil law.

On the other hand, access to justice is restricted when courts have found no previous CL under IL and rejected any further application or have considered that the statute is not applicable to cross-border circumstances, and that ruling otherwise may raise political questions and disrespect international comity. Similarly, some less broad views have pointed out that a proper defendant should hold US citizenship and/or be a natural person.

4. Access to Justice Crossover Examination

This chapter analyzes some of the most important juridical hurdles found in the precedent study from the perspective of elements of competence. The main juridical obstacles will be identified and discussed; even when addressed as *obiter dicta*, shedding light on the extent to which each issue may broaden or restrict access to justice. The classification is done mainly for methodological reasons; some of the hurdles are considered prudential or discretionary and not jurisdictional, but, in any event, still being equally important to limit or broaden access to justice.

Space does not permit examination of cases that analyze such issues as hurdles on state secrets and foreign affairs doctrines, choice of law, and diplomatic and consular immunities.

4.1 Personal Jurisdiction

- **Active Legitimation**

This element encompasses the question of who has standing to sue. The ATS grants aliens standing to bring civil actions before federal courts for torts committed in violation of the LoN or a treaty of the US, without regard to possible contentions on passive personality concerning the victims' US citizenship. This clause needs to be analyzed *vis-à-vis* the US Constitution, article 3 "The Supreme Court has repeatedly stated that, to establish jurisdiction under Article 3, a plaintiff must demonstrate: 1) an actual injury, or 'injury-in-fact,' 2) that the injury is fairly traceable to the defendant's conduct and 3) the likelihood that the court has the power to grant relief that will redress the actual or threatened injury."[59]

In *Khulumani*, Justice Korman stated that the litigants "fail to link the conduct of a specific defendant to an injury suffered by a particular plaintiff [...]. In sum, these are reparations cases, seeking at least $400 billion in reparations, rather than torts cases

[59] *Supra* note 14 at 321.

for damages. They fail to allege a cognizable cause of action."[60] In that sense, the plaintiffs hold the burden of bringing a claim for actual specific injuries and not merely hypothetical contentions. This submissions must also demonstrate that the "injury-in-fact" was a consequence of the defendant's purportedly illegal conduct, e.g. the provision of substantial assistance necessary to cause a tort and the knowledge that such assistance will enable or support a third party in carrying out the damage.

Issues regarding active legitimation also arise from who might have standing to be represented, such as a deceased person, and maybe joined to choice of law concerns. In *Drummond*, the Eleventh Circuit applied the *lex loci delicti commissi* doctrine to determine, *inter alia,* proper parties to the litigation, therefore applying Colombia's wrongful death law.[61]

- **Passive Legitimation**

There is a constant concern, either implicit or explicit, in the cases' link with the US For instance, during the last *Kiobel* hearing, Justice Alito asked "what business does a case like that have in the courts of the US?"[62] The ATS does not literally distinguish between private and non-state actors or individual natural persons and corporations to be sued. There is no explicit requirement for the defendant, although it may be reasonable to argue that a party is a proper defendant if the party can be held accountable under the tort law causes of action that can be raised according to the jurisdiction granted by the judiciary act. Most courts, in the cases under study, have accepted corporations as proper defendants, even when their main business location is not the US.

It is important to bear in mind that there is a distinction between norms ruling subjects of IL and the domestic liability for relief and compensation, as well as between criminal liability and civil liability where vicarious, agency or parent-subsidiary liability are at issue sometimes with less demanding burdens for the plaintiffs than those needed to demonstrate, for example, criminal liability beyond reasonable doubt.

The first issue in *Kiobel certiorari* is whether CL is a question on the merits or of subject-matter jurisdiction, which is remarkable, since might overturn federal courts'

[60] *Supra* note 45 at 71.
[61] *Supra* note 40 at 20.
[62] *Supra* note 6, Alito at 11:00

well established practice on corporations as proper defendants, foreclosing future lawsuits. *Kiobel* acknowledges that corporations may have passive legitimacy in civil liability proceedings and may consequently be liable for compensation, but excludes them from ATS jurisdiction, not because they are out of the scope of tort law, but because they have never been subjects to international law. This places the discussion on whether corporations are covered by IL as a subject-matter jurisdiction issue depending on the law that applies to a given accused, and not on the connection to the actual or imminent damage, which would be a discussion of merits or passive legitimation.

Justice Alito's inquiry may be addressed form the passive legitimation perspective considering that, in tort law, standing to be sued is generally attributed to the tortfeasor, and that jurisdiction to prescribe is not a prerequisite for jurisdiction to adjudicate.[63] "US domestic law requires the defendant to have 'minimum contacts' to the US before the US will exercise personal jurisdiction over the defendant. It could be possible, at least in theory, to own property and transact business within the US and thus have sufficient contacts for US personal jurisdiction *in rem or quasi in rem* without ever being physically present in the US"[64]

Personal jurisdiction over corporate defendants may be traced back to the US Constitution, article 3 §2, which provides for adjudicative jurisdiction, and 28 USC. §1332(c)(1), which clarifies that a corporation may be deemed to be a citizen of the state of its incorporation or where it has its principal place of business.

Additionally, the ATS does not explicitly require active personality concerning US citizenship of the offender, and this element has regularly been overlooked. However, Justice Kavanugh dissenting in *Exxon-Mobil* considered that, even if there is CIL liability for corporations, the ATS should be restrictively interpreted according to the TVPA, where there is no CL; under that act, such a cause of action is not available for US citizens.[65]

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[63] Dodge, William, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. 271 (2009) at 43.
[64] Engle, Eric, *The Alien Torts Statute: Extraterritorial Jurisdiction in US and International Law*, LAP Lambert (2010) at 58, citing *World-Wide Volkswagen Corp. v. Woodson* (444 US 286, 1980).
[65] *Supra* note 45, Kavanaugh dissenting at 3.

Arguments about attributions for proper defendants were also found in *Sarei*, where Judge Ikuta dissenting stated that "Contemporary Anglo-European legal principles provided that a country had no responsibility under the law of nations to adjudicate suits between two aliens arising abroad, but was obligated to redress injuries its citizens caused to aliens,"[66] adding later that it would be consistent with the constitution to limit IL claims to cases between aliens and citizens.[67]

- **The Act of State Doctrine**

Recurrently in ATS cases, direct perpetrators are mainly state agents. Thus, an extensive application of this doctrine may represent a substantial restriction to access to justice, for example, by covering corporations acting at the request of a given government, or when the last word on the execution of an offense depends on public officials. In such circumstances, the situation may demand some deference to the foreign state decisions, and the case may end up discretionally dismissed.

Even if a given court has jurisdiction over a case, claims can still be discretionally dismissed on the act of state doctrine. There are some parameters on whether the judicial decision may entail declaring invalid the official act of another state, whether that state is acting in the public interest, that the defendant demanding the application of the act of state doctrine or alleging immunity is required to prove the necessity of its application, and that none of the FSIA exceptions to sovereign immunity apply.[68] Additionally, *Sarei* also shed light by endorsing that a violation of *jus cogens* is not a sovereign act, because *"jus cogens* norms are exempt from the doctrine, since they constitute norms "from which no derogation is permitted."[69]

4.2 Subject-matter Jurisdiction

- **Recognition as Violations of the Law of Nations**

The ATS is a judiciary act providing for jurisdiction. The substantive norm lies on IL rather than domestic law, and this work aims at what the US law and federal courts regard as violations of IL. One of the main factors courts examine, and one of the most

[66] *Supra* note 42 at 19475.
[67] *Ibid.* at 19482.
[68] *Supra* note 64 at 13-19. Also *supra* note 15 at 289.
[69] *Supra* note 42 at 19358.

common reasons for dismissal, is jurisdiction *ratione materiae*, whether the alleged circumstances sufficiently amount to violations of the LoN.

Identifying IL violations beyond those accepted in 1789 is a difficult task, and judges regularly frame their findings in *Sosa* warnings and reasons for restrictive interpretation: "First, … the [modern] understanding that the law is not so much found or discovered as it is either made or created[;] … [s]econd, … an equally significant rethinking of the role of the federal courts in making it[;] … [t]hird, [the modern view that] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases[;] … [f]ourth, … risks of adverse foreign policy consequences[; and] … fifth[,] … the lack of a] congressional mandate to seek out and define new and debatable violations of the LoN."[70]

An additional secondary source for recognition of IL violations is section 702 of the Restatement Third of the Foreign Relations Law which lists as *jus cogens* violations "a) genocide, b) slavery or slave trade, c) the murder [of] or causing the disappearance of individuals, d) torture or other cruel, inhumane, or degrading treatment or punishment, e) prolonged arbitrary detention, f) systematic racial discrimination, or g) a consistent pattern of gross violations of internationally recognized Human Rights."[71] However, the Restatement is not a legally binding source, and judges are not compelled to follow it.

Through the cases analyzed, there has been a constant indistinct use of the terms IL, LoN and CIL while analyzing whether allegations sufficiently amount to LoN violations. The Court in *Khulumani* did not distinguish the concepts, and it was not until *Exxon-Mobil*, after *Kiobel*,[72] that the issue was addressed and underpinned in the International Court of Justice statute, article 38, identifying customary law as one of the sources for the LoN.

A broader interpretation of recognizing violations of the LoN has led district courts to admit allegations regarding pollution in the Amazonian rainforest (*Aguinda v. Texaco,* later *Chevron*),[73] involuntary medical experimentation on Nigerian children (*Abdullahi*

[70] *Supra* note 52 at 31 citing *Sosa.*
[71] *Supra* note 15 citing *Restatement Third of the Foreign Relations Law of the US* §702 n.
[72] *Supra* note 45 at 43.
[73] 303 F.3d 470, 2002 [hereinafter *Chevron*]

v. *Pfizer*),[74] extrajudicial killings in Colombia (*Drummond*),[75] and other *jus cogens* violations.

However, other justices sustain a narrower version of justiciable torts under the ATS. Justice Kavanaugh, dissenting in *Exxon-Mobil*, identified 7 violations of the LoN internationally accepted in 1789: "the 'Blackstone three' plus the 'Breyer four.' The original Blackstone three are offenses against ambassadors, violations of safe conducts, and piracy. *Sosa*, 542 US at 715. The Breyer four – which Justice Breyer identified but the Court as a whole has not yet taken a position on – are torture, genocide, CAH, and WC. *Id.* at 762 (Breyer, J., concurring),"[76] coinciding in great part with those mentioned above from the Restatement.

According to *Sosa*, there may be causes of action under ATS jurisdiction whenever there is a violation of the LoN sufficiently specific, universal and obligatory. But, since there is no mandatory exhaustive list of recognized violations meeting those requirements, nor can there be, there is no consistent position on such wrongdoings as systematic racial discrimination. Hence, this gap leaves room for restrictive interpretations that narrow the access to justice. Justice Korman in *Khulumani* considered that systematic racial discrimination was not already proscribed at the time of the apartheid regime, while the "movement towards the recognition of corporate liability post-date the collapse of the apartheid regime."[77]

Similarly, the majority concluded in *Sarei* that similar claims were rightly dismissed and affirmed that, while systematic racial discrimination is a universally recognized prohibition, it is not sufficiently specific and obligatory. It was considered that the Convention on the Elimination of All Forms of Racial Discrimination is not self-executing before US courts, and the definition of racial discrimination does not define "systematic racial discrimination, nor even include the word 'systematic.'"[78]

Also in *Sarei*, submissions about a blockade of food, medicines and clothing leading to starvation and death were not considered a violation sufficiently specific in *Sosa* terms, since they are not among those mentioned or listed in relevant international statutes,

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[74] 562 F.3d 163, 2009 [hereinafter *Pfizer*]. Settlement was reached; see International Human Rights Clinic, Human Rights at Harvard Law School, 2011.
[75] *Supra* note 33.
[76] *Supra* note 45, Kavanaugh dissenting at 5.
[77] *Supra* note 40 at 125.
[78] *Supra* note 42 at 19378.

such as the Rome Statute or the ICTY and ICTR statutes (Extermination Rome Statute art. 7(1)(b); ICTY Statute, art. 5(b); ICTR Statute art. 3(b)). Although such conduct may fall within the category of other inhumane acts, the *Sarei* court considered that the mentioned provisions do not specifically refer to a blockade and, therefore, there is no violation of a specific internationally recognized norm.

- **Scope of Liability**

There are two options for looking at the scope of liability, drawing it from domestic tort law, as Justice Hall in *Khulumani*, Justice Reinhardt in *Sarei*, Justice Leval in *Kiobel* and the majority opinion in *Exxon-Mobil* stand for; or taking it from the substantive international norm, as most circuit court judges agree including not only physical individuals but also corporations as subjects of IL.

Kiobel agrees that the scope of liability should be drawn from IL, but raises an important issue by considering, unlike most circuit courts, that CL for, *inter alia,* ICC is not universally recognized under IL and therefore not enforceable under the ATS. Additionally, *Kiobel* concluded that "the responsibility of establishing a norm of CIL lies with those wishing to invoke it."[79] The panel agreed that the ATS does not provide subject-matter jurisdiction over corporations, stating that corporations has never been named proper subjects to IL, therefore reducing the number of ATS respondents. The contested issue may be traced back to *Sosa* footnote 20, where the scope of liability for private actors was underpinned in IL but without further clarification of private entities.

The precedent study in chapter three shows that the *Kiobel* position had also been raised by some judges in separate opinions. Justice Korman in *Khulumani* stated that CL was not sufficiently internationally established and recognized under CIL (using the term indistinguishable from LoN) at the time of the violations.[80] Similarly, Justice Kavanaugh dissenting in *Exxon-Mobil* stated that claims against corporations cannot be filed under ATS, because "customary international law does not impose liability against corporations at all."[81] He considered doing so to be inconsistent with Congress' intent in enacting the TVPA, which provides that only natural persons have standing to be sued.

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[79] *Supra* note 5 at 10.
[80] *Supra* note 40 at 125.
[81] *Ibid.*, Kavanaugh dissenting at 23

Consequently, the second issue of the *Kiobel* certiorari inquires whether corporations are immune from tort liability for, *inter alia*, ICC, such as genocide.[82] If the question is set forth in domestic tort law, then, on the merits, judges will need to assess not the engagement in criminal conduct but whether victims suffered actual damage and whether it was caused by the corporate defendant, such as by its negligence, since corporations are regularly subjects to tort law liability.

On the other hand, if the jurisdiction granted in the ATS depends on IL jurisdiction, then the door is open to interpretations granting no corporate immunity, "that formulation improperly assumes that there is a norm imposing liability in first place,"[83] but excluded corporations from liability until IL evolves and explicitly names them.

However, the *Kiobel* basis on lack of IL recognition of CL maybe deemed moot *vis-à-vis* the fact that, for the first time, the Nuremberg trials held state agents liable for ICC, despite no previous precedent because "the universality of the crimes prevented the absence of previous individual liability from providing an obstacle to prosecution."[84]

Unlike *Kiobel*, although not quarrelling with Leval's separate opinion, *Exxon-Mobil* provides for a wider access to justice construction by stating: "the technical accoutrements to the ATS cause of action, such as corporate liability and agency law, are to be drawn from federal common law,"[85] resorting to general principles of IL, such as *respondeat superior*, and taking CL as an element of juridical personhood.

Currently, when a particular court has accepted alleged submissions as properly amounting to a violation of the LoN and admitted corporate liability under the ATS, then a test on modes of liability has been applied, turning to aiding and abetting accessorial liability as the most accepted among the federal courts of appeals. Some have applied the ICC standard of *purpose*, others the ICTY and ICTR precedents with *knowledge* approach.[86]

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[82] *Supra* note 8.
[83] *Supra* note 5 at 9.
[84] Danforth, Matthew, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*, 44 Cornell Int'l L.J. at 672 citing Ann Tusa and John Tusa, *The Nuremberg Trials*, (1983) at 73.
[85] *Supra* note 49 at 74.
[86] *Supra* notes 19 and 20.

The majority opinion in *Sarei, Talisman*, Justice Leval dissenting in *Kiobel*, and Justice Katzmann concurring in *Khulumani* all sided with substantial assistance and purposive specific intent; whereas Justice Pergerson concurring in *Sarei*, and *Exxon-Mobil* rely on substantial assistance and *knowledge mens rea*, being the latter being less demanding with regard to evidentiary matters, and therefore providing flexible access to justice.

- **The Political Question Doctrine**

On the precedent line and the analytical study of cases there were few, but meaningful, findings regarding access to justice challenges based on the political question doctrine, mostly arising from the likelihood of judicial decisions intervening with other state branches. The doctrine is rooted in the constitutional principle of separation of powers,[87] and is "jurisdictional in nature, rather than prudential" [meaning that, on such grounds, a] "cause is not wholly and immediately foreclosed, rather the court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[88]

Assessing this hurdle requires a case-by-case study of whether the presented question is political rather than juridical. In *Sarei* and *Khulumani*, the courts considered *Baker v. Carr's* six factors: "(1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) lack of judicially discoverable and manageable standards for resolving it; (3) impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[89]

Likewise, US government submissions, frequently regarding political or economic interests, should also be carefully considered. For instance, in *Mujica v. Occidental Petroleum*, allegations of WC and CAH were dismissed after the US Department of

[87] Doctrine traced back to *Marbury v. Madison* 5 US 137, 1803.
[88] *Supra* note 15 at 273 citing *Corrie v. Caterpillar* 503 F.3d 974, 2007, and *Baker v. Carr* 369 US 186, 1962.
[89] *Ibid.* at 281 quoting 369 US 186, 1962.

State submitted concerns about governmental relations with Colombia.[90] Foreign governments' statements are similarly very important, oftentimes referring to their sovereign jurisdiction linking the analysis to, *inter alia*, international comity issues regarding foreign jurisdictions and disputes on different sovereign laws.

In *Exxon-Mobil* the defendants contended that the D.C. Circuit Court should not favor the choice of Indonesian law for non-federal claims, because that country opted for a general amnesty. The Court found uncertainty in the local remedies, no clarity in the provisions for an HR court and a commission for truth and reconciliation with implementation gaps.[91] Likewise, *Khulumani* recalled that "not every case 'touching foreign relations' is non-justiciable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of HR." The court pointed out that "Mere executive fiat cannot control the disposition of a case before a federal court. Our principle of separation of powers not only counsels the judiciary to conduct an independent inquiry—it requires us to do so."[92]

4.3 Territorial Jurisdiction

- **Extraterritoriality**

Another equally relevant issue that may bar access to justice dismissing complaints and leading cases to end up in summary judgment rather than trial is the *ratione loci* consideration of ATS extraterritorial application, the application of domestic law to circumstances outside of the national territory, a situation frequently quarreling with the principle of states' equal sovereignty.

There is a constant pattern against statutory extraterritorial application, considering that only Congress can authorize it, a factor usually determined by express literal inclusion in the given norm or, absent such, by the norm's historical context. However, it does not necessarily foreclose ATS extraterritorial application, "courts can look to the context of the statute to ascertain the 'most faithful reading' of it. Courts may then rely on the 'most faithful reading' of a statute to determine whether Congress intended it to

[90] 381 F.Supp.2d 1134, 2005, regarding an aerial attack, occurred in 1998, by the Colombian air force using cluster bombs over a village. Several civilians, including children, were injured and killed during the bombing. In 2011, the case was admitted by the Inter American Court of Human Rights given the lack of investigation.
[91] *Supra* note 45 at 110.
[92] *Supra* note 40 at 14 and 65.

apply extraterritorially. (…) In addition… the Supreme Court already indicated that the ATS applies extraterritorially in its *Sosa* opinion."[93] "Because the Judiciary Act expressly limits the territorial application of criminal, admiralty, and maritime laws, it seems unlikely that the First Congress would also intend to limit territorial application of the ATS but omit limiting language. The First Congress's failure to also limit the territorial application of the ATS serves as historical evidence that the First Congress did not want courts to only apply the ATS domestically."[94]

In the litigation under study, most of the judges have had a pro-access to justice interpretation agreeing on ATS extraterritorial application, but Justices Kavanaugh dissenting in *Exxon-Mobil*[95] and Kleinfeld dissenting in *Sarei*[96] loudly asserted the ATS presumption against extraterritoriality for cross-border conduct. They reasoned based on the US Constitution, article 3 §2; that jurisdiction over piracy in high seas does not mean jurisdiction over foreign soil; and that the lack of clear indication of extraterritoriality within the statute's content or historical purpose demands clear Congress' consent, and a deference to the principle of equal sovereignty.

Some scholars maintain that the presumption against extraterritoriality should not apply to statutes implementing IL, since they apply law binding on the foreign sovereign and since "such statutes present no or minimal risk of both conflicts with foreign law and jurisdictional overreaching. In addition, applying the presumption to these statutes may result in the US failing to fulfill international obligations to exercise jurisdiction. The presumption thus could generate exactly what it was designed to avoid: unintended discord with foreign nations."[97]

This issue has attained major relevance, since last March the *Kiobel certiorari* was order to be reargued on whether the case links to the US may permit ATS extraterritorial application. It is remarkable that, during the hearing, justices were concerned about whether a similar foreign case could have been adjudicated somewhere else in the world, given, for example, the defendants' stronger contacts in other countries.[98] Although controversial, this question might eventually be answered

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[93] Fiechter, Michelle, *Extraterritorial Application of the Alien Tort Statute: The Effect of Morrison v. National Australia Bank, Ltd. on Future Litigation*. Iowa Law Review, Vol. 97, at 972-973 (2012).
[94] *Ibid.* at 975.
[95] *Supra* note 45, Kavanaugh dissenting at 2.
[96] *Supra* note 42, Kleinfeld dissenting at 19430.
[97] Colangelo, Anthony, *A Unified Approach to Extraterritoriality*, Virginia Law Review, Vol. 97, 2011, at 1056. See also Knowles, Robert, *Developments in the Law – Extraterritoriality*, 124 Harv. L. Rev. 1226 (2011).
[98] *Supra* note 6, Kennedy at 3:20, 14:00, and 22:00; Ginsburg at 6:10; and Alito at 7:10.

affirmatively subject to strict requirements, generally on the defendant's nationality, for instance, in Australia, the UK, Canada[99] and Switzerland.[100]

Regardless of the discussion on other latitudes, the extraterritorial application of the ATS is of crucial importance, since most of the lawsuits concern cross-border circumstances, and, if it is deemed to be applied only within the US borders, hardly any ICC cases will survive. It has been argued that the Supreme Court could grant corporate liability but deny extraterritoriality, which would be a "more intellectually attractive way to shut down the corporate alien tort enterprise."[101] However, it would be difficult to overturn landmark cases such as *Filártiga* and *Sosa*, together with more than thirty years of well-settled decisions, when such claims can still be brought under state law, and other alternatives on personal jurisdiction strengthening the cases' links to the US might be available.

- **International Comity**

Although not jurisdictional, international comity is a discretionary basis for declining to hear a case and is of great importance while accessing justice. It relates to the respect of a judicial forum and its legal system for resolving a juridical controversy. In this regard, Justice Korman dissenting in *Khulumani* made an important point by observing that it must be assessed whether "the interests of a foreign sovereign are 'legitimately affronted by the conduct of litigation in a US forum,' steps the foreign sovereign may have taken to address the issues in the litigation, and the extent of our own interest in the underlying issues. Perhaps the most significant factor is whether the foreign sovereign to which we defer is a democratically elected government with an independent judiciary."[102] The international comity doctrine is frequently addressed with issues related to a political question and particularly with the exhaustion of domestic remedies.

- ***Forum non conveniens***

Plaintiffs enjoy a range of freedom in electing a forum subject to forum shopping concerns, while defendants may object the forum and demonstrate the existence of a

[99] *Supra* note 25, Oxford Pro Bono Publico at 22-25 and 280; also Canada S.C. 2012, c. 1, s. 2, 13 (2012).
[100] European Centre for Constitutional and Human Rights, *Nestlé precedent case: Charges filed in murder of Colombian trade unionist*, 2012; similarly, in *Sinaltrainal v. Nestlé USA, Inc.*, No. 06-61623, 2006, although withdrawn.
[101] Goldhaber, Michael, *Human Rights Plaintiffs Can't Even Pick their Position*, The AmLaw Daily, 2012.
[102] *Supra* note 40 at 78 citing *Jota v. Texaco*, 157 F.3d 153, 1998, and *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 1993.

more appropriate alternative. However, the issue has been developed more carefully in other cases out of the scope of this research, such as *Pfizer* and *Chevron*. Similarly, the issue was approached more extensively in a non ATS case *Sinochem International Co., Ltd. v. Malaysia International Shipping Corporation*,[103] regarding the seizure of a ship, holding that a *forum non conveniens* motion should be decided even before reaching jurisdiction questions on *ratione materiae* or *ratione personae*.

Forum non conveniens can become a ground for dismissal and a significant limitation on access to justice, even after finding *ratione materiae* and *personae* jurisdiction, if plaintiffs do not have a relevant link to the US and when there is a low standard on assessing the adequacy of the alternative forum.[104] The appropriateness of the forum may entail judicial economy considerations about the location of the plaintiffs, witnesses and evidence; the availability of an alternative suitable legal system and applicable law for addressing the issues involved; and the interests of the parties in a given forum and whether it implies unfair impositions or advantages, such as, for example, the likelihood of safety and security risks.

In the cases under study, Justice Korman, concurring in part and dissenting in part *Khulumani*, made a noteworthy point when he stated that the Court must assess whether the alternative forum comprises a democratically elected government with an independent judiciary and the measures taken by the state to address the violations, and when he stressed that the burden on demonstrating a better alternative lies on the defendants.[105]

- **Exhaustion of local remedies**

Following the precedent analysis, some *de-jure* obstacles for foreign victims may arise from the review of exhaustion of local remedies, a factor that might constitute a precondition but is not always required. Although it was not discussed in all of the judicial decisions under study, there were some thought-provoking remarks. *Sarei*, taking into account *Sosa*, stressed a two-step exhaustion analysis over each of the claims alleged. Firstly, exhaustion should be required when appropriate, such as when alleviating comity concerns, evaluating "(1) the strength of the nexus, if any, between

[103] Whytock, Christopher, *The Evolving Forum Shopping System* (2011), Cornell Law Review, Vol. 96 2010-2011 at 499 citing 549 US 422, 2007. Also at 502, using a legal empirical method, he argues that *forum non convenience* is the source of dismissal for 47% of transnational claims before federal courts.
[104] *Supra* note 15 at 345, 349 and 350.
[105] *Supra* note 40 at 78.

the US and the acts and omissions alleged in the complaint—the less nexus, the more reason for exhaustion, and (2) the gravity of the violations alleged, namely whether the claims implicated 'matters of universal concern' —the more grave the violations, the less reason for exhaustion."[106]

If, as a result of the previous analysis, exhaustion of local remedies must be imposed, then a given court should engage in the two-part inquiry considering "(1) whether the foreign plaintiffs had local remedies where the alleged torts occurred and had exhausted them, and, if not, (2) whether any exhaustion requirement is excused because local remedies are ineffective, unobtainable, unduly prolonged, inadequate, or otherwise futile to pursue."[107] However, for the *Sarei* majority opinion, allegations regarding matters of universal concern such as *jus cogens* violations, might outweigh this test, thus discarding it.

As seen in the second part of the *Sarei* test, exhaustion of local remedies may entail considerations of whether the litigation should first go through an alternative judicial forum, mainly where the facts took place. However, in an earlier *en banc* decision, the same court held "that an exhaustion analysis is required, but only as a matter of discretion."[108] Furthermore, in the same decision, the Court held that the defendant bears the burden to plea and justify the exhaustion requirement, including availability of local remedies, and, if required, the plaintiff should demonstrate its futility.[109] The Court reached a similar ruling in *Sinaltrainal v. Coca-Coca Co*.[110]

4.4 Temporal Jurisdiction

Ratione temporis is an additional important threshold for access to justice. The concise character of the ATS does not specify statutes of limitations and accordingly, such international sources as the Rome Statute and such crimes as genocide, WC and CAH are not subject to any prescriptive limit (article. 29).

The issue was not discussed in any of the selected cases, but it was raised in *Chavez v. Carranza* regarding CAH, torture and extrajudicial killings. Then, the Sixth Circuit held

[106] *Supra* note 42 at 19421
[107] *Ibid.* Bea concurring in part and dissenting in part at 19422.
[108] *Supra* note 15 at 371 citing 550 F.3d 822, 2008.
[109] 550 F.3d 822, 2008 at 18458.
[110] *Supra* note 64 at 18 citing 256 F.Supp.2d 1345, 2003.

that ATS claims should have a limitation of 10 years drawn from an analogous application of the TVPA provisions (§2 (c)).[111] Additionally, other related statutes contain similar provisions; for instance, the Foreign Sovereign Immunities Act has a 10-year statute of limitation (28USC§1605A) and the Anti-terrorism Act has a four years statute of limitation (18 USC§2335 (a)).

However, given the character of the mentioned crimes and the terrible consequences they may inflict upon the victims, extraordinary circumstances should be considered, such as the timely filing of a lawsuit and therefore statutes of limitations may be equitably tolled taking into account for instance: "(1) lack of notice of filing requirement, (2) lack of constructive knowledge of the filing requirement, (3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement."[112]

[111] *Chavez v. Carranza*, 559 F.3d 486, 2009 [hereinafter *Carranza*] at 6.
[112] *Ibid.* at 5.

5. Reflections

Throughout the dynamic and static analysis in chapter 3, it was apparent that there are conflicting positions among justices even belonging to the same panel. Standing for corporate liability (CL) are the Ninth Circuit (*Sarei*), the Fourth (*Aziz v. Alcolac, Inc.*),[113] the Seventh (*Boimah Flomo v. Firestone Natural Rubber, Co.* regarding child labor in Liberia),[114] D.C. Circuit (*Exxon-Mobil*), and the Eleventh Circuits (*Sinaltrainal* and *Drummond*). On the other hand, *Kiobel* found no subject-matter jurisdiction over corporations.

It was also observed that the judicial split may extend beyond the research question involving additional variables. For instance, the D.C. Circuit held that non-state actors, such as the Palestinian Authority, cannot be held liable under the ATS for torture or other physical abuse (*Ali Shafi v. Palestinian Authority*).[115] As Justice McKeown noticed in his separate opinion in *Sarei*, the judicial split can be traced back to *Sosa's* holding that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted."[116]

There is no consistent precedent for admissibility requirements hierarchy, but it is clear that some of them may soon block lawsuits, perhaps having devastating effects for foreign victims. Although contradicting more than ten years of most circuit court holdings, *Kiobel* remains of paramount importance, since it will be the basis of the next US Supreme Court controlling decision on issues closely related to the enforcement of international HR law, and to the availability of effective recourses to domestic courts.

The *Kiobel certiorari* (joined to *Mohammad v. Palestinian Authority* regarding torture and holding that non-state actors cannot be liable under the TVPA),[117] almost ten years after *Sosa*, might clarify whether corporate liability is a question of merits or subject-matter jurisdiction, whether corporations are out of IL's scope, and when the ATS may

[113] 658 F.3d 388, 2011.
[114] 643 F.3d 1013, 2011.
[115] 642F.3d1088, 2011 at 15-16.
[116] *Sarei v. Rio Tinto,2011* at 19404 citing *Sosa*
[117] 634 F.3d 604, 2011, at 7. Unanimously affirmed by the Supreme Court, Docket 11-88, 2012.

be applied extraterritorially. These issues were not addressed by *Sosa*, although it applied the ATS over an abduction occurred abroad and barred the liability of US state agents for harm caused by their conducts there, limiting the so called "headquarters doctrine" and favoring sovereign immunity.[118]

According to the *Kiobel* Circuit Court opinion the scope of liability must be drawn from IL excluding municipal law, and, therefore, CL should be regarded as a question of subject-matter jurisdiction.[119] The Court's reasoning that no international tribunal has ever held corporations liable for HR violations might be analyzed *vis-à-vis* other gaps in IL; for instance, terrorism is abroad concept with no international consensus about the scope and mode of liability. However, even when there is no specific treaty or world-wide customary legal practice, much less international tribunals' judgments holding corporations liable for terrorism, states are not barred from having jurisdiction and providing for domestic tort causes of action against corporations, as submitted in chapter two while examining that though the uniqueness of the ATS it is not a novelty when it comes to corporate liability.

The *Kiobel* exclusion of CL has not stopped ATS human rights litigation or settlements compensating victims,[120] although it might be argued that for the defendants stopping many years of negative publicity outweighs the benefits of waiting for judicial acquittal. Additionally, it is remarkable that the US government submitted *amici curiae* supporting the *Kiobel* plaintiffs and arguing for CL.

During the last *Kiobel* hearing on February 28, 2012, the justices largely emphasized the question of CL. They were concerned about IL recognition of CL,[121] other national jurisdictions providing for it,[122] whether it is a question of substantive obligation or of remediation enforcement,[123] and whether individuals and corporations should be treated equally with regard to HR violations.[124]

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[118] *Supra* note 3 at 7.
[119] *Supra* note 5 at 6.
[120] *Supra* notes 40 and 74.
[121] *Supra* note 6, Kennedy at 00:58; Ginsburg at 05:35 and 45:20; Roberts 21:50, and Breyer at 24:25.
[122] *Ibid.* Alito at 04:10; Kagan 54:00.
[123] *Ibid.* Sotomayor at 17:10; Kagan at 19:30, 20:48, 39:00, and 40:15; and Kennedy at 36:30.
[124] *Ibid.* Ginsburg at 13:30; Kagan at 33:45; and Breyer 46:40.

The *renvoi* clause embedded in the ATS "committed in violation of the LoN or a treaty of the US"[125] may be understood as referring to the substantive tort and not to who can be party to the litigation. If so, the question courts should answer is what a tort is under IL, and not who can have international personhood. If there is a hurdle in identifying those responsible, it does not entail that the alleged tort did not exist nor that the damage victims suffered should not be redressed. The ATS clearly states that the judicial remedy is a civil action, hence it should be adjudicated through US tort law principles, then appealing to the LoN to determine the nature of awardable damages. Thus, the *locus standi* for the contending parties should follow the rules of the corresponding US civil causes of actions where corporations are experienced defendants.

Therefore, by looking to IL to define the scope of liability, the *Kiobel* Circuit Court decision may be approving an additional *renvoi* clause for the defendant's category, apparently not originally included in the ATS. It is helpful here to consider that a crime is a wrong against society and, by exception, some prohibitions are aimed at certain categories of offenders, and to some extent with distinguishable scope of liability. For instance, fleeing legal custody is an offence with a necessary category of offender: inmates. Similarly, the crime of military desertion can be pursued only by a military unit. Bribery generally regards public officials or civil servants in the performance of their duties.

There are conducts that can be committed only by states or on their behalf, and conduct realized regardless of the perpetrator's status. There are certain international HR violations with well-defined responsibilities; for example, failing to provide for fair trials and not unduly prolonged detentions is clearly a state's obligation. Without clearly defining a particular scope of liability for an entire corpus of law, exceptional provisions in IL are found, for example, on torture becoming an international crime if committed by a "public official or other person acting in an official capacity,"[126] and genocide which points out at perpetrators "whether they are constitutionally responsible rulers, public officials or private individuals."[127] Similarly, certain modes of liability, such as command responsibility, also require a qualified active subject, although it is not an independent offence itself.

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[125] *Supra* note 1.
[126] CAT art. 1.
[127] Convention on the Prevention and Punishment of the Crime of Genocide art.4.

On the other hand, the circumstances and elements of ICC are openly different. They do not have definite perpetrators, and they were enacted following a victim not a perpetrator approach. They are aimed at the protection of humankind from the most egregious acts, regardless of requirements of specific qualified actors, endorsing a universal protection and a general prohibition pursuing the punishment of whoever may commit an underlying offence.

The *Kiobel certiorari* was ordered to be reargued asking for further elaborations of extraterritorial application. As seen in chapter 4, Justice Kavanaugh dissenting in *Exxon-Mobil*[128] and Justice Kleinfeld dissenting in *Sare*i[129] based their arguments on a presumption against the ATS extraterritoriality on the US Constitution article 3, a question raised by Justice Alito during the *Kiobel* hearing.[130] Additionally, the issue of a link with the US was addressed in *Sarei* through the requirement of exhaustion of local remedies; a test was set up by requiring strict exhaustion when the nexus is weak and excluding the inquiry for *jus cogens* violations.

A ban on extraterritoriality, as seen in chapter 4, might limit ATS human rights litigation to a great extent given that most victims-plaintiffs have suffered damages in foreign countries. However, it also might be argued that, even when the actual damages occurred abroad, the wrongful conduct was ordered or planned in the US, in which event it would be uncertain whether the Supreme Court, in addition to overturning *Filártiga* and *Sosa*,[131] would also vest corporations with immunity as granted in *Sosa* for state agents, even though when federal statutes, such as the TVPA or the under-discussion "Holocaust Rail Justice Act" bill,[132] legislative efforts in other national jurisdictions, and intergovernmental organizations seem to be moving in the opposite direction as seen in chapter 2. Such a ruling might also be incongruent with international human rights obligations.

New movements in the international field, such as the Guiding Principles, recall upon states' duty to protect HR and insist that states must, among others, "protect against

[128] *Supra* note 45 Kavanaugh dissenting at 2.
[129] *Supra* note 42 at 19430.
[130] *Supra* note 6 at 54:30.
[131] *Ibid.,* recognized by Ginsburg and Kennedy as binding precedents at 13:13.
[132] Submitted in 2011, see *German National Railway Fears Flood of Lawsuits*, Spiegel Online International (2012)

HR abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulation and adjudication." [Moreover, the UN Human Rights Council has confirmed that states should] "Enforce laws that are aimed at, or have the effects of, requiring business enterprises to respect HR, and periodically to assess the adequacy of such laws and address any gaps."[133] The ATS could help to develop the Guiding Principles by strengthening supervision over corporations. HR treaties also exhort states to take steps to reinforce the rights enacted or the prohibitions set forth.

From a *lege ferenda* perspective, a possible alternative formulation to the majority opinion in *Kiobel* might be that *(i)* an ATS lawsuit shall be filed by an alien plaintiff; *(ii)* on the grounds of a damage caused as a consequence of a violation of the LoN, taking into account whether the substantive norm contains a specific definition of active subjects or is a provision of universal protection; and *(iii)* should be lodged through a civil cause of action, consequently having as proper defendants those who can be liable in tort law and according to constitutional and statutory sources.

Additionally, the Supreme Court's concerns on the case's link to the US might be addressed granting ATS extraterritorial application subject to heightened requirements on personal jurisdiction to adjudicate tort claims over US citizen entities, or domiciled there.

Although the scope of liability and extraterritorial application may represent important hurdles in accessing justice, the ATS is already limited in a number of ways for foreign victims under e.g. prudential doctrines. If CL is regarded as a subject-matter issue it would be a frontline barrier to admissibility; on the other hand, if considered a question of merit it does not release victims from facing such juridical challenge to getting relief, they still will have to deal with it in a last trial stage.

Whatever may be the Supreme Court decision, some questions might remain unsolved and therefore subject to the circuit courts' rulings, *inter alia*, whether actual damages happening abroad but arising from plans, orders, instigation, initiated or producing

[133] *Supra* note 22, principles 1 and 3(a)

benefits or revenues in the US may grant jurisdiction; whether chief executives, shareholders or even investors may be held liable and under what circumstances and modes of liability; whether *knowledge* or *purpose* should be the applicable approach for aiding and abetting; the exhaustion of local remedies standard; and whether there are provisions in the TVPA also applicable to the ATS and whether US citizens might be able to sue in the same conditions as aliens.

Through the ATS, main hurdles to the access to justice, from a juridical perspective, arise from failing to comply with *Sosa* requirements on allegations' specificity, obligatory nature and universality, *forum non conveniens* issues, the possible discouraging effect of more than one decade of proceedings, and *de facto* unlikeliness of getting a trial. By the same token, prudential doctrines may hinder access to justice when acting as a sort of *ex-ante* barriers; doctrines grouped under elements of competence in chapter 4, considering that they are regularly addressed together.

The analytical study carried out found that access to justice in ATS litigation may be restricted when judges exclude corporate liability because of a lack of previous IL precedent; when assuming a presumption against extraterritorial application of municipal law; when a heightened burden on exhaustion of local remedies is required together with a low threshold on considering a more appropriate alternative foreign forum; when foreign affairs, political or economic considerations outweigh the interest of adjudicating justice; and when the prospective ruling might challenge the position of other governmental branches.

On the other hand, following the legal perspective, access to justice regarding corporate involvement in ICC outside of the US has until now, even after *Kiobel* circuit decision, been consistently open and accorded to the advantages of civil litigation *vis-à-vis* criminal procedures, such as the extension of the scope of liability to abstract entities as a principle of civil law, a broader scope of accountability, and the application of more flexible evidence rules with lesser requirements than proof beyond reasonable doubt.

Courts granting open access to justice apply adjudicative power on personal jurisdiction grounds, acknowledge ICC as justiciable violations of the LoN regardless of the perpetrator's incorporated character, admit ATS extraterritoriality, apply a *knowledge* standard rather than a *purpose* standard for accessorial liability, recognize

the US judicial forum as more appropriate for human rights litigation than the judiciary of, for example, less developed countries immersed in armed conflict, and exclude *jus cogens* violations from exhaustion of local remedies inquiries. Foreign victims looking for corporate liability under the ATS need to overcome a comprehensive set of juridical challenges which, in the meanwhile, also furnishes justices with large control over what cases to take up.

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