EUROPEAN MASTER's DEGREE in HUMAN RIGHTS and DEMOCRATISATION

Civil Litigation of Transnational Corporations

An examination of the legal, procedural and political issues arising in transnational tort claims in the United States and England.

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ABSTRACT

This research paper investigates and evaluates legal means of making transnational corporations (TNCs) accountable for human rights violations committed in the course of their activities in developing countries. It is based on the view that globalisation has been asymmetrically focused on developing the interests of big business for too long and that it is now necessary to balance this with the human rights of those who are affected by their operations in countries distant from TNC headquarters. It focuses on claims brought in the U.S. and England by the victims of these violations. Such legal actions attempt to target the parent companies for their role in directly perpetrating violations, or for their complicity in the perpetration of violations by other actors. They have are becoming more and more prevalent and the jurisprudence of the courts has been evolving in a way generally favourable to foreign victims. Much controversy has ensued from legal, economic and political circles. However, this paper seeks to demonstrate the value of these legal actions, focusing on the fact that it is highly realistic and practical to focus on extending already existing legal mechanisms to TNCs operating abroad. Looking at the U.S. and English examples, this paper will compare the mechanisms which have been used by victims and their lawyers, in order to ascertain the advantages and disadvantages of each.

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"Sick former workers from the Prieska asbestos mill, which was run by the British company Cape, demonstrate in South Africa last year. The miners' plight is now before Britain's Law Lords, who must decide if they have the right to bring their compensation cases in the UK"[2]

Photo: Hein du Plessis[3]

[2] Dropkin, G., 2000.

[3] From his exhibition *Cape Dust: Forgotten South African asbestos victims demand justice*, available at http://www.labournet.net/images/cape/layout4.htm

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INTRODUCTION

This research paper will look at some of the principles used to bring transnational corporations (TNCs) to justice for their actions abroad, focusing on the use of civil litigation to address human rights violations. It seeks to introduce, clarify and compare two such methods of bringing TNCs before the domestic courts of their home states. The means of comparison will be an analysis of the legal issues affecting such litigation, as such it will be a legal thesis.

The primary problem that victims of corporate human rights violations face when they deal with TNC groups is choosing the right forum in which to pursue their claims. In one way or another, the victim's choice of forum is prone to challenge by the parent company and these challenges are not only inconvenient but also costly. This paper will look at the law from the human rights based approach of a lawyer seeking reparations for the victim-plaintiff.

In Chapter 1, the importance of legally targeting TNCs will be explained. It will be seen that big business is a huge element of the process of globalisation, whereby the international order may be seen to be progressing more and more towards an economics centred dynamic where TNCs wield enormous power. Typically, they operate in a climate of impunity. The countries where they carry out dangerous operations frequently lack political will or the ability to hold them accountable for human rights violations. As a result, victims of human rights violations suffer from a lack of access to justice. This chapter has the purpose of demonstrating the importance of looking to domestic “home country” courts as a means to find a solution to the problem. Access to justice will be exposed as being a pervading theme throughout the paper, which gives validation to the types of cases discussed in the paper. The reason for focusing on civil litigation rather than criminal will also be explained here.

In **Chapter 2 and 3** will provide a background of the civil legal actions taken in the U.S. and in England respectively as a result of this lack of access to justice in the countries where TNCs operate, namely the Alien Tort Statute in the U.S. and the use of domestic tort law in England. Both methods will be outlined in parallel, looking at

the bases of jurisdiction for both the subject matter and the parties involved in the claims, the legal causes of action upon which an action may be allowed to proceed and other legal doctrines and issues which can have and effect on such claims.

In the U.S., the Alien Tort Statute has come to be interpreted as providing jurisdiction over the actions of TNCs abroad when they are alleged to have committed violations of international human rights norms, which have been accepted as being part of federal common law. It will be seen that this legislation has great potential to at least put pressure on big business to take responsibility for the devastating effects of their activities. No case has gone beyond the procedural stage of deciding whether US courts have jurisdiction, with companies preferring to settle the claims than have the merits of the action decided on in court. Nevertheless, in the cases where the courts have found that they have jurisdiction, large financial pay-outs to the victims and damaged communities have ensued.

In England, jurisdiction has been found to exist over TNCs under the common law of torts. The House of Lords has held that it has jurisdiction to hear such claims in situations where it would be impossible to achieve justice in the alternative host state. This is a relatively recent development and only three such cases have been brought, all of which ended before a decision on the merits could be made. However, these cases have served to open a potential avenue of claims to foreign litigants.

Procedural barriers which are invoked by defendants will be examined also. The underlying theme of justice for the plaintiff will serve to connect the topics. Common to both jurisdictions is the doctrine of *forum non conveniens*, whereby a judge, at his discretion, may decide to stay proceedings in favour of an alternative, more appropriate forum. The well established legal principle that companies enjoy *separate legal personality* also poses problems, as this principle provides that individual companies are legally seen as completely separate even if it is this is not the truth in reality. For example, only in exceptional cases will a court find that a parent company is liable for the actions of its subsidiary.

In the U.S. cases, the doctrines of *act of state* and *political question* provide for a case to be rejected in the situation where it would be an interference with the actions of

another sovereign state, and liable to disrupt the executive from carrying out its function in deciding on foreign policy. The corresponding doctrines in England will be described in order to make a comparison.

Article 6 of the European Convention of Human Rights which provides that everyone has the right to a fair trial will be studied to the extent that it has the potential to affect decisions of the English courts when they are determining on whether staying proceedings for the purpose of *forum non conveniens* would result in denying the rights of the victim.

A final issue which will be touched on is the recent propensity of the Bush administration to side with corporate defendants, by submitting opinions to the court which state that all ATS jurisprudence to date should be disregarded as founded on an incorrect interpretation. This adds an extra political, economic dimension to the claims discussed in the chapter, and places them firmly in the perspective of today's society.

In Chapter 4, a synthesis of both legal actions will be made. Each element will be compared and evaluated, firstly the jurisdictional requirements for cases to be taken – focusing on subject matter jurisdiction and personal jurisdiction. Then, the barriers to claims being brought will be considered. Finally, note will be made of the controversial arguments made by those who contest the bringing of such extraterritorial claims in the U.S. courts – primarily by those with an economic agenda. The concepts will be analysed in light of a victim's point of view.

In conclusion, this paper will explain that access to justice by victims of serious human rights abuses is such a fundamental part of corporate responsibility that all avenues for pursuing justice must remain accessible to foreign victims of human rights violations committed by TNCs in the operations abroad. It will summarise the comparison, seeking to extract the advantages of both systems and arrive at a conclusion of the aspects most befitting a human rights based approach.

CHAPTER 1 – INTRODUCTION

This introduction will outline why legal mechanisms are necessary to make TNCs accountable for their actions, and more precisely, why actions taken in the home state of the corporation are necessary, worthwhile and warrant continued attention. This is done by firstly describing the power of TNCs and then explaining how their actions relate to human rights concerns. Following that, home state litigation, more precisely through civil rather than criminal means, will be shown to be the most appropriate and useful for situations of egregious human rights violations when it is compared to alternative mechanisms for the protection of human rights, namely corporate social responsibility and legal proceedings in the states where the impugned activities are carried out.

1.1 TNCs and Human Rights

1.1(a) Economic Globalisation and TNCs

In this time of economic globalisation, it is well documented the nation state no longer holds the position as the single most important unit of society. National borders have become fluid with the advent of technological innovation which has allowed ease of communication and transportation, emergence of international financial markets and an unprecedented ability to transfer information, money, raw materials and products between geographically distant locations.[4] All this has encouraged the growth of TNCs as a means of doing business. TNCs have become as important, if not more important as states in terms of resources and influence.[5] Their capacity to rival states as global actors is especially evident because they are international networks that coordinate action, thus making it possible to influence a state's policy both from within and from above.[6]

Due to the breadth of TNC activity in today's society and their powerful position which equals that of some governments, it may be asserted that their interests now

[4] Benedek, De Feyter & Marrella, 2007; Clapham, 2006; Ramasatry, 2002; Bratspies, 2005, pp. 9 – 15; Abadie, 2004, pp. 749 – 751; Salazar, 2004, pp. 113 – 115.
[5] See Paul, 2001, p. 289, stating that corporations have now become a primary subject displacing the state's exclusivity in this sphere just as they have displaced state ownership and regulation in the market. In fact, a commonly cited statistic from the Institute for Policy Studies reports that corporations make up 51 of the top 100 'economies' in the world, see Anderson & Cavanagh, 2000, p. 3.
[6] De Feyter, 2005, p. 12.

extend beyond their traditional endeavours in markets and the workplace, to encompass community stakeholders and the environment.[7] Certainly, they impact upon the lives of people who live in locations remote from centralised decision making activities. It is important to note as a starting point that TNCs and their presence in developing countries do not necessarily have negative effects. Undoubtedly, economic globalisation has led to benefits in the living circumstances of people worldwide and TNCs can potentially contribute to the well-being of societies.[8] Power is not uni-dimensionally evil.[9] However, this paper will focus on the adverse effects caused by certain unscrupulous corporations which take advantage of their position of being able to act with apparent impunity due to the difficulties of legally targeting them and making them responsible for their actions in regions distant from their headquarters.

TNCs are in such a powerful position due to their domination of the world economy.[10] Their power and control over resources in developing countries combine to place them in a significant position on the world stage, as they frequently interact with both governments and populations of developing countries.[11] The tendency for TNCs to 'shop around' to avail of the best conditions in developing countries means that many of their employees will be working in a country where their human rights are forfeited for the good of the national economy. Added to this is the fact that foreign debt is a major issue for many developing and least developed countries, and that international financial institutions such as the World Bank and the International Monetary Fund are not legally bound by human rights considerations in their lending and financing decisions. [12]

Business repeatedly states that governments are responsible for ensuring fair and equitable practices in their countries, but due to three decades of increased liberalism, privatisation and bilateral investment agreements, it is clear that responsibilities must be shared. Governments are key, but in an increasingly interconnected world other

[7] Clapham, 2006, p. 44.
[8] Shinsato, 2005, p. 6.
[9] De Schutter, 2004 (b), p. 27.
[10] De Feyter, 2005, p. 9 notes that TNCs employ a huge section of the world population, with foreign affiliates employing about 54 million employees in 2001.
[11] Breed, 2002, p. 1008.
[12] Francioni, 2007, p. 246.

social actors must also be directly involved in addressing common challenges.[13] Economic globalisation has had the consequence that even though certain TNCs have aroused bad feelings in developing countries, the truth is that for such countries, worse than attracting foreign direct investment is attracting none.[14]

1.1(b) Legal characteristics of TNCs[15]

The distinguishing characteristics of TNCs are that they operate in different countries and share a common central coordination point. It has been noted that from the beginning, such entities were defined in terms of jurisdiction and potential jurisdictional conflict.[16] More modern definitions also focus on the cross border element of TNCs. According to the UN Norms on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights, the term TNC refers to an "economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively".[17] The OECD Guidelines include the additional element of coordination and central control.[18]

Essentially, for the purposes of this paper, TNCs can be characterised as being a group of corporations based in different countries, but linked by their central ownership and management strategy.[19]

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[13] Robinson, 2007.
[14] De Schutter, 2004 (b), p. 404.
[15] The distinctions between the terms "multinational enterprise", "multinational corporation" and "TNC" are often blurred, and this paper does not attempt to distinguish between them.
[16] Kobrin, 2001, p. 1 - At a conference at Carnegie Mellon University, David Lilienthal, the inventor of the term "multinational corporation" defined them as 'such corporations… which have their home in one country but which operate and live under the laws of other countries as well'.
[17] UN Norms on the on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), para 20, available at http://www1.umn.edu/humanrts/links/norms-Aug2003.html
[18] OECD Guidelines for Multinational Enterprises, June 27, 2000, Part I, "Concepts and Principles", para 3, available at http://www.oecd.org/dataoecd/56/36/1922428.pdf states that MNEs "usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed."
[19] Joseph, 2004, p. 1.

TNCs are usually arranged in a complex manner involving many subsidiary companies, either wholly or substantially owned by the parent company. Subsidiaries are incorporated or acquired in the host country and then may organise their own affairs regarding staff and contracts. Larger TNCs may have companies interposed between the parent company and the subsidiary. The significance of this situation is that there is a difference between the common view amongst the general public and economists of a TNC being a single enterprise and the legal view whereby a TNC is made up of separate independent entities, each with its own legal duties and liabilities separate and distinct from the parent company. This artificial legal conception is widely recognised as being in conflict with the truth, and has been described as being "manifestly anachronistic, bearing no resemblance to the economic reality".[20]

In practical terms, the most immediate effect of this separate legal personality is that the assets of the parent company and the rest of the group are not available to satisfy the liabilities of subsidiaries in the event of claims against them arising out of their activities in developing countries.[21] Moreover, confusion is created due to the TNC's peculiar nature as no single law creates it, and thus no single law is clearly identified as governing the limits of its activities.[22] Although these corporations have a dramatic impact on individuals, communities and nations, the vast scope of their activities make it difficult for any one government to hold them accountable.[23] As a result, there is now a perception that states are losing their power to control the direction of corporate responsibility and that the systems of economic transactions produced by globalization now tend to benefit only foreign owners while allocating all risk to domestic actors.[24] All these affects are moreover amplified by the inherent power of TNCs as outlined above.[25]

1.1(c) TNCs and human rights concerns

As a result of the economic globalisation described above, it is common for governments in developing countries to guard their competitive advantage – by allowing, or turning a blind eye to the violation of the basic human rights of their

[20] Blumberg, 2000, p. 303.
[21] Badge, 2006, p. 6.
[22] Kamminga & Zia-Zarifi, 2000, pp. 4-5.
[23] Stephens, 2000, p. 209.
[24] Backer, 2005, p. 104.
[25] Joseph, 2004, p. 4.

employees and stakeholders. TNCs have long pursued their business in developing countries with little oversight by weak local governments and even less by the international community.[26]

The most common and obvious rights affected are economic, social and cultural rights[27], most notably the core labour standards for workers. There have been many circumstances of companies underpaying employees and failing to provide for adequate health and safety mechanisms in the workplace.[28] Frequently, employees do not have recourse to unions as their right to associate and bargain collectively is restricted.[29] The nature of work in developing countries may often be hazardous to the local environment, because of faulty equipment[30] or indiscriminate dumping of waste[31], but again, governmental decision makers are driven by the incentive of having a world class company operating in their country, and may ignore complaints. Export Processing Zones or Free Trade Zones in developing countries contribute to this phenomenon as bureaucratic requirements are lowered as an incentive for TNCs to locate there.[32] A report by the International Labour Organisation notes the presence of incentives such as legal restrictions on trade union and equality rights and exemptions from generally applicable legislation in the area of occupational health and safety.[33] These examples represent violations of the right to enjoyment of just and

[26] Ottoway, 2001, p. 44.
[27] A comprehensive list of such rights is to be found in the International Covenant on Economic, Social and Cultural Rights,
[28] See, for example the English cases which are analysed in detail below, where English corporations Cape, Thor and Rio Tinto failed to provide for the health and safety of their employees despite their knowledge of the risks of their operations
[29] Claims brought in America have highlighted the dangers of associated activity in some developing countries. One notable example is the death of Ken Wiwa and others in Nigeria following their participation in the Movement for the Survival of the Ogoni People, for details see Fellmeth, 2002, pp. 244 – 246; another is the case being brought by the Sinaltrainal trade union from Columbia against Coca Cola alleging murders, kidnapping and torture of trade union leaders by paramilitaries at bottling plants, with the knowledge and under the direction of Coca Cola company managers, for details see Forero, 2001.
[30] For example the Bhopal disaster of 1984 killed thousands of people in the Indian city of Bhopal following the accidental release of huge amounts of toxins from a chemical plant owned by the U.S. corporation Union Carbide. Investigations revealed that many safety procedures were bypassed and the standard of operations in the Indian plant did not match those at other Union Carbide plants; see Rolle, 2003, pp. 164 – 167;
[31] See the new case which has been initiated in the English courts against Trafigura; information available at http://www.leighday.co.uk/doc.asp?doc=964&CAT=1021
[32] The Helsinki Process Report on Globalisation and Democracy Report: Mobilising Political Will, 2005, p. 21; A typology of Export Processing Zones may be found on the ILO website at http://www.ilo.org/public/english/dialogue/sector/themes/epz/typology.htm
[33] ILO, 2003, pp. 7 – 11.

favourable conditions of work and the right to the enjoyment of the highest attainable standard of physical and mental health.

Civil and political rights may also be at stake when TNCs operate in developing countries. There have been examples of violent suppression of organised opposition to TNC activities and facilitation of unfair trials, punishments and executions[34]. Such acts would represent violations of the right to life, the right to a fair trial, the right to freedom from torture and the right to freedom from arbitrary arrest and detention.[35] In even more serious cases, due to the expanding operations of TNCs, they sometimes end up operating in countries with serious conflict and bad human rights records.[36] There have been examples of TNCs benefiting from corrupt or weak governments by using national military forces as security for their operations which has had disastrous results for local populations.[37] This "militarised commerce"[38] has occurred on numerous occasions, contributing to some of the most blatant displays of corporate complicity in egregious human rights violations, such as genocide, crimes against humanity and war crimes.[39]

1.1(d) Corporate Social Responsibility (CSR)

The notion of CSR has become a big issue for business and NGOs. It is defined by the European Commission as a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment as a response to a variety of social, environmental and economic pressures.[40] The rise of CSR as we know it today happened as a result of anti-corporate activism and the reputational damage that campaigns were causing to TNCs.[41] Many voluntary initiatives and codes of conduct

[34] See *supra* footnote 29.
[35] International Covenant on Civil and Political Rights
[36] Joseph, 2003, p. 3.
[37] Examples include Unocal's operations in Burma where the military were assigned to provide security for the construction of a gas pipeline, which resulted in the commission of extreme violations of the human rights of the local populations, most notably forced labour; for more detail see Frydman & Hennebel, 2007.
[38] See definition of the elements of militarised commerce in the Fall 2000 edition of the Human Rights Bulletin of the Canadian Lawyer's Association for International Human Rights, 2000, p. 6.
[39] Breed, 2001, p. 1008; for a definition of these terms see the Rome Statute of the International Criminal Court
[40] European Commission Green Paper Promoting a European Framework for Corporate Social Responsibility, 2000.
[41] The allegations of Shell's complicity in the execution of Ken Saro Wiwa and other activists in Nigeria represented the climax of anti-corporate campaigning and the introduction of huge PR

were developed, for example the Global Reporting Initiative in 1997,[42] Social Accountability International's SA8000 in 1998[43], the UN Global Compact in 1999[44] and the UN Norms on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights.[45]

CSR is important and voluntary codes of conduct, ethical trading programmes and other such initiatives may lead to improvements on the ground. The flexible nature of these strategies mean that they can be adapted to specific industries, which is an advantage over legal rules which can be vague and difficult to apply to different types of business. Moreover, voluntary codes may pave the way for binding rules as they develop consensus and understanding about core rights, sometimes providing direct inspiration for national initiatives and legislation. They are important in this respect, but for the range of serious violations of human rights committed by TNCs, additional methods of enforcement are required.[46] It is necessary to move "beyond voluntarism" and work on an international regime which would incorporate both voluntary and binding rules.[47]

This is because despite the positive changes brought by CSR, in many cases it fails to have an impact. There are many reasons for this which apply especially to large TNCs who publicise their commitment to social causes yet cause huge human rights problems in the countries where they operate. First, CSR is, by definition, a voluntary concept and there is no regulation of the concept leading to vague, undefined declarations. For example, TNCs prefer to use the word 'commitment' than 'duty' so that they can arbitrarily decide what value this should take.[48] Second, economically and legally, CSR can only be insincere. Companies are legally bound to maximise profits to shareholders and have a duty to make money, and economically they can only make a decision which favours the wider social good if the outcome is also the

operations to rebuild reputations and to convince the public that corporations play an important role in society.

[42] http://www.globalreporting.org/Home
[43] http://www.sa-intl.org/
[44] http://www.unglobalcompact.org/
[45] UN Norms on the on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)
[46] International Council on Human Rights Policy, 2002, p. 156.
[47] International Council on Human Rights Policy, 2002, p.9
[48] Fauset, 2006, p. 10.

most profitable one.[49] Third, CSR may be seen as a strategy to avoid regulation. It has been described as a mask which disguises the impact of TNCs in the world by using highly efficient PR machines to draw attention to certain development initiatives and away from the devastating effects they can have.[50] Moreover, it is logical that no-one would seriously suggest that individuals should regulate themselves, yet we are asked to believe that corporate persons should be left free to govern themselves. The impression of social responsibility which TNCs promote through CSR is not always an effective form of regulation, and serves to benefit the company's reputation, not its stakeholders or the public in general.[51] They see it as a means to a profit-making end, not as a sincere endeavour to improve corporate practices in vulnerable communities. Therefore, it is clear that CSR is not always taken seriously and that in order to make TNCs genuinely socially responsible, more concrete forms of accountability are required to force them to behave ethically.

1.1(e) Host state responsibility

It would appear that holding companies responsible for their actions in a specific country should take place in that country. As a rule, primary responsibility for providing remedies should rest with the state in which injury occurred. National laws, regulations and initiatives are the principal ways of placing liability on a TNC for its operations whether through company law, consumer protection laws, advertising law, environmental law or criminal law. The existence of provisions to guarantee fair access to justice should allow victims to gain redress. On a practical level, the victims, the perpetrating company and any evidence would be readily available at close hand to enable a court to conduct a trial.[52] National law is important as a first stop, and it is vital to recognise the role of the host state in defending the rights of its citizens against the actions of TNCs in its jurisdiction. In the majority of cases, host state national law will suffice, but as with CSR, for serious violations of human rights

[49] Friedman, M., quoted in Fauset, 2006, p. 9.
[50] Pendleton, 2004, p. 2.
[51] This conclusion is supported by looking at the American case of *Kasky v Nike* where amicus curiae briefs submitted by TNCs, advertising groups and public relations associations were of the opinion that "if a corporation's every press release, letter to an editor, customer mailing and website posting may be the basis for civil and criminal actions, corporate speakers will find it difficult to address issues of public concern implicating their products, services or business operations". (Amici Curiae Brief in support of Nike submitted to the US Supreme Court by Exxon Mobil, Bank of America, Microsoft, Monsanto and Pfizer, p. 3.)This brief in itself clearly reveals TNCs' attitudes towards their CSR policies.
[52] International Council on Human Rights Policy, 2002, p. 77.

committed by TNCs in developing countries, frequently it is not sufficient to ensure that they will act responsibly.[53]

This is for a number of reasons. Firstly, due to the fact that developing states often perceive the need to attract TNCs investment in order to develop their economies, political will to make them accountable for their actions in the jurisdiction is frequently lacking.[54] Corporate human rights liability laws are therefore either not enacted or not enforced because of a fear that stricter regulations will provoke TNCs to withdraw their investment and transfer their operations to another, less stringent jurisdiction.[55]

Secondly, governments of developing countries are often weaker and may be susceptible to bribery and corruption.[56] Victims' fear of reprisal and persecution for acting against powerful TNCs is also a factor in preventing cases being taken against TNCs in developing countries with weak or corrupt governments.[57]

Thirdly, legal systems in developing countries are generally less developed than those in developed countries and may lack the expertise required to deal with TNC activities.[58] Extensive legal knowledge and an understanding of technical operations are essential to effectively target TNCs and make a credible final ruling on allegations against them. The objectivity of host country courts may be in question in countries with weak governance, and bribery of judges can also be an issue when salaries are low.[59] Also, systems of legal assistance are rarely available, and therefore it is practically impossible for victims who are usually from the poorer sections of society to take a case in order to remedy their situation.[60]

Fourthly, a combination of poverty and a low standard of technological, scientific and social development mean that in many cases it is completely unrealistic to expect the

[53] International Council on Human Rights Policy, 2002, p. 46
[54] International Council on Human Rights PolicY, 2002, p. 11.
[55] Joseph, 2001, p. 4.
[56] *Ibid*, p. 4.
[57] Ward, 2001, p. 462.
[58] Joseph 2001, p. 5.
[59] Ward, 2002, p. 463.
[60] Joseph 2001, p. 5.

authorities in the host country to supervise the effects of TNC activities on human rights in the territory. The more pressing the need for foreign capital and investments becomes, the more illusory the expectation that the host state will act as a guardian of human rights standards[61] because TNCs operating in developing countries often have more control over human and financial resources than the states that are supposed to regulate them[62].

For these reasons, it is clear that consequent result can be that the TNC operates in a developing host State with effective impunity[63] and therefore, the law of the host state may only be seen as a starting point in realising corporate compliance with human rights. It is not, and should not be envisaged as the final solution to the problem.[64]

1.2 Home State Responsibility

1.2(a) Importance of Home State Responsibility

Because of the shortcomings of the other means of accountability discussed above, a growing body of jurisprudence is developing around the notion that the state in which a TNC is incorporated should hear cases involving their misdemeanours abroad. This idea is controversial due to legal issues of extraterritoriality, as well as political concerns that such cases would damage foreign relationships and business community opposition.[65] However, resort to domestic courts is important because of the limitations posed by the alternatives above in cases of egregious human rights violations by TNCs. As long as this option does not displace resort to more appropriate procedures in the country where an abuse occurred, there is much merit in the conviction that home state legal systems should be used to ensure that no wrong committed by TNCs should go unredressed.[66] Cases have been taken in the U.S., the United Kingdom, Canada and Australia, all of which demonstrate a growing tendency for national courts to accept jurisdiction to hear cases involving the actions of TNCs during their foreign operations.

[61] Francioni, 2007, p. 249.
[62] Grossman, C. & Bradlow, D., 1993, p. 8.
[63] Joseph, 2001, p. 5.
[64] Francioni, 2007, p. 250.
[65] Wouters et al, 2003.
[66] International Law Association, 2001, p. 131.

There are several advantages to the development of transnational cases of this kind. Corporate accountability laws requiring higher standards of behaviour from TNCs often exist in developed nations and because it is generally recognised in international law that States can exercise extraterritorial jurisdiction over wrongs committed abroad by their own nationals, greater regulation of TNCs could come from home states.[67] Litigation may therefore be based on the principle that companies should not carry out acts abroad which would be illegal in their home state. There may also be a public interest in allowing victims of human rights violations to obtain reparation from those who committed them, even though they took place outside the jurisdiction in which the claim is brought.[68] Moreover, existing basic international human rights provisions applicable to TNCs can be enforced through both domestic court systems through a range of civil and criminal proceedings, on behalf of public and private plaintiffs.[69] In sum, although this kind of "cathartic ritual" should be provided by the state in which violations of human rights occur, in cases where that has not and will not occur, an action in another country provides a surrogate forum and means by which victims can bring publicity and political pressure to bear against the government of the state in which the events occurred.[70] Bringing such a lawsuit serves an important symbolic purpose, and according to the Centre for Constitutional Rights, the typical plaintiff's "satisfaction comes from the mere filing of a lawsuit, from confronting the defendant in court or forcing him to flee from the US, and from obtaining judgment from a US court which makes a formal record of the human rights violations and of the defendant's responsibility".[71]

As well as allowing victims to obtain redress for damage caused to them by TNCs, a properly functioning, effective regime of legal accountability would encourage a "culture of compliance"[72], which would complement and supplement other methods of making companies take responsibility for their actions abroad.

[67] Joseph, 2001, p. 11.
[68] International Law Association, 2001, p. 133.
[69] Stephens, 2000, p. 209.
[70] Terry, 2001, p. 113.
[71] *Ibid*, p. 113.
[72] International Council on Human Rights Policy, 2002.

Extraterritoriality issues

In most domestic legal systems, an individual who carries out actions resulting in personal injury or death will be subject not only to a criminal prosecution, but to a civil action by the injured party. Although the responsible state bears the primary responsibility to provide a remedy, and international complaints-based mechanisms constitute a secondary means of redress, the interests of justice might require other national legal systems to hear claims when these avenues are not available.[73] A further justification is that there are already too many nations with problematic, ineffective judicial systems which drastically fail to provide their own citizens with remedies for gross human rights violations.[74] Accordingly, such legal proceedings should not be seen as out of control mechanisms, rather as acting as a supplement to malfunctioning foreign legal systems.

Extraterritorial jurisdiction occurs when a State seeks to influence the conduct of persons, acts or property outside its national territory.[75]

De Schutter outlines three ways in which this may be done. First, it may intervene on the national territory of another State by deploying the activity of its organs on that territory (enforcement extraterritorial jurisdiction). Second, it may attribute to its jurisdictions power to adopt decisions which concern situations having arisen abroad (adjudicative extraterritorial jurisdiction). Thirdly, it may adopt legislation intending to have an extraterritorial effect, governing persons, property or conduct outside the national territory (prescriptive extraterritorial jurisdiction.[76]

International law generally recognizes that the justifying link for prescriptive jurisdiction may be found in territory, nationality, or the need to protect the state's national or security interests.[77] In addition, by the principle of universal jurisdiction, international law has long recognised that a state may exercise jurisdiction over a

[73] International Law Association, 2001, p. 132 – 134.
[74] International Jurists Amicus Curiae Brief in *Sosa* v. *Alvarez Machain*, 124 S. Ct 2739 (2004), p. 25.
[75] De Schutter, 2006, p. 9.
[76] *Ibid*, p. 9 -10.
[77] Donovan and Roberts, 2006, p. 143.

limited category of conduct even without a connection by territory, nationality, or need for protection.[78]

1.2(b) Access to Justice

It is necessary to keep in mind the notion of access to justice as a pervading theme. The central feature and defining reason why transnational litigation such as that outlined above exists, is a global need for justice which is accessible and efficient. The plight of the victims of the actions of TNCs acting abroad is a serious one, but due to the asymmetrical relationship between them and their transnational perpetrators, it is one which is difficult to be made heard before courts which have the potential to make an authoritative, effective judgment – namely the courts of the countries of the parent companies of the TNC

Access to justice is a key element of the problems of making TNCs responsible for their actions. The low number of cases taken under the ATS, for example, reflects this. Despite being the best known example of suing corporations in their home country, the difficulty and expense of bringing a claim, coupled with the number of procedural barriers and an increase of political opposition (which will be examined below), has meant that access to such procedures has been limited. In the English examples outlined above, the fact that it is a recent development in the law, as well as having many procedural barriers to overcome, has made it a difficult means of justice to avail of.

The law was developed in the context of flows of investments from developed to developing states. In that context, the focus has entirely been on the protection of the multinational corporation which is usually the vehicle of these investments, from the exercise of sovereign power of the host state. [79]

However, it is now necessary to focus on the need for justice for the victims. The right of access to justice must be pushed firmly to the forefront of the demands for reparation and the symbolic character of a hearing in a court.

[78] Restatement (Third) of the Foreign Relations Law of the U.S., Section 404 (1987).
[79] Sornarajah, 2001, p. 493.

The increased amount of human rights based rhetoric in the global culture is one which will hopefully deliver in terms of an improvement in the behaviour of TNCs. The impunity which they have enjoyed for many years must be limited, so that they see their overseas operations in developing countries in the same way as those in developed countries. Just because the legal obligations of states are lax, because governments in developing countries are frequently corrupt or corruptible cannot be allowed to continue to give TNCs a licence to act in an indefensible, unethical way to the detriment of the citizens of these countries.

1.2(c) Civil and Criminal Claims

Before analysing the opportunities for holding TNCs liable under domestic civil law systems, it is necessary to provide an outline of the differences between criminal and civil law, in order to explain why it civil law should be used instead of, or as a supplement, to criminal law in these cases. It is also necessary to address the question of extraterritoriality. These questions will be addressed before turning to the respective legal actions.

Criminal law would appear to be the most natural choice for bringing allegations of violations of human rights by TNCs before domestic courts.[80] It provides the possibility of a public condemnation for criminal behaviour, which would carry symbolic weight in the public conscience. It may be argued that the reparations gained from tort law or under the ATS carry nothing like the moral weight of a criminal judgment and cannot be an effective means to punish and deter international crimes.[81]

However, on closer inspection, civil litigation provides a useful recourse for victims of human rights violations. First, tort actions have less onerous procedural and evidentiary requirements than criminal ones since they do not threaten the liberty of the tortfeasor.[82] Second, the parties involved are the ones to lead that action instead of the state.[83] This is important because state often have little incentive to investigate and prosecute another state's human rights offences, whereas individual plaintiffs will

[80] Frydman and Hennebel, 2007, p. 20.
[81] Bratspies, 2005, p. 32
[82] Terry, 2001, p. 114.
[83] Davidson, 2005, p. 1423.

have powerful incentives for pursuing a claim for vindication and compensation.[84] Therefore, tort remedies allow complaints to be made even where such complaints are – generally for economic reasons - politically unpopular.[85] Third, reparation and satisfaction for victims is provided by civil law as much as, if not more so than by criminal law. Redress often requires reparation and not merely vindication.[86] Compensation is made available in civil proceedings, but not in criminal ones[87] and civil law can play an equally strong declarative role as criminal law[88] through the availability to the public of the facts of the case and the resulting negative publicity.[89] Therefore, despite the lack of symbolic condemnation, the most important results for a victim may be provided by civil law – reparation and publicity. Fourth, due to the rarity of criminal prosecutions, civil proceedings act as a substitute or supplement.[90]

On balance, tort suits for violations of international human rights and humanitarian law are worthwhile.[91] They are an important complement to, and in many ways a more useful mechanism than the criminal remedy.[92] Due to the lack of international enforcement mechanisms, the retention of the availability of domestic civil proceedings for victims is of the utmost importance.[93]

1.2(d) Separate Legal Personality

TNCs may organise their operations in different countries in different ways. They may set up a direct branch in the country; they may incorporate a new company in the country of business which they can control through a majority shareholding; or they may have contractual relationships with a company already operating in the country.[94] In most legal systems, an employer owes a duty of care to ensure the safety of its workers, so a claim by a worker against the subsidiary company employer should be relatively straightforward. If a direct branch of the TNC is present in the country, holding it responsible in its home country for its actions in the other

[84] Terry, 2001, p. 115.
[85] Engle, 2005, p. 2.
[86] International Law Association, 2001, p. 133.
[87] Davidson, 2005, p. 1422.
[88] Donovan and Roberts, 2006, p. 154.
[89] Chatham House, 2006, p.3.
[90] Davidson, 2005, p. 1422.
[91] *Ibid*, p. 1431.
[92] Terry, 2001, p. 111.
[93] Van Schaak, 2001, p. 156.
[94] De Schutter, 2006, p. 35 -36.

The problem arises from the principle of separation of legal identity between different limited companies. This principle means that different companies are independent, and act in their own right – not as an alias for its controllers. Similarly, shareholders are not liable for the company's debts beyond their initial capital investment, even if one company owns all the shares in another company. This is called the corporate veil, and it will only be lifted in exceptional circumstances, or where the company in question can be shown to be a sham or an agent of a shareholder.[95] The significance of the corporate veil in cases regarding the actions of TNCs abroad is that it has the effect of shielding the parent company from the actions of its subsidiaries abroad. Legal obstacles and difficulties in obtaining access to justice in local courts, against local subsidiaries which are often uninsured, mean that the TNC escapes responsibility altogether and victims go without redress.[96]

In order for the courts of the home country of the TNC to try foreign corporations, it will usually be necessary to identify the parent company of the subsidiary, and establish responsibility for the acts of the subsidiary, or direct participation in the activity complained of.[97]

[95] *Salomon v Salomon & Co Ltd* [1897] AC 22
[96] Meeran, 2001, p. 162.
[97] Blumberg, 2001, p. 299.

CHAPTER 2 – ALIEN TORT STATUTE IN THE UNITED STATES

The ATS is a legislative provision which has been targeted by human rights defenders due to its interpretation that international human rights norms may be invoked by foreign plaintiffs for determination in U.S. federal courts. It is controversial due to competing views – one which sees the statute as a unique opportunity to use U.S. courts to carry out positive change and provide a remedy for people who would otherwise have no means of challenging powerful human rights violators, and the other view which sees the interpretation of the statue as an impermissible use of judicial power.[98]

2.1 Jurisdiction and Causes of Action

This section will analyse it according to subject matter jurisdiction, personal jurisdiction, possibilities of liability and cause of action.[99]

The ATS is a federal law enacted in 1798 when the US Congress adapted it as part of the Judiciary Act. The text of the act states that *"the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the U.S."*.[100] Originally, it is believed that this statute, which has been described as being of "homeopathic brevity",[101] was to be confined to three causes of action: violation of safe conducts, infringements of the rights of ambassadors, and piracy.[102] However, in the sequence of human rights cases which have been brought before American jurisdictions, it has been decided that the ATS extends much further than this. The provision is unusual in that it requires plaintiffs to found their cause of action in norms deriving from international law rather than the national law of either the U.S. or the state where the injury occurred. In practice, this means that the grounds for bringing a tort under ATS are very narrow, and have been restricted mainly to serious violations of the law of nations.[103]

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[98] Fuks, 2006, p. 115.
[99] For an up-to-date overview of ATS cases, including a summary of ATS cases' background, current status and significance see EarthRights Litigation Manual, 2007, pp. 58 – 68.
[100] 28 U.S.C. § 1350
[101] Wilson, 2005, p. 5.
[102] *Sosa* v *Alvarez-Machain* 124 S. Ct 2739 (2004).
[103] Anderson, 2002, p. 406.

Largely ignored, the statute was only relied on in two cases[104] until the landmark ATS decision made by the U.S. Court of Appeals for the Second Circuit in *Filartiga* v. *Pena-Irala*[105]. The Court found that the claim brought for the torture and murder of Joelito Filartiga, a Paraguayan national, by Pena-Irala, the then Inspector General of Police in Asuncion, Paraguay was actionable under the ATS. Reversing the decision of the District Court, the Court of Appeals held, following an examination of United Nations declarations, regional human rights agreements, U.S. government statements and the conclusions of international law scholars, that official torture constituted a tort in violation of the law of nations as required by the statute[106], therefore triggering jurisdiction under the ATS. Significantly, it also held that courts must interpret international law as it stands now, not in its historical sense as it stood at the time of the passage of the statute in 1798.[107] The lower court found Pena-Irala to be liable to the amount of $10 million, and although he fled the country without paying, the importance of this mechanism to victims was already made clear by the statement of Filartiga's sister who had brought the claim together with her father. "I came to this country in 1978 hoping simply to confront the killer of my brother. I got so much more. With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice?"[108]

Decisions subsequent to *Filartiga* have slowly developed the ATS's jurisdictional reach which now extends to cases between aliens alleging abuses such as genocide, war crimes, summary execution, disappearance and arbitrary detention as well as torture.[109] Jurisdiction has been found when the alleged tort satisfies the international law definition of a universally prohibited offence.[110] The defendants in the cases have

[104] Randall, 1985, pp. 4-5, reported that 21 cases claimed ATS jurisdiction prior to Filartiga. Jurisdiction was sustained in *Bolchos* v. *Darrell* 3 F.Cas 1795 a case involving property rights over slaves seized as a prize of war and in *Adra* v. *Clift* 195 F.Supp 1961, an international custody dispute.
[105] *Filartiga* v. *Pena-Irala* 630 F.2d 876; this landmark case has been extensively described and analysed in academic literature – see for example Joseph, 2004; Stephens, 2002; Swan, 2001.
[106] *Filartiga*, 630 F.2d. 876 884.
[107] *Filartiga*, 630 F.2d. 876 881.
[108] From the statement of Dolly Filartiga – March 29, 2004 at a news conference to discuss the ATS and the Supreme Court case of *Sosa v Alvarez-Machain*; cited in EarthRights International, 2004.
[109] See for example: *Kadic* v. *Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Abebe-Jira* v *Negewo*, 72 F 3d 844 (11th Cir 1996); *Trajano* v. *Marcos*, 878 F.2d 1439 (9th Cir. 1989); *Xuncax* v. *Gramajo*, 886 F.Supp 162 (D. Mass. 1995); *Forti* v *Suarez-Mason* 694 F.Supp. 707 (N.D. Cal. 1988).
[110] Stephens, 2002, p. 7.

expanded from state actors as in *Filartiga*, to private actors[111] including corporations[112].

2.1(a) Subject Matter Jurisdiction.

The ATS creates jurisdiction for plaintiffs to bring claims based on internationally accepted norms of international law – the 'law of nations'. This interpretation was originally upheld in *Filartiga*[113]and has been overwhelmingly accepted in subsequent cases.[114] In *Forti*[115], the court specifically stated that it is unnecessary for plaintiffs to establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify the part of the statute regarding the law of nations.[116] In 2004, in the *Sosa* case,[117] the Supreme Court of the U.S. preserved the ATS as an avenue for claims based on violations of international law. This was in response to an argument which contended that the ATS was purely jurisdictional, without any corresponding cause of action – that it was, in a sense, "stillborn".[118] The Supreme Court found that the ATS was jurisdictional by its terms, but that it was not passed just for "jurisdictional convenience to be placed on the shelf for use by a future Congress"; rather, it was intended to apply to common law actions arising from the violation of international law.[119] Therefore it is federal common law that provides the cause of action in ATS suits.[120]

The *Sosa* claim involved the abduction of a Mexican doctor (Alvarez Machain) from Mexico by Mexican nationals (including Sosa) under the instruction of U.S.

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[111] *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[112] *Doe* v. *Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997).
[113] *Filartiga v.Pena-Irala*, 630 F.2d 876, 887 (CA. N.Y. 1980).
[114] In *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d, the DC Court of Appeals held that the ATS was purely jurisdictional due to concerns that if international law was held to be a source of tort cause of action, any distinction between self-executing and non-self-executing international treaties would disappear. However, this view has been rejected in subsequent cases, which prefer to follow *Filartiga* instead.
[115] *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)
[116] *Ibid*, 1539
[117] *Sosa* v. *Alvarez Machain*, 124 S. Ct. 2739 (2004).
[118] In other words, the argument against the Filartiga interpretation was that Congress should have explicitly enacted legislation to apply to the ATS, without it the ATS has no effect. This was rejected by the court.
[119] *Sosa* v. *Alvarez Machain*, 124 S. Ct. 2739, 2758-9 (2004).
[120] Baluarte, 2004, p. 13.

government agents to bring him to the U.S. where he was arrested.[121] It was claimed that this was against international law and that his arbitrary detention violated the law of nations. Although the Supreme Court dismissed the case because his brief arbitrary arrest was not a sufficiently established violation of customary international law, the Supreme Court affirmed that the ATS could indeed be used. It limited the scope of claims to those that "rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized".[122] It has been said that the Court's decision to recognise common law causes of action arising from breaches of certain international legal norms is not only good public policy, but is also in harmony with the Court's previous decisions on the role of international law within the common law.[123] Certainly, this is true from a victim's point of view.

Thus, the ATS grants federal courts the jurisdiction to hear cases based on certain violations of the law of nations which have been incorporated into the common law.

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[121] This was because it was alleged that he was present at the detention and torture of a U.S. Drug Enforcement Agency official and supervised his torture; the facts of the case are set out in Waldman, 2005, pp. 256 – 257.

[122] *Sosa* v. *Alvarez Machain*, 124 S. Ct. 2739, 2761-2 (2004); This case has given rise to a large amount of controversy regarding how to interpret the court's decision. Some see it as supporting continued litigation by aliens under the ATS, using customary international law according to the intention of Congress when it originally drafted the article. Others reject this, saying that the Supreme court has greatly limited the possibilities for victims to use international human rights norms. See for example Waldman, 2005 (the decision is improperly vague but may nonetheless serve to restrict the application of international law under the ATCA); Roth, 2004 (the Sosa decision announces the existence of strict limits to the power of courts to establish international law-based causes of action under the ATS, but does relatively little, in practical terms, to specify those limits). There is also controversy pursuant to the Supreme Court decision in *Erie Railroad* v. *Tompkins*, 204 U.S. 64 (1938), whereby federal courts can not apply customary international law in the absence of some domestic authorisation, and the ATS does not constitute an exception to this rule. A consideration of the debate goes beyond the scope of this thesis, however, for an extensive examination of the applicable principles, see Bradley, Goldsmith & Moore, 2007 (concluding at p. 935 that *Sosa* upholds *Erie* in that constitutional or political authorisation is required for customary international law to be incorporated into federal law, but noting that in any case there are a number of plausible structural and statutory authorisations for the domestication of customary international law so that it will continue to play an important role in U.S. judicial decision making.); and a response to their article by Dodge, 2007 (concluding that Sosa acknowledged that Congress has the power to shut the door to the law of nations at any time just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such", and that therefore, just as the possibility of legislative override provides democratic legitimacy to judge-made common law, so too it provides legitimacy to customary international law made by the general assent of nations).

[123] Berkowitz, 2005, p. 296.

2.1(b) Personal Jurisdiction

ATS jurisprudence has gradually developed to expand the range of actor which may be held liable under it.

In *Filartiga*, it was accepted that deliberate torture committed makes a **state actor** liable if universally accepted international law has been violated. Overturning the federal court's decision that Paraguay's treatment of its own citizens was not governed by international law, the Court of Appeals found that torture was a violation of international law, and that torturers were hostis humanii generis (enemies of all mankind) who could be brought to justice anywhere.

The landmark case for the proposition that **private actors** may be held liable for violations of international law is *Kadic* v. *Karadzic*[124], where the statute was held to extend to Radovan Karadzic in his private capacity for genocide, war crimes and crimes against humanity. In this case, the defendant had argued that international law binds only states and persons acting under the colour of a state's law, not private actors.[125] However, the court looked at historical application of international law, executive branch support, and the position of the Restatement (Third) of the Foreign Relations Law of the U.S. in applying universal international law to a private actor.[126] It found that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[127] The *Kadic* court also recognised that the State action requirement may extend accountability to otherwise private actors who act in complicity with public actors .[128] The significance of this decision was that previously, a private actor was immune from ATS jurisdiction, and the *Kadic* court recognised that certain international law violations apply to private actors in their individual capacity, allowing future ATS plaintiffs who allege universal international law violations to avoid the question of private and public actors in cases of extreme violations.[129] It also paved the way for corporations to be targeted under the ATS.

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[124] *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[125] *Ibid*, 239.
[126] *Ibid*, 239-41.
[127] *Ibid*, 239.
[128] Stephens 2000, p. 216, giving the example of where the public actor instigates, consents to or acquiesces in the violation, to paraphrase the language of the Torture Convention
[129] Enslen, 1997, p. 723,

Although corporate defendants have attempted to assert otherwise, **corporations** can violate the law of nations.[130] When the Supreme Court analyzed the ATS in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, it noted that the ATS, "by its terms does not distinguish among classes of defendants".[131] This is consistent with the "considerable body of U.S. and international precedent" indicating that "corporations may be liable for violations of international law"[132] *Doe* v. *Unocal* is the landmark case which held that corporations may be held liable, either as direct perpetrators of violations of jus cogens norms, or for their role in knowingly aiding and abetting the direct perpetrators. This complaint in this case was brought by a group of Burmese villagers, who attacked Unocal for using the military as a security force to protect the area on which a gas pipeline was being constructed. As a result of this relationship, it was alleged that numerous, grave human rights violations were commited, including murder, assault, rape, torture, forced labour and the dispossession of homes and property. Many other cases involving corporations have been brought and have succeeded in having the courts find personal jurisdiction over them.

Obtaining personal jurisdiction over a TNC incorporated or headquartered in the U.S. is uncomplicated as they may automatically be sued in U.S. courts. However, for applying the ATS to foreign corporations, American case law has developed case law requiring a certain link with the American legal order, thereby filtering a possible flow of cases. On the basis of the *"minimum contacts"* doctrine for instance, federal courts can only deal with procedures against defendants that have minimum contacts with the forum State.[133] To establish minimum contacts, the criterion of "*presence"* or *"continuous and systematic business"* is considered.[134]

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[130] *Presbyterian Church of Sudan* v. *Talisman*, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003)
[131] *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).
[132] *Presbyterian Church of Sudan* v. *Talisman*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003)
[133] Minimum Contacts doctrine was laid down in the landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)
[134] On the basis of this criterion, a claim against an American subsidiary of the French company Total for complicity in human rights violations in Myanmar was declared inadmissible– the existence of a representative office and the contract of partnership with the U.S. company working on the project within which the alleged human right violations occurred were insufficient to give the court personal jurisdiction over Total's actions. *Doe I* v. *Unocal*, U.S. District Court C.D. California, 18 November 1998 (27 F. Supp. 2d 1174)

2.1(c) Liability

There is a strong moral argument for extending international law norms to apply to corporations as well as to their traditional state subjects. They should be responsible for their actions, and any claims of immunity should be treated strictly due to the huge power and resultant responsibilities which they carry, as detailed in Chapter 1 of this paper. Moreover, there is a school of thought which says that corporations should be scrutinised even more heavily than governments because of the corporate setting in which the behaviour of individuals may be transformed, leading to so-called "personal value transformation", which may lead them to make decisions in their corporate capacity which they would not make in their individual capacities.[135] In conjunction with knowledge of corporate immunity, this mentality can lead to serious repercussions for the policies and behaviour of the company as a whole.[136]

As was said in *Eastman Kodak*, "it would be a strange tort system that imposed liability on State actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power".[137] This logic equally applies to international law; if a state can violate a particular norm, so can those who assist that state in doing so.[138]

International law typically constrains the conduct of states, not that of individuals, private actors or corporate actors. Because of this, for ATS cases brought against TNCs, the courts have made a distinction between violations of international law for which a TNC may be held liable for its individual actions and those requiring an element of state action in the alleged conduct[139]. Therefore, under the ATS, the question of who may be sued depends on the harm they are alleged to have conducted.[140] If the individual or entity is alleged to have perpetrated a tort that falls into the most severe category, one may be sued regardless of status as an individual, corporation, state or non-state actor. However, if the violation falls into a lesser category, the question of who may be sued becomes more complex and depends on

[135] Wilson, 2005, p. 16; quoting Larry May from his book "Sharing Responsibility", 2004.
[136] *Ibid*, p. 16.
[137] *Eastman Kodak* v. *Kavlin*, 978 F.Supp. 1078 (S.D. Fla. 1997) at 1091.
[138] Wilson, 2005, p. 22.
[139] Discussed *supra*, pp. 34 – 38.
[140] Breed, 2002, p. 1017.

whether the individual is a state or non-state actor.[141] The rationale behind the distinction is that private actors are generally not capable of violating international law because most international laws create duties for states, not private individuals.[142]

For certain violations of international norms

To be directly liable, a private party must have committed one of the "handful of crimes"[143] that are violations of customary international law regardless of who has committed them. Violations not requiring state action are those so grave as to be of universal concern, including piracy, slave trade, genocide, war crimes, hijacking of airplanes and perhaps certain acts of terrorism.[144] One example which has held that corporations may be directly liable is the *Beanal* case where the court found that genocide is a violation of international law whether carried out as a state or non-state actor.[145] Corporate defendants have attempted to argue that only governments can be held liable under international law, and that there must at least be an element of state action involved.[146] However, this argument has been rejected and there is no statutory basis for limiting the ATS.[147]

Company can be complicit in state action

It is more usual that TNCs will only become involved with human rights violations in situations where they assist human rights violations or provide the opportunity for the human rights violations. In this sense, it has been held that if a corporation is complicitly engaged with a foreign government in the violation of international law, it can be held liable under the ATS for any acts deemed to be in violation of the law of nations.[148] Complicity in state action will permit a wider range of violations to be brought against a TNC than if it is for purely individual direct action.

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[141] Bridgeman, 2003.
[142] Bridgeman, 2003.
[143] *Doe* v. *Unocal*, 110 F. Supp. 2d. 1294, 1304 (C.D. Cal. 2000).
[144] *Kadic* v. *Karadzic*, 70 F.3d at 239.
[145] *Beanal* v. *Freeport-McMoran Inc*., 969 F. Supp. 362, 372-73 (E.D. La. 1997) - for abuses at the hands of Freeport-McMoran's security forces for their mining operation in Indonesia.
[146] Appellees' Answering Brief at PP 11-21, *John Doe III* v. *Unocal Corp*., No. 00-56628 (9th Cir. May 7, 2001). In fact, in *Kadic*, the argument was made "that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the [ATS]" *Kadic* v. *Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).
[147] Collingsworth, 2003, p. 197.
[148] Pagnattaro, 2004, p.228, citing *Estate of Rodriguez* v. *Drummond* Co., 256 F. Supp. 2d 1250, 1265 (N.D. Ala. 2003) (finding that the defendant mining corporation could be liable under ATS if it could

To do this, a test adopted from international criminal law has been recently favoured. In *Doe* v. *Unocal*, the Court of Appeals disagreed with the District Court's reliance on Section 1983, under which it had found that Unocal could not be held liable under the ATS because it did not fulfil the requirement of having acted under the colour of government authority. The Court of Appeals found that the Section 1983 test was immaterial to the case at hand, instead applying the "aiding and abetting" test which it took from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.[149] Aiding and abetting liability arises from "knowing and practical assistance or encouragement that has a substantial effect on the perpetration of the crime"[150]. It is not necessary to prove that the accomplice had intended to commit the principal crime.[151] This formulation of "aiding and abetting" defines a standard for liability, based on well established legal concepts and plain common sense, that puts TNCs on notice that if a corporation knowingly assists or encourages the perpetration of a crime, the company will be held responsible for its actions.[152]

Moreover, the court also acknowledged, in an expansive footnote, that other theories of third-party liability could be used to link the violations of a state actor to a private corporation, namely the theories of joint venture, agency, negligence, and recklessness could be used to link all sorts of relationships that a corporation may have with government officials, government agencies, and state enterprises.[153] In June 2005 the district court in *Talisman* held that aiding and abetting or "secondary" liability is actionable under the ATS.[154] The court refused an appeal on this point in August 2005. Talisman had argued, relying on Sosa, that secondary liability was not sufficiently accepted in international law to support an ATS claim. However the Court cited the Ninth Circuit's decision in Unocal, and rejected this argument, holding

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be proven that paramilitaries that murdered union leaders were members of the Colombian military, thus satisfying the "state action" requirement).

[149] The Court found useful the aiding and abetting standard defined in the *Prosecutor v. Furundvzija* case before the Yugoslavia Tribunal, describing it as "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime. Leaving out the "moral support" aspect, it came to the present definition.

[150] *Doe* v. *Unocal*, 395 F.3d 932 (9th Cir. 2002).

[151] Frydman & Hennebel, 2007, p. 10.

[152] Cheverie, 2002, p. 10.

[153] Schrage, 2003, p. 159.

[154] *Presbyterian Church of Sudan* v. *Talisman Energy*, 374 F. Supp. 2d 331.

instead that the notion of liability in international law "for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime" is a core principle that forms the foundation of customary international legal norms.[155]

A new case has been filed before the U.S. District Court against Jeppesen Dataplan Inc., a subsidiary of Boeing.[156] It has been brought by the American Civil Liberties Union (ACLU) on behalf of three foreign plaintiffs, who were victims of the U.S. government's practice of extraordinary rendition flights. It is alleged that Jeppesen aided and abetted forced disappearance and torture of these men by acting as a 'trip planner'. The company organised landing clearances, flight plans, ground crews ad hotel rooms with knowledge of what would happen to the plaintiffs as a result.[157] Therefore, the newest question to be tried at court is whether a government contractor can be liable under the ATS for implementing a government policy that clearly violates customary international law and treaties signed by the U.S.[158]

As a state actor for purposes of section 1983

A less favoured approach from older case law is to import jurisprudence from domestic civil rights litigation case law in order to determine when a private actor's actions are sufficiently public so as to trigger liability under provisions requiring State action.[159] Several courts have suggested that the standards applicable to a key US civil rights statute, section 1983, which defines violations of constitutional rights by public officials[160] should also be used to determine State action for the purposes of ATS cases.[161]

This section has been used to provide that private actors can be held liable for civil rights violations when committed under "colour" of state action or government authority. There are five ways in which section 1983 may make a private actor liable:

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[155] *Ibid*, 340-341.
[156] *Mohamed et al. v. Jeppesen Dataplan Inc*, complaint filed 30-05-07.
[157] The complaint in full together with more information is available at http://www.aclu.org/safefree/torture/rendition.html.
[158] Sebok, 2007, available at http://writ.news.findlaw.com/sebok/20070605.html.
[159] Stephens, 2000, p. 216; Shaw, 2002, pp. 1374 – 1375.
[160] 42 U.S. Code § 1983.
[161] Stephens, 2000, p. 216; *Doe I* v. *Unocal* at 890, citing *Kadic* v. *Karadzic* at 245; *Beanal* at 275-80; *Forti I* at 1546.

firstly, if the private actor carries out a public function in that it exercises powers which are traditionally the exclusive prerogative of the state; when the private actor's actions are compelled by the state; under the nexus test - where there is such a connection between the private actor and the state that it is fair to treat the action of one as the action of another; in a case of joint action liability - where the private actor and the government are wilful participants in a partnership so that both are liable for abuses perpetrated by one party in the performance of partnership tasks; or proximate cause - when the private actor exercises control over a state's perpetration of an abuse.[162] The section has been used to make direct action of corporations connected to the government in order to establish state action, or to classify government behaviour as that of the private party.[163] For example in *Beanal*, *Kadic* and *Forti*, the court used section 1983 jurisprudence as a guide.

2.1(d) Which violations attract ATS jurisdiction for corporations?

Under the ATS, claims may be brought for violations of the "law of nations" due to the position of the law of nations in the common law of the U.S. It has been held that this is an evolving concept, and that courts must interpret the law as "it has evolved and exists among the nations of the world today".[164] In other words, it is not a stagnant idea.[165] To determine the existence of a legal norm, the courts will look to international law sources which will provide the foundation for adjudicating these claims.[166] In Xuncax, it was asserted that an international approach leaves courts freer to incorporate diverse elements necessary to resolve international law issues as long as they are not inconsistent with international or US law.[167]

To be judiciable, the norms must be "specific, universal and obligatory". Thus there must be a general international acceptance of the prohibition and it must be both binding without exception and subject to a clear definition.[168] If the conduct "contravenes 'well-established, universally recognized norms of international law",

[162] Joseph, 2004, pp. 33-34.
[163] Joseph, 2004, p. 35.
[164] *Filartiga v. Pena-Irala,* 630 F.2d 876, 881 (CA. N.Y. 1980); *Kadic* v. *Karadzic* 70F. 3d 232, 238 (2nd Cir. 1995).
[165] *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984).
[166] Swan, 2001, pp. 87 – 88.
[167] Xuncax, at 182-3.
[168] Stephens, 2000, p. 213.

it violates the law of nations.[169] "In order to state a claim under the ATS, a plaintiff must allege either a violation of a U.S. treaty or of a rule of customary international law, as derived from those universally adopted customs and practices that States consider to be legally obligatory and of mutual concern".[170] However, the *Sosa* case makes it more difficult for judges to adapt the law of nations to private rights, as the decision in that case cautioned that restraint should be exercised.[171] The Court put forward the standard already mentioned above, that "courts should require any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." In determining whether a norm is sufficiently defined to support a private right of action, courts must also consider the practical consequences of making that cause of action available to litigants in federal court.[172]

International law is used as described in *Filartiga*, where it was stated that when the court is dealing with "hosti humanii generis" courts should recognise that the interests of the global community transcend these issues.[173]

International treaties are used in their extent as evidence of the law of nations, but are not used in themselves as creating a legal norm. The ATS is seen "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law".[174] According to *Filartiga*, "it is only where the nations of the world have demonstrated that the wrong is of mutual and not merely

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[169] *Estate of Rodriquez* v. *Drummond* Co., 256 F. Supp. 2d 1250, 1260 (N.D. Ala. 2003) (quoting *Kadic* v. *Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995))
[170] *Flores* v. *S. Peru Copper Corp*., 343 F.3d 140, 153-54 (2d Cir. 2003).
[171] The Court gave five reasons for its rule that judges should be conservative in using their discretion to adapt the law of nations to private rights: First, the prevailing conception of the common law has changed since the enactment of the ATS in 1789. Whereas the common law was once thought of as a "transcendental body of law" awaiting discovery, it is now generally understood that judges do not find the common law but rather create it. Second, making federal common law generally requires that federal courts "look for legislative guidance before exercising innovative authority over substantive law." Third, the creation of a private right of action should generally be left to the legislature. Fourth, the potential implications for the foreign relations of the United States of recognizing new private causes of action for violating international law counsels against the courts intruding on the discretion of the Executive and Legislative Branches. Fifth, the courts have no congressional mandate to "seek out and define new and debatable violations of the law of nations."
[172] Berkowitz, 2005, p. 293.
[173] *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (C.A., 2d Cir. 1980) at 863-4
[174] *Ibid*, 887.

several, concern, by means of express international accords, that a wrong generally recognised becomes an international law violation within the meaning of the statute".[175] The law of nations includes *jus cogens* norms but is not limited to them.[176]

In deciding whether norms are to be actionable, courts generally refer to the Third Restatement[177]. Out of seven customary international law violations, six are said to be *jus cogens*. Those requiring state action are summary execution, extrajudicial killing and wrongful death[178]; disappearance[179]; official torture[180]; prolonged arbitrary detention[181]; acts of cruel, inhuman or degrading treatment or punishment[182]; and systematic racial discrimination[183]. Norms not requiring state action are war crimes and genocide[184]. It is of note that norms requiring state action may be framed in terms of this norm against war crimes and genocide, therefore avoiding the requirement for state action.[185] Other examples of violations which have been held to come within the 'law of nations' for the purposes of the ATS are sexual assault,[186] slavery,[187] forced relocation, disappearance, forced exile, forced displacement, racial discrimination, aircraft hijacking, pollution contrary to UNCLOS,[188] rights to associate and organise, right to life, liberty and personal security, peaceful assembly and association, freedoms of political belief, opinion and expression.[189] Claims refused on grounds that they did not constitute the law of nations include the right to life, health, sustainable development, freedom from discrimination per se, freedom of speech,

[175] *Filartiga*, 888.
[176] *Alvarez-Machain* v. *U.S.*, 331 F.3d 604, 612-13 (9th Cir. 2003). See Collingsworth, 2002, pp. 196-97 & n.100. In *John Doe III* v. *Unocal*, the defendants sought to limit the list of international law norms actionable under the ATS to jus cogens, but they were not successful.
[177] pp. 701 and 702
[178] *Kadic* v. *Karadzic*, 70 F.3d, 240-1, 243-4, noting that when Congress passed the TVPA, it codified the ATS's application to extrajudicial killing and torture; *Forti* v *Suarez-Mason* 694 F.Supp. 707 (N.D. Cal. 1988).
[179] *Forti II*; *Xuncax* v. *Gramajo*, 886 F.Supp 162 at 195.
[180] *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (C.A., 2d Cir. 1980) at 882-3.
[181] *Forti* v *Suarez-Mason* 694 F.Supp. 707 (N.D. Cal. 1988); *Sosa* v. *Alvarez-Machain*, 266 F.3d at 1052.
[182] *Xuncax* v. *Gramajo*, 886 F.Supp 162 at 185-189 (D. Mass. 1995).
[183] This is defined in the Restatement, but not discussed in these cases except briefly and indirectly in *Xuncax* v. *Gramajo*, 886 F.Supp 162 at 189 (D. Mass. 1995).
[184] *Kadic* v. *Karadzic*, 70 F.3d, 232 (2d Cir. 1995); followed by *Beanal* v. *Freeport-McMoran* 969 F. Supp. 362 (E. Louisiana, 1997) and referred to as being a reasoned analysis of the scope of a private individual's liability for violations of international law in *National Coalition Government of the Union of Burma* v. *Unocal* (1997) 176 F.R.D. 329 (C.D. Cal. (9th Cir.)) .
[185] Swan, 2001, p. 101.
[186] *Kadic* v. *Karadzic*, 70 F.3d, 232 (2d Cir. 1995);
[187] *Doe* v. *Unocal*, 395 F.3d 932 (9th Cir. 2002).
[188] United Nations Convention on the Law of the Sea of 10 December 1982
[189] Joseph, 2004, p. 26 – 27.

cultural genocide, environmental abuses, constructive exile, expropriation by a state, forced prison labour, forced conscript labour, transborder abduction, fraud, negligence, commercial torts, conversion.[190] Environmental torts have not been proven to be a specific, universal and obligatory norm outlawed by international law.[191] International consensus is lacking on many other issues central to human rights concerns such as minimum wage, health and safety standards, maximum hours, and sexual harassment.[192] The ATS presents the potential to address claims involving intentional physical or mental harm, but is not likely to reach less extreme but much more common claims, including abominable working conditions.[193]

The above list of rights which are currently actionable under the ATS are those which international victims of violations may allege under the ATS to enforce the rights. Further development of the "law of nations" depends upon comprehensive efforts to build international consensus for new standards. Pagnattaro, writing in the context of labour rights says that as there is more international agreement about the scope of rights, the scope of acts covered by the ATS will broaden.[194]

2.2 Obstacles and Issues

2.2(a) Forum Non Conveniens

Forum non conveniens is a key procedural barrier for plaintiffs attempting to have their case heard in England and the U.S. It allows for judges to decline jurisdiction to hear a case, at their discretion, when there is an alternative, more appropriate place for the case to be heard. The act of rejecting jurisdiction his is known as "staying" the proceedings.

Particularly for the type of case being discussed in this paper, involving corporate defendants and their actions abroad, the doctrine is very frequently the first point of defence for these defendants, as they attempt to have the case heard in the country

[190] *Ibid*, p. 27 – 28.
[191] *Ibid*, p. 29.
[192] See for example Pagnattaro, 2004 writing about labour rights.
[193] Boggia, 2006, p. 329.
[194] Pagnattaro, 2004, p. 223.

where the tort occurred. The preference for foreign forum is generally due to the fact that TNCs have close ties with and a perceived influence on host governments.[195] Plaintiffs will be at a disadvantage in such forums as they normally will have a lower standard of legal aid, and it will be more difficult for the plaintiff to have their case heard with the same benefits as they would have in the highly advanced legal systems of England and the U.S..

The most notable Supreme Court decisions which developed the reach of the doctrine of *forum non conveniens* in America are *Gilbert*[196], *Koster*[197] and *Piper Aircraft*.[198]

Gilbert and *Koster* both involved domestic parties and were the cases which set down the modern scope of *forum non conveniens* in America. Decided on the same day, the cases made clear that there was a wide discretion open to judges when more than one forum is available for an action.[199]

The *Gilbert* opinion famously set out the public and private interests which are to be taken into account when deciding on whether a case should be dismissed. The private interests are the easy availability of evidence and witnesses, the site of the claim as well as any other issues bearing on the fairness of trial in the chosen forum.[200] The public interests considerations favour handling cases in the place where the facts of the case occurred in order to avoid centralising litigation in a few forums, burdening courts with the need to apply foreign law frequently and burdening citizens with additional jury duty.[201] A significant point of the *Gilbert* litigation and opinion is the dissenting statement of Judge Black, who "prophetically" warned that *forum non conveniens* could allow defendants to manipulate the place of trial, and that it would be a "poorly represented multistate defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient.[202]

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[195] Abadie, 2004, p. 768.
[196] *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).
[197] *Koster* v. *Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).
[198] *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981).
[199] Brand, 2002, p. 476.
[200] *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947).
[201] *Ibid*, 508-509.
[202] Wilson, 2004, p. 676, citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 515-516 (1947).

Forum non conveniens was developed further in the *Piper* case in 1981. This case involved a foreign national plaintiff who wished to have his case heard under American jurisdiction due to a less favourable law existing in his home jurisdiction of Scotland. Allowing a *forum non conveniens* stay, the Court held that an unfavourable law in the alternative forum would not defeat a *forum non conveniens* motion. Looking to *Gilbert,* the court noted that the central tenet of the doctrine is convenience.[203] The court justified its decision in this case by reasoning that the court should not be burdened by frequent choice-of-law and comparative law analyses, and that allowing such claims would lead to an increase of foreign plaintiffs and the court's workload increasing as a result. Only in rare circumstances would a plaintiff succeed in his claim that unfavourable laws in the alternative forum and defeat a *forum non conveniens* claim. "Piper Aircraft thus turned Gilbert and Koster upside down. *Forum non conveniens* was no longer a response to the exceptional cases in which a plaintiff's forum choice harassed a defendant. Now, it would be the exceptional plaintiff who could not defeat a *forum non conveniens* motion. By broadening the scope of *forum non conveniens*, Piper Aircraft encouraged defendants to increase the frequency of its use."[204]

The current status of the doctrine is succinctly outlined by Wilson.[205] Nowadays, courts continue to follow the court in *Piper*. This means that they will determine whether there is an adequate alternative forum for the plaintiff's claim;[206] apply Gilbert's private and public interest factors; and expect that the appeals courts will review trial courts' *forum non conveniens* dismissals only for abuse of discretion.[207] Less deference will be given to the foreign plaintiff's forum choice[208] and the fact that the alternative forum has unfavourable law will not lend strength to his argument. He notes that according to this formulation, the *forum non conveniens* inquiry gives domestic defendants the upper hand against foreign plaintiffs, so it is not surprising that many of these lawsuits end in dismissal.[209]

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[203] *Piper Aircraft Co*. v. *Reyno*, 454 U.S. 235, 249 (1981)
[204] Wilson, 2004, p. 679 – 680.
[205] *Ibid*, pp. 681 – 682.
[206] *Piper Aircraft Co*. v. *Reyno*, 454 U.S. 235, 254 (1981)
[207] *Ibid*, 257.
[208] *Ibid*, 255 – 256.
[209] Wilson, 2004, p. 682.

Before Wiwa v. Royal Dutch Petroleum Co.[210], the doctrine of *forum non conveniens* presented a difficult hurdle for ATS plaintiffs. With witnesses often in another country and alleged torts taking place somewhere other than the U.S., ATS cases were vulnerable to dismissal. The Gilbert factors that have weighed most heavily against ATS plaintiffs are the relative ease of access to sources of proof, the cost of obtaining the attendance of willing witnesses, and the possibility of viewing the relevant premises.[211] Obviously, these factors will favour the defendants in cases involving human rights violations by American TNCs in foreign countries.[212]

In *Wiwa*, the Second Circuit overturned the district court decision to dismiss the case. It especially took into account the U.S. resident's choice of forum, and the interests of the U.S. in furnishing a forum to litigate claims of violations of the international standards of the law of human rights.[213] The court also acknowledged the hurdles that would be presented to ATS plaintiffs if they are forced to start anew in another jurisdiction.[214] Not only would they likely need to obtain new counsel and perhaps a new residence, a victim of torture may have enormous difficulty finding a court willing to entertain such claims.[215] The court's reasoning emphasized the interest of the U.S. in vindicating human rights abroad and would hold wealthy parties to a greater standard of inconvenience than poorer parties.[216] This case has been seen as altering the balance forum non conveniens, making it easier to bring claims based on a foreign human rights violation even when an alternative forum is available.[217]

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[210] *Wiwa* v. *Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000); The plaintiffs in this case are all Nigerians, they were arbitrarily detained, shot, beaten, and their relatives were tortured and hanged, by the Nigerian military government. Shell is alleged to have assisted and instigated the abuses against the plaintiff

[211] See Fellmeth, 2002, pp. 249 – 251, analysing the example of the litigation brought against Texaco for its operations in Ecuador, which involved suits by foreign nationals for cooperating with an oppressive foreign government in mineral extraction activities, resulting in widespread and severe environmental damage. Another notorious example is the decision of Justice Keenan in Bhopal, where the case against the TNC was dismissed in favour of an Indian forum.

[212] Breed. 2002, 1020.

[213] *Wiwa* v. *Royal Dutch Petroleum Co*., 226 F.3d 101; 103-6 (2d Cir. 2000)

[214] *Ibid*, 106.

[215] Pagnattaro, 2004, p. 256.

[216] Fellmeth, 2002, p. 241.

[217] *Ibid*, p. 241.

The trend to provide a U.S. forum for ATS cases was continued by *Sudan* v. *Talisman Energy*[218]. Here, the court found that the Sudan could not provide an adequate forum for the adjudication of the plaintiffs' claims that the Sudanese government committed genocide and war crimes.[219] Next, even though the court recognized that Canada might be an alternative adequate forum, using a balancing test it gave deference to the choice of a U.S. forum by resident plaintiffs.[220] Finally, the court noted the "strong U.S. interest in vindicating international human rights violations."[221]

Notably, both *Wiwa* and *Talisman* remarked upon the importance of the US federal courts' role in deciding ATS cases in order to enforce international law in the case of human rights violations.[222]

Thus, a case will not be dismissed if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, or if the plaintiff shows that foreign law is inadequate, or that conditions in foreign law are inadequate, or that conditions in foreign forum plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein. [223] This is determined in light of U.S. interests to hear cases involving international law in cases of human rights violations.

It has been submitted that globalisation and the greater ease of global communication have led courts to re-examine the doctrine and accept cases that previously might have been rejected as too remote to the interests of U.S. courts and the U.S. justice system[224]

2.2(b) *Act of State* doctrine

The *act of state* doctrine is outlined in its classic form in the Supreme Court judgment of *Underhill* v. *Hernandez*. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit

[218] *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
[219] *Ibid*,, 335.
[220] *Ibid*, 335-9.
[221] *Ibid*, 343; this case was dismissed in the New York District Court in March 2007 on grounds of lack of admissible evidence to prove that Talisman was indeed complicit in violations of international law by the Sudanese government.
[222] Pagnattaro, 2004, 256.
[223] Swan, 2001, p. 82.
[224] Schrage, 2003, p. 163.

in judgment on the acts of the government of another done within its own territory".[225] It was reviewed in modern times in *Sabbatino* where it was held that the doctrine generally precludes U.S. courts from reviewing a foreign sovereign's official acts performed on its own territory.[226] In that case, the court rejected that the doctrine came from international law – rather, it was a result of the constitutional relationship between the executive and the judiciary. The Supreme Court was of the belief that piecemeal judicial intervention could interfere with foreign policy interests and negotiations being carried out by the executive branch with the country involved in the case at trial.[227] In fact, the Sabbatino Court noted that the judiciary is the branch of the federal government that is the least competent in the field of international relations.[228] In *Liu* in 1989, the court defined it as a flexible doctrine designed to prevent judicial pronouncements on the legality of the acts of foreign states which could embarrass the Executive Branch in the conduct of foreign affairs.[229]

The Court did not consider whether the doctrine should be applied when the executive expressed the view that it would not be embarrassed by judicial action in a certain case, however, other cases held that the executive's views should not influence its application.[230]

The Supreme Court has held that it applies equally to violations of international law,[231] and certainly where the content of international law was uncertain, and in the absence of a treaty or other unambiguous agreement.[232]

The Supreme Court has left the application of the doctrine of *act of state* largely to discretion instead of laying down concrete rules.[233] It set forth a balancing test whereby lower courts were charged with weighing the "degree of codification or consensus concerning a particular area of international law" against the "delicacy of the issue at stake in foreign diplomacy".[234] It has been submitted that this balancing

[225] *Underhill* v. *Hernandez*, 168 US 250, 252 (1897).
[226] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 437- 38 (1964).
[227] Collins, 2002, p. 505.
[228] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964).
[229] *Liu* v. *The Republic of China*, 892 F.2d 1419 at 1432 (C.A., 9th Cir. 1989).
[230] *First National City Bank of New York* v *Banco Nacional de Cuba*, 406 US 759 (1972).
[231] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).
[232] Collins, 2002, p. 505.
[233] Pearsall, 2005, p.1008.
[234] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964).

test seems to subsume any and all rationales[235] and that justification for the doctrine has at one time or another rested upon or implicated international comity, choice of law, conflict of laws, judicial abstention, institutional competency, averting embarrassment of the executive and separation of powers.[236]

ATS cases involving corporate complicity in human rights abuses committed by foreign governments seem to fall under this rule because the violations necessarily occur within the borders of the foreign state.[237] However, it is considered to be "a rare case in which the *act of state* doctrine" would preclude a suit" under the ATS.[238] This is because it can only be used to shield official acts by a government in power in pursuit of public purpose or in the public interest and governments routinely avoid claiming human rights abuses as policy or viewing them as expressions of sovereignty.[239] Nevertheless, many corporate defendants have raised it as a defence.[240] The courts have rejected many defendants' act of state arguments in ATS cases on the grounds that nations cannot claim a right to commit violations of international law such as the torture or enslavement of their own citizens.[241] For example, the action by the state official in *Filartiga* was in violation of Paraguayan constitution and laws and as a result, the Court did not consider that this could be properly characterised as an *act of state*.[242] ATS cases will usually deal with situations when states are accused of behaviour which is condemned by international consensus, where the foreign state's human rights record has already been publicly denounced by the U.S. government, or where the impugned foreign act is that of a former government.[243] The *act of state* doctrine could, however, act as a bar to corporate complicity claims that do not involve violations of such fundamental norms of international law as torture or enslavement of a country's own citizens.[244]

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[235] Pearsall, 2005, p. 1008.
[236] *Ibid*, p. 1011.
[237] Breed, 2002, p. 1022.
[238] *Kadic* v. *Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).
[239] Steinhardt, 2005, p. 201; Liniger, 1994, p. 189; Zia Zarifi, 1999, pp. 132 – 133.
[240] See, e.g., Unocal, 2002; Wiwa v. Royal Dutch Petroleum Co.; Beanal v. Freeport-McMoRan, Inc., 1997.
[241] For example, *Doe* v. *Unocal*, 963 F. Supp. at 894-95; *Presbyterian Church of Sudan* v. *Talisman.*
[242] Swan, 2001, pp. 79 – 81.
[243] Joseph, 2004, p. 41.
[244] Breed, 2002, p. 1022.

In *Doe* v. *Unocal*¸ Unocal attempted to argue that the claims brought by the plaintiffs against it should be dismissed due to the doctrine of *act of state*,[245] because a decision on whether Unocal had aided and abetted the Myanmar military in perpetrating human rights violations would necessarily involve a decision as to the legality of the military's actions under international law.[246] The Ninth Circuit disagreed, finding that the *act of state* doctrine should not apply.[247] In reaching its decision, the court used a four-factor test: 1) the degree of codification or consensus concerning a particular area of international law; 2) the implications for foreign relations; 3) the continued existence of the accused government; and 4) whether the foreign state was acting in the public interest.[248]

After consideration, the court found that the *act of state* doctrine could not prevent the plaintiffs from bringing an action against Unocal. Its reasoning was that there is "international consensus" that "murder, torture, and slavery are jus cogens violations", that "coordinate branches of our government have already denounced Myanmar's human rights abuses", and "it would be difficult to contend that the defendant's alleged violations of international human rights were "in the public interest".[249] The fact that the Myanmar Military is still in power was the only factor that weighed in favour of applying the *act of state* doctrine, but it was not of sufficient weight to invoke the *act of state* doctrine.[250] As such, plaintiffs' claims against Unocal were not barred under this doctrine and Unocal has laid important groundwork for future suits by ATS plaintiffs attempting to maintain claims against companies who aid and abet conduct in violation of the law of nations.[251]

2.2(c) *Political Question* doctrine

The *political question* doctrine directs the courts to decline to decide a case which is otherwise admissible if the dispute presents issues constitutionally assigned to the

[245] *Doe* v. *Unocal*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), at 20.
[246] *Ibid*, at 20.
[247] *Ibid*, at 21.
[248] *Ibid*, at 20. The first three factors come from *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964), and the fourth factor is taken from *Liu* v. *Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).
[249] *Ibid*, at 21.
[250] *Ibid*, at 21.
[251] Pagnattaro, 2004, pp. 259 – 261.

political branches of the government.[252] It has been stated that it has merged with the *act of state* doctrine in ATS cases.[253]

Human rights cases as a rule do not trigger this test,[254] because they involve tort claims which are clearly entrusted to the judiciary to examine, and moreover, the torts are internationally accepted norms, which do not raise policy considerations. However, corporate defendants have not hesitated to raise it as a defence for the ATS, and in two cases, have succeeded in this bid.[255]

The doctrine is narrow, with the foreign policy aspect of the determination resting on the following factors: "independent resolution" must be an impossibility and there must be "an unusual need for unquestioning adherence" to a political decision.[256] Adjudication may also be prevented if there is a lack of judicially discoverable and manageable standards for resolving a dispute. The fact that a case "presents issues that arise in a politically charged context" does not trigger the *political question* doctrine - the doctrine is one of 'political questions', not one of 'political cases'.[257]
It will be of interest to see how the U.S. courts decide the new Jeppesen case, as it could be construed as having the effect of passing judgment on the "war on terrorism".[258]

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[252] *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) A *political question* [involves] (1)a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
[253] Breed, 2002, 1022.
[254] Stephens, 2004, p.193, relying on *Kadic* v. *Karadzic* where it was held that as the claims involved tort law, the judiciary was clearly the most competent branch to consider them, moreover, the claims involved internationally accepted norms, which therefore posed no policy problems.
[255] *Iwanowa et al*, v. *Ford Motor Company et al*, 67 F. Supp. 2d at 485-89 (allegation that Ford had coerced plaintiff into forced labour under inhuman conditions during World War II. The claim was dismissed for being constitutionally committed to the political branches rather than the judiciary); *Burger-Fischer* v. *Degussa AG*, 65 F. Supp. 2d at 284-85 (allegation against German corporations which knowingly refined gold seized from inmates of Nazi concentration camps, employing slave labour and manufacturing the gas used to murder inmates. Again the claims under international law were dismissed on the grounds that they raised *political question*s which were not subject to judicial remedy).
[256] Stephens, 2004, p. 193.
[257] *Kadic* v. *Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)
[258] Sebok, 2007.

2.2(d) Opposition to Litigation

Much has been written of the attempts to stymie the Filartiga interpretation of the ATS.[259] The controversy over its application is well documented by the spate of amicus curiae briefs[260] presented before the Supreme Court in relation to its hearing of the *Sosa* v. *Alvarez-Machain* case in 2004. Submissions were made by many different groups – ranging from governments,[261] business lobby groups[262] and international diplomats[263] to academics[264] and human rights groups.[265] The arguments presented on both sides were numerous and were essentially split into those dealing with the scope of the ATS and the intention of its drafters, and those presenting more extrapolated arguments regarding the international influence of the Act. Breaking with traditional governmental support for human rights litigation,[266] the Bush Administration has notably also submitted briefs opposing the use of the ATS in the *Unocal* case, while the Department of State has written letters in defence of corporations such as Rio Tinto and Exxon Mobil.[267] Governmental support for business interests also came from the brief submitted by the United Kingdom, Australia and Switzerland, where the protection of trade and international investment was raised as a justification to limit extraterritoriality.[268]

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[259] See, for example, Stephens, 2004; O Donnell, 2004; Koh, 2003; Hermer & Day, 2004.

[260] Amicus Curiae literally translates as "friend of the court". It refers to someone, not a party to a case, who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it.

[261] Brief for the United States as Respondent supporting petitioner; Brief of the Governments of the Commonwealth of Australia, the Swiss Federation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner

[262] Brief for the National Foreign Trade Council, USA*Engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, the International Chamber of Commerce, the Organisation for International Investment, the Business Roundtable, the American Petroleum Institute and the US-Asian Business Council

[263] Brief of Amici Curiae Career Foreign Service Diplomats in Support of Respondent.

[264] Brief of Amici Curiae International Jurists in Support of Affirmance; Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents; Brief of Amici Curiae Professors of Law in Support of Reversal

[265] Brief for the Center for Justice and Accountability, National Consortium of Torture Treatment Programs, and Individual ATCA Plaintiffs as Amici Curiae in Support of Respondents Brief of Amici Curiae Corporate Social Responsibility Amici in Support of Petitioner

[266] Stephens, 2004, p. 169 notes that the Carter and Clinton Administrations supported the Filartiga doctrine and that George Bush, Sr. also expressed support for its goals and signed legislation authorizing a significant expansion of human rights accountability.

[267] *Doe* v. *Exxon Mobil Corp*., No. 01–CV–1357 (D.D.C. filed June 19, 2001); Letter from William H. Taft, IV, Legal Adviser to the U.S. Department of State, to Louis P. Oberdorfer, Judge, U.S. District Court for the District of Columbia.

[268] Brief of the Governments of the Commonwealth of Australia, the Swiss Federation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner, p. 10.

The essential problem with the positions which oppose the Filartiga interpretation of the ATS is that they appear to be transparent attempts to place the interests of big business and profit margins over those of protecting people in developing countries from the violation of the most fundamental human rights. As Beth Stephens says, it is clear that Bush administration is demonstrating an interest in shielding its favoured defendants.[269] Indeed, one does not need to be particularly cynical to begin to understand why this administration, which is friendly to big business, would seek to have the ATS consigned to history.[270] The Administration's approach would virtually repeal it by granting immunity to all human rights abusers, whether official or corporate, so long as they commit their violations abroad.[271] Instead of raising concerns over cases on an ad hoc basis, it is trying to overturn the precedence created, overwhelmingly accepted and developed since the Filartiga case almost thirty years ago. This policy is an extreme one, and it has been said that simply slamming the door on those seeking relief in US Courts is bad foreign policy, bad economic policy and bad legal practise.[272] The message of its arguments seems to be that it opposes enforcement of international law standards by US courts against TNCs, an approach which is unnecessarily arbitrary.[273] This intervention in corporate lawsuits disputes the administration's sincerity and commitment to its goal of achieving human rights progress in the developing world.[274]

Judicial pronouncements on the scope of liability have been prudent, and have held the ATS to be a statute only applicable in the most serious of human rights violations. The only situation where a private party can be found liable will be if it provided direct and substantial assistance in the commission of a human rights violation, involving 'specific, universal and obligatory' international norms as previously explained in Chapter 2. This is considered to be a modest and reasonable standard for U.S. businesses to meet.[275] This interpretation applies the act to only the most extreme violations of international human rights: genocide, war crimes, piracy, slavery,

[269] Stephens, 2004, p. 182.
[270] Hermer and Day, 2004.
[271] Koh, 2003.
[272] Schrage, 2003, p. 156.
[273] *Ibid*, p. 162.
[274] O'Donnell, 2004, p. 260.
[275] Brief of Amici Curiae Career Foreign Service Diplomats in Support of Respondent, p. 23.

torture, unlawful detention and summary execution.[276] Mere operations in a country where human rights violations occur will not be sufficient.[277] Therefore, emotive and biased concerns, intent on mobilising fearful opposition amongst American businesses are unwarranted.[278] ATS helps ensure that multinational corporations complicit in gross violations of international and U.S. law will not enjoy impunity.[279]

The executive branch should allow human rights cases that embarrass foreign sovereigns to run their course, instead of trying to influence them for political and economic gain.[280] If the allegations of the lawsuits are without merit, corporate defendants can adequately defend their interests without the help of the executive branch.

A concern of the business representatives is that American corporations will be placed at a competitive disadvantage compared with those over whom the U.S. courts do not have jurisdiction.[281] However, from a human rights point of view, much less a moral and ethical one, the fact that some foreign companies might win foreign contracts from U.S. bidders by engaging in security practices that may include torture and murder, which are forbidden to U.S. companies, is hardly a sufficient reason for an American court to decline to adjudicate claims that American corporate practices violate international legal standards that forbid gross human rights abuses.[282]

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[276] Hermer and Day, 2004.
[277] Kurlantzick, 2004, p. 64.
[278] See, for example Rosenzweig, 2003 where he opposes the application of the ATS to American companies, stating that "American businesses are not pirates"
[279] Brief of Amici Curiae Career Foreign Service Diplomats in Support of Respondent, p. 22.
[280] O'Donnell, 2004, p. 264.
[281] See the Brief for the National Foreign Trade Council, USA*Engage and others. This brief also communicates concern for the welfare of developing countries, which, if international investment is deterred, will lose the opportunity for the world's corporations to bring improvements to its residents' lives.
[282] Brief of Amici Curiae Career Foreign Service Diplomats in Support of Respondent, p. 23.

CHAPTER 3 – ENGLISH DOMESTIC TORT LAW CLAIMS

This section will make the same analysis of the law as above, except this time it will be with regard to actions brought in England.

There is no substantive difficulty in pursuing a claim for a tort committed overseas as the "long-arm," or exorbitant,[283] jurisdiction of the English courts is exceptionally wide. Thus, jurisdiction can be asserted in civil proceedings over a foreign corporation (or individual) under a variety of circumstances where the connection with the United Kingdom is tenuous, or nonexistent.[284]

Technically, it is possible that claims against multinationals may also be brought for breaches of international law in the U.K., however, they are, and are likely to continue to be brought within the pre-existing tort framework and will seek to link the incidents overseas with acts and omissions occurring in the U.K.[285]

While there was a rapid increase in the number of civil suits in the U.S. concerning serious human rights violations abroad in the 1980s and 1990s, the English Court of Appeal heard its first case of this kind in 1996. It related to acts of torture committed in Kuwait, allegedly by a member of the Kuwait royal family.[286] The Court of Appeal found that the government of Kuwait was immune from the jurisdiction of the English courts in respect of all non-commercial torts committed abroad.[287] Although this was a loss for the claimant, this case served the important purpose of galvanising a group of British based international lawyers into considering the potential of English courts to act as a forum for the pursuit of justice for the victims of atrocities committed abroad.[288]

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[283] Exorbitant jurisdiction is that which is exercised over a case which does not have a significant relationship to the forum in question. The most significant types are jurisdiction based upon nationality, jurisdiction based upon assets and jurisdiction based upon "doing business".
[284] FAFO, 2004, p. 27.
[285] *Ibid*, p. 27 - 28. This report notes that there are some cases being taken in the UK for UK government breaches of international law, but that these are likely to be framed in domestic tort law terms as claims of negligence.
[286] *Al-Adsani* v. *Government of Kuwait and Others*, [1996] TLR 192, CA.
[287] *Ibid*.
[288] Byer, 2000, p. 242.

This resulted in the three cases *Thor*,[289] *Connelly*[290] and *Cape*[291] taken by British law firm Leigh, Day & Co. *Connelly* and *Thor* overlapped in time and were followed by *Cape*. The progressive nature of the litigation is seen by the fact that the gains made in the first two cases "fed into the Cape action".[292]

3.1 Jurisdiction and Causes of Action

3.1(a) Subject Matter Jurisdiction.

The cases in England relating to TNCs were brought on the basis of domestic tort law. The principal torts which are relevant to the behaviour of corporations are torts relating to harm to person and property (negligence, statutory torts, nuisance and related torts); torts relating to personal assault (trespass to the person – assault, battery and false imprisonment; intimidation) and torts relating to trade and livelihood (unlawful interference with trade; abuse of dominant position under competition law).[293]

In *Thor*, the case was brought on grounds of negligent behaviour in failing to prevent the foreseeable risks of mercury poisoning. Negligence was alleged in aspects of the operations including the design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process. In fact, the company moved its operations from England to South Africa and replicated the same problems that had previously existed in England, leading to the death of three people, and the poisoning of many more.[294] In *Connelly v RTZ*, liability was alleged due to key strategic technical and policy decisions relating to the operations in Namibia were made in England.[295] In *Cape*, the claim was brought alleging Cape plc as the parent company had knowledge that exposure to asbestos was "gravely injurious" to health and failed to take proper steps to ensure proper working practices and proper safety precautions,

[289] *Sithole & Ors* v *Thor Chemicals Holdings Ltd & Anor TLR* 15/2/1999.
[290] *Connelly* v. *RTZ Corporation Plc* [1997] AC 854.
[291] *Lubbe* v. *Cape Plc*, [2000] 1 W.L.R. 1545 (H.L.).
[292] McCulloch, 2005. p. 69.
[293] Badge, 2006, p. 7.
[294] Meeran, 2003 (a).
[295] *Ibid*.

thereby breaching a duty of care which it owed to those working for its subsidiaries or living in the area of their operations in South Africa.[296]

Another claim which is being brought in England, currently at a very preliminary stage, is against Trafigura where proceedings were issued in the High Court on the 10th November 2006 on behalf of people in the Ivory Coast who have suffered "widespread death and injury" as a result of exposure to toxic chemicals unloaded from a tanker which had been chartered by Trafigura, a company based in London. Ten people have died and up to 100,000 injured as a result of the toxic waste. The claims are based on Trafigura being negligent and causing nuisance resulting in injuries to the local citizens. [297]

Thus, all of the English cases so far relate to negligence. This is a common law tort. Elements required are that the defendant carried out an act or omission, which fell below objective standard of conduct, which caused the claimant harm. The defendant must have had a duty of care to the claimant and the resulting harm must have been reasonably foreseeable in the circumstances.[298]

3.1(b) Personal Jurisdiction

The litigation in the English courts is based on the principle that multinational corporate groups should behave as they do at home, and that their behaviour as direct investors abroad matches standards of care that would be expected at home.[299]

Jurisdiction in these cases is established due to the extraterritorial jurisdiction of English courts over extraterritorial acts of English companies as well as foreign companies that carry on business "to a definite and to some reasonable extent, permanent place" within the jurisdiction.[300]

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[296] *Ibid*.
[297] Information available at http://www.leighday.co.uk/doc.asp?doc=964&CAT=1021
[298] Badge, 2006, p. 8. A detailed explanation of all of these elements may be found in Badge, 2006, pp. 8 – 15.
[299] Ward, 2001, p. 456.
[300] Adams v. Cape Industries, [1991] 1 All ER 929.

The foreign corporation must have premises in England from which or at which its business is carried on. Litigation at hand must in some way involve business of the branch but not necessarily significantly.[301] The cases discussed in this paper, *Thor*, *Connelly* and *Cape*, had English jurisdiction available to them "as of right" because all of the defendant companies are domiciled in England.[302]

English courts have more extraterritorial power than the US due to lack of strict constitutional due process clauses.[303] Service outside of the jurisdiction is allowed as long as there is a sufficiently close connection with England.[304]

Under common law rules, jurisdiction is limited by the ability to serve on the defendant the document necessary to institute proceedings between the parties, the Claim Form. Generally, if the defendant is present in England, and can be served with a claim form, the courts will have jurisdiction over him, conditional on the court's permission.[305] A foreign corporation may also be served in England.[306]

Service abroad is also provided for by the Civil Procedure Rules[307] whereby the court will give permission to serve abroad if there is a good arguable case that the plaintiff's claim will fall within one of the categories prescribed by Rule 6.20 of the Civil Procedure Rules; that there is at least a serious issue to be tried and that England is the appropriate forum for the trial of the action. The categories of claims relevant to cases of this type are (i) if the defendant is domiciled in England but physically present abroad; (ii) if the defendant is a "necessary or proper party" to proceedings in England which have already been validly commenced or (iii) if a claim is made in tort where damage was sustained within the jurisdiction or if the damage sustained resulted from an act committed within the jurisdiction. In *Al-Adsani*, the court held that continuing

[301] Joseph, 2004, p. 114.
[302] Muchlinski, 2002, p. 171.
[303] Joseph, 2004, p. 114.
[304] *Ibid*. In *Al-Adsani*, continuing psychological trauma following extraterritorial commission of torture was sufficient.
[305] International Law Association Human Rights Committee, 2003, p. 139.
[306] Serving a foreign corporation may be done through a) the person who is authorised to accept a service on behalf of the company's English branch (under the Companies Act 1985, ss 690A and 694A and Sched. 21A); b) a person resident in England and authorised to accept service if the corporation does not have a branch but a place of business (under the Companies Act 1985, s. 695); or c) at the place of business of the corporation in the jurisdiction (under the Civil Procedure Rules, rr. 6.2(2) and 6.5(6)).
[307] Civil Procedure Rules, Rule 6.20.

psychological trauma occurring in England pursuant to physical injury in Kuwait was sufficient to amount to damage "sustained within the jurisdiction".

3.1(c) Liability

The main problem in finding TNCs to be liable is the principle of separate legal personality.[308] According to this principle, all separately incorporated companies, even those in the same corporation or group, are legally regarded as being independent and responsible for their own operations and actions. This concept is known as the 'corporate veil'.

Direct liability

The liability of the TNC may be based on the parent company's direct actions affecting its operations abroad. In Connelly and Cape, great care was taken to ensure that the claim was based not so much on vicarious liability for acts committed overseas but rather on the negligent omissions of the HQ to ensure safety measures were imposed by the subsidiaries.

The parent company may be seen as directly liable for actions which it has taken itself. The possibility of raising this as a reason to hold the parent company liable depends on whether it has a duty or an obligation to control the actions of its subsidiaries.[309] This was the case in *Connelly* and in *Cape*. In *Connelly*, it was because the parent company had devised the subsidiary company's policies on health, safety and the environment, and had its own employees supervising the mine. Therefore, through its own acts, the parent company had contributed to the damage caused to the victims. In *Cape*, it was the failure of the parent company to prevent harm occurring to the workers in its mine and the people living in the surrounding area even though it was fully aware of the health risks involved. In this way, it was alleged that the parent company breached its duty of care to the employees of the subsidiary and those living in the vicinity of its operations.[310]

Indirect liability

[308] *Salomon* v *Salomon & Co. Limited* [1897] AC 22.
[309] De Schutter, 2006, p. 41.
[310] *Connelly* v. *RTZ Corporation Plc* [1997] AC 854.

Separate legal personality may be displaced in some cases in order to establish liability of the parent company for actions of its subsidiary. This is known as 'piercing the corporate veil. For this to happen, it must be shown that the subsidiary was under the factual control of the parent company, that a company is a mere façade concealing the true facts[311] and that treating the two entities as legally separate will lead to fraud or an inequitable result.[312]

This was the case for example in *Thor*, where evidence was shown that the parent company had transferred its subsidiaries to a newly formed company. According to the plaintiffs this had the sole purpose of defrauding them and the company's creditors. The English Court of Appeal found that this was an "irresistible" inference in the absence of any evidence to the contrary.

There are other common law principles for making a parent company liable for the actions of others.

Firstly, there is the principle of procurement of a tort whereby if a person procures a tort, he himself also commits and is liable for that tort and may be sued in relation to it. Procurement may take place by inducement, incitement or persuasion. Facilitation does not amount to procurement and a close participation must be shown.[313]

Secondly, a tort may take place by conspiring to injure, either by agreeing to do an unlawful act by lawful means, or a lawful act by unlawful means. If the conspiracy relates to otherwise lawful acts, the claimant must establish that the predominant purpose of the conspirators' acts was to injure him. If the conspiracy involves the use of unlawful means, the claimant need only establish that the acts themselves were deliberate and had the effect of injuring him.[314]

Third, the principle of agency may be relevant. The key link here is authorisation. According to this, a person or a company is liable for acts carried out by others which he has expressly or impliedly authorised. If the principal company has given express written or oral authority to another to carry out a particular act on its behalf, it will

[311] *Woolfson* v. *Strathclyde Regional Council*, 1978 SLT 159.
[312] De Schutter, 2006, p. 38, citing *Taylor* v. *Standard Gas Co*., 306 U.S. 307, 322 (1939) – "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice"
[313] Badge, 2006, p. 23.
[314] *Ibid*. p. 24.

generally be liable for the consequences of that act. Implied authority may also be inferred from the facts. This will arise in the case of an employee, as an employer is vicariously liable for the acts of his employees proved that the act is committed in the course of employment. An employer will also be liable for any act of his employee that results in a tort if that tort is a necessary outcome of an expressly authorised act[315] even if the employee carries out those acts in an unauthorised way.[316] Where the person or company committing the act is not an employee, there will be a determination of the scope of the authority given, the width of the discretion and whether the act in question came within the authority. A corporation can carry on business through an agent, including a subsidiary but it must be established that the agent was carrying out the parent's business, not its own. Relevant factors are the purpose of the agent's place of business, reimbursement by the parent for the agent's staff, contribution by the parent to costs of the agent's business, the degree of control by the parent over the business of the agent, and whether the agent made contracts in the name of the plaintiff.[317]

Fourth, attributing the acts, omissions or knowledge of an individual to a company involves a determination of whether the individual is an agent of the company for the purpose of carrying out the act of omission. For example in *Thor*, the question was whether the acts or defaults of an individual, Desmond Cowley, who was simultaneously the controlling shareholder and chairman of Thor Holdings as well as an employee of Thor SA where he designed the infrastructure of the plant in question, could be attributed to Thor Holdings to render them liable. The case was settled before the issue was explored.[318]

One marked contrast to the American civil cases is that there is no tort of knowing assistance. An attempt was made in 2000 to draw an analogy between the criminal offence of aiding and abetting to apply to acts of assistance in connection with another's wrong if carried out with the intention of bring about a violation of a third party's right should be recognised as a new independent tort.[319] However, this was

[315] FAFO, 2004, p. 40.
[316] *Ibid*.
[317] *Adams* v. *Cape Industries PLC*, [1990] 1Ch 433.
[318] Meeran, 2003 (a).
[319] *Credit Lyonnais* v. *ECGD* [2000] 1 AC 486.

rejected. It was decided that the existing limit on an employer's liability for acts was already appropriate and well established, and that moreover, it was inappropriate to draw analogies between criminal and civil law given their separate development.[320]

3.1(d) Which cause of action?

The cause of action is domestic tort law as outlined in the Private International Law (Miscellaneous Provisions) Act 1995.

Regarding the choice of law, the law of the country where the tort happened must generally be applied.[321] However, this rule may be disregarded if it is appropriate to apply the law of another country due to the significant links between that second country and the tort.[322] More important for human rights claims, foreign law will not be applied if to do so would conflict with principles of English public policy.[323] This exception would have the affect of not applying a law which would exempt perpetrators of liability for egregious human rights violation. However, it might not apply to foreign laws pertaining to health and safety issues which are simply more lenient than those in England.[324]

The outcome of these rules in a case such as *Connelly* and *Cape* remains ambiguous. The plaintiffs targeted policy decisions made in boardrooms rather than implementation of work practices in South Africa but neither reached the choice of law stage.[325]

3.2 Obstacles and Issues

3.2(a) Forum Non Conveniens

Originally, English courts were reluctant to decline jurisdiction and they did not try to discourage plaintiffs from litigating in England once the case was brought there

[320] Badge, 2006, p. 24.
[321] Private International Law (Miscellaneous Provisions) Act 1995, section 11.
[322] *Ibid*. section 12.
[323] *Ibid*. section 14(3).
[324] Joseph, 2004, p. 120.
[325] *Ibid*. p. 120.

consistent with English jurisdictional rules.[326] In 1972, Lord Denning stated that, "No one who comes to these courts asking for justice should come in vain. The right to come here is not confined to Englishmen. It extends to any friendly foreigner".[327] The courts do, however, have the right to refuse to adjudicate claims at their discretion based on the doctrine of *forum non conveniens*. In the early twentieth century, the grounds for doing so were limited to those cases not only where a foreign forum was available, but also when staying a trial would not cause injustice to the plaintiff, and continuing the trial in the plaintiff's chosen forum would be oppressive or vexation.[328] Initially the doctrine was favourable to plaintiffs, developing in the seventies and eighties to be more achievable for defendants seeking to stay actions, when it was only required that the defendant show that there existed another more appropriate forum, and that this forum would not deprive the plaintiff of a legitimate advantage otherwise available to him.[329]

The seminal judgment defining the modern scope of *forum non conveniens* is Lord Goff's opinion in *Spiliada*.[330] In this judgment, the two stage test still in use today was set out. It essentially provides that the onus is on the defendant to prove that another, more appropriate forum exists. If he does so, a stay will be granted, unless the plaintiff manages to prove that a stay should not be granted for reasons of justice. If no natural forum exists, the court should have regard to factors such as the availability of witnesses, the law governing the relevant transaction and the places where the parties reside or carry on business. Subsequent cases have enlightened a clear set of guidelines. Most notably, relevant factors to be taken into account are the convenience of the parties; the geographic location with which the dispute is closely connected; whether third parties and other defendants will be able to be joined in the fori in question. Largely irrelevant are questions of the level of damages, costs and delays.

[326] Morse, 2002, p. 542.
[327] Boggio, 2006, p. 331, citing Lord Denning in *The Atlantic Star* [1973] 1 Q.B. 364, 381–1 (Eng. C.A. 1972.
[328] *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141 (Eng. C.A. 1905); *St. Pierre* v. S. *Am. Stores (Gath & Chaves) Ltd.*, [1936] 1 K.B. 382, 398 (Eng. C.A. 1935).
[329] *MacShannon* v. *Rockware Glass Ltd*., 1 A.C. 795, 812 (H.L. 1978).
[330] *Spiliada Maritime Corp*. v. *Cansulex Ltd*., 1 A.C. 460 (H.L. 1987).

The first limb of the test (about the existence of a more appropriate forum) is concerned with objective questions about the centre of gravity of the dispute, and the questions of the cost, duration and expense of proceedings; the second limb (regarding whether he forum will serve the interests of justice) deals with subjective issues relating to the personal circumstances of the claimant.[331] Just because a foreign forum is procedurally less advantageous will not lead to a court allowing the litigation to take place in England – the plaintiff must establish that substantial justice cannot be done in the appropriate forum.[332] Relevant factors include the lack of independence of the judiciary in the foreign forum, the claimant's inability to instruct an advocate and his legitimate fears for his personal safety should he return to the foreign jurisdiction.[333] Allegations such as these must be supported by "positive and cogent evidence" if they are to succeed in convincing a judge that justice would not be done abroad.[334]

"Faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgement, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights".[335] It has been submitted that the House of Lords is developing a "due process" approach to the second limb of the Spiliada doctrine insofar as the absence of legal aid led to the finding that substantial justice could not be achieved in the foreign forum.[336]

In *Connelly*, it was underlined that the important issue is whether the plaintiff can establish that substantial justice will not be done in the particular circumstances of the case, and that the availability of financial assistance will be a relevant factor in exceptional cases. *Connelly* was held to be such an exceptional case because due to its nature and complexity, it could not be tried at all without the benefit of legal

[331] Harris, 2005, p. 937.
[332] *Spiliada Maritime Corporation* v. *Cansulex Ltd* [1987] AC 460, 482.
[333] International Law Association Human Rights Committee, 2003, p. 147 citing *The Abidin Daver* [1984] A.C. 398, 411; and *Oppenheimer* v. *Louis Rosenthal & Co.* [1937] 1 All E.R.23 as approved by Lord Goff in *Connelly* v. *RTZ Corporation Plc* [1987] A.C. 854, 872 D-E.
[334] International Law Association, 2003, p. 148.
[335] *Connelly* v. *RTZ Corporation Plc* [1998] A.C. 854.
[336] Muchlinski, 2003, p. 172.

representation and expert scientific assistance, available in England but not in Namibia.

In *Lubbe* v. *Cape*,[337] the guidelines in *Spiliada* and *Connelly* were affirmed. In deciding whether it would be just for jurisdiction to be refused in favour of another more appropriate forum, procedural advantages available to the plaintiff will generally not be relevant as he must take a forum as he finds it. Only if a plaintiff establishes that substantial justice will not be done in the alternative forum will a stay be refused.[338] The Court reiterated that it will look not only at factors connecting the proceedings with the foreign or the English forum but that it will also consider whether the plaintiff will obtain justice in the foreign jurisdiction. In this case, although South Africa was the more appropriate forum, differences in systems of legal aid, contingent fee arrangements, and the handling of group claims meant that the plaintiffs would be unlikely to obtain justice in South Africa as a result of inadequate funding for legal representation.

Notably, and in contrast to *forum non conveniens* in the U.S., Lord Bingham stated that public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the Court has to make.[339]

In the UK the law on declining jurisdiction appears to be moving in a direction that will comport with UK obligations under the European Convention.[340]

Thus, as the twenty-first century begins, the English law of *forum non conveniens* applies a most appropriate forum concept. The current formulation of the doctrine allows plaintiffs to prevent a stay by showing that trial in the alternative forum would not do justice and relies entirely on private-interest factors to determine both the appropriateness of each forum and the availability of justice.

[337] *Lubbe* v. *Cape Plc*, [2000] 1 W.L.R. 1545 (H.L.).
[338] *Ibid*. 1554.
[339] *Ibid*. 1561.
[340] Anderson, 2002, p. 414.

3.2(b) Act of State doctrine

For purposes of making a parallel with the examination of the U.S. cases above, the *act of state* doctrine in England will now be considered. It is essentially the same as in the U.S.. "Courts will not sit in judgment on the act of a foreign sovereign performed within the territories of that sovereign".[341] This is almost identical to the understanding of the doctrine in *Underhill*.

However, there is a difference because in England, the purpose of the doctrine is to prevent interference with the legitimate acts of a foreign nation, whereas in the U.S., it is to prevent interference with the executive's conduct of foreign affairs.[342] As a result, the doctrine is less strict in England. For example, Lord Salmon in *Oppenheimer* v. *Cattermole* stated that he could not see how refusing to give legal effect to a foreign law out of respect for the rules and principles of international law should cause embarrassment to the government of the foreign state.[343]

The Court of Appeal has recently held that the doctrine may not be applicable in the case of violations of international law. In *Kuwait Airlines*[344] it was found that the expropriation of Kuwaiti aircraft by Iraq in gross violation of UN Security Council resolutions condemning the Iraqi invasion of Kuwait was not entitled to recognition in England, despite the existence of the *act of state* doctrine. This was because it was in breach of international law, it was contrary to English public policy, and did not raise non-justiciable issues.[345] The decision is of considerable importance because it is the first decision clearly to decide that the acts of a foreign state within its territory and which would otherwise be applicable according to accepted principles of private international law may be refused recognition because they are contrary to public international law.[346] Furthermore, in the *Pinochet* case, the House of Lords rejected the notion that the *act of state* doctrine applies to bar proceedings against an individual for acts of torture. [347]

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[341] *Duke of Brunswick* v. *King of Hanver* (1848) 2 H.L.Cas. 1.
[342] Joseph, 2004, p. 121.
[343] *Oppenheimer* v. *Cattermole*, [1976] A.C. 249 (H.L.) at 283.
[344] *Kuwait Airways Corp.* v. *Iraqi Airways Co*. [2001] 3 WLR 1117.
[345] Collins, 2002, p. 508.
[346] *Ibid*.
[347] *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* (24 March, 1999) 1 A.C. 147, 159 (House of Lords, 2000).

The English courts have not yet had to consider the *act of state* doctrine in cases of TNCs operating abroad. However, in circumstances where the damage occurred from a situation of cooperation between the TNC and the host country government, the English view of the doctrine would appear to be relatively weak when compared to the American one. Given that its intention is not to interfere with legitimate acts of government, and that the courts are comfortable to disregard the application of a foreign law where it is in contravention with international law, if a case was brought which alleged a serious enough human rights violation, and which would be eligible for English jurisdiction on all other grounds, it is unlikely that an English court would dismiss it on *act of state* grounds alone.

3.2(c) Non-justiciability

Non-justiciability is the English counterpart of the U.S. *political question* doctrine and is a narrower concept. It arises if there is no applicable law.[348] It requires the court to decline jurisdiction on the ground that there are no manageable judicial standards that it can use to judge the issues in question, rather than because the validity of governmental acts is directly called into question

Regarding the U.S. *political question* doctrine, it may difficult to recreate in Europe. It has been held that Article 6 applies to where a situation is deferred from the judiciary to the executive. In *Beaumartin* v. *France*,[349] it had decided in the Conseil d'Etat that the interpretation of a treaty between France and Morocco was to be the one of the French Ministry of Foreign Affairs. The usual practice was for ordinary French civil courts to interpret treaties themselves, so long as they did not raise issues liable to jeopardise good international relations. The question put to the European Court of Human Rights was whether the practice of deferring to the executive was a violation of the right to access to a court under Article 6 of the ECHR. The French Government argued that the practice was in conformity with the Convention: its position was that the practice ensured uniformity of interpretation, the minister was the person best placed to inform the court of the mutual intention of the contracting

[348] Joseph, 2004 p. 121.
[349] *Beaumartin* v *France* (1994) 19 EHRR 485

parties, and the practice represented a proper balance of powers between the judiciary, the executive and the legislature.

The European Court of Human Rights disagreed. Only an institution with full jurisdiction, and independence from the executive and the parties, was a tribunal within the meaning of Article 6. The involvement of the minister of foreign affairs had been decisive, and not open to challenge in the administrative court. The case had therefore not been heard by an independent tribunal.

3.2(d) Article 6 ECHR

Article 6(1) ECHR: *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*.

The ECHR is given further effect in England by the Human Rights Act 1998.[350] This legislation makes it unlawful for any public body to act in a way which is incompatible with the ECHR, requires UK judges take account of decisions of the ECtHR and to interpret legislation, as far as possible, in a way which is compatible with the Convention.[351]

Article 6 requires that civil proceedings be determined somewhere before a tribunal in accordance with Article 6.[352] According to the European Court of Human Rights, there is no justification for interpreting this article restrictively.[353]

Article 6 will not help plaintiffs in all situations where they wish for their complaint to be heard in an English court. For example, it will not defeat a finding by court that there is no basis of jurisdiction.[354] If there is no real and substantial tort, that just because access is denied to the English courts does not necessarily mean a breach of Article 6.[355] The argument that a denial of access to the English courts is a denial of

[350] For an examination of the effect of the Human Rights Act see Masterson, 2005.
[351] Section 2 (1) (a), Human Rights Act 1998: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen".
[352] Fawcett, 2007, p. 6.
[353] *Moreira de Azeredo* v. *Portugal*, ECHR (1990) Series A, No. 189 (1990) 13 EHRR 74.
[354] Fawcett, 2007, p. 6.
[355] *Dow Jones & Co Inc* v *Yousef Abdul Latif Jameel* [2005] EWCA Civ 75. [2005] QB 946, 70.

access to the court of choice will not succeed either. As was said in *OT Africa Line Ltd*, "Article 6 of the ECHR does not provide that a person is to have an unfettered choice of tribunal in which to pursue or defend his civil rights… the crucial point is that civil rights must be determined somewhere by a hearing and before a tribunal in accordance with the provisions of Article 6".[356]

However, Article 6 may have an effect in other situations. It requires that there must be a trial somewhere. Taken literally, this would suggest that an English court would be in breach of Article 6 if England was the only forum available but refused to try the case. Second, the trial must be before a tribunal in accordance with Article 6, ie there is a fair and public hearing before an independent and impartial tribunal established by law[357]

In *forum non conveniens* cases, Article 6 concerns are raised in three different ways: because of a denial of access; because of a delay in trial; and, in some cases, because of a breach of the right to a fair trial abroad.[358]

In relation to denial of access, what was said in *OT Africa Line Ltd* applies here. What Article 6 requires is that there is a trial somewhere and that this is before a tribunal in accordance with the requirements of Article 6. It does not matter that this trial is abroad.

The delay involved in considering a *forum non conveniens* stay has not been treated in detail, although Advocate General Leger has stated that the grant of a stay on *forum non conveniens* grounds, because of the delay involved, could be regarded as being incompatible with the requirements of Article 6.[359] However, this concern does not appear to have been discussed in the English courts.

The third way in which Article 6 concerns are raised relates to a possible breach of the right to a fair trial by a foreign court. This is the most relevant aspect for the English cases discussed in this paper. This question arises if the alternative forum abroad would lead to substantial delays before the case is tried or if there is a question mark over the independence and impartiality of the judiciary.[360] The issue here is whether

[356] *OT Africa Line* Ltd v. *Hijazy (The Kribi)* [2004] EWCA Civ 168, [2005] Fam 267, CA.
[357] Fawcett 2007, p. 7.
[358] *Ibid*. p. 9.
[359] *Owusu* v. *Jackson*, Case C-281/02 [2005] QB 801, para 270.
[360] Fawcett, 2007, p. 10.

staying the action in favour of a forum in another country would be regarded as denying the claimant the right to a fair trial? It is implicit from the above quote in *OT Africa Line Ltd* that the English courts must not transfer a case to a tribunal abroad in which there is no fair and public hearing before an independent and impartial tribunal established by law.

The most significant case with regard to legal representation and Article 6 is *Airey* v. *Ireland*,[361] which dealt with an applicant who was applying for judicial separation in the Irish High Court, but who could not afford a lawyer. The ECtHR held that it was unrealistic to expect the claimant to be able to effectively conduct her own case, especially as her husband would be represented by a lawyer. The test was whether the applicant would be able to 'present her case properly and satisfactorily'. It is on national legal orders that primary responsibility falls to ensure conformity with the ECHR: inequality of access to legal aid, advice, and services is thus a problem for national governments.[362]

In *Cape*, the plaintiffs argued that staying the English proceedings in favour of proceedings in South Africa would violate their rights guaranteed under Article 6 of the ECHR because it would deny them a fair trial due to the lack of funding and legal representation in South Africa. This was considered by Lord Bingham towards the end of his judgment, after he had applied the principles on stays of action as laid down in *Spiliada*.[363] As has already been seen, according to that doctrine, a stay will not be granted where it is established by that the claimant will not obtain justice in the foreign forum.

Lord Bingham had already concluded that a stay would lead to injustice to the claimants. He then dismissed the human rights argument by saying "I do not think article 6 supports any conclusion which is not already reached on application of Spiliada principles"[364]. Although the result on the facts in this case does not give rise to human rights concerns, Fawcett points out that Lord Bingham dealt with the human rights aspect only after the *Spiliada* principles had been applied, and that had the facts been different, and a stay would otherwise have been granted, there may be a conflict

[361] *Airey* v. *Ireland*, ECHR (1979), Series A, No 32, 2 EHRR 305.
[362] Harlow, 1999, p. 204.
[363] *Spiliada Maritime Corporation* v *Cansulex Ltd*, [1987] AC 460.
[364] *Lubbe* v. *Cape Plc*, [2000] 1 WLR 1545, 1561.

with Article 6 ECHR.[365] She argues, that if this were to happen, the court would be in breach with Article 6 and with section 2 of the Human Rights Act 1998 to take into account any decisions of the ECtHR relevant to the proceedings since it would be ignoring the decision of the ECtHR in *Airey* deciding that the unavailability of legal representation before the courts of a State can constitute a breach of Article 6 by that State.[366]

As a result of Article 6, it may be concluded that it could have positive repercussions for foreign nationals attempting to obtain justice in English courts.

[365] Fawcett, 2007, p. 10.
[366] *Ibid*., p. 11.

CHAPTER 4 – COMPARISON AND EVALUATION

The cases brought in the U.S. and England clearly point to a certain amount of judicial awareness that the actions of TNCs abroad may be brought in the courts of the country of the parent company. Unfortunately, none of the cases have been concluded, due to problems with procedural issues and the fact that companies tend to negotiate settlements with plaintiffs before any damaging final decision can be made. However, a comparison may still be made, incorporating the differences between the English and U.S. civil procedure, and the difference between dealing with domestic law and international law norms.

4.1 Jurisdictional Matters

4.1(a) Subject Matter Jurisdiction.

It has been seen that in the U.S., subject matter jurisdiction is based on a statutory tort cause of action, which is in turn based on international norms which are part of federal common law. In effect, this means that the ATS may be used to bring international law norms, (the 'law of nations') under the jurisdiction of the U.S. courts. Successive interpretations of this concept have lead to the definition that this is a law, which is 'specific, universal and obligatory'. Examples of violations of the law of nations are summary execution, extrajudicial killing and wrongful death; disappearance; official torture; prolonged arbitrary detention; acts of cruel, inhuman or degrading treatment or punishment; and systematic racial discrimination, war crimes and genocide.

In England, the cases looked at in this dissertation have been brought on the basis of domestic tort law. The most relevant torts include negligence and trespass to the person. The English cases, following acceptance of jurisdiction will engage in a choice of law, whether to use the law of the country in which the human rights violations were carried out, or to use English law. Significantly, foreign law will not be applied if to do so would conflict with principles of English public policy. This includes human rights under the ECHR as transposed into English law by the Human Rights Act 1998.

4.1(b) Personal Jurisdiction

Defendants

In the U.S. ATS cases, jurisdiction may be exercised directly over a corporation which is based in the U.S. or has at least 'minimum contacts' with it as has been previously noted. The TNC must have engaged in the most egregious of human rights violations, because as it was explained above, these are international law norms which traditionally apply only to states. For other norms of customary law, the corporation must have acted under colour of state law, or in complicity with a state actor, with the effect that human rights violations were carried out as a result. Aiding and abetting a state actor in perpetrating violations, insofar as the TNC provided assistance with the knowledge that it would lead to the perpetration of human rights violations will be sufficient.

Jurisdiction in the English cases has been based on the extraterritorial jurisdiction of English courts over extraterritorial acts of English companies as well as foreign companies that carry on business "to a definite and to some reasonable extent, permanent place" within the jurisdiction. As long as a corporation can be served with notice of proceedings according to settled legal principles, it can be under the personal jurisdiction of the English courts. Ordinary tort principles apply to determine whether the company had sufficient contact with the operation or individual who directly carried out the human rights violation. Unlike in the U.S. there is no tort of knowing assistance or 'aiding and abetting' liability.

Victims

The unique nature of the ATS means that plaintiffs must be aliens. The English cases have taken the cases on the basis that they may exercise extraterritorial jurisdiction over corporations which have a link of some sort to the jurisdiction and have involved claims from both United Kingdom nationals as in *Connelly*, and by foreign victims as in *Cape*.

4.1(c) Advantages of the procedural systems

Both systems offer advantages when compared with the legal systems of the countries where these claims often originate. They share many of these advantages.

The U.S. system has traditionally allowed for contingent fee arrangements, whereby the lawyers bringing the case agree to work on a conditional basis – if they do not succeed in achieving justice for the plaintiff, they will not ask for fees. In England, this notion is known as conditional fee arrangements, which have been made legal only since 1995.[367] However, they are subject to strict limitations. [368] Contingent fee arrangements are clearly beneficial to the plaintiffs in cases such as those examined in this paper.

Both systems allow for actions taken by multiple plaintiffs whereby damages may be recovered through a single legal action. They are clearly beneficial as they allow people who would not have the individual strength to bring their opponents to court to command more litigation resources by bringing their actions together.[369] They also serve to bring public attention to human rights atrocities, provide an outlet for victims to "tell their story" and have the facts investigated by a neutral arbiter. They can cause embarrassment to human rights abusers and apply pressure on domestic legislatures to respond by provoking changes in the law.[370] In the U.S. this is known as a class action, [371] while in England, "representative proceedings" are available at common law,[372] and group litigation schemes are available through legislation.[373] Although these continue to develop in the United Kingdom, they are still far away from American class actions. In particular, the limitations on contingent fees and the rule that the "loser pays" (see below) considerably lessen the extent of the English "class action".[374]

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[367] Conditional Fee Agreements Order 1995, which has now been superseded by the Conditional Fee Agreements Order 1998 (SI 1998, No 1860). Generally, in England, if the case is won, the lawyer is paid normal fees plus success fees of normally 25% - 50% of the normal fee; in the U.S. if the case is won, the lawyer is paid a share of the awarded damages (Andrews, 2001, p. 21).

[368] See Andrews, 2001. The limitations are that damages cannot be awarded without reference to the particular loss suffered by each member of the class action, which must be calculated precisely. The court can award damages in a representative action only where: (i) the class members' loss can be precisely determined at the time of judgment; or (ii) the class members have waived their rights to individual receipt of damages and instead wish their compensation to be paid to a body enjoying care of their interests.

[369] Sherman, 2002, p. 401.

[370] Johnson, 2004, p. 656.

[371] For an analysis of class actions in the U.S., see Johnson, 2004; For analysis of similar actions elsewhere, see Sherman, 2002.

[372] Sherman, 2002, p. 422 - permitting a person to take legal action on behalf of persons who had "common issues" arising from "the same interest" in a claim against the same defendant.

[373] Through amendments to the Civil Procedure Rules in 2000.

[374] Sherman, 2002, p. 424.

Compensation in the U.S. is generally high due to the jury deciding the amount.[375] None of the ATS cases involving corporations have reached this stage, but examples of other concluded cases where settlement payouts were high are indicative. For example, the plaintiffs in FIlartiga were awarded $10,375,000.[376] The UK settlements have not been so generous, as in the examples of *Thor* and *Cape*. *Thor*, a claim brought on behalf of twenty workers, was settled for £1.3 million. In 2003, the *Cape* litigation on behalf of about 7500 plaintiffs resulted in a settlement of three parts after Gencor, the South African company which took over some of Cape's South African asbestos operations when Cape left the country in 1979, had been joined to the action. First, Gencor established and now administers a £35 million trust in South Africa. Second, Cape settled with its 7500 claimants for £7.5 million. Third, Gencor settled with the 7500 claimants for approximately £3 million.[377]

Other differences between the two systems are that in the U.S. there is no 'loser-pays' principle whereby the losing side in litigation should pay for the fees and costs of the winner.[378] There is also a substantial public interest legal sector in the U.S which is lacking in England.[379]

The U.S. would appear to have a civil procedure system which may be preferable for foreign plaintiffs coming to attempt to bring the TNCs responsible for violating their human rights through their operations abroad. Practically, the procedural benefits such as lawyers willing to take on pro bono work, high compensation payouts and the straightforwardness of bringing class actions are advantages. Symbolically, the extremely strong condemnation provided by claiming a violation of international human rights would be a very sought-after means of retribution from victims.

[375] Sykes, 2007, p. 3; Joseph, 2004, p. 17.
[376] For details of all settlements made in major ATS cases, where they were made public, see EarthRights, 2007, pp. 58 – 68.
[377] McCulloch, 2005, p. 73.
[378] Joseph, 2004, p. 16.
[379] *Ibid*.

4.2 Obstacles and Issues

Even if jurisdiction is established in all the ways outlined above, there will still be further issues to be dealt with, particularly in the case of actions against TNCs which will have the resources to employ legal expertise to attempt to prevent the claim in any way possible

4.2(a) Forum Non Conveniens

This doctrine allows the court with jurisdiction to dismiss proceedings in favour of a more appropriate forum for the litigation. The English version of the doctrine is said to be more liberal, in that it explicitly takes into consideration the possibility for access to justice by the plaintiff in the alternative forum. However, the U.S., while having a more limited version of the doctrine, widely regarded as unfavourable to a foreign plaintiff, has in recent cases begun to take more into consideration the problems likely to be faced by the plaintiff in the alternative forum.

It seems that from the point of view of the foreign victim of human rights violations, that the English system is more receptive to hearing their claims. As stated above, the major difference between *forum non conveniens* in the U.S. and in England is that the former includes consideration of public policy arguments as well as an explicit discrimination against foreign plaintiffs. The English courts limit their consideration to the private interests of the parties and the ends of justice. Article 6 of the ECHR, regarding access to a fair trial, as reinforced in English law by the Human Rights Act 1998, could also be seen as pushing the English courts into a more victim-friendly stance. However, in recent U.S. ATS claims, the court has noted that the U.S. has an interest in litigating and enforcing international human rights which may have the effect of pushing the U.S. courts in the same direction.

Supporters of *forum non conveniens* stays point to judicial economy as being of the utmost importance. They are of the view that the plaintiff's own forum, where the alleged events occurred, is usually the one which has a greater interest in hosting the litigation. Moreover, they see *forum non conveniens* as an essential means of

preventing the plaintiffs from forum shopping in an attempt to achieve more favourable outcome.[380]

However, from the point of view of foreign victims who may find it difficult if not completely impossible to have their cases heard in their home states, these arguments are not satisfactory. It has been noted that the doctrine of *forum non conveniens* is not suited to the modern transnational litigation such as that discussed in this paper and that adherence to a doctrine which favours a corporate defendant with great resources over a victim of human rights violations is contrary to the requirements of international judicial cooperation and efficiency in an era when globalisation of all aspects of life is underway. [381]

From a practical point of view, when the defendant has strong ties to the U.S. or England, the interest in trying the case there is clear, and the question of forum shopping could equally be applied to a corporate defendant who tries to evade justice being done in a forum which would be unfavourable by seeking a stay of proceedings in favour of another, less developed forum which would be unsympathetic to the victims of its operations. As Judge Lloyd Doggett said in *Dow Chemical Co. v. Castro Alfaro*, the doctrine can have the result that corporations may "evade legal control merely because they are transnational… In the absence of meaningful tort liability in the U.S. for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions".[382]

Another criticism which may be made from the victim's point of view is that denying them recourse to jurisdictions is contrary to the human right to access to justice, as set down for example in Article 6 of the European Convention on Human Rights and Fundamental Freedoms which guarantees that justice should be accessible to all.[383] It has been recommended that the doctrine of *forum non conveniens* take this human

[380] Wilson, 2002, pp. 661 – 662.
[381] *Ibid*. p. 691.
[382] *Dow Chemical Co v. Castro Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990).
[383] Article 6 states that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

rights approach into account.[384] Especially in the framework of the UK Human Rights Act 1998, this right may have an influence on decisions of private international rules in the UK.[385]

Harold Koh has stated that "the transnational public law plaintiff pursues a prospective aim as well: to provoke judicial articulation of a norm of transnational law, with an eye toward using that declaration to promote a political settlement in which both governmental and nongovernmental entities will participate".[386]

4.2(b) Parent Company Liability

This is a principle of law which exists in both the U.S. and in England. In the cases at hand, the parent company of the TNC has been targeted for being directly involved in human rights violations. In this situation, for the parent company to be held liable, it must be established that it held a high level of control over the actions of those in charge of operations in the (usually) developing country.

It has been submitted that the option of targeting the parent company directly for its actions is the preferable route. The alternative route of finding that the parent company's level of involvement in the subsidiary is such that it makes it responsible for the subsidiary's actions may have the result that parent companies will exercise less control and leave the activities of the subsidiary its own discretion. Directly targeting the parent company, on the other hand, will provide an incentive for it to monitor and take care to ensure that it is not found liable for negligent oversight of its subsidiary's actions.[387]

If a proper balance is to be achieved, the law must continue to develop to reflect the reality of TNC operations and adapt to counter TNC methods of avoiding legal responsibility. It is no coincidence that these areas o law which have been formulated and developed by reference to commercial interests, have been challenged by workers

[384] Anderson, 2002, p. 414 points to the Conference on Hague Conference on Private International Law as an example of the conflicts existing between the civil law tradition which places an emphasis on human rights approach and the common law tradition which in comparison is perceived as being "arbitrary and unjust".
[385] *Ibid*.
[386] Koh, 1991, p. 2349.
[387] De Schutter, 2006, p. 43.

in developing countries who were subjected to the most abysmal of working practices and sustained serious injuries as a result. [388]

4.2(c) *Act of State* doctrine

This doctrine has effect if the decision of the court would have the effect of passing judgment on the actions of a foreign government. In the U.S., the consideration focuses on whether such a determination would interfere with the executive's conduct of foreign affairs. Clearly this would seem to apply to many ATS claims, as they are brought against TNCs which act in close cooperation with developing countries' governments. Although it has not been an issue in the cases before the English courts, it may have potential as an argument for a corporate defendant if a case is brought regarding a situation where the company uses military security for its operations, or if the court has to pass judgment on the effective impunity enjoyed by the company in that country. It would seem from the analysis of the situation made above, that the U.S. *act of state* doctrine is stronger and more relevant in terms of the types of transnational civil litigation cases brought before its jurisdiction. However, as has already been seen, it usually does not affect proceedings because the violations in question carry universal condemnation and foreign governments would be very slow to classify them as acts of public policy.

4.2(d) *Political Question* and Non-justiciability

This rarely affects cases, but to the extent that it does, it is invoked more in the U.S. On the occasion that it succeeds, it has the effect that the case in question is should be entrusted to the executive rather than the judiciary. However, due to the nature of the cases, based on international human rights norms, and framed as torts which the judiciary is clearly tasked to deal with, it will rarely succeed in preventing litigation. The English counterpart is even less likely to be relevant, especially as the European Court of Human Rights has found that displacing a legal question to the executive branch of government may be contrary to Article 6 ECHR

4.2(e) Article 6 ECHR

[388] Meeran, 1999 p. 161.

This has to be mentioned as procedural issue even though it applies to the English litigation only. Article 6 has the potential to entrench a human rights based approach to deciding whether cases should be held in the home state or not because it has been incorporated into English law through the Human Rights Act 1998. The right to a fair trial has been held to include access to legal representation in some situations.

4.2(f) Political opposition

This political opposition has been developed through the use of amicus curiae briefs in the American ATS cases. Unsuprisingly, the interests of businesses and representing associations are prominent in the arguments against the application of the ATS. It is argued that holding TNCs liable for their acts abroad will deter them from investing in developing countries, thus harming the American economy, and preventing developing countries from benefiting from such investment.

These arguments have been supported by the Bush administration to put pressure on the judiciary to refuse to hear claims, not only against TNCs for their violations of human rights, but all claims possible of being brought under the ATS. Although the judiciary is not bound by the amicus curiae briefs which it receives, the concerted pressure of many influential groups, most notably the executive branch must have an effect.

According to human rights defenders, the ATS can be an incentive for corporations to ensure that their projects do not perpetuate human rights violations, thereby providing an opportunity for the US to develop relationships with communities around the world, for its own long term political and economic benefit.[389] This is opposed to the view of business, which seeks to lend weight to its opposition of the ATS by arguing that using the ATS in such away will complicate US foreign policy, alienating potential allies, thus damaging the war against terrorism.[390]

In contrast, the English proceedings have been brought relatively peacefully. The cases have relied on law which is already well established, and the decisions of the House of Lords have not created any great surprise.

[389] Bruno, 2003.
[390] Griswold, 2003.

CONCLUDING OBSERVATIONS

The U.S. and English legal systems share many features which would make them attractive locations for a lawsuit from the plaintiff's point of view.
They provide highly developed and credible fora for the adjudication of claims against TNCs in their operations abroad and have demonstrated concern for the predicament of foreign plaintiffs, by gradually expanding the reach of their jurisdictions to encompass cases brought by victims of TNC activity abroad.

The discussion in this paper offered an enlightenment of the differences between the English and U.S. systems, on a procedural and political level. It is also possible to discern the differences between bringing a claim based on international law violations and bring one based on domestic law. Each has advantages and disadvantages.

The U.S. cases in this dissertation deal with the extreme human rights violations, which are universally condemned, while the English cases are concerned with the unlawful actions of TNCs under domestic tort law which have an effect on foreign nationals.

Both require a certain link to the home forum in order to exercise jurisdiction, but one difference is that only aliens may invoke the U.S. jurisdiction under the ATS whereas anyone affected by the actions of a TNC with sufficiently close links to England may initiate a claim.

The liability of parent companies for their subsidiaries has not been a big issue. This is because most of the cases have been against corporations incorporated in the U.S and in England, and the cases brought have mostly focused on the direct actions of the parent company as a reason to hold them liable. Where a subsidiary's actions are involved, the issue to be resolved is the level of control exercised by the parent company over the subsidiary, according to already settled corporate law.

The egregious nature of the violations brought to light in ATS cases has meant that the actions of a foreign state actor will often be in question. Where state action is required for a violation of the 'law of nations' to be actionable under the ATS, aiding

and abetting the state actor will be reason enough to find a TNC liable for the consequent damage caused to foreign victims. In England, traditional common law principles are used to impute the actions of a subsidiary to a parent company. This means that the separate legal personality of the subsidiary must be shown to be a mere façade, hiding a factual existence of a high level of control by the parent company over the subsidiary's actions. The question of state action has not been raised as of yet, but in the case that this does happen, aiding and abetting liability is unlikely to be used as the standard. Rather, the principles of liability set out in Chapter 3.1(c) will be relevant here, for example procurement of a tort or conspiracy to injure.

From a procedural point of view, it may be argued that the when all the factors are considered that the U.S. system is favourable for victims seeking justice. Firstly, targeting a TNC for a violation of the law of nations is a far stronger criticism of the actions than bringing an action under ordinary tort law. Finding or even alleging that a company is responsible for violating fundamental human rights is likely to hold greater appeal for plaintiffs seeking condemnation for the TNCs actions, even if it is not a criminal condemnation. Secondly, the culture of litigation in the U.S. which welcomes large class actions and has many associations and law firms offering pro bono or contingent fee services is also beneficial for victims coming from developing countries, frequently with very little resources compared with the might of a TNC;s wealth. The settlements already concluded under the ATS are high, and compensation is generally higher as well when compared with English compensation. The only downfall is the great amount of political and economic opposition which is being brought to bear on the judiciary. Economic opposition can be overcome without much difficulty, but when it is coupled with support from the government, it may have a larger effect, with potential to affect the long term development of the ATS as an efficient cause of action. This problem is not found in the English system. Although there may be a question of political favouritism towards big corporations, as evidenced by the United Kingdom's submission to the U.S. Supreme Court in the *Sosa* case as mentioned in Chapter 2.2(d), the English courts do not have the same range of politically motivated docrines to consider, notably the *act of state* doctrine and the *political question* doctrine.

It must also be noted that a human rights approach is becoming more and more entrenched in the English legal system, firstly because of the influence of the ECHR, but also because of the governmental approval in giving further weight to the Convention through the Human Rights Act 1998, which includes a provision which obliges the courts to take ECtHR precedent into account in its decisions. As a result of this, the English system holds great potential for foreign victims of human rights violations. The progressive development of the cases from Thor to Cape has been made in a relatively short period of time, raising hopes for this mechanism to continue to be developed.

In conclusion, this paper has shown the importance of continuing to use the domestic courts of the home states of TNCs. Both English and U.S. legal developments have made a positive contribution to making TNCs aware of the responsibilities when they operate abroad, and have contributed to diminish the impunity which they have traditionally benefited from. It is to be hoped that the predicament of the victims of TNC operations abroad will continue to be exposed in order to achieve a measure of equilibrium in the drive for increasing economic globalisation in today's society.

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Brief for the Respondent

Brief of *Amici Curiae* International Jurists in Support of Affirmance

Brief for the Center for Justice and Accountability, National Consortium of Torture Treatment Programs, and Individual ATCA Plaintiffs as Amici Curiae in Support of Respondents

Brief of Amici Curiae Career Foreign Service Diplomats in Support of Respondent.

Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents.

Brief for the United States as Respondent supporting petitioner

Brief of the Governments of the Commonwealth of Australia, the Swiss Federation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner

Brief for the National Foreign Trade Council, USA*Engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, the International Chamber of Commerce, the Organisation for International Investment, the Business Roundtable, the American Petroleum Institute and the US-Asian Business Council.

Brief for the National Association of Manufacturers as *Amici Curiae* in Support of Reversal.

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