An evident flaw in international law is its failure to regulate the conduct of one of the world’s most powerful actors: the multinational corporation. Fred has long recognized this fact. In 2004, as the International Law Association’s Director of Studies, he ensured that the plenary session of the Association’s Berlin Conference was devoted to the theme Corporate Social Responsibility and International Law. This was then a far-sighted choice of topic. The following year UN Secretary-General Kofi Annan appointed John Ruggie as his Special Representative on Business and Human Rights. In 2011, the UN Human Rights Council endorsed Ruggie’s Guiding Principles on Business and Human Rights. The Guiding Principles remain the principal global framework applicable to corporations. They suggest that corporations have a moral responsibility towards society (“global standard of expected conduct”) but not a legal obligation to respect human rights. Fifty years after Wolfgang Friedmann first suggested that private corporations should be regarded as subjects of international law mainstream textbook writers can therefore legitimately maintain that corporations do not have international legal personality. Multinational corporations continue to be regulated merely under the domestic laws of the states in which they operate.

The picture is similar when it comes to judicial remedies against abuses committed by multinational corporations. In the absence of international remedies, the only available remedies against corporate abuse are those under domestic law. The Guiding Principles on Business and Human Rights therefore provide rather lamely that

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.6

As will be seen below there are numerous of such barriers facing individual plaintiffs.

In this contribution I will concentrate on civil law (tort) remedies and leave aside remedies under criminal law. The exercise of civil law remedies may not only result in compensation for the victims of corporate misconduct but will also hopefully help to prevent repetition of such misconduct. It may also achieve what the UN Human Rights Council has so far failed to do; clarify the content of the required standard of corporate conduct. Civil law remedies against multinational corporations may be exercised either in the host state or in the corporation's home state. If abuses have occurred in the host state, remedies should preferably be exercised there. However, victims in these states often “have no available cause of action, or face insurmountable obstacles to bringing their claims.”7 It then makes sense if victims have access to remedies in the home state of the multinational corporation. This has been termed transnational human rights litigation.8

There is a widespread assumption among both legal scholars and human rights activists that transnational human rights litigation in response to extraterritorial corporate abuses depends on a single piece of United States legislation, the Alien Tort Statute (ATS).9 According to this school of thought, the Supreme Court's 2013 Kiobel judgment10 has interpreted the ATS in such a way that it has dealt a serious blow to the victims of corporate abuse and their lawyers because

8 The term “transnational human rights litigation” is somewhat unfortunate because many of the non-US cases are tort based and not human rights based. Halina Ward therefore coined the term “foreign direct liability litigation” but this term has not been widely adopted: H. Ward, “Governing Multinationals: The Role of Foreign Direct Liability” (2001) 18 Royal Institute of Foreign Affairs Briefing Paper.
9 The Alien Tort Statute 28 USC § 1350.
10 Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013). Together with four Dutch colleagues I submitted an amicus brief to the Kiobel Court. Brief of Prof. Alex-Geert Castermans (Leiden University), Prof. Cees van Dam (Utrecht University), Dr. Liesbeth Enneking (Utrecht University), Dr. Nicola Jägers (Tilburg University) and Prof. Menno Kamminga (Maastricht University) in support of the petitioners.