

ALIEN TORT LITIGATION: THE ROAD NOT TAKEN

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INTRODUCTION

When the Second Circuit decided in *Filartiga v. Pena-Irala*¹ that the Alien Tort Statute (ATS) provided a federal forum for international human rights claims, no one would have predicted that thirty-three years later in *Kiobel v. Royal Dutch Petroleum Co.*² the Supreme Court would use the presumption against extraterritoriality to limit those claims.³ This Essay recounts some of the doctrinal developments in alien tort litigation during the intervening thirty-three years.⁴

After *Filartiga*, courts faced a choice whether to apply international law as the rule of decision or the law of the place where the tort occurred. Courts chose the international law road, with U.S. law providing the cause of action and the rules for damages. The Supreme Court ratified this choice in

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* The Honorable Roger J. Traynor Professor of Law, University of California, Hastings College of the Law. I should disclose that I have played a role in a number of the cases discussed in this essay. As a law student, I was on the brief for the plaintiffs in *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993). I wrote the Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, which the Supreme Court followed in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). I joined the Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellees in *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). And as Counselor on International Law to the Legal Adviser at the State Department from 2011 to 2012, I worked on the briefs for the United States as *amicus curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). The views expressed here are my own. My thanks to Bill Casto, Scott Dodson, Chimène Keitner, and Beth Stephens for comments on an earlier draft.

1 630 F.2d 876 (2d Cir. 1980).

2 133 S. Ct. 1659 (2013).

3 Cf. Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671 (2014) (suggesting that the legal academy chose to ignore the question).

4 For an excellent account of alien tort litigation in a broader historical and doctrinal context, see Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014).

Sosa v. Alvarez-Machain,⁵ clarifying that the cause of action came not from the ATS itself but from federal common law. In the battles over aiding and abetting liability that followed, plaintiffs argued that federal common law should govern just about every issue of ATS litigation except the initial violation of international law, while defendants and the Bush Administration argued that the presumption against extraterritoriality should apply to the federal common law cause of action, the position the Supreme Court accepted in *Kiobel*. It appears in hindsight that the early decisions to apply international law rather than the *lex loci delicti* as the rule of decision in alien tort litigation ultimately provided the doctrinal hook for the Supreme Court to restrict alien tort suits with the presumption against extraterritoriality.

Certainly there were reasons to choose international law over foreign domestic law at the time.⁶ Once alien tort litigation had started down the international law road, there were paths that might have skirted the extraterritoriality question more easily.⁷ And it is possible that the Roberts Court would have found another doctrine to restrict alien tort suits had different choices been made.⁸ Choices are inevitable in litigation as in life. The purpose of this Essay is to explore the doctrinal consequences of the choices that were made and to glance briefly down the road not taken.

I. *FILARTIGA* AND THE CHOICE OF LAW

Two roads diverged in a yellow wood,
 And sorry I could not travel both
 And be one traveler, long I stood
 And looked down one as far as I could
 To where it bent in the undergrowth;⁹

The era of human rights litigation in U.S. courts began in 1980 with the Second Circuit's decision in *Filartiga*.¹⁰ Joel and Dolly Filártiga, the father and sister of Joelito Filártiga, brought suit in U.S. district court against Americo Peña-Irala, a Paraguayan police inspector who overstayed his visa in the United States.¹¹ They alleged that Peña-Irala had tortured Joelito to death in retaliation for his father Joel's political activities.¹² On appeal, the Second Circuit held that the district court had subject matter jurisdiction under the Alien Tort Statute, which provides original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a

5 542 U.S. 692 (2004).

6 See *infra* notes 105–27 and accompanying text.

7 See *infra* notes 188–93, 218–23, and accompanying text.

8 Cf. *Daimler AG v. Bauman*, 134 S. Ct. 746, 753–63 (2014) (dismissing ATS suit for lack of general jurisdiction over parent corporation).

9 ROBERT FROST, *The Road Not Taken*, in *MOUNTAIN INTERVAL* 9 (1931).

10 For a comprehensive account of the *Filartiga* case, see WILLIAM J. ACEVES, *THE ANATOMY OF TORTURE* (2007).

11 *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

12 *Id.* at 879.

treaty of the United States.”¹³ Clearly, the *Filártigas* were aliens and torture is a tort. Supported by a memorandum filed by the U.S. government,¹⁴ the Second Circuit also held that official torture was a violation of customary international law.¹⁵ While this holding was sufficient to satisfy the statute, subject matter jurisdiction for federal courts also requires a basis in Article III of the Constitution, which the Second Circuit found in Article III’s grant of jurisdiction over cases “arising under . . . the Laws of the United States.”¹⁶ “The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.”¹⁷

The *Filartiga* court emphasized that it was *only* deciding the question of subject matter jurisdiction and *not* “the issue of the choice of law to be applied, which will be addressed at a later stage in the proceedings.”¹⁸ In arguing for dismissal on grounds of *forum non conveniens*, the defendant Peña-Irala claimed that Paraguayan law provided a civil remedy for the wrong alleged.¹⁹ The court of appeals also discussed at some length the doctrine of transitory tort,²⁰ a doctrine under which a tortfeasor could be sued wherever he was found, but generally under the *lex loci delicti*—the law of the place where the tort occurred.²¹ Indeed, the court even suggested that “the dis-

13 *Id.* at 880 (quoting 28 U.S.C. § 1350 (1976)).

14 Memorandum for the United States as Amicus Curiae, *Filartiga*, 630 F.2d 876 (No. 79-6090), *reprinted* in 19 I.L.M. 585 (1980).

15 *See Filartiga*, 630 F.2d at 880–85.

16 U.S. CONST. art. III, § 2.

17 *Filartiga*, 630 F.2d at 885.

18 *Id.* at 889. In an earlier ATS case arising in Cuba during the Spanish-American War, the district court assumed that the *lex loci delicti* applied, *see O’Reilly De Camara v. Brooke*, 135 F. 384, 391 (S.D.N.Y. 1905) (quoting the Spanish Civil Code), but dismissed the suit on the ground that the defendant’s actions had been ratified by the United States. *See O’Reilly De Camara v. Brooke*, 142 F. 858, 861–63 (S.D.N.Y. 1906), *aff’d*, 209 U.S. 45 (1908).

19 *Filartiga*, 630 F.2d at 879 & n.5. Plaintiffs’ complaint had made no claims under Paraguayan law. *See Verified Complaint, Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (No. 79 C 917), *reprinted* in ACEVES, *supra* note 10, at 215.

20 *Filartiga*, 630 F.2d at 885.

21 *See Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (K.B.) 1029 (noting in a transitory tort case that “whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried”). Transitory tort actions filed in U.S. state courts almost always apply the *lex loci delicti*. *See* Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 50 (2013) (“[U]nless the defendants choose not to raise the choice-of-law issue—which would result in the application of forum law—the law of the foreign country where the actions took place will surely apply.” (footnote omitted)); *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1638 (2014) (“[T]he First Congress expected municipal (i.e., domestic) law, rather than international law, to govern in ATS cases.”); Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1652 (2014) (“[T]he legal norms the First Congress had in mind when enacting the ATS were not protean international law norms, but rather the domestic law of tort . . .”). In other countries, courts also typically apply foreign domestic law to claims that might be brought under the ATS in the

strict court may well decide that fairness requires it to apply Paraguayan law to the instant case.²² But ultimately, the court of appeals left it to the district court to decide whether to apply the law of Paraguay or international law as the rule of decision.²³

The law applicable in ATS cases was widely acknowledged to be an open question after *Filartiga*.²⁴ We can get a sense of what the two doctrinal roads looked like at that time from two early and influential law review articles.²⁵ In a piece published the year after *Filartiga*, Jeffrey Blum and Ralph Steinhardt described the choice of law question this way:

Once jurisdiction is sustained, the question emerges of how to conceptualize the cause of action: do plaintiffs sue for torture under the law of nations as incorporated into United States common law, or is the cause of action wrongful death under the law of the situs, with international law having relevance only for clearing the jurisdictional hurdle?²⁶

Blum and Steinhardt looked first at the traditional option of applying the *lex loci delicti* in transitory tort cases. Determining the content of foreign tort law

United States. See, e.g., Rb. The Hague 30 januari 2013, Case No.: C/09/337050 / HA ZA 09-1580, at ¶ 4.9 (Akpan/Royal Dutch Shell PLC) (Neth.) (holding that Nigerian law governed environmental tort claims against Royal Dutch Shell); Rb. The Hague 21 maart 2012, Case No.: 400882 / HA ZA 11-2252, at ¶ 2.3 (El-Hojouj/Derbal) (Neth.) (awarding damages for torture under Libyan law); Guerrero v. Monterrico Metals PLC, [2009] EWHC 2475 (QB), [¶ 10] (describing claims of corporate responsibility for torture under Peruvian law). See generally Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127 (2013) (discussing human rights litigation against corporations in other countries). For useful summaries of the avenues for bringing human rights claims in other legal systems, see Supplemental Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners at 28–40, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); Robert C. Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841 (2009).

22 *Filartiga*, 630 F.2d at 889 n.25.

23 See *infra* notes 107–15 and accompanying text.

24 See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 804 n.10 (D.C. Cir. 1984) (Bork, J., concurring) (“If jurisdiction rested on section 1350, there are three arguable theories about what law would supply the rule of decision. The rule of decision might be the international law (treaty or customary international law) violated; it might be a federal common law of torts; or it might be the tort law of whatever jurisdiction applicable choice of law principles would point to.”); *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) (“We must now face the issue left open by the Court of Appeals, namely, the nature of the ‘action’ over which the section affords jurisdiction.”). As late as 2000, the Second Circuit would say that “the federal courts have never definitively resolved this choice-of-law question.” *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.12 (2d Cir. 2000).

25 Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53 (1981); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986).

26 Blum & Steinhardt, *supra* note 25, at 57.

was no obstacle, for this is something federal courts do routinely in choice of law cases.²⁷ But two other problems gave them pause. The first had to do with immunities. If a federal court were to apply the *lex loci delicti*, they reasoned, it would have to apply that law “in its entirety,” which meant that “[a] foreign state could thus shield its officials who violated core human rights by enacting very broad immunities for government officials.”²⁸ The second problem had to do with Article III jurisdiction. “[I]t might be argued that, if the substantive law of the *situs* defines the cause of action, federal courts cannot constitutionally hear the case under article III, since it does not ‘arise under’ the Constitution or the laws or treaties of the United States.”²⁹ The less travelled road was “to apply international law as it has been incorporated into the federal common law.”³⁰ This, Blum and Steinhardt suggested, would solve the Article III problem³¹ and “negate [] the ability of foreign governments to immunize their officers who violate human rights norms.”³²

Writing in 1986, which was still early but after the district court’s decision on remand in *Filartiga* and the D.C. Circuit’s split decision in *Tel-Oren*,³³ William Casto saw the two roads somewhat differently. He divided the possibility of applying international law as federal common law into two options—applying international law directly or fashioning federal common law remedies for violations of international law—but found neither attractive.³⁴ “Most of the current litigation arises out of incidents between aliens in foreign countries, and doubt exists whether United States domestic law can or should be used to regulate these incidents. Likewise it is questionable whether private tort remedies are available under international law.”³⁵ This left “foreign domestic law.”³⁶ While Casto agreed with Blum and Steinhardt that foreign

27 See *id.* at 98 (“Proving the content of the law of the *situs* generally poses few conceptual or procedural difficulties.”).

28 *Id.* But see Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT’L L. 65, 95 (1995) (“[C]hoice of law analysis need not yield a single body of law to govern every issue in a case.”).

29 Blum & Steinhardt, *supra* note 25, at 98.

30 *Id.*

31 *Id.* at 99 (“The incorporation of the law of nations into federal common law, which the court of appeals was careful to demonstrate, means that *Filartiga*-like claims do ‘arise under’ the laws of the United States, within the meaning of article III.”).

32 *Id.* at 101; see also Richard A. Conn, Jr., Note, *The Alien Tort Statute: International Law as the Rule of Decision*, 49 FORDHAM L. REV. 874, 885 (1981) (“The policy interest of the international community may . . . be inadequately reflected in the domestic laws of an interested jurisdiction.”).

33 See *infra* notes 85–115 and accompanying text.

34 See Casto, *supra* note 25, at 471–86.

35 *Id.* at 471–72 (footnotes omitted); see also Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT’L L. 39, 46 (1981) (“The *lex delicti* should not be displaced by using the human rights law against torture as the rule of decision unless the *lex delicti* so departs from these human rights norms that it would upset the peace of nations to apply it.”).

36 Casto, *supra* note 25, at 487.

law might include limitations on recovery, including doctrines of immunity,³⁷ he was less troubled by the constitutional question. “Constitutional authority for a grant of jurisdiction to try aliens’ claims created by foreign law is justifiable under a theory of protective jurisdiction.”³⁸ If Congress had the constitutional authority to pass legislation for human rights cases that affect the United States’ foreign relations, it might take the lesser step of committing these cases to the federal courts and providing that they be governed by foreign law.³⁹

With the benefit of hindsight, it is possible to evaluate some of these initial worries. The concern that choosing foreign law might obligate a U.S. court to apply foreign immunity doctrines appears to have been unfounded. In the 1940s, the Supreme Court had adopted a policy of deferring to the executive branch on questions of state immunity,⁴⁰ a position of deference that some lower courts extended to questions of foreign official immunity.⁴¹ In 1976, Congress codified the rules with respect to foreign states in the Foreign Sovereign Immunities Act (FSIA).⁴² Although a number of lower courts applied the FSIA to alien tort suits against foreign officials,⁴³ the Supreme Court made clear in *Samantar v. Yousuf*⁴⁴ that the immunity of foreign officials “is properly governed by the common law.”⁴⁵ At the time *Filartiga* was decided, the *Restatement (Second) of Foreign Relations Law* summarized the common law as providing official immunity for heads of state, heads of government, foreign ministers, and “any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.”⁴⁶ For present purposes, the key point is that *none* of these authorities provided

37 *Id.* at 487 n.110.

38 *Id.* at 512.

39 *See id.* at 512–25; *see also* Michael Danaher, Case Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Peña-Irala*, 33 STAN. L. REV. 353, 357 (1981) (“An alternative constitutional theory, ‘protective jurisdiction’—coupled with a cause of action drawn from traditional choice of law analysis—may provide a civil remedy for victims of torture without relying on an unnecessary expansion of international law.”). On protective jurisdiction generally, *see* Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 184–96 (1953); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948).

40 *See* Republic of Mex. v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Republic of Peru, 318 U.S. 578 (1943).

41 *See* Greenspan v. Crosbie, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976).

42 28 U.S.C. §§ 1330, 1602–1611 (2006 & Supp. V).

43 *See, e.g.,* Hilao v. Estate of Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1469–72 (9th Cir. 1994) (holding that former Philippine president was not entitled to immunity under the FSIA because acts of torture, execution, and disappearance were outside of his official authority).

44 560 U.S. 305 (2010).

45 *Id.* at 325.

46 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (1965).

that the immunity of a foreign official from suit in U.S. court would be determined by foreign law.⁴⁷

The concern about Article III jurisdiction was more serious. Because Article III's grant of alienage jurisdiction does not reach cases where both parties are aliens,⁴⁸ the only possible basis for Article III jurisdiction in a case like *Filartiga* would be the "arising under" grant. The Second Circuit had found "arising under" jurisdiction based on the assumption that "the law of nations . . . has always been part of the federal common law."⁴⁹ The problem with this solution is that, at least until *Erie*, the law of nations was considered to be part of *general* common law, not federal common law.⁵⁰ The better answer is that the law of nations, though part of general common law, was nevertheless considered part of the "Laws of the United States" as that phrase is used in Article III.⁵¹ This interpretation makes sense of the difference in

47 Conflicts principles would also have allowed the application of U.S. law to questions of immunity. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties" (emphasis added)); *id.* cmt. d (noting that the law governing acceptable conduct might be different from the law governing immunity). A related concern might have been foreign amnesty laws, see BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 122 (1996) (noting this possibility), but a U.S. court could decline to apply such a law on public policy grounds. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (noting a court may consider "the relevant policies of the forum"); *cf. id.* § 90 ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."). Finally, foreign statutes of limitations might have barred some claims. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986) (claim may be barred by statute of limitations of state other than the forum). But until federal courts began to apply the Torture Victim Protection Act's ten-year statute of limitations in ATS cases, see *Xuncax v. Gramajo*, 886 F. Supp. 162, 192–93 (D. Mass. 1995) ("Plaintiffs' claims also are timely under the most analogous federal statute, the TVPA, which contains a ten year statute of limitations."), it was not at all clear that foreign statutes of limitations would be less favorable than the U.S. one. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547–51 (N.D. Cal. 1987) (holding that California's one-year limitation applied, rather than Argentina's two-year rule).

48 See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800).

49 *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (1980).

50 See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 824 (1997) ("During this period, the law of nations . . . had the legal status of general common law." (footnote omitted)); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2354 (1991) ("But throughout the early nineteenth century, American courts regularly construed and applied the unwritten law of nations as part of the 'general common law,' particularly to resolve commercial disputes, without regard to whether it should be characterized as federal or state.").

51 William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 701–11 (2002); see also Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 65 (1988) (noting that jurisdiction to hear ATS claims between two aliens is provided "by the 'Arising Under' clause of Article III"); William A. Fletcher, *International Human Rights in American Courts*, 93

language between Articles III and VI of the Constitution,⁵² is supported by the purpose of the delegates at the Philadelphia Convention to create a federal judiciary with jurisdiction over all questions under the law of nations, and is consistent with the understanding of the state ratifying conventions.⁵³

Blum and Steinhardt suggested that the Article III problem could be solved by reading the ATS as a grant of authority “to create a federal common law of torts to give effect to the purposes of international norms,”⁵⁴ a possibility supported by the Supreme Court’s decision in *Textile Workers Union v. Lincoln Mills of Alabama*.⁵⁵ They were more skeptical that Article III jurisdiction would exist if foreign law were applied to the merits.⁵⁶ Casto, on the other hand, thought that courts could apply foreign domestic law and still solve the Article III problem with a theory of protective jurisdiction.⁵⁷

VA. L. REV. 653, 656 (2007) (noting that Oliver Ellsworth, who drafted the ATS, “may also have believed that the law of nations was federal law in the jurisdiction-conferring sense”); Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 204 (2001) (“[T]o argue that international law is nonpreemptive U.S. law—i.e., it is encompassed by Article III but not by Article VI[—] . . . fits comfortably within constitutional text, structure, and practice.”). *But see* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 597–616 (2002) (arguing that the law of nations is not part of the laws of the United States under Article III).

52 Compare U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, *the Laws of the United States*, and Treaties made, or which shall be made, under their Authority” (emphasis added)), *with id.* art. VI, cl. 2 (“This Constitution, and *the Laws of the United States which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” (emphasis added)).

53 See Dodge, *supra* note 51, at 705–09 (considering evidence from the Constitutional Convention and ratification debates).

54 Blum & Steinhardt, *supra* note 25, at 98.

55 353 U.S. 448, 456–57 (1957) (reading § 301(a) of the Labor Management Relations Act of 1947 to authorize a federal common law of labor relations). In *Filartiga*, the Second Circuit had considered this theory but found it unnecessary to adopt it. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (noting that “such a reading [of the ATS] is possible”). Two subsequent decisions relied explicitly on *Lincoln Mills*. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (“Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute.” (citing *Lincoln Mills*, 353 U.S. 448)); *In re Estate of Marcos*, 910 F. Supp. 1460, 1469 (D. Haw. 1995) (“Because Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of human rights.” (citing *Lincoln Mills*, 353 U.S. at 457)).

56 See Blum & Steinhardt, *supra* note 25, at 98 (“[I]t might be argued that, if the substantive law of the *situs* defines the cause of action, federal courts cannot constitutionally hear the case under article III, since it does not ‘arise under’ the Constitution or the laws or treaties of the United States.”); *supra* notes 29–32 and accompanying text.

57 See Casto, *supra* note 25, at 512–25 (discussing the theory of protective jurisdiction); *supra* notes 38–39 and accompanying text.

although the Supreme Court has never relied on such a theory to support subject matter jurisdiction.⁵⁸

But a solution simpler than both of these presented itself just three years after *Filartiga*, when the Supreme Court decided *Verlinden B.V. v. Central Bank of Nigeria*.⁵⁹ In *Verlinden*, a Dutch corporation sued the Central Bank of Nigeria for anticipatory breach of a letter of credit.⁶⁰ Both parties were aliens,⁶¹ as in a typical ATS suit, and the law governing the merits of the dispute was not federal.⁶² The Court relied on Chief Justice Marshall's "broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law."⁶³ Because the FSIA codified the law of foreign state immunity, the Court concluded that "a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Article III."⁶⁴

Given that the law of nations is part of the "Laws of the United States" for Article III purposes,⁶⁵ precisely the same thing must be said about suits brought under the ATS: a suit under the ATS necessarily raises a question of U.S. law—whether there has been a tort in violation of the law of nations—at the very outset, and hence arises under U.S. law even if, as in *Verlinden*, the law governing the merits is non-federal law. The only possible difference between *Verlinden* and a typical ATS case is that the FSIA enumerates rules for state immunity,⁶⁶ while the ATS incorporates the law of nations by refer-

58 *Mesa v. California*, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged." (citation omitted)).

59 461 U.S. 480 (1983). The Second Circuit's decision in *Verlinden* was written by Judge Kaufman, who also wrote the opinion in *Filartiga*. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 647 F.2d 320, 321 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983); *Filartiga*, 630 F.2d at 877. In *Verlinden*, Judge Kaufman held that Article III jurisdiction was lacking because the issue of sovereign immunity was an affirmative defense rather than part of the plaintiff's case, 647 F.2d at 326–27, but the Supreme Court reversed. *Verlinden*, 461 U.S. at 497; see *infra* notes 60–64 and accompanying text (discussing the Supreme Court's decision in *Verlinden*).

60 *Verlinden*, 461 U.S. at 482–83.

61 See *id.* at 482 (noting the Dutch and Nigerian nationalities of the parties).

62 The sales contract was governed by Dutch law. *Id.* The opinion does not make clear what law governed the letter of credit, though both parties agreed that the letter had incorporated by reference the Uniform Customs and Practices for Documentary Credits, a source of trade custom. See *id.* at 482–83 & n.3.

63 *Id.* at 492 (citing *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 818, 822 (1824)).

64 *Id.* at 493.

65 See *supra* notes 51–53 and accompanying text.

66 28 U.S.C. §§ 1330, 1602–1611 (2006 & Supp. V).

ence.⁶⁷ But the Supreme Court long ago rejected the proposition that Congress must create law by enumeration rather than by reference. In *United States v. Smith*,⁶⁸ the Court upheld a federal statute punishing “the crime of piracy, as defined by the law of nations.”⁶⁹ “Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term.”⁷⁰ Thus, by 1983 at the latest, it should have been clear that Article III created no obstacle to ATS suits irrespective of whether the law applied to the merits was international law incorporated as federal common law or foreign law.⁷¹

As noted above, Casto favored applying foreign domestic law because he thought it inappropriate to apply U.S. law.⁷² “Most of the current litigation arises out of incidents between aliens in foreign countries, and doubt exists whether United States domestic law can or should be used to regulate these incidents.”⁷³ Even if the rule of decision were taken from international law, he reasoned, “the remedy would be a creature of a particular sovereign—the United States.”⁷⁴ Although the remedy for constitutional torts under *Bivens*⁷⁵ offered a model for the development of tort remedies,⁷⁶ Casto thought there would be “special factors counseling hesitation”⁷⁷ in recognizing remedies under U.S. law for violations of international law in other countries.⁷⁸

While Casto expressed concern about applying U.S. law in ATS cases, he did not express that concern in terms of the presumption against extraterritoriality.

67 28 U.S.C. § 1350 (2006).

68 18 U.S. (5 Wheat.) 153 (1820).

69 *Id.* at 157 (internal quotation marks omitted).

70 *Id.* at 159.

71 The Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), finally establishes that Article III jurisdiction exists over ATS suits between two aliens. Although the Court may decide certain threshold issues before establishing that it has subject matter jurisdiction, see *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007) (holding that a court may decide a *forum non conveniens* motion before determining personal or subject matter jurisdiction), extraterritorial scope “is a merits question,” *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), which the Court could not have reached in *Kiobel* unless it had jurisdiction under Article III. Much the same thing could have been said after *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See Fletcher, *supra* note 51, at 664 (“[T]he Court’s decision necessarily implies that the federal common law of customary international law is jurisdiction conferring.”). But because *Sosa* also involved a claim against the United States under the Federal Tort Claim Act, supplemental jurisdiction might alternatively have supported the ATS claim. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

72 See *supra* note 35 and accompanying text.

73 Casto, *supra* note 25, at 471 (footnotes omitted).

74 *Id.* at 474–75, 477.

75 See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 390–97 (1971).

76 Casto, *supra* note 25, at 481.

77 *Id.* at 482 (quoting *Bivens*, 403 U.S. at 396).

78 See *id.* at 481–86. For Casto’s post-*Sosa* views on the applicable law, see *infra* notes 188–93 and accompanying text.

toriality.⁷⁹ In the 1980s, it would have seemed highly unlikely that the Supreme Court would apply that presumption to the ATS. Although that presumption against extraterritoriality has a long history in American law, by the time *Filartiga* was decided it had largely fallen out of use.⁸⁰ The Supreme Court did not fully revive the presumption until its 1991 decision in *Aramco*,⁸¹ and while the Court's decisions since then have not been entirely consistent, the presumption against extraterritoriality has been applied with much greater frequency.⁸² Even after the presumption's revival, its applicability to alien tort litigation was not obvious. The ATS is a jurisdictional statute, and the Court has not typically applied the presumption against extraterritoriality to jurisdictional statutes.⁸³ Moreover, the presumption certainly does not apply to customary international law, which by definition is binding everywhere. But as U.S. courts increasingly looked to federal law to create a cause of action and to fashion remedies in ATS cases, the presumption would become more and more of a threat.

II. INTERNATIONAL LAW AS THE RULE OF DECISION

Then took the other, as just as fair,
 And having perhaps the better claim,
 Because it was grassy and wanted wear;
 Though as for that the passing there
 Had worn them really about the same,⁸⁴

The doctrinal road that alien tort litigation took was to apply international law as the rule of decision, with U.S. law providing the cause of action and the rules for damages. The choice was influenced by the claims that plaintiffs decided to bring. In *Tel-Oren v. Libyan Arab Republic*,⁸⁵ the first sig-

79 See *supra* notes 72–78 and accompanying text.

80 See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–86 (1998).

81 EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991). The Court had also applied the presumption two years earlier in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440–41 (1989).

82 See William S. Dodge, *Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 547 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

83 See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (applying the presumption to the substantive, but not the jurisdictional, provisions of the Securities Exchange Act). The two cases in which the Supreme Court has applied the presumption against extraterritoriality to arguably jurisdictional statutes both involved statutes that codified rules of immunity, which may be characterized as substantive. See *Smith v. United States*, 507 U.S. 197, 203–04 (1993) (interpreting the Federal Tort Claims Act); *Amerada Hess*, 488 U.S. at 440–41 (interpreting the Foreign Sovereign Immunities Act). For further discussion, see William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC'Y INT'L L. PROC. 396, 399 (2011).

84 FROST, *supra* note 9, at 9.

85 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

nificant ATS case decided after *Filartiga*, representatives of the victims of a Palestine Liberation Organization terrorist attack brought claims under treaties, customary international law, and U.S. criminal statutes, but no claims under the laws of Israel, where the attack occurred.⁸⁶ Plaintiffs claimed subject matter jurisdiction not just under the ATS⁸⁷ but also under § 1331, the general “federal question” statute,⁸⁸ because some of the plaintiffs were U.S. citizens whose claims the ATS did not cover.⁸⁹ The invocation of § 1331 led the district court to focus on the existence of a cause of action, which it found lacking with respect to U.S. criminal statutes, treaties, and customary international law.⁹⁰ The court rejected the claim that federal common law provided a cause of action for violations of the law of nations, reasoning that the requirement for a cause of action was “no less compelling” for customary international law than for treaties, and that “[t]o permit plaintiffs to assert under § 1331 claims under the law of nations notwithstanding the absence of private rights of action—express or implied—sanctions judicial interference with foreign affairs and international relations.”⁹¹ Having analyzed the existence of a cause of action under § 1331, the court simply applied the same analysis under § 1350, noting that the ATS “serves merely as an entrance into the federal courts and in no way provides a cause of action to any plaintiff.”⁹²

With the issue thus framed in terms of the cause of action, the *Tel-Oren* case came before the D.C. Circuit on appeal.⁹³ Judge Bork agreed with the district court that a cause of action was required and that none existed.⁹⁴ With respect to the ATS, he noted:

[T]here are three arguable theories about what law would supply the rule of decision. The rule of decision might be the international law (treaty or customary international law) violated; it might be a federal common law of torts; or it might be the tort law of whatever jurisdiction applicable choice of law principles would point to.⁹⁵

Bork rejected the possibility that treaties or customary international law might provide a cause of action.⁹⁶ He also rejected the possibility of a cause

86 See *id.* at 544–46, 548.

87 28 U.S.C. § 1350 (2006).

88 28 U.S.C. § 1331 (2006).

89 See *Tel-Oren*, 517 F. Supp. at 548 (“[S]ome of the plaintiffs and their personal representatives are citizens of the United States and cannot invoke a claim under § 1350.”). Plaintiffs also claimed jurisdiction under the diversity statute, 28 U.S.C. § 1332 (2006), and, with respect to their claim against Libya, under the FSIA, 28 U.S.C. § 1330, 1602–1611 (2006 & Supp. V), but the district court rejected both arguments. See *Tel-Oren*, 517 F. Supp. at 549 n.3.

90 *Tel-Oren*, 517 F. Supp. at 545–48.

91 *Id.* at 548.

92 *Id.* at 549.

93 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

94 *Id.* at 798–823 (Bork, J., concurring).

95 *Id.* at 804 n.10 (citing Blum & Steinhardt, *supra* note 25, at 99–100).

96 See *id.* at 808–10, 816–19.

of action founded in federal common law.⁹⁷ Bork did not consider the possibility of a cause of action under foreign law, because the plaintiffs had brought no such claim.

In contrast to the district court⁹⁸ and Judge Bork,⁹⁹ Judge Edwards did not think the cause of action analysis was the same under the ATS as it was under § 1331.

Unlike section 1331, which requires that an action “arise under” the laws of the United States, section 1350 does not require that the action “arise under” the law of nations, but only mandates a “violation of the law of nations” in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350.¹⁰⁰

Edwards thus concluded “that section 1350 itself provides a right to sue for alleged violations of the law of nations.”¹⁰¹ He went on to discuss at some length the possibility that a cause of action might “be found in the domestic tort law of the United States,”¹⁰² but thought that this “formulation makes sense only if construed to cover actions by aliens for domestic torts that occur in the territory of the United States.”¹⁰³ Like Bork, Edwards did not consider the possibility of a cause of action under foreign law, because the plaintiffs had not asserted such a claim.¹⁰⁴

While the D.C. Circuit was debating the existence of a cause of action in *Tel-Oren*, the district court in *Filartiga* was addressing the question of applicable law on remand.¹⁰⁵ Although the plaintiffs briefed the availability of damages under Paraguayan law,¹⁰⁶ they argued that, because the torture of Joelito Filártiga was not just a municipal tort but also a violation of customary international law, damages should not be “confined to what municipal law provides, but must account as well for the international character of the tort and the interest of the international community in just satisfaction.”¹⁰⁷ The

97 See *id.* at 811 (“To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief.”).

98 See *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 549 (D.D.C. 1981); *supra* note 92 and accompanying text.

99 See *Tel-Oren*, 726 F.2d at 800 (Bork, J., concurring).

100 *Id.* at 779 (Edwards, J., concurring).

101 *Id.* at 780. He attributed the same view to the Second Circuit in *Filartiga*, although the court there had expressly reached only the question of subject matter jurisdiction and had reserved the question of applicable law. See *supra* note 18 and accompanying text.

102 *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring).

103 *Id.* at 788.

104 See *id.* at 775 (per curiam). The third member of the panel did not address the cause of action issue and would have dismissed on political question grounds. See *id.* at 823–27 (Robb, J., concurring).

105 *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

106 Plaintiffs’ Post-Trial Memorandum of Facts and Law, *Filartiga*, 577 F. Supp. 860 (No. 79 Civ. 917), *reprinted in* ACEVES, *supra* note 10, at 655, 689–94.

107 *Id.* at 675.

district court agreed. With respect to the substantive law governing liability, the court concluded that it should “look[] to international law, which, as the Court of Appeals stated, ‘became a part of the common law of the United States upon the adoption of the Constitution.’”¹⁰⁸ The district court seemed motivated by the fears that applying foreign law would allow other countries to “enact immunities for government personnel”¹⁰⁹ and that treatment as a municipal tort would not reflect sufficient condemnation of torture since “[w]e are dealing not with an ordinary case of assault and battery.”¹¹⁰

With respect to remedies, the district court reasoned that the ATS gives federal courts the “power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law.”¹¹¹ Citing conflicts authorities, the court looked “first to Paraguayan law in determining the remedy for the violation of international law.”¹¹² Paraguayan law permitted “moral” damages for pain and suffering but not punitive damages.¹¹³ Yet the district court thought it “essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture.”¹¹⁴ In addition to compensatory damages, it therefore awarded each of the plaintiffs five million dollars in punitive damages under federal common law.¹¹⁵

Judge Edwards’s opinion in *Tel-Oren* and Judge Nickerson’s decision in *Filartiga* set the course for alien tort litigation going forward. Federal courts accepted the need for a cause of action under the ATS, but held that the ATS created the necessary cause of action in addition to conferring jurisdiction.¹¹⁶ In 1992, Congress spoke to the issue by passing the Torture Victim Protection Act (TVPA), which establishes civil liability for torture and extrajudicial killing.¹¹⁷ The TVPA was a direct response to Judge Bork’s opinion in *Tel-Oren*, and Congress expressed its intent not just to grant a “private right of action” for those two human rights violations but to allow federal courts to

108 *Filartiga*, 577 F. Supp. at 863 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980)).

109 *Id.* As noted above, this concern was ill-founded. See *supra* notes 40–47 and accompanying text.

110 *Filartiga*, 577 F. Supp. at 863.

111 *Id.* In ordinary tort cases, the substantive law applied also determines the available damages. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971) (“The law selected by application of the rule of § 145 determines the measure of damages.”); Borchers, *supra* note 21, at 52–53.

112 *Filartiga*, 577 F. Supp. at 864 (citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)).

113 *Id.*

114 *Id.* at 865.

115 *Id.* at 867.

116 See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847–48 (11th Cir. 1996); *Kadic v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995); *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1474–76 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

117 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

recognize claims for violations of “other norms that already exist or may ripen in the future into rules of customary international law.”¹¹⁸ The TVPA thus seemed to endorse the notion that U.S. law should provide the causes of action for torts in violation of the law of nations.

The question of applicable law received extended consideration in *Xuncax v. Gramajo*.¹¹⁹ Plaintiffs brought claims under both international and domestic law against a former Guatemalan Minister of Defense.¹²⁰ In considering the proper choice of law, the district court contrasted what it termed the “*Filartiga* approach” of applying international law as the rule of decision with a “[d]omestic [l]aw [a]lternative” that would look to either U.S. or foreign domestic tort law.¹²¹ The court reasoned that applying international law was more consistent with the text and purpose of the ATS and would give federal courts the flexibility “to develop a uniform federal common law response to international law violations.”¹²² Applying domestic tort law, the court noted, “mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort.”¹²³ Although the district court declined to apply domestic law to the merits of the plaintiffs’ ATS claims,¹²⁴ it did exercise supplemental jurisdiction over their domestic law claims, finding the claims for wrongful death, assault and battery, false imprisonment, and intentional infliction of emotional distress to be governed by Guatemalan law.¹²⁵ The court found inadequate evidence that punitive damages would be allowed under Guatemalan law,¹²⁶ but it did award punitive damages on the international law claims, following “the developing body of federal common law precedent which has allowed both compensatory and punitive damages for such harms.”¹²⁷

While most federal courts took the international law road, the Ninth Circuit’s decision in *Trajano v. Marcos*¹²⁸ showed what the other road might have looked like. In a suit against the daughter of the former Philippine President,¹²⁹ the district court had construed the ATS to be purely jurisdictional and had determined damages under Philippine law.¹³⁰ The court of appeals thus “assume[d] that the court did not rely on treaties or interna-

118 H.R. REP. NO. 102-367(I), at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; *see also* S. REP. NO. 102-249, at 4–5 (1991) (addressing Judge Bork’s concurring opinion in *Tel-Oren* and noting that the ATS “should remain intact”).

119 *Xuncax*, 886 F. Supp. 162.

120 *Id.* at 169.

121 *Id.* at 179–83.

122 *Id.* at 182.

123 *Id.* at 183.

124 *See id.*

125 *See id.* at 194–97. The court found one claim of defamation to be governed by Kentucky law. *See id.* at 197.

126 *Id.* at 202.

127 *Id.* at 198.

128 *Trajano v. Marcos* (*In re Estate of Marcos*), 978 F.2d 493 (9th Cir. 1992).

129 *Id.* at 495.

130 *See id.* at 503.

tional law to provide the cause of action, only to establish federal jurisdiction.”¹³¹ The Ninth Circuit observed that this “approach comports with the view that the First Congress enacted the predecessor to § 1350 to provide a federal forum for transitory torts . . . whenever such actions implicate the foreign relations of the United States.”¹³² It further noted that this “approach also allows the ‘law of nations’ and ‘treaty’ prongs of § 1350 to be treated consistently, in that the cause of action comes from municipal tort law.”¹³³ Significantly, the Ninth Circuit saw no Article III problem with this approach. Citing *Verlinden*, the court reasoned that the need to “decide whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it was violated in the particular case” were federal questions sufficient to establish “arising under” jurisdiction under Article III.¹³⁴

But not even the Ninth Circuit pursued this path in subsequent cases.¹³⁵ In *Hilao v. Estate of Marcos*, the court of appeals held that the ATS created a federal cause of action,¹³⁶ and while it noted the possibility of applying municipal tort law, the court found it unnecessary to decide the question because the plaintiffs had not raised it.¹³⁷ In *Alvarez-Machain v. United States*, the Ninth Circuit sitting en banc reaffirmed that the ATS creates a cause of

131 *Id.*

132 *Id.* (citation omitted).

133 *Id.* Judge Bork had found it anomalous in *Tel-Oren* to imply a cause of action for violations of the law of nations when no cause of action would be implied for non-self-executing treaties. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 820 (D.C. Cir. 1984) (Bork, J., concurring) (“If, as Judge Edwards states and *Filartiga* assumes, section 1350 not only confers jurisdiction but creates a private cause of action for any violation of the ‘law of nations,’ then it also creates a private cause of action for any violation of ‘treaties of the United States.’” (quoting 28 U.S.C. § 1350 (1976))).

134 *Trajano*, 978 F.2d at 502 (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983)). Applying its decision in *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990), *abrogated by Samantar v. Yousuf*, 560 U.S. 305 (2010), the court also held that the need to determine whether a foreign official was entitled to immunity under the FSIA was sufficient to establish “arising under” jurisdiction under Article III. *Trajano*, 978 F.2d at 501–02. The Supreme Court would abrogate *Chuidian* in *Samantar v. Yousuf* and hold that the immunity of foreign officials was governed by federal common law. 560 U.S. at 325.

135 In *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002), the district court initially held that it was obligated to apply foreign law, *id.* at 268, but after further briefing concluded that it would apply foreign law only to the extent it was consistent with international law and federal common law. See *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 406, 418–19 (S.D.N.Y. 2002).

136 *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994).

137 *Id.* at 1476 n.10 (citing *Trajano*, 978 F.2d at 503). In a subsequent appeal, the court affirmed an award of exemplary damages against the Marcos estate on the ground that such damages were permitted under Philippine law. See *Hilao v. Estate of Marcos*, 103 F.3d 767, 771–72, 779–80, 787 (9th Cir. 1996).

action for violations of international law,¹³⁸ applied customary international law to the merits,¹³⁹ and applied federal common law to the question of damages.¹⁴⁰ The court noted that the policy expressed in the ATS was “to provide a remedy for violations of the law of nations” and concluded that “limitations on damages under Mexican law—including the unavailability of punitive damages—are not consistent with the congressional policy that underlies the [ATS].”¹⁴¹

Thus by the mid-1990s, ATS cases had clearly taken the international law road, which was really a road that combined the application of international law and federal law in various ways. The customary international law on torture, extrajudicial killing, causing disappearances, genocide, etc. provided the rules of decision in ATS cases.¹⁴² Federal statutory law provided the cause of action, either the ATS itself or (for torture and extrajudicial killing) the TVPA.¹⁴³ Federal common law provided the remedies, including punitive damages that would not have been available under the municipal law of many countries where the human rights violations occurred.¹⁴⁴ Although successful plaintiffs rarely collected any damages,¹⁴⁵ both the application of international law and the availability of punitive damages were thought necessary to express appropriate condemnation of acts that were certainly not “garden-variety municipal tort[s].”¹⁴⁶ These doctrinal choices were made in cases that resembled *Filartiga*, with one alien bringing suit against another alien for serious human rights abuses that occurred abroad. In 1996, a new wave of ATS litigation began, with plaintiffs bringing suits against corporations—often U.S. corporations—for complicity in foreign government violations of human rights. These cases raised a new choice of law issue: whether international law or federal common law should provide the rules for aiding and abetting liability.¹⁴⁷

III. HOW WAY LEADS ON TO WAY

And both that morning equally lay
 In leaves no step had trodden black.
 Oh, I kept the first for another day!

138 See *Alvarez-Machain v. United States*, 331 F.3d 604, 612–13 (9th Cir. 2003) (en banc), *rev'd sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

139 See *id.* at 620–31.

140 See *id.* at 632–36.

141 *Id.* at 635.

142 See *supra* notes 85–127 and accompanying text.

143 See *supra* notes 101–04, 116–18, and accompanying text.

144 See *supra* notes 111–15, 126–27, 140–41, and accompanying text.

145 See Stephens, *supra* note 4, at 1467 (“[O]nly a handful of lawsuits have produced enforceable judgments for plaintiffs, while another handful settled . . .”).

146 *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995); see also *Filartiga v. Penarala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (“We are dealing not with an ordinary case of assault and battery.”).

147 See *infra* Part III.

Yet knowing how way leads on to way,
I doubted if I should ever come back.¹⁴⁸

The way from suits against individuals to suits against corporations was revealed in *Kadic v. Karadžić*,¹⁴⁹ a case against Bosnian-Serb leader Radovan Karadžić alleging genocide, war crimes, torture, and summary execution.¹⁵⁰ Because the Bosnian-Serb entity of Srpska was not a recognized foreign state, the question arose whether state action was a necessary ingredient in ATS suits.¹⁵¹ The Second Circuit held that the customary international law norms against genocide and war crimes applied to private individuals irrespective of state action,¹⁵² and that the state action requirements for torture and extrajudicial killing might be met by showing that Karadžić “[a]ct[ed] in concert with a foreign state.”¹⁵³ As Beth Stephens noted:

These two principles permit the application of the [ATS] to corporate defendants. Private corporations are liable for violations of human rights norms such as genocide, slavery and war crimes that by definition apply to private actors as well as official government agents. Moreover, corporations can be held liable for violations committed “in concert with” government officials.¹⁵⁴

The first ATS suits against corporations were filed in 1996, the year after *Kadic*.¹⁵⁵ In the most famous of these, two sets of villagers from Myanmar brought suit alleging that Unocal Corporation had aided and abetted the Myanmar military in subjecting them to forced labor, murder, rape, and torture in connection with the building of a pipeline.¹⁵⁶ On a motion to dismiss,¹⁵⁷ the district court followed *Kadic*, looking to 42 U.S.C. § 1983 jurisprudence to see if the allegations in the complaint satisfied the require-

148 FROST, *supra* note 9, at 9.

149 70 F.3d 232 (2d Cir. 1995).

150 *Id.* at 236–37.

151 *Id.* at 239.

152 *Id.* at 241–43.

153 *Id.* at 243, 245. *Kadic* looked to federal law to determine whether the state action requirement had been satisfied, applying the “color of law” jurisprudence developed in civil rights suits under 42 U.S.C. § 1983. *Id.* at 245 (internal quotation marks omitted). A district court had looked to § 1983 in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), and Congress endorsed this approach with respect to the TVPA’s state action requirement. See H.R. REP. NO. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87; S. REP. NO. 102-249, at 8 (1991).

154 Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV. 401, 407 (2001).

155 See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in part and rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *vacated & reh’g granted*, 395 F.3d 978 (9th Cir. 2003), *and dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc). Other ATS cases against corporations soon followed. See Stephens, *supra* note 4, at 1517–19.

156 *Unocal*, 963 F. Supp. at 883–84.

157 *Id.* at 884.

ment of state action¹⁵⁸ and holding that private actors may be held liable for forced labor, as a modern form of slave trading, even in the absence of state action.¹⁵⁹ A few years later, on motion for summary judgment and before a different judge, the district court held that plaintiffs had not presented sufficient evidence to meet § 1983's state action standard.¹⁶⁰ With respect to complicity for the Myanmar military's forced labor practices, however, the court looked to international law, holding that the decisions of the Nuremberg Tribunal required not just "knowledge that someone else would commit abuses" but "participation or cooperation in the forced labor practices."¹⁶¹

On appeal to the Ninth Circuit, the choice of law governing complicity took center stage. The panel majority agreed with the district court that liability for aiding and abetting should be governed by "international law as developed in the decisions by international criminal tribunals."¹⁶² It found that law in recent decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) required practical assistance that has a "substantial effect" on the perpetration of the crime, coupled with "knowledge" that the defendant's actions would assist in the commission of the crime.¹⁶³ The Ninth Circuit specifically rejected the suggestion that it should apply the domestic law of Myanmar, quoting *Xuncax's* observation that to do so would "'mute[] the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort."¹⁶⁴

In a concurring opinion, Judge Reinhardt differed over the law applicable to the question of complicity. In his view, once a tort in violation of international law had been established, federal common law governed "the ancillary legal question of Unocal's third-party tort liability."¹⁶⁵ He pointed to the "unique federal interests involved in Alien Tort Claims Act cases that support the creation of a uniform body of federal common law to facilitate the implementation of such claims."¹⁶⁶ Judge Reinhardt also had doubts about both the substance and the status of the international law rule applied by the majority. On substance, he pointed out that the ICTY's decisions

158 *Id.* at 890–91 (citing *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995)).

159 *Id.* at 891.

160 *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1305–07 (C.D. Cal. 2000), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated & reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *and dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc).

161 *Id.* at 1310.

162 *Unocal*, 395 F.3d at 948. Bizarrely, the court suggested that its decision to apply international law was limited to the facts of this case and that in other cases "application of the law of the forum state—including federal common law—or the law of the state where the events occurred may be appropriate." *Id.* at 949 n.25.

163 *Id.* at 950 (quoting *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 235, 245 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998)). The panel rejected the "active participation" standard applied by the district court as relevant only to overcoming a defense of necessity. *See id.* at 947–48.

164 *Id.* at 948 (quoting *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995)).

165 *Id.* at 963 (Reinhardt, J., concurring).

166 *Id.* at 965.

would permit liability for providing “moral support,” which was “far too uncertain and inchoate a rule for us to adopt without further elaboration.”¹⁶⁷ On status, he characterized the ICTY as “a recently-constituted ad hoc international tribunal”¹⁶⁸ and pointed out that future tribunals might define the standard differently.¹⁶⁹ Judge Reinhardt preferred to apply federal common law on joint venture, agency, and reckless disregard—principles that were well established and over which the federal courts maintained control.¹⁷⁰

Advocates for human rights victims, while not opposed to applying international law, seemed to prefer federal common law on questions of complicity. Writing in 1996, Beth Stephens and Michael Ratner observed: “While international law is generally favorable to plaintiffs . . . , it might limit the court’s ability to develop a full range of remedies for the conduct alleged in suits under the ATCA. The flexibility of the common law approach allows the court to reject an unduly restrictive international law precedent.”¹⁷¹ Similarly in 2003, just after the Ninth Circuit’s *Unocal* decision, Paul Hoffman and Daniel Zaheer argued “that federal courts must fashion federal common law based on federal jurisprudence and international authority to determine rules for complicity liability and other ancillary standards in ATCA litigation.”¹⁷² Like Judge Reinhardt, they seemed concerned about the status of the international law rule on aiding and abetting, although they also argued at some length that it was well settled¹⁷³ and “identical” to the federal common law standard for aiding and abetting liability.¹⁷⁴ In particular, Hoffman and Zaheer worried that aiding and abetting might not meet the “specific, universal and obligatory” standard that lower courts had applied to screen actionable violations and that the Supreme Court would soon endorse in *Sosa*.¹⁷⁵

167 *Id.* at 969-70. The majority found it unnecessary to reach the question whether mere moral support would be sufficient. *See id.* at 951 (majority opinion).

168 *Id.* at 967 (Reinhardt, J., concurring).

169 *See id.* at 970. For further discussion of aiding and abetting liability under international law, see *infra* note 211.

170 *See Unocal*, 395 F.3d at 970-76. Judge Reinhardt did not point to federal common law on aiding and abetting, though the majority pointed out that the ICTY’s standard of knowing substantial assistance was similar to the RESTATEMENT (SECOND) OF TORTS § 876 (1979). *See Unocal*, 395 F.3d at 951.

171 STEPHENS & RATNER, *supra* note 47, at 122. They rejected the “foreign law approach,” which “could result in a narrow and cramped decision that awards minimal damages or even results in a dismissal, if, for example, the foreign state has passed an amnesty law.” *Id.*

172 Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47, 49 (2003).

173 *See id.* at 70-75.

174 *Id.* at 79.

175 *Id.* at 70 (“[A] ‘specific, universal and obligatory’ norm is not necessary for proscribing an aiding and abetting violation of international law.”). Hoffman and Zaheer added an addendum following the Supreme Court’s 2004 decision in *Sosa* (which Hoffman

Sosa was not a corporate case, but it ratified the lower courts' decisions to apply a combination of international law and federal law in ATS cases and fixed the analytic framework for cases against corporations, including *Kiobel*. The plaintiff, Humberto Alvarez-Machain, had been abducted from Mexico by Jose Francisco Sosa and other Mexican nationals at the behest of the U.S. Drug Enforcement Administration (DEA) to stand trial for involvement in the murder of a DEA agent.¹⁷⁶ After his acquittal, Alvarez filed suit against the United States under the Federal Tort Claims Act and against Sosa under the ATS. Before the Supreme Court, Sosa argued that the ATS was strictly jurisdictional and that it did not create a cause of action.¹⁷⁷ The Bush Administration supported that argument¹⁷⁸ and added that inferring a cause of action from the ATS would violate the presumption against extraterritoriality, which was designed to protect "against unintended clashes between our laws and those of other nations which could result in international discord."¹⁷⁹ The U.S. brief emphasized "[t]he potentially disruptive effects of Section 1350 litigation on the foreign policy interests of the United States," citing the pending suit against corporations that had done business in South Africa under Apartheid as a particular example.¹⁸⁰ The presumption would have applied to any statute creating a cause of action, the Bush Administration noted, and by inferring a cause of action from the ATS instead, the court of appeals had "essentially bypassed the presumption against extraterritoriality."¹⁸¹

The Supreme Court agreed with Sosa and the United States that the ATS was "strictly jurisdictional"¹⁸² but refused to accept "that the ATS was still-born because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action."¹⁸³ Agreeing with an ami-

argued), in which they read *Sosa* to endorse "federal common lawmaking," *id.* at 86, and argued that the "specific, universal and obligatory" test did not apply to "subsidiary rules of decision," *id.* at 87, like aiding and abetting liability. For more on the interpretations of *Sosa*, see *infra* notes 188–225 and accompanying text.

176 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-98 (2004).

177 Brief of Petitioner at 9-45, *Sosa*, 542 U.S. 692 (No. 03-339).

178 Brief for the United States as Respondent Supporting Petitioner at 11–24, *Sosa*, 542 U.S. 692 (No. 03-339).

179 *Id.* at 47 (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)). The Bush Administration had previewed this argument in two 2003 filings. See Brief for the United States of America as Amicus Curiae at 29-31, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (en banc) (Nos. 00-56603, 00-56628); Supplemental Statement of Interest of the United States of America at 21-23, *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. CIV.A.01-1357 (LFO)). As Eugene Kontorovich has noted, the United States "had filed at least six prior amicus briefs in ATS cases, starting with *Filartiga*, without having raised the extraterritoriality issue." Kontorovich, *supra* note 3, at 1677.

180 Brief for the United States as Respondent Supporting Petitioner, *supra* note 178, at 43.

181 *Id.* at 48.

182 *Sosa*, 542 U.S. at 713.

183 *Id.* at 714.

cus brief, the Court held that the ATS was “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”¹⁸⁴ The Court then translated this proposition to a post-*Erie* world by articulating a restrictive test for the recognition of causes of action under federal common law: “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”¹⁸⁵ Looking to the “current state of international law” for the substantive rule on arbitrary detention,¹⁸⁶ the Court held that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”¹⁸⁷

As William Casto noted, *Sosa* “established an analytical watershed for litigation under the Alien Tort Statute.”¹⁸⁸ It drew upon “the well-established distinction between rights and remedies,” with the rights governed by international law and the remedies by federal common law.¹⁸⁹ “All questions as to whether the defendant has acted unlawfully must be answered by recourse to rules of decision found in international law.”¹⁹⁰ But questions like the statute of limitations, the survival of an action after the defendant’s death, vicarious liability under the doctrine of respondeat superior, and the availability of punitive damages would be answered by resort to federal common

184 *Id.* at 724. I wrote the amicus brief the Court followed on this point. *See supra* note *.

185 *Sosa*, 542 U.S. at 732. The Court noted that this limit was consistent with the standards applied by many lower courts, specifically citing the “specific, universal, and obligatory” standard applied by the Ninth Circuit in *Hilao*, as well as *Filartiga* and Judge Edwards’s opinion in *Tel-Oren*. *See id.* (citing *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994), *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

186 *Id.* at 733.

187 *Id.* at 738.

188 William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 635 (2006).

189 *Id.* at 638; *see also* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 36-37 (2d ed. 2008) (“*Sosa* clarified the central choice of law issues in ATS cases by holding: (1) the substantive violation is governed by international law; and (2) federal common law provides the cause of action and, therefore, governs non-substantive issues.”); William R. Casto, *The ATS Cause of Action Is Sui Generis*, 89 NOTRE DAME L. REV. 1545, 1546 (2014) (“In international torts, however, the norm and the remedy do not come from the same sovereign. The norm comes from international law, and the remedy is legislated by federal courts.”).

190 Casto, *supra* note 188, at 643.

law.¹⁹¹ Casto put aiding and abetting on the international law side of this line,¹⁹² but not everyone agreed.¹⁹³

In the corporate cases, advocates on both sides subsequently viewed the question of aiding and abetting liability through the lens of the *Sosa* framework. In *Unocal*, the Ninth Circuit had granted rehearing en banc prior to *Sosa* and now called for further briefing.¹⁹⁴ Plaintiffs initially suggested that international law might govern:

In [*Sosa*], the Supreme Court specifically concluded that ATS claims are “claims under federal common law.” Thus, the federal courts must develop principles to govern ATS litigation. Because international law is part of federal common law, international law principles of aiding and abetting are applicable to determine liability; aiding and abetting is also recognized generally under federal common law.¹⁹⁵

191 See *id.* at 642, 644, 652. Casto acknowledged the shift from his 1986 article in light of *Sosa*. See *id.* at 652 n.100; *supra* notes 33–39 and accompanying text.

192 Casto, *supra* note 188, at 650 (arguing that because “aiding-and-abetting is a conduct-regulating norm,” such liability “is inappropriate in ATS litigation unless a norm of international law forbids private persons to assist violators”); see also Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 73–83 (2008). Professor Ingrid Wuerth rejected the dilemma of a binary choice and suggested that

[T]he relationship between federal common law and international law is not binary but instead is best understood on a continuum, with certain aspects of ATS litigation governed by federal common law that is tightly linked to international law, other aspects governed by federal common law that is not derived from international norms, and still others that fall somewhere in between.

Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1932–33 (2010).

193 See Hoffman & Zaheer, *supra* note 172, at 88 (“To require a court to find a ‘specific, universal and obligatory’ prohibition against aiding and abetting is as nonsensical as requiring such a finding with respect to defenses, damages, statutes of limitations, and numerous other ancillary rules that are essential elements of any civil case.”); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2274 (2004) (“[T]he federal courts in ATS cases must derive federal common law rules to govern such issues as statutes of limitation, standing to sue, exhaustion of remedies, third party complicity, and the like.”); Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 560 (2005) (noting with respect to aiding and abetting liability that “a court might ask first whether international law provides a clear answer, then look to federal vicarious liability standards as necessary to fill any gaps”).

194 The parties settled before rehearing. The Ninth Circuit panel’s decision had been vacated upon the grant of rehearing, *Doe I v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003), and the en banc panel granted a motion to vacate the district court’s 2000 opinion granting summary judgment, see *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (en banc), leaving the district court’s 1997 decision denying the motion to dismiss as the last word in this case.

195 *Doe and Roe Plaintiffs’ and Appellants’ Supplemental Brief* at 18, *Unocal*, 403 F.3d 708 (Nos. 00-56603, 00-56628, 00-57195, 00-57197) (en banc) (citations omitted).

But over the next few years plaintiffs increasingly argued for the application of federal common law rules on aiding and abetting, particularly as cases applying international law started to go against them.¹⁹⁶

In the *Apartheid* case, which both the Bush Administration brief and the Supreme Court had singled out in *Sosa*,¹⁹⁷ the district court held that international law did not prohibit aiding and abetting human rights violations clearly enough to meet the *Sosa* standard.¹⁹⁸ On appeal, plaintiffs argued that aiding and abetting was an “ancillary” rule that did not have to meet the *Sosa* standard.¹⁹⁹ “The District Court should have determined whether plaintiffs’ complaint alleged substantive violations of ‘specific, universal, and obligatory’ international norms, and then consulted federal common law to determine whether aiding and abetting liability exists for suits under the ATS.”²⁰⁰ The Second Circuit panel divided three ways. Judge Katzmman thought that international law rules should apply to aiding and abetting,²⁰¹ but that international law required that the defendant have acted “with the purpose of facilitating the commission of th[e] crime.”²⁰² Judge Hall thought “a federal court should consult the federal common law” to derive a standard for aiding and abetting liability²⁰³ and that federal common law required only that the defendant act with knowledge.²⁰⁴ Lastly, although Judge Korman agreed with Katzmman that international law should govern aiding and abetting liability,²⁰⁵ he doubted that there was any international law definition of aiding and abetting sufficient to meet the *Sosa* standard.²⁰⁶

196 See Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT’L CRIM. JUST. 745, 762 (2010) (noting that plaintiffs argued “that as the Supreme Court has said that the ATS is a creature of US federal common law, courts should look to federal common law to answer such questions” as aiding and abetting liability); Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 214 (2008) (“[T]he better view, espoused by most human rights plaintiffs, is that courts may therefore apply federal common law liability rules.” (footnotes omitted)).

197 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *supra* note 180 and accompanying text.

198 See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004).

199 Brief for Plaintiffs-Appellants at 30-32, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (No. 05-2326).

200 *Id.* at 32.

201 *Khulumani*, 504 F.3d at 268 (Katzmann, J., concurring).

202 *Id.* at 277. Judge Katzmman acknowledged that some international tribunals had adopted a “knowledge” standard for mens rea, but suggested that the narrower “purpose” standard was necessary to satisfy *Sosa*. See *id.* at 276-77 n.12.

203 *Id.* at 284 (Hall, J., concurring).

204 See *id.* at 287 (citing RESTATEMENT (SECOND) OF TORTS § 876(b) (1979)).

205 See *id.* at 331 (Korman, J., concurring in part and dissenting in part).

206 See *id.* at 333. He nevertheless concurred in Judge Katzmman’s “purpose” standard for mens rea in order to give the district court a test to apply on remand. See *id.* Judge Korman also urged dismissal on a variety of other grounds, including the novel claim that international law did not recognize corporate liability. See *id.* at 321-26.

Defendants petitioned for certiorari, but the Supreme Court was unable to muster a quorum.²⁰⁷

The Second Circuit addressed the question of aiding and abetting liability again in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, holding that such liability was governed by international law and adopting Judge Katzmann's "purpose" standard as the law of the circuit.²⁰⁸ Plaintiffs petitioned the Supreme Court for review, arguing that the Second Circuit's decision to apply international law to aiding and abetting liability was "inconsistent with this Court's decision in [*Sosa*] that civil claims under the ATS are based upon federal common law."²⁰⁹ Under federal common law, plaintiffs argued, the standard for aiding and abetting liability is "[k]nowing assistance."²¹⁰ In retrospect, the better argument might have been that international law applied to aiding and abetting claims with a "knowledge" standard for mens rea.²¹¹ As my colleague Chimène Keitner pointed out, applying international law to aiding and abetting claims "avoids criticism of

207 See *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (affirming without precedential effect pursuant to 28 U.S.C. § 2109 (2006)).

208 582 F.3d 244, 257-59 (2d Cir. 2009).

209 Petition for Writ of Certiorari at 4, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S. Ct. 79 (2010) (No. 09-1262) [hereinafter *Talisman Petition*].

210 *Id.* at 24-26.

211 See Keitner, *supra* note 192, at 83-96. The "knowledge" standard for aiding and abetting liability dates back to Nuremberg's *Zyklon B Case*, in which two defendants were convicted of war crimes for "supply[ing] poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." Trial of Bruno Tesch and Two Others (The *Zyklon B Case*), in 1 TRIALS OF WAR CRIMINALS 93 (1947); see *United States v. Ohlendorf* (The *Einsatzgruppen Case*), in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 569 (n.d.) [hereinafter *TRIALS*]; *United States v. Flick* (The *Flick Case*), in 6 TRIALS, *supra*, at 1217 (1952); *United States v. Krauch* (The *I.G. Farben Case*), in 8 TRIALS, *supra*, at 1169 (1952). The *Ministries Case*, on which some federal courts have relied for a "purpose" standard, also applied a "knowledge" standard. See *United States v. von Weizsaecker* (The *Ministries Case*), in 14 TRIALS, *supra*, at 478, 620, 622. The banker Karl Rasche was acquitted in that case not because the tribunal required a mens rea of purpose, but because it found that making a loan was not a sufficient actus reus. See *id.* at 622. And the "purpose" test in Article 25(3)(c) of the Rome Statute, on which some federal courts have also relied, "was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how, precisely, to express the mens rea of the aider or abetter" for the particular purposes of the International Criminal Court. Brief of David J. Scheffer, Director of the Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari at 11, *Talisman*, 131 S. Ct. 79 (No. 09-1262) (expressing the views of the lead U.S. negotiator at the Rome Conference). The Nuremberg precedents, together with the more recent decisions of international criminal tribunals adopting a "knowledge" requirement, see, e.g., *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Chamber Judgment and Sentence, ¶ 180 (Int'l Crim. Trib. for Rwanda Jan. 27, 2000); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber Judgment, ¶ 486 (Special Court for Sierra Leone May 18, 2012), are plainly sufficient to meet the *Sosa* standard.

applying U.S. law to defendants' conduct in an international system that generally disfavors the extraterritorial application of domestic substantive law."²¹² Although plaintiffs did argue to the Supreme Court in *Talisman* that international law required only knowledge for aiding and abetting liability, that argument was clearly secondary.²¹³ In any event, although the Supreme Court was able to muster a quorum this time, it denied cert.²¹⁴

While plaintiffs increasingly argued that federal common law governed every question but the initial violation of the law of nations, the United States government pointed to the applicability of federal common law as grounds for applying the presumption against extraterritoriality. No Justice had accepted this argument in *Sosa*, but in the Bush Administration's view, *Sosa*'s decision to base ATS causes of action on federal common law made the presumption all the more salient. The United States' supplemental brief in *Unocal* emphasized that under *Sosa* "any cause of action recognized by a federal court is one devised as a matter of federal common law—*i.e.* the law of the United States."²¹⁵ The United States claimed that "[i]t would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-a[-]vis its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power."²¹⁶ The Bush Administration repeated this argument in *Khulumani*, *Talisman*, and other cases.²¹⁷

212 Keitner, *supra* note 192, at 74.

213 *Talisman* Petition, *supra* note 209, at 27–33. The standard for aiding and abetting under customary international law may have seemed less cert-worthy at the time because there was not yet a circuit split on that question. Compare *Talisman*, 582 F.3d at 257–59 (adopting a purpose standard under international law), and *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011) (same), with *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011) (adopting a knowledge standard under international law); see also *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 765 (9th Cir. 2011) (en banc) (noting the question without deciding it).

214 *Talisman*, 131 S. Ct. at 79.

215 See Supplemental Brief for the United States of America, as Amicus Curiae at 4, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

216 *Id.*; see also *id.* at 4–7 (discussing the presumption against extraterritoriality).

217 See Brief for the United States as Amicus Curiae in Support of Petitioners at 12–16, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919); Brief for the United States as Amicus Curiae at 5–12, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); Brief for the United States of America, as Amicus Curiae at 5–8, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2326-CV). Professor Michael Ramsey made a related argument that creating a cause of action was an exercise of jurisdiction to prescribe and that, because aiding and abetting was not an offense subject to universal jurisdiction, creating such a cause of action with respect to foreign corporations would violate international law limitations on jurisdiction to prescribe. See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 292–320 (2009).

I argued that the Bush Administration's interpretation of *Sosa* was fundamentally mistaken.²¹⁸ U.S. courts did not apply U.S. substantive law in ATS cases, I explained, but rather customary international law.²¹⁹ "Customary international law is not made by the United States alone and cannot be applied 'extraterritorially,' since it is, by definition, binding in all countries."²²⁰ To be clear, I did not argue that courts should apply foreign domestic law in ATS cases—alien tort litigation had taken a different path long ago. But I did argue that the application of customary international law in ATS cases was *like* "what U.S. courts do in ordinary conflict-of-laws cases when they apply foreign substantive law"²²¹ and that U.S. courts were exercising "not jurisdiction to prescribe but jurisdiction to adjudicate."²²² *Sosa* had established a restrictive standard for federal common law causes of action not to impose additional U.S. substantive obligations on foreign conduct, but rather to *limit* the adjudication in U.S. courts of claims under existing customary international law.²²³ It would be utterly misguided (and profoundly ironic), I thought, to use this limiting cause of action as the basis for *further* limitation through the presumption against extraterritoriality.

Lower federal courts rejected the Bush Administration's extraterritoriality argument.²²⁴ "The norms being applied under the ATS are international, not domestic, ones," the Ninth Circuit observed.²²⁵ Of course, the more U.S. courts applied not international law but federal common law as the rule of decision, the more difficult this argument was to maintain.

IV. *KIOBEL* AND THE ROAD NOT TAKEN

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.²²⁶

218 See William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35 (2010).

219 See *id.* at 37.

220 *Id.* at 45.

221 *Id.* at 39.

222 *Id.* at 37.

223 See *id.* at 43 ("Simply put, *Sosa*'s language about creating federal common law causes of action describes not a new exercise of prescriptive jurisdiction but a new limit on adjudicatory jurisdiction."). For a post-*Kiobel* argument along the same lines, see Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65 (2013).

224 See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745–47 (9th Cir. 2011) (en banc); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20–28 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

225 *Sarei*, 671 F.3d at 746. The court also held that if the presumption applied it would be rebutted. See *id.* at 745 ("Moreover, we know from *Sosa*, that the Congress in 1789 had overseas conduct in mind.").

226 FROST, *supra* note 9, at 9.

Kiobel arrived at the Supreme Court by an odd route. Nigerian nationals brought a class action against Royal Dutch Petroleum, an Anglo-Dutch corporation, for aiding and abetting the Nigerian government in committing a number of human rights violations in the Ogoni region of Nigeria.²²⁷ The district court held that aiding and abetting claims could be brought under the ATS and that some of the alleged violations of international law did not meet the *Sosa* standard and certified the case for interlocutory appeal.²²⁸ On appeal, the Second Circuit dismissed the entire complaint on a ground not addressed by the district court—that “customary international law has steadfastly rejected the notion of corporate liability for international crimes.”²²⁹

The Supreme Court granted plaintiffs’ petition for certiorari on the question of corporate liability, but following oral argument, directed the parties to brief the additional question whether courts may recognize causes of action for violations of the law of nations occurring within the territory of a country other than the United States.²³⁰ Plaintiffs argued against a territorial limitation, invoking the transitory tort doctrine.²³¹ They acknowledged that in “transitory tort cases U.S. courts are simply adjudicating the legal obligations supplied by foreign law,” but argued that the doctrine applied because “[i]n all ATS cases the tortfeasor is held to universally-recognized standards supplied by customary international law governing the underlying wrongful conduct.”²³² Plaintiffs explained that “[t]his is so even if U.S. federal common law provides some of the rules governing the litigation because the international system assumes that domestic legal systems will use their own remedial systems to enforce international law.”²³³ In arguing that the ATS was consistent with international law rules on jurisdiction, plaintiffs again

227 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662–63 (2013).

228 *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463–68 (S.D.N.Y. 2006). Royal Dutch Petroleum did not move to dismiss for lack of personal jurisdiction or under the doctrine of *forum non conveniens*, presumably because the Second Circuit had rejected those defenses in a different case arising from the same facts, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94–108 (2d Cir. 2000). This deprived the district court, the court of appeals, and ultimately the Supreme Court of two doctrines designed to screen out cases that have minimal contacts to the United States. *Cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 753–63 (2014) (dismissing ATS suit for lack of general jurisdiction over parent corporation).

229 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010). The Second Circuit reached the wrong answer by asking the wrong question. As the Obama Administration argued before the Supreme Court, the Second Circuit should not have “examined the question of corporate liability in the abstract” but rather looked to see “whether any of the particular international-law norms [at issue] exclude corporations from their scope.” Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). For further discussion, see William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT’L L. 1045 (2012).

230 *See Kiobel*, 133 S. Ct. at 1663.

231 *See* Petitioners’ Supplemental Opening Brief at 27–31, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

232 *Id.* at 30.

233 *Id.* at 30–31.

emphasized that “ATS actions enforce universally-recognized norms of customary international law binding in every country through the domestic mechanism of federal common law, not substantive norms of American public law prescribed by Congress.”²³⁴

Respondents, for their part, argued that “[t]he presumption against extraterritorial application of U.S. law is triggered” because under *Sosa* “courts apply a civil cause of action under U.S. federal common law to remedy a violation of an international-law norm.”²³⁵ The transitory tort doctrine was inapposite because “[i]n such cases, the cause of action is afforded by the law of the place of the conduct.”²³⁶ As for the Obama Administration, the Justice Department’s amicus brief acknowledged that “there are circumstances in which it would be appropriate for a court to recognize a cause of action based on the ATS for violations of international law occurring outside the United States.”²³⁷ But consistent with the Bush Administration’s briefs, the Justice Department also argued that “a private right of action fashioned by a court exercising jurisdiction under the ATS constitutes application of the substantive and remedial law of the United States”²³⁸ and that a court “must take account of the principles underlying the presumption against extraterritorial application of federal statutes, especially where the alleged conduct has no substantial connection to or impact on the United States.”²³⁹

Putting the question of corporate liability to one side, the Supreme Court held that “the presumption against extraterritoriality applies to claims under the ATS.”²⁴⁰ Writing for the Court, Chief Justice Roberts acknowledged that the presumption does not typically apply to jurisdictional statutes,²⁴¹ but he reasoned that “the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”²⁴² Roberts distinguished the transitory tort doctrine invoked by plaintiffs on the ground that courts in such cases applied foreign law.²⁴³ “The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law,”²⁴⁴ he noted. “The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.”²⁴⁵

234 *Id.* at 40.

235 Supplemental Brief for Respondents at 6–7, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

236 *Id.* at 17.

237 Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

238 *Id.* at 2.

239 *Id.* at 15–16.

240 *Kiobel*, 133 S. Ct. at 1669.

241 *See id.* at 1664 (“We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad.”).

242 *Id.*

243 *See id.* at 1666.

244 *Id.*

245 *Id.*

Justice Breyer, joined by Justices Ginsberg, Sotomayor, and Kagan, concurred only in the judgment. He thought the presumption against extraterritoriality was overcome by the subject matter of the ATS and the fact that one of the historical paradigms (piracy) would typically have occurred outside the United States.²⁴⁶ But Breyer still viewed the question of geographic scope through *Sosa*'s lens as an exercise of prescriptive jurisdiction. Specifically, he looked for guidance to customary international law rules on jurisdiction to prescribe²⁴⁷ and concluded (somewhat mysteriously)²⁴⁸ that the ATS should be limited to situations where (1) the tort occurred on U.S. soil; (2) the defendant was a U.S. national; or (3) the United States had another important interest, including its interest in not becoming a "safe harbor" for torturers.²⁴⁹

It is difficult to see how either the *Kiobel* majority or Justice Breyer could have reached the conclusions that they did if alien tort litigation had taken the more traditional path of applying the *lex loci delicti* to transitory torts. A suit for torture under the ATS would have been treated no differently than a suit for battery under foreign law is treated in state court, or indeed than such a suit is treated in the courts of many other nations.²⁵⁰ It would have been clear that courts hearing such cases were not exercising jurisdiction to prescribe the applicable law, but rather jurisdiction to adjudicate disputes under laws prescribed by other nations. The main difference between an ATS suit and a transitory tort suit in state court would have been the need to determine that the law of nations had been violated in order to secure a federal forum. As explained above, such a determination would have been sufficient under *Verlinden* to satisfy the requirement for Article III jurisdiction.²⁵¹ And while it may not have had the same symbolic value as applying international law directly to the merits, it would have had symbolic value nevertheless—for a federal court would still have found that the defendant had engaged in torture or some other violation of international law.

But that is not the road that alien tort litigation took. To distinguish torture from "a garden-variety municipal tort," federal courts chose to apply international law as the rule of decision.²⁵² "[T]o give effect to the manifest objectives of the international prohibition against torture," they chose to award punitive damages under federal common law.²⁵³ *Sosa* ratified these decisions and added another domestic element—a cause of action based in

246 *Id.* at 1672–73 (Breyer, J., concurring).

247 *Id.* at 1673 (discussing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW §§ 402–404).

248 See Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 619 (2013) ("The relationship between [Breyer's] opinion and customary international law of prescriptive jurisdiction . . . is ultimately unclear.").

249 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

250 See *supra* note 21.

251 See *supra* notes 59–71 and accompanying text.

252 *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995).

253 *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (E.D.N.Y. 1984).

federal common law.²⁵⁴ Plaintiffs were initially pleased with the turn towards domestic law because it seemed to offer greater flexibility and a better rule on aiding and abetting liability in particular.²⁵⁵ But every step down this path brought alien tort cases closer to the possibility that courts would apply the doctrines traditionally used to limit the extraterritorial scope of substantive U.S. law to the ATS. That is what happened in *Kiobel*.

It is impossible to tell what the future course of human rights litigation in U.S. courts may be. *Kiobel* leaves open the possibilities of suits against U.S. corporations and traditional *Filartiga*-type suits against individuals.²⁵⁶ Some have predicted a new wave of human rights litigation in state courts, perhaps on a transitory tort model.²⁵⁷ But it is possible to tell with the benefit of hindsight (and perhaps with a sigh) that over the past three decades alien tort litigation took the road less travelled by. “And that has made all the difference.”²⁵⁸

254 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

255 See *supra* notes 196–214 and accompanying text.

256 See, e.g., Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014); Ralph G. Steinhardt, *Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations*, 28 MD. J. INT’L L. 1, 22–23 (2013); Beth Stephens, *Extraterritoriality and Human Rights After Kiobel*, 28 MD. J. INT’L L. 256, 273 (2013).

257 See Borchers, *supra* note 21, at 48–61; Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 739–52 (2012); Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 17–22 (2013); Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 83–87 (2013); Christopher A. Whytock et al., *Forward: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5–7 (2013).

258 FROST, *supra* note 9, at 9.

