

CORPORATIONS AND TRANSNATIONAL LITIGATION:
COMPARING *KIOBEL* WITH THE JURISPRUDENCE OF ENGLISH COURTS

*By Andrew Sanger**

As a result of the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, claims brought under the Alien Tort Statute (ATS)¹ must "touch and concern the territory of the United States . . . with sufficient force" for federal courts to recognize a federal common

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¹ 28 U.S.C. §1350.

law cause of action for violations of international law.² While the contours of this test are established on a case-by-case basis, ATS jurisprudence will continue to be unsettled and will likely result in far fewer cases being pursued in U.S. federal courts. The lower courts have already relied on the *Kiobel* decision to quickly dismiss pending cases,³ suggesting that, even if the Supreme Court did not close the door to transnational tort litigation, the decision may well prove to be the end of transnational ATS litigation. In light of *Kiobel* and its emerging progeny, now seems to be an opportune time to examine approaches to transnational tort litigation in the courts of other states.

The present contribution compares common law tort claims in U.S. federal courts with common law tort claims in English courts and suggests that, in a post-*Kiobel* world, the latter may offer significant advantages over the former. First, English courts apply the harmonized European Union Regulation on Jurisdiction (Brussels I),⁴ under which corporations domiciled in an EU member state are to be sued in that state, with courts precluded from declining jurisdiction on the ground that the court of a non-EU state would be a more appropriate forum. Second, in most cases, the applicable law is the law of the state in which the harm is alleged to have occurred, which avoids the potentially controversial extraterritorial application of the law of the forum state. Third, English courts have shown a willingness to find that a parent company may, in certain circumstances, owe a duty of care to employees of its subsidiaries. Finally, this short essay briefly addresses why, despite these potential advantages, comparatively few transnational tort claims against transnational corporations have been brought in English courts.

The Exercise of Jurisdiction over a Foreign Corporation

A jurisdictional challenge may arise when a claimant wishes to use the legal system where one part of a transnational corporation is domiciled to sue a constituent part incorporated in another state. The facts of *Kiobel* provide an example: Nigerian plaintiffs sued an English-Dutch parent company in the United States on the basis that the parent company operated an office in New York.⁵

U.S. federal courts may exercise two types of personal jurisdiction over a defendant corporation. First, a federal court has *specific* jurisdiction over a corporation if the claim arises out of the corporation's contact with the state in which the court is located (the forum state)—for example, if the tort is committed within the state. Second, a court has *general* jurisdiction over

² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013).

³ See, e.g., *Al Shimari v. CACI Int'l, Inc.*, No. 1:08-cv-827, 2013 U.S. Dist. LEXIS 92937, at *50–51 (E.D. Va. June 25, 2013), available at http://ccrjustice.org/files/Shimari_Opinion%20Dismissing%20ATS%20Claims%206.26.13.pdf.

⁴ Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 60, 2001 O.J. (L 12) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF> [hereinafter Brussels I]; Case C-281/02, *Owusu v. Jackson*, 2005 ECR I-1383, paras. 37–46, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0281:EN:HTML> (a decision on the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1978 O.J. (L 304) 36, but directly applicable to Brussels I). As of January 10, 2015, Brussels I will be recast as Regulation (EU) 1215/2012, 2012 O.J. (L 351) 1 (hereinafter EU Regulation). Article 63 of the EU Regulation is the corresponding provision to Article 60 of Brussels I.

⁵ See *Kiobel*, 133 S.Ct. at 1662–63; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93 (2d Cir. 2000).

any claim brought against a corporation⁶ if “the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”⁷ The Supreme Court stated in *Goodyear Dunlop Tire Operations v. Brown* that general jurisdiction exists over foreign corporations “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”⁸ The Court further explained that “continuous activity of some sort within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.”⁹

The decision in *Goodyear* is difficult to square with *Wiwa v. Royal Dutch Petroleum Co.*, where the Second Circuit ruled that the New York office of Royal Dutch Petroleum was sufficient to establish general jurisdiction, notwithstanding that the sole purpose of the office was to manage the corporation’s listing on the New York Stock Exchange.¹⁰ In *Kiobel*, Royal Dutch Petroleum challenged the assertion of personal jurisdiction, but the company did not raise the issue again after the district court proceedings, perhaps because of the ruling in *Wiwa*.¹¹ The Supreme Court will soon review *Bauman v. DaimlerChrysler Corp.*,¹² where the U.S. Court of Appeals for the Ninth Circuit ruled that it could exercise jurisdiction over a German company because one of its subsidiaries operates in California.¹³

By contrast, Brussels I requires that corporations domiciled in an EU member state be sued in that state, with EU member state courts precluded from declining jurisdiction on the ground that the court of a non-EU state would be a more appropriate forum.¹⁴ A corporation is domiciled where it has its “statutory seat” (identified in the following order: registered office, place of incorporation, or place under the law of which formation took place), “central administration,” or “principal place of business.”¹⁵ If a corporation is domiciled in more than one EU state, the claimant may choose where to bring the claim. A court will decline to hear a case only where (1) proceedings have already commenced between the same parties on the same subject matter in a non-EU jurisdiction;¹⁶ (2) the parties have contractually agreed that the courts of

⁶ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414–15 (1984).

⁷ *Goodyear Dunlop Tires Operations, SA v. Brown*, 131 S.Ct. 2846, 2849 (2011) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

⁸ *Id.* at 2851 (quoting *Int’l Shoe*, 326 U.S. at 317).

⁹ *Id.* at 2856 (quoting *Int’l Shoe*, 326 U.S. at 318).

¹⁰ *Wiwa*, 226 F.3d 88.

¹¹ See John Bellinger, *Reflections on Kiobel*, LAWFARE, Apr. 22, 2013, at <http://www.lawfareblog.com/2013/04/reflections-on-kiobel>.

¹² *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 133 S.Ct. 1995 (U.S. Apr. 22, 2013) (No. 11-965).

¹³ See, e.g., John Bellinger, *Recent Decisions May Make Ninth Circuit a Magnet for Foreign Plaintiffs*, LAWFARE, Sept. 3, 2012, at <http://www.lawfareblog.com/2012/09/recent-decisions-may-make-ninth-circuit-a-magnet-for-foreign-plaintiffs>; Kenneth Anderson, *Supreme Court to Review Bauman v. DaimlerChrysler*, OPINIO JURIS, July 17, 2013, at <http://opiniojuris.org/2013/07/17/supreme-court-to-review-bauman-v-daimlerchrysler>; see also Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *DaimlerChrysler AG v. Bauman*, No. 11-965 (U.S. July 2013), available at <http://www.justice.gov/osg/briefs/2012/3mer/1ami/2011-0965.mer.ami.pdf> (arguing that the Supreme Court should reverse the Ninth Circuit’s “seriously flawed” decision in *Bauman*).

¹⁴ Brussels I, *supra* note 4, Art. 60 (EU Regulation, *supra* note 4, Art. 63); *Owusu*, *supra* note 4, paras. 37–46.

¹⁵ Brussels I, *supra* note 4, Art. 60 (EU Regulation, *supra* note 4, Art. 63).

¹⁶ *Id.*, Art. 27 (EU Regulation, *supra* note 4, Art. 29).

a non-EU state should have jurisdiction over the dispute;¹⁷ or (3) a particularly close connection exists between the dispute and another jurisdiction that ousts the exclusive jurisdiction of EU member states under Article 22 of Brussels I (e.g., claims involving rights in land and specific provisions of company law).¹⁸

In the recent English case of *Vava v. Anglo American South Africa Ltd.*, claimants argued that, for the purposes of Brussels I, the “central administration” of the South African company Anglo American South Africa (AASA) included the place where the “entrepreneurial decisions” of the company were taken, notwithstanding that these decisions were taken in England by the company’s parent corporation.¹⁹ AASA objected to the assertion of jurisdiction by the English courts, and the claimants sought specific disclosure of appropriate documents to support their case against the objection. The High Court of Justice of England and Wales (Silber, J.) ruled that specific disclosure could be granted because the claimants had “at least an arguable case that the ‘central administration’ of a company is where management decisions are taken and where entrepreneurial decisions take place irrespective of where its economic activities occur.”²⁰ However, in the final hearing on jurisdiction, the High Court (Smith, J.) disagreed, finding that this argument went too far: it could result in the untenable conclusion that if a company’s “entrepreneurial decisions are determined predominantly by the wishes of a bank or other [financial] institution,” the location of the bank could be construed as the central administration of the company.²¹ Justice Smith explained that the question of the central administration of a company “depends upon where the company itself carries out its functions, and, unless the company can properly be said to act through another person or entity because of agency or delegation or on some other legally recognised basis, the actions of others do not determine the question.”²² The factual evidence did not support the argument that AASA carried out its functions in England; that its English parent company influenced decisions, policies, and strategies adopted by the AASA did not mean that its central administration was in England.²³

If the defendant corporation is not domiciled in an EU member state, English courts fall back on the common law, which provides that jurisdiction may be exercised where effective service of the claim form can be made.²⁴ An English court may exercise jurisdiction over foreign corporations not domiciled in the European Union as long as they have a place of business (a

¹⁷ *Id.*, Art. 23 (EU Regulation, *supra* note 4, Art. 25). Article 25 of the EU Regulation contains changes to the rules for assessing both the validity of the agreement conferring jurisdiction and the effect of the *lis alibi pendens*.

¹⁸ *Id.*, Art. 22 (EU Regulation, *supra* note 4, Art. 24). In addition, Articles 33 and 34 of the EU Regulation allow, but do not require, a court to stay proceedings on the basis that proceedings before a nonmember state involving the same parties and concerning the same subject matter were pending at the time that proceedings were instituted in the member state court.

¹⁹ *Vava v. Anglo American South Africa Ltd.*, [2012] EWHC 1969, paras. 17, 19 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2012/1969.html>.

²⁰ *Id.*, para. 43.

²¹ *Vava v. Anglo American South Africa Ltd.*, [2013] EWHC 2131, para. 71 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2013/2131.html>.

²² *Id.*

²³ *Id.*, paras. 71–72, 76.

²⁴ Civil Procedure Rules 1998, S.I. 1998/3132, pt. 6 (UK), available at <http://www.legislation.gov.uk/uksi/1998/3132/made> [hereinafter CPR].

presence less than domicile) in England.²⁵ It is not necessary for the claim to have any connection with the defendant's activities in England, but, unlike the Brussels I regime, a court may stay proceedings on the basis that another available forum is more appropriate than England and that it would not be unjust to require the claimant to sue in this alternative forum.²⁶ However, in two important cases involving corporations, English courts refused to order a stay of proceedings on the basis that to require the plaintiffs to pursue their claim in a foreign jurisdiction would deny them access to adequate funding for lawyers and experts, thereby resulting in the denial of practical access to justice.²⁷

Application of the Law of the Place Where Damage Occurred

In ATS cases, U.S. federal courts may recognize a federal common law cause of action for violations of international law if the rule alleged to have been violated has “a specificity comparable to the features of the 18th-century paradigms” of assaults against ambassadors, safe conducts, and piracy.²⁸ After *Kiobel*, claims will also have to “touch and concern the territory of the United States . . . with sufficient force.” This controversial—and now limited—exercise of extraterritorial prescriptive jurisdiction by U.S. federal courts does not occur in transnational tort cases governed by rules of private international law.

For cases brought in English courts, the Rome II Regulation (Rome II) determines the law to be applied (the *lex causae*). Rome II provides that, as a general rule, courts should apply the “law of the country in which the damage occurs”²⁹ for all matters of substance in the case. Thus, if the acts of a defendant occur in one state, but the claimant is injured in another, the law of the latter state will apply. The general rule is subject to an exception and an escape clause.³⁰ Rome II preserves the public policy interests of the forum state, which allows an English court to refuse to apply a rule of foreign law if its application would be “manifestly incompatible with the public policy . . . of the forum” state.³¹ In *Kuwait Airways Corp. v. Iraqi Airways Co.*, the House of Lords refused to give effect to Iraqi laws purporting to give the title of six aircraft, confiscated from Kuwait Airways during the Gulf War of 1990, to the defendants because the laws were in flagrant breach of international law and were therefore contrary to English public policy.³² A UN Security Council resolution had called upon states not to recognize the annexation of Iraq and to “refrain from any action or dealing that might be interpreted as an indirect

²⁵ *Id.* §§6.2, 6.5; Companies Act 2006, c.46 (UK), available at <http://www.legislation.gov.uk/ukpga/2006/46>. Stakeholder interests include the interests of employees, suppliers, customers, and (local) communities.

²⁶ See *Spiliada Maritime Corp v. Cansulex Ltd.*, [1987] A.C. 460 [H.L.]; *Connelly v. RTZ Corp.*, [1998] 1 A.C. 854 (H.L.); *Lubbe v. Cape PLC*, [2000] 4 All E.R. 268 (H.L.) (appeal taken from Eng.).

²⁷ *Connelly*, *supra* note 26; *Lubbe*, *supra* note 26, para. 24.

²⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

²⁹ Council Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations, Art. 4(1), 2007 O.J. (L 199) 40 (general rule applying to torts after January 11, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF> [hereinafter Rome II]; Case C-142/10, *Homawoo v. GMF Assurances SA*, 2011 ECR I-11603, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0412:EN:HTML>.

³⁰ Rome II, *supra*, note 29, Art. 4(2) (exception applying to torts committed after January 11, 2009); *id.*, Art. 4(3) (escape clause); see also *id.*, Art. 14(1)(a) (post-event agreement); *id.*, Art. 14(1)(b) (pre-event agreement).

³¹ *Id.*, Art. 26.

³² *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] UKHL 19, paras. 14–17, [2002] 2 A.C. 883, available at <http://www.bailii.org/uk/cases/UKHL/2002/19.html>.

recognition of the annexation.”³³ If the law of the state in which the harm occurs does not impose civil liability on those whose conduct international law requires states to prohibit and punish—for example, torture—English courts may apply English law on the basis that the *lex causae* is manifestly contrary to English public policy.

English common law tort claims are based on well-accepted types of torts, such as negligence, trespass to the person, and product liability. The torts may be committed in violation of international law and/or involve violations of human rights, but, unlike ATS claims in U.S. federal courts, the tortious conduct need not be contrary to a rule of international law. Nevertheless, liability in tort can protect the same values that are protected in ATS cases. A claim for torture is a claim for trespass to the person; a claim for avoidable environmental damage is a claim for negligence. Although these labels do not carry the same censure as a “tort in violation of international law” or a “human rights tort,” suing for traditional torts can still ensure responsibility and compensation for harmful conduct.³⁴

Application of the *lex causae* in English transnational tort cases also has some advantages over the recognition of a U.S. federal common law cause of action for violations of international rules in ATS cases. First, as noted, for nearly all transnational tort cases, English courts apply the law of the state in which the tort occurred; the concern that a state may exercise its prescriptive jurisdiction on an exorbitant basis does not arise. In complex or penumbral cases, rules of private international law assist the courts in determining which domestic law to apply, avoiding the challenges experienced by U.S. federal courts in deciding whether to apply rules of international law or federal common law in ATS cases. Second, English courts are not required to examine international law or engage with the constitutional rules that determine its place within the domestic legal system. Both of these tasks have frequently divided U.S. judges and academics in ATS cases and have led to a divergent body of jurisprudence. Third, applying the domestic law of the state in which the tort occurred avoids many of the corporate responsibility questions that have occupied federal courts in ATS cases. Unlike international law, domestic legal systems have well-developed notions of civil liability that deal with questions of corporate responsibility and the appropriate standard for secondary liability. Furthermore, for claimants, establishing negligence and other traditional torts is often easier than establishing a corporate violation of a rule or norm of customary international law.

Parent Company Responsibility

Where English law has been applied in cases involving corporate groups, English courts have shown a willingness to find a parent company directly responsible for the harm caused by its subsidiary. In *Chandler v. Cape*, an English parent company was found to owe a duty of care to the employees of its subsidiary on the basis of a clear proximity between the operations of

³³ SC Res. 662 (Aug. 9, 1990); see also SC Res. 661 (Aug. 6, 1990).

³⁴ See UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31, princ. 26 & cmt. (Mar. 21, 2011), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

the two companies.³⁵ For claimants, parent company responsibility means that they only need to establish that the parent company failed to exercise appropriate control over a subsidiary, rather than proving an abuse of the corporate form. The same approach could also be applied to corporations exercising control through long-term supply contracts. Several corporations have recently been criticized for creating—and/or failing to intervene in—situations where the supplier's employees have been subjected to poor working conditions.³⁶ Although English law will rarely be applied in transnational tort cases brought in English courts, *Chandler* provides a precedent on which foreign courts could rely.

A Comparable Degree of Success?

Hundreds of claims against corporations have been filed under the ATS, but fewer than half a dozen have been filed in English courts; by contrast, most claims in English courts have been successful, but very few ATS cases have resulted in a judgment or settlement.³⁷ If claims in English courts generate less controversy and have a comparatively better chance of success than ATS cases, why have there been so few English cases? A number of factors could explain the reluctance to bring cases in English courts,³⁸ but the two strongest explanations are the difference in both the procedural rules and the types of claim brought by plaintiffs. The United States offers more advantageous procedural rules for plaintiffs, including extensive discovery options, class action suits, and punitive damages.³⁹ In English courts, the losing party typically pays the other side's costs, a significant deterrent to potential claimants. In addition, English common law claims are not brought as human rights cases or violations of international law,⁴⁰ whereas ATS claims require that federal courts adjudge whether a corporation is liable for a violation of international law. Decisions on whether corporations have violated rules of international law have been instrumental in creating a normative expectation that corporations should comply with international standards, and the potential for ATS litigation has helped to reinforce other corporate responsibility initiatives.⁴¹ Nevertheless, traditional tort claims do have a significant role to play in setting standards for transnational corporate responsibility.⁴²

Conclusion

The future of transnational tort litigation is likely to involve the application of *lex causae* in traditional tort cases, rather than federal common law causes of action for violations of international law in ATS cases. As this brief comment has illustrated, transnational tort claims in

³⁵ *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525, para. 80 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html>. An argument based on parent company responsibility was also made in *Lubbe*, *supra* note 26, and *Gurrero v. Monterrico Metals PLC*, [2009] EWHC 2475 (QB).

³⁶ Andrew Sanger, *Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of Its Subsidiary*, 71 CAMBRIDGE L.J. 478 (2012); see also, in this Agora, Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*.

³⁷ Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 128 (2013).

³⁸ See, in this Agora, Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*.

³⁹ See, in this Agora, Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*.

⁴⁰ See McCorquodale, *supra* note 36.

⁴¹ See, in this Agora, Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*.

⁴² See, in this Agora, Mahdev Mohan, *The Road to Song Mao: Transnational Litigation from Southeast Asia to the United Kingdom*.

English courts provide a significant—and a comparatively uncontroversial—alternative to ATS cases in U.S. federal courts.