

RESEARCH ARTICLE

Was *Kiobel* Detrimental to Corporate Social Responsibility? Applying Lessons Learnt From American Exceptionalism

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The recent decision in the US Supreme Court *Kiobel* case applied the presumption against extra-territoriality towards the Alien Tort Statute, decreasing the potential scope of tort actions that can be made against corporations for severe human rights violations. In light of the growing influence of multinational corporations and the lack of any international law regime to regulate corporate wrongdoing, this decision might be seen as a blow against one of the few potential avenues for justice for those victims of corporate human rights violations.

The Alien Tort Statute is not a jurisdictional statute that allows for claims under international law but is rather a uniquely American cause of action unconnected to international law. The question remains whether an extension of American law to provide remedies for severe corporate human rights abuses can be justified in the absence of any such remedies existent in international law.

This article will attempt to answer this question applying criteria developed by leading scholars in response to American exceptionalism. It will argue that the *Kiobel* decision, rather than being detrimental to holding corporations accountable, actually addresses many of the negative aspects of extraterritorial litigation whilst preserving some possibility of remedy for victims of severe human rights violations by corporations.

Keywords: human rights; corporate social responsibility; alien tort statute; *kiobel*; extra-territorial litigation

I. Introduction

The rights enjoyed by transnational corporations have increased manifold over the past two decades, as a result of multilateral trade agreements, bilateral investment pacts, and domestic liberalization... Along with expanded rights, however, have come demands... that corporations accept commensurate obligations.¹

Until the mid-1970s international human rights law was not seen as imposing specific human rights obligations on corporations.² Instead the rationale was that States' obligations under human rights law contained the obligation to ensure all natural or legal actors, including corporations, operating within their respective territories respected human rights.³ The regulatory response to growing multinational activity has been largely ineffective or even absent.⁴ Instead the focus has been on soft initiatives of business codes of con-

¹ John Ruggie, 'American Exceptionalism, Exemptionalism, and Global Governance' (2004) KSG Working Paper No. RWP04-006 372.

² Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012) 6-7 citing August Reinisch, 'The Changing International Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 79-82.

³ *ibid.*

⁴ Michael Koebele, *Corporate Responsibility under the Alien Tort Statute*. (MNP 2009) 45. See also Deva (n 2) 8.

duct.⁵ Many authors believe that the Alien Tort Statute serves as a means to hold corporations accountable in the absence of international law.⁶

Historically, States have been unwilling to regulate the behaviour of multinational corporations and their local subsidiaries due to the fear that this might impair their competitiveness to attract much needed foreign investment.⁷ Attempts to enact an extraterritorial law to regulate the overseas activities of corporations registered in their respective jurisdictions have failed in the US⁸ as well as elsewhere.⁹ The ATS has been the most fertile ground for instituting legal actions against companies for human rights violations.¹⁰

The decision in the recent *Kiobel case*¹¹ applied the presumption against extraterritoriality to the ATS. Whilst this decision has been discussed at length in academia, this article will attempt to evaluate the decision using the criteria of leading scholars in their discussions regarding American exceptionalism. This article will first detail the development of the ATS. The second part will explain why litigation under the ATS is better seen as the unilateral enforcement of American law abroad than as a jurisdictional statute for international law claims. The third part will then look to discussions of American exceptionalism in the context of human rights, identifying the criteria developed by leading scholars and using them to evaluate ATS litigation.

II. ATS Litigation and Corporations

Litigation under the ATS has provided an unparalleled route for victims of human rights abuse to seek justice against corporations. The ATS was first enacted as part of the Judiciary Act of 1789¹² to deal with mistreatment of foreign ambassadors and piracy.¹³ It states: 'The district courts shall have jurisdiction of any civil action by any alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'¹⁴ It lay dormant for 170 years until the 1980 *Filartiga v Pena-Irala*¹⁵ decision introduced it as a vehicle for non-nationals to hold human rights abusers civilly liable in US.¹⁶ This precedent was largely followed by other courts over claims including genocide, war crimes, summary execution, forced disappearance, slavery and cruel, inhuman, and degrading treatment.¹⁷ Whilst the *Filartiga* case had concerned alleged torture by a State official, the court held that the ATS's scope also extended to private actors in the *Kadic v Karadzic* case.¹⁸ Since the mid-1990s, actions have been brought against corporations under the ATS for their alleged involvement in human rights violations¹⁹ and, since the *Sosa* case²⁰ in 2004, around half of ATS actions have been brought against multinational corporations.²¹

International law regulates the conduct of States and consequently, in the majority of instances, there is a requirement for private actors to have co-operated with States in order to give rise to liability under the ATS: the State action requirement.²² However, in the *Kadic* case it was ruled that the law of nations was not limited to State action but could also extend to conduct of those acting as private individuals.²³ Deva identifies the norms that do not require State action as *jus cogens* norms.²⁴ Professor Koebele reasons there are areas of public international law which extend to non-State actors without need for State action, such as war crimes

⁵ *ibid.*

⁶ *ibid.*

⁷ Deva (n 2) 5 citing Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 238.

⁸ Corporate Code of Conduct Bill 2000 (US), HR 4596, 106th Cong. (2nd Sess. 2000).

⁹ Deva (n 2) 51.

¹⁰ *ibid* 60.

¹¹ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹² Koebele (n 4) 3.

¹³ *Kiobel* (n 11).

¹⁴ Alien Action for Tort, 28 USC 1350 (2004).

¹⁵ *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980).

¹⁶ Virginia M Gomez, 'The Sosa Standard: What Does It Mean for Future ATS Litigation?' (2006) *Pepperdine Law Review* 33:2 469, 470.

¹⁷ Koebele, (n 4) 4.

¹⁸ *ibid* 6.

¹⁹ Tyler Giannini and Susan Farbstain, 'Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights.' *Harvard International Law Journal* 52 (2010): 119, 120 note 5.

²⁰ *Jose Francisco Sosa v Humberto Alvarez-Machain* 124 S. Ct 2739.

²¹ Koebele (n 4) 6.

²² *ibid* 212.

²³ *Kadic v Karadzic* 70 F.3d 232, 239.

²⁴ Deva (n 2) 69 citing *Kadic* (n 23) 239 and *Doe v Unocal Corp* 963 F Supp. 880 (CD Cal., 1997) even though these norms are not expressly referred to in the cases as *jus cogens*.

and genocide under the Geneva Conventions²⁵, violations of humanitarian law,²⁶ crimes against humanity,²⁷ forced labour,²⁸ aircraft hijacking²⁹ and piracy.³⁰

The first Supreme Court decision on the matter, the *Sosa* case³¹, decided that the ATS was a jurisdictional statute that does not provide for which norms are actionable.³² For the international norm to be actionable under the ATS, it 'must be accepted by the civilised world and defined with a specificity comparable to the features of 18th century paradigms.'³³ Hence the Court urged lower courts to subject the recognition of new ATS claims under present-day international law to 'vigilant doorkeeping.'³⁴

In the *Kiobel* case, a subsidiary of Royal Dutch Petroleum Co. was sued for allegedly enlisting the Nigerian Government to violently suppress the burgeoning demonstrations.³⁵ Throughout the early 1990's, the Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents.³⁶

On September 17, 2010, a two-judge majority of the Second Circuit held in *Kiobel v Royal Dutch Petroleum Co.* that 'corporate liability is not a discernable—much less universally recognized—norm of customary international law that we may apply pursuant to the [Alien Tort Statute].'³⁷

On February 28, 2012, the Supreme Court heard arguments on whether corporations are immune from tort liability for international law violations such as torture. On October 1, 2012 *Kiobel*³⁸ was reargued with the Court asking litigants to focus on whether the ATS applied extraterritorially. On April 17, 2013 the Court ruled unanimously against the plaintiffs. The five justices in the majority opinion did so under the presumption against extra territoriality. They stated 'even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.'³⁹

The four justices that signed onto Justice Breyer's concurring opinion did not invoke the presumption against extraterritoriality.⁴⁰ Instead, they argued that the Alien Tort Statute was meant to address foreign affairs.⁴¹ They argued that the 'majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas... a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies.'⁴² The majority distinguishes this jurisdiction from *territorial* jurisdiction which carries more direct foreign policy consequences⁴³ but Justice Breyer's opinion argues this is not the case referencing the Barbary Pirates, the War of 1812, the sinking of the *Lusitania* and the Lockerbie bombing.⁴⁴

Justice Breyer's opinion lists three different situations that fall within the ATCA:

- (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbour... for a torturer or other common enemy of mankind.⁴⁵

In his reasoning behind this third criterion he argues that *Sosa* asked who today's pirates are and that today's pirates are those common enemies of mankind such as torturers and perpetrators of genocide.⁴⁶

²⁵ *Koebel* (n 4) 246.

²⁶ *ibid* 251.

²⁷ *ibid*.

²⁸ *ibid* 250.

²⁹ *ibid*.

³⁰ *Koebel* (n 4) 246.

³¹ (n 20).

³² *ibid* 2759.

³³ *ibid* 2761.

³⁴ *ibid* 2764.

³⁵ *Kiobel*, (n 11).

³⁶ *Kiobel*, (n 11) Slip Opinion 2.

³⁷ *Kiobel v Royal Dutch Petroleum Co. et al.*, No. 06- 4800, 2010 US App. LEXIS 19382, *1 (2d Cir. Sept. 17, 2010).

³⁸ *Kiobel* (n 11).

³⁹ *Kiobel* (n 11) Slip Opinion 14.

⁴⁰ *Kiobel* (n 11) (Breyer J., concurring in judgement), Slip Opinion 1.

⁴¹ *ibid*.

⁴² *ibid* 4 citing *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 20–21 (1963); 2.

⁴³ *ibid* 5.

⁴⁴ *ibid*.

⁴⁵ *ibid* 1.

⁴⁶ *ibid* 5 quoting *In re Demjanjuk*, 612 F. Supp. 544, 556 (ND Ohio 1985).

In his own concurring opinion Justice Kennedy leaves open a wide margin of discretion in the future: 'the presumption against extraterritorial application may require some further elaboration and explanation'⁴⁷ leaving hope for advocates of ATS that the door may have been kept open for future extraterritorial litigation.

The academic reaction to the result in the *Kiobel* case was resoundingly negative; Parrish collated multiple comments made the day the *Kiobel* decision was announced criticising it in strong terms.⁴⁸ Bechky described the decision as a sad mistake⁴⁹ and Altholtz called upon legislative action to revive it.⁵⁰ Many articles have criticised the use of presumption against extraterritoriality by the Court.⁵¹ The majority of authors do not answer the question of whether ATS litigation *should* apply but instead focus on methods *how* it can apply. Parrish concludes that:

Ironically, the attack on domestic courts unilaterally resolving international challenges through extraterritorial laws have benefited little from the serious debate about the role of courts in global governance, but instead mostly reflect recurring domestic debates largely untethered from international concerns.⁵²

Kiobel ended any extraterritorial litigation where there is no connection with the US but still applies extraterritorial litigation to those cases that 'touch and concern' the US. Much of the academic literature is critical of this on the basis that it will adversely impact the ability to hold multinational corporations accountable to human rights standards. It expressly or implicitly advocates this position without addressing the fact that ATS litigation effectively enforces unilaterally decided norms internationally and the consequent effect of this internationally. Instead, they assume the moral imperative of holding multinationals accountable to human rights violations and limit their discussions to doctrinal niceties such as plaintiff and defence bars and the role of the courts.⁵³

Two questions should be asked in relation to the extraterritorial nature of ATS litigation. The first is whether there is a *legal* basis in international law for the exercise of extraterritorial jurisdiction in relation to ATS claims against corporations. The second is, if ATS litigation is not an enforcement of international law, whether it can still be justified on a *moral* basis and under what criteria. Part 2 will argue that international law does not provide a basis for universal civil jurisdiction for even the most severe human rights violations committed by corporations. Having concluded that ATS litigation is the enforcement of American norms abroad, part 3 will then apply criteria developed by leading scholars in relation to American exceptionalism in the context of human rights to ATS litigation.

III. ATS Litigation and International Law

Colangelo distinguishes two forms of extraterritoriality: the implementation of international law and the projection of national law abroad.⁵⁴ He argues that when Congress enacts a statute designed to implement international substantive law, courts should presume that it meant also to implement international jurisdictional law which may permit, encourage or obligate extraterritoriality.⁵⁵ As regards the ATS, he argues that if it applies international substantive law it should apply international jurisdictional law and could

⁴⁷ *Kiobel* (n 1) (Kennedy, concurring), Slip Opinion 1.

⁴⁸ Austen Parrish, 'Kiobel, Unilateralism, and the Retreat from Extraterritoriality' [2013] 28 Maryland Journal of International Law 103.

⁴⁹ Perry S. Bechky, 'Homage to Filártiga' (2013) Review of Litigation (forthcoming) <<http://ssrn.com/abstract=2336305>> accessed 31 December 2013.

⁵⁰ Roxanna Altholtz, 'Chronicle of a Death Foretold: The Future of US. Human Rights Litigation Post-Kiobel' (2013) UC Berkeley Public Law Research Paper No. 2347213, 42.

⁵¹ David L. Sloss, 'Kiobel and Extraterritoriality: A Rule Without a Rationale' (2013) Santa Clara Univ. Legal Studies Research Paper No. 11-13. <<http://ssrn.com/abstract=2264358>> accessed 31 December 2013; Anthony J. Colangelo, 'Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction' (2013) Maryland Journal of International Law forthcoming <<http://ssrn.com/abstract=2246138>> accessed 31 December 2013; Zachary D. Clopton, 'Replacing the Presumption Against Extraterritoriality' (2013) Boston University Law Review forthcoming. <<http://ssrn.com/abstract=2249914>> accessed 31 December 2013; Jonathan Hafetz, 'Human Rights Litigation and the National Interest: Kiobel's Application of the Presumption Against Extra-Territoriality to the Alien Tort Statute' (2013) 28 Maryland Journal of International Law 107; Anthony J. Colangelo, 'The Alien Tort Statute and the Law of Nations in Kiobel and Beyond' [2013] 44 Georgetown Journal of International Law 1329.

⁵² Parrish (n 48) 220.

⁵³ *ibid* 230-31.

⁵⁴ Anthony Colangelo, 'A Unified Approach to Extraterritoriality' [2011] 97 Virginia Law Review 5 1019, 1023.

⁵⁵ *ibid*.

exercise entirely extraterritorial jurisdiction provided international law allows for universal jurisdiction.⁵⁶ However, to the extent that ATS causes of action rely upon federal common law, its application should be restricted to US territory.⁵⁷

Anderson argues that ATS litigation is not, but is often confused with, a legitimate enforcement of international law and should be carefully restricted in such a way as to be compliant with international law.⁵⁸ He is of the opinion that unilateral extraterritorial action is inappropriate in most cases but believes it is appropriate in cases where the violators are *hostis humani generis*, enemies of all mankind.⁵⁹ He places the 'crimes of genocide, crimes against humanity, slavery, and a handful of other crimes' within this category and argues that the category must be limited to the 'most egregious and obvious claims'⁶⁰. He argues that this requires prosecution only by a public authority rather than through private claims and actions should only be limited to individuals and not corporations, like under the International Criminal Court.⁶¹

From the perspective of preventing severe human rights violations committed by corporations, there are definitely good reasons why private claims against corporations are to be preferred to criminal actions against private individuals as it can be difficult to allocate individual responsibility.

Giannini and Farbstain argue that international norms are primarily enforced in the national arena and international enforcement is provided for in the absence of domestic remedies.⁶² On this basis they argue that, to require 'international enforcement to establish the existence of a particular norm, could similarly curtail domestic enforcement that relies on a substantive international norm for a given cause of action.'⁶³ They argue, on this basis that it is enough that there is international consensus surrounding a norm itself and that the norm be enforceable extraterritorially.

Professor Ramsey argues that there is no customary international law that provides for the ATS's interpretation of corporations aiding and abetting State action where often the link between the corporation's conduct and the government is quite attenuated.⁶⁴ Colangelo illustrates this problem⁶⁵ with reference to *In re African Apartheid Litig*⁶⁶ in which the court decided that in looking at the liability of a corporation it was necessary for common law to fill in gaps and applied US corporate veil-piercing doctrines.⁶⁷

Ramsey argues that, for there to be investor liability under the law of nations, it would not be enough to find that those crimes were recognised as being against the law of nations, but that it would also have to be shown that the law of nations imposes investor liability for those crimes as well.⁶⁸ He further contends that international consensus on what constitutes misconduct is *not* sufficient to impose liability extraterritorially but that it must be shown that there is customary international law supporting universal jurisdiction over such misconduct.⁶⁹

Anderson also argues that the most sympathetic cases that have been raised under the ATS are only notionally about these crimes and are really about labour conditions and environmental damage and should not be pursued.⁷⁰ He believes these claims represent a cheapening of the *Sosa* standard⁷¹ and argues this has led to a false belief that the ATS is an enforcement of international law.⁷²

Hence the ATS cannot be considered as an enforcement of the law of nations in respect of corporations because it provides a tortious remedy, is applied to the corporations rather than just individuals and it applies municipal law to deal with issues of corporate liability that customary international law is silent on such as standards for piercing the corporate veil, holding parent companies liable for subsidiaries and

⁵⁶ *ibid* 1057-58.

⁵⁷ *ibid* 1057.

⁵⁸ Kenneth Anderson, 'Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional Universalism in Retreat' [2013] *Cato Supreme Court Review*, 149.

⁵⁹ *ibid* 153.

⁶⁰ *ibid* 153-154.

⁶¹ *ibid* 154.

⁶² Giannini & Farbstain (n 19) 123-27.

⁶³ *ibid* 126.

⁶⁴ Michael D. Ramsey, 'International Law Limits on Investor Liability in Human Rights Litigation' [2009] 50 *Harvard International Law Journal* 271, 271-272.

⁶⁵ Colangelo *supra* (n 54) 1088-1090.

⁶⁶ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, (S.D.N.Y. 2009).

⁶⁷ *ibid*.

⁶⁸ Ramsey (n 64) 274.

⁶⁹ *ibid* 319.

⁷⁰ *ibid* 154-155.

⁷¹ *ibid* 156.

⁷² *ibid*.

questions of successor liability.⁷³ Professor Ku suggests that the Second Circuit *Kiobel* decision was correct due to the lack of well established principles of international law to resolve the question of liability and predicted that the Supreme Court Decision would mark a change in paradigm from the ATS as a mechanism for developing international law to a 'garden-variety state common law tort claim that happens to occur in a federal court' and that consequently the presumption against extraterritoriality would apply.⁷⁴

Hence, the ATS is not simply a jurisdictional statute applying international law in relation to corporations but was acting as a mechanism for applying a mixture of US law alongside international law to the most severe human rights violations. Hence it is best understood as an enforcement of US values abroad.

There are many issues with the extraterritorial application of national law abroad including elevating the risk of discord with foreign nations resulting from both jurisdictional overreaching and conflicts with foreign law in foreign territory.⁷⁵ States may resist extraterritorial litigation⁷⁶ through nonrecognition of judgments, diplomatic protests and the enactment of blocking or clawback statutes.⁷⁷ There is also the question of whether the enforcement of US law extraterritorially is a breach of civil liberties as there is the question as to whether the parties could have reasonably expected the law to govern their conduct⁷⁸ and democratic principles because they never chose to be governed by those laws.⁷⁹ Finally, it might provoke retaliation by other countries prosecuting Americans extraterritorially under their own conflicting interpretations of human rights law⁸⁰ and lead to incoherence within the international legal system through creating a patchwork of inconsistent adjudications from different legal systems.⁸¹

IV. ATS Litigation and American Exceptionalism

American exceptionalism is the theory that America is especially different from other countries. In order to discuss American exceptionalism it is important to make a distinction between when American exceptionalism is used as justification for avoiding international law and politics within the confines of the US, and when it is used to assert US law and politics on the international scene. In examining ATS litigation in the context of American exceptionalism, first the various perspectives of leading scholars will be summarised and then certain criteria will be identified and used to evaluate extraterritorial litigation under the ATS.

John Ruggie makes this distinction by differentiating between 'American exceptionalism' and 'American exemptionalism'.⁸² 'American exemptionalism' is the attempt of the US to insulate itself from the effects of international law in its domestic affairs⁸³ whereas 'American exceptionalism' is the attempt to push its own ideologies onto the international scene.⁸⁴

Hoffman states there have historically been two different types of American exceptionalism.⁸⁵ One is isolationism; the United States 'was a beacon of light, a model perhaps for others, but it wasn't going to get involved in others' fights.'⁸⁶ The other form was 'crusading and militant: making the world safe for democracy.'⁸⁷ It was the former that was behind the US's reluctance to fight in World War I and the latter

⁷³ Julian Ku, 'Online *Kiobel* symposium: The Alien Tort Statute as a species of extraterritorial US. law' (SCOTUSblog, 16 July 2012) <<http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-alien-tort-statute-as-a-species-of-extraterritorial-u-s-law>> accessed 31 December 2013.

⁷⁴ *ibid.*

⁷⁵ Colangelo (n 54) 1088-90; Austen Parrish, 'Reclaiming International Law from Extraterritoriality' [2009] 93 *Minnesota Law Review* 815, 857.

⁷⁶ Parrish (n 48) 233.

⁷⁷ Gary Born and Peter Rutledge, *International Civil Litigation in United States Courts* (5th edn, Aspen Pub 2011) 682; Parrish (n 75) 864.

⁷⁸ Colangelo (n 54) 1026-1017.

⁷⁹ Parrish (n 48) 231-233.

⁸⁰ Parrish (n 48) 234.

⁸¹ Parrish (n 75) 866.

⁸² John G. Ruggie 'Doctrinal Unilateralism and its Limits: America and Global Governance in the New Century.' (2006) Corporate Social Responsibility Initiative Working Paper No. 16, 6-7 http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_16_ruggie.pdf accessed 31 December 2013.

⁸³ *ibid* 6. For example, Calabresi argues against the use of foreign law in the US Supreme Court based on ideas ingrained in American culture: 'The ideology and the reality of American exceptionalism are so fundamental to this country that even a 200-year-old line of caselaw must yield in their face' (Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' [2006] 86 *Boston University Law Review* 1335 1412).

⁸⁴ *ibid* 4-5.

⁸⁵ Stanley Hoffmann, 'American Exceptionalism: The New Vision' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (PUP 2006) 267.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

behind the willingness to build global institutions, good both for the promotion of US interests and for the expansion of America's mission and ideals.⁸⁸ The Cold War required the making of alliances to challenge the Soviet Union⁸⁹ but afterwards exceptionalism became about becoming and remaining the only superpower and was about capabilities rather than ideals or missions.⁹⁰

Ignatieff argues that American exceptionalism has three variants which he refers to as: exemptionalism, double standards, and legal isolationism.⁹¹ American exemptionalism in this case refers to the supporting of multilateral instruments provided they include exemptions for US citizens or practices, failing to comply with international agreements and negotiating treaties and then failing to ratify them altogether.⁹² The variant of double standards refers to the US judging itself and allies by standards different than by which it judges its 'enemies'.⁹³ Legal isolationism is the resistance of US courts to the rights jurisprudence of other countries.⁹⁴

Koh argues there are five variants of American exceptionalism: distinctive rights, different labels, the 'flying buttress' mentality, double standards and exceptional global leadership.⁹⁵ He argues that the distinctive rights culture produces notable, if only slightly different, interpretations of rights than the interpretations given in Europe and Asia.⁹⁶ The US also use different labels to describe the same basic substance such as not using the term 'torture and cruel, inhuman, or degrading treatment' and instead using a multitude of distinctive American terms such as 'cruel and unusual punishment', 'police brutality', 'section 1983 actions' etcetera.⁹⁷ In Koh's view, describing the US's nonratification of treaties as American exemptionalism fails to address the fact that the US tends to comply with the norms themselves. This is better understood as a 'flying buttress' mentality by which the US 'enjoys the appearance of compliance, whilst maintaining the illusion of unfettered sovereignty'.⁹⁸ Double standards is the application of different standards to foreign countries than to the US and is referred to as a very dangerous and negative aspect of American exceptionalism.⁹⁹ The fifth variant is what Koh refers to as the positive face of American exceptionalism, the exceptional global leadership and activism the US displays in pursuing international law, democracy and human rights.¹⁰⁰

Whilst the typologies devised for dividing different features of American exceptionalism vary, they all maintain that there is an external feature of American exceptionalism that justifies the US exerting its own influence unilaterally onto the world stage. This can provide the opportunity to provide leadership on human rights in respect of corporations in the absence of global consensus but can also be a method of asserting national interests, double standards and American ideals not necessarily reflective of global values. The following sections will discuss whether there is need for a leader in relation to the pursuit of a human rights agenda in relation to corporations, whether those norms in ATS litigation reflect global values, to what extent ATS litigation promotes double standards and how ATS relates to the US's participation in the transnational process.

A. The Need for a Leader

Many authors discuss American exceptionalism in cases of unilateral US action arguing that it can be necessary to pursue a human rights agenda, for instance in Kosovo¹⁰¹ where there were strong levels of support even though 'it arguably had less legal justification going for it than did the war against Iraq'.¹⁰² Koh believes:

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ *ibid.* 270.

⁹¹ Michael Ignatieff 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (PUP 2006) 11-16.

⁹² *ibid.* 11-14.

⁹³ *ibid.* 14.

⁹⁴ *ibid.* 14-16.

⁹⁵ Harold H. Koh, 'America's Jekyll and Hyde Exceptionalism' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (PUP 2006) 136-145.

⁹⁶ *ibid.* 136.

⁹⁷ *ibid.*

⁹⁸ *ibid.* 138.

⁹⁹ *ibid.* 138-39.

¹⁰⁰ *ibid.* 139-44.

¹⁰¹ Harold H. Koh, 'On American Exceptionalism' [2003] Faculty Scholarship Series.Paper 1778, 178; Andrew Moravcsik 'The Paradox of US Human Rights Policy' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (PUP 2006) 178; Hoffmann (n 85) 282; Koh, (n 95).

¹⁰² John G. Ruggie, 'American Exceptionalism, Exemptionalism, and Global Governance' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (PUP 2006) 389.

Experience teaches that when the United States leads on human rights, from Nuremberg to Kosovo, other countries follow. When the United States does not lead, often nothing happens, or worse yet, as in Rwanda and Bosnia, disasters occur because the United States does not get involved.¹⁰³

Moravcsik states that: '[t]he United States acts even where... the potential costs are high, and in some cases such leadership has been essential to the success of human rights enforcement.'¹⁰⁴ Ignatieff argues that:

What is exceptional here is not that the United States is inconsistent, hypocritical, or arrogant... What is exceptional, and worth explaining, is why America has been both guilty of these failings and also been a driving force behind the promotion and enforcement of global human rights.¹⁰⁵

Chronowski looks at the various methods available to prevent the abuse of human rights by multinationals and concludes that there is no international mechanism that can enforce human rights norms against corporations¹⁰⁶ and that therefore States must enforce human rights norms themselves.¹⁰⁷ He argues that developing countries fail because they need the foreign investment and lack developed legal structures and that therefore they should be able to sue corporations in their home States.¹⁰⁸ It is upon this basis that one could argue that there is a *moral* need for the ATS.

The issue of corporate social responsibility cannot be limited to national efforts alone. Multinationals act across international borders and can therefore affect the allocation of productive resources and therefore escape the supervision of domestic and international law.¹⁰⁹ This creates distinct problems in the development of economic policies in the States in which they operate.¹¹⁰ States rarely wish to legislate against corporate entities because developing countries require their investment and developed States fear they will lose competitiveness and multinational corporations will move.

In recent years, it has been increasingly difficult for developing countries to impose regulations on multinationals. After World War II the developing countries of the South, which viewed multinationals as instruments to continue the economic and political domination of the North,¹¹¹ resorted to significant expropriation and nationalisation of these corporations.¹¹² During the Cold War the rivalry between the West and the East had ensured a steady stream of economic aid from either side of the iron curtain.¹¹³ However following the end of the Cold War this aid slowed down and international banks no longer lent to new States due to the inability of these States to service their debts.¹¹⁴ As a result, the only avenue open to developing countries in the aftermath of the Cold War was foreign investment which required acceptance and adherence to the free market development model.¹¹⁵

As Ruggie points out,¹¹⁶ a UN study found 94% of all national regulations related to foreign direct investment that were modified from 1991 to 2001 were intended to further facilitate it.¹¹⁷ The globalisation consequent in the 1990s saw a dramatic rise in the number of multinational corporations and transnational activity that neither business nor States were prepared for.¹¹⁸

The resultant need arose to protect foreign investment from future expropriation; the current international investment regime is built on international investment treaties and contracts, often supported by binding investor-State arbitration with around 3,000 bilateral and regional investment treaties are currently

¹⁰³ Koh (n 95) 140.

¹⁰⁴ Moravcsik (n 101) 178.

¹⁰⁵ Ignatieff (n 91) 10.

¹⁰⁶ Nora Chronowski, 'International and Constitutional Approach of Business and Human Rights', (2013) forthcoming, 2 <<http://ssrn.com/abstract=2294129>> accessed 31 December 2013.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.* 12.

¹⁰⁹ Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002) 11.

¹¹⁰ Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007), 8.

¹¹¹ Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' [2001] 111 *Yale Law Journal* 443, 453.

¹¹² J. Frederick Truitt, 'Expropriation of Foreign Investment: Summary of the Post World War II Experience of American and British Investors in Less Developed Countries' [1970] 1 *Journal of International Business Studies* 21.

¹¹³ Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in developing countries*, (Routledge 2009) 21.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.* 22.

¹¹⁶ John G. Ruggie *Just Business*, (WW. Norton & Company 2013) xxv.

¹¹⁷ UNCTAD, *World Investment Report 2002* (UNCTAD 2002), 7.

¹¹⁸ Ruggie (n 116) 33-34.

in effect.¹¹⁹ Under these treaties, foreign investors may be protected from new laws and regulations even if these policies are enacted for legitimate public interest objectives such as labour standards or environmental and health regulations and even where there is no discrimination against foreign investors.¹²⁰

Furthermore, the restrictive interpretation of applicable law by the arbitrators responsible for ruling on compliance with these investment treaties may not include any recognition of a State's human rights obligations, therefore punishing States for ensuring fundamental human rights guarantees in respect of multinational corporations.¹²¹ As well as developing States changing their laws to accommodate further foreign investment and signing bilateral investment treaties that prevent them from passing laws that might impact on foreign investors, 'many governments were unable or unwilling to enforce their domestic laws in relation to business and human rights, where such laws existed at all'.¹²² Ruggie identified that human rights violations were more common in countries with weaker governance,¹²³ particularly conflict zones.¹²⁴

There are thus strong arguments in support of the right for human rights victims to have the ability to sue in developed countries with their greater economic and political power, their stronger governance and more developed legal systems. It is worth noting that there are also disincentives to developed countries tackling human rights violations occurring in developing countries. According to a study conducted in 2003, potential judgements in ATS cases were a threat to about \$300 billion worth of global investment.¹²⁵

The main attempts internationally to enforce corporate social responsibility duties on multinational corporations are: the ILO Tripartite Declaration, the UNCTC, the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, the Norms on Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights and the UN Guiding Principles on Business and Human Rights.

The International Labour Organisation's Tripartite Declaration concerning Multinational Enterprises and Social Policy¹²⁶ was the first attempt by the international community to set corporate social responsibility standards for multinationals.¹²⁷ It was originally passed in 1977 and then revised in 2000 and 2006.¹²⁸ The declaration does not provide a complaint procedure against companies or governments; it is a voluntary instrument and no reporting is required.¹²⁹ Amao argues it has been of little consequence in practice.¹³⁰

The United Nations Centre on Transnational Corporations (UNCTC) was set up in 1973 with three objectives. Firstly, it was to further the understanding of the political, economic, social and legal effects of multinational activity, especially in developing countries. Secondly, it was to secure international arrangements that promote the positive effects whilst controlling and eliminating the negative effects of multinationals on national development goals and worldwide economic growth. Thirdly, it was to strengthen the negotiating capacity of host countries, in particular developing countries, in their dealings with multinationals.¹³¹ The UNCTC produced a draft code, adopted in 1983 and revised in 1988 and then in 1990; however, the chief champions of the code (the countries of the South) withdrew their efforts in the 1990s in order to secure foreign investment, assistance for development and forgiveness of mounting foreign debt.¹³² The emergence of neo-liberalism as the dominant economic view spelt the end for the UNCTC which closed in 1993.¹³³

The Organisation for Economic Cooperation and Development (OECD) negotiated the OECD Guidelines for Multinational Enterprises in 1976 as part of the OECD Declaration on International Investment and Multinational Enterprises.¹³⁴ It was revised in 1991 to take into account environmental considerations.¹³⁵ It

¹¹⁹ *ibid* 135.

¹²⁰ *ibid*.

¹²¹ *ibid* 183-84.

¹²² *ibid* xxvi.

¹²³ *ibid* 19-36.

¹²⁴ *ibid* 29-33.

¹²⁵ Gary Hufbauer and Nicholas Mitrookostas *Awakening Monster: The Alien Tort Statute of 1789* (Peterson Institute 2003) although, there is evidence that many of the claims relating to the potential for the ATS to disrupt investment behaviour are exaggerated (Judith Chomsky, 'Will the Real ATS Please Stand up' [2010] 33 *Suffolk Transnational Law Review* 33(3) 461, 464-470).

¹²⁶ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) 17 *ILM* 422, para. 6.

¹²⁷ Amao (n 113) 27.

¹²⁸ *ibid* 30.

¹²⁹ *ibid*.

¹³⁰ *ibid* 31.

¹³¹ UN, *The United Nations Code of Conduct on Transnational Corporations, United Nations Centre on Transnational Corporations*, UNCTC Current Studies, ser.A, no.4 (New York, 1986).

¹³² Ratner (n 111) 453.

¹³³ Désirée Abrahams, *Regulations for Corporations: A Historical Account of TNC Regulation* (UNRISD 2005).

¹³⁴ Amao (n 113) 34.

¹³⁵ *ibid*. 33-34.

was further revised in 2000 to shift the focus on national law and practice to an emphasis on international standards.¹³⁶ Murray describes the overriding purpose of the OECD guidelines as being the protection of foreign investment.¹³⁷ Due to insistence by the United States, Switzerland and Germany the OECD Guidelines were not made binding.¹³⁸

The OECD Guidelines are implemented through National Contact Points (NCPs)¹³⁹ which have been criticised as unresponsive and unaccountable¹⁴⁰ and leave wide discretion to States as to how to structure them.¹⁴¹ Furthermore the Guidelines themselves have been criticised for lacking a chapter on human rights and requiring an 'investment nexus' for complaints to be admissible.¹⁴² In 2011, the requirement for this investment nexus was loosened through incorporation of a requirement of due diligence to be clarified by more detailed guidance¹⁴³ and a human rights chapter based on the UN Guiding Principles on Business and Human Rights¹⁴⁴ discussed later.

The United Nations Global Compact (UNGC) was launched in 2000 and is a voluntary framework with principles that Amao describes as ambiguous in content and not reflective of international legal norms. It has no real enforcement mechanism and corporations that sign up to it are only required to make an unambiguous statement of support and include some reference in their annual report on the progress with which they are implementing the principles within their operations.¹⁴⁵ Some authors argue that, although the UNGC may not be very effective now, it is the start of something greater¹⁴⁶ and that the purpose of the UNGC is to promote UN goals rather than regulate them.¹⁴⁷

Human rights treaties have traditionally addressed the State and have only indirectly addressed individuals, including corporations, by placing positive obligations on the State to ensure individuals do not violate human rights. In the late 1990s, the UN Sub-Commission on the Promotion and Protection of Human Rights began drafting treaty-like documents called 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the 'Norms'). The Norms would have imposed the same human rights duties on transnational corporations as those that States accepted for themselves under treaties they have ratified. In 2003, the Human Rights Commission declined to take action on these Norms.

After the rejection of the Norms above, John Ruggie became the 'Special Representative on the issue of human rights and transnational corporations and other business enterprises' in July 2005. In July 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights that he had developed, even though the Council had not requested it. 'This was the first time the Council or its predecessor, the Commission, had "endorsed" any normative text that governments did not negotiate themselves.'¹⁴⁸

The Guiding Principles lay out in some detail the steps required for States and businesses to implement the 'Protect, Respect and Remedy Framework' Ruggie proposed to the Council in 2008.¹⁴⁹ There are three pillars:

1. the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;
2. an independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing the rights of others and to address the adverse impacts of activities with which they are involved;
3. The need for greater access by victims to effective remedies, both judicial and nonjudicial.¹⁵⁰

¹³⁶ *ibid.* 35.

¹³⁷ Jim Murray, 'A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD' [2001] 30(3) *Industrial Law Journal* 256.

¹³⁸ *ibid.* 260.

¹³⁹ Amao (n 113) 36.

¹⁴⁰ Ran Goel, *Guide to Instruments of Corporate Responsibility: An Overview of 16 Key Tools for Labour Fund Trustees* (York University, 2005).

¹⁴¹ Sorcha Macleod and Douglas Lewis, 'Transnational Corporations: Power, Influence and Responsibility' [2004] 4(1) *Global Social Policy* 77.

¹⁴² Ruggie (n 116) 160.

¹⁴³ *ibid.* 174.

¹⁴⁴ *ibid.*

¹⁴⁵ Oliver Williams, 'The UN Global Compact: The Challenge and the Promise' [2004] 14 (4) *Business Ethics Quarterly* 755, 755.

¹⁴⁶ *ibid.* 761.

¹⁴⁷ Amao (n 113), 40.

¹⁴⁸ Ruggie (n 116) xx.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.* xxi.

States must protect, companies must respect and those who are harmed must have redress. The Guiding Principles are not intended to act as an international treaty or a code but are intended 'to constitute a normative platform and high level policy prescriptions for strengthening the protection of human rights against corporate related harm.'¹⁵¹

In conclusion, the multilateral attempts at the international level are a collection of nonbinding and voluntary measures. The attempt to make the UNCTC draft code into a treaty failed because the developing countries abandoned it in order to secure financial investment and forgiveness over debts. The attempt to make the OECD Guidelines binding failed under objections by certain developed States. The attempts to make human rights directly applicable to multinational corporations failed due to a mixture of criticism over the content and a rejection by the Human Rights Commission composed of State representatives. In the aftermath of the failure of both the UNCTC and the Norms, the UN has focused on norm building through the use of the UN Global Compact and the UN Guiding Principles on Human Rights and Business. Whilst there is speculation this may lead to hard law measures in the future, there is no possibility of judicial remedies resultant from multilateral efforts in the near future. Hence there is a strong moral need to fill governance gaps in the field of corporate social responsibility.

To justify unilateral action solely in relation to the moral need created by governance gaps presupposes that unilateral action is a potential solution. American exceptionalism is directly connected to America's ability to exert its influence. As Koh describes:

To this day, the United States remains the only superpower capable, and at times willing, to commit real resources and make real sacrifices to build, sustain, and drive an international system committed to international law, democracy, and the promotion of human rights.¹⁵²

Whether you agree or disagree with this sentiment, the success of American exceptionalism is dependent on the US's role as a superpower. However, at present, the US's status as a superpower is questionable. Whilst the US's dominance in terms of military capability cannot be doubted, the US's economic dominance is less certain.¹⁵³ Moravcsik argues that the US has an exaggerated understanding of its own ability as a superpower.¹⁵⁴ The EU trades more than the US and it has a better bilateral balance with countries such as China.¹⁵⁵ Parrish argues that it is questionable that the US is able to shape the world order and protect American interests on its own.¹⁵⁶ Anderson describes himself as 'an unapologetic American sovereigntist, a believer in American hegemony'¹⁵⁷ but believes that the US is no longer the superpower it was in the 90s¹⁵⁸ and that ATS litigation is unsustainable.¹⁵⁹

Knowles likewise realises that the US's power to exercise ATS litigation is diminishing¹⁶⁰ but argues it should do so presently in order to build norms into international law that benefit US interests whilst it has the opportunity.¹⁶¹ 'the articulation and development of certain core CIL norms by US courts will give the United States a crucial advantage, even in a multipolar world.'¹⁶²

Whilst the ATS has a poor record in providing remedies against corporations,¹⁶³ it has two major indirect positive effects: the 'limelight effect', bringing publicity towards the issue of corporate accountability for human rights abuses, and the 'leverage effect', improving the bargaining position of victims and increasing the possibility of out-of-court settlements.¹⁶⁴ Furthermore, ATS litigation has shown positive effects on multinationals, which have had to alter business practices in areas with a potential for severe human rights violations.¹⁶⁵

¹⁵¹ *ibid.* 124.

¹⁵² Koh (n 95) 140.

¹⁵³ Andrew Moravcsik, 'The Myth of Unipolarity in a Post-Cold War World: Lessons about Power from the US and Europe' China and Global Institutions Project, Princeton University.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.* 8.

¹⁵⁶ Parrish (n 75) 857.

¹⁵⁷ Anderson (n 59) 166.

¹⁵⁸ *ibid.* 171.

¹⁵⁹ *ibid.* 166.

¹⁶⁰ Robert Knowles 'A Realist Defense of the Alien Tort Statute' [2011] 88:1117 Washington University Law Review, 1168.

¹⁶¹ *ibid.* 1146.

¹⁶² *ibid.* 1177.

¹⁶³ Deva (n 2) 68.

¹⁶⁴ *ibid.* 74.

¹⁶⁵ Koebel (n 4) 14.

B. The Pursuit of an Internationally Recognised Good

Where a State is enforcing international norms, extraterritorial prescriptive jurisdiction is less prone to criticism on the part of the receiving State.¹⁶⁶ During his time as the UN's Special Rapporteur for Business and Human Rights, John Ruggie initiated a study into the legitimacy of extraterritorial litigation and concluded that multilateral measures are perceived as more legitimate than unilateral measures, principle-based approaches are preferred to rule-based approaches, cases where there is greater international consensus of the wrongfulness of the act in question and the regulation of specific and defined acts is preferred to enforcing an entire policy domain.¹⁶⁷

The ATS's application of civil liability to corporations, with its inclusion of corporate veil-piercing laws and standards of aiding and abetting could be described as a more rule-based approach than a principle-based approach but it is essential for holding corporations accountable. Likewise the rules regarding piercing the corporate veil, holding parent companies liable for subsidiaries and questions of successor liability are essential to tackling the various mechanisms multinationals utilise across international borders to escape the supervision of domestic law. Whilst the enforcement of norms under the ATS may not be consistent with those breaches of international law that give rise to universal jurisdiction, it is almost certainly consistent with the UN Guiding Principles on Human Rights and Business since John Ruggie's Report on the Issue of Human Rights and Transnational Corporations and other Business Enterprises referenced ATS corporate cases and was basically consistent with its jurisdiction.¹⁶⁸ This even extends to the controversial standard of 'knowledge' in aiding and abetting.¹⁶⁹

It is also important if ATS litigation is to be justified on the basis of a moral need that the US avoids acting in its own interests. Knowles defends ATS litigation precisely on the basis that it pursues US interests through applying realist arguments.¹⁷⁰ He argues that critics of ATS litigation often cite realist arguments and that, the defenders focus on the ATS's role in advancing a global human rights regime.¹⁷¹ Knowles believes that when carrying out a cost-benefit analysis to their compliance with international law, States will look at their reputations as this will affect how appealing they are to conduct trade with. They will therefore engage in behaviours that suit their short-term interests (such as compliance with human rights norms) in order to foster this reputation. Knowles identifies that, because America (as a superpower) 'has the greatest power to ignore external constraints, it bears the highest costs from complying with international human rights norms.'¹⁷² When analysing the realist account of the US's failure to submit to multilateralism, Ignatieff states that, whilst realism accounts for why the US would want to minimise the constraints imposed by international law, it fails to adequately explain the US's investment in and promotion of multilateral engagements.¹⁷³ However, as the largest producer and consumer of what Knowles refers to as 'public goods', he argues it has the most interest in a co-operative international community.¹⁷⁴

Knowles argues that the US makes three conflicting considerations when looking at compliance with international law: it wants to shape international law, it wants to signal cooperativeness with international law and it wants to avoid sovereignty costs from having to comply with human rights norms which are not already a part of its domestic law.¹⁷⁵ He argues that the ATS allows an alternative path for the US to signal cooperativeness in a way that minimises the cost to itself.¹⁷⁶ First, it allows the United States to act as a 'norm definer' and therefore influence how international law is formed.¹⁷⁷ Second, whilst sovereign immunity generally protects US officials from liability, foreign government officials are not similarly protected. This creates an unfair double standard giving the US government (if not its citizens) the advantage of defining norms while not adhering to them.¹⁷⁸ Third, because these actions are committed by the judiciary rather than the executive, it allows the US to 'maintain a neutral posture.'¹⁷⁹

¹⁶⁶ Donald Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' [2006] *The American Journal of International Law* 100 *American Journal of International Law* 142, 144.

¹⁶⁷ Ruggie (n 116) 141.

¹⁶⁸ Chomsky (n 125) 473.

¹⁶⁹ *ibid.*

¹⁷⁰ Knowles (n 160).

¹⁷¹ *ibid* 1120.

¹⁷² *ibid* 1170.

¹⁷³ Ignatieff (n 91) 18.

¹⁷⁴ Knowles (n 160) 1170.

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid* 1171.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid* 1172.

Knowles's analysis is illustrative of three potential problems with viewing ATS litigation as part of America's role as a global leader in human rights. The advancement of national interests within ATS litigation, double standards in ATS litigation and the use of the ATS as a way of signalling international cooperativeness in order to avoid engaging in genuine international co-operation in the field of corporations and human rights.

Those areas where ATS litigation deviates from the law of nations are both necessary in the context of holding corporations accountable for human rights violations and are reflective of global values. However the *Kiobel* decision further removes the possibility of the ATS being used to advance national interests. It limits the scope of ATS litigation to situations that touch and concern the territory of the United States with a sufficient force to displace the presumption against extraterritorial application. On the one hand, this can be seen as reducing its potential 'good' but on the other hand as it can be seen to disadvantage US multinationals more than multinationals from other countries.¹⁸⁰

Whilst there are valid arguments that ATS litigation promotes double standards in relation to the protection of the US and its own agents¹⁸¹ this is not relevant to the issue of corporate social responsibility. However the issue of whether ATS litigation may be used as a method for the US to 'signal compliance' whilst maintaining its sovereignty will be explored further in relation to the US's approach to the transnational process.

C. The Avoidance of Double Standards

A liberal internationalist would reply that if America wants to be a human rights leader, it must be consistent. It must obey the rules it seeks to champion. Leadership depends on legitimacy and legitimacy requires consistency. Certainly double standards increase resistance to American leadership...¹⁸²

Double standards are a well-documented consequence of American exceptionalism. According to Ignatieff since 1945, the US has displayed exceptional leadership in promoting international human rights whilst simultaneously resisting compliance with human rights standards at home or aligning its foreign policy with such standards abroad.¹⁸³ Ignatieff references America's role in the drafting of Universal Declaration of Human Rights,¹⁸⁴ foreign policies emphasising progress in human rights (such as tied aid), effective human rights NGOs and opposition to tyrants in relation to its leadership;¹⁸⁵ he references its collusion in rights-abusing regimes, opposition to the International Criminal Court (ICC), maintenance of human rights abusing practices such as capital punishment, unilateral pre-emptive military actions, failure to ratify human rights treaties and ignoring UN criticism as evidence of its resistance.¹⁸⁶

Koh argues that double standards are the worst aspect of American exceptionalism and argues there are four problems with double standards: the US ends up on the lower rung with non-democratic countries,¹⁸⁷ it cannot effectively pursue a human rights agenda¹⁸⁸ (as it may end up defending human rights abuses in friendly States),¹⁸⁹ it lacks moral authority and therefore lacks a critical element of its soft power¹⁹⁰ and double standards undermine the legitimacy of rules that may serve the US's own national purposes.¹⁹¹

Moravcsik argues that there is little empirical evidence to support the idea that US noncompliance with human rights norms actually has had a negative impact on the acceptance of human rights standards abroad, and that human rights norms have developed without much attention to US domestic policy.¹⁹² In fact there

¹⁸⁰ One author in fact argued against the *Kiobel* case on the basis that it put US companies at a disadvantage compared to other companies (Anupam Chander, 'Unshackling Foreign Corporations: *Kiobel*'s Unexpected Legacy.' (2013) 107 *American Journal of International Law* forthcoming <<http://ssrn.com/abstract=2297048>> accessed 31 December 2013.

¹⁸¹ See David C. Baluarte, 'Sosa v. Alvarez-Machain: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism' *Human Rights Brief* 12, no. 1 (2004) 11 at 12.

¹⁸² Ignatieff (n 91) 27.

¹⁸³ *ibid.* 9.

¹⁸⁴ *ibid.* citing Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* (Westview Press 2003), Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001).

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ Koh (n 95) 139.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.* 138-39.

¹⁹² Moravcsik (n 101) 212.

is evidence to suggest that anti-Americanism consequent from these domestic practices may indeed fuel the solidarity of other States behind the promulgation of multilateral human rights norms 'as appears to have been the case in the closing days of the ICC negotiations.'¹⁹³

Whilst Moravsik's argument might be correct in, for instance, cases of treaty ratification and compliance, it would not be a valid argument in the context of MNC litigation. ATS litigation may require other countries to comply with judgements in US courts and so these judgements will be seen as directly constraining other States' sovereignty and so must be seen as legitimate in order to be enforced in these other States.

Double standards in US policy may already have affected American multinational corporations as large American consumer brands such as Coca-Cola, McDonald's and Marlboro suffered financial losses as a consequence of boycotts across the rest of the world, particularly Europe.¹⁹⁴ A leading British business risk consultancy described US foreign policy as 'the most important single factor driving the development of global risk.'¹⁹⁵

Under the *Sosa* standard, there is no risk of the US awarding remedies against corporations for human rights violations abroad which would not similarly be prohibited under US municipal law. Whilst there is the argument that double standards exist in respect of actions committed by government officials,¹⁹⁶ this does not apply to corporations.

In the *Sosa* case¹⁹⁷ the US, UK, Australian and Swiss governments filed amici curiae briefs opposing the wholesale use of the ATCA for redressing human rights violations by US-based MNCs. The court decided the determination of whether a norm is sufficiently definite or not 'should (and, indeed, inevitably must) involve an element of judgement about the practical consequences of making that cause available to litigants in the federal courts.'¹⁹⁸ Deva argues that this 'element of judgement' addresses concerns that ATS litigation might interfere with US foreign policy. However, the use of this as a vehicle for supporting US foreign policy could, and is arguably *meant* to, provide preferential treatment towards those States with which the US has positive relations. If ATS litigation is to avoid double standards it is important that the same normative standards are applied irrespective of US foreign policy concerns.

The decision in *Kiobel* has mitigated such potential issues. The presumption against extraterritoriality adopted by the majority is intended to address foreign policy concerns.¹⁹⁹ The majority opinion makes reference to the fact that 'corporate presence' would not be enough.²⁰⁰ The 'touch and concern' test would appear to decide which cases fall within the scope of the ATS based on the level of their presence in the US, rather than on the consequences of the decision itself. This is less likely to lead to different standards being applied to different States.

D. Participation in the Transnational Process

Koh argues that to address the most negative aspects of American exceptionalism whilst maintaining its positive aspects the US must participate in the transnational process.²⁰¹ Furthermore, if ATS litigation is to be justified on the basis of it fulfilling a moral need created by international governance gaps, it is essential that the US is not responsible for those governance gaps in the first place. For ATS litigation to be deemed acceptable it must be pursued alongside participation in the transnational process and end once transnational procedures are in place.

Parrish argues that extraterritorial litigation has risen in parallel with disengagement in multilateralism²⁰² and there is a growing preference in American legal theory for unilateral domestic regulation over international law.²⁰³ Koh identifies that the best way to address concerns with the negative aspects of American

¹⁹³ *ibid* quoting Lawrence Wechsler, 'Exceptional Cases in Rome: The United States and the Struggle for an ICC,' in Sarah B. Sewall and Carl Kaysen (eds) *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield, 2000).

¹⁹⁴ Ruggie (n 116) 390 citing Richard Tomkins, 'Anti-war Sentiment is Likely to Give Fresh Impetus to the Waning Supremacy of US Brands,' *Financial Times*, March 27, 2003.

¹⁹⁵ *ibid* quoting Stephen Fidler and Mark Husband, 'Bush Foreign Policy "Is Creating Risks for US. Companies"' *Financial Times* (11 November 2003) 11.

¹⁹⁶ Baluarte (n 181) 12.

¹⁹⁷ *Sosa* (n 20).

¹⁹⁸ *ibid* 2766.

¹⁹⁹ Beth Stephens, 'Extraterritoriality and Human Rights After *Kiobel*.' [2013] 28:1 *Maryland Journal of International Law* 256, 273.

²⁰⁰ *Kiobel* (n 11) 1669.

²⁰¹ Koh (n 95) 151.

²⁰² Parrish (n 77) 818.

²⁰³ Parrish (n 48) 220.

exceptionalism whilst maintaining its connection to human rights protection is participation in the transnational process.²⁰⁴

There are legitimate concerns that the US does not participate enough in the transnational process regarding corporate social responsibility. The US fiercely opposed the UNCTC and pressured UN Secretary-General Boutros Boutros-Ghali to dismiss the third executive director of the Centre in 1992, split the UNCTC and transferred part of its work from New York to UNCTAD in Geneva.²⁰⁵

The US prevented the OECD Guidelines from becoming binding.²⁰⁶ Even under the diminished voluntary OECD Guidelines, the US has failed to fulfil its most basic obligations.²⁰⁷ Furthermore, the US was the only State to vote against the International Code of Marketing Breast-milk Substitutes and is one of only six States worldwide which is classified as having taken 'no action' on them.²⁰⁸

The US has also been a key player in setting up the very Bilateral Investment Treaties that prevent developing countries from taking measures against multinationals in the public interest, however John Ruggie drew attention to the fact that the US has issued a new model Bilateral Investment Treaty described by its fact sheet as a 'carefully calibrated balance between providing strong investor protections and preserving the government's ability to regulate in the public interest.' It places the obligation on parties not to 'waive or derogate from' domestic labour and environmental laws and for both parties to 'reaffirm and recognize international commitments.'²⁰⁹

Should the US use its influence to thwart efforts at creating an international law regime then it cannot rely on the lack of international consensus for justification as to its unilateral action. In order for ATS litigation to be legitimate it would have to be alongside good faith efforts on the part of the US to establish a multilateral regime.

V. Conclusion

ATS litigation has the potential to provide accountability in situations where multinational corporations commit serious human rights violations. The ATS is not a statute that enforces international law and no binding international law exists in respect of human rights violations committed by corporations. A question remains as to whether litigation under the ATS can be justified under the moral need for such accountability. Through drawing an analogy to broader debates surrounding the role of American exceptionalism in pursuing a human rights agenda, three main evaluative criteria were identified: that the values pursued are globally recognised, that double standards are avoided and that there is participation in the transnational process. It was concluded that the *Kiobel* case helped mitigate potential issues. *Kiobel* addresses the possibility that the ATS was a vehicle to promote national interests by keeping the ATS limited to those claims that touch and concern the US. By applying the touch and concern test instead of relying on including an element of judgement to the practical consequences of the judgment (as required by *Sosa*), *Kiobel* has decreased the chance that different standards will be applied to corporations from different countries because of foreign policy concerns. Concerns still exist as to the US's participation in the transnational process and to the extent to which the US can justify ATS litigation to fill governance gaps whilst not supporting attempts at reaching a binding international framework.

²⁰⁴ Koh (n 95) 151.

²⁰⁵ Richard Jolly and Louis Emmerij and Thomas G. Weiss *UN Ideas That Changed the World*, (Indiana University Press 2009) 112

²⁰⁶ Murray (n 137).

²⁰⁷ Matthew H Kita, 'It's Not You, It's Me: An Analysis of the United States' Failure to Uphold its Commitment to OECD Guidelines for Multination Enterprises in Spite of No Other Reliable Alternatives' (2010) 29:2 Penn State International Law Review 359.

²⁰⁸ http://www.unicef.org/nutrition/files/State_of_the_Code_by_Country_April2011.pdf.

²⁰⁹ Ruggie (n 116) 185.

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