

TAKING SALIENCE SERIOUSLY: THE VIABILITY OF RONALD DWORKIN'S THEORY OF SALIENCE IN THE CONTEXT OF EXTRA-TERRITORIAL CORPORATE ACCOUNTABILITY

DAVID BRIAN DENNISON
Faculty of Law
Uganda Christian University
dbriandennison@gmail.com

Abstract: In his posthumously published article “A New Philosophy for International Law”, Ronald Dworkin advocates for the use of “salience” as means for generating international law. Dworkin argues that the consent-based mechanisms for establishing international law are often incapable of addressing collective challenges such as change. Dworkin’s salience in alternative means for creating international law whereby the law can emerge from widely held principles and practices without the necessity of global sovereign consent. Unfortunately and somewhat ironically, Dworkin’s essay on salience does not include non-consent based mechanisms for salience to obtain international recognition as a legitimate engine for creating international law. This essay offers international corporate accountability is a fertile area for the emergence of salience as a source of international law. Dworkin’s description of salience and its law-forming capacity speaks to what can take place and what is taking place in the development of this area of law. Salience presents a theoretical construct that can nurture the development of coherent and extra-referential standards for judicial engagement with extra-territorial corporate wrongs. Thus the use of salience in the context of international corporate accountability is well-suited for the specific task at hand and can offer a stage whereby salience can prove its worth and legitimacy as a source of international law.

Keywords: international law, universal jurisdiction, jurisprudence, Dworkin, salience.

INTRODUCTION

Well before to his death in early 2013, Dworkin’s place among scholars of jurisprudence was well secured by works such as *Law’s Empire*, *A Matter of Principle*, *Taking Rights Seriously* and *Justice for Hedgehogs*.

Dworkin’s considerable jurisprudential cannon grew incrementally in 2013 with his posthumously published essay “A New Philosophy for International Law”¹. Unlike many of Dworkin’s prior efforts, this essay has yet to make a substantial impact in academic circles. Instead, the limited response to his essay has ranged from lukewarm to critical.

Dworkin’s essay challenges the predominant modern conception of international law as solely a product of the consent

ISSN 2283-7949
GLOCALISM: JOURNAL OF CULTURE, POLITICS AND INNOVATION
2015, 1, DOI: 10.12893/gjcp.2015.1.9
Published online by “Globus et Locus” at www.glocalismjournal.net



of sovereign nations. Instead Dworkin contends that international law often emerges from widespread practice and widely held principles² without actual consent. He calls this generative legal phenomenon “salience.”

Dworkin describes “salience” as follows:

If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a *prima facie* duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole (2013: 19).

Dworkin sees the legal recognition of salience as a means of generating international law capable of addressing the effectual ills of the modern international legal order. He has concerns about the capacity of consent-based international law to address certain global challenges (2013: 27). For Dworkin, salience provides a means of overriding the self-interest of states that can prevent the international community from establishing binding legal standards that promote the greater global good. Unlike consent, salience has the capacity to establish much needed laws that address global prisoner dilemmas such as global warming and overfishing.

Critics of Dworkin’s foray into international legal theory focus on perceived pragmatic deficiencies. (Chilton 2013) Critical rhetorical questions flow forth: How can Dworkin’s theory of salience be reconciled with a sovereign state’s obligation to comply with the will of its own people? Should the theory of salience prevail in situations where states are not faced with the types of prisoner dilemmas that keep from acting in the best interest of the global good? Won’t the principle of salience cause state actors to be more wary of entering into international treaties and agreements that expose them to a loss of sovereignty and autonomy? If salience does not require consent, what will be done to ensure that sovereign states do not choose to opt out of this new international legal order?

The present scholarly response dismisses Dworkin’s salience as a small theoretical footnote on the jurisprudential landscape. (Cotton 2014) Yet, Dworkin’s salience is not mere theory. While it might be currently untenable in the context of legal obligations between sovereign states, Dworkin’s salience could have an immediate role to play in the context of extra-territorial corporate accountability. While this is a less ambi-

tious domain than he proposed, this field is a promising opportunity for the formal emergence of salience.

Dworkin's doctrine of salience is well-suited for application in the context of transnational corporations. Salience presents a means for enabling the mutual development of coherent and referential international standards concerning the judicial management of extra-territorial corporate accountability. Salience offers a particularly attractive sourcing approach in the context of developing nations.

UNDERSTANDING DWORKIN'S SALIENCE IN "A NEW PHILOSOPHY OF INTERNATIONAL LAW"

Dworkin presents salience as a generative theory. It is an explanation as to where law comes from. Salience is more consensus than consent. It is a progressively developed tipping point vitalized by shared convictions and principles.

Salience is distinct from legal positivism. Positivism is the dominant legal sourcing theory among international law scholars. Positivists³, as characterized by Dworkin, contend that "whether a law exists is fundamentally a question of historical fact" (2013: 3). Positivists conceive any actual law as predicated on an occurrence where "some person or group has created that law" (2013: 3). In the context of international law that occurrence is the consent of sovereign states.

Per Dworkin, the positivists "assume that a sovereign state is subject to international law but on the standard account, only so far as it as *consented* to be bound by that law, and they take the principle of consent to furnish an international rule of recognition". Thus for positivists, a sovereign state is only subject to law if that state "has accepted, in the exercise of its sovereignty, to be bound by that law" (2013: 6).

He observes that the positivist approach to international law is propagated and sustained through Article 38(1) of the Statute of the International Court of Justice (ICJ). Article 38(1) delineates the sources of international law as follows:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

As Dworkin quips, only “a” “b” and “c” concern the actual power to make law. Item “d” does not give judges and “philosopher kings” the power to make law (2013: 6). Instead it merely gives the assertions of judges and academics as to what the law might be official persuasive weight. This is what the language “subsidiary means” has been interpreted to mean (Thirlway 2014: 117-18).

He observes that positivists have gone as far as to couch *jus cogens* – which are the peremptory and universal norms which spring from the moral consensus of all of mankind – as subsumed by consent by including “a peremptory norm of general international law” in Article 53 of the Vienna Convention of the Law of Treaties.

Yet Dworkin refuses to subscribe to a simplified approach to the creation and sourcing of international law. He notes the inability of the positivist approach to make assessments of priority among laws that have been consented to (2013: 6-7). Laws are inherently inconsistent and require a framework for establishing coherence through interpretation. Positivist consent fails to provide an interpretive means for working through inevitable bramble bushes within international law (2013: 22).

Next, he points out the circular and functional absurdity of the crystallization of customary international law (2013: 7, 20). Dworkin poses questions that demonstrate legal crystallization is not rooted in actual consent. He asks pointedly how many states does it take to bind other states to a newly developed international custom. He wonders if staying quiet up until the moment of crystallization really amount to consent by a sovereign.

Alternatively, Dworkin posits that customary law emerges from the bedrock of widely held principles. This bedrock generates proposals and movements for new international laws with the prospect of general endorsement (2013: 15, 22). Dworkin’s depiction of the generation of law through salience is reminiscent of his discussion of “moral progress” in *Taking Rights Seriously* (1978: 147). There he describes a principle as “a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or

some other dimension of morality” (2013: 22). Thus for Dworkin, salience is non-consequentialist and is built from the shared moral sensibilities of humanity. Today appeals to moral beliefs are at the core of efforts to reform by international law by entities such as Amnesty International and the International Committee of the Red Cross⁴.

Next he turns to the anachronistically phrased Article 38(1)(c). What nations, asks Dworkin, are “sufficiently civilized to participate” in the “essentially legislative power” of establishing general principles of law? (2013: 7). Article 38(1)(c) is rooted in the initially Roman and subsequently Westphalian concept of the *ius gentium*, which is akin to salience if not salience itself. As Thomas Aquinas wrote in definitive prose: “(t)hat which natural reason constitutes between all men and is observed by all people is called the *ius gentium*” (*On Kingship* 57.3).

Dworkin also questions the legitimacy of consent in the context of ongoing treaty obligations. He points out that sovereign consent is based on the fiction of the continuing personality of the state despite the fact that the nature of the state and identity of the people who comprise the state change over time (2013: 9-10).

He contends that interpreting the language of a treaty without the guidance of the treaty’s grander purpose is dysfunctional and can result in an interpretive “dead end” (2013: 7-8). He ultimately expands his argument to include the need for “basic principles within international law” that can be applied universally to the interpretation of texts and the assessment of legal challenges (2013: 10).

Dworkin believes that sources of law require a normative aspect. He writes:

Any theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not to happen. Since the doctrinal conception of law is interpretive, we provide a theory of the grounds of law by posing and answering questions of political morality (2013: 11).

Finally, and most urgently for Dworkin, the consent account of international legal obligations is not just empirically flawed; it is pragmatically flawed⁵. He writes:

International law could not serve the purposes it must serve in the contemporary world – disciplining the threat some states offer to

others, for example – unless it escaped the straitjacket of state-by-state consent. But yielding to that ambition seems to undermine the axiomatic place of consent in the scheme, and thus its assumed jurisprudential foundation (2013: 7).

Later he expounds on this pressing functional flaw:

Governments fail their citizens' legitimate expectations in a third and less obvious way when they accept an international system that makes impossible or discourages the international cooperation that is often – and increasingly – essential to prevent economic, commercial, medical, or environmental disaster. People are subject to the constant risk of what philosophers call “prisoners' dilemmas”: circumstances in which it is rational for them one by one to do something – drop litter in the park – that ends in loss for them all – a park destroyed. These situations pose difficult challenges of coordination. Governments can and do respond to such challenges, when these can be solved locally, by adopting and enforcing laws, by making littering a crime, for instance. But some problems – overfishing of the seas, for example, and pollution of the atmosphere with carbon – cannot be met by governments each acting only for its own territory. People in the separate states need the protection that only a coordinated policy backed by all or nearly all governments can provide (2013: 18).

Dworkin reiterates his grounds for urgency. He writes that “(w)e are already seized by the devastating prisoners' dilemmas: about terrorism, climate change, Internet communications, and economic policy” (2013: 27). These are collective international problems that require collective international legal solutions – legal solutions that can emerge without universal consent.

The limitations of consent as a basis for international law call for an alternative theory. He writes:

The idea of customary law presupposes that there is some different, more basic principle at work, in the identification of international law, or at least that the subjects of international law think there is some such principle at work. We need to ask: what is that more basic principle? If we find an answer, it is that more basic principle, not the fact of consent, that provides or is thought to provide the grounds of international law (2013: 9).

Dworkin's discussion is reminiscent of his treatment of John Rawls' *A Theory of Justice* in the chapter “Justice and Rights” in *Taking Rights Seriously* (1978). He seeks to show how morality and principles can play a role in the constructive

development of the law. In *Taking Rights Seriously*, Dworkin posits dignity as such a principle. In the context of international law, he identifies mitigation as a traditional broadly constitutive principle of international law (2013: 19).

For Dworkin mitigation is the “most general structural principle and interpretive background of international law” (2013: 19). The principle of mitigation calls on states to “pursue available means to mitigate the failures and risks of the sovereign-state system.” Thus mitigation is more pragmatic than moral.

While mitigation might be the most commonly held meta-principle driving international law, Dworkin finds it inadequate for empowering and informing the international legal order. It is simply too open-ended and too in-determinative to resolve real disputes between states (2013: 19). Here is where salience can serve to birth other common principles that can inform those who are “sculpting” international law⁶.

He makes his case for the rightful place of salience in international law with a historic account. He reports that salience was the impetus behind the emergence of international law in 16th Century Western Europe. Dworkin notes that the region was home to two dominant strains of thought that were accepted as legitimate grounds for the creation of law. The first “was the political force of Christianity” which formed “spine of developing international law” in contexts such as the law of war (Dworkin 2013: 20). The second force was the conception of a common legal tradition inherited from Rome known as the *ius gentium*. This concept of shared universal law, which was further supplemented by universalist conceptions of natural law, is what became section 38(1)(c) of the ICJ Statute (2013: 20).

Dworkin’s historic treatment of the presence and workings of salience is well supported. Yet, when he seeks to generate modern scenarios and thought experiments where salience can achieve new operative legal effects his essay languishes. Despite pronouncements that salience is a true real source of international law, Dworkin merely offers consent-based mechanisms in order to formally legitimate salience as a source of customary law⁷. Examples include the establishment of an international court “with jurisdiction over all the nations of the world” before which “cases can be brought before that court reasonably easily and effective sanctions are available to enforce the court’s rulings” (2013: 14). Another example is an imagined form of voting among United Nations members that

enables international law to be made without total consensus⁸. A third example is a “four majorities system of international legislation” that can override the sovereignty of destructively self-interested states⁹.

Ironically, while asserting that “we cannot take the self-limiting consent of the sovereign nations to be the basic ground of international law”, Dworkin proposes institutional mechanisms that are formed through consent as the vehicles for formally elevating salience to a source of international law. Thus even Dworkin’s own “freewheeling” thought experiments are beholden to conventional positivism.

Thus the net result of Dworkin legal creativity is a contradictory whimper. As presented, Dworkin’s salience can only operate sub rosa unless states consent to establishing official means for recognizing salience as a source of law. Surely Dworkin’s rival, professor H.L.A. Hart, would have been all too happy to point this out if he had been alive to do so.

THE POSSIBILITY OF ALTERNATIVE PATHS FOR THE RECOGNITION OF SALIENCE IN INTERNATIONAL LAW

Dworkin could have proposed another path for the rebirth of salience in international law—a path based on current and emerging legal situations as opposed to complex consent-founded mechanisms. Two viable possibilities for the promotion and use of salience come to mind. The first is the body of international law concerning universal criminal jurisdiction. The second is extra-territorial corporate accountability.

Both of these transnational mechanisms for achieving justice present opportunities for international law to emerge, as he writes, by “retail” as opposed to “wholesale” (2013: 15). This is because both legal phenomena occur within individual nations that choose to entertain such actions in their courts. Thus the occurrence and propagation of these international legal activities do not depend on universal consent.

For Dworkin salience is about “snowballing” and not sudden crystallization (2013: 19)¹⁰. He writes “(a)s more nations recognize a duty to accept and follow widely accepted principles, those principles, thus even more widely accepted, have greater moral gravitational force”¹¹ (2013: 19-20). Thus “retail” jurisprudence begins to add up in a way that builds momentum for legal doctrines powered by salience.

“International law has long recognized” universal jurisdiction “for a certain set of serious crimes” (Ku 2013: 835). The practice of universal jurisdiction over individuals is inexorably tied to the concept of *jus cogens*. Universal jurisdiction attaches to nefarious acts that all the world considers to be grave wrongs such as piracy, torture and genocide. *Jus cogens* is rooted in salience because it comes from the idea that there are certain preemptory norms that are universal (Dworkin 2013: 20). The universality of these norms springs from widely held beliefs and morals as opposed to universal consent (Thirlway 2014: 160). Moreover, these norms trump consent because states are not permitted to jettison *jus cogens* obligations through treaties or agreements (Thirlway 2014: 160).

In addition to internationally salient substance, universal jurisdiction presents a means whereby salience can generate law outside the confines of consent. *Jus cogens* obligations are obligations owed to the entire international community. Thus any state can enforce them (Brody and Radner 2000: 344). Therefore, the prosecution, sentencing and incarceration of violators of preemptory norms can all take place within the borders of the state exercising universal jurisdiction. This means that the jurisprudence of universal jurisdiction has the freedom to develop without seeking the formal consent of the international community. Even so, courts must be cognizant and engaged with the international norms at play in the jurisprudence of universal jurisdiction as they navigate, apply and mold the law. Thus juridical action arising within instances of universal jurisdiction has an obligation to reflect widely held practices, norms and principles (i.e. salience).

Finally, the emergence of the law of universal jurisdiction is protected by salience. When a state practices universal jurisdiction it runs the risk of disrupting the international order. The shield that protects states from international consternation for practicing universal jurisdiction is moral. Universal jurisdiction is rooted in a universally immoral act. The moral weight of a grave breach offers the cover needed to unilaterally practice universal jurisdiction.

Extra-territorial corporate jurisdiction¹² shares common ground with universal personal jurisdiction. At its core, extra-territorial corporate jurisdiction is about holding the universal villain accountable. However, in this case the villain is a corporation (Nolan, Posner and Labowitz 2014: e48-50).

Matters arise where a transnational corporation performs a bad act in a state and the claimant is unable to effectively

bring the claim in the situs state. The UN Guiding Principles on Business and Human Rights provide that states are to “provide access to judicial remedies for human rights violations, even those that have occurred outside the territory of the state by a corporation domiciled in that state especially where claimants ‘cannot access [their] home State courts regardless of the merits of the claim’” (McCorquodale 2013: 835).

There are additional reasons why extra-territorial jurisdiction might be justified. Perhaps, the laws of the situs state do not allow for the extent of liability that will create a disincentive substantial enough to prevent such behavior in the future. Perhaps the legal system in the situs state is susceptible to abuse or can be rendered dysfunctional by those with considerable financial resources. Perhaps the situs state does not have the laws needed to stop or punish the corporate behavior at issue or the laws that are in place are ridden with legal loopholes¹³.

Like universal jurisdiction, extraterritorial corporate jurisdiction occurs in isolated states. Thus it is not dependent on uniform consent.

Extraterritorial corporate jurisdiction is a legal phenomenon in need of salience. Widely held principles as to when it is appropriate to exercise extraterritorial jurisdiction would add clarity and value to the international legal order. There needs to be a broadly accepted understanding as to when extraterritorial corporate jurisdiction is appropriate and how it should be conducted. The following list of non-exhaustive questions could stand to benefit from the analytical leaven of salience: *a)* What sort of corporate activities are proper for the exercise of such jurisdiction? *b)* Are there certain wrongs that should know no territorial bounds such as environmental harms that can some impact on the entire planet? *c)* What types and levels of corporate abuse warrant extraterritorial accountability? *d)* How should the potential for legal action in the situs state be assessed for making possible determinations about complementarity? *e)* What level of connection, if any, does a corporation need to have with a forum state seeking to establish extra-territorial jurisdiction? *f)* What standards should be applied to see that damages and other remedies awarded in a court of another state are used to assist the situs state and its citizens? *g)* What should be done to ensure that extraterritorial jurisdiction is handled in an orderly and non-duplicious manner?

These questions are pertinent to the extra-territorial adjudicative process. As is the case with universal personal jurisdiction, none of these questions require the consent of the international community in order to emerge and develop through individual judicial proceedings. However, while consent might not be necessary, there is a practical need to develop commonly held and practiced standards that answer those questions. We see the need for widely held international standards in the *Kiobel* case¹⁴.

KIOBEL V. ROYAL DUTCH PETROLEUM CO., 569 U.S.; 133 S.C.T. 1659 (2013)

The United States Supreme Court case of *Kiobel v. Royal Dutch Petroleum Co.* is an object lesson in the challenges and needs presented in matters of extraterritorial corporate accountability. *Kiobel* entails a balancing of “[t]he need to redress horrific violations of the most fundamental human rights, and on the other, the view that many of these cases have little to do with the United States, may impose foreign policy costs, and may not enhance net social welfare for those most harmed” (Wueth 2014: 620).

The facts in *Kiobel* shock the conscience. Wuerth recounts out the facts as follows:

Kiobel arose out of conduct that took place in Ogoniland, Nigeria, an oil-rich region of the Niger delta. During the early 1990s, residents of Ogoniland protested the environmental effects of oil extraction, including gas flares and the construction of pipelines. The Nigerian government attempted to quell the unrest, sometimes violently, and in 1994, several Ogoni leaders were murdered. Nine Ogoni were sentenced to death for the murders in a 1995 trial that was widely viewed as lacking basic procedural protections. Among those sentenced to death and subsequently executed was Ken Saro-Wiwa, an author and outspoken leader of the Ogoni. His quickly became a cause célèbre.

Events in Ogoniland provided the basis for several lawsuits filed in the United States against an individual and entities related to the corporation now known as Royal Dutch Shell. These cases include *Kiobel*. The complaint alleged that Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in England), and Shell Petroleum Development Company of Nigeria (incorporated in Nigeria) aided and abetted the Nigerian military in committing extrajudicial killing, torture, crimes against humanity, and other human rights violations.

The plaintiffs, including Esther Kiobel, whose husband was one of the men sentenced to death and executed in 1995, now live in the United States, where they have been granted political asylum (footnotes omitted) (Wueth 2014: 603-04).

Esther Kiobel was the lead plaintiff in the case. The matter was brought under the Alien Tort Statute (28 U.S.C. §1350, hereinafter referred to as the “ATS”), a United States domestic law enacted in 1789. The ATS reads in part as follows: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

The *Kiobel* case is representative of a growing wave of ATS cases brought at the turn of the millennium. While ATS cases had been “generally brought by public interest organizations against individual defendants, frequently former government officials with few resources,” this wave “focused increasingly on corporate defendants such as Barclay National Bank, Chevron, Del Monte, Ford, IBM, Rio Tinto, Talisman Energy, and Unocal, all of whom allegedly aided and abetted foreign governments’ human rights violations such as slave labor, extraordinary rendition, apartheid, war crimes, and torture”. These were complex cases brought by high-powered law firms against corporations with deep pockets. As the stakes of ATS cases started to rise, the U.S. “government began to advocate for the dismissal of many suits (including some against individuals) based on the presumption against extraterritoriality, foreign policy considerations, and the rejection of aiding and abetting liability” (Wueth 2014: 604).

This resistance had already resulted in some legal pushback prior to *Kiobel*. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (hereinafter referred to as *Sosa*) a Mexican citizen brought an ATS claim arising out of an abduction that took place in Mexico with the involvement of the U.S. Drug Enforcement Agency. The U.S. Supreme Court “held that a contemporary ATS claim must ‘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’ of piracy, safe conducts, and assaults against ambassadors” (*Sosa* 725, 731–32). The opinion advised applying “judicial caution” when recognizing ATS causes of action, noting the potential negative impact of such actions on foreign relations (*Sosa* 727-28). Ultimately the *Sosa* court rejected the

claims on the grounds that they did not sufficiently violate specific and established norms of customary international law.

The *Sosa* test presented challenges for the *Kiobel* plaintiffs. Some of the *Kiobel* claims, including forced exile, failed to survive the *Sosa* test at the district court level¹⁵. In addition, the Nigerian corporate defendant was dismissed from the case based on a lack of personal jurisdiction. The district court's dismissals were upheld at the circuit court level and the plaintiffs petitioned for and were granted certiorari before the U.S. Supreme Court.

The procedure of *Kiobel* before the U.S. Supreme Court was somewhat unusual. It involved two stages of briefing. The first stage primarily concerned corporate liability. After initial oral argument, the Court directed the parties to prepare a second briefing as to “[w]hether and under what circumstances the [ATS] 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” (*Kiobel* 1663). The second briefing elicited amicus briefs from Argentina, Germany, the Netherlands, the United Kingdom, the United States, and the European Commission along with various scholars, non-profit organizations, and corporations (Wueth 2014: 606).

The Roberts majority held that there was a wide-ranging presumption against extra-territorial jurisdiction under U.S. law. The specific holding in *Kiobel* was as follows: “[o]n the facts of the case – the relevant conduct took place within the territory of a foreign sovereign, the claims did not ‘touch and concern’ U.S. territory, and the foreign defendants had no more than a ‘corporate presence’ in the United States” thus “the Court held that the presumption [against extra-territoriality] was not overcome” (*Kiobel* 1669).

In terms of constitutional analysis, the Roberts majority gave weight to the “perception that Congress ordinarily legislates with respect to domestic, not foreign matters” (*Kiobel* 1672). In terms of policy grounds, Chief Justice Roberts pointed to the potential for “diplomatic strife” and the potential that other nations might “hale our citizens” before their courts based on reprisal or precedent (*Kiobel* 1668–69). In his concurrence, Justice Breyer voiced similar concerns about the need to “minimize the international friction” that a more liberal interpretation of the ATS might engender (*Kiobel* 1674).

In terms of Dworkin’s theory of salience, *Kiobel* appears to be a lost opportunity (Parrish 2014: e19). The majority affirmed the holding in *Sosa* that the ATS is purely jurisdictional

and that it leaves federal courts with the power to recognize causes of action based on the customary international law of 1789. If one would take a certain originalist approach to the law, one could imagine the court looking to the Westphalian salience-based tradition of establishing customary law in ATS actions as opposed to the modern day consent model epitomized by Article 38(1) of the ICJ Statute. Discerning international law was more of a matter of discerning the *ius gentium* in 1789 than applying positivist constructs.

Yet the Roberts majority does not exploit the opportunity to apply salience presented by the interpretive mandate of the ATS. Instead, the majority's emphasis on foreign policy concerns results in the expansion of the presumption against extra-territoriality to include the assessment and determination of substantive claims under the *Sosa* test. Roberts writes that the "danger of unwarranted judicial interference in the conduct of foreign policy" is increased in the context of the ATS "because the question is not what Congress has done but instead what courts may do" (*Kiobel* 1664).

The Roberts majority wanted no part in the realization of the sort of freewheeling thought experiments proposed by Dworkin where courts have the power to interpret international law based on salience. This desire to prevent such eventualities is further demonstrated by the severely originalist test for establishing actionable international norms in *Sosa* which is limited to established 18th-century norms. Under this test courts must look to the law of 1789 to determine what torts can be deemed to violate the law of nations under the ATS. Thus originalism plays the role of limiting the creation of international law.

Kiobel finds itself in the scholarly spotlight because it is an American Supreme Court case. The United States is home to a high profile legal system and its landmark opinions are the subject of extensive scholarship. Also, the potential for "jaw dropping" jury verdicts in the United States makes American jurisdiction especially relevant in the context of corporate incentives. While the International Court of Justice is assessing a \$95,000 judgment in the celebrated *Diallo* case (Giorgetti 2012), American ATS cases were making news for \$15 million dollar settlements.

Yet, in the context of international legal significance, the *Kiobel* case is a bit of red herring. *Kiobel* concerns a peculiarly American interpretation of a relatively ancient and laconic American statute. Notably, *Kiobel* court did not rule out the

possibility of universal civil jurisdiction in the United States; it simply held that the U.S. Congress did not intend to create universal civil jurisdiction in the ATS. Attempts to forge international applications to the holdings and analysis in the case are arguably misplaced.

In many ways *Kiobel* speaks to the utility of salience in the context of international law concerning extra-territorial jurisdiction. First, *Kiobel* demonstrates the relevance of international relations in matters of jurisdiction. The concerns of Roberts and Breyer speak to the need for a regime of extra-territorial jurisprudence that cuts across borders. Arguably some use and reference to salience is required to limit the potential for negative political ramifications. Second, the *Kiobel* case, like the *Sosa* before it, demonstrates the recognition of 19th Century salience-based international customary law and the potential of such law to be interpreted by courts. Moreover, in the case of Justice Breyer, at least one member of the bench goes as far as explicitly urging the “consideration of ‘international jurisdictional norms’ to help construe the scope of the ATS” (Basille 2014: e13). Third, the *Kiobel* case, at least in word if not deed, affirms the legal legitimacy of universality as previously established in the *Sosa* case. The Supreme Court *in Kiobel* recognizes that there are certain acts for which people and corporations incur greater jurisdictional accountability and that the determination as to which acts warrant expansive jurisdiction can be informed by international law.

Despite the result in *Kiobel*, there is reason for hope among those concerned about the potential of transnational corporations to act with impunity. Recent developments in Europe demonstrate reflect a growing willingness to the entertaining extra-territorial claims against transnational corporations. These developments present opportunities for salience to form the legal landscape. The next section tracks these developments in extra-territorial corporate accountability.

THE EMERGING INTERNATIONAL LANDSCAPE OF EXTRA-TERRITORIAL ACCOUNTABILITY

There are several recent examples of laws and court cases in Europe that provide a legal forum for holding corporations legally accountable for wrongful acts committed in other nations. For example “[a]t the EU level, the Brussels I Regulation (Brussels I) opens member state courts to civil claims in

tort, even when the damage occurred outside of the European Union and the victim is a non-national, as long as the ‘event giving rise to the harmful event’ occurred within a European forum jurisdiction” (Kaebe and Scheffer 2013: 854). In fact, “[a]t least ten EU member states allow for universal civil jurisdiction on a ‘necessity basis’” (Kaebe and Scheffer 2013: 853). Kaebe and Scheffer describe the European Union as taking “a progressive approach that looks to international custom to reinforce legislative will, rather than juxtaposing custom and legislative mandates” (2013: 853).

Those learning of *Kiobel* might come away with the impression that Europe is against extra-territorial corporate jurisdiction. After all, British and Dutch companies and their home nations opposed US jurisdiction under the ATS. However, the European Commission also entered the fray in *Kiobel* and their amicus brief opposed the position asserted by the British and the Dutch.

The European Commission “stressed the need to ensure ‘an effective remedy for repugnant crimes in violation of fundamental human rights,’ which helps to defeat impunity”. The Commission ultimately “concluded that ‘the United States’ exercise of universal [civil] jurisdiction [with no U.S. nexus of the parties or conduct] under the ATS is consistent with international law in accordance with these well-established constraints’ that stand apart from any presumption against extra-territoriality”.

Paradoxically, both the Netherlands and the United Kingdom are home to recent legal developments that improve the prospects for extra-territorial jurisdiction over corporations for human rights violations. According to Jägers and others “several recent rulings in the Netherlands suggest that Dutch courts may accept jurisdiction with extraterritorial scope, including even foreign-cubed¹⁶ cases” (Jägers et al. 2014: e38). Moreover, in the Netherlands “it is possible to hold corporations liable for human rights violations under domestic tort law” (Jägers et al. citing Article 6:162 of the Dutch Civil Code [Burgerlijk Wetboek] and Article 51 of the Dutch Criminal Code [Wetboek van Strafrecht]). In the United Kingdom a High Court recently accepted a case concerning land evictions in Cambodia.¹⁷

Europe is home to emerging salience for stakeholder-centric corporate models and the end of corporate impunity. There is growing appreciation of the fact that stakeholder returns are an inadequate and impoverished basis for assessing

corporate actions. Thus “its governments, parliaments, and courts are discovering ways to impose greater degrees of liability on corporations that are engaging in or are complicit in egregious violations of international law outside of their home jurisdiction” (Kaeb & Scheffer 2013: 854).

Even so, although there are laws and structures in place to prevent the impunity of corporate actors, there is relatively little civil litigation brought against corporations based on tort liability in Europe. Various reasons for the lack of activity are suggested. First, the damages tend to be lower so the incentive to bring such actions is reduced (McCorquodale 2013: 850). Also, American legal features such as contingency fees, punitive damages and class actions that facilitate and incentivize the bringing of such actions, and a culture that views civil remedies as appropriate means for addressing wrongful conduct are often absent or diminished within European legal systems (Kaeb & Scheffer 2013: 855).

THE EMERGENCE OF UNIVERSAL CORPORATE MORALITY AND CORPORATE SOFT LAW

This section covers two distinct but related developments in corporate global culture that are relevant to Dworkin’s salience. The first is the development of widely held beliefs about corporate morality. The second is the rise of soft law pertinent to international corporate activity.

As discussed above, Dworkin’s salience involves the progressive and collective emergence of law based on widely held principles. Therefore, commonly held precepts are necessary elements of legal development through salience. In the previous section, reference was made to the European stakeholder approach to corporate accountability and its impact on salience. This moral underpinning drives the development of the European law on extra-territorial corporate jurisdiction and other matters of corporate law. This section presents emergent principles that apply in transnational corporate contexts. Widely held beliefs about corporate rights and wrongs can provide the gravitational force needed for salience to generate international law pertaining to transnational corporate accountability.

Many corporations emphasize the importance of moral standards that inform and guide conduct. This is exemplified by Google’s moral aphorism “don’t be evil.” This plainspoken

objective is hard to disagree with. It is difficult to imagine a high-profile multinational corporation that is outwardly indifferent to being evil.

So perhaps “don’t be evil” would seem to be a good place to start. But what is corporate evil? Cynics might posit that Google left their guiding standard open-ended for selfish reasons. Perhaps their standard of “don’t be evil” was flexible enough to initially permit them to profit from pornography advertising and later decide to stop benefiting from such ads.

For the purpose of establishing corporate salience there are other more specific “e” words that would seem to be acquiring global moral resonance. One of these other “e” words is “exploitation.” Public scorn awaits those who are seen to be exploiting the poor and vulnerable. We can think of many modern examples such as the criticism large corporations in the fashion and apparel industry have received for using exploiting child labor. The reputation that Halliburton earned in the wake of the second Iraq war is also indicative of the wider salience condemning transnational exploitation.

Another “e” word that elicits broad-based contempt is “environmental” as in “environmental degradation”. Environmental concerns are central to Dworkin’s call for salience. Today’s global environmental movement continues to gain traction. From preserving rain forests to limiting carbon emissions, pro-environmental objectives are becoming widely held norms.

Hans Haugen addresses the principles of corporate conduct in other nations. Haugen believes that corporate actors doing business in foreign states must do more than just not be evil (2011). Thus Haugen’s guidelines for corporate morality shares common ground with Dworkin’s principle of mitigation. For Haugen the potential of sovereignty to enable, facilitate and protect corporate wrongs in the globalized and imbalanced international business environment must be addressed. Haugen discusses the duty not to do harm and the principle of diligence. He asserts that translational corporations in developing states have heightened responsibilities. In particular “enhanced due diligence must be exercised in states with weak government institutions” (2011: 441). Haugen believes that relevant OCED standards should inform the development and application of transnational corporate standards (2011: 442).

The OCED standards bring us to the issue of soft law. Soft law is law whose “binding quality is somehow missing or attenuated” (Thirlway 2014: 164).

Soft law is on the rise in the context of corporate responsibility. Considerable strides have been made in promulgating standards, principles and guidelines in the context of international business activities. However, this soft law has its limitations. For example, in the context of the UN Guiding Principles on Business and Human Rights, Nolan and others observe:

While the UN Guiding Principles on Business and Human Rights both affirm that companies have a responsibility to respect rights and call on governments and companies to develop meaningful remedies when rights are violated, a lack of clarity or consensus still exists about what these concepts mean in practice. Important work needs to be undertaken to provide practical guidance clarifying what “responsibility to respect” means in practice and what remedies are available to those who have been harmed. In the absence of a “hard” legal regime that compels global companies to act or not act in a particular way, the burden is falling on others to develop a series of practical remedies that will hold corporations accountable to human rights standards and that go beyond what is required by local laws (Nolan et al. 2014: e49-50).

The pressing challenge for soft law is how it can become more than mere words. Thirlway writes that “it has been convincingly argued that in a rapidly changing and developing world order, soft law is a vital intermediate stage towards a more rigorously binding system, permitting experiment and rapid modification” (2014: 164). Dworkin’s theory of salience presents an empowerment opportunity for soft law. Salience can provide a means for the soft law to transition into binding law through court precedent.

KEY POINTS FOR DEVELOPING ECONOMIES IN THE CONTEXT OF EXTRA-TERRITORIAL CORPORATE ACCOUNTABILITY

Issues that concern developing nations are morally loaded. There are widespread concerns about the exploitation of developing nations in the post-colonial world. Principles of human dignity, human development and sustainability are also of special relevance in the context of developing states. Thus

salience has the raw material in terms of moral content to imbue the emergence of law.

One of the primary collective issues for courts and legislatures is deciding when state courts should entertain non-situs cases. The standard course is to defer to the situs state court or a regional court with jurisdiction over the situs state. However, according to Mohan a new post-*Kiobel* paradigm is emerging where “(p)lausible domestic and regional processes should be the initial juridical focus when seeking redress for business-related human rights abuses” and only after “such processes are exhausted or prove ineffective, recourse can be sought through transnational human rights litigation against transnational corporations and before foreign courts that have a nexus to the claim” (2014: e30). International law has developed a principle of complementarity in the context of non-national courts. This principle can be folded into the doctrine of salience to ensure that national courts and self-policing remains the first option. Salience is well equipped to graft principles grounded in the best interest of developing states into the development of the global jurisprudence of extra-territorial corporate jurisdiction.

Not all corporations are villains. In fact, multi-national corporations often hold themselves to higher standards in environmental compliance and labor standards than the domestic standards where they do business. If international corporations are held to higher standards and exposed to greater liability than situs-state businesses the result is a competitive disadvantage. Also, the threat of universal jurisdiction could dampen financial incentives that bring foreign-owned industry to the developing world. The net result could be detrimental to economic development.

Universal corporate jurisdiction can be a double-edged sword for developing nations. Extra-territorial accountability can chill foreign-sourced investment and hamper the right to development. (Seck 2012). The law of extra-territorial corporate accountability jurisprudence should account for the right to development of situs states. Developing states should have a say as to whether or not they are actually being exploited.

Universal corporate accountability is a highly political and complex arena. This is not an area of law where express sovereign agreements are likely to emerge. However, individual court decisions can serve as an incremental mechanism for development. Dworkin’s salience offers individual courts a workable theoretical means for finding and developing inter-

national law. Salience calls on courts to apply the widely held principles of non-exploitation and state sovereignty to develop and apply emergent jurisprudence that gives sufficient deference to the right to development.

THE POSSIBILITY OF SALIENCE IN THE LAW OF EXTRA-TERRITORIAL CORPORATE ACCOUNTABILITY

Dworkin's principle of salience might not be politically viable with respect to early 21st Century sovereign states, but it appears to be well suited to serve as a new unifying approach to extra-territorial corporate accountability.

First, Dworkin's salience offers a theory of legal generation and recognition that prevents bad actors from hiding behind the unanimity required by consent-based international law. Thus corporations that violate widely held moral norms can be held accountable. They cannot hide behind the consent of states that have self-interested reasons not subject their corporations with restrictions that the majority of people and states consider necessary.

Second, salience in the area of extra-territorial corporate accountability can help to discourage and nullify corporate gamesmanship. It is crucial that people in developing states have the power to reach parent corporations. The nature of the corporate form enables companies to play "shell games" in order to protect their assets from exposure. Per Sanger "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" (2014: e24). This is an encouraging development that speaks to the potential benefit of court-generated law in this context.

Third, extra-territorial jurisdiction is an internationally occurring phenomena that is well suited for salience. It has the potential to occur by "retail" as opposed to "wholesale." In light of the European developments discussed Section 5 above, the international legal environment appears ripe for the "snowballing" of international corporate accountability standards. Moreover, the commonalities between universal jurisdiction and extra-territorial corporate accountability serve to limit the political backlash that could result from the development of international law without the formal consent of nation states. Over the years states have become accustomed to the idea of the court-by-court and state-by-state development of

extra-national jurisdiction. Thus the judicial development of this legal phenomenon should be less unsettling to sovereign states.

Fourth, the *Kiobel* majority speaks to the need for an orderly international approach to the issue of transnational corporate jurisdiction. Salience has the potential of providing the world with this order. Salience is not mere international pluralism (Krisch 2010: 306-07). It entails some degree of the freedom found in legal pluralism. However, that freedom is tempered with an overriding commitment to appreciating and building a common legal order. A salience-based approach calls upon courts to refer to the laws and court decisions of other nations in order to work toward the development of a consistent body of international law. In this respect, a salience approach mitigates against the political concerns articulated by Justices Roberts and Breyer in *Kiobel*.

Fifth, the presence of principles and precepts in emergent soft law can serve to form salient international principles with legal ramifications. Thus the growing body of soft law can give courts the guidance they need to discern the bedrock of salience that can guide their development and application of the law.

Sixth, salience can serve as a check on the abuse of transnational corporate jurisdiction as it occurs in isolated states and courts. Salience can serve as the theoretical mean through which the international community of courts can develop a body of law that creates widely accepted standards as to when and how extra-territorial corporate jurisdiction should be applied.

CONCLUSION

To some degree Dworkin's theory of international law is a desperate act. It is a dying philosopher king's attempt to empower international law to meet the ominous problems presented in an increasingly connected and fragile world. As Dworkin writes:

In a world of strong and increasing economic interdependencies, however, people's lives may be more affected by what happens in and among other countries than by what their own community decides. Dignity seems to require that people everywhere be permitted to participate in some way – even if only in some minimal way – in the enactment and administration of at least those policies that

threaten the greatest impact on them. An unmitigated Westphalian system makes that impossible (2013: 18).

Dworkin fears that desperate necessity or disaster will eventually precipitate the rise of non-consent based mechanisms and means for creating law. Per Dworkin “a time may come, sooner than we suppose, when the need for an effective international law is more obvious to more politicians in more nations than it is now”. Emergent threats such as “(c)limate change, for example, may provoke that shift in opinion. It would be a shame if lawyers and philosophers had not improved the jurisprudential discussion of international law before that day arrived” (Dworkin 2013: 15).

Extra-territorial corporate accountability is an ideal legal laboratory for the use salience of as a source of international law. As noted above, this corpus of law can develop on “re-tail” basis within sovereign states.

Not only is the development of law through salience possible in the context of extra-territorial corporate liability, it is needed. Although he makes no reference to multi-national corporations, many of the challenges brought out by Dworkin apply to multi-national corporations. The challenges are particularly daunting in the context of multinationals operating in the developing world. This is a context where Dworkin’s principle of dignity can serve as a guiding generative principle in the development of international law.

Moreover, courts that develop principles of extra-territorial corporate accountability must be aware of the wider political and economic implications of their decisions. Courts must look outwardly and think collaboratively as they develop this law. Salience is an outward looking and principled approach that can nurture such approaches.

Uncoordinated and pluralistic legal development presents the potential for disorder, inequity and strained international relations (Parrish 2014: e20). As noted by Higgins, “(t)here is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances” (1994: 56). Dworkin’s doctrine of salience offers a conceptual approach that has the can guide the coordinated emergence of legal standards and strengthen corporate legal accountability. Salience has the potential to create law in an evolving manner that will not jolt and shock the existing legal order.

Admittedly this paper offers a somewhat diminished assessment of Dworkin's salience. Perhaps Professor Dworkin would be disconcerted to see his doctrine lying on the cutting room floor so soon after its submission to the wider world. Yet, one can hope that he would be pleased if his theory of salience found a pragmatic foothold in the context of transnational corporate accountability. Certainly transnational corporate actors are key stakeholders in the "prisoners dilemmas" that concerned Dworkin.

Although this application of Dworkin's theory will not address the problems of a dysfunctional Security Council, it could produce a new world order of corporate responsibility that would be more orderly, more just and more effective. Meanwhile, transnational corporate accountability can serve as a hot house where Dworkin's theory of salience can grow and develop. If it can thrive in this context, salience could work its way back to its former place at the heart of international law.

NOTES

¹ Dworkin died when the essay was in the last stages of revision. Dworkin's colleagues at New York University Professors Liam Murphy and Samuel Scheffler helped to finalise the essay for publication.

² This is not to say that Dworkin is an adherent to the natural law school of legal jurisprudence. He did not consider natural law to be a legitimate source of law or guide for legal interpretation (1985; 1978: 166). He did not believe that moral intuition was rooted in some fixed and objective truth of what is right and wrong (1978: 160). He was particularly dismissive of individual morality or morality rooted in religious convictions as a direct source of law or as a means for pointing to a law that can be divined (1978: 251). Yet, Dworkin attributed a constitutive value in intuitive beliefs about law and justice. He was not dismissive of presence and significance of the "innate categories of morality common to all men, imprinted in their neural structure, so that man could not deny these principles short of abandoning the power to reason about morality at all" (1978: 158-59). He saw moral intuition of people as part of the content that should be considered when constructing a system of justice (1978: 160). He saw his task as a legal philosopher as one who built a bridge between legal and moral theory (1978: 13, 149). He challenged the version of legal positivism that fails to appreciate the role of standards rooted in principles and policies (1978: 22). Significantly for Dworkin, the moral element that he sees as a legitimate consideration in law and political theory are not morals in the "anthropological sense, meaning to refer to whatever attitudes the group displays about the propriety of human conduct, qualities or goals" instead his moral element refers to convictions resulting from rationalizations built on widely held principles and consequential analysis that concerns the best interests of the community (1978: 248-58).

³ Dworkin defined legal positivism in the context of rights as "the theory that individuals have legal rights only insofar as these have been created by explicit political decisions or explicitly social practice" (1978: xii). He criticised this theory as an inadequate conceptual theory of law in Chapters 2 and 3 of *Taking Rights Seriously*.

⁴ See for example the communications from these organizations appearing on their websites at <https://www.amnesty.org/en/what-we-do> and <https://www.icrc.org/en/what-we-do/humanitarian-diplomacy-and-communication>.

⁵ This is not to say that he switched from the “law as principle” to “law as pragmatism” camp. Yet, clearly Dworkin’s consequentialist concerns for the fate of humanity and the planet serve as motivations for Dworkin’s call for the legal recognition of salience.

⁶ Dworkin wrote that the constructive model “treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed, as if a sculptor set himself to carve the animal that best fits a pile of bones he happened to find together. This ‘constructive’ model does not assume, as the natural model does, that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way. It does not assume that the animal it matches to the bones actually exists. It makes the different, and in some ways more complex, assumption that men and women have a responsibility to fit the particular judgments on which they act into a coherent program of action, or at least, that officials who exercise power over other men have that sort of responsibility (1978: 160)”.

⁷ He asserts that “the charter and institutions of the United Nations are best understood not as arrangements binding only through contract or on signatories but as an order all nations now have a moral obligation to treat as law” (2013: 20). However, this mid-20th Century development is the closest he gets to providing a modern example of the recognition of salience as a source of binding international obligations.

⁸ Dworkin proposes the following “Imagine that the General Assembly has adopted a resolution with the following substance: member states are forbidden, acting unilaterally or in groups or regional organizations, to threaten or use military force without the authorization of the Security Council, unless a majority of the Security Council has voted to authorize the intervention and the International Court, pursuant to its authority to issue advisory opinions upon the request of the General Assembly, declares that the actions of the regime against which force is proposed constitute crimes against humanity” (2013: 25).

⁹ He describes a hypothetical “four majorities” system as follows: “Suppose an international conference is convened in which almost all nations, though perhaps not including all the permanent members of the Security Council, agreed to a General Legislative Convention. This Convention authorizes the United Nations General Assembly to adopt legislation addressed to global dangers requiring coordinated international action, and stipulates that such legislation would be enacted if it received votes representing states that hold a majority of the members’ total populations, a majority of votes in the General Assembly, a majority of votes in the Security Council, and a majority of votes among the permanent members. Legislation so enacted would automatically be submitted to the International Court of Justice, which would apply principles of subsidiarity, as these have been developed within the European Union, for example, to determine whether such legislation was sensibly regarded as of international dimension or was a matter properly left to national determination. I suggest this voting formula – four-majorities together with judicial review – only as an example of a new institutional structure that might be created by broadscale treaty making followed by salience” (2013: 28).

¹⁰ Although Dworkin writes that “doctrines with crystallize over time” (2013: 30) at the conclusion of the essay, this form of crystallisation is distinguishable from the instantaneous realisation of consent reified through the positivist fiction of Article 38(1)(b) of the ICJ Statute. He contests the legal fiction of instant sudden crystallization (2013: 7, 20).

¹¹ Dworkin also used gravitational force as a metaphor for describing the existence and force of law in his discussion of precedent and principle in *Taking Rights Seriously* (1978: 110-122).

¹² Extra-territorial jurisdiction is a sub-category of what is known as “prescriptive jurisdiction” which is a means through which a state can attach jurisdiction to a matter. The traditional grounds for establishing prescriptive jurisdiction are (1) territory; (2) nationality; (3) conduct that has an effect on territory; (4) foreign conduct that is directed against the security of the state or against a limited class of other state interests; and (5) certain crimes of universal concern. Restatement (3rd) of the Foreign Relations Law of the United States (1987) §§404, 404.

¹³ The prevailing trend in Europe in the context of extrajudicial corporate accountability actions is to apply the law of the situs state with limited exceptions (McCorquodale 2013: 847; Sanger 2014).

¹⁴ One could fairly criticize the use of *Kiobel* as the lead discussion case in a paper arguing for the use of salience in transnational corporate accountability cases. After all, in *Kiobel* the U.S. Supreme Court chose not to apply salience. However, the purpose of this extensive treatment of *Kiobel* is not to prove a positive with a negative. Instead, the purpose is to show how salience serves as an effective theoretical means for a domestic court to answer questions of jurisdiction and would effectively address the concerns that the Roberts majority cite in *Kiobel* as their basis for refusing to exercise jurisdiction. Moreover, although *Kiobel* is technically a domestic case, it has clear global significance as demonstrated by the amicus briefs it received from nations, organizations and entities all over the world.

¹⁵ The prior case history of the *Kiobel* case is: *Kiobel v. Royal Dutch Petroleum Co.*, 456 F.Supp.2d 457, 464 (2006), aff'd in part, rev'd in part, 621 F.3d 111 (2nd Cir. 2010), aff'd, 133 S.Ct.1659 (2013).

¹⁶ Foreign cubed cases are cases where, relative to the state of the court faced with the prospect of exercising jurisdiction over a matter, a foreign defendant committed alleged tortious acts against foreign defendants in foreign countries.

¹⁷ Statement of Claim, *Song Mao v. Tate & Lyle Indus. Ltd.*, Claim No. 2013, Folio 451 (EWHC (Comm), Mar. 28, 2013) (QB).

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