IF THE SHOE DOES NOT FIT: WHY THE ATS DOES NOT WORK

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Generally speaking, international law regulates the conduct of states in their relations with each other and in their relations with individuals within their jurisdictions. Of course, individuals may also be subject to international law. This is most notably the case in the field of international criminal law, which recognizes individual responsibility for international crimes. International human rights law confers obligations on states—both positive and negative—and grants rights to individuals. This is trite law.

While these jurisdictional principles are uncontroversial, the use of the Alien Tort Statute (ATS)[1] confounds these basic principles and tends towards a distortion of the international legal order. The ATS operates on the basis that universal jurisdiction may be asserted, as a matter of customary international law, over actors who are alleged to have committed human rights abuses abroad. The United States stands largely alone in its attempt to provide a civil cause of action for human rights violations committed abroad with no factual or legal nexus with the United States.

The *Georgetown Journal of International Law*'s 2012 Symposium on Corporate Responsibility and the Alien Tort Statute was organized in the wake of the latest attempt to extend the reach of the ATS to hold corporations liable for human rights abuses in the case of *Kiobel v. Royal Dutch Petroleum Co.*[2] However, following oral arguments, and in view of the new ATS case *Sarei v. Rio Tinto, PLC*,[3] the Supreme Court has decided to order reargument in *Kiobel* as to "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[4] This order is significant

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1. 28 U.S.C. § 1350 (2006).

2. 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (No. 10-1491), *argued* Feb. 28, 2012, *restored to calendar for reargument*, 132 S. Ct. 1738 (2012) (No. 10-1491). The Court is expected to decide *Kiobel* in the 2012 Term.

3. 671 F.3d 736 (9th Cir. 2011).

4. *Kiobel*, 132 S. Ct. at 1738.

because it appears to signal that the Supreme Court is finally going to consider what gives the United States the right, under either international or domestic law, to assert its jurisdiction over crimes committed abroad, against aliens, and by aliens.

Corporate responsibility for human rights abuses is an extremely important question. There are significant movements towards greater corporate social responsibility for corporations and there will be an inevitable overlap with the substantive human rights obligations placed on states. This is not, however, the first question. We want to ensure that responsibility is placed at the door of those who deserve it. Impunity is to be battled against and human rights litigation must continue to move forward and become part of the national—as well as the international—legal discourse. We must be careful, however, not to conflate the "should" with the "how."

The ATS is a bold statute. It seeks to plug an accountability gap that is at times gaping. Yet the use of the ATS to achieve this goal presents problems of exceptionalism, of credibility, and of legitimacy. We are veering towards a type of legal colonialism that is at odds with the foundations of international law. The divide between the idealists and the realists has consequently widened and progress is stalled.

This Remark seeks to bring some perspective to this broader concern and offer some alternatives for moving forward. It advocates a "back to basics" approach to international law for determining what is customary international law and when a state may exercise its civil jurisdiction over the nationals of a third state. It will look not only at the lack of international consensus as to what extent corporations may be directly accountable for alleged human rights abuses in international law, but also more broadly at the difficulties a statute as jurisdictionally vague as the ATS presents. This Remark then considers the expansion of extraterritoriality under the European Convention on Human Rights (ECHR) and suggests that a regional framework's use of extraterritoriality based on a genuine and effective link with the forum state offers a way forward for human rights litigation in domestic courts. Last, this Remark proposes three options for moving forward: stronger use of regional frameworks; a revised version of the ATS with more clearly defined jurisdiction based on nexus; and a separate regime for corporations, with a mix of domestic corporate, public international, and private international law with clearly defined obligations and scope.

I. Back to Basics: The Need to Get International Law Right

ATS litigation has moved away from the fundamental principles of public international law, causing corresponding difficulties. This is not

to say that international law is a rigid concept. International human rights law in particular should and does adapt to reflect changes in cultural and legal norms. It is important, however, to recognize and respect its basic starting points. This serves not only to ensure legal certainty, but lends greater credibility—and ultimately strength—to attempts to use international law to protect the rights of individuals.

A. *The Proper Foundations and Formation of Customary International Law*

At its most basic, international law is a general recognition that a legal principle or obligation is engaged. There are, of course, norms universally recognized as being against the law of nations. Such *jure gentium* are what the Supreme Court seemed to have in mind in *Sosa v. Alvarez-Machain,* where it ruled that a norm must be "specific, universal, and obligatory" before it can fall within the reach of the ATS.[5] Yet courts in recent ATS cases—particularly with regard to the question of corporate liability—keep getting it wrong. Their approach to this issue appears to be motivated by the desire to "do the right thing," rather than the tenets of international law.

An excellent example is Judge Posner's approach in *Flomo v. Firestone Natural Rubber Co.*,[6] where in considering the exigencies of customary international law, he remarked, "[a]nd suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be."[7] Judge Posner went on, as have others in ATS litigation, to consider the fact that at the end of World War II, certain German corporations were dissolved by the Allied Powers where they had assisted the Nazis in addition to the fact that these corporations may have faced domestic sanctions in many jurisdictions.

Judge Posner's suggested standard is circular: he presumes the existence of a norm with little evidence to support it. This, respectfully, misses the point. What is needed for ATS liability post-*Sosa* is *universal* and *specific* acceptance that there is an *obligation* as a matter of international law to hold corporations directly accountable for violations of human rights abuses. It is at least doubtful that this standard is met, as the question of direct civil accountability for violations of international human rights norms is far from resolved. This question is distinct from

5. 542 U.S. 692, 732 (2004) (citation omitted).

6. 643 F.3d 1013 (7th Cir. 2011).

7. *Id.* at 1017.

whether corporations may face penalties under domestic tort law, for example. Such torts will furthermore often have a human rights aspect. For instance, in the United Kingdom, corporations may be held to account under domestic tort law but not more generally under a cause of action for breaches of international human rights obligations. The Human Rights Act 1998 (HRA),[8] which incorporates the ECHR into domestic law, only imposes obligations on public authorities, and does not apply horizontally. Holding corporations civilly liable may be an emergent norm of international law, but it does not rise to the *Sosa* standard and the courts are therefore approaching the issue inappropriately.

A separate but related point may be made about the approach of the D.C. Circuit in *Doe v. Exxon Mobil Corp.*,[9] suggesting that U.S. courts may rely on decisions of the International Criminal Tribunal for the Former Yugoslavia as a direct representation of customary international law, simply because they are mandated to apply that which is "beyond any doubt" part of it.[10] Leaving aside the risks of direct reliance on a secondary source to establish a primary norm, there is an inherent flaw in relying on international criminal law to support the proposition that there may be a civil cause of action on the same basis. The two types of law are very different in how they apportion responsibility. The focus is on individual, rather than state responsibility, and civil liability does not automatically flow from the criminal in international law. Furthermore, the Statute of the International Criminal Court, the most recent codification of international criminal law principles, deliberately omits legal persons from its jurisdiction.

Again, this is not to suggest that corporations are not increasingly being held to account for their actions, particularly when it comes to the treatment of individuals. However, it strongly calls into question whether a clear, consistent, and universal norm for such liability has emerged as customary international law.

The selective approach of the courts falls far short of the standard required in *Sosa* and in customary international law more generally. Perhaps most concerning of all, it is an approach wherein U.S. courts appear to steer dangerously close to making customary international law, rather than applying it.

8. Human Rights Act, 1998, c. 42 (U.K.).

9. 654 F.3d 11 (D.C. Cir. 2011).

10. *Id.* at 31.

B. *Jurisdiction and Why It Is Important*

Jurisdiction follows from, and is inextricably linked to, the customary international law question discussed above, as well as the type of defendant capable of being subject to the ATS. In the wake of the *Kiobel* oral arguments before the Supreme Court, jurisdiction could be said to go to the very core of the ATS. This is a statute that only gives rights to foreign citizens for human rights abuses committed by foreign defendants on foreign territory. In essence, the statute is based on the principle of universality. Jurisdiction has moved beyond the traditional notion of strict territoriality in recognition that such a limited approach does not fit modern conflicts and the increasingly global nature of rights and litigation. However, universal civil jurisdiction—for we are not dealing with acts charged as crimes but rather with torts—remains in my submission an exceptional departure from the basic principle that for jurisdictional competence to exist, there must be a genuine or effective link between the act (crime) and the forum state.

It is also worth noting that while many of the human rights abuses falling within the scope of the ATS may also amount to international crimes, many will not. As Lord Millett remarked when dissenting in *Pinochet*, to amount to an international crime over which universal jurisdiction may be exercised actions must first rise to the level of *jus cogens* and second, be "so serious and on such a scale that they can justly be regarded as an attack on the international legal order."[11] War crimes or the systematic and widespread use of torture clearly qualify. Piracy on the high seas is another act commonly cited in this category. There are clear pragmatic as well as moral reasons for exercising jurisdiction in such cases. However, there are also clear pragmatic reasons for not exercising it in all cases.

For example, the United Kingdom's position is to only assume universal jurisdiction where an international agreement expressly requires it. Indeed, one may question whether exercising jurisdiction with respect to *torts* that are not *jus cogens*, and are not systematic and widespread is permissible at all. Factor in the real possibility that a defendant may be tried *in absentia* under the ATS, and the position becomes murkier still. However, it should be stressed that this is not to argue against the exercise of extraterritorial jurisdiction, as explained below.

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11. R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L.) 275 (appeal taken from Eng.).

A related question is that of enforcement jurisdiction under the ATS. Assume for a moment that the Supreme Court decides to uphold a statute that exercises jurisdiction over foreign individuals and corporations in third countries with no real nexus with the United States on the basis either that such jurisdiction is permitted in international law or as a matter of domestic tort law. Assume further that there are no assets held in the United States, and that neither the parent company nor any subsidiaries carry on business in the United States. How, then, would any award of damages be enforced? As a general principle, a state cannot enforce its own laws on the territory of another without its consent.

The controversial "effects" doctrine sometimes applied in U.S. law would not apply here because the event is wholly self-contained on the territory of another state. This is an important question as it seems to undermine one of the main arguments for retaining the ATS: that victims of human rights abuses should have access to justice and, presumably, a remedy such as to outweigh the not insignificant foreign policy concerns this approach presents.

II. Extraterritorial Jurisdiction Over Human Rights Abuses Under the ECHR

Although the ECHR regime probably cannot translate directly over to the United States, it offers an important point of reference for how extraterritorial jurisdiction may be effectively used to protect the rights of foreign individuals outside of the territory of member states. While the European model is far from perfect, the ECHR does offer one of the most effective international human rights regimes in terms of enforceability and redress. The rights enshrined in the ECHR are directly enforceable in the courts of its member states, either automatically or through the adoption of domestic legislation. The United Kingdom has done this through the enactment of the HRA, which came into force on October 2, 2000. The Act has done much to bring human rights dialogue into every day judicial discourse.

Although the jurisprudence in this area may properly be criticized for lack of consistency, the basic principle that has emerged is one of "effective control" over a territory. This now applies not only in the *espace juridique* of the ECHR but also to third states, for example, where a member state is an occupying military force. Following *Al-Skeini*[12] and

12. Al-Skeini v. United Kingdom, Eur. Ct. H.R., App. No. 55721/07 (July 7, 2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-428.

Al-Jedda,[13] nationals of a third country who have their Convention rights breached by the nationals of a member state (where they are acting in an official capacity, as the Convention does not impose obligations on private individuals or legal entities) may sue in the domestic courts of that member state.

The circumstances in which ECHR protections may apply remain limited and open to criticism. Furthermore, this approach does not wholly eradicate the problem of "nexus," especially in regard to corporations. This regime does, at least, offer a comprehensive set of rights that are widely enforceable but subject to a clear link with the state responsible for any violation. The element of multilateralism involved in the development of such jurisprudence also should not be overlooked. Rather than unilaterally moving forward according to one's own ideas of what international law should be and to whom it should apply, inter-state cooperation ultimately achieves more in terms of acceptance and legitimacy.

III. WHERE NEXT?

The ATS is a statute unfit for its purpose. It either needs to be scrapped or significantly amended to reflect clear principles of international law. If the aim is to develop principles of international law through domestic litigation, this needs to be accomplished with a view to the proper limits of such principles. It is also difficult to sustain the position advocated by the current application of the ATS and not accept reciprocal consequences. It is likely that the United States will be accused of "exceptionalism" as a state that metes out "international justice" but does not take kindly to being on its receiving end.

I propose three possible models for approaching the concerns underlying some of the ATS litigation. Each option provides an extraterritorial effect, but is based on the principle that there must be a clear link with the United States in order for U.S. courts to exercise jurisdiction.

A. *For Corporations, Tougher Use of CSR and Domestic Corporate Law*

There are already movements towards ensuring corporate social accountability and penalising corporations that act incompatibly with international human rights norms. Equally effective is the use of tort

13. Al-Jedda v. United Kingdom, Eur. Ct. H.R., App. No. 27021/08 (July 7, 2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-426.

law to hold corporations to account in domestic courts where an appropriate nexus exists.[14] There are currently, however, different models in international law for public bodies or state actors and private individuals or corporations, and there are difficulties in bringing the two together under an international human rights regime. This is not to suggest that there should not be a complementary system whereby human rights principles are incorporated into the legal obligations imposed on corporations in their trading practices. This could be done either on the basis of domestic corporate law—such as, for example, increased disclosure obligations for corporate trading practices overseas with financial penalties for non-compliance, or through bilateral agreements between corporations and host states mandating respect for human rights.

In the longer term, an international framework effectively using both private and public international law could operate to great effect. Preventing corporations from trading on foreign soil unless a legally binding undertaking to protect human rights is given is likely to be far more effective than reliance on a sole statute where the costs of bringing the litigation likely outweigh any award of damages and have little preventative or deterrent effect.

B. *A Stronger Use of Regional Instruments*

As noted above, multilateral cooperation in the development and enforcement of human rights is a valuable tool, particularly in terms of increasing the pressure on states to respect and enforce those rights. To truly progress international human rights law, it needs to be enforceable and global. Yet universal instruments are often difficult to translate into practice. Under the ECHR, there is a regional court tasked with interpreting Convention rights. While the exact nature of state obligations under this system is under debate, especially in the United Kingdom, this regime requires domestic legislatures to take action to bring national laws into compliance with ECHR rulings and asks domestic courts to take Strasbourg jurisprudence into account when deciding domestic cases.[15]

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14. The question of how one defines "nexus" in the context of multinational corporations is a complex one and beyond the space constraints of the present Remark. There is considerable ambiguity as to what would be sufficient as a "nexus," and the notion is generally ill-defined.

15. Of course, how a member state chooses to follow its obligations under the ECHR will depend on its own constitutional structure. For example, in the United Kingdom, the courts do not have the power to strike down legislation that is deemed incompatible with Convention rights

While the ECHR system is not without its criticisms, it has gone a long way in developing human rights jurisprudence and offering individuals an effective means of enforcement. A similar—constitutionally tweaked—model could be adopted under the Inter-American system. This has the benefit of bringing international human rights directly into national jurisprudence, while allowing for greater legal certainty than the ATS model offers. Of course, questions, such as against whom could actions be brought, would still need to be considered. However, the more effective are the regional systems that are in existence, the greater the development of international human rights law will be generally.

C. *A Domestic Statute With Clearly Defined Rights and Jurisdiction*

Such a statute could either complement or replace the regional model suggested above. Effectively, this would be a revised ATS. Assuming the United States wishes to retain a mechanism by which foreign nationals can bring litigation to U.S. courts for acts committed overseas, any new statute would have to be carefully framed both in terms of its substantive and its jurisdictional scope. As argued above, jurisdiction should be based on a clear link with the United States, such that an alien could bring an action only against defendants linked to the United States. Again, the next question will be how one defines "nexus" in difficult cases that do not feature an individual or other domestic actor as perpetrator.

IV. CONCLUSIONS

These proposals do not purport to be the last word. Nor do they purport to solve the impunity gap that plagues the human rights movement and international law generally. Nonetheless, it is suggested that while these proposals do not solve all of the difficulties inherent to this subject and do not change the world, they will do more to guarantee human rights than the ATS in its current form will ever be able to do.

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but may declare it to be incompatible. Similarly, if the Strasbourg Court rules against the United Kingdom in a particular case, the Government must take measures to bring the offending law into step with the ECHR, but has on some occasions decided not to do so. *See* Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 681. Although in this author's view, the obligations of states under the ECHR are clear, the issues surrounding them are complex and beyond the scope of this Remark. Even so, the ECHR is now an entrenched part of the domestic judicial dialogue and, for the most part, the U.K. Government considers itself bound by the rights enshrined therein.