

The Alien Tort Statute before the US Supreme Court in the *Kiobel* case: Does international law prohibit US courts to exercise extraterritorial civil jurisdiction over human rights abuses committed outside of the US?

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I. Introduction

The US Alien Tort Statute (28 U.S.C. § 1350; ATS), which dates from 1789, is hardly the best imaginable mechanism to adjudicate and implement international human rights norms. It reads as follows:

“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.”

The plain wording of the statute would seem to enable US courts to adjudicate over private claims for damages regarding gross human rights violations which have taken place in a foreign country, even if no US nationals have been involved as perpetrators or victims. Various legitimate political concerns can be raised in this context. Is it wise to entrust the domestic courts of one country with the universal task of applying and enforcing international human rights law? Is civil litigation the right mechanism to enforce human rights due to its profit-oriented structures of legal representation and its market-based forms of case selection? Does it further contribute to an increasingly dominant position of US law in our globalized economy? Many of the concerns raised appear well founded from a political perspective. Moreover, there is an intuitive uneasiness amongst international lawyers when they have to rely on decentralized and thus unilateral adjudica-

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tion and enforcement of international legal norms; ironically, however, that often remains the only game in town. But today, in light of what is by now a household proliferation of international judicial institutions, decentralized adjudication does not have the same appeal to international lawyers as it may have had at the time the ATS was drafted.

Nevertheless, in the human rights field and in particular in the area of corporate liability for gross human rights violations, there are – for all the glowing expressions and well-intended endeavors regarding corporate accountability of the past decades – still no international courts to turn to for effective redress if someone has been killed, tortured or similarly harmed for protesting against the corporate devastation of one's land and livelihood. That is essentially the claim brought by the plaintiffs in *Esther Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, a case that has attracted a lot of attention and rekindled several crucial debates.¹ They allege Shell's complicity in human rights violations committed against them in the Ogoni region between 1992 and 1995, including torture, extra-judicial executions and crimes against humanity. These were preceded by indigenous protest movements against Shell and other companies operating in the Niger delta.² To add insult to injury and leaving aside more fundamental misgivings, those domestic legal orders that might be considered to have close links to a particular case through the territoriality or personality principle, such as the host or home country of a multinational corporation, often have restrictive substantive or procedural rules in place when it comes to holding corporations or other private or public actors liable for human rights abuses, especially when committed abroad. Conversely, the same multinational corporation's business interests are nowadays very likely to be protected by a highly effective mechanism of international investment arbitration.³

In the late 18th century, given the absence of permanent international judicial institutions, unilateral adjudication would likely have seemed to the founders of the ATS to be an ordinary means of redress for victims of international law violations. Even though recourse to *ad hoc* international arbi-

¹ At the time of writing, the case is pending in the US Supreme Court (Docket No. 10-1491), on appeal from the US Court of Appeals for the Second Circuit.

² See IV. D. below.

³ There is a certain asymmetry in current international law between the degree of judicial protection of interests of economic actors and the judicial protection of non-economic interests of individuals, local communities or the population at large; see on such concerns *J. von Bernstorff*, Reflections on the Asymmetric Rule of Law in International Relations, in: *J. Crawford/S. Nouwen* (eds.), *Select Proceedings of the European Society of International Law*, Vol. 3, 2010, 381; *M. Jacob*, *International Investment Agreements and Human Rights*, INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010.

tration mechanisms, such as the ones provided for by the Jay Treaty,⁴ gradually became more frequent, they were not a permanent forum to adjudicate over a broader number of infringements of international law outside of particular bilateral contexts. Moreover, for European international lawyers, the concept of the national judge as an agent of the international legal community was a familiar notion of 20th century international legal theory, with *Georges Scelle* and his idea of a “*dédoulement fonctionnel*” springing to mind. According to this, national agents and officials should be seen as performing a split function as domestic officials and as agents of the international legal community.⁵

For better or for worse, decentralized judicial enforcement continues to play a vital role in those fields of international law that lack adequate centralized judicial institutionalization. Such “outsourcing” can even be a mechanism to counter the predominance of the executive branch when it comes to domestic decisions over the (non-)implementation of international legal standards.⁶

In the *Kiobel* matter in the US Supreme Court, many of these controversial issues were raised and broken down into concrete arguments in light of that particular lawsuit, not least by means of *amicus curiae* briefs. While the earlier focus had amongst other things been on the question whether corporate entities could be held liable, in March 2012 the Supreme Court unexpectedly and at a rather late stage restored the case to the calendar for re-argument and invited further submissions on the following fundamental question:

“Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”

Evidently this is a very broad query that opens up several possible routes for tackling it, for instance by way of a detailed examination of US tort law, conflict of laws or constitutional law. Regardless of the specific avenue pursued, it is hard to escape the feeling that the Supreme Court was keen to subject the ATS to a more thorough review, given the head-scratching the

⁴ Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, signed 19 November 1794.

⁵ *G. Scelle*, *Précis de droit des gens. Principes et systématique*, 2 Vols. (Paris: Librairie du Recueil Sirey 1932-1934), 10, 21; on *Scelle* see *W. Schiffer*, *The Legal Community of Mankind*, 1954, 260 et seq.

⁶ *E. Benvenisti*, *Reclaiming Democracy: The Strategic Uses of International and National Law by National Courts*, *Am. J. Int'l L.* 102 (2008), 241.

provision has caused⁷ and since it would certainly have appeared possible to avoid a more penetrating analysis by deciding the corporate liability point accordingly. But the Court chose not to let sleeping dogs lie.

In what follows, we focus mainly on international law. We would like to present some arguments why international law is not opposed to the ATS allowing US courts to hear lawsuits for certain violations of the law of nations on foreign soil. Politically, the mechanism may well be an imperfect one, giving rise to various concerns regarding the legitimacy and objectivity of national civil law procedures revolving around international human rights norms. At the same time, one could make a case for the ATS being the lesser of two evils. As authors of one of the *amicus* briefs in the *Kiobel* case, we contend that those concerns or any related shortcomings should not be dressed up as legal obstacles to the existence of the ATS supposedly imposed by international law.⁸ What follows is a defence of the ATS against charges that it contravenes various norms of general international law, and, when it comes to comity, also domestic public policy. It is in line with our answers submitted in response to the extraterritoriality angle contained in the question posed by the US Supreme Court. The argument proceeds in three steps.

We first recall that there must be a generally recognized basis of jurisdiction for international law to permit US courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the US (II). Familiar and frequently applied bases of jurisdiction in both civil and criminal matters include territory, nationality, the protection of other state interests, and the protection of certain universal interests (i.e. universal jurisdiction). In our view, even if one were not to accept a more relaxed “doing business” approach as many domestic systems are prepared to do in civil matters, the extraterritorial exercise of adjudicative jurisdiction (both penal and civil) is permissible in situations involving gross violations of universally recognized human rights norms. Second, we submit that the prudential comity doctrine does not preclude the exercise of jurisdiction based upon the ATS, be it under international law or domestic public policy (III). Third and finally, we assert that any requirement under international law to exhaust local remedies does not categorically preclude an ATS claim in a situation like that in *Kiobel* (IV).

⁷ For an overview see *A. Seibert-Fohr*, United States Alien Tort Statutes, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2008.

⁸ See Supplemental Brief of *Amici Curiae* German Institute for Human Rights and International Law Experts in Support of Petitioners of 13 June 2012. Besides the German Institute for Human Rights, *amici* included *Jochen von Bernstorff*, *Eva Kocher*, *John Henry Dingfelder Stone*, *Marc Jacob*, *Antje C. Berger* and the Humboldt Law Clinic for Human Rights.

The following is an abridged and largely identical version of the arguments presented in the *amicus* brief to the US Supreme Court. This is reflected in the style and form of presentation of the remainder.

II. International Law Allows US Courts To Recognize A Cause Of Action For Violations Of The Law Of Nations Occurring Within The Territory Of A Sovereign Other Than The United States When A Generally Recognized Basis Of Jurisdiction Exists

1. Permissible Bases Of Jurisdiction Under International Law Include Territory (Which In Civil Matters Can Also Encompass Presence, Domicile, Business Activity or Assets), Nationality, The Protection Of Other State Interests, And The Protection Of Certain Universal Interests

In international legal practice, the exercise of domestic jurisdiction to adjudicate upon conduct or an incident occurring within the territory of another sovereign requires a recognized basis of jurisdiction. Even if not strictly required by the International Court of Justice or its predecessor,⁹ this helps to avoid potential conflicts with foreign jurisdictions. Besides a territorial connection, other generally accepted and frequently applied bases of jurisdiction in both civil and criminal matters are: nationality, the protection of other state interests, and the protection of certain universal interests. See *A. Cassese*, *International Law* (2nd ed. 2005) 50; *M. Shaw*, *International Law* (6th ed. 2008) 651-673.

⁹ The Permanent Court of International Justice famously held that international law leaves room for extraterritorial jurisdiction. This has not been reversed by the International Court of Justice:

“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable”, *The Case of the S.S. “Lotus”* (*France v. Turkey*), Judgment, PCIJ Rep., 1927, Series A, No. 10., 19.

This does not imply that the exercise of adjudicative jurisdiction beyond these bases is necessarily unlawful; it is, however, more likely to intervene unduly in the internal affairs of another state. Jurisdictional competence under international law thus is a relational concept, which in a community of sovereign nation states has to be applied in line with the principle of non-intervention as its ultimate legal limitation.¹⁰

Two important aspects of the doctrine of jurisdictional competence must be pointed out in this context. First, jurisdictional competence is not based on a principle of exclusiveness. As Professor *Brownlie* put it, “the same acts may be within the lawful ambit of one or more jurisdictions”. *Id.*, at 312. Secondly, the various bases of jurisdiction often interweave in practice and are used in combination with one another. *Id.*, at 308. A lesser link to the territory of a state in a particular case can for instance be complemented by an indirect link to nationals of that state in order to cumulatively justify jurisdiction. Alternatively, the protection of universal interests as a basis of criminal jurisdiction could in practice go together with a less substantial connection to the territory of a state (i.e. physical presence or economic activity in the country).

From the perspective of international law, US courts are thus free to recognize claims brought under the Alien Tort Statute (28 U.S.C. § 1350; ATS) for violations of the law of nations if at least one of these generally recognized bases for jurisdiction exists (territory, nationality, protection of other state interests, or the protection of certain universal interests). Importantly, the international legal regime concerning extraterritorial enforcement does not apply to the ATS. Hence, even in cases in which no substantial connection to the territory or nationals of the US can be identified, US courts may exercise adjudicative jurisdiction for the protection of specific universal interests, such as combating piracy, the slave trade, and gross violations of specific human rights norms. Cf. *M. Sharw, supra*, 668-671; *M. Kmak*, The Scope and Application of the Principle of Universal Jurisdiction, Erik Castén Research Reports 28/2011, 93 (2011) (stating that “the international community agrees that universal jurisdiction is firmly established on the level of international law as an institution with the aim of fighting impunity”). Indeed, international law in general relies primarily on decentralized (i.e. domestic) implementation, especially as concerns civil remedies.

¹⁰ Specific treaty rules limiting jurisdiction may of course apply. See *I. Brownlie*, Principles of Public International Law, 299, 312 (7th ed. 2008) (on the principle of non-intervention as an outer limit to jurisdictional competence).

In practice, the principle of universal jurisdiction is often applied in combination with other recognized bases of jurisdiction.¹¹ But despite the infrequent exercise of pure universal jurisdiction, the joint separate opinion of Judges *Higgins*, *Kooijmans* and *Buergenthal* in the *Arrest Warrant* case of the International Court of Justice noted that this does not imply that such an exercise would be unlawful. See *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Rep. 2002, p. 3, Joint Sep. Op., *Higgins*, *Kooijmans* and *Buergenthal*, at para. 45. To the contrary, the substantial practice in this field, which often bases jurisdictional competence on additional grounds, is a testament to the general acceptance of universal jurisdiction. In the words of the judges: “There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded unlawful.” *Ibid.* para. 46.

It needs to be emphasized that there is no doubt as to the legality of the exercise of universal jurisdiction once, beside this particular basis of jurisdiction, other connections to the country assuming jurisdictional competence can be identified. As to the required factual links under other bases of jurisdiction, such as territory, nationals or national interests, contemporary trends show a lowering of thresholds in the form of the “effects”, “impact” and “doing business” doctrines. See *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), *supra*, at para. 47 (on this general development); *M. Kamminga*, Extraterritoriality, in: Max Planck Encyclopedia of Public International Law (R. Wolfrum ed.), para. 27 (2012) (attesting that “the exercise of extraterritorial jurisdiction by way of prescription and adjudication is on the rise”); *M. Rosenthal/S. Thomas*, European Merger Control 11-12 (2010) (on the effects doctrine).

Particularly in civil matters states often claim judicial jurisdiction on broad grounds that look beyond the location where an act or event took place. See *M. Akehurst*, Jurisdiction in International Law, *Brit. Y.B. Int'l.L.* 46 (1974), 145, 170-177. Various national legal systems have legislation encompassing extraterritorial elements. This is relevant because the principles of jurisdiction under international law rest on a generalized amalgam of national provisions. See *I. Brownlie*, *supra*, at 308.

¹¹ E.g. nationals as victims, economic activity on the territory, temporary physical presence on the territory. See for example the two cases *Att’y Gen. V. Eichmann*, 36 ILR 277, 303-04 (1968) (Isr.S.Ct. 1962); and *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-583 (6th Cir. 1985), cert denied, 475 U.S. 1016 (1986).

2. In Exercising Universal Jurisdiction National Courts Act On Behalf Of The International Community Of Sovereign States, Therefore An Infringement Of Sovereign Rights Of Other States Is Unlikely

The principle of universal jurisdiction evolved as a specific basis of jurisdiction in order to enable states to define and foresee punishment for the violation of rules of universal concern, such as the prohibition of piracy and the slave trade. See Restatement (Third) of Foreign Relations Law of the United States, § 404. This had taken shape as a general principle of international law before the ATS was passed by Congress. The initial set of offenses covered by the ATS according to the US Supreme Court's judgment in *Sosa v. Alvarez-Machain et al.*, 542 U.S. 692 (2004) include what were at the time the most important and universally accepted norms of international law, such as piracy, violation of safe conduct and offenses against ambassadors. See *Sosa*, at 715-720, 723-725; 4 W. *Blackstone*, Commentaries on the Laws of England *68 (1769). As to the evolution of this principle in customary international law, two main motives have been identified why the community of sovereign states would allow this particular form of extraterritorial jurisdiction. First, in order to punish offenses like piracy, which are often perpetrated on the high seas and thus outside of domestic jurisdictional reach. Second, to allow for the national prosecution and punishment of particularly heinous and repugnant violations of the law of nations, such as the slave trade, even if this is not undertaken in a location beyond the jurisdictional reach of states.¹² It was precisely the prohibition of the slave trade in the 19th century that introduced a new dynamic element into the ambit of norms empowered by the principle of universal jurisdiction: international legal norms that protect human dignity.

Conceptually, the exercise of jurisdiction based on the principle of universal jurisdiction must be differentiated from the other generally accepted bases for jurisdiction regarding an incident or conduct occurring on foreign soil mentioned above. Its central rationale is to put into effect a limited number of elementary rules of the law of nations through domestic prescription, adjudication, and enforcement. By doing so, domestic institutions

¹² See *I. Bantekas*, Criminal Jurisdiction of States under International Law, in: R. Wolfrum (ed.), MPEPIL, para. 23 (2012).

seek to uphold shared interests of the community of sovereign states,¹³ whereas under other generally recognized bases of jurisdiction a specific national interest must generally be invoked to justify the exercise of jurisdiction. This is not to say that the exercise of universal jurisdiction by a sovereign nation is a purely altruistic move to enforce foreign interests. Quite the opposite. Under universal jurisdiction national and international interests in adjudicating the most important international legal rules coincide. It is in the interest of each individual sovereign nation that the most egregious violations of international law are addressed effectively.

Consequently, universal jurisdiction by its very nature is a basis for jurisdiction which is less concerned with the question of whether or not other sovereigns might have a specific or more justified national interest in exercising jurisdiction. Every state can impose liability for any of these violations of universal concern at any time, unless the perpetrators have already been adequately punished (*ne bis in idem*) or have already adequately compensated the victims. See *I. Brownlie, supra*, at 308. However, in contradiction to the other bases of jurisdiction, the principle of universal jurisdiction, if applied as the only basis of jurisdiction, allows US courts to recognize a cause of action only for a limited number of violations of the law of nations.

3. Under The Principle Of Universal Jurisdiction, The Extraterritorial Exercise Of Adjudicative Jurisdiction Is Permissible In Situations Involving Gross Violations Of Well-Defined and Universally Recognized Human Rights Norms

Universal jurisdiction does not apply to all norms forming part of customary international law. Besides piracy and slavery, universal jurisdiction in state practice is exercised over torture,¹⁴ genocide,¹⁵ war crimes,¹⁶ and

¹³ Cf. *B. Simma*, From Bilateralism to Community Interest in International Law, RdC 250 (1994), 217 et seq. ; *A. Paulus*, Die internationale Gemeinschaft im Völkerrecht, 2001, (on the notion of international community in international law).

¹⁴ Universal jurisdiction over acts of torture is permitted under customary international law. See *Prosecutor versus Furundzija*, IT-95-17/1-T, para 156; Universal jurisdiction is compulsory under Art. 5 (2) of the Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984).

¹⁵ Universal jurisdiction over acts of genocide is recognized by customary international law. See *Prosecutor v. Ntuyahaga* ICTR-90-40-T (Mar. 18, 1999); *Prosecutor v. Tadic*, IT-94-1-AR72, para 62 (Oct. 2, 1995). For the practice of national courts see *Att'y Gen. V. Eichmann*,

crimes against humanity.¹⁷ Gross violations of the integrity and dignity of individuals have thus since the Nuremberg trials gradually evolved into issues of universal concern. The content of these norms has been specified by both the abundant international treaty practice and by pronouncements of national and international judges on these violations. They can be interpreted as specific, universal and obligatory international law norms in accordance with the US Supreme Court's judgment in *Sosa*, at 732 (referring to *In re Estate of Marcos Human Rights Litigation*, 25 F. 3d 1467, 1475 (C.A.9 1994)). This trend towards universal jurisdiction corresponds to doctrinal developments in the area of state responsibility. As was famously held in the *Barcelona Traction* case, a number of fundamental rules protecting the "basic rights of the human person" create obligations by each state to all other states, so called *erga omnes* obligations. *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Rep. 1970, p. 3, para 34. It follows from this that it is today practically undisputed that each state, even if it is not affected by a breach of such an obligation, has a right to invoke the responsibility of another state for these violations. See UN International Law Commission (Fifty-third Session), *Responsibility of States for Internationally Wrongful Acts* (2001), annexed to GA Res. 56/83, December 12, 2001, corrected by document A/56/49 (Vol. I)/Corr.4, Art. 48.

As to the exact range of human rights violations covered by the principle of universal jurisdiction, it must be added that the above mentioned list is a restricted one, which however could expand in the future. In state practice, universal jurisdiction so far has only been applied to vindicate gross violations of human rights. According to the ALI's Restatement:

"a violation is gross if it is particularly shocking because of the importance of the right or the gravity of the violation. All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are interna-

36 ILR 277, 303-04 (1968) (Isr.S.Ct. 1962); and *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-583 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *Prosecutor v. Jorgic*, German Federal Constitutional Court, 2 BvR 1290/99, of Dec. 12, 2000, para 15-17.

¹⁶ Compulsory universal jurisdiction under international humanitarian law for grave breaches: First Geneva Convention, 75 U.N.T.S. 31, August 12, 1949, Art. 49; Second Geneva Convention, 75 U.N.T.S. 85, August 12, 1949, Art. 50; Third Geneva Convention, 75 U.N.T.S. 135, August 12, 1949, Art. 129; Fourth Geneva Convention, 75 U.N.T.S. 287, August 12, 1949, Art. 146.

¹⁷ Crimes against humanity were recognized in Art. 6 (2) c) of the Nuremberg Charter of the Military Tribunal, 8 U.N.T.S. 279, August 8, 1945. They encompass murder, extermination, enslavement, deportation and other inhumane acts. This category of violations is today a norm of international customary law, which is recognized as giving rise to universal jurisdiction. See Restatement (Third), *supra*, § 701; Reporters' Notes 3; § 702, comment (o).

tionally recognized but some rights are fundamental and intrinsic to human dignity". See Restatement (Third), *supra*, § 702, Comment (m).

In sum, in order to be consistent with international law, judges exercising jurisdiction under the ATS based on the universality principle alone can adjudicate gross violations of international human rights norms. Whenever other bases of jurisdiction come into play in an ATS case, any violation of the law of nations satisfying the criteria developed by the Court in *Sosa* could be vindicated by US courts.

4. The ATS Can Be Interpreted In Light Of The Principle Of Universal Jurisdiction Regardless Of Its Civil Law Nature

Universal jurisdiction is exercised through criminal and civil law. See Restatement (Third), *supra*, § 404, Comment (b); *M. Shaw, supra*, 652 (pointing to the rarity of diplomatic protests in civil matters). Even though universal criminal jurisdiction is more common than universal civil jurisdiction, the latter is in line with the idea and concept of universal jurisdiction. Notable evidence is the, in principle, undisputed existence of the ATS in these proceedings. As amicus curiae briefs in this case demonstrate, even those states that support the respondents have not claimed that the ATS as such necessarily violates the law of nations. What is generally being asked for is a "cautious" approach in applying it, not the removal of the statute from the statute book.¹⁸ Indeed, a great majority of states support punishing the most heinous violations of international law through national courts.

The second argument is the general trend towards convergence between criminal and civil remedies in many national legal orders. German law as well as a number of other European legal systems foresees the possibility of also claiming civil (i.e. tort-based) compensation in criminal proceedings.¹⁹ The former rather strict procedural separation between criminal law and civil law in continental legal orders is increasingly giving way to a merger of

¹⁸ See e.g. Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, February 2, 2012, at 15.

¹⁹ See e.g. §§ 403 to 406 of the German Code of Criminal Procedure. Cf. also the practice in Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Portugal, and Sweden; EU Commission, Amicus Curiae Brief, U.S. Supreme Court, *Sosa v. Alvarez-Machain et al.*, January 23, 2004, 21 (providing an overview of European countries). See also Council Regulation (EC) No. 44/2001 of December, 22 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 12, 16.1.2001, 1 et seq., Art.5(4) (regarding civil claims for damages or restitution which are based on acts giving rise to criminal proceedings).

criminal sanctions and requests for damages in a particular case at hand. Courts exercising universal criminal jurisdiction can hence also often hear ancillary claims for damages. Lastly, from an international law perspective, no general exclusion of universal civil jurisdiction can plausibly be argued. As the Court held in *Sosa*: “Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private right in § 1350 cases” (at 727).

The principle of universal jurisdiction aims at providing an effective legal remedy on the national level for egregious violations, without specifying domestic procedural requirements. In this regard punishment and compensation are complementary reactions to illegal conduct. It follows precisely from the idea of decentralized adjudication and enforcement that the choice of procedure remains within the sovereign discretion of each nation state. It should also be taken into account in this context that civil law compensation is generally less intrusive for the defendant than criminal law sanctions. Given that universal criminal jurisdiction is generally accepted, universal civil jurisdiction can *a fortiori* be recognized as a legitimate concretization of the general principle of universal jurisdiction.

III. The Prudential Doctrine Of International Comity Does Not Preclude The Exercise Of Jurisdiction Based Upon The Alien Tort Statute

1. The Nature of International Comity

International comity signifies traditions or habits of politeness, convenience, and goodwill. Lacking *opinio juris*, this comity of nations is neither a source of international law nor legally binding. See *North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. The Netherlands)*, Judgment, ICJ Rep. 1969, p. 3, para. 77; W. Graf Vitzthum, *Völkerrecht* (5th ed. 2010) 29; R. Jennings/A. Watts (eds.), *Oppenheim’s International Law* 51 (9th ed. 2011) (calling the difference between rules of international law and international comity “clear-cut in logic”). The distinction between international law in proper and counsels of courtesy, deference, or expediency in interstate relations is venerable and firmly established. Cf. H. Grotius, *De iure belli ac pacis libri tres*, in: *The Classics of International Law* (J. Scott ed.) (1964), vol. 2, transl. book 1, Prolegomena, para. 41; *Alabama case (United States of America v. Great Britain)*, Decision and Award, Septem-

ber 14, 1872, reprinted in: T. Balch, *The Alabama Arbitration* 136 (reprint 1969). From the perspective of international law, a contravention of international comity can hence at most amount to an unfriendly political act. It cannot give rise to state liability. Accordingly, even if the ATS were in disregard of international comity, which is questionable, this would not be a breach of international law.

Moreover, international comity is a “doctrine more easily invoked than defined.” *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 298 (2d Cir. 2007) (*Korman*, J., concurring in part and dissenting in part). Traditionally, the US Supreme Court has characterized comity as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164. More recent definitions have portrayed comity as “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 fn 27 (1987) and as a concept that leads “each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.” *Sosa*, at 761 (*Breyer*, J., concurring). The application of comity is meant to “ensure that ‘the potentially conflicting laws of different nations’ will ‘work together in harmony’”. *Ibid.* 761 quoting *F. Hoffmann–La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004).

As already noted above concerning international law, deference to the interests of other nations, however, is “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” *Hilton v. Guyot*, 159 U.S. 113, 163-64. Rather it is normally a matter of discretion for the court. See *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir.2006); *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987). Nor, as is the case with any doctrine that results in a denial of jurisdiction on prudential grounds, is it a discretion that may be employed lightly, since there exists a “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976).

The circumstances under which a federal court may exercise its discretion and deny jurisdiction based upon international comity are far from clear. In large part, the lack of clarity arises from the various different contexts in

which the doctrine has been applied. See *D. E. Childress*, Comity as Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. Davis L.Rev. 11, 48 (2010). In instances where the extraterritoriality of a federal statute is at issue, the only question is whether a true conflict exists between the foreign and domestic law. See *Hartford Fire Insurance v. California*, 509 U.S. 764, 798 (1993). In applying this standard (or choosing not to), the circuit courts are not of one mind. Both the 9th circuit and 3rd circuit apply the “true conflict” test in virtually any and all comity cases. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1211-12 (9th Cir. 2007); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3rd Cir. 2006). The 11th circuit distinguishes between two different forms of the comity doctrine (restrospective and prospective), yet their “analysis for both forms of international comity embody similar concerns with foreign governments’ interests, fair procedures, and American public policy.” *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). The 2nd circuit likewise differentiates between two separate categories. In *Hartford*-like cases involving the extraterritoriality of a federal statute, the 2nd circuit applies the “true conflict” test. *In re Maxwell Communication Corp. plc by Homan*, 93 F.3d 1036, 1049 (2nd Cir. 1996). However, where the decision concerns whether or not a legal action would be more “properly adjudicated in a foreign state”, *In re Maxwell Communication Corp. plc by Homan* 1047, the 2nd circuit chooses to focus on whether the exercise of federal jurisdiction would offend the “amicable working relationship” with that foreign state. *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2nd Cir. 2006). Given the conflicting tests employed by each circuit, as yet, there is no unified standard for the application of international comity.

2. Regardless Of The Test Employed By the US Supreme Court, Alien Tort Statute Claims Will Rarely Merit Dismissal Based Upon Concerns Of International Comity

Irrespective of the lack of uniformity applied in the international comity context, it is questionable whether any of the tests would require the dismissal of an Alien Tort Statute case. The class of international norms actionable under the Alien Tort Statute has been described as “narrow” by the US Supreme Court. *Sosa*, at 729. In *Sosa*, the Court cited with approval the contention that the reach of the Alien Tort Statute extended only so far as a “handful of heinous actions—each of which violates definable, universal and obligatory norms”. *Sosa*, at 732, quoting *Tel-Oren v. Libyan Arab Republic*,

726 F.2d 774, 781 (C.A.D.C. 1984) (*Edwards*, J., concurring). As argued in Section 1 (universal jurisdiction), the types of actions brought under the Alien Tort Statute are likely concerned with gross violations of human rights, including slavery, torture, genocide, war crimes, and crimes against humanity. These obligatory norms of international law protecting human dignity are universally recognized, and as such all nations have a community interest in their enforcement. For instance, the Federal Republic of Germany in its amicus brief expressly holds itself out as a “strong defender” and promoter of human rights, while not submitting any actual, concrete comity concerns beyond a very general suggestion that the ATS “could potentially interfere” with Germany’s sovereignty, and even that only if applied in an “unreasonable” manner.²⁰ Moreover, jurisdiction and sovereignty are not coextensive.

Specifically, the “heinous” nature of the actions within the province of the Alien Tort Statute dictate that very few, if any, legitimate Alien Tort Statute cases will merit dismissal using any of the specific tests employed in the circuit courts. For example, the “true conflict” test developed in *Hartford Fire* states that international comity is only appropriate where a “true conflict” exists between the American and foreign law, and that no such conflict exists where the person subject to both laws is able to comply with both simultaneously. *Hartford Fire Insurance* 798-99. Given that any meritorious cause of action brought under the Alien Tort Statute will involve actions that are both universal and obligatory, and thus necessarily illegal in every nation, it is unlikely that there could exist such a “true conflict” that would make a dismissal based upon comity appropriate. Any legitimate Alien Tort Statute case will likely also satisfy the 2nd circuit’s “amicable working relationship” test, which is mainly concerned with not offending foreign relations with a particular foreign nation. The obligatory and universal nature of the international norms at issue here dictate that all foreign nations necessarily have aligned interests in their enforcement, and the exercise of jurisdiction by the federal courts “will not significantly threaten the practical harmony that comity principles seek to protect.” *Sosa*, at 762 (*Breyer*, J., concurring).

Similarly, the applicable international comity test arising from 11th circuit jurisprudence also will rarely, if ever, require the dismissal of an Alien Tort Statute case. The 11th circuit distinguishes between two different forms of the comity doctrine: those where comity is applied retrospectively and those where it is done so prospectively. See *Ungaro-Benages* 1238. Retro-

²⁰ Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, *supra*, at 1, 10.

spective application involves cases where either parallel foreign proceedings or a foreign court judgment already exists, neither of which is true in the present case. *Ibid.* 1238. The prospective comity doctrine concerns “whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum.” *Ibid.* 1238. As previously stated, the nature of the actions underpinning an Alien Tort Statute case dictate that everyone involved (the United States, the foreign government, and the international community at large) will have an aligned interest in the enforcement of the specified international norm. That the jurisdiction of the foreign nation has not been invoked in such a case (thus necessitating the “prospective” doctrine), is the conscious choice of the individual filing the Alien Tort Statute claim. This is a knowing choice of a legitimate jurisdiction, and is deserving of some deference itself.²¹ After all, courts all over the world tend to assume jurisdiction where national procedural codes see fit, as long as they consider there to be sufficient connections to their forum according to their municipal law and whenever they consider this reasonable.

Moreover, the mere application of the 11th circuit test itself is not without difficulties. Establishing whether the interests of a foreign nation deserve deference from the federal judicial branch requires US courts to not only evaluate, but also determine the legitimacy and importance of those foreign interests. This is an evaluation that is fraught with potential diplomatic landmines. In addition, the 11th circuit test obliges the court to then weigh US interests against foreign interests in order to determine which are more important. Such a balancing test necessitates that the court either defer to the foreign nation, or effectively declare that its interests are either illegitimate, overstated, or simply not important enough. The entire process of evaluating and weighing the interests of foreign nations in the name of international cooperation and harmony appears as likely to upset that harmony as ensure it.

²¹ In ordinary transnational litigation among businesses or individuals based or residing in different countries, it is commonplace and perfectly legitimate that a civil claim is brought in a forum where the plaintiffs can expect the most favorable adjudication of their claim or where the defendant has sufficient assets so that the effective enforcement of the judgment can be ensured.

3. Even Where Concerns Over International Comity Suggest Deference To A Foreign Nation, Consideration Of American Public Policy Will Likely Necessitate The Retention Of Jurisdiction Over An Alien Tort Statute Claim

Nevertheless, exceptional circumstances occasionally do exist where the interests of a foreign nation are of such importance that the exercise of jurisdiction over a particular Alien Tort Statute case will potentially provoke disharmony between the United States and that foreign nation. In such a case, it is likely that the United States Department of State will inform the court of its concerns in this respect. These concerns, while entitled to great respect, however, are not dispositive.²² See *Khulumani* 263-264. Yet, even in these circumstances, it is not entirely clear that a dismissal of an Alien Tort Statute claim under the international comity doctrine would be appropriate.

“No nation is under unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum.” *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C.Cir.1984). Federal courts will not defer to foreign interests where “doing so would be contrary to the policies or prejudicial to the interests of the United States.” *Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). Given the particularly heinous character of the actions justiciable under the Alien Tort Statute, and their status as universal and obligatory norms of international law, it is likely that choosing not to enforce those international norms would be against the public policy of the United States. Torture, for instance, is itself against the stated public policy of the United States. (*Senate Report* at 3 (“no state commits torture as a matter of public policy”). It follows that voluntarily not enforcing the international norm against torture where the exercise of jurisdiction over that norm is both possible and an “unflagging obligation” of the federal courts would also be against domestic public policy. Considering that the Alien Tort Statute will largely involve instances of gross violations of human rights, this is arguably the case with nearly every claim brought under that statute. In such circumstances, the interests of international comity, re-

²² Naturally, in exercising jurisdiction over a case that impacts the foreign relations of the United States, questions concerning the proper separation of powers between the executive and judicial branches will arise. As these issues do not bear upon international law or comity, they are not dealt with in this brief.

ardless of their strength, must take a backseat to domestic public policy interests. *Pravin Banker Associates, Ltd.*, *supra*, 854.

IV. Any Requirement Under International Law To Exhaust Local Remedies Does Not Categorically Preclude A Claim Under The Alien Tort Statute

The US Supreme Court has stated that it might consider an exhaustion requirement akin to that of the Torture Victim Protection Act of 1991, § 2(b), 106 Stat. 73 in an “appropriate case”. *Sosa*, at 733, n.21. *Kiobel* is not a case where exhaustion is appropriate.

1. The Exhaustion Rule Applies To Diplomatic Protection Under International Law

Historically, the international law principle concerning the exhaustion of local remedies is rooted in the practice of sovereigns protecting their subjects when these are injured abroad.²³ Exhaustion was originally conceived as a precondition for turning to one’s own prince for aid. It is a necessity for the latter to espouse a claim. That is done through the mechanism of diplomatic protection, whereby the home state of an injured person secures the protection of that person through diplomatic action or other peaceful means of dispute resolution by taking up his or her case and obtaining reparation for an internationally wrongful act committed by a foreign state.²⁴ As encapsulated by the International Court of Justice, the underlying rationale in those constellations is that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system”. *Interhandel case (Switzerland v. United States of America)*, Preliminary Objections, ICJ Rep. 1959, p. 6, at p. 27.

²³ See J. Crawford/T. Grant, Local Remedies, Exhaustion of, in: R. Wolfrum (ed.), MPEPIL, paras. 1, 42 (2012).

²⁴ Cf. UN International Law Commission (Fifty-eighth Session), *Draft Articles on Diplomatic Protection* (2006), Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), Art. 1. The link between exhaustion and diplomatic protection is spelt out by Art. 14(1): “A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies”.

A private tort claim, e.g. one brought under the ATS, does not involve diplomatic protection. In such a situation plaintiffs are not asking a sovereign to present a claim on their behalf in respect of an injury suffered. The present case illustrates the point. Claimants in *Kiobel* seek redress against violations allegedly committed in complicity with their own state. The fiction that their ill-treatment injures their home state,²⁵ which is the rationale for traditional diplomatic protection, makes little sense when residents of Nigeria claim that various corporations aided and abetted the Nigerian government in committing violations of the law of nations. Nor can they be taken to have willingly accepted foreign mechanisms upon going abroad, which is another justification for the exhaustion rule. *Salem* case (United States of America v. Egypt) (1932) 2 R.I.A.A. 1161, 1202. There is no “sending” or “receiving” state in a typical ATS suit and hence no tacit submission.

2. The Exhaustion Rule Is A Procedural Requirement For International Claims

Beyond diplomatic protection, exhaustion of local remedies plays a role when private individuals bring proceedings in their own right against states on the international plane, in particular based on international conventions for the protection of human rights. The International Covenant on Civil and Political Rights for example states that the corresponding Human Rights Committee shall only deal with referred matters “after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law.” International Covenant on Civil and Political Rights, December 16, 1966, 99 U.N.T.S. 171, Art. 41(1)(c). Similarly, the European Convention on Human Rights states in its admissibility criteria that the European Court of Human Rights may only adjudicate “after all domestic remedies have been exhausted, according to the generally recognised rules of international law [...]”. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, Art.

²⁵ The Permanent Court of International Justice put it as follows: “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law”. *Mavrommatis Palestine Concessions* cases (*Greece v. United Kingdom*) PCIJ Rep., 1924, Series A, No. 2, 12.

35(1).²⁶ Crucially, those regimes however envisaged that exhaustion of local remedies would contribute to the effective vindication of human rights claims, rather than being a mechanistic barrier thereto.²⁷ The ultimate point is actual redress.

In such situations, the exhaustion of local remedies features as a prerequisite for the admissibility of non-domestic claims in international courts and tribunals. In the classic formulation of the Commission of Arbitration in the *Ambatielos* case: “[The rule] means that the State against which an *international action* is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State.” *Ambatielos* case (*Greece v. United Kingdom*) (1956) 12 R.I.A.A. 83, 118-119 (emphasis added). In short, the rule serves to demarcate the line between the jurisdiction of international and national courts.²⁸

It is important to note in this respect that the International Law Commission in its codification efforts on state responsibility resiled from an earlier draft that had treated exhaustion as a substantive element of a breach of an international obligation. In the final version that was commended by the UN General Assembly, exhaustion is expressly treated as a matter of admissibility. UN International Law Commission (Fifty-third Session), *Responsibility of States for Internationally Wrongful Acts* (2001), annexed to GA Res. 56/83, December 12, 2001, corrected by document A/56/49 (Vol. I)/Corr.4, Art. 44(b).²⁹ This procedural approach fits with the jurisprudence of the International Court of Justice, which stated that “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.” *Elettronica Sicula SpA (ELSI)* case (*United States of America v. Italy*), Judgment, ICJ Rep. 1989, p. 15, para. 59. See also *Interhandel* case, *supra*, at 26-27; *Case concerning the*

²⁶ See also American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, Art. 46(1)(a).

²⁷ See A. *Cançado Trindade*, *The Application of the Rule of Exhaustion of Local Remedies in International Law* 4 (1983).

²⁸ See D. *Mummary*, *The Content of the Duty to Exhaust Local Judicial Remedies*, AJIL 58 (1964), 389, 390.

²⁹ The first reading of the draft articles of 1996, ultimately rejected, had instead insisted in Art. 22 that “there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them [...]”. UN International Law Commission (Forty-eighth Session), Official Records of the General Assembly (Fifty-first Session), Supplement No. 10 (A/51/10 and Corr.1), pp. 125-151).

Factory at Chorzów (Germany v. Poland), Jurisdiction, PCIJ Rep., Series A, No. 9, p. 26.

A civil suit that comes under the ATS is a domestic action before a domestic court. That the alleged conduct violating a substantive norm of international law took place abroad is immaterial in this respect. A US torts claim brought by individuals in a US court against private entities is not one to which this facet of the international law rule on exhausting local remedies applies. This leaves untouched disciplining elements the domestic legal system of the US might otherwise impose. But it is neither required by international law, nor desirable in principle, for the US Supreme Court to evaluate the municipal law and procedure of other states in order to determine whether plaintiffs in a situation such as in *Kiobel* have exhausted local remedies. For good reason, § 1350 itself does not contain a requirement for US courts to evaluate the capability of foreign courts.

3. The Scope of the Rule is Limited to Local Remedies

Even if the international law principle on the exhaustion of remedies were considered applicable in an ATS suit, the scope of the rule would be limited to *local* remedies, i.e. domestic remedies of the state in which the conduct giving rise to the claim occurred. By analogy, the Torture Victim Protection Act of 1991, § 2(b), 106 Stat. 73 fittingly speaks of claimants exhausting “adequate and available remedies *in the place in which the conduct giving rise to the claim occurred*” (emphasis added).

Such an interpretation is in accordance with the leading international law cases. The tribunal in *Ambatielos*, *supra*, at 119, spoke of private individuals having recourse to “all the remedies available to them under the municipal law of that State [i.e. the state against which an international action is brought]”. Likewise, *Interhandel*, *supra*, at 27, ruled that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system”. Moreover, it is established case law of the European Court of Human Rights that the exhaustion of domestic remedies demands that the national legal remedies of the respondent state are used. *Case of Akdivar and Others v. Turkey*, Application No. 21893/93, September 16, 1996, para. 65.

This clearly defined scope makes sense in light of the basic rationale of the requirement: the host state, i.e. the sovereign within whose territory the alleged violation takes place, should have a proper opportunity to settle the dispute through its own legal system. See e.g. European Court of Human

Rights, *Case of Davydov and Others v. Ukraine*, Applications Nos. 17674/02 and 39081/02, July 1, 2010, para. 247. This harks back to the basic rationale behind the exhaustion rule: to give local courts the opportunity to before “internationalizing” a claim. It assumes a binary contest. What the rule does not do, even if applied analogously, is to resolve cases of concurrent national jurisdiction. It cannot, for instance, coordinate between the location in which an act occurred, where the harm manifested, or where the respondent was domiciled, registered or headquartered.

4. Exceptions To The Exhaustion Rule Exist

In any event, it is well-established that such recourse is excused in certain cases. Art. 15 of the *Draft Articles on Diplomatic Protection* (2006), *supra*, succinctly summarizes the pertinent international law. The exhaustion requirement does not apply whenever local remedies are neither reasonably available nor capable of providing effective redress, *ibid*. The aggrieved individual must not be manifestly precluded from pursuing local remedies, *ibid*. Undue delay constitutes another exception, *ibid*. That the requirement is not immutable is further borne out by the fact that states against which an international action is brought can waive it, *ibid*. This practice is for example abundantly common in bilateral investment treaties, including those of the US, which among other things afford private investors from each treaty party the right to submit an investment dispute with the host state to international arbitration without having to use local courts.³⁰

In short, the remedy must not just exist on paper. While it is generally asked that the essence of a case was brought and unsuccessfully pursued as far as permitted by local law, *ELSI* case, *supra*, at 15, para. 59, there must at least be a “reasonable possibility” of redress. *Case of Certain Norwegian Loans (France v. Norway)* (Judgment) ICJ Rep. 1957, 9, Sep. Op., *Lauterpacht*, at 39; *Draft Articles on Diplomatic Protection* (2006), *supra*, Art. 15(a). It must further not be unfair or unreasonable to require that an injured alien should be required to exhaust local remedies. As summed up by a NAFTA tribunal, what is demanded is that remedies are effective, adequate and reasonably available. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award on Merits, June 26, 2003, Case

³⁰ See e.g. Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, 19 February 2008, Arts. 24-25, <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/pdf-agreements/RwandaBIT.pdf> (05/24/2012).

No. ARB(AF)/98/3, para. 168. Whether or not this is the case can be presumed from the actual circumstances.

Local proceedings are not for example required when the domestic courts have no jurisdiction over the complaint or when host state legislation will not be reviewed by the domestic courts. Moreover, where there is evidence that the independence of the judiciary is doubtful in light of the capricious authority of the executive there is simply no justice to exhaust. *Robert E. Brown (United States) v. Great Britain*, (1923) 6 R.I.A.A. 120, 129. In a similar vein *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist., LEXIS 4409, at *5 (S.D.N.Y. 1996) (plaintiffs fulfilling the exhaustion requirement of the Torture Victim Protection Act 1991 by showing that the Rwandan judicial system was virtually inoperative and unable to deal with civil claims in the near future).

Less drastically but no less significantly, exhaustion is no bar when local proceedings would be ineffective. It was contended in the *Kiobel* proceedings that states other than Nigeria, in particular the states in which the respondent transnational corporations are headquartered or have their registered office, provide adequate access to their own courts and to appropriate legal remedies for non-European nationals who have been victims of serious human rights violations abroad. However, the general rule under the harmonized European conflict of laws provides that the law applicable to a non-contractual obligation arising out of a tort or delict is the law of the country in which the damage occurs. See Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”), O.J. L 199, 31.7.2007, pp. 40-49, Art. 4(1). The approach reflects common European practice. This may very well engender the problems outlined above concerning effective redress. Moreover, a recent study published by the European Commission seriously questioned the ready availability of effective legal remedies within the E.U. in a situation like the present in more general terms and proposed to reform E.U. legislation in that respect:

“even if third-country victims of corporate abuse succeed in securing access to EU Member State courts, they will face very significant procedural obstacles in obtaining redress from [multinational corporations] including obstacles pertaining to time limitations, legal aid and due process, non-availability of public interest litigation and mass tort claims, and provisions on evidence. In his most recent report, the [Special Representative of the Secretary-General of the UN] has highlighted three types of procedural obstacles in particular: the problem of costs of obtaining legal advice and of the case itself should the claim prove unsuccessful; procedural barriers resulting from limitations on standing and on the ability to

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bring group claims for compensation; and financial, social and political disincentives for lawyers to represent claimants in this area.” *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, Report published by the European Commission, October 2010, para. 238; *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UN Doc A/HRC/14/27, April 9, 2010, paras. 109-112.