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Roger P. Alford

*Notre Dame Law School*, [ralford@nd.edu](mailto:ralford@nd.edu)

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# THE FUTURE OF HUMAN RIGHTS LITIGATION AFTER *KIOBEL*

Roger P. Alford\*

## INTRODUCTION

This Article begins from the premise that the Alien Tort Statute (ATS) no longer serves a useful purpose in litigating human rights claims.<sup>1</sup> As others have argued in this issue, that premise may not be correct.<sup>2</sup> Assuming it is, however, one should anticipate that human rights lawyers will pursue alternative avenues for relief.

As outlined below, there are a surprising number of options available under federal, state, and foreign law. The most obvious alternatives are not necessarily the most effective. The Torture Victim Protection Act (TVPA), for example, will be of no value to plaintiffs pursuing claims against corporations or governments.<sup>3</sup> The Racketeer Influenced and Corrupt Organizations Act (RICO) regulates a vast array of unlawful conduct, but has its own territorial limits.<sup>4</sup> State statutes that regulate unfair business practices and consumer fraud are promising avenues to address secondary harms to domestic consumers and competitors, but offer no direct relief to human rights victims.<sup>5</sup>

The most important alternative avenue is tort law.<sup>6</sup> Indeed, one could say that the future of human rights litigation in the United States depends on

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\* Professor of Law and Associate Dean for International and Graduate Programs, University of Notre Dame School of Law. J.D. New York University; LL.M. University of Edinburgh.

1 See *infra* Part I.

2 See Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1780–88 (2014); William R. Casto, *The ATS Cause of Action Is Sui Generis*, 89 NOTRE DAME L. REV. 1545, 1563–75 (2014); Ralph G. Steinhardt, *Determining Which Human Rights Claims “Touch and Concern” the United States: Justice Kennedy’s Filartiga*, 89 NOTRE DAME L. REV. 1695, 1703–14 (2014); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1538–41 (2014).

3 See *infra* Part II.

4 See *infra* Part III.

5 See *infra* Part IV.

6 See *infra* Part V.

refashioning human rights claims as state or foreign tort violations. Almost every international law violation is also an intentional tort. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. Rather than pursuing claims for wrongful conduct under the ATS, those same victims could plead violations of domestic or foreign tort laws. Courts seized with such claims should apply choice of law principles to assess the appropriate tort law to resolve the dispute. If the United States has a paramount interest in addressing the human rights violation, then that likely will result in the application of domestic tort law. Otherwise, traditional choice of law analysis applied in the international human rights context will often result in the application of foreign tort law.

Other avenues for relief remain untested. One of the most uncertain avenues is to plead violations of international law as part of foreign law.<sup>7</sup> If international law has been incorporated into the law of most countries around the world, it follows that a violation of international law will often also be a violation of foreign law. By employing choice of law principles to invoke foreign law, plaintiffs can pursue international law claims incorporated into foreign law. This is most obvious in monist states that directly apply international law into domestic law. But even dualist states implement international law either directly or indirectly. In *Kiobel v. Royal Dutch Petroleum Co.*,<sup>8</sup> for example, the plaintiffs could have alleged human rights violations under Nigerian law because human rights treaties and customary international law form part of Nigerian law.

Another untested avenue for relief is to plead federal common law violations of the law of nations in state courts or federal courts exercising foreign diversity jurisdiction.<sup>9</sup> Assuming the statutory presumption against extraterritoriality limits the scope of the ATS and not the underlying federal common law claims, there is nothing to prevent plaintiffs from pursuing common law claims elsewhere. Nor is there anything that prevents state courts from recognizing international law violations as state common law claims. Such claims would not be subject to the statutory presumption against extraterritoriality, but would be subject to territorial limits imposed by constitutional and international law.

Finally, if international law forms part of domestic and foreign law, then applying the choice of law doctrine of false conflicts would permit courts to apply the international law that is incorporated into domestic law rather than the international law that forms part of foreign law.<sup>10</sup> In the absence of a conflict between the potentially applicable foreign law and domestic law, the forum is free to apply domestic law. In other words, it is quite plausible that a federal district court in *Kiobel* could have applied federal common law claims alleging violations of the law of nations—not because those common law claims governed the dispute—but because there was no conflict between that

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7 See *infra* Part VI.

8 133 S. Ct. 1659 (2013).

9 See *infra* Part VII.

10 See *infra* Part VIII.

substantive international law embedded in the common law and the international law embedded in Nigerian law.

Part I briefly analyzes the Supreme Court's decision in *Kiobel* with particular attention to the consequences that that decision has for the demise of ATS litigation. Part II summarizes the limits of the TVPA and suggests that such claims will only be viable against foreign government officials with attachable assets located abroad. Part III outlines claims under civil RICO and discusses the divergent territorial limits that courts have imposed since the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*<sup>11</sup> Part IV discusses state unfair and deceptive acts and practices (UDAP) statutes regulating unfair business practices and consumer fraud. Those statutes routinely have been included in human rights litigation in the past, and will continue to be included following *Kiobel*. The presumption against extraterritoriality applies to those statutes, however, resulting in relief for domestic consumers and competitors, but not for foreign human rights victims. Part V discusses the most likely avenue for relief by pleading violations of state or foreign tort laws. Whether state or foreign law applies depends on choice of law principles. Because the center of gravity for human rights violations is foreign rather than domestic, foreign tort laws will apply to the typical human rights claims that were pursued under the ATS. Part VI follows the previous Part by suggesting that the invocation of foreign law might also include the invocation of international law. Choosing foreign law also means choosing international law that is incorporated into that law. Part VII suggests that the common law claims for international law violations recognized in *Sosa v. Alvarez-Machain*<sup>12</sup> are not subject to the presumption against extraterritoriality. If the statutory presumption only limits the ATS and not the underlying common law claims, then those claims may be pursued in state courts or in federal courts exercising foreign diversity jurisdiction. Finally, Part VIII concludes with an analysis of the "false conflict" doctrine as applied to international law claims. If the same international law forms part of domestic and foreign law, then the false conflict doctrine would permit domestic courts to use the international law that forms part of domestic law.

#### I. *KIOBEL* AND THE DEMISE OF THE ALIEN TORT STATUTE<sup>13</sup>

The history of international human rights litigation under the ATS is well known.<sup>14</sup> Since *Filartiga v. Pena-Irala*,<sup>15</sup> such litigation has become some-

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11 130 S. Ct 2869 (2010).

12 542 U.S. 692 (2004).

13 This brief discussion of the demise of the ATS is taken substantially from my most recent article. See Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. (forthcoming 2014) (on file with author).

14 There is extensive commentary on both the history of the ATS and the litigation that it has spawned. See, e.g., Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509 (2012) [hereinafter Bradley, *Bradford's Opinion*]; Curtis A. Bradley et al., *Sosa, Customary International Law,*

thing of a cottage industry, with over 150 cases filed alleging the commission of a tort in violation of the law of nations.<sup>16</sup> For over two decades, interpretation of the ATS developed without the benefit of Supreme Court review.<sup>17</sup> Finally in 2004, the U.S. Supreme Court in *Sosa v. Alvarez-Machain* limited the scope of the ATS, but left the door ajar for further litigation, “subject to vigilant doorkeeping.”<sup>18</sup> The central holding of *Sosa* was that the ATS was a jurisdictional statute that nonetheless permitted common law causes of action for torts committed in violation of the “present-day law of nations,” provided those claims rested on accepted international norms and were defined with sufficient specificity.<sup>19</sup>

Since that time, lower courts struggled to answer the many questions *Sosa* left unresolved.<sup>20</sup> Among the open questions were whether claimants

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*and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004); William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT'L L. 1045 (2012); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2011); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531 (2012); Ryan Goodman & Derek P. Jinks, Note, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

15 630 F.2d 876 (2d Cir. 1980).

16 See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011); Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, LAW.COM (Oct. 12, 2010), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473215797&slreturn=20140016104130>.

17 See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

18 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

19 *Id.* at 725. The Court stated that the modern-day international norms must be accepted by the civilized world and be defined with a specificity comparable to the features of the eighteenth-century paradigms—namely, violations of safe conducts, infringements of the rights of ambassadors, and piracy. See *id.* at 715, 725.

20 See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 560 U.S. 305 (2010); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

were required to exhaust local remedies,<sup>21</sup> whether alien claims against aliens were cognizable federal questions,<sup>22</sup> whether corporations were amenable to suit under international law,<sup>23</sup> whether corporations were liable for aiding and abetting government misconduct,<sup>24</sup> and whether the ATS applied extraterritorially.<sup>25</sup>

Finally, last term the Supreme Court in *Kiobel* issued a landmark decision that signals the end of the *Filartiga* human rights revolution. It did so by embracing the presumption against extraterritoriality, a presumption designed to avoid “‘unintended clashes between our laws and those of other nations which could result in international discord.’”<sup>26</sup> The Court concluded that nothing in the text, history, and purpose of the statute negated a presumption against extraterritoriality.<sup>27</sup> The text provides no evidence that Congress intended causes of action to have extraterritorial reach.<sup>28</sup> The history of the statute offers instances in which the statute is applied within the United States and on the high seas, but little to no support for its application

21 See *Sarei*, 671 F.3d at 829–33; *Flomo*, 643 F.3d at 1024–25; *Exxon Mobil*, 654 F.3d at 27; *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1096–98 (N.D. Cal. 2008). See generally Rosica (Rose) Popova, *Sarei v. Rio Tinto and the Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, but at What Cost?*, 28 *HAMLIN J. PUB. L. & POL’Y* 517 (2007) (criticizing the Ninth Circuit for declining to apply the exhaustion of local remedies principle in *Sarei*).

22 See *Sarei*, 671 F.3d at 752–55; *Khulumani*, 504 F.3d at 309–10; *Taveras v. Taveraz*, 477 F.3d 767, 772–77 (6th Cir. 2007); *Tel-Oren*, 726 F.2d at 775; Anthony J. Bellia, Jr., Sosa, *Federal Question Jurisdiction, and Historical Fidelity*, 93 *VA. L. REV. BRIEF* 15, 16 (2007).

23 See *Flomo*, 643 F.3d at 1019–25; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010), *aff’d on other grounds*, 133 S. Ct. 1659 (2013); *Viet. Ass’n for Victims of Agent Orange*, 517 F.3d at 119–23; see also Julian Ku, *Response: Rethinking the Direction of the Alien Tort Statute*, 100 *GEO. L.J.* 2217, 2219–21 (2012) (discussing legal theories that might allow parties to sue corporations for violations of international law in U.S. courts despite “international precedents . . . against corporate liability”); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 *VA. J. INT’L L.* 353, 365–68 (2011) (discussing the evolution of theories with respect to corporate liability under international law in U.S. courts).

24 See *Sarei*, 671 F.3d at 748–54; *Abdullahi*, 562 F.3d at 174; *Romero*, 552 F.3d at 1315; *Khulumani*, 504 F.3d at 259–60; *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). See generally Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 *NW. J. INT’L HUM. RTS.* 304 (2008) (discussing aiding and abetting as developed in international law).

25 See *Velez v. Sanchez*, 693 F.3d 308, 318 n.6 (2d Cir. 2012); *Exxon Mobil*, 654 F.3d at 20; *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 621 (S.D.N.Y. 2012); *Bowoto*, 557 F. Supp. 2d at 1088.

26 *Kiobel*, 133 S. Ct. 1659, 1664 (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)).

27 See *id.* at 1665–69.

28 See *id.* at 1666 (“The reference to ‘tort’ does not demonstrate that the First Congress ‘necessarily meant’ for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality.”); see also 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

on the territory of another sovereign.<sup>29</sup> As for the statute's purpose, the goal of the statute was not to transform the fledgling country into "the *custos morum* of the whole world," but rather to provide a means for "judicial relief to foreign officials injured in the United States."<sup>30</sup> Therefore, the Court held, the presumption against extraterritoriality applied to limit the reach of the ATS.

As applied to the facts in *Kiobel*, given that all the relevant conduct occurred outside the United States, the Court held that the statute did not reach the plaintiffs' claims. As for other claims that "touch and concern the territory of the United States," the Court concluded that "they must do so with sufficient force to displace the presumption against extraterritorial application."<sup>31</sup>

The *Kiobel* decision is complex and confusing, offering scant guidance as to how lower courts should proceed when claims touch and concern U.S. territory. However, unlike the other articles in the issue, the purpose of this Article is not to analyze *Kiobel*, but rather to consider the future of human rights litigation in the United States in light of *Kiobel*. The effective result of *Kiobel* is to severely limit ATS litigation in the United States. The old *Filartiga* paradigm of using the statute to redress human rights violations of foreign defendants committed against foreign plaintiffs on foreign soil is dead.<sup>32</sup> Because "[m]odern ATS litigation almost always involves conduct that took place outside the United States,"<sup>33</sup> the presumption against extraterritoriality will foreclose the vast majority of ATS cases. To be sure, future litigation will clarify how sufficient the territorial nexus to the United States must be to rebut the presumption. Thus far, lower courts have required substantial contact with the territory of the United States to rebut the presumption.<sup>34</sup>

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29 See *Kiobel*, 133 S. Ct. at 1666–69 ("Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign.").

30 *Id.* at 1668 (emphasis added) (internal quotation marks omitted). "[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. . . . The ATS ensured that the United States could provide a forum for adjudicating such incidents." *Id.*

31 *Id.* at 1669.

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

33 Bradley, *Bradford's Opinion*, *supra* note 14, at 512.

34 See *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013); *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at \*7 (S.D. Tex. Aug. 23, 2013); *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 WL 4130756, at \*15 (D. Mass. Aug. 14, 2013); *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 WL 3873960, at \*8 (N.D. Ala. July 25, 2013); *Al Shimari v. CACI Int'l, Inc.*, No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720, at \*10 (E.D. Va. June 25, 2013); see also Roger Alford, *Kiobel Insta-Symposium: Interpreting "Touch and Concern"*, OPINIO JURIS (Apr. 19, 2013), <http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-interpreting-touch-and-concern> (discussing *Kiobel*'s reliance on *Morrison v. National Australia Bank Ltd.* in interpreting when claims touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality).

## II. HUMAN RIGHTS AND THE TVPA

With the demise of the ATS, the TVPA is perhaps the most obvious path for pursuing international human rights litigation in the United States. The statute provides:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>35</sup>

The TVPA is broader than the ATS in that it applies extraterritorially<sup>36</sup> and permits both U.S. citizens and aliens to bring claims.<sup>37</sup> It is narrower than the ATS in that it only permits claims for acts of torture or extrajudicial killings committed under color of foreign law, and limits liability to acts committed by natural persons, excluding corporations, foreign state entities, or other legal instrumentalities.<sup>38</sup>

The TVPA has rarely produced results favorable to plaintiffs.<sup>39</sup> Foreign states and foreign state entities are immune from claims of torture or extrajudicial killings.<sup>40</sup> Because claims may only be brought against individuals acting under color of foreign law, plaintiffs must establish that “the defendants possessed power under [foreign] law, and that the offending actions . . . derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power.”<sup>41</sup> Allegations that corporate officers or U.S. government officials conspired with for-

35 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

36 The statute provides for liability for any individual who acts under apparent authority or color of law “of any foreign nation” and includes an exhaustion of remedies requirement that requires courts to dismiss a claim if the claimant has not exhausted adequate and available remedies “in the place in which the conduct giving rise to the claim occurred.” *Id.* § 2(a)–(b); see Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*, 2012–2013 CATO SUP. CT. REV. 149, 176 (2013) (“If Congress wants to do as it did in the Torture Victim Protection Act and create detailed, specific conditions for extraterritorial reach, it can do so with regard to the ATS.”).

37 See *Kadic v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995).

38 See Torture Victim Protection Act § 2(a); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707–11 (2012); *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009); *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 111–12 (E.D.N.Y. 2005); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004).

39 See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 76 (2d ed. 2008) (“As of late 2006, approximately 45 reported decisions included TVPA claims; about a dozen resulted in final judgments awarding damages . . .”).

40 See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428 (1989).

41 *Arar*, 585 F.3d at 568.



eign governments or facilitated foreign government action will fall short of the requisite finding that the individual exercised power under the authority of the foreign state.<sup>42</sup>

As a practical matter this will limit claims to those brought against individuals acting under the authority or at the behest of the foreign state, and will exclude claims against corporate officials that merely conspired or acted in concert with foreign governments.<sup>43</sup> The most common TVPA defendants are judgment-proof foreign government officials like Americo Peña-Irala.<sup>44</sup> For plaintiffs, the most promising defendants are high-ranking foreign government officials with attachable looted assets.<sup>45</sup> Corporate officers are far less likely to be defendants in TVPA litigation. The likelihood that corporate officers acted under color of foreign law will be rare,<sup>46</sup> and even assuming they did, pleading that fact as a plausible occurrence will be extraordinarily difficult in light of heightened federal pleading standards.<sup>47</sup>

### III. HUMAN RIGHTS AND RICO

The unlawful pattern of human rights violations raises the prospect of civil remedies under RICO. RICO provides treble damages<sup>48</sup> for persons injured by enterprises that commit unlawful conduct through a “pattern of racketeering.”<sup>49</sup> To state a claim under RICO, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.<sup>50</sup> Any enterprise is potentially liable under RICO if it engages in two or more predicate acts of racketeering such as wire or mail fraud, immigration fraud, murder, slave labor, torture, kidnapping, gambling, trafficking, or bribery.<sup>51</sup> An “enterprise” is broadly defined to include formal legal entities, such as

42 See *id.*; *Harbury v. Hayden*, 444 F. Supp. 2d 19, 41 (D.D.C. 2006), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008); *Schneider*, 310 F. Supp. 2d at 267.

43 See, e.g., *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1148–49 (E.D. Cal. 2004); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 267–68 (S.D.N.Y. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355–56 (N.D. Ga. 2002); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1247–49 (S.D. Fla. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995).

44 See *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (noting that Peña-Irala was the Inspector General of Police in Asunción, Paraguay at the time he tortured the Filártigas); WILLIAM J. ACEVES, *THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PEÑA IRALA* 18 (2008).

45 See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996); Associated Press, *Marcos Faces a Judgment Against Property*, N.Y. TIMES, July 5, 1990, at B4.

46 See *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 WL 3873960, at \*9 (N.D. Ala. July 25, 2013).

47 See *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

48 18 U.S.C. § 1964(c) (2006).

49 *Id.* § 1962(a).

50 See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

51 See 18 U.S.C. §§ 1961(1),(4)–(5), 1964.

corporations and partnerships, as well as individuals or groups who are associated in fact.<sup>52</sup>

Civil RICO claims have been filed in dozens of instances arising out of alleged human rights abuse.<sup>53</sup> Indeed, the facts in *Kiobel* gave rise to related litigation alleging RICO violations.<sup>54</sup> Those claims are rarely successful because the presumption against extraterritoriality requires either evidence of a domestic enterprise or of substantial domestic conduct. Following *Morrison v. National Australia Bank Ltd.*,<sup>55</sup> courts addressing RICO's extraterritoriality fall into two camps: those asserting that RICO's focus is on the domestic enterprise and those asserting that RICO's focus is on the pattern of domestic racketeering activity.<sup>56</sup> The Ninth Circuit has focused on "the pattern of Defendants' racketeering activity as opposed to the geographic location of Defendants' enterprise."<sup>57</sup> Other courts have concluded that RICO does not apply where the alleged enterprise and the impact of the predicate activity are entirely foreign.<sup>58</sup>

What remains unclear under either approach is "RICO's application to an allegedly domestic enterprise whose effects are felt outside the United States."<sup>59</sup> Nor is it clear whether "RICO *should* apply to racketeering activity abroad that causes effects in the United States on or through a domestic

52 *Id.* § 1961(4).

53 *See, e.g.*, *Habyarimana v. Kagame*, 696 F.3d 1029, 1031 (10th Cir. 2012); *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009); *Türedi v. Coca-Cola Co.*, 343 F. App'x 623, 624 (2d Cir. 2009); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1245, 1254, 1267 (11th Cir. 2005); *Doe I v. Unocal Corp.*, 395 F.3d 932, 936–37 (9th Cir. 2002); *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at \*1 (S.D.N.Y. Aug. 28, 2013); *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at \*1–3 (S.D. Tex. Aug. 23, 2013); *Delgado v. Villanueva*, No. 12 Civ. 3113(JMF), 2013 WL 3009649, at \*1–2 (S.D.N.Y. June 18, 2013); *Licea v. Curacao Drydock Co.*, 794 F. Supp. 2d 1299, 1301–02 (S.D. Fla. 2011); *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1221–22 (S.D. Fla. 2011); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083 (N.D. Cal. 2008); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1023 (W.D. Wash. 2005); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003).

54 *See* *Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, 335 F. App'x 81, 84 (2d Cir. 2009); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93–94 (2d Cir. 2000).

55 130 S. Ct. 2869 (2010).

56 *See* *United States v. Chao Fan Xu*, 706 F.3d 965, 975–78 (9th Cir. 2013) (citing cases from both camps).

57 *Chao Fan Xu*, 706 F.3d at 977; *see* *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 168 (D.D.C. 2013); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012).

58 *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 732 (S.D.N.Y. 2013); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (NGG) (VVP), 2011 WL 843957, at \*5 (E.D.N.Y. Mar. 8, 2011); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010).

59 *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011); *see In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, 826 F. Supp. 2d 1180, 1200 (C.D. Cal. 2011).

enterprise.”<sup>60</sup> Further jurisprudence with respect to these questions is necessary to assess the likely salience of RICO to international human rights violations. Regardless, most international human rights cases brought under the ATS would lack the requisite domestic nexus to overcome RICO’s presumption against extraterritoriality. Either the collection of actors who are associated in fact will not constitute a domestic enterprise, or the pattern of racketeering activity will be more foreign than domestic.

#### IV. HUMAN RIGHTS AND UNFAIR BUSINESS PRACTICES

The overwhelming majority of states have broad prohibitions protecting consumers against corporations that engage in unfair and deceptive acts and practices—UDAP statutes.<sup>61</sup> These statutes broadly construe unfair and deceptive behavior to include almost any commercial conduct that harms consumers, including not only unlawful conduct, but also “immoral, unethical, oppressive, or unscrupulous” behavior.<sup>62</sup> A typical UDAP statute authorizes public and private enforcement through injunctive relief, monetary damages, attorneys’ fees, and, in some cases, enhanced and punitive damages.<sup>63</sup> In many jurisdictions, there is no obligation to prove knowledge or intent to deceive, and no obligation to prove consumer reliance.<sup>64</sup>

Plaintiffs alleging human rights abuse occasionally have included a cause of action for UDAP violations.<sup>65</sup> The most frequent statutory claim connecting international human rights violations with unfair business practices is based on section 17200 of the California Business and Professions Code,

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60 William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687, 695 (2011). For such a scenario, see *Chevron Corp.*, 871 F. Supp. 2d at 244–45; *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1221–22 (S.D. Fla. 2011).

61 See CAROLYN L. CARTER, NAT’L CONSUMER LAW CTR. INC., CONSUMER PROTECTION IN THE STATES 11–12 (2009) (stating that forty-three states and the District of Columbia have broad prohibitions against deceptive practices, while thirty-nine states and the District of Columbia have broad prohibitions against unfair practices), available at [http://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](http://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf).

62 ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 378 n.50 (August Horvath et al. eds., 2009).

63 See *id.* at 377, 381–84; T. EVAN SCHAEFFER, DEPOSITION CHECKLISTS AND STRATEGIES § 8:05 (2013); Matthew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 STAN. J.L. BUS. & FIN. 362, 399 (2007).

64 See ABA SECTION OF ANTITRUST LAW, *supra* note 62, at 377, 384; SCHAEFFER, *supra* note 63, § 8:01.

65 See, e.g., *Deutsch v. Turner Corp.*, 324 F.3d 692, 704–05 (9th Cir. 2003); *Doe v. Unocal Corp.*, 248 F.3d 915, 921 (9th Cir. 2001); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083 (N.D. Cal. 2008); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1185 (C.D. Cal. 2005); *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 501 n.5 (S.D.N.Y. 2004); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1103 (C.D. Cal. 2003); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1156 (N.D. Cal. 2001); *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002); Second Amended Complaint for Tort Damages at 29, *Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW (N.D. Cal. July 19, 2007); Class Action Complaint for Injunctive Relief and Damages at 2, *Doe v. Wal-Mart Stores, Inc.*, No. BC339737 (Cal. Super. Ct. Sept. 13, 2005).

which defines “unfair competition” to include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”<sup>66</sup> The goal is to protect “consumers and competitors by promoting fair competition in commercial markets for goods and services.”<sup>67</sup>

On the basis of this statute, plaintiffs in *Doe v. Unocal* alleged that when a California corporation subjected Burmese villagers to forced labor, murder, rape, and torture in Burma, it constituted unfair business practices within the meaning of the statute.<sup>68</sup> A California superior court agreed, holding that a section 17200 claim could be “brought in California for injuries occurring outside of California as long as some of the wrongful conduct occurred within California,” including simply making “funding policy decisions” within the state.<sup>69</sup> Unocal subsequently settled with a substantial monetary award for the plaintiffs.<sup>70</sup>

Similarly, in *Kasky v. Nike, Inc.*, the California Supreme Court addressed whether Nike could be held liable for misleading statements regarding its sweatshop labor practices in Asia.<sup>71</sup> It concluded that section 17200 creates a private right of action for violations of other laws that are not otherwise actionable.<sup>72</sup> It also held that “[b]y defining unfair competition to include . . . any ‘unfair or fraudulent business act or practice,’ the [statute] sweeps within its scope acts and practices not specifically proscribed by any other law.”<sup>73</sup> Moreover, even if corporate officers make true statements about their overseas labor practices, those statements are nonetheless actionable if they are likely to deceive the public. “[W]hen a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements . . . may be regulated to prevent consumer

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66 CAL. BUS. & PROF. CODE § 17200 (West 2008).

67 *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 883 (Cal. 2011) (internal quotation marks omitted).

68 As alleged in the complaint, “[t]he use of . . . unfair, illegal, and forced labor creates an unfair business advantage over competitors within California and the United States.” Complaint at 33, *Doe v. Unocal*, No. B C237980 (Cal. Super. Ct. Oct. 4, 2000).

69 Ruling on Defendants’ Motion for Summary Judgment, or in the Alternative, Summary Adjudication on Each of Plaintiffs’ Tort Claims at 14, *Doe v. Unocal Corp.*, Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. June 7, 2002), available at <http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/Unocal-Tort-Liability-MSA-Ruling.pdf>; see also *Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1126–27 (N.D. Cal. 2000) (explaining that a claim must have some nexus to California in order for the court to have jurisdiction); *Norwest Mortg., Inc. v. Superior Court*, 85 Cal. Rptr. 2d 18, 28 (1999) (explaining that the court must analyze choice of law issues to determine whether California law or the laws of other states should govern).

70 See Svetlana Meyerzon Nagiel, Note, *An Overlooked Gateway to Victim Compensation: How States Can Provide a Forum for Human Rights Claims*, 46 COLUM. J. TRANSNAT’L L. 133, 139–44 (2007).

71 45 P.3d 243 (Cal. 2002).

72 See *id.* at 249.

73 *Id.* (citation omitted).

deception.”<sup>74</sup> *Kasky* was limited by state referendum to grant standing to plaintiffs who have lost money or property, but unfair competition actions still may be brought as a class action as long as the named plaintiff has suffered an injury in fact.<sup>75</sup>

Such claims are not based on injuries to the foreign human rights victims, but rather injuries to competitors or injury to consumers deceived by corporate misrepresentations regarding its human rights record.<sup>76</sup> Human rights claims are about regulating corporate misconduct in the global supply chain that causes consumer confusion or unfair competition for competitors who refrain from unethical conduct. Consumers will pay significant premiums for assurances that a garment was not manufactured under sweatshop conditions.<sup>77</sup> As the California Supreme Court has put it: “To some consumers, processes and places of origin matter. . . . Whether a diamond is conflict free may matter to the fiancée who wishes not to think of supporting bloodshed and human rights violations each time she looks at the ring on her finger.”<sup>78</sup>

The extraterritorial application of UDAP statutes rarely will be an issue where the corporation engages in deceptive or misleading communications regarding its human rights record. Online press releases or announcements on company websites that target domestic consumers constitute conduct within the United States.<sup>79</sup> Moreover, unfair labor practices abroad that adversely affect the domestic market will also overcome the presumption against extraterritoriality.<sup>80</sup> However, unfair business practices that only injure foreign plaintiffs are not covered by state UDAP statutes.<sup>81</sup>

UDAP statutes are particularly important in challenging representations as to a corporation’s human rights record. When retailers misstate their commitment to social responsibility, such statements are actionable under these statutes. For example, labor groups successfully brought claims against The Gap, Target, JC Penney, and The Limited for labeling garments “Sweat

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74 *Id.* at 262.

75 *In re Tobacco II Cases*, 207 P.3d 20, 31–38 (Cal. 2009).

76 *See Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1122–23 (C.D. Cal. 2010).

77 *See* Kimberly Ann Elliott & Richard B. Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy*, in *EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 47, 51 (Richard B. Freeman et al. eds., 2004), available at <http://papers.nber.org/chapters/c9950.pdf>; *The Consumer and Sweatshops: New Marymount University Survey Warns Manufacturers/Retailers: Consumers Don't Want Sweatshop Goods*, MARYMOUNT UNIV., <http://connect.marymount.edu/news/garmentstudy/overview.html> (last visited Mar. 14, 2014).

78 *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 889 (Cal. 2011) (footnote omitted).

79 *See Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1127 (N.D. Cal. 2000).

80 *See Diamond Multimedia Sys., Inc. v. Superior Court*, 80 Cal. Rptr. 2d 828, 846 (Cal. 1999); *RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 35 Cal. Rptr. 3d 469, 478–79 (Cal. Ct. App. 2005).

81 *See Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1195–96 (Cal. 2011).

Free” when they sourced their products from sweatshops.<sup>82</sup> When public controversy erupts regarding a corporation’s overseas practices, misleading corporate statements in response to such controversy also can trigger UDAP litigation. For example, when labor groups alleged that Nike contracted with overseas sweatshop suppliers, Nike vigorously defended its practices and denied the existence of poor labor standards in its overseas factories. Those denials led to a section 17200 action alleging that Nike misled the public in denying the existence of sweatshops. In 2003, Nike settled for several million dollars.<sup>83</sup>

As a result of UDAP statutes, corporations that engage in human rights abuse have a choice. They can face public opprobrium by remaining silent or conceding wrongdoing and be sued for unfair business practices. Alternatively, they can mislead the public by denying corporate misconduct and be sued for unfair *and* deceptive business practices.

## V. HUMAN RIGHTS AND TORT LAW

The same facts that give rise to international human rights violations almost always will also constitute a domestic or foreign tort. Plaintiffs in ATS litigation, including the plaintiffs in *Kiobel*,<sup>84</sup> routinely have added pendant state tort claims.<sup>85</sup> Plaintiffs also occasionally present such claims in state courts, alleging assault, battery, wrongful death, and false imprisonment for facts that might otherwise be cognizable as international human rights violations.<sup>86</sup>

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82 See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 957 (2008).

83 See Aaron J. Schindel & Jeremy Mittman, *Workers Abroad, Trouble at Home: Multinational Employers Face Growing Liability for Labor Violations of Overseas Suppliers*, 19 INT’L L. PRACTICUM 40, 43 (2006); Adam Liptak, *Nike Move Ends Case over Firms’ Free Speech*, N.Y. TIMES (Sept. 13, 2003), <http://www.nytimes.com/2003/09/13/us/nike-move-ends-case-over-firms-free-speech.html>.

84 See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93–94 (2d Cir. 2000).

85 See, e.g., *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205, 209 (4th Cir. 2012); *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 205 (4th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011); *Saleh v. Titan Corp.*, 580 F.3d 1, 3 (D.C. Cir. 2009); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1287 (11th Cir. 2009); *Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 171 (3d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266–67 (11th Cir. 2009); *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 61 (2d Cir. 2008); *Abagninin v. Amvac Chem. Corp.*, 545 F.3d 733, 735 (9th Cir. 2008); *Arias v. DynCorp*, 928 F. Supp. 2d 10, 13 (D.D.C. 2013); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1063 (C.D. Cal. 2010); *Julin v. Chiquita Brands Int’l, Inc.*, 690 F. Supp. 2d 1296, 1300 (S.D. Fla. 2010).

86 See, e.g., *Alomang v. Freeport-McMoran, Inc.*, 811 So. 2d 98, 100 (La. Ct. App. 2002); *Licci v. Lebanese Canadian Bank*, 984 N.E.2d 893, 894–95 (N.Y. 2012); Ruling on Defendants’ Motion for Summary Judgment, or in the Alternative, Summary Adjudication on Each of Plaintiffs’ Tort Claims at 2, *Doe v. Unocal Corp.*, Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. June 11, 2002), available at <http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/Unocal-Tort-Liability-MSA-Ruling.pdf>; Ruling on Unocal Defendants’ Motion for Summary Judgment Based on: (1) Absence of Vicarious Liability; and (2) Fail-

As courts of general jurisdiction, state courts may adjudicate violations of state or foreign tort laws. Federal courts also may resolve such claims based on diversity jurisdiction. As the Supreme Court noted in *Kiobel*, the transitory tort doctrine allows “a party to recover when the cause of action arose in another civilized jurisdiction” if there is “a well founded belief that it was a cause of action in that place.”<sup>87</sup> The transitory tort doctrine is based on the theory that, “although the act complained of was subject to no law having force in the forum, it gave rise to an obligation . . . which, like other obligations, follows the person, and may be enforced wherever the person may be found.”<sup>88</sup>

Choice of law principles determine whether state or foreign tort laws will govern the dispute. There are numerous approaches for resolving choice of law questions, but in the overwhelming majority of cases foreign law will apply to resolve disputes between foreign parties regarding torts committed on foreign soil.<sup>89</sup> Courts are more likely to apply domestic law as the jurisdictional nexus increases based on the government interests, the parties’ residence, the locus of the wrongful conduct, and the locus of resulting injuries.<sup>90</sup>

In the terrorism context, for example, courts have applied choice of law principles to hold defendants responsible for terrorist attacks on foreign soil.<sup>91</sup> If the terrorist attack targeted the United States or the victims were American nationals, courts typically will apply domestic state tort laws.<sup>92</sup> By

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ure to Join Indispensable Parties at 4–6, 15, *Doe v. Unocal Corp.*, Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. June 10, 2002).

87 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

88 *Slater v. Mex. Nat’l R.R.*, 194 U.S. 120, 126 (1904); *accord* *Dennick v. R.R.*, 103 U.S. 11, 18 (1880); *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 248 (1843); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). *See generally* Bradley, *Bradford’s Opinion*, *supra* note 14, at 512 (discussing examples of courts employing the transitory tort doctrine); Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 *GEO. J. INT’L L.* 1329, 1342–43 (2013) (stating that the exercise of jurisdiction over cases arising “between foreigners . . . out of foreign conduct” is consistent with international law); 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, 2270 (2004) (discussing the origins of the transitory tort doctrine).

89 Alford, *supra* note 13 (manuscript at 46–47).

90 *Id.*; *see also* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 *N.Y.U. L. REV.* 719, 777 (2009) (“[A] judge is most likely to apply domestic law when the locus of the underlying activity is mostly or all inside U.S. territory and the parties are mostly or all domestic, and she is least likely to do so when the locus of activity is mostly or all outside U.S. territory and the parties are mostly or all foreign. This . . . prediction decreases . . . as territoriality and personality become more balanced.”).

91 Alford, *supra* note 13 (manuscript at 5).

92 *See* *Nikbin v. Islamic Republic of Iran*, 517 F. Supp. 2d 416, 426 (D.D.C. 2007); *Bennett v. Islamic Republic of Iran*, 507 F. Supp. 2d 117, 126 (D.D.C. 2007); *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 54 (D.D.C. 2006); *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 101–02 (D.D.C. 2006); *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 83 (D.D.C. 2006); *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 159 (D.D.C. 2006); *Dammarell v. Islamic Republic of Iran (Dammarell IV)*, 404 F. Supp. 2d 261,

contrast, if the attack targeted other countries and injured foreign nationals, courts typically will apply foreign tort laws.<sup>93</sup> The result has been the application of state or foreign tort laws to award billions of dollars to victims of international terrorism.<sup>94</sup>

In the transnational context the issue rarely is whether tort laws will sanction human rights abuse. According to the International Commission of Jurists, “in all jurisdictions the law of civil remedies can be invoked to remedy harm to life, liberty, dignity, physical and mental integrity and property.”<sup>95</sup> The more salient question is whether there is an independent and impartial adjudicator to resolve the dispute. Litigating foreign torts in the United States makes sense where there is a legitimate nexus to the forum and no viable alternatives. On the other hand, transferring the case to foreign courts under the doctrine of *forum non conveniens* is appropriate if there is an alternative available forum and the balance of public and private interests favors dismissal.<sup>96</sup> By initiating litigation in the United States where domestic courts have concurrent jurisdiction, and transferring claims to foreign courts where appropriate, the parties have some assurance that their dispute will be resolved by an independent adjudicator applying the appropriate law.

Common law state tort laws routinely are applied extraterritorially.<sup>97</sup> There are constitutional limits, but those limits are rarely meaningful.<sup>98</sup>

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271 (D.D.C. 2005); *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 14, 23–24 (D.D.C. 2005); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132–33 (D.D.C. 2005); *Dammarell v. Islamic Republic of Iran (Dammarell III)*, 370 F. Supp. 2d 218, 220–21 (D.D.C. 2005); *Dammarell v. Islamic Republic of Iran (Dammarell II)*, No. Civ.A. 01-2224JDB, 2005 WL 756090, at \*17–21 (D.D.C. Mar. 29, 2005); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 114 (D.D.C. 2005); *Dammarell v. Islamic Republic of Iran (Dammarell I)*, 281 F. Supp. 2d 105, 192–94 (D.D.C. 2003).

93 See *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 843 (D.C. Cir. 2009); *Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 772 F. Supp. 2d 218, 223–26 (D.D.C. 2011); *Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 537 F. Supp. 2d 85, 95–96 (D.D.C. 2008).

94 See *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1122 (9th Cir. 2010); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 37 (D.D.C. 2009).

95 3 EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INT’L CRIMES, INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES 11 (2008), available at [http://www.icjcanada.org/fr/document/doc\\_2008-10\\_vol3.pdf](http://www.icjcanada.org/fr/document/doc_2008-10_vol3.pdf).

96 See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504–05 (1947). See generally Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’L L. 157, 164–74 (2012) (reviewing the doctrine); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1095–1101 (2010) (discussing effects of the doctrine); Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1062–80 (2010) (explaining the history of the doctrine).

97 See, e.g., Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad*, 102 GEO. L. J. 301 (2014); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effect of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. REV. 535 (2012).

98 See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1075–82



Under the Due Process Clause, a state may apply its own laws if it has any “significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”<sup>99</sup> State choice of law principles incorporate these constitutional limitations and refrain from applying state tort laws in the absence of sufficient contacts or interests.<sup>100</sup> To the extent these constitutional limits circumscribe the extraterritorial application of state tort laws, these limitations will simply require the court to apply foreign tort law. Thus, even if state tort laws may not regulate the foreign conduct of foreign defendants, state courts may adjudicate claims alleging violations of foreign law.

## VI. HUMAN RIGHTS AS FOREIGN LAW

Many of the problems raised in *Kiobel*—including the dispositive issue of extraterritoriality—could have been avoided had the plaintiffs pled international law as part of foreign law instead of federal law. *Kiobel* focuses on the question of international law as incorporated in federal common law under the ATS. But international law also is incorporated into the laws of other jurisdictions and can be invoked as foreign law. To the extent a court applies choice of law principles to invoke foreign law to resolve a dispute, this includes the invocation of international law that is part of such foreign law. As Dinah Shelton has noted, “a court in a dualist state might give direct effect to international law during litigation involving transnational issues, using choice of law principles, because the relevant other legal system is a monist state.”<sup>101</sup>

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(2009); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992).

99 *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). A different, more stringent standard under the dormant Commerce Clause applies to the extraterritorial application of state legislation. See *Healy v. Beer Inst.*, 491 U.S. 324, 367–37 (1989); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–89 (1987); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982). See generally Florey, *supra* note 98, at 1084–94 (discussing the *Edgar* extraterritoriality standard).

100 The Court has declared that another constitutional limitation, the Full Faith and Credit Clause, must be “interpreted against the background of principles developed in international conflicts law,” *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988), perhaps suggesting that the state laws that are consistent with international principles would satisfy constitutional limitations. See C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 120–21 (1993). While both the Due Process Clause and the Full Faith and Credit Clause limit the application of state law, only the Due Process Clause limits a state’s application abroad. See Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1552 n.161 (2011).

101 Dinah Shelton, *Introduction to INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS* 1, 2 (Dinah Shelton ed., 2011).

Monist states, by definition, recognize international law as automatically incorporated into domestic law.<sup>102</sup> Monism envisions a unitary world legal system, proclaims the “supremacy of international law in relation to national law,” treats national and international law as possessing “comparable, equivalent, or identical subjects, sources, and substantive contents.”<sup>103</sup>

Dualist states, by contrast, require international treaties to be incorporated through implementing measures. Most common law countries follow the dualist approach. In the United Kingdom, for example, “[t]reaties to which the United Kingdom is a party do not automatically become part of UK law. They become part of UK law—and hence binding on courts—only when their contents are enacted into law by Parliament.”<sup>104</sup> With respect to customary international law, however, like most dualist countries, the United Kingdom follows the doctrine of automatic incorporation.<sup>105</sup> As Lord Denning noted, “Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows . . . inexorably that the rules of international law, as existing from time to time, do form part of . . . English law.”<sup>106</sup> Other common law countries follow a similar approach, holding that customary international law that does not conflict with legislation automatically forms part of the common law and has direct effect in courts.<sup>107</sup>

Under the facts of *Kiobel*, had the plaintiffs invoked international law as part of Nigerian law rather than part of federal law under the ATS, they would have avoided any question regarding the extraterritorial application of federal law. Relying on international law as part of Nigerian law obviates the central holding of *Kiobel*. Moreover, under the transitory tort doctrine articulated by the Court in *Kiobel*, the plaintiffs could have pursued an international human rights claim under Nigerian law because “the cause of action arose in another civilized jurisdiction” and there was “a well founded belief

102 See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 49 (8th ed. 2012); Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* 529, 530–31 (1999); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *AM. J. INT’L L.* 310, 314 (1992); S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 *VA. J. INT’L L.* 499, 510 (2013).

103 HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1096–97 (3d ed. 2008) (internal quotation marks omitted).

104 Stephen C. Neff, *United Kingdom*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 101, at 448, 457–58.

105 See CRAWFORD, *supra* note 102, at 67–70; Shelton, *supra* note 101, at 4, 13.

106 *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 1 *Q.B.* 529 at 554 (Eng.). See generally *Campaign for Nuclear Disarmament v. Prime Minister of U.K.*, [2002] *EWHC (Admin)* 2777 (U.K.) (discussing the effect of international law on the British decision to enter the Iraq War); *R (European Roman Rights Centre) v. Immigration Officer at Prague Airport*, [2004] *UKHL* 55, [2005] 2 *A.C.* 1 (explaining the interaction of British law and international law on refugees); Neff, *supra* note 104, at 626–27 (discussing incorporation of customary international law).

107 See Shelton, *supra* note 101, at 13.

that it was a cause of action in that place.”<sup>108</sup> The international human rights claim could have gone forward as a claim arising under Nigerian law.

Nigeria follows the dualist tradition and requires domestic implementation of treaties.<sup>109</sup> Human rights treaties, including the African Charter on Human and Peoples’ Rights and the Convention on the Rights of the Child, have become part of Nigerian law by virtue of implementing legislation.<sup>110</sup> The legislation implementing the African Charter, for example, provides that “the provisions of the African Charter on Human and Peoples’ Rights . . . shall . . . have [the] force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.”<sup>111</sup> More broadly, when Nigeria adopted its 1999 constitution it did so with intent to create “enforceable fundamental rights” that incorporate “the civil and political rights guaranteed in major international human rights instruments.”<sup>112</sup>

With respect to customary international law, Nigeria follows the common law tradition and adheres to the doctrine of incorporation. Under that doctrine, “customary international law is automatically incorporated into domestic law and requires no further legislation.”<sup>113</sup> Nigeria has “a dualist system, albeit with some monist considerations, which uses the doctrine of incorporation in relation to customary international law.”<sup>114</sup> As the Nigerian Supreme Court put it in *Ibidapo v. Lufthansa Airlines*, “Nigeria . . . inherited the English common law rules governing the municipal application of international law.”<sup>115</sup>

This approach reflects the indirect application of international law through the vehicle of foreign law. The federal court in *Kiobel* could have relied on New York’s choice of law rules to apply Nigerian law. In circumstances in which the plaintiffs and defendants have split domiciles, New York’s choice of law principles almost certainly would have resulted in the application of Nigerian law as the *lex loci delicti*.<sup>116</sup> It could have then applied

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108 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

109 See Babafemi Akinrinade, *Nigeria*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 101, at 448, 457–58.

110 See *id.* at 457–60.

111 African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act (1983) Cap. (A9) (Nigeria), available at <http://www.nigeria-law.org/African%20Charter%20on%20Human%20and%20Peoples%27%20Rights.htm>.

112 Jacob Abiodun Dada, *Human Rights Under the Nigerian Constitution: Issues and Problems*, 2 INT’L J. HUMAN. & SOC. SCI. 33, 37 (2012).

113 Akinrinade, *supra* note 109, at 461.

114 *Id.* at 467.

115 *Ibidapo v. Lufthansa Airlines*, [1997] 4 NWLR 124, 150 (Nigeria).

116 See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972); see also *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 181 (3d Cir. 2000) (detailing choice of law rules under the Federal Tort Claims Act); *Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033, 1037 (N.Y. 2011) (holding that *lex loci delicti* is default); *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993) (noting that in theory the laws of the location of the injury create the legal right of redress); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679,

international law as part of Nigerian law. Thus, under this approach, the plaintiffs in *Kiobel* could use New York's choice of law rules to rely on Nigerian law, including international law incorporated therein.

## VII. HUMAN RIGHTS AS COMMON LAW

Reading the Supreme Court's decision in *Kiobel* in light of its earlier decision in *Sosa v. Alvarez-Machain* leads to the following syllogism: if (1) there is a limited category of federal common law claims actionable for violations of the law of nations; and (2) the statutory canon limits the extraterritorial reach of the ATS, not the underlying common law claims; then (3) the common law claims may be pursued in federal courts exercising diversity jurisdiction or state courts exercising general jurisdiction.

The first premise is that the ATS does not create a cause of action for violations of the law of nations, the common law does. In *Sosa* the Court held that the ATS, although only a jurisdictional statute, was "enacted on the understanding that that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability."<sup>117</sup> It then held that

no development in the two centuries from the enactment of § 1350 . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.<sup>118</sup>

For such a common law claim to be actionable, however, it must be "based on the present-day law of nations" and "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."<sup>119</sup> The Court in *Kiobel* reinforced this understanding of a "modest number" of federal common law claims actionable for violations of the law of nations.<sup>120</sup> In other words, both *Sosa* and *Kiobel* confirm that the ATS is not the source or the limit for common law claims involving international law violations.

The second premise is that the ATS is a jurisdictional statute and that the presumption against extraterritoriality applies only to the statute, not to the underlying federal common law claims for violations of the law of nations. In *Kiobel* the Court declared that "the presumption against extrater-

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682–83 (N.Y. 1985) (noting the locus is the location of the last wrong); Alford, *supra* note 13 (manuscript at 32).

117 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

118 *Id.* at 724–25.

119 *Id.* at 725.

120 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013). The ATS provides jurisdiction to hear claims "but does not expressly provide any causes of action." *Id.* The common law provides "a cause of action for [a] modest number of international law violations" and "courts may recognize private claims [for such violations] under federal common law." *Id.* (alteration in original) (internal quotation marks omitted).

ritoriality . . . constrain[s] courts exercising their power under the ATS.”<sup>121</sup> That presumption, the Court said, is “a canon of statutory interpretation” that assumes that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>122</sup> The purpose of the canon is to avoid “unintended clashes between our laws and those of other nations” by requiring Congress to manifest a clear intent to regulate conduct abroad.<sup>123</sup> Although the ATS “does not directly regulate conduct or afford relief,” the Court concluded that “we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”<sup>124</sup> The Court then looked to the text, history, and purpose of the ATS to determine whether Congress intended for the ATS to apply abroad and found “nothing in the statute [to] rebut[ the] presumption.”<sup>125</sup> Had there been such evidence, the jurisdictional statute would apply extraterritorially without altering the content or reach of the underlying common law claims. Should Congress amend the ATS so that it applies extraterritorially, this too would not alter the content or reach of the underlying common law claims. Thus, the presumption against extraterritoriality applies to limit Congress’s grant of jurisdictional authority to adjudicate federal common law claims for violations of the law of nations.

The surprising conclusion one draws from these two premises is that federal common law claims actionable for violations of the law of nations still may be pursued in federal courts exercising foreign diversity jurisdiction or state courts exercising general jurisdiction. As for the former, foreign diversity jurisdiction pursuant to 28 U.S.C. § 1332 requires a \$75,000 amount in controversy and the inclusion of a U.S. citizen either as a plaintiff or defendant.<sup>126</sup> The typical “foreign-cubed” facts pursued in ATS claims would be foreclosed under this grant of jurisdiction. However, where a U.S. citizen is involved in a diversity action, the federal common law claims recognized in *Sosa* may survive *Kiobel*’s presumption against extraterritoriality. The presumption against extraterritoriality will apply to the diversity jurisdiction statute as well, but it is uncontroversial that “federal courts may exercise foreign diversity jurisdiction over tort claims by aliens against U.S. citizens for acts occurring outside the United States.”<sup>127</sup> As others in this issue have argued: “[e]ven after *Sosa* and *Kiobel*, aliens will be able to sue U.S. citizens in federal court for a wide range of torts regardless of whether they compare favorably to the Blackstone crimes or whether they occurred in the United States.”<sup>128</sup>

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121 *Id.* at 1665.

122 *Id.* at 1664 (alteration in original) (internal quotation marks omitted).

123 *Id.* (internal quotation marks omitted).

124 *Id.*

125 *Id.* at 1669.

126 28 U.S.C. § 1332(a) (2006).

127 Anthony J. Bellia, Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1639 (2014).

128 *Id.* at 1642.

On the other hand, there are persuasive reasons to believe this syllogism may be wrong. “As a general matter, the presumption against extraterritoriality does not apply to jurisdictional statutes,”<sup>129</sup> and the Court in *Kiobel* suggested that the presumption applied not just to the statute but also to the “causes of action that may be brought under the ATS.”<sup>130</sup> Moreover, the Court in *Sosa* expressly excluded the possibility that federal common law claims under the ATS could be brought under other jurisdictional statutes, such as federal question jurisdiction.<sup>131</sup> If the *Sosa* causes of action do not create federal question jurisdiction, there is no reason to think those same federal causes of action could be brought under diversity jurisdiction.

State courts sitting as courts of general jurisdiction may resolve the federal common law claims recognized in *Sosa*. Unless one interprets the presumption against extraterritoriality articulated in *Kiobel* as limiting the underlying common law claims rather than the jurisdictional statute, the international law claims that heretofore were pursued in federal court under the ATS still could be pursued in state court as federal common law claims. There is nothing unusual in suggesting that federal common law claims may be adjudicated in state courts. State courts routinely apply and make federal common law, including claims involving admiralty and implicating the rights and obligations of the United States.<sup>132</sup>

Finally, assuming the Court’s application of the presumption against extraterritoriality applies both to the ATS and the underlying federal common law claims, there remains the possibility that state courts could fashion state common law claims based on the criteria established in *Sosa*. State law routinely mirrors comparable federal law, including the RICO and UDAP statutes outlined above. There is nothing in *Sosa* or *Kiobel* that prevents a state court from recognizing a state cause of action for violations of “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms,” such as piracy, violations of safe conducts, or offenses against ambassadors.<sup>133</sup> Nor is there anything unusual with state law incorporating international law or applying choice of law principles so that state common law claims have greater extraterritorial reach than federal law.<sup>134</sup> Courts applying the common law already have established gradations of torts that embrace negligence, gross negligence, intentional torts, and strict liability. There is no

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129 William Dodge, *Guest Post: Dodge—The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), <http://opiniojuris.org/2014/01/28/guest-post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/>.

130 *Kiobel*, 133 S.Ct. at 1664.

131 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004).

132 See Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 839–840 (2005).

133 *Sosa*, 542 U.S. at 725.

134 Anthony Colangelo, *Guest Post: Colangelo—Kiobel and Conflicts of Law*, OPINIO JURIS (Jan. 28, 2014, 4:10 PM), <http://opiniojuris.org/2014/01/28/guest-post-colangelo-kiobel-conflicts-law/>.

logical reason that an international law violation could not be a state common law cause of action, or at a minimum a critical factor in the determination of liability or damages under state law.

To suggest that the statutory presumption against extraterritoriality does not apply to federal common law claims (or similar state common law claims) is not to suggest the absence of territorial limits. As with the extraterritorial application of state laws, the constitutional limits of the Due Process Clause prevent state courts from applying common law claims in the absence of any “significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”<sup>135</sup> Nor is there any reason to think courts resolving common law claims for international law violations would go so far as to violate international limits of prescriptive jurisdiction. Both constitutional and international law impose obligations of a territorial nexus separate and apart from the statutory presumption against extraterritoriality. The territorial limits of common law claims for international law violations are derived from constitutional and international law, not canons of statutory interpretation.

#### VIII. HUMAN RIGHTS AND FALSE CONFLICTS

If international law is incorporated into the national laws of all relevant jurisdictions, then this may result in what conflict of law scholars describe as a “false conflict,” allowing the forum court to apply domestic law where it is identical to foreign law. In essence, this doctrine holds that if the competing laws are the same, there is no need to choose between them.<sup>136</sup> Under New York’s choice of law principles that would have applied in *Kiobel*, “[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved.”<sup>137</sup> Laws are in conflict where “the applicable law from each jurisdiction provides different substantive rules.”<sup>138</sup> Where the laws of competing

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135 *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). See generally Florey, *supra* note 98, at 1084–94 (discussing the prohibition on extraterritoriality under the dormant Commerce Clause).

136 See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 838 n.20 (1985) (Stevens, J., concurring in part and dissenting in part); *Wachsmann ex rel. Wachsmann v. Islamic Republic of Iran*, 537 F. Supp. 2d 85, 94 (D.D.C. 2008); *Gulf Grp. Holdings, Inc. v. Coast Asset Mgmt. Corp.*, 516 F. Supp. 2d 1253, 1271 (S.D. Fla. 2007). A variation of this false conflict analysis that is applied in the government interest approach to conflict of laws looks to whether all competing states have an interest in applying their own laws. If only one involved state has an interest in applying its law, there is a “false conflict.” See Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958).

137 *In re Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 937 (N.Y. 1993).

138 *Finance One Public Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005) (internal quotation marks omitted); accord *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998); *Elson v. Defren*, 726 N.Y.S.2d 407, 413 (N.Y. App. Div. 2001).

jurisdictions are not in conflict and “New York law is among the relevant choices, New York courts are free to apply it.”<sup>139</sup>

The harmonization of national laws achieved by international law reduces the conflict of laws. In fields such as intellectual property and contracts, for example, substantive treaty guarantees under the Berne Convention and the Convention on the International Sale of Goods have reduced the number of true conflicts between jurisdictions.<sup>140</sup> Likewise, the Warsaw Convention and subsequent protocols have reduced conflicts between national laws with respect to airline liability for torts.<sup>141</sup>

In the human rights context, to the extent the same international law is part of domestic and foreign law, there is no true conflict between those laws. In the absence of a conflict between the potentially applicable foreign law and domestic law, the forum is free to apply domestic law. In other words, it is quite plausible that a federal district court in *Kiobel* could have applied federal common law claims alleging violations of the law of nations—not because it governed the dispute—but because there was no conflict between the international law incorporated in domestic law and the international law incorporated in Nigerian law. Absent a need to choose, courts are free to apply international law as incorporated in the ATS.

This false conflict analysis suggests there is no basis for applying a presumption against extraterritoriality. As the Court noted in *Kiobel*, the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>142</sup> But when domestic and foreign law is the same, then by definition there is no clash between those laws. International law incorporated in domestic law is applied *only* because it is identical to international law incorporated into foreign law.

Anthony Colangelo has argued something similar in the context of universal jurisdiction of international law violations:

Because the State exercising universal jurisdiction merely enforces shared normative and legal commitments of all, no conflict of laws exists since the law being applied is the same everywhere. . . . [T]he State exercising universal jurisdiction does not extend extraterritorially its own national laws, but

139 *Int’l Bus. Machs. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004).

140 *See AMCO Ukrservice v. Am. Meter Co.*, 312 F. Supp. 2d 681, 686–94 (E.D. Pa. 2004); *Product Liability Claims on Both Sides of the Border: A Panel Discussion*, 8 U.S.–Mex. L.J. 123, 132 (2000) (arguing there is a false conflict where the CISG would apply under both Mexican and American law); *see also* Paul Edward Geller, *Conflict of Laws in Copyright Cases: Infringement and Ownership Issues*, 51 J. COPYRIGHT SOC’Y U.S.A. 315, 322 (2004) (stating as a result of the Berne Convention and subsequent treaties, copyright laws have converged worldwide, resulting in false conflicts).

141 *See Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 921–22 (9th Cir. 1999); *D’Alessandro v. Am. Airlines, Inc.*, 139 F. Supp. 2d 305, 309–10 (E.D.N.Y. 2001).

142 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)).



instead applies through domestic process a universally applicable international law that covers the globe.<sup>143</sup>

Colangelo argues that a false conflict analysis removes sovereignty claims because states are applying norms that by force of international law apply within the jurisdictions of all other interested states.<sup>144</sup> But the false conflict analysis need not be limited to claims involving universal jurisdiction. As he argues elsewhere, “False conflicts thus should be the starting point for any evaluation of international human rights claims in state court under state law.”<sup>145</sup> If, and only if, the relevant jurisdictions have incorporated the same substantive international norm into domestic law, then there is no conflict between competing sovereigns and no basis to fear unintended clashes between foreign and domestic laws.

#### CONCLUSION

The ATS has never been an effective tool to resolve international human rights violations. It has captivated the imagination of scholars and lawyers, but rarely provided actual relief for victims.<sup>146</sup> The statute’s struggle to survive ended with the presumption that it does not apply abroad.

The question presented by this Article is whether the demise of the ATS will occasion the creative exploration of alternative avenues for relief. Putting aside the possibility of litigation in foreign or international courts, there is every reason to expect that plaintiffs will continue to pursue human rights litigation in the United States. Some but not all of these avenues require a significant territorial nexus to the United States. Some but not all of these avenues require novel applications of international law.

The options outlined in this Article are based on conjecture and speculation. Some of these avenues for relief are more plausible than others. None can be dismissed out of hand. Each demands further reflection. Only after years of litigation will one be able to fully assess *Kiobel’s* impact on human rights litigation and the viability of alternative avenues for relief.

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143 Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 883, 924 (2009).

144 See *id.* at 883.

145 Anthony Colangelo, *International Law in U.S. State Courts: Extraterritoriality and “False Conflicts” of Law*, AMER. SOC. INT’L L. PROC. (forthcoming 2014) (manuscript at 15) (on file with author).

146 See DAVID KINLEY, CIVILISING GLOBALISATION 193 (2009) (referring to the statute as “an extremely limited, highly conditional, litigable instrument of last resort”); Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 269 (2004) (describing the various barriers to recovery under the ATS).