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# Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v. Royal Dutch Petroleum Co.*

VIVIAN GROSSWALD CURRAN<sup>†</sup>

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## INTRODUCTION

Extraterritoriality and universal jurisdiction have both overlapping and distinct characteristics. An attribute they share with the Alien Tort Statute (ATS)<sup>1</sup> is that the more one tries to pin down their definitions, the more entangled one becomes in intersections among the international, transnational, and national, as well as in varying understandings of each. This situation might be compared to “div[ing] into the fog.”<sup>2</sup>

Many thought that the U.S. Supreme Court would address extraterritoriality under the ATS in *Sarei v. Rio Tinto, PLC*,<sup>3</sup> a case whose petition for certiorari was already filed at the time the Court heard oral arguments in *Kiobel v. Royal Dutch Petroleum Co.*<sup>4</sup> on what should have been the issue of corporate liability under the ATS.<sup>5</sup> The first issue framed in the *Rio Tinto* petition for certiorari

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1. 28 U.S.C. § 1350 (2006).

2. See Christian Atias, *The Distinction Between Patrimonial and Extra-Patrimonial Rights in the Economic Analysis of the Law*, HENRI CAPITANT L. REV. (Dec. 1, 2010), <http://henricapitantlawreview.org/article.php?lg=en&id=254> (quoting MICHEL VILLEY, LE DROIT ET LES DROITS DE L’HOMME (1983)).

3. 671 F.3d 736 (9th Cir. 2011) (en banc), cert. granted, vacated and remanded, 133 S. Ct. 1995 (2013), dismissed on other grounds, Nos. 02–56256, 02–56390, 09–56381, 2013 WL 3357740 (9th Cir. June 28, 2013).

4. 133 S. Ct. 1659 (2013).

5. On appeal from the Second Circuit, the issues presented before the Supreme Court were:

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, is a merits question, as it has been

was “[w]hether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign’s own conduct on its own soil toward its own citizens.”<sup>6</sup> Already at the first *Kiobel* oral argument, the Court seemed noticeably more interested in asking questions about extraterritoriality and foreign law than about corporate liability.<sup>7</sup> A few days later, the Court ordered a second reargument of *Kiobel* on the sole issue of ATS extraterritorial jurisdiction.<sup>8</sup>

## I. EXTRATERRITORIALITY

### A. *International Law*

The rationale against the extraterritorial application of law arises from the tenet that respect for the equal sovereignty of all nations requires interdiction against the extraterritorial application of the laws of any one nation.<sup>9</sup> Under traditional international law, it is indeed a basic point of departure that national law is territorial and has no legal effect beyond its geographical borders, and that States violate international law if they exercise extraterritorial jurisdiction over foreign conduct that does not affect matters in their territory.<sup>10</sup>

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treated by all other courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.

Petition for Writ of Certiorari at i, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

6. Petition for a Writ of Certiorari at i, *Rio Tinto*, 671 F.3d 736 (No. 11-649).

7. See Transcript of Oral Argument, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

8. On March 5, 2012, the Court ordered the parties to brief for reargument on: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

9. ANTONIO CASSESE, *INTERNATIONAL LAW* 53 (2d ed. 2005).

10. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 309 (7th ed. 2008) (“The governing principle is that a state cannot take enforcement measures on the territory of another state without the consent of the latter.”); 1 EMMERICH DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* §§ 16, 36–37 (Paris, Librairie de Guillaumin et Cie 1863) (analyzing nations as the moral equivalents of individuals, concluding that no nation may oblige any

Emmerich de Vattel, whose impact on U.S. law was profound and formative through his four-volume work on *The Law of Nations*, as it usually is translated, a more modern translation of which would be “customary international law,” also underscored the right of each nation to be free from the interference of any other, even if it chooses to behave in a manner deemed savage by others, so long as it does so within its own borders.<sup>11</sup> Vattel criticized Hugo Grotius, the Dutch jurist, for taking the view that there was a right to perfect one’s neighbor in spite of itself: “Has not Grotius become aware that . . . his view opens the door to all of the furor of enthusiasm and fanaticism, and furnishes the zealous with endless pretexts?”<sup>12</sup>

In 1912, Oppenheim’s seminal treatise on international law explained that “[s]tates possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like. However, as members of the Family of Nations and International Persons, the States must exercise self-restraint in the exercise of this natural power in the interest of one another.”<sup>13</sup> He further concluded that “[n]o right for a State to extend its jurisdiction over acts of foreigners can be said to have grown up under the Law of Nations . . . .”<sup>14</sup>

The situation slowly changed, however. According to the French Legal Scholar, Mireille Delmas-Marty, the break occurred not with the end of the Second World War or the Nuremberg Trials, but with the end of the First World War and the Treaty of Versailles, which made Kaiser Wilhelm judicially subject to extradition,<sup>15</sup> despite the fact that the Dutch government would refuse extradition.<sup>16</sup> However, in 1927, less than a decade after the First World War, the Permanent

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other to conduct itself as it did not decide independently); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–404; *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1280 (2011).

11. 2 VATTEL, *supra* note 10, § 7; see Charles G. Fenwick, *The Authority of Vattel*, 8 AM. POL. SCI. REV. 375, 385 (1914).

12. 2 VATTEL, *supra* note 10, § 7. Author’s Note: I translated “enthousiasme” as “enthusiasm,” but, given the context, imagine that in the eighteenth century, the French word connoted something closer to fanaticism.

13. 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 201–02 (2d ed. 1912).

14. *Id.* at 204.

15. Mireille Delmas-Marty, *La responsabilité pénale en échec: prescription, amnistie, immunités*, in JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX 613 (Antonio Cassese & Mireille Delmas-Marty eds., 2002).

16. CASSESE, *supra* note 9, at 453–54.

Court of International Justice stated in the often-quoted *Lotus* case that,

[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.<sup>17</sup>

*Lotus*'s correct interpretation and significance is a hotly debated issue today, but the successor International Court of Justice has not repudiated the principle articulated above, although it gave the following qualification in *Barcelona Traction*:

It is true that . . . international law . . . leaves to States a wide discretion. . . . It does however (a) postulate the *existence* of limits . . . and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.<sup>18</sup>

In particular, *Lotus* endorses a State's right to prescribe extraterritorially, distinguishing between prescribing and enforcing.<sup>19</sup>

It has been observed that the international legal system endorses relativism by virtue of the principle of equal national sovereignty, since each State's distinct values and norms are accorded equal validity.<sup>20</sup> At the same time, on a philosophical level, the international legal order embraces the abstract universalism of reason

17. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

18. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 105 (Feb. 5) (separate opinion of Judge Fitzmaurice).

19. See *Lotus*, 1927 P.C.I.J. at 19; see also Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L. L. 142, 142 & n.2 (2006).

20. See, e.g., MIREILLE DELMAS-MARTY, *ETUDES JURIDIQUES ET COMPARATIVES ET INTERNATIONALISATION DU DROIT* 52 (2003).

that undergirds natural law.<sup>21</sup> Delmas-Marty advocates pluralism without relativism, and suggests that “pluralism has its limits.”<sup>22</sup>

### B. *United States Law*

U.S. courts apply a long-standing presumption against the extraterritorial effect of federal laws.<sup>23</sup> An instance of vigorous application came in 2010 in *Morrison v. National Australia Bank Ltd.*,<sup>24</sup> a securities case involving foreign plaintiffs, a foreign defendant, and securities sold on a foreign stock exchange. The Supreme Court ruled that Section 10(b) of the Securities and Exchange Act did not encompass the case under consideration.<sup>25</sup> The Court first reasoned that “when a federal statute gives no clear indication of an extraterritorial application, it has none,”<sup>26</sup> and that Section 10(b) of the statute was primarily focused on the acts of purchase and sale, none of which had occurred in the United States in the case at issue.<sup>27</sup> Five Justices limited Section 10(b) to “the purchase of such a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”<sup>28</sup>

The next year, in *J. McCyntire Machinery, Ltd. v. Nicaastro*,<sup>29</sup> the Supreme Court found that a New Jersey court lacked jurisdiction over a British company, which had sold a product it manufactured to a separately owned company in Ohio for distribution in the United States.<sup>30</sup> More specifically, the Court rejected the defendant’s jurisdictional argument that jurisdiction was established by the defendant’s product placement in the stream of commerce, which targeted U.S. consumers.<sup>31</sup> The Court found, rather, that the absence of any other business contacts between the manufacturer and the forum state of New Jersey was insufficient to constitute “activities in New Jersey that reveal an intent to invoke or benefit from the

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21. *Id.*

22. *Id.* at 120.

23. *See* *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

24. 130 S. Ct. 2869 (2010).

25. *Id.* at 2881 (citing *United States v. O’Hagan*, 521 U.S. 642, 651 (1997)).

26. *Id.* at 2878.

27. *Id.* at 2888.

28. *Id.*

29. 131 S. Ct. 2780 (2011).

30. *Id.* at 2790–91.

31. *Id.*

protection of its laws.”<sup>32</sup>

One perspective on the contemporary trend is that the United States has been demonstrating “[i]ncreasing hostility towards extraterritorialism [and that this has] culminated in *Kiobel* . . .”<sup>33</sup> *Morrison* involved an alleged “manipulative or deceptive device or contrivance . . .”<sup>34</sup> “in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . .”<sup>35</sup> *Nicastro* involved product liability in a personal injury case when a New Jersey metal worker injured his hand while using defendant’s product, a shearing machine.<sup>36</sup> Although the Supreme Court majority in *Kiobel* evoked this line of cases in reasoning that the ATS can have no extraterritorial application in foreign-cubed cases, neither *Morrison* nor *Nicastro*, unlike *Kiobel*, involved universal jurisdiction, or, thus, the grave human rights violations that ATS jurisdiction signifies: *jus cogens* crimes.

In theory, universal jurisdiction must imply extraterritoriality, but only to a strictly limited category of cases. It is this last factor that would distinguish ATS cases, which by statutory requirement are limited to violations of the law of nations or a treaty of the United States,<sup>37</sup> except for the fact that the current era of ATS suits, unlike the prior ones, has focused primarily on multinational corporate defendants.<sup>38</sup> Thus, although *Morrison* and *Nicastro* did not deal with *jus cogens* violations, contemporary United States universal jurisdiction cases do deal with corporations.

In *Kiobel*, the Second Circuit would have allowed universal jurisdiction and extraterritoriality to proceed unabatedly, so long as the corporate defendant could be shielded from liability.<sup>39</sup> In 2010, the Second Circuit held that corporate defendants were not liable under the ATS, and that same year, the Supreme Court decided

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32. *Id.* at 2791.

33. Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritorialism, Sovereignty and the Alien Tort Statute*, 30 BERKELEY J. INT’L L. 259, 274 (2012). This prescient comment was made before the Supreme Court’s decision in *Kiobel*.

34. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010).

35. *Id.*

36. *Nicastro*, 131 S. Ct. at 2786.

37. 28 U.S.C. § 1350 (2006).

38. See *infra* notes 48–52 and accompanying text.

39. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 121–22 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013).

*Citizens United v. FEC*,<sup>40</sup> finding that corporations, like natural people, had a First Amendment right of free expression.<sup>41</sup> When the Court granted certiorari in *Kiobel*, the issue on appeal was whether corporations could be held responsible as ATS defendants.<sup>42</sup> The Court decided to change the issue to that of extraterritoriality under the ATS sua sponte, and it found that it did not need to consider the first question, having decided the second one.<sup>43</sup>

In light of *Citizens United*, it is possible that the Court preferred to examine whether there was a basis for limiting the ATS' scope other than the corporate nature of the defendant, in the event that it decided to limit the ATS, even though the Ninth Circuit had addressed extraterritoriality in *Rio Tinto* and a petition for certiorari was pending on that very issue before the Court in that case,<sup>44</sup> while in *Kiobel* the Second Circuit had only skimmed the issue of extraterritoriality.<sup>45</sup> After deciding *Kiobel*, the Court vacated its writ of certiorari in *Rio Tinto* and remanded the case for further consideration in light of *Kiobel*.<sup>46</sup> Not only did the majority in the end decline to adjudicate the issue of corporate liability, but it also analyzed extraterritoriality outside of the context of universal jurisdiction.

## II. UNIVERSAL JURISDICTION

Universal jurisdiction, arising from the idea that some crimes are so repugnant to all humankind that any nation may try the perpetrators, has made an important inroad into the principle against extraterritoriality. It has been said that

universal jurisdiction [is] founded on the sheer heinousness of certain crimes, such as genocide and torture, which are universally condemned and which

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40. 130 S. Ct. 876 (2010).

41. *Id.* at 913.

42. Petition for Writ of Certiorari, *supra* note 5, at i.

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

44. Petition for Writ of Certiorari, *supra* note 5.

45. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

46. *Rio Tinto, PLC, v. Sarei*, 133 S. Ct. 1995 (2013) (mem.). On June 28, 2013, in accordance with the Supreme Court remand for a ruling consistent with its opinion in *Kiobel*, the Ninth Circuit affirmed the district court's dismissal of the suit against *Rio Tinto* in an order without an opinion. *Id.*



every state has an interest in repressing even in the absence of traditional connecting factors. . . . [T]hough subject to evolution, the roster of crimes presently covered by universal jurisdiction includes . . . genocide, torture, some war crimes, and crimes against humanity.<sup>47</sup>

In reality, contemporary universal jurisdiction cases, such as the Nuremberg trial cases, reflect a high frequency of cooperation, participation, and even incitement by States in which the alleged harms occurred. Indeed, in the case that reincarnated the ATS after a dormancy of two centuries, *Filártiga v. Peña-Irala*,<sup>48</sup> as well as those that characterized the first generation of modern ATS cases, defendants were State actors of foreign States.<sup>49</sup> In the subsequent decades, when multinational corporations became the primary defendants,<sup>50</sup> State actors of the States in which the alleged *jus cogens* violations occurred often were alleged to be complicit or, as in *Kiobel*, the corporate defendants complicit in crimes committed by foreign State actors.<sup>51</sup> Consensus concerning the universality of the evil involved in *jus cogens* crimes provides justification for the theory of making jurisdiction universal, but logic alone makes clear that there would be no need for universal jurisdiction if the States in which the crimes are committed were not themselves often complicit or, worse, the instigators and primary perpetrators.

### III. THE CHALLENGE OF *KIOBEL*

*Kiobel* involved more than international and U.S. law; it also involved foreign domestic law and, as a consequence, questions of comparative law. A key concern of the Court during both oral arguments seemed to focus around the United States being alone in allowing civil, as opposed to criminal, jurisdiction in an exercise of extraterritorial universal jurisdiction.<sup>52</sup> The Court repeatedly inquired about the practice of other countries, and a perusal of amicus briefs

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47. Donovan & Roberts, *supra* note 19, at 143.

48. 630 F.2d 876 (2d Cir. 1980).

49. See *Factsheet: Alien Tort Statute*, CTR. FOR CONST. RTS., <http://ccrjustice.org/learn-more/faqs/factsheet%3A-alien-tort-statute> (last visited Mar. 6, 2013).

50. See *Doe v. Unocal*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd*, 248 F.3d 915 (9th Cir. 2001). *Doe* was the first time a suit against a multinational corporation proceeded. *Id.*

51. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

52. See Transcript of Oral Argument, *supra* note 7; Transcript of Oral Reargument, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

filed on behalf of defendants reflects many amici authors arguing that the extraterritorial exercise of civil universal jurisdiction would be a breach of international law.<sup>53</sup>

*Kiobel* presents the challenge of crossing legal cultures and categories. Just as the linguistic level is replete with false friends,<sup>54</sup> so too at the legal level, appearances and categorizations are deceptive. Our courts are in an open struggle with their manner of accessing foreign law, as the three opinions of the Seventh Circuit in *Bodum USA, Inc. v. La Cafetière, Inc.*<sup>55</sup> illustrated in 2010. Judges Easterbrook and Posner set forth reasons against using party experts as the favored method of understanding applicable law, despite their jurisdiction's favoring that method, while their colleague, Judge Wood, disagreed.<sup>56</sup>

*Kiobel's* foreign or comparative law element was not immediately apparent. As an ATS case, it naturally raised issues relating to a domestic federal statute. Since the ATS expressly deals with violations of the law of nations, or customary international law, the case also concerned international law. International law, however, ultimately is an issue of how States mutually understand agreements between themselves, and the standards that govern the international legal system—the *ordre public*. It is perhaps worth noting at the outset that, with respect to international legal standards, according to Sir Ian Brownlie, “in principle [there is] no difference between the problems created by the assertion of criminal and civil jurisdiction over aliens.”<sup>57</sup> At *Kiobel's* second oral argument, those Justices

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53. Defendants (respondents) also made this argument. The respondent's brief and amici briefs are available from the American Bar Association. *Preview of United States Supreme Court Cases: Kiobel v. Royal Dutch Petroleum Co.*, AM. BAR ASS'N, [http://www.americanbar.org/publications/preview\\_home/10-1491.html](http://www.americanbar.org/publications/preview_home/10-1491.html) (last visited Mar. 31, 2013).

54. Author's Note: For example, the French *éventuel* and German *eventuell* mean possible, not eventual in English; additionally, the French *actuel* and German *aktuell* mean current, not actual in English.

55. 621 F.3d 624 (7th Cir. 2010).

56. *Id.* at 628–29 (arguing, for the majority, against the use of experts because French law is widely available in English); *id.* at 631–32 (Posner, J., concurring) (arguing that the court is not limited to relying on testimony to determine foreign law); *id.* at 638–39 (Wood, J., concurring) (arguing that expert testimony may be necessary in order to avoid misinterpretation through translation). For an overview of the *Bodum* debate, see Frederick Gaston Hall, *Not Everything Is As Easy As a French Press: The Dangerous Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution*, 43 GEO. J. INT'L. L. 1457, 1464–73 (2012).

57. BROWNLIE, *supra* note 10, at 300.

concerned about the United States' not applying a unique law extraterritorially<sup>58</sup> asked questions from a common law understanding of the meaning and function of civil and criminal law, and from an assumption that this understanding was the same as that of the rest of the world, or of the rest of the "civilized nations," since theirs is the practice the Court attends to in determining ATS standards.<sup>59</sup> In fact, the States looked to in *Kiobel* were primarily Western European nations, principally Germany and France.<sup>60</sup> The Netherlands and Britain were referred to inasmuch as petitioners argued that they have civil universal jurisdiction,<sup>61</sup> while respondents argued to the contrary, pointing out that both of those governments had filed amicus briefs objecting to U.S. civil extraterritorial jurisdiction.<sup>62</sup>

At a basic level, the civil and common law nations differentiate between the concept of a criminal and a civil offense in a comparable manner. Murder, for example, is a criminal offense in both systems, unintentional torts a civil offense in both. Some acts have been categorized as criminal offenses in one system and civil in another, such as defamation, traditionally a criminal offense in civilian States and a civil one in common law States, but that categorization under the influence of globalization is not set in stone, as a challenge started in 2008 to its criminal categorization in France demonstrates, although it has remained unsuccessful to date.<sup>63</sup>

Based on the above analysis, there is little reason to question the basic similarity of meaning when a civilian jurist and an American one refer to criminal versus civil law, and this was the assumption of all involved in *Kiobel*. After the Court asked for renewed briefing and oral argument on the issue of extraterritoriality, this author wrote a

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58. See Linda J. Silberman, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions*, in 12 YEARBOOK OF PRIVATE INTERNATIONAL LAW 123 (2010) (discussing a similar concern in *Morrison*).

59. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

60. See *Kiobel v. Dutch Petroleum Co.*, 621 F.3d 111 (2d. Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

61. Petitioners' Supplemental Reply Brief at 17, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

62. Supplemental Brief for Respondents at 3, 40, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

63. See, e.g., Laurence de Charette & Johan Prorok, *La dépenalisation de la diffamation bientôt débattue*, LE FIGARO, Dec. 2, 2008, <http://www.lefigaro.fr/actualite-france/2008/12/02/01016-20081202ARTFIG00309-la-depenalisation-de-la-diffamation-bientot-debattue-.php>.

brief on behalf of Comparative Law scholars and a French Supreme Court Justice, who has sat both on the Constitutional Council and the Council of State of France, to alert the Supreme Court to functional differences in criminal and civil law in the two legal systems that are so profound as to mean that U.S. civil universal jurisdiction is analogous and equivalent to civilian criminal universal jurisdiction, and that ATS extraterritorial jurisdiction is well within current international law standards.<sup>64</sup>

The key difference between the two legal orders is that U.S. tort law fulfills many of the functions of civilian criminal law, while its criminal law system would be less well-adapted to universal jurisdiction cases.<sup>65</sup> Conversely, in civilian States, the criminal law system affords victims opportunities similar to those that the U.S. tort system affords, while civilian civil courts are less well-suited for universal jurisdiction cases. In Continental Europe, the criminal prosecutor often is part of the magistrature, called a “standing judge,” as opposed to a “sitting” one.<sup>66</sup> Unlike in the United States, in civilian States, prosecutors tend to be neutral, non-partisan figures who have no professional interest in amassing convictions, and who are trained and obliged to garner exculpatory as well as inculpatory evidence.<sup>67</sup>

A crucial annex to the prosecutor’s ability and resources to uncover relevant evidence is the civilian system’s mechanism for victim participation in criminal trials, victim financial compensation ensuing from them, and for victim initiation of criminal trials; essentially, all the features of U.S. tort trials and none of the attributes of U.S. criminal trials. Both the U.S. tort and the civilian

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64. Brief of Amici Curiae Comparative Law Scholars and French Supreme Court Justice in Support of Petitioners, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); see also Vivian Grosswald Curran, *Mass Torts and Universal Jurisdiction*, 34 U. PA. J. INT’L L. (forthcoming 2013).

65. See Curran, *supra* note 64; Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 382–83 (2008); see also 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, 19 (2002) (describing how many civil law systems allow victims to seek damages as part of a criminal prosecution).

66. For France, see Loi 58-1270 du 22 Déc. 1958 portant loi organique relative au statut de la magistrature, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339259>; for Belgium, see 1994 CONST. art. 15(2); and for Italy, see Art. 104 Costituzione (It.).

67. See Philip Milburn & Denis Salas, *Les procureurs de la République: De la compétence personnelle à l’identité collective*, in *Etude sociologique et étude comparative européenne* 137 (2007); Curran, *supra* note 65, at 377–78.

criminal trial are largely victim-driven, and give victims an opportunity to bring important issues to the public's attention.<sup>68</sup> By contrast, the civilian civil trial is a private matter, often entirely in writing, with no oral testimony whatsoever. In France in particular, even the lawyers' submissions to courts are the intellectual property of their authors, and unavailable to the public unless the lawyers make them available.<sup>69</sup> When crimes against humanity suits have been attempted in civil courts in some civilian States because the plaintiffs were for technical reasons unable to pursue their suits in criminal court, the legal and lay public both have been known to react with considerable derision, in large measure because the plaintiffs' selection of the civil court prevented issues of historical, political, and social importance from being aired in public.<sup>70</sup>

The civilian legal order also has no equivalent to the U.S. class action suit, since class actions countermand the deeply entrenched civilian principle that all justice must be individual.<sup>71</sup> This difference was, moreover, an express concern of Justice Scalia in his *Morrison* opinion.<sup>72</sup> Whereas civilian victims have access to the resources of the State through the criminal court, they must use their own resources to finance suits in civil court in a system, which, unlike its U.S. counterpart, forbids U.S.-style contingency fee arrangements as unethical.<sup>73</sup> Moreover, civilian civil suits, unlike their U.S. homologues, do not allow punitive damages, considering them to be appropriate solely to criminal law.<sup>74</sup> All things considered, the U.S. tort suit functions in a manner analogous to the civilian criminal suit, and conversely, for purposes of determining that the two systems

68. See JOHN BELL, *FRENCH LEGAL CULTURES* 141 (2001). On the importance of public discourse to U.S. tort law, see JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2006).

69. Curran, *supra* note 65, at 377.

70. See *id.* at 373–80.

71. See 1958 CONST. art. 66 (Fr.) (stating that members of the judiciary are guardians of individual liberty); Nouveau code de procédure civile [N.C.P.C.] art. 31 (Fr.) (requiring that the plaintiff's interest in a cause of action be direct and personal). Note also the legal maxim that “none may plead by representation” (“*nul ne plaide par procureur*”).

72. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010).

73. See, e.g., CODE OF CONDUCT FOR EUROPEAN LAWYERS R. 3.3 (2006) (forbidding the contingency fee or “*pactum quota litis*”), available at <http://anwaltverein.de/downloads/praxis/berufsrecht/2006-code-of-conduct.pdf>. The majority of EU member states have adopted the Code of Conduct for European Lawyers. *Status of the CCBE Code of Conduct at a National Level*, CCBE (Jan. 7, 2013), [http://www.ccbe.eu/fileadmin/user\\_upload/NTC\\_document/Table\\_adoption\\_of\\_th1\\_1358409892.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTC_document/Table_adoption_of_th1_1358409892.pdf).

74. See Helmut Koziol, *Punitive Damages: A European Perspective*, 68 LA. L. REV. 741, 751 (2008); see also JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA* 1022 (1994).

have an operational equivalence in their respective modes of exercising universal jurisdiction. It was in this context that the issue of the ATS might have been considered more fruitfully, before concluding that extraterritorial application of the ATS would make the United States, in the words of the majority, “a uniquely hospitable forum for the enforcement of international norms.”<sup>75</sup>

## CONCLUSION

Modern catastrophes are ever more extraterritorial as technology increases their breadth and reach. Human rights law is rooted in claims of universalism, but anchored, for the most part, in the national courts in which actions are brought. The *Kiobel* case was situated at the intersection of two lines of cases. The first line was *Filártiga* and its progeny, with the Supreme Court endorsing in *Sosa* the applicability of the ATS to “foreign-cubed” cases of grave crimes against humanity: namely where plaintiff and defendant are foreign, and where the relevant acts occurred abroad. The second line harks to the presumption that federal statutes do not have extraterritorial application, and in recent applications includes *EEOC v. Arabian American Oil Co.*,<sup>76</sup> *Nicastro*,<sup>77</sup> and *Morrison*.<sup>78</sup> Justice Breyer’s concurring opinion in *Kiobel* struck a compromise between the two lines. Without relinquishing the importance of nexus to the United States and echoing the majority opinion and his own often articulated concern for attending to foreign relation concerns, his concurring opinion underscored his continuing vision of the ATS as a vehicle for the extraterritorial application of *jus cogens* law.<sup>79</sup>

It remains to be seen how norms of international law will be carried out in the future. The era of the direct effect of international law is in transition. European (and other, such as Canadian) States are adopting the Rome Statute of the International Criminal Court<sup>80</sup> in part or whole into their national legal orders, and some, like France,

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75. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

76. 499 U.S. 244, 277 (1991) (denying extraterritorial application of Title VII protections to U.S. citizen while employed in Saudi Arabia).

77. 131 S. Ct. 2780, 2789 (2011).

78. 130 S. Ct. 2869 (2010).

79. See *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

80. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

with incremental bills to be inserted at various times as part of national law.<sup>81</sup> It has been somewhat over half a century since the Nuremberg trials and the events that preceded them catapulted the individual into becoming a subject of international law, and since law began to articulate standards of international human rights based on the hindsight of what had gone wrong.

We have come a long way since Helmuth von Moltke, a young German lawyer fighting the Nazi machine tooth and nail from within the ranks of the German *Abwehr*, or military intelligence, saved thousands of lives by cajoling and menacing colleagues and superiors with the specter of an international humanitarian law that he sometimes formulated as he went along, and at a time when Lord Lothian, a British ambassador to the United States, could maintain that there was no such thing as international law.<sup>82</sup> The role of the multinational corporation today with traits akin to a State as well as to a non-State actor suggest that *Kiobel* is only a step, and not the final destination, in a road with many turns to come.

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81. In 2010, French law incorporated the Rome Statute with respect to genocide and crimes against humanity, Loi 2010-930 du 9 août 2010 *portant adaptation du droit pénal à l'institution de la Cour pénale internationale*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Aug. 10, 2008, p. 14678, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022681235&dateTexte=&categorieLien=id>. A more expansive bill is in committee. See Antoine Reverchon, *Affaires criminelles*, LE MONDE, Mar. 25, 2013, [http://www.lemonde.fr/economie/article/2013/03/25/affairescriminelles\\_1853684\\_3234.html](http://www.lemonde.fr/economie/article/2013/03/25/affairescriminelles_1853684_3234.html).

82. On Lord Lothian, see MICHAEL BALFOUR & JULIAN FRISBY, *HELMUTH VON MOLTKE: A LEADER AGAINST HITLER* (1972). For two accounts of von Moltke's resistance, see *id.* and HELMUTH VON MOLTKE: *LETTERS TO FREYA 1939-1945* (Beate Ruhm von Oppen ed. & trans., 1990).