**What business does a case like that have in the courts of the United States?**

Human rights campaigners have been seeking ways and means to hold accountable those responsible for human rights abuses and violations. These measures have included seeking the criminal prosecution of individual human rights abusers, as well as seeking civil damages against individual actors. So far, so unobjectionable. After all, who would oppose human rights violators being brought to justice? Who *could* oppose human rights violators being brought to justice?

These aims are generally reflected in the international legal system. International law plays two critical roles in relation to human rights. First, it establishes acceptable norms of conduct, such as the prohibition of torture. Second, it provides, where possible, enforcement mechanisms that support domestic enforcement of these norms.[[1]](#footnote-1) However, at present there is a lack of effective international enforcement mechanisms for such abuses. Measures to ensure redress for human rights violations have focused upon the domestic sphere. The reasons for this are due to the perceived relationship between national and international law. The prevailing view of Anglo-American jurisprudence views national law as having primacy over international law: international laws apply when the nation State passes treaties or statutes which make clear their applicability.[[2]](#footnote-2)

There are generally two routes for the restitution of human rights violations: the domestic and the transnational. The domestic route allows for citizens who have suffered wrongs from their government or other private actors to bring cases in the courts of their own State. The transnational route allows for victims of human rights abuses to bring actions *in other states*. Both approaches have problems.

The national approach relies upon the nation State itself to provide justice in its court system and court procedure. The transnational approach could lead to the nation State being inundated with transnational claims and seeking to foreclose any future claims. After a State allows for the redress of violations of international law in its courts, that State can become a focus for the global human rights movement. Such a move has occurred most famously in the United States. In 1980, the Court of Appeals for the Second Circuit in the case of *Filártiga* ruled that individual aliens could bring claims for violations of the law of nations under the Alien Tort Statute, or ATS.[[3]](#footnote-3) This has led to cases being brought in US Federal courts claiming damages for genocide, war crimes, summary execution, disappearance, and arbitrary detention.

However, the ATS litigation which has reached the Supreme Court points to a sceptical outlook for extraterritorial claims. In *Sosa v. Alvarez-Machain*, the Court considered a claim brought under the ATS by a Mexican citizen against another Mexican citizen for a kidnapping that occurred in Mexico.[[4]](#footnote-4) The Court in their decision limited the applicability of the ATS. The Court accepted that federal courts did have jurisdiction over torts in violation of the ‘law of nations’,[[5]](#footnote-5) but strictly limited the category of offences which were defined by their universal acceptance, their obligatory nature and high degree of specificity.[[6]](#footnote-6)

This limitation upon ATS litigation could be in the process of being extended. In *Kiobel*, the question posed before the Court was whether corporate civil tort liability under the ATS justiciable, or whether corporations were immune for tort liability under the ATS.[[7]](#footnote-7) During oral argument, Justice Alito expressed concern at the very extraterritorial nature of the ATS:

The first sentence in your brief in the statement of the case is really striking: “This case was filed ... by twelve Nigerian plaintiffs who alleged ... that respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship ... in Nigeria between 1992 and 1995”. What does a case like that -- what business does a case like that have in the courts of the United States?[[8]](#footnote-8)

Justice Alito thus clarifies the Court’s concern in *Sosa* – why should offences committed abroad by justiciable in American courts? Do prudential considerations (ensuring certainty in the law) disqualify such extraterritorial actions?

These concerns point toward a larger issue underlying the court’s decision-making, namely the Rule of Law. There is an ambiguity surrounding the Rule of Law at the heart of historical justice litigation. Historical justice litigation is marked by an adherence to the Rule of Law, a desire to see the Rule of Law upheld and justice done. However, such litigation supports a substantive, rather than a formal, conception of the Rule of Law. The dichotomy between formal and substantive conceptions of the Rule of Law is crucially importance in determining the nature of the specific legal precepts which can be derived from it.[[9]](#footnote-9)

The term appears so self-evident that it seems to need no definition. However this lack of definition brings to the fore the importance of whether the Rule of Law is given substantive or formal meaning. Formal conceptions of the Rule of Law address the manner in which the law was promulgated, the clarity of the ensuing norm and whether the norm was promulgated prospectively or retrospectively.[[10]](#footnote-10) Such conceptions do not seek to pass judgment upon the actual content of the law itself. This can be contrasted to substantive conceptions of the Rule of Law, which seek to develop certain substantive rights which are claimed to derive from, or be based upon, the Rule of Law. The Rule of Law founds these rights, which can be used to distinguish between ‘good’ laws which comply with such rights, and ‘bad’ laws which do not.[[11]](#footnote-11)

The content of this foundational legal concept will differ greatly depending upon whether a procedural or substantive viewpoint is adopted. This is the case as there are certain principles which can be posited as forming part of the Rule of Law. The most important can be said to be the principle that all persons are to be treated equally under the law. The implications of this principle, equal treatment under the law, differ depending on whether formal or substantive definitions of equality are adopted. Formal equality is as old a principle as Western political philosophy: if two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect. As Aristotle stated, we are to “treat like cases alike”.[[12]](#footnote-12)

It was a concern for the key *formal* principles of the Rule of Law which led the Supreme Court to order *Kiobel* to be expanded and reargued. The new question the Court will answer is:

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.[[13]](#footnote-13)

**Outline of Project**

Where are we going?

* Set out the outline for our project
* what is the purpose of HR violation litigation?

The aim of bringing human rights violators to court seeks to provide justice to the individual victims. However, questions need to be raised as to how much a financial settlement will actually recompense for human rights violations. What do the claimants want? Do they want a monetary sum, or official recognition and apportionment of blame for the wrongs that they suffered?

* I foresee the following points: a study focusing upon past abuses and present entrenchment of abuses

Our study needs to focus upon the wrongs of the past (in colonialism) and how the current system of violation litigation can actually

* Which countries are we focusing upon?
* A focus upon British colonialism
* Outline the fact that we are countering trends in the literature focusing on the expansion of human rights norms

**The Trends of Human Rights violation litigation**

* Connect the present litigation to the desire to ensure ‘justice’ to victims

Kiobel and Mau Mau litigation

* Use this litigation as a current example of HR violation litigation
* Such Mau Mau litigation does connect the claimant through territory to the defendant; the issues here would not affect as many as the ATS litigation.
* Kiobel is a point to pause and reflect upon the future of such litigation
* There may not be the rosy future many anticipate

There are two methods of litigation for redress in relation to HR violations: the domestic route and the international route.

The South African Apartheid litigation under the ATS has the potential, together with the failed Herero litigation, to serve as an indicator to what extent a future lawsuit against the UK for their concentration camp policy in South Africa could be used for remedying this historical wrong committed against white and black South Africans. A recent ruling by a UK court to allow, at least in part, Kenyan victims of UK’s counter insurgency measures during the Mau Mau emergency in Kenya during the 1950’s, to sue the British government serves as a reminder of the still existing need to address historical wrongs.[[14]](#footnote-14)

* In relation to the Mau Mau, the issue is justiciability
* Would the time-limiting factor (i.e., the fact that the Government may not get a fair trial due to the period of time that has passed, impinge upon this possibility?
* Even if the UK government accepts the abuse which occurred in Kenya, it is still contesting the case
* What does this mean for our study?

Compare the UK ‘domestic’ litigation to ‘transnational’ litigation in the USA

Thus the potential of extraterritorial historical justice litigation may be curtailed through a concern to secure legal certainty and the Rule of Law. The future of historical justice litigation may have to focus upon territorial challenges. However, this also has potential problems.

1. Tyler Giannini and Susan Farbstein, ‘Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Numerberg Legacy and Modern Human Rights’ (2010) 52 Harvard International Law Journal 119, 124. [↑](#footnote-ref-1)
2. Hans Kelsen, ‘Sovereignty and International Law’ (1960) 48 The Georgetown Law Journal 627, 630 [↑](#footnote-ref-2)
3. *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), 28 U.S.C. §1350 (1994). [↑](#footnote-ref-3)
4. *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004) (SCOTUS). [↑](#footnote-ref-4)
5. Ibid, 714. [↑](#footnote-ref-5)
6. Ibid, 732. [↑](#footnote-ref-6)
7. *Kiobel v Royal Dutch Petroleum*, No. 10-1491 (argued 28 February 2012) (SCOTUS). [↑](#footnote-ref-7)
8. *Kiobel*, oral transcript, p.11, 16-24 <http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf> [↑](#footnote-ref-8)
9. Craig “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” 1997 *Public Law* 467. [↑](#footnote-ref-9)
10. Craig 467. [↑](#footnote-ref-10)
11. *ibid* 467-468. [↑](#footnote-ref-11)
12. Aristotle, *Nicomachean Ethics* (1984) Book 5 3 1131a10-b15. [↑](#footnote-ref-12)
13. 10-1491, *Kiobel, Esther, et al. v Royal Dutch Petroleum, et al.,* Order in Pending Case, 5 March 2012, <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf>. [↑](#footnote-ref-13)
14. See *Ndiku Mutua and others v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB); O Bowcott “Mau Mau torture claim Kenyans win right to sue British government”, *The Guardian*, 21 July 2011, retrievable at <http://www.guardian.co.uk/world/2011/jul/21/mau-mau-torture-kenyans-compensation>. [↑](#footnote-ref-14)