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CUSTOMARY INTERNATIONAL LAW AND ITS HORIZONTAL EFFECT? HUMAN RIGHTS LITIGATION BETWEEN NON-STATE ACTORS

*Simon Baughen**

Every December, a big *Coca-Cola* poster goes up on Hotwell Road in Bristol, United Kingdom, near where I live. Within a few days, without fail, it will have been defaced with reference to the "Killer *Coke*" campaign.[1] Then every year, I tell my daughters about the latest developments in the Alien Tort Statute ("ATS");[2] in 2013, there was a lot to tell. In this Article, I want to develop the theme of human rights treaties, which forms Chapter Six of Professor Joel P Trachtman's book *The Future of International Law: Global Government*.[3] I will also look at the potential horizontal effect of customary international law in the human rights field. The *Coke* case was an ATS case involving alleged complicity of a *Coca-Cola* licensee in violation of human rights in Colombia[4]—a claim in a national court by a private party, against a private party, based on a violation of customary international law. I want to consider whether such claims are purely a U.S. phenomenon, whether such claims are likely to fade in the future given the United States Supreme Court's decision in *Kiobel*,[5] or whether such claims outline the

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1. Ray Rogers, *Killer Coke*, THE CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/ (last visited Jan. 8, 2014).

2. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Alien Tort Statute, 28 U.S.C. § 1350 (2004). Until 2004, the Alien Tort Statute was known as the Alien Tort Claims Act ("ATCA"). *Id.*

3. JOEL P. TRACHTMAN, *Human Rights*, *in* THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT (Cambridge Univ. Press 2014).

4. Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1348–49 (S.D. Fla. 2003).

5. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

basis of a new, universal form of civil liability based on violations of customary international law.

I would like to start with a brief look at the ways in which international law can creep into domestic courts, such as those of the United Kingdom. First, it may form the basis of claims by private parties against states through regional human rights treaties. The Human Rights Act of 1998 provides: "It is unlawful for a public authority to act in a way which is incompatible with a [c]onvention right."[6] Further, it allows violations of the European Convention on Human Rights to form the basis of proceedings against a United Kingdom public authority.[7] Examples of such actions have been claims for judicial review in *Al-Skeini v. U.K.*[8] and *R. (on the application of Smith) v. Oxfordshire Assistant Deputy Coroner*,[9] and for damages in *Smith v. M.O.D.*[10] All claims arose out of British military involvement in the invasion and occupation of Iraq.

Second, private parties may also obtain rights against states pursuant to the provisions of Bilateral Investment Treaties,[11] which contain investor-state arbitration provisions. These treaties between states allow each contracting state's investors the direct right to arbitrate against the other state in respect of violations of the state obligations contained in the treaty. It is common for such treaties to refer to those obligations of states to aliens that are established under customary international law, such as the prohibition on expropriation of property.[12] Under investor-state arbitral provisions, violations of such norms can allow the affected investor a direct right to arbitrate and seek

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6. Human Rights Act, 1998, c. 42, § 6(1) (Eng.).
7. *Id.* at §§ 6, 7, 8.
8. Al-Skeini v. U.K., (2011) 53 EHRR 18.
9. R v. Oxfordshire Assistant Deputy Coroner, [2010] UKSC 29, [2011] 1 A.C. 1.
10. Smith v. M.O.D., [2013] UKSC 41, [2013] 3 W.L.R. 69.
11. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (describing how private parties obtain rights against the U.S., Canada, and Mexico).
12. *See, e.g.*, Bilateral Investment Treaty, Arg.-U.K., art. 5, Dec. 11, 1990, 32 I.L.M. (1994), *available at* https://treaties.un.org/doc/publication/unts/volume%201765/volume-1765-i-30682-english.pdf. This investment treaty provides:

> Investments of investors of either [c]ontracting [p]arty shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other [c]ontracting [p]arty except for a public purpose related to the internal needs of that [c]ontracting [p]arty on a non-discriminatory basis and against prompt, adequate[,] and effective compensation . . . .

compensation from the culpable state, without having to seek compensation through state-to-state proceedings.[13]

Third, international law may creep into tort suits against states through a public policy exception. In *Kuwait Airways Corporation v. Iraqi Airways Company*, the House of Lords considered the application of the double actionability rule of conflicts of law that applied at the time of the Iraqi invasion of Kuwait.[14] Kuwait Airways sued Iraqi Airways in conversion following the transfer of its air-fleet by Resolution 369 of Iraqi law.[15] Applying that resolution would mean that the suit would not be actionable under Iraqi law and the claim before the English court would therefore fail. However, by a 3-2 majority, the House of Lords disregarded Resolution 369 on grounds of public policy because it was found to be a violation of international law. A national court could decline to give effect to legislation or the acts of a foreign state where that state was in violation of international law—namely, Iraqi Resolution 369—that purported to dissolve Kuwait Airways and transfer its assets to Iraqi Airways.[16]

Subsequently, claimants have raised public policy arguments in English cases, but with less success. In *Apostolides v. Orams*,[17] purchasers of property in the Turkish-controlled sector of Cyprus appealed an order of the English High Court registering judgments from the Nicosia district court in the Republic of Cyprus in favor of the original property owner who was dispossessed in 1974, pursuant to Article 34(1)

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13. *See* The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13, at 94 (Sept. 13); Barcelona Traction (Belg. v. Spain), 1970 I.C.J 3 (Feb. 5).

14. Kuwait Airways Corp. v. Iraqi Airways Co., [2002] UKHL 19, [2002] 2 A.C. 883.

15. The House of Lords had previously held, by a 3-2 majority, that although Iraqi Airways Company enjoyed state immunity for its acts of taking the aircrafts and removing them from Kuwait to Iraq as directed by the Government of Iraq, its retention and use of the aircraft after Resolution 369 came into force were not acts done in the exercise of sovereign authority and thus were not covered by state immunity. *See* Kuwait Airways Corp. v. Iraqi Airways Co. (No.1), [1995] 1 WLR 1147.

16. *See* dicta of Lord Cross in Oppenheimer v. Cattermole (Inspector of Taxes), [1976] A.C. 249 (H.L.) [278] in relation to recognition of a Nazi law of 1941 removing citizenship and property from German Jews who had left Germany:

> But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. In my mind, a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

Id.

17. Apostolides v. Orams, [2010] EWCA (Civ) 9; *see* Adeline Chong, *Transnational Public Policy in Civil and Commercial Matters*, 128 L.Q.R. 88 (2012).

of Council Regulation (EC) No. 44/2001. The Court of Appeal upheld the registration of the judgments, noting that the circumstances in which an English court would not enforce a judgment on the ground that it is contrary to international law were extremely narrow.[18] Unlike the position in *Kuwait Airways*, there was no suggestion that clear-cut rules of international law required non-recognition in the present case, but rather that the climate for a political settlement would be impaired by action recognizing Cypriot judgments.

Recently, in *Mutua v. Foreign and Commonwealth Office*,[19] the claimants were Kenyans who were tortured during the Mau insurgency in the 1950s and argued that a violation of the *jus cogens*[20] prohibition against torture trumped the provisions of the Limitation Act of 1980. Mr. Justice McCombe addressed this argument as follows:

> However, I accept the defendant's submission that the *jus cogens* of the prohibition of torture in international law adds nothing to the seriousness of the allegations which the court naturally takes into account in considering 'all the circumstances of the case' under section 33 of the Act.
>
> So far as international law's 'deprecation' of limitation periods in respect of torture is concerned, I can find no customary rule of international law that prohibits the imposition in domestic law of just rule of limitation in civil actions.[21]

However, he went on to hold that the claims were still in time because of section 33 of the Act.

Fourth, international law may come into suits by private parties against private parties through domestic courts. International law may be involved through the implementation of treaties which directly affect the rights and obligations of non-state parties. For

18. Apostolides v. Orams, [2010] EWCA (Civ) 9, [54].

19. Mutua v. Foreign & Commonwealth Office, [2012] EWHC 2678 (Q.B.), (2012) 162 N.L.J. 1291. The claims were settled on June 6, 2013. *See The U.K. Regrets Torture and Compensates Kenyan Victims After More Than [Fifty] Years*, REDRESS (June 6, 2013), *available at* http://www.redress.org/downloads/MauMapressrelease-060613.pdf.

20. Article 53 of the Vienna Convention on the Law of Treaties of 1969 defines a peremptory (*jus cogens*) norm as "a norm accepted and recognized by the international community of [s]tates as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 20, 1969.

21. Mutua v. Foreign & Commonwealth Office, [2012] EWHC 2678 (Q.B.) [¶¶ 156–57], (2012) 162 N.L.J. 1291.

example, the "Oil Pollution Convention," the 1969 International Convention on Civil Liability for Oil Pollution Damage (the "CLC"), is an agreement between states, which is then implemented into domestic law, that gives private parties statutory rights to claims against other private parties for loss sustained due to marine oil pollution.[22] An indirect horizontal effect may also occur under regional human rights treaties as with the development of the law relating to privacy in the U.K. The Human Rights Act of 1998, section 6(1) provides: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right," and section 6(3)(a) provides that this includes a court or tribunal. This has had an effect on how the courts of the U.K., as public authorities, apply the law of tort.[23]

However, what I want to look at is the situation where there are no such treaties. Can customary international law[24] on human rights have a horizontal effect and form the basis of an action by one private citizen against another? Plaintiffs will have to bring these suits through national courts because there is no international equivalent of the International Criminal Court for civil claims. Customary international law in itself does not create actionability. Rather, it

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22. In the U.K., this has been done through Chapters III and IV of the Merchant Shipping Act of 1995, which implements the 1992 Protocol to the CLC. *See* Merchant Shipping Act, 1995, c. 21 (U.K.).

23. In particular, the development of a right to privacy based on article 8 of the ECHR. *See* Campbell v. MGN, Ltd., [2004] UKHL 22, [2004] 2 A.C. 457. In *Campbell*, Lord Nicholls of Birkenhead stated:

> The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Chief Justice Lord Woolf has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: A v. B PLC [2003] Q.B, 195, 202, para[graph] 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.

Id.

24. Flores v. Southern Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003) (defining international human rights law as being "composed only of those rules that [s]tates universally abide by, or accede to, out of a sense of legal obligation and *mutual* concern").

creates binding norms which can then enter domestic legal orders that incorporate customary international law.[25]

America Leads the Way: Customary International Law as a Cause of Action in the Federal Courts of the United States

I now turn my attention to the United States where there has been a torrent of such claims coming through the federal courts since 1980. The reason for this is the Alien Tort Statute of 1789, which provides: "The district courts shall have original jurisdiction of any civil action by an alien[26] for a tort only, committed in violation of the law of nations or a treaty of the United States."[27] The statute was rediscovered in 1980 in

25. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984). Per Judge Edwards:

> As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action-and it is hard even to imagine that harmony ever would characterize this issue.

Id.

26. The ATS grant of jurisdiction is limited to claims by aliens. On March 12, 1992, President George H.W. Bush signed into law the Torture Victim Protection Act of 1991 (hereinafter "TVPA") which provides in section 2:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation[—](1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act § 2(a), 28 U.S.C.A. § 1350 (1991). This allows claims for torture to be made by any person, of whatever nationality. Claims under the Act are subject to an exhaustion of remedies requirement and to a ten-year limitation period. The reference to acting under "authority, or color of law, of any foreign nation" would preclude suits being brought against U.S. officials, unless they were acting under foreign law.

27. A claim for a violation of a treaty of the United States under the ATS will only be possible if the treaty is self-executing. In *Jogi v. Voges*, 425 F.3d 367, 374–76 (7th Cir. 2005), such a claim was advanced in relation to an alleged violation of article 36 of the Vienna Convention on Consular Relations (the "Vienna Convention"), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. The Seventh Circuit subsequently reconsidered its opinion and decided not to rest subject matter jurisdiction on the ATS, since it was unclear whether the treaty violation constituted a "tort," but, rather, decided that jurisdiction was secure under 28 U.S.C. § 1331. Jogi v. Voges, 480 F.3d 822, 836 (7th Cir. 2007).

Filartiga v. Pena-Irala, when the appellants, the father and sister of a seventeen-year-old Paraguayan man, Joelito, brought an action in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing Joelito's death.[28] The statute gives jurisdiction only in respect of claims by an alien.[29]

What does "the law of nations" mean? In *Filartiga*, the Second Circuit held that a rule commands the "general assent of civilized nations" if it is to become binding upon them all.[30] This was a stringent requirement, but one that was satisfied with regards to the prohibition on torture. In *Flores v. Southern Peru Copper Corporation*, the Second Circuit defined "the law of nations" by reference to customary international law that it defined as follows: "Customary international law is composed only of those rules that states *universally abide* by, or accede to, out of *a sense of legal obligation* and *mutual concern*."[31] The plaintiffs argued that there were rules creating rights to life and health and a prohibition on intra-national pollution.[32] The court rejected all three of these as representing norms of customary international law.[33]

The federal courts have held that the following claims meet the standard for recognition of a norm of customary international law set out in *Filartiga* and *Flores*: forced labor,[34] crimes against humanity,[35] war crimes,[36] torture, extrajudicial killing, pollution in breach of the 1982 U.N. Convention on the Law of the Sea,[37] non-consensual medical experimentation,[38] cruel, inhuman or degrading treatment,[39] and genocide.[40] However, the federal courts have held that the following do

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28. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

29. "The district courts shall have original jurisdiction of any civil action *by an alien* for a tort only, committed in violation of the law of nations or a treaty of the United States." Torture Victim Protection Act, 28 U.S.C.A. § 1350 (1991) (emphasis added).

30. *Filartiga*, 630 F.2d at 881.

31. Flores v. Southern Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003) (emphasis added).

32. *Id.* at 254.

33. *Id.* at 263–64.

34. Doe I. v. Unocal, 395 F.3d 932, 944 (9th Cir. 2002).

35. Bowoto v. Chevron, 312 F. Supp. 2d 1229, 1241–43 (N.D. Cal. 2004); Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1150–51 (C.D. Cal. 2002).

36. Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 314–19 (S.D.N.Y. 2003); *Sarei*, 221 F. Supp. 2d at 1184–86.

37. *Sarei*, 221 F. Supp. 2d at 1162–63.

38. Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2002 WL 31082956, at *12 (S.D.N.Y. Sept. 17, 2002).

39. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *7–*9 (S.D.N.Y. Feb. 28, 2002).

40. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 326–29.

not meet the standard for recognition of a norm of customary international law: claims in respect of national pollution,[41] trans-boundary pollution,[42] and cultural genocide.[43]

The first wave of ATS suits were directed at former state officials.[44] In the United States, the immunity of state officials is determined by the common law, and not the Foreign Sovereign Immunities Act of 1976.[45] Under U.S. common law, there are two types of immunity. First, there is "Head of State" immunity, which is an absolute immunity for serving heads of state and applies even when a claim is made in respect of a violation of a *jus cogens* norm of international law. Second, there is "conduct-based" immunity of foreign officials arising out of their official acts when in office.[46] The Fourth Circuit has held that this immunity may not be asserted in respect of private acts or acts involving an alleged violation of a *jus cogens* norm of international law or the commission of an international crime—such as torture in *Filartiga*.[47] This *jus cogens* restriction of conduct-based immunity has not been accepted outside the U.S., as witnessed by the U.K. decision in *Jones v. Saudi Arabia*,[48] and in the ECHR's decision in *Al-Adsani v. U.K.* [49] with regards to a civil claim against a state or a state official.

The second wave of ATS suits was directed at non-state actors, raising the question of how norms of customary international law that proscribe the conduct of states can come to affect private actors.[50] The

41. *See* Beanal v. Freeport McMoran, Inc., 197 F.3d 161, 166–67 (5th Cir. 1999); Aguinda v. Texaco, 303 F.3d 470, 476–80 (2d Cir. 2002); Flores v. Southern Peru Copper Corp., 414 F.3d 233, 254–59 (2d Cir. 2003).

42. Amlon Metals v. FMC, 775 F. Supp. 668, 670–76 (S.D.N.Y. 1991).

43. *Beanal*, 197 F.3d at 168–69 n.3.

44. Where a suit is made against a state, the ATS is preempted by the Foreign Sovereign Immunities Act of 1976. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989). The preemption applies even where the claim alleges a violation of a *jus cogens* norm of international law. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992).

45. Samantar v. Yousuf, 560 U.S. 305, 313–16 (2010). The Supreme Court held that a foreign official did fall under either § 1603(a), which referred to a "foreign state," or § 1603(b), which referred to an "agency or instrumentality of a foreign state." *Id.* at 314.

46. Yousuf v. Samantar, 699 F.3d 763, 773–77 (4th Cir. 2012).

47. *Id.* at 776–78. However, the Second Circuit in *Matar v. Dichter*, 563 F.3d 9 (2d Cir 2009) allowed conduct-based immunity in respect of claims brought under the ATS and TVPA against the former Israeli intelligence chief in connection with the bombing of Gaza in 2002.

48. Jones v. Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270.

49. Al-Adsani v. U.K., (2002) 34 EHRR 11.

50. Julian Ku, *The Third Wave: the Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 105–106 (2005). Ku has identified a third wave of ATS suits directed at U.S. officials in connection with abuses allegedly committed during the war on terror post 9/11. *Id.* However, such suits have been dismissed as the U.S. has invoked

answer given by the U.S. courts in ATS cases is either through the domestic "color of law" jurisprudence under § 1983,[51] or through international criminal law. The civil liability of non-state actors for violations of norms of customary international law was first recognised in an ATS suit in 1995, *Kadic v Karadzic*.[52] A non-state actor could incur civil liability under customary international law for violating one of the handful of norms for which criminal liability could be incurred under international law.[53] As well as incurring a primary liability for directly violating such a norm, as Karadzic did, a non-state actor could also incur a secondary liability for aiding and abetting the violation of such a norm by a state actor. In 2002, the majority of the Ninth Circuit in *Doe I. v.*

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sovereign immunity, and the plaintiffs have failed to show any waiver of immunity. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 41 (D.D.C. 2010). The ATS itself does not provide a waiver of sovereign immunity. Industria Panificadora, S.A. v. U.S., 957 F.2d 886, 887 (D.C. Cir. 1992); *see also* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985). Sovereign immunity has also been invoked to dismiss state lawsuits against private contractors operating for the U.S. government in Iraq. *See* Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009). It was held that during wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted, both with regards to ATS claims and tort claims under state law. *Id.*

51. "Civil action for deprivation of rights" provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate . . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [U.S.] Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2012). If § 1983 is engaged, the effect is that though the defendant, or his or her agents, may have committed the tort, the finding of state involvement in the tort will enable an ATS claim to be brought against a non-state actor for a violation of customary international law. The more common situation in ATS proceedings is what has been described as "reverse state action" where the wrongs have been committed by the foreign state and the plaintiff seeks to link the defendant to those violations. *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 35 (2004).

52. Kadic v. Karadzic, 70 F.3d 232, 239–42 (2d Cir. 1995). The norms violated by Karadzic were those prohibiting genocide and war crimes. *Id.* at 242–43. Karadzic also violated the norm prohibiting torture. *Id.* at 245. This, by definition, can only be committed by a state actor, but also covered actions by non-recognized states, such as Srpska. Alternatively, Karadzic, as a non-state actor, could be liable for torture by reference to "color of law" under 42 U.S.C. § 1983.

53. An example of a non-state actor who incurred such a criminal liability is provided by Bruno Tesch who supplied Zyklon B to the Nazi S.S., which was used to kill allied POW's. He was found guilty of aiding and abetting a war crime and was hung in 1946. Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), 1 U.N. WAR CRIMES COMM'N LAW, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93–107 (Brit. Mil. Ct. 1946).

Unocal Corporation,[54] decided that a corporate defendant in an ATS suit could be liable on the basis of the criminal liability imposed by international law on those who aid and abet violations of *jus cogens* norms—namely, the prohibition on forced labor that had evolved from the prohibition on slavery. The Ninth Circuit's decision was vacated in February 2003 and an *en banc* rehearing re-ordered, primarily to clarify whether international law or federal tort law was the applicable law for an ATS claim.[55] However, before the case could be re-heard, the parties agreed to a settlement. Since then, aiding and abetting liability has formed the basis of most of the claims against corporations that have come along in the second wave of ATS cases.[56]

In 2004, the Supreme Court in *Sosa v. Alvarez-Machain*,[57] considered the nature of the statute. The plaintiff alleged that he had been unlawfully abducted from Mexico for twenty-four hours to face trial in the United States.[58] The Supreme Court held that the ATS was jurisdictional and created no new causes of action.[59] Justice Souter, however, pointed out that the drafters of the ATS understood that federal common law would provide a cause of action for the three violations of international law thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy.[60] Since then, a significant rethinking of the role of the federal courts in making common law came in *Erie Railroad Company v. Tompkins*, in which the Supreme Court denied the existence of any federal "general" common law.[61] New causes of action under federal common law could be recognized for violations of norms of international law but only those which had the same definite content and acceptance among civilized nations as did the three historical paradigms at the time ATS was enacted. Therefore, it is the jurisdictional grant under the ATS that enables the federal courts to develop federal common law to recognize an

54. Doe I. v. Unocal Corp., 395 F.3d 932, 972–74 (9th Cir. 2002).

55. Doe I. v. Unocal Corp., 403 F.3d 708, 708 (9th Cir. 2005). The effect of vacating the decision is that it has no precedential effect and may not be cited by the Ninth Circuit.

56. Claims have been made that a corporate actor has directly violated such a norm. For example, in one case, it was alleged that a corporation directly violated the norm prohibiting forced labor which derived from the prohibition on the slave trade. Flomo v. Firestone, 643 F.3d 1013, 1015 (7th Cir. 2011).

57. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

58. *Id.* at 697.

59. *Id.* at 713.

60. *Id.* at 724–25.

61. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

action for damages for violations of those norms of customary international law that have these characteristics.[62]

Justice Souter insisted that the federal courts should recognize private claims under federal common law only for violations of those international law norms which had the same definite content and acceptance among civilized nations as did the three historical paradigms at the time the ATS was enacted.[63] The determination of whether a norm was sufficiently definite to support a cause of action "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[64] A related consideration was whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.[65] Other factors that might limit the availability of relief in the federal courts for violations of customary international law could include a requirement of prior exhaustion of domestic remedies, as well as a policy of case-specific deference to the political branches.[66] Justice Souter then concluded that Alvarez's relatively brief period of detention in excess of positive authority did not show a violation of any international law norm that met this standard.

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62. Judge Schroeder of the Ninth Circuit analyzed the nature of the ATS cause of action as follows:

> Thus, it is by now widely recognized that the norms [*Sosa*] recognizes as actionable under the ATS *begin* as part of international law—which, without more, would not be considered federal law for Article III purposes—but they *become* federal common law once recognized to have the particular characteristics required to be enforceable under the ATS.

Sarei v. Rio Tinto, PLC, 671 F.3d 736, 752 (9th Cir. 2011).

63. Justice Souter referred with approval to language in previous ATS decisions. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("For the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humanis generis*, an enemy of all mankind."); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) ("[ATS was limited to] a handful of heinous actions—each of which violates definable and universal and obligatory norms."); *In re* Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) (explaining that a norm is "specific, universal and obligatory").

64. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004).

65. *Id.* at 732 n.20.

66. *Id.* at 732–33 n.21. One case suggests there is a strong argument that "federal courts should give serious weight to the [e]xecutive [b]ranch's view of the case's impact on foreign policy." *In re* South African Apartheid Litig., 617 F. Supp. 2d 228, 280 (S.D.N.Y. 2009) (citing *Sosa*, 542 U.S. at 733). However, despite the formal statements of interest by the South African government and the Executive Branch of the United States expressing support for dismissal, Judge Schiendlin declined to dismiss on grounds of comity and political question. *Id.* at 296.

Justice Breyer concurred with Justice Souter, but pointed out that substantive uniformity on a norm of international law would not automatically lead to universal jurisdiction.[67] The eighteenth century consensus on piracy, for instance, was not only that it was wrong but also that any nation could prosecute any pirate. Today, international law sometimes reflects procedural agreement on universal jurisdiction to prosecute a subset of universally-condemned behaviors—such as torture, genocide, crimes against humanity, or war crimes. This procedural consensus showed that universal jurisdiction was consistent with notions of comity. Criminal jurisdiction necessarily contemplated a significant degree of civil tort recovery as well.[68]

The call for judicial restraint in *Sosa* as to the recognition of new causes of action based on violations of customary international law might have indicated that such norms were limited to those for which universal criminal jurisdiction exist, as Justice Breyer indicated.[69] However, there has been no limitation of ATS claims to those *jus cogens* norms of customary international law, which impose universal criminal jurisdiction on non-state actors. The federal courts have recognized causes of action in suits brought under the ATS in respect of a range of norms of customary international law under which criminal liability could not be incurred by a non-state actor, such as those prohibiting torture, extrajudicial killing, apartheid, cruel and inhuman treatment,[70] and non-consensual medical experimentation.[71] Section 1983 and "state action" have continued to be used to link a non-state actor defendant to the violation of such a norm.

International Criminal Law and Civil Liability Under Customary International Law

Customary international law can only have a horizontal effect on non-state actors by reference to norms that directly regulate the conduct of such parties. These norms derive from international criminal law, which consists of the three international crimes for which individuals can be prosecuted before an international tribunal: war crimes, genocide,

67. *Id.* at 761–62 (Breyer, J., concurring).

68. Justice Scalia, joined by Justice Thomas, disagreed with the majority on the basis that the Supreme Court's decision in *Erie* left the federal courts with no discretion to create federal common law. *Sosa*, 542 U.S. at 741–42 (Scalia, J., concurring in part and concurring in judgment).

69. *Id.* at 748.

70. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 302–03.

71. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009).

crimes against humanity, and the wider set of international crimes for which there is universal jurisdiction entitling any state to prosecute an offender. This brings in the initial three prohibitions against piracy; violations of safe conducts; and offenses against ambassadors, which were in force in 1789 when the ATS was enacted; along with the later prohibitions against slave trading (now extended to forced labor). With regards to state actors, there is also the prohibition against torture.

Although a wider range of norms of customary international law have been invoked in ATS suits through use of the "color of law" jurisprudence under section 1983, this is a purely American phenomenon and has no justification in customary international law. The point was made in *Bowoto v. Chevron*, where Judge Illston noted that the Supreme Court in *Sosa* had clearly stated that the scope of liability had to be decided by international law.[72] Further, there was no international law authority to support the view that a defendant acting under "color of law" could be found liable for the violation of a norm of international law.[73] Accordingly, we must look to international criminal law to find norms which directly affect non-state actors. Those norms can then form the basis of civil liability, through the incorporation of customary international law into the domestic order of the state in which suit is to be brought.

The ATS jurisprudence on civil liability of non-state actors by reference to international criminal law shows the basis of a universal civil liability of private parties in respect of a limited number of *jus cogens* violations of customary international law. Most of the allegations in ATS suits against non-state actors have been in respect of aiding and abetting international crimes, rather than in respect of primary liability for the crime.[74] In addressing such claims, the federal courts have looked at the following principal sources:[75] decisions of the Nuremburg and

72. Bowoto v. Chevron Corp., No. C. 99-02506, 2006 WL 2455752, at *1, *5 (N.D. Cal. Aug. 22, 2006).

73. *Id.* at *5–*8.

74. Such claims have been unsuccessfully made in several other contexts. *See, e.g.*, Flomo v. Firestone, 643 F.3d 1013, 1025 (7th Cir. 2011) (denying claim based on forced labor); Adhikari v. Daoud, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009) (denying claim based on forced labor); Roe I. v. Bridgestone Corp., 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007) (denying claim based on forced labor); *In re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 588 (E.D. Va. 2009) (denying claim based on war crimes); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1267 (11th Cir. 2009) (denying claim based on war crimes); Abagninin v. AMVAC Chemical Corp., 545 F.3d 733, 740–41 (9th Cir. 2008) (denying claim based on crimes against humanity).

75. In *Doe I. v. Unocal Corp.*, the Ninth Circuit split, with the majority looking to international criminal law and Judge Reinhardt looking to federal tort law on aiding and abetting. 395 F.3d 932, 949–950 (9th Cir. 2002). The decision was vacated following an *en*

Tokyo tribunals, decisions of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), and the provisions of the 1998 Rome Statute of the International Criminal Court (the "Rome Statute").[76] Six problematic areas have emerged with regards to the content of international criminal law on aiding and abetting.

(1) Aiding and Abetting: What Are the Norms of Customary International Law?

In *Unocal*, the majority linked aiding and abetting liability under customary international law with those norms for which a non-state actor could incur criminal liability under international law.[77] Thus, non-state actors cannot be held liable for aiding and abetting torture, as a primary offense, unless the torture arose in the course of forced labor, a norm for which a non-state actor could incur primary criminal liability.[78] Judge Illston in *Bowoto* initially adopted this view, when she held that the international law norms invoked by the plaintiff (the prohibition of torture, and of extrajudicial killing) placed no direct liability on a private party.[79] Thus, it would be inappropriate to allow liability to be imposed on a private party for aiding and abetting a breach of such a norm.[80] However, in 2007, she reversed this finding, accepting that it had been based on the faulty premise that if a party could not be liable as a principal, it could not be liable as an aider and abetter.[81] Consequently, civil liability for aiding and abetting could arise under the ATS in respect of any norm of customary international law that was sufficiently established under the criteria set out by the Supreme Court in *Sosa*. For example, in 2009, in *In re South African Apartheid Litigation*, Judge Schiendlin held that companies that had aided and abetted apartheid could be liable under the ATS for violating the laws of nations.[82] However, apartheid can only be committed by a state, and therefore no

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banc rehearing and the case subsequently settled before it was reheard. *Id.* Since then, most circuits have applied international criminal law to aiding and abetting claims.

76. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

77. *See generally* Doe I. v. Unocal, 395 F.3d 932 (9th Cir. 2002).

78. *See id.* at 934.

79. *Bowoto*, 2006 WL 2455752, at *5–*8.

80. *Id.*

81. Bowoto v. Chevron Corp., No C-99-02506, 2007 U.S. Dist. LEXIS 59374 (N.D. Cal. Aug. 13, 2007).

82. *In re* South African Apartheid Litig., 617 F. Supp. 2d 228, 269–70 (S.D.N.Y. 2009).

individual could be held criminally liable for it before any international criminal tribunal, such as the International Criminal Court.

(2) What is the Mens Rea for Aiding and Abetting Under International Criminal Law?

The federal courts have adopted the definition of the actus reus for aiding and abetting under international criminal law as set out by the ICTY Tribunal in *Prosecutor v. Furundzija* as "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[83] However, opinion is divided as to what is required by way of mens rea. Is it knowing assistance or purposive assistance? Most of the Nuremberg decisions and those of the ICTY and ICTR would point to knowing assistance. However, the Rome Statute of 1998 establishing the International Criminal Court ("ICC") would appear in article 25 to point towards purposive assistance. Subsection 3 provides that a person "shall be criminally responsible and liable for punishment for a crime" if that person "[f]or *the purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."[84] In 2009, the Second Circuit in *Presbyterian Church of*

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83. Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶ ¶ 195–225, 236–40 (Int'l Trib. for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Former Yugoslavia since 1991 Dec. 10, 1998) (reviewing case law). The Rome Statute of 1998 does not define the actus reus of aiding and abetting. *Id.*; *see also* Khulumani v. Barclay Nat. Bank, Ltd., 504 F.3d 254, 277 (2d Cir. 2007) *aff'd sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008):

> With respect to the actus reus component of the aiding and abetting liability, the international legislation is less helpful in identifying a specific standard. However, in the course of its analysis of customary international law, the ICTY concluded that "the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime."

Id.

84. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90. However, article 30(1) of the Rome Statute goes on to state:

> Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the [c]ourt only if the material elements are committed with intent and knowledge. Paragraph two then provides that a person has intent where: '(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence *or is aware* that it will occur in the ordinary course of events' (emphasis added).

Sudan v. Talisman Energy adopted purposive assistance as the international law test for the mental element necessary to impose liability on a party as an aider and abetter.[85]

The position of other circuits on this question is mixed. In *Sarei v. Rio Tinto*, the Ninth Circuit was prepared to assume that the mens rea for aiding and abetting under international criminal law was purposive assistance, without deciding the issue.[86] In contrast, in *Doe v. Exxon*, the majority of the Court of Appeals for the District Columbia held that customary international law on aiding and abetting was to be found in the decisions of the ICTY and ICTR, and that, in any event, the Rome Statute contemplated the mens rea requirement based on knowledge rather than intention.[87] The position in international criminal tribunals is equally mixed with two decisions in 2013 going different ways. In *Prosecutor v. Perišić*,[88] the ICTY held that it had to be established that the defendant's assistance was "specifically directed" to aiding the commission of the offense, whereas in *Prosecutor v. Taylor*,[89] the Special Court of Sierra Leone Appeals Chamber held that the mens rea of aiding and abetting was knowledge.

(3) Must the Plaintiff Exhaust Domestic Remedies?

In *Sarei v. Rio Tinto*, an en banc panel of the Ninth Circuit considered Justice Souter's suggestion in *Sosa* that ATS suits might be

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Rome Statute of the International Criminal Court art. 30(1), July 17, 1998, 2187 U.N.T.S. 90.

85. Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 259–60 (2d Cir. 2009).

86. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 765–66 (9th Cir. 2011).

87. Doe v. Exxon Mobil Corp., 654 F.3d 11, 37 (D.C. Cir. 2011). Judge Rogers pointed to article 25(3)(d), which provides liability for an individual who "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" where such contribution is "intentional" and either "made with the aim of furthering the criminal activity or criminal purpose of the group" or "made in the knowledge of the intention of the group to commit the crime" *and* to article 30, which provides that "a person has intent where . . . [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." *Id.* Judge Rogers also highlighted a case applying a "knowledge" standard under article 25(3)(a) to international law violations by a co-perpetrator: Prosecutor v. Thomas Lubanga Dyilo, ICC/01/04–01/06, Pre-Trial Chamber Decision on the Confirmation of Charges (Int'l Crim. Court Jan. 29, 2007). *Id.* at 37.

88. Prosecutor v. Perišić, IT-04-81-A (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

89. Prosecutor v. Taylor, SCSL-03-01-A (10766-11114) (Special Court for Sierra Leone Sept. 26, 2013).

subject to a requirement of prior exhaustion of remedies.[90] The suit involved claims by inhabitants of Bougainville who had suffered during the civil war and the resulting blockade of the island by Papua New Guinea, prompted by protests against Rio Tinto's operation of its giant Panguna mine.[91] The claim was brought against Rio Tinto, and the allegation was that it had been complicit in various violations of customary international law by the Papua New Guinea Defensive Force. It was alleged that a senior executive in the company urged a blockade of the island with the words: "[s]tarve the bastards out, some more, and they [will] come round."[92] Rio Tinto attempted to get the case thrown out, arguing *forum non conveniens*, comity, political question, act of state, inapplicability of international law to corporations, and failure to exhaust domestic remedies.[93]

The Ninth Circuit remanded the action for the limited purpose of ascertaining whether, as an initial, prudential matter, exhaustion of domestic remedies should be required. Judge McKeown concluded that "in ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion of domestic remedies, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.'"[94] When the case was remitted to the district court, Judge Morrow found that the question of exhaustion did not need to be considered with regards to claims involving matters of universal concern, such as the claims for crimes against humanity, war crimes, and racial discrimination.[95] However, the traditional two-step exhaustion analysis[96] would be applied to the other ATS claims for violation of the rights to health, life, and security of the person; cruel, inhuman, and degrading treatment; international environmental violations; and a consistent pattern of gross human rights violations. The plaintiffs decided to abandon these claims.[97]

90. Sarei v. Rio Tinto, PLC, 550 F.3d 822, 826 (9th Cir. 2008).

91. *Id.* at 825–26.

92. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1126 (C.D. Cal. 2002).

93. *Sarei*, 550 F.3d at 842.

94. *Id.* at 831.

95. Sarei v. Rio Tinto, PLC, 650 F. Supp. 2d 1004, 1020 (C.D. Cal 2009).

96. *Id.* at 1011 n.9. The analysis requires determining whether local remedies exist as the first step and then, as a second step, determining whether they are ineffective, unobtainable, unduly prolonged, inadequate, or otherwise futile to pursue.

97. Judge Morrow's decisions with regards to the claims for crimes against humanity, war crimes, and racial discrimination were upheld by the Ninth Circuit in *Sarei v. Rio Tinto*, 671 F.3d 736, 770 (9th Cir. 2011). The Seventh Circuit declined to apply an exhaustion analysis in a separate case. *See* Flomo v. Firestone, 643 F.3d 1013, 1024–1025 (7th Cir. 2011).

(4) Can Corporations Incur Liability under Customary International Law?

Until 2010, it had been assumed that corporations, as well as natural persons, could incur liability under the ATS.[98] This would change when the question was raised by the Second Circuit *sua sponte* in *Kiobel v. Royal Dutch Petroleum*.[99] In 2010, the majority held that there was no jurisdiction under the ATS to hear a claim against a corporation for an alleged violation of a norm of customary international law.[100] The ATS tort jurisdiction extended to those individuals who had committed international crimes, and it therefore followed that it could not extend to corporations, although individual perpetrators in a corporation could still incur liability.[101] International law, and not domestic law, determined the reach of the ATS, in regards to *what norm was broken* and *who* were the persons liable for breach of that norm.[102] Footnote twenty of Justice Souter's opinion in *Sosa* also mandated that the courts use international law to determine the subjects of international law.[103]

As corporations have never been the subject of international criminal liability, it follows that they cannot incur civil liability under customary international law. Judge Cabranes reviewed the development of international law from the Nuremberg trials onwards.[104] Nuremberg made explicit the proposition that individuals could incur liability for committing international crimes, but this principle was expressly confined to natural persons.[105] The tribunals had no jurisdiction to impose criminal liability on the organization itself.[106] Although the tribunals had the authority to declare an organization to be criminal, this was to facilitate the imposition of criminal liability on the individual members of the organization. All subsequent international criminal

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98. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Judge Schwarz had held that corporations could incur liability under the ATS. 244 F. Supp. 2d 289, 318–19 (S.D.N.Y. 2003). This finding was reiterated by Judge Cote in a later case of the same name, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 333 (S.D.N.Y. 2005). The only judicial support for the view that there is no basis for imposing liability on corporations under customary international law was to be found in the dissent of Judge Korman of the Second Circuit in *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 292–93 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part).

99. Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010).

100. *Id.* at 145–47.

101. *Id.*

102. *Id.* at 148–49.

103. Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 n.20 (2004).

104. *Kiobel*, 621 F.3d at 118–21, 132–37.

105. *Id.*

106. *Id.*

tribunals from the ICTY and ICTR to the ICC[107] had possessed jurisdiction over natural persons, but not over legal persons.[108] In contrast, Judge Leval, in his dissent, looked to customary international law to determine the norms imposing liability, including those relating to aiding and abetting, and then to domestic law to supply the remedy for breach.[109] The second stage determined who could be liable: because corporations were subject to civil liability under U.S. domestic law, they could also be liable under the ATS.[110]

A circuit split has also opened up, with three circuits subsequently holding that claims against corporations for violations of the law of nations can be made under the ATS. First, in the Seventh Circuit case, *Flomo v. Firestone Natural Rubber*, Judge Posner held that the factual premise underlying the majority's decision in *Kiobel* was incorrect and that, at Nuremberg, two measures had specifically provided sanctions against organizations.[111] Second, the Ninth Circuit, in *Sarei v Rio Tinto*, held that neither the language nor the legislative history of the ATS suggested that corporate liability was excluded and that only liability of natural persons was intended.[112] Judge Schroeder stated that footnote twenty of *Sosa*:

> expressly frames the relevant international-law inquiry to be the scope of liability of private actors for a violation of the 'given norm,' i.e. an international-law inquiry specific to each cause of action asserted . . . . The proper inquiry, therefore, should

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107. *See* Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 ("The Court shall have jurisdiction over natural persons pursuant to this [s]tatute.").

108. Unlike the Nuremberg tribunals, these subsequent tribunals had not been given jurisdiction to declare organizations to be criminal.

109. *Kiobel*, 621 F.3d at 145–47 (Leval, J., concurring only in the judgment of the court dismissing the complaint and filing a separate opinion). In April 2014 in *In re South African Apartheid Litigation*, No. 02MDL 1499 (SAS), 2014 WL 1569423, *13–*14 (S.D.N.Y. Apr. 17, 2014), Judge Schiendlin concluded that the Supreme Court in *Kiobel* had implicitly accepted that corporations could incur liability under the ATS.

110. *Id.* at 173–76.

111. Flomo v. Firestone Nat'l Rubber Co., 643 F.3d 1013, 1015–17 (7th Cir. 2011) (discussing "Control Council Law No. 2, 'Providing for the Termination and Liquidation of the Nazi Organizations,'" and "Control Council Law No. 9, 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,'" under which the seizure of all I.G. Farben's assets was ordered with a direction that some of them be made "available for reparations") *Id.* at 1017 (citations omitted).

112. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011).

> consider separately each violation of international law alleged and which actors may violate it.[113]

With regards to genocide, the ICJ's decision in *Bosnia and Herzegovina*[114] made it explicitly clear that a state may be responsible for genocide committed by groups or persons whose actions are attributable to the state. "This clarity about collective responsibility implies that organizational actors such as corporations or paramilitary groups may commit genocide. Given the universal nature of the prohibition, if an actor is capable of committing genocide, that actor can necessarily be held liable for violating the *jus cogens* prohibition on genocide."[115] A similar conclusion was reached regarding war crimes. The text of Common Article III of the Fourth Geneva Convention binds "each [p]arty to the conflict[;]" because parties to a non-international conflict must, by definition, include at least one non-state actor, entity, or group, the provision could not reasonably be interpreted to be limited to states.[116] Third, the District Court for the District of Columbia, in *Doe I. v. Exxon Mobil*, held that the norms of conduct in an ATS suit were derived from customary international law—including those relating to aiding and abetting, but not the "technical accoutrements" to the ATS cause of action, such as corporate liability and agency law, which were to be determined under federal common law.[117]

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113. *Id.* at 748.

114. Int'l Court of Justice, *Reports of Judgments, Advisory Opinions and Orders: Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 INT'L CT. JUST. REP. 43, 114, ¶ 167.

115. *Sarei*, 671 F.3d. at 759–60.

116. *Id.* at 786.

117. Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011). The district court explained:

> Our analysis begins by recognizing that corporate liability differs fundamentally from the conduct-governing norms at issue in *Sosa*, and consequently customary international law does not provide the rule of decision. Then we establish that corporate liability is consistent with the purpose of the ATS, with the understanding of agency law in 1789 and the present, and with sources of international law. Our conclusion differs from that of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, . . . because its analysis conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here; even on its own terms, its analysis misinterprets the import of footnote 20 in *Sosa* and is unduly circumscribed in examining the sources of customary international law.

Id. (citation omitted).

The issue was due to be resolved by the Supreme Court, who, in 2011, granted a writ of certiorari in *Kiobel* to determine the issue of "whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide [or] may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations."[118] However, after oral argument in February 2012, the Supreme Court directed the parties to file supplemental briefs addressing an additional question: "[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."[119] The Supreme Court heard oral argument on this issue in October 2012 and on April 17, 2013, and unanimously upheld the Second Circuit's dismissal of the complaint.[120] Its judgment was based entirely on its answer to the second question. Accordingly, the first issue remains unresolved and is likely to remain so given that the effect of the Supreme Court's decision on the extraterritorial reach of the ATS is likely to call a halt on future ATS suits.[121]

(5) What Happens When International Law Runs Out?

Many of these ATS cases are brought against parent corporations whose subsidiaries are alleged to have aided and abetted state violations of *jus cogens* norms. But what law do we use to determine the responsibility of a parent corporation for the defaults of its subsidiary? There is, not surprisingly, few guidance in international criminal law on this point, as corporations have never been the subjects of international criminal law—a point fastened on by the Second Circuit in dismissing the ATS claim in *Kiobel* for lack of subject matter jurisdiction. In 2009, in *In re South African Apartheid Litigation*, Judge Schiendlin held that although the ATS requires the application of customary international law whenever possible, it is necessary to rely on federal common law in

118. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011). In 2012, the Supreme Court held that claims under the Torture Victim Protection Act of 1991 could only be advanced against natural persons. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1707–80 (2012).

119. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012).

120. Kiobel, 133 S. Ct. 1659, 1660–62 (2013).

121. In April 2014 in *In re South African Apartheid Litigation*, No. 02MDL 1499 (SAS), 2014 WL 1569423, at *13–*14 (S.D.N.Y. Apr. 17, 2014), Judge Schiendlin held that the Supreme Court's decision in *Kiobel* implicitly accepted that corporations could be liable under the ATS, contrary to the Second Circuit's majority decision in 2010.

limited instances in order to fill gaps.[122] Vicarious liability was clearly established under customary international law, obviating any concerns regarding universality. Command responsibility, the military analogue to holding a principal liable for the acts of an agent, was firmly established by the Nuremberg Tribunals.[123] However, as the international law of agency had not developed precise standards in the civil context,[124] federal common law principles concerning agency should be applied.[125]

(6) Extraterritoriality and Customary International Law

All ATS claims will have a foreign element: the plaintiff must be an alien. However, many ATS claims involve allegations of violations of international law occurring outside the United States. Where the defendant is also an alien, the result is that the claims are heard in U.S. federal courts, although they have no connection with the United States at all. These are so-called "foreign-cubed"[126] suits which involve claims by a foreign plaintiff against a foreign defendant in respect to events that took place in a foreign jurisdiction. In *Kiobel*, the governments of the United Kingdom[127] and the Netherlands[128] submitted amicus briefs to the Supreme Court arguing that international law does not permit a state to

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122. *In re* South African Apartheid Litig., 617 F. Supp. 2d 228, 271 (2009).

123. Steve Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 504–06 (2001). Professor Ratner has argued that command responsibility provides a plausible way of developing customary international law on this issue. *Id.*

124. In contrast, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), Judge Cote, applying the conflicts of law rules of New York, held that this issue was to be determined under the law of the place of incorporation of the company whose veil is to be pierced. *Id.* at 682–83. The allegation that the subsidiaries had acted as agents of the parent would be determined either under the law of Sudan as the *lex loci delicti* and domicile of most plaintiffs, or of the law of Canada, as the domicile of Talisman, with a presumption in favor of the former. *Id.* at 687–88.

125. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 271. In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 191–96 (2d Cir. 2010), Judge Leval dissented on the corporate liability point but agreed that the claim should be dismissed. One of his reasons was on the facts alleged: the plaintiffs had failed to plead a basis for a claim of agency or alter ego liability so as to make the parent corporation liable for the defaults of its subsidiary. *Id.* at 191–94.

126. According to the Second Circuit in *Morrison v. National Australia Bank, Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008), the phrase was coined in 2004.

127. Brief of the Government of the United Kingdom of Great Britain and Northern Ireland, et al. as Amici Curiae in Support of the Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2012) (No. 10-1491).

128. Brief of the Government of the Kingdom of the Netherlands and the United Kingdom of Great Britain, et al. as Amici Curiae in Support of Neither Party, Kiobel v Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2012) (No. 10-1491).

entertain civil claims involving foreign parties with respect to conduct that took place entirely in the jurisdiction of another state.[129] However, in the U.K., it is quite possible for jurisdiction to be established in a "foreign-cubed" case through service of proceedings, although the proceedings are liable to be stayed based on *forum non conveniens*.[130] This will not always be the case, for a stay will be denied where the claimant can establish that there would be substantial injustice in being required to proceed in the alternative forum.[131] Furthermore, although there are rules of international law regarding the permissible criminal jurisdiction of states, it is not clearly established that there are similar rules relating to civil jurisdiction.[132]

Kiobel and Beyond?

In 2011, two critical developments occurred that were to determine the future scope of the ATS. First, the Supreme Court granted a writ of certiorari in *Kiobel* to determine the issue of "whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide [or] may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations."[133] Secondly, the Supreme Court, in *Morrison*

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129. In the end, *Kiobel* was not decided on the basis of any rule of international law: either in regard to the civil liability of corporations for violations of customary international law, or in regard to a rule precluding a state from asserting jurisdiction over "foreign-cubed" civil claims that have no connection with that state. Rather, the Supreme Court decided the case based on the application of a U.S. canon of statutory interpretation, which restricted the causes of action that could arise in the federal courts under the grant of jurisdiction in the ATS.

130. ATS suits may also be dismissed on this basis, as well as on other grounds of abstention, such as comity, act of state, and political question. However, over the last ten years, it has been rare for the federal courts to dismiss ATS suits on such grounds.

131. An example is provided by The Vishva Ajay, [1989] 2 Lloyd's Rep. 558 (Q.B.) which involved a collision in an Indian port and a claim made against the Indian owners of the colliding vessel. Service had been effected by the arrest of a sister-ship and the English proceedings. Although India was the appropriate forum, the court refused to stay the English proceedings following evidence that a trial in India would be delayed for many years, making the testimony of witnesses involved less reliable. A similar analysis is applied when a court decides whether to give permission to serve proceedings out of the jurisdiction. Cherney v. Deripaska, [2009] EWCA (Civ) 849, [2010] 2 All E.R. (Comm) 456 is an instance of a "foreign-cubed" case in which permission was given because substantial injustice would occur were the case to proceed in the natural forum, Russia.

132. *See* MALCOLM SHAW, INTERNATIONAL LAW 652 (6th ed. 2008) (noting that the rarity of diplomatic protests has led some writers to conclude that customary international law does not prescribe any particular regulations to restrict courts' jurisdiction in civil matters).

133. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1661–62 (2012).

v. National Australia Bank, Ltd., reconfirmed a canon of construction whereby U.S. statutes are presumed not to have extraterritorial effect.[134] For more than forty years, the United States courts had applied the antifraud provisions of federal securities law to actors and transactions operating outside the United States. The Supreme Court held that although this may be permitted under international law, it was necessary for Congress to give a clear indication that it wanted United States law to apply to securities transactions in foreign markets.[135] On April 17, 2013, these two developments were to come together in the Supreme Court's decision in *Kiobel*.[136]

The initial issue referred to the Supreme Court in *Kiobel* was that of corporate liability under the ATS. However, after oral argument in February 2012, the Supreme Court directed the parties to file supplemental briefs addressing an additional question: "[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." The Supreme Court heard oral argument on this issue in October 2012 and on April 17, 2013, and unanimously upheld the Second Circuit's dismissal of the complaint.[137] Its judgment was based entirely on its answer to the second question. The decision is likely to stop the elucidation of civil liability of non-state actors under customary international law through ATS suits in the U.S. federal courts.

The majority opinion was based on the application of the presumption against extraterritorial application, which had recently been reaffirmed in *Morrison*, and which was typically applied to discern whether an Act of Congress regulating conduct applies abroad. Chief Justice Roberts acknowledged that in *Morrison*, the Supreme Court had noted that the question of extraterritorial application was a "merits question," not a question of subject matter jurisdiction, whereas the ATS, on the other hand, was "strictly jurisdictional."[138] However, he then went on to say: "But we think the principles underlying the canon of interpretation

134. Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 255–57 (2010).

135. *Id.* at 253–54.

136. Prior to the Supreme Court's decision in *Kiobel*, the Ninth Circuit, in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 736 (9th Cir. 2011), had held that the ATS was not constrained by this presumption.

137. *Kiobel*, 133 S. Ct. at 1659. Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Kennedy filed a concurring opinion. *Id.* Justice Alito filed a concurring opinion, in which Justice Thomas joined. *Id.* Justice Breyer filed an opinion concurring in the judgment, in which Justices Ginsburg, Sotomayor, and Kagan joined. *Id.* at 1670.

138. *Id.* at 1664 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)).

similarly constrain courts considering causes of action that may be brought under the ATS."[139] To rebut the presumption, the ATS would need to evince a "clear indication of extraterritoriality[,]"[140] which it did not. Even where the claims did touch and concern the territory of the United States, they had to do so with sufficient force to displace the presumption against extraterritorial application.[141] Mere corporate presence would not suffice. On the facts, all the relevant conduct took place outside the United States (in Nigeria), and the Second Circuit's dismissal was affirmed.

Justice Kennedy concurred, but noted that it was proper for the Court

> to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute . . . . Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA[142] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[143]

Justice Alito, in his concurrence with which Justice Thomas agreed, stated: "As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations."[144] This is the most stringent approach to the presumption against extraterritorial application, and would mean that there would be no cause of action under the ATS in cases like *Filartiga*, where the violation of the international law norm prohibiting torture took place in Peru. It would also deny an action against pirates where the violation of the international law norm took place on the High Seas.

Justice Breyer agreed with the result but did not invoke the presumption against extraterritoriality. He concluded that there would be jurisdiction under the ATS where: the alleged tort occurs on American soil, and the defendant is an American national; or the defendant's

139. *Id.* at 1664.
140. *Id.* at 1665 (quoting Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 264 (2010)).
141. *Morrison*, 561 U.S. at 264–73.
142. Torture Victim Protection Act, 28 U.S.C.A. § 1350 (1991).
143. *Kiobel*, 133 S. Ct. at 1669.
144. *Id.* at 1670 (Alito, J., concurring).

conduct substantially and adversely affects an important American national interest, including a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[145] The second element would cover cases such as *Filartiga* and *In re Estate of Marcos, Human Rights Litigation*.[146]

The Supreme Court's decision in *Kiobel* has sounded the death knell for "foreign-cubed" suits—a foreign plaintiff suing a foreign defendant in respect of actions that took place outside the U.S.—proceeding in the federal courts under the Alien Tort Statute.[147] What is less clear is whether the decision will close off "foreign-squared" suits under the ATS. These involve an alien plaintiff suing a U.S. defendant in respect of a violation of international law that took place in a foreign jurisdiction, as was the case in *Unocal*.[148] There would be scope for such suits under Justice Breyer's analysis in *Kiobel*,[149] in cases where there was a distinct national interest in preventing the United States from becoming a safe haven for a torturer or other common enemy of mankind. In contrast, Justice Alito's statement that a putative ATS action would be barred "unless the *domestic conduct* is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations" would rule out any such suits proceeding under the ATS. Chief Justice Roberts's opinion, with its reference to the need

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145. *Id.* at 1674. In doing so, Justice Breyer referred to the *Restatement (Third) of Foreign Relations Law* §§ 402–04 (1986). *Id.* at 1671. The latter is particularly significant in that it explains that a "state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and analogous behavior. *Id.* at 1673.

146. *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1480 (9th Cir. 1994).

147. A further development which will limit the scope of extraterritorial litigation in the federal courts, and not just under the ATS, is the tightening of the rules regarding personal jurisdiction following the Supreme Court's 2011 decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). Following this decision, it is doubtful that Shell would have been subject to general jurisdiction by reason of its "Investor Relations Office" in New York, as was held in an earlier companion case, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). On April 22, 2013, just five days after its judgment in *Kiobel*, the Supreme Court in *DaimlerChrysler AG v. Bauman* granted the defendant's petition for a writ of certiorari to determine "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." 133 S. Ct. 1995 (2013). The Supreme Court subsequently gave a negative answer to this question and held that there would only be general personal jurisdiction where the defendant corporation is essentially regarded as "at home" in the forum state. 134 S. Ct. 746 (2014).

148. Doe v. Unocal Corp., 395 F.3d 932 (2002).

149. *Kiobel*, 133 S. Ct. at 1671.

for the claims to "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application, leaves this question open.

Decisions in the wake of *Kiobel* show that claims may be brought under the ATS where the violation of the law of nations takes place on U.S. territory, or on U.S. territory abroad, such as an embassy. It will not, however, apply where a U.S. defendant is sued in relation to a violation of the law of nations that takes place outside the U.S. In analyzing the effect of the presumption against extraterritorial application and Chief Justice Roberts's "touch and concern" wording, there has been a divergence of views. In the first two cases, the question of whether the presumption is rebutted is purely a question of analysis of the statute itself. The presumption is not rebutted within the ATS, which does not show a clear indication of extraterritoriality, and there is no room for any judicial discretion. In the latter two cases, there appears to be room for judicial discretion with regards to jurisdiction under the ATS for claims involving conduct outside the U.S. where the claims "touch and concern" the territory of the U.S. with sufficient force.

In *Balintulo v. Daimler AG*,[150] the latest chapter in the South African apartheid litigation, the Second Circuit rejected the plaintiffs' argument that whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national. The Supreme Court in *Kiobel* had expressly held that claims under the ATS could be brought only for violations of the law of nations occurring within the territory of the United States. In this case, all the human rights violations took place in South Africa. The ATS did not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign, and there was no room for judicial discretion.[151] In contrast, in *Mwani v. bin Laden*,[152] Judge Facciola invoked the "touch and concern" language of *Morrison* to hold that the presumption against extraterritoriality had been displaced in a claim under the ATS arising out of the bombing of the U.S. Embassy in Nairobi by Al Qaida in 1998. "Surely, if any circumstances were to fit the court's framework of 'touching and concerning the United States with

150. Balintulo v. Daimler AG, 727 F.3d 174, 189–91 (2d Cir. 2013).

151. *Id.* at 191–92. The complaint alleged that the U.S. defendant parent corporations were vicariously liable for aiding and abetting of violations of the laws of nations committed within South Africa by their South African subsidiaries. However, none of those acts took place within the U.S. and therefore the U.S. parent corporations could not be vicariously liable for that conduct under the ATS. Claims of derivative liability depended on the viability of the underlying claim.

152. Mwani v. bin Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013).

sufficient force,' it would be a terrorist attack that 1) was plotted in part within the United States[;] and 2) was directed at a United States Embassy and its employees."[153] An ATS suit has also survived a post-*Kiobel* challenge to jurisdiction in *Sexual Minorities Uganda v. Lively*.[154] The case involved a claim against a U.S. citizen residing in Massachusetts for allegedly aiding and abetting a claim for persecution amounting to a crime against humanity, based on a systematic and widespread campaign of persecution against lesbian, gay, bisexual, transgender, and intersex ("LGBTI") people in Uganda.[155] Judge Ponsor held that there was jurisdiction to hear the claim under the ATS. Although the impact of the defendant's conduct was felt in Uganda, his actions in planning and managing a campaign of repression in the Uganda had taken place in the U.S. and were "analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there." [156]

Recently, in *Al-Shimari v. CACI International, Incorporated*, the Fourth Circuit held that there was subject matter jurisdiction in a claim against a U.S. defendant corporation arising out of alleged torture and war crimes arising at Abu Ghraib.[157] Judge Barbara Keenan found that the case differed from *Kiobel* and *Balintulo*, stating:

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153. *Id.* at 5. However, because this was likely to be the first opinion given after *Kiobel*, Judge Facciola immediately certified this issue for appeal to the court of appeals under 28 U.S.C. § 1292(b). *Id.*

154. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 315–17 (D. Mass. 2013).

155. *Id.* at 309. Although there was a circuit split as to the mens rea element for aiding and abetting under international law, the court did not need to resolve the issue, as the plaintiffs had pleaded that they had given purposive assistance to the Ugandan authorities. *Id.* at 318.

156. *Id.* at 328. The amended complaint alleged that after the defendant travelled to Uganda in 2002, he continued to assist, manage, and advise associates in Uganda on methods to deprive the Ugandan LGBTI community of its basic rights. *Id.* at 323. His Ugandan co-conspirators contacted him in the United States in 2009 to craft tactics to counter the Ugandan High Court ruling confirming that LGBTI persons enjoyed basic protections of the law. *Id.* After going to Uganda in 2009, he continued to communicate from the United States through Martin Ssempa to members of the Ugandan Parliament about the legislation proposing the death penalty for homosexuality; from his home in the United States, he reviewed a draft of the legislation and provided advice on its content. *Id.*

157. Al-Shimari v. CACI Int'l, Inc., 758 F.3d 516 (4th Cir. 2014) (reversing the previous decision of Judge Lee in *Al-Shimari v. CACI Int'l, Inc.*, 951 F.Supp.2d 857 (E.D. Va. 2013)). As had been the case in *Balintulo*, Judge Lee had held that the presumption against extraterritorial application is only rebuttable by legislative act and not by judicial decision. *Id.* at 866.

> In the present case, however, the issue is not as easily resolved. The plaintiffs' claims reflect extensive "relevant conduct" in United States territory, in contrast to the "mere presence" of foreign corporations that was deemed insufficient in *Kiobel*. When a claim's substantial ties to United States territory include the performance of a contract executed by a United States corporation with the United States government, a more nuanced analysis is required to determine whether the presumption has been displaced. In such cases, it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory.
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> Here, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.
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> In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense.
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> Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it.[158]

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158. *Id.* at 528–29. On August 28, 2014, in *In re South African Apartheid Litigation*, No. 02 MDL 1499 (SAS), 2014 WL 4290444, *4–*5 (S.D.N.Y. Aug. 28, 2014) Judge Schiendlin distinguished *Al-Shimari* as a case involving much greater contact with the U.S. government, military, citizens, and territory. As with *Balintulo*, the instant case involved vicarious liability of U.S. parent corporations in respect of actions committed by their subsidiaries in South Africa, all of whose conduct took place abroad.

Kiobel has not entirely killed off future claims for violations of the law of nations being brought in the federal courts pursuant to the ATS, but it has severely curtailed them.[159] The Supreme Court's judgment would deny jurisdiction to almost all the cases I have mentioned in this paper, including *Filartiga*, the case that started the development of human rights litigation through the ATS. It is unlikely that we will see much more in the way of elucidation of customary international law through ATS suits in the federal courts. The ATS is probably the only way in which such claims can be brought in the federal courts. In the future, such claims may be brought in state courts or recast as conventional tort suits.[160]

Civil Liability Under Customary International Law Outside the United States

Outside the U.S., we can find examples in three other common law jurisdictions of a norm of customary international law forming the basis of a cause of action in a national court. First, there is the U.K. where there are two doctrines as to how customary international law can enter the domestic legal order. The first is the doctrine of incorporation, under which the rules of international law are incorporated into U.K. law automatically and considered to be part of U.K. law unless they are in conflict with an Act of Parliament.[161] The second is the doctrine of

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159. One possible alternative outlet for claims based on violations of customary international law is 28 U.S.C. § 1331, which gives federal courts jurisdiction over matters arising under the Constitution and federal laws. In *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000), it was held that U.S. citizens could sue a French bank in respect of the looting of their possessions in World War II, which constituted a war crime. In contrast, in *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995), it was held that federal law gave rise to no autonomous right to sue for breaches of customary international law. However, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004), Justice Souter observed: "Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as [28 U.S.C.] § 1350) . . . ." Referring to Justice Souter's observation, Judge Clifton in *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010) stated that the ATS "is the only possible vehicle for a claim like Plaintiffs' because no other statute recognizes a general cause of action under the law of nations."

160. *See* Donald Earl Childress, III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012).

161. The doctrine originates from the following statement of Lord Mansfield, C.J., in *Triquet v. Beth*, [1764] 3 Burr. 1478, [1481]: "Lord Talbot declared a clear opinion: 'That the law of nations in its full extent was part of the law of England . . . . that the law of nations was to be collected from the practice of different nations and the authority of writers.'" *Id.* (citing Buvot v. Barbut, [1736] 3 Burr. 1481, 4 Burr. 2016). Accordingly, he argued and

transformation, under which the rules of international law are not to be considered as part of U.K. law except insofar as they have been already adopted and made part of our law by the decisions of the judges, or by an Act of Parliament, or a long-established custom.[162]

In criminal proceedings, the theory of transformation has been applied.[163] In *R v. Jones (Margaret)*, the House of Lords held that international law does not create new criminal offenses and therefore the defendants could not advance a defense in criminal proceedings that their conduct had been directed at preventing an international crime, the crime of aggression.[164] However, their Lordships stressed that they were making no finding with regards to the potential role of customary international law in civil proceedings.[165]

In civil proceedings since the decision of the Court of Appeal in *Trendtex Trading Corporation v. Central Bank of Nigeria*, the theory of incorporation has been applied.[166] There have since been two cases in which the claimants based their claims not only on conventional torts, but also on a violation of the international prohibition against torture, in an attempt to preempt the invocation of foreign sovereign immunity. The first was *Al-Adsani v. Kuwait*[167] in which the court of appeal held that section 1 of the State Immunity Act of 1978 precluded a civil suit being

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determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc., there being no English writer of eminence on the subject *Id.*

162 The doctrine goes back to 1876 in the judgment of Chief Justice Lord Cockburn in *R v. Keyn*, [1876] 2 Ex. D. 63, [202–03]:

> For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it . . . Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature.

Id.

163. Under both doctrines, treaties only become part of English law if an enabling Act of Parliament has been passed. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45 (6th ed. 2003).

164. R v. Jones (Margaret), [2006] UKHL 16, [2007] 1 A.C. 136. Although historically, the courts may have recognized breaches of international law, such as piracy, violations of safe conduct, and the rights of ambassadors, as creating domestic crimes, since R v. Knuller, [1973] A.C. 435, the courts had refused to create any new criminal offenses. That was entirely matter for Parliament.

165. *See id.* at ¶ 59 (Lord Hoffman), ¶ 100 (Lord Mance).

166. Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] Q.B. 529.

167. Al-Adsani v. Kuwait, 103 I.L.R. 420 (Q.B. 1995), *aff'd*, Al-Adsani v. Kuwait, 107 I.L.R. 536 (C.A. 1996).

brought against a foreign state for breach of this norm.[168] Notwithstanding the fact that torture is recognized as a *jus cogens* norm of customary international law and that the 1984 U.N. Convention Against Torture ("UNCAT") expressly grants universal criminal jurisdiction against torturers. Subsequently, the decision was upheld by a majority decision of the European Court of Human Rights.[169] The second case was *Jones v. Saudi Arabia* in which a claim for torture was made against the Kingdom of Saudi Arabia and against an individual state official, Colonel Aziz, and the plaintiff sought leave to serve proceedings out of jurisdiction. Saudi Arabia claimed sovereign immunity on behalf of itself and its official. The House of Lords held that UNCAT provides no exception to the principle of sovereign immunity in relation to civil proceedings.[170] Although UNCAT established universal criminal jurisdiction in respect of torture,[171] this did not translate into universal civil jurisdiction and accordingly, sovereign immunity could still be invoked with respect to civil claims against individuals who had committed torture.[172] As to the fact that the prohibition on torture was a *jus cogens* norm, Lord Hoffmann approved the following observations:

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a *jus cogens* mandate can bite.[173]

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168. "A [s]tate is immune from the jurisdiction of the courts General of the United Kingdom except as provided in the following provisions of this [p]art of this act." State Immunity Act, 1978, § 1.

169. Al-Adsani v. U.K., [2002] 34 EHRR 11.

170. Jones v. Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270, ¶¶ 29, 85 (overruling the decision of the Court of Appeal, [2004] EWCA (Civ) 1394 and [2005] Q.B. 699, that the immunity of an official was *ratione materiae* only, and torture could not be treated as the exercise of a state function so as to attract immunity *ratione materiae* in either criminal or civil proceedings against individuals). Their Lordships' decision on sovereign immunity was upheld by the European Court of Human Rights (Fourth Section) in *Case of Jones and Others v. The United Kingdom*.

171. Their Lordships noted that the decision in *Pinochet 3* created an exception to sovereign immunity only in relation to criminal proceedings. *Id.* at ¶¶ 19, 68.

172. The Convention dealt with civil proceedings in article 14.1 but this only required a state to grant a civil remedy in respect of torture committed within its jurisdiction. Their Lordships noted that the decision in *Pinochet 3* created an exception to sovereign immunity only in relation to criminal proceedings. *Id.*

173. *Id*. at ¶ 44. (Lord Hoffman).

Their Lordships, though, made no comment on whether a violation of the international prohibition on torture gave rise to a cause of action separate from that arising under domestic tort law.[174] Therefore, it would seem that there is still some scope for making a claim on the basis of a breach of a violation of a norm of customary international law by a non-state party. Although the decisions in *Al-Adsani* and *Jones v. Saudi Arabia* would rule out any civil claims against a state or its officials where the state claims immunity, the U.K. courts have yet to grapple with the issues of customary international law that have arisen in ATS cases.[175] The only ATS-type case to come before the High Court to date is *Guerrero & Others v. Monterrico Metals*,[176] which was pleaded as a tort

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174. *See* Francois Larocque, *Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort*, 46 OSGOODE HALL L.J. 605, 640 (2008):

> It may be that, on the basis of their inherent jurisdiction, Canadian and English courts are able to recognize new causes of action for torture on the theory that the "prohibitive rules of customary law" are incorporated into the common law. But looking back at the few Canadian and English transnational human rights proceedings on record, it is striking to note how little judicial discussion this issue has received. One wonders whether the *Bouzari* and *A1-Adsani* courts simply assumed it to be within their purview to enforce international norms through their civil jurisdiction. Reference to the principle of incorporation in the courts' reasons for judgment supports this hypothesis, though it is impossible to draw definitive conclusions in the absence of explicit reasoning on this point. One possible explanation, of course, is that the courts did not feel compelled to say much on the civil actionability of the international crime of torture in light of their decisions that the claims were barred in any event by state immunity.

175. EU States Regulation, No. 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations ("*Rome II*") poses a complication with a cause of action based on the violation of such norms of international law. Article 4(1) provides:

> The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> A claim based on a violation of international law would raise the question of whether international law was incorporated into the domestic civil law of the country in question. If it were not, the derogation under art. 26 would probably apply. This provides: "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

EU States Regulation, No. 864/2007 of 11 July 2007, art. 4.

176. Guerrero & Others v. Monterrico Metals, [2009] EWHC 2475 (Q.B.).

claim. However, the pleading of torture as a distinct cause of action in *Al-Adsani* and *Jones v. Saudi Arabia* leaves open the possibility of a future claim being brought in the courts of the United Kingdom against a company based on its alleged complicity in international crimes.[177]

Second, in 1995, in *The Toledo*, a claim was made against the Irish State in violation of its obligation under international law to admit vessels in distress to a place of refuge within its domestic waters.[178] Judge Barr held that where there is a long-standing, generally-accepted practice or custom in international law, then subject to established limitations thereon, it is part of Irish domestic law, provided that it is not in conflict with the constitution or an enactment of the legislature or a rule of the common law. On the facts, the claim was unsuccessful because the right of access was not absolute and was modified by countervailing considerations such as the risk of oil pollution or of the vessel's sinking or hindering navigation should it be admitted into Irish waters.[179]

Thirdly, there is Canada, where a torture claim was brought against Iran in 2002 in *Bouzari v. Islamic Republic of Iran*[180] but was dismissed on sovereign immunity grounds. In 2009, in *Bil'in (Village Council) v. Green Park International Ltd.*,[181] a claim was brought in Canada against a corporation alleging complicity in war crimes in the occupied territories in Israel. That claim floundered on the rock of *forum non conveniens*.[182]

Conclusion

Early on, in the post-*Filartiga* renewal of the ATS, Judge Bork commented in *Tel-Oren v. Libyan Arab Republic*:[183]

> Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. Plaintiffs would troop to court marshalling their "experts" behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in

177. Al-Adsani v. Kuwait, 103 I.L.R. 420 (Q.B. 1995), *aff'd*, Al-Adsani v. Kuwait, 107 I.L.R. 536 (C.A. 1996); Jones v. Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270.

178. *The Toledo*, (1995) 3 I.R. 406, (1995) 2 IRLM 30.

179. *Id.* 422–27, 431–34

180. Bouzari v. Islamic Republic of Iran, [2002] O.J. No. 1624, *aff'd*, [2004] O.J. No. 2800 Docket No. C-38295.

181. Bil'in (Village Council) v. Green Park Int'l Ltd., [2009] Q.C.C.S. 4151.

182. *Id.* at ¶ 335.

183. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823 (D.C. Cir. 1984).

> citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international 'law.'

To some extent, this is exactly what has happened with the subsequent development of ATS suits. If you want to know what constitutes customary international law, study the ATS cases over the last thirty-three years. However, what this U.S. jurisprudence shows is that there is a limited number of norms of customary international law that touch and concern non-state actors,[184] which are derived from international criminal law. These prohibitions on the conduct of non-state actors may then form the basis of a civil cause of action in a domestic court in a state that incorporates customary international law into its domestic legal order.[185] This forms the basis for a potential universal civil liability for breaches of those norms of customary international law that touch and concern the conduct of non-state actors. The resulting substantive law should, in theory, be the same in any nation.[186] Therefore, the possibility remains for customary international law to have a horizontal effect on civil liability in jurisdictions other than the

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184. Kadic v. Karadzic, 70 F.3d 232, 239–42 (2d Cir. 1995); Doe I. v. Unocal Corp., 395 F.3d 932, 972–74 (9th Cir. 2002). ATS suits have involved a wider range of norms of customary international law either through the "color of law" doctrine or by linking aiding and abetting liability under international criminal law with violations of state norms of customary international law.

185. It is often said that the ATS gives the federal courts "universal jurisdiction." This means that the federal courts will apply a substantive law that is based on violations of the law of nations—*i.e.*, of customary international law. However, while substantive law involves the application of peremptory norms, this does not mean that the U.S. federal courts must hear these claims. The history of ATS litigation is littered with challenges to jurisdiction based on various grounds of abstention, such as *forum non conveniens*, political question, act of state, comity, and sovereign immunity. In *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002), Judge Rakoff stated:

> Accordingly, even if one assumes for the sake of argument the hypothesis that Texaco participated in a violation of international law that would support the claim here brought under the ATCA, neither that assumption nor any of the other considerations special to these cases materially alters the balance of private and public interest factors that, as previously discussed, 'tilt[s] strongly in favor of trial in the foreign forum,' [internal citation omitted] and, indeed, virtually mandates dismissal in favor of Ecuador or, if any plaintiff prefers, Peru.

Aguinda, 142 F. Supp. 2d at 554.

186. Khulumani v. Barclays National Bank, Ltd., 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009). According to Judge Schiendlin, "[i]deally, the outcome of an ATCA case should not differ from the result that would be reached under analogous jurisdictional provisions in foreign nations such as Belgium, Canada, or Spain." *Id.*

U.S., where the Supreme Court's decision in *Kiobel* as to the territorial limits of the ATS is likely to curtail the viability of such suits in future.

If foreign courts are to develop such a universal civil liability, they will have to grapple with the six issues as to the shape of international criminal law that have occupied the U.S. federal courts in ATS cases over the last decade. In particular, they will have to determine whether international law authorizes states to impose civil liability on corporations that commit international crimes, either as principals or as aiders and abetters.

In determining this issue, a domestic court could go one of two ways. It could determine that customary international law provides the prohibitive norms and that it is then left to each state to determine how to apply them within their domestic legal order. Domestic law would then determine the issue of corporate liability. This is the approach taken by Judge Leval in *Kiobel*[187] and by Judge Posner in *Flomo*.[188] Alternatively, courts could adopt the view expressed by the majority of the Second Circuit in *Kiobel*—that corporations cannot incur civil liability for violations of customary international law that constitute international crimes, because only natural persons can be prosecuted for international crimes.[189]

It is quite likely that if other jurisdictions were to admit actions based on violations of international criminal law, this theoretical uniformity would soon split, with different jurisdictions giving different decisions as to whether corporations could be liable[190] and also as to the mens rea for aiding and abetting. The development of a universal civil cause of action would have to be led by lawyers in human rights cases seeing an advantage in advancing their claims on this basis, rather than pleading them as conventional tort cases.[191] It remains to be seen

187. Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 173–76 (2d Cir. 2010).

188. Flomo v. Firestone Nat'l Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2011).

189. *Kiobel*, 621 F.3d at 132–37.This approach would still leave open the possibility that individual corporate officials could incur civil liability for conduct constituting an international crime.

190. This is already evidenced by the circuit split on this issue in the U.S. federal courts. Corporate liability also raises problems of attribution—which corporate officials do we look to when determining issues of "knowing assistance" or "purposive assistance?" International criminal law can give us no answer to this question, as from Nuremberg to the International Criminal Court, corporations have never been susceptible to proceedings before international criminal tribunals. To answer this question we would either have to look to some domestic law, such as the *lexfori* or the *lex loci delicti* or the *lex loci societatis*. This would lead to different outcomes on liability depending on the rules of corporate attribution in the jurisdiction in which the action was brought.

191. Under English law a cause of action based on reliance on customary international law may yield a substantive advantage over a straightforward tort claim; and

whether lawyers outside the U.S. will pick up the baton of pleading claims on this basis, or whether the horizontal effect of the law of nations will prove to be a purely U.S. phenomenon that ended with *Kiobel*.

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that is in respect of aiding and abetting. A claim against a secondary party has to be on the basis that it is a joint tortfeasor. A party who knowingly facilitates a wrong committed by another will not be jointly liable.

> Mere facilitation of the commission of a tort by another does not make the defendant a joint tortfeasor and there is no tort of 'knowing assistance' nor any direct counterpart of the criminal law concept of aiding and abetting: the defendant must either procure the wrongful act or act in furtherance of a common design or be party to a conspiracy.

W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 21.2 (18th ed. 2010).

However, with aiding and abetting an international crime it is arguable that the mens rea is one of knowing assistance rather than intentional assistance.