THE ALIEN TORT STATUTE AFTER *KIOBEL*: THE POSSIBILITY FOR UNLAWFUL ASSERTIONS OF UNIVERSAL CIVIL JURISDICITON STILL REMAINS

PAUL DAVID MORA*

Abstract The jurisdictional reach of causes of action brought under the Alien Tort Statute 1789[1] (ATS) was considered by the Supreme Court of the United States in *Kiobel v Royal Dutch Petroleum*.[2] The claimants in this decision sought to bring an action before a US District Court asserting universal civil jurisdiction over the conduct of foreign corporations performed against non-US nationals in the territory of a foreign State. Although the Supreme Court dismissed the particular claim on the basis of a domestic canon of statutory interpretation (the presumption against extraterritoriality), the narrowness of its reasoning left open the possibility for actions to continue being brought under the ATS which assert universal civil jurisdiction over the harm caused by individuals rather than corporations. Moreover, this position was specifically endorsed by a four-member minority of the Supreme Court in the Concurring Opinion of Justice Breyer. This paper argues that the reasoning of Justice Breyer is unconvincing and goes on to suggest that assertions of civil jurisdiction made under the universal principle are unlawful in international law as they fail to find a legal basis in either customary or conventional international law.

Keywords: Alien Tort Statute, damages for human rights, international law, State sovereignty, universal civil jurisdiction.

I. THE ALIEN TORT STATUTE AND UNIVERSAL CIVIL JURISDICTION

The Alien Tort Statute (ATS) provides that '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'. Enacted by

* Visiting Researcher, Faculty of Law, National University of Singapore, P.D.Mora@hotmail.co.uk. The author would like to once again thank Professor Colin Warbrick, Professor Jonathan Harris and Dr Sarah Williams, as well as Robin Kaniah and Chris Monaghan. All errors and shortcomings are those of the author alone.

[1] 28 USC section 1350.

[2] *Kiobel v Royal Dutch Petroleum Co and Shell Transport and Trading Company Plc*, 133 S. Ct. 1659 (2013). For a comment on the Supreme Court's decision see I Wuerth, '*Kiobel v Royal Dutch Petroleum Co*.: The Supreme Court and the Alien Tort Statute' 107(3) AJIL 601 (2013); A Sanger, 'Transnational Human Rights Cases? Not in Our Backyard!' (2013) 72(3) CLJ 487; and K Anderson, '*Kiobel v Royal Dutch Petroleum*: The Alien Tort Statute's Jurisdictional Universalism in Retreat' 12 Cato Supreme Court Review 149 (2012–13). See also the various articles in 'Agora: Reflections on *Kiobel*' 107(4) AJIL 829 (2013) 829–63; and 'Extraterritoriality post-*Kiobel*: International and Comparative Legal Perspectives' 28 MdJIntlL (2013) 1–274.

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the First US Congress as part of the Judiciary Act of 1789, the Act was only invoked on three occasions and remained largely dormant until revisited in *Filártiga v Peña-Irala*. The facts of this well-known case concerned two Paraguayan nationals invoking the ATS to bring a civil action in the US District Court for the Eastern District of New York against a Paraguayan State official for acts of torture committed in Paraguay. The claimants had arrived in the United States under a visitor's visa and subsequently applied for political asylum. When learning that the defendant had also been residing in the United States they initiated civil proceedings. The US Court of Appeals for the Second Circuit held that where a defendant is found and served with process in US territory so as to establish personal jurisdiction, the ATS conferred federal jurisdiction on district courts over violations of the law of nations.[3] It further held that acts of torture violated the law of nations.[4] On remand back to the District Court, it was decided that the law to be applied to an action brought under the ATS was not that of the *lex loci delicti* (in this case Paraguayan law), but the US common law.[5]

Filártiga involved an assertion of universal civil jurisdiction. Jurisdiction is a term that is used in a variety of legal contexts. In public international law, jurisdiction of the State is concerned with the competence which States enjoy to administer their sovereign authority to regulate conduct and the consequences of events[6] performed by natural and legal persons. The manner in which States exercise sovereign authority over conduct and the consequences of events falls into two separate and distinct stages: jurisdiction to prescribe and jurisdiction to enforce.[7] In practice, the two different forms of jurisdiction often share a very close relationship with one another, particularly where both manifestations of sovereign authority are performed by a domestic court. Although this article draws a formal distinction between the different stages in which States exercise regulatory competence over conduct and the consequences of events, it is worth recalling that, more properly, jurisdiction 'ought to be regarded as a unitary phenomenon categorised by different stages of [an] exercise of authoritative power'.[8]

[3] 630 F 2d 876, 878 (2d Cir. 1980).

[4] ibid at 880. The Supreme Court in *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004), held that only 'specific, universal, and obligatory' violations of international law norms were actionable under the ATS (at 732).

[5] 577 F Supp. 860, 862–863 (1984). The District Court also applied the *lex fori* when awarding remedies (at 863–867).

[6] R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992) 456.

[7] See eg FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Hague Recueil 1, 13; DW Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 BYIL 1, 1; I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 299; and R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 JICJ 735, 736. See also *Hartford Fire Insurance Co. v California*, 509 U.S. 764, 813 (1993).

[8] H Maier, *Jurisdictional Rules in Customary International Law* in KM Meessen (eds), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996) 78.

States regulate conduct and the consequences of events by making use of the legal process. Prescriptive jurisdiction refers to the ability of States to characterize conduct and the consequences of events as being contrary to their domestic laws.[9] Although the prescriptive function is primarily performed by the legislature (legislative jurisdiction), it may also be performed by the judiciary (judicial or adjudicative jurisdiction) as well as the executive (executive jurisdiction). States may either criminalize conduct as being an offence giving rise to criminal liability, or, alternatively, characterize it as a civil wrong giving rise to civil liability. The concern of prescriptive jurisdiction is not with how States characterize conduct, but instead with whether States may characterize conduct performed in the territory of another State as an unlawful act. To put the matter differently, the concern of prescriptive jurisdiction is with whether domestic laws may be applied abroad to regulate conduct and the consequences of events occurring in the territory of a foreign sovereign.

Enforcement jurisdiction, by way of contrast, is concerned with the ability of States to give effect to prescribed legal rules. Although States will in the main enforce their own prescribed rules, instances do arise in which they may enforce the law of another State.[10] Enforcement jurisdiction may be performed by either judicial bodies or executive agencies.

States assert enforcement jurisdiction over conduct at the moment when they apply prescribed rules which seek to regulate that conduct. Exercises of prescriptive jurisdiction over conduct are however temporally different and take place when the conduct is performed as that is the point in time when the natural or legal person has acted unlawfully.[11] *Filártiga* demonstrates the temporal difference between the two forms of jurisdiction. The United States' exercise of prescriptive jurisdiction over the acts of torture occurred when the acts were committed in Paraguay. Given that the acts were performed extraterritorially by a Paraguayan national and the harm had been suffered by another Paraguayan national, universality was the principle of prescriptive jurisdiction upon which the United States exercised regulatory authority over the conduct that had been made unlawful by the common law. In contrast, enforcement jurisdiction was asserted by the United States when the civil action was brought before its domestic courts under the ATS and both parties were present in its territory. The mutually distinct yet intertwined nature of these different forms of jurisdiction is well described by O'Keefe when commenting that '[a] State's assertion of the applicability of its … law[s] to given conduct is actualized, as it were, when it is sought to be enforced in a given case'.[12]

[9] It is worth noting that it is not the natural or legal persons themselves which are being directly regulated by the act of prescription, but the conduct and consequences of events which they perform.

[10] See the discussion at notes 86–93.

[11] See O'Keefe (n 7) 741–4. An important exception to this is when a State applies its laws retroactively and makes the relevant conduct unlawful after it has been committed.

[12] ibid 741.

The limits which international law places on these different forms of jurisdiction, as well as whether it recognizes the lawfulness of universal civil jurisdiction, are considered in more detail below.

II. *KIOBEL V ROYAL DUTCH PETROLEUM*

A. The Decision of the Supreme Court

The successful decision in *Filártiga* led to numerous claims for human rights violations committed abroad being brought before US District Courts. These claims have either been brought against the individuals responsible for the alleged abuses, or corporations who aided and abetted foreign governments in committing the violations of international law.

The case of *Kiobel* arose out of 12 Nigerian nationals bringing a civil action under the ATS in the District Court for the Southern District of New York against Royal Dutch Petroleum Company, and Shell Transport and Trading Company Plc. Royal Dutch Petroleum and Shell are holding companies who, at the time of the action, were respectively incorporated in the Netherlands and the United Kingdom. It was alleged that a joint subsidiary of the defendants that was incorporated in Nigeria, Shell Petroleum Development Company of Nigeria, had both enlisted as well as aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. These alleged violations included crimes against humanity, arbitrary arrest and detention, and acts of torture. As identified by the Supreme Court, '[o]n these facts, all the relevant conduct took place outside the United States'.[13]

The claimants were granted political asylum in the United States where they resided as legal residents after these alleged violations had been committed. When their claims were brought before the US District Court for the Southern District of New York, both Royal Dutch Petroleum and Shell had an office in the United States and were trading shares on the New York Stock Exchange. Shell Petroleum Development Company of Nigeria, however, had no such corporate presence in the United States, and the action brought against it was dismissed by the District Court for lack of personal jurisdiction.[14] The claims brought against Royal Dutch Petroleum and Shell for aiding and abetting crimes against humanity, arbitrary arrest and detention, and torture were allowed to proceed by the District Court.

The US Court of Appeals for the Second Circuit subsequently dismissed the entire action on the basis that customary international law does not

[13] *Kiobel* (n 2) at 1669.

[14] *Kiobel v Royal Dutch Petroleum Co.*, 456 F.Supp.2d 457 (S.D.N.Y. 2006). Personal jurisdiction, sometimes referred to as *in personam* jurisdiction, is concerned with the authority of a court over the parties (natural or legal) to the proceedings before it. Personal jurisdiction is a form of enforcement jurisdiction.

recognize corporate liability for violations of international law.[15] On appeal to the US Supreme Court, *certiorari* was granted to consider '[w]hether corporations are excluded from tort liability for violations of the law of nations'.[16] Despite hearing argument on this issue, the Supreme Court ordered a re-argument on a separate and more fundamental question.

The new question that the Supreme Court granted *certiorari* to consider was '[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'. Its eventual decision was based solely on the extraterritorial reach of causes of action brought under the ATS and did not consider whether corporations could be liable for violations of international law.[17] The Supreme Court unanimously held that the action could not be brought against the defendant holding companies under the ATS. Despite all members of the Court agreeing with this finding, the Justices were divided by five members to four on reaching this conclusion.

The Opinion of the Supreme Court was delivered by Chief Justice Roberts and was joined by Justices Scalia, Kennedy, Thomas and Alito. It began by finding that the presumption against extraterritorial application of US law 'constrain[s] courts considering causes of action that may be brought under the ATS'.[18] As had been recognized by the Supreme Court in its earlier decision in *Morrison v National Australia Bank*, the presumption provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none'.[19] The presumption against extraterritoriality is a domestic canon of statutory interpretation developed by the courts to determine whether an Act of Congress applies abroad. It recognizes that an exterritorial application of US law interferes with the ability of foreign sovereigns to regulate their internal affairs,[20] and thereby serves to protect

[15] *Kiobel v Royal Dutch Petroleum Co*., 621 F. 3d 111 (2010). Circuit Judge Level concurred with the judgment to dismiss the claim, but on the grounds that the victims had failed to plead specific facts creating a reasonable inference that the corporations had acted with a purpose of bringing about the alleged violations. His concurring judgment disagreed with the reasoning and conclusions drawn by the majority.

[16] The Supreme Court also granted *certiorari* to consider '[w]hether the issue of corporate civil tort liability under the [ATS] is a merits question, or an issue of subject matter jurisdiction'.

[17] For recent decisions concerning corporate liability under the ATS, see *Presbyterian Church of Sudan v Talisman Energy Inc*., 582 F.3d 244 (2d Cir. 2009); *Doe v Exxon Mobil*, 654 F.3d 11 (DC Cir. 2011); and *Flomo v Firestone*, 643 F.3d 1013 (7th Cir. 2011). The impact of these decisions on the potential liability of corporations is considered in this issue by U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute'.

[18] *Kiobel* (n 2) at 1664. The Supreme Court declined to consider the *Charming Betsy* canon of statutory interpretation which provides that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains': *Murray v Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[19] *Morrison v National Australia Bank Ltd*, 130 S. Ct. 2869, 2878 (2010).

[20] *F. Hoffmann-La Roche Ltd v Empagran S. A.*, 542 U.S. 155, 165 (2004).

against unintended clashes of jurisdiction which could result in international discord.[21]

Having determined that the presumption against extraterritoriality applied to causes of action brought under the ATS, the Supreme Court then considered whether the presumption had been rebutted by the text, history or purpose of the Act. Referring once again to its earlier decision in *Morrison*, it identified that only a 'clear indication of extraterritoriality'[22] would rebut the weighty concerns underlying the presumption. The Supreme Court held that neither the text, history, nor purpose of the Act provided a clear indication that the First Congress had intended for causes of action brought under the ATS to have an extraterritorial reach and regulate conduct occurring in the territory of a foreign State.[23]

Although disposing of the case on the basis that the presumption against extraterritoriality had not been rebutted by the text, history or purpose of the ATS, the Supreme Court continued and found, separately, that the facts giving rise to the claim did not rebut the presumption either. In this regard, Chief Justice Roberts held that '[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices'.[24] It must be said that considering a further criterion after it had been concluded that the 'petitioners' case . . . is barred'[25] lacks some degree of logical coherence. As such, the better reading of the decision must be that in reaching its conclusion that the presumption against extraterritoriality had not been rebutted, the Supreme Court gave consideration to all of these factors rather than just the first three.

The Concurring Opinion of Justice Breyer (joined by Justices Ginsburg, Sotomayor and Kagan) agreed with the conclusion drawn by the Supreme Court that the action brought under the ATS did not apply to the facts of the case, but not with the reasoning employed by the majority in reaching this decision. Rather than invoke the presumption against extraterritoriality, Justice Breyer decided to identify the jurisdictional scope of the ATS and consider whether the facts giving rise to the claim fell within its ambit.[26] Justice Breyer was of the view that the ATS should be interpreted as 'providing jurisdiction only where distinct American interests are at issue'.[27] He then identified three instances in which the ATS would provide jurisdiction to causes of action brought under the Act:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest

[21] *EEOC v Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).
[22] *Morrison* (n 19) at 2883.
[23] *Kiobel* (n 2) at 1665–1669.
[24] ibid at 1669.
[25] ibid.
[26] Breyer J criticized the majority's reliance on the presumption of extraterritorially to dismiss the claim (ibid at 1672–1673).
[27] ibid at 1674.

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> in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[28]

Applying this finding to the facts of the case, Justice Breyer held that both the conduct and the parties lacked sufficient nexus with the United States in order for the ATS to provide jurisdiction over the claim.[29]

B. What Future for Transnational Human Rights Litigation under the ATS after Kiobel*?*

Great ambiguity surrounds which cases may invoke the ATS in order to seek civil redress for violations of the law of nations following the Supreme Court's decision in *Kiobel*. Despite granting *certiorari* to consider the broad question of whether, and the circumstances in which, causes of action may be brought under the ATS for violations of international law committed abroad, the Supreme Court provided no guidance on this matter beyond applying its conclusion to the facts of the case. At best, all that can therefore be taken from the judgment with some degree of certainty is the *ratio decidendi* of the case itself: US District Courts will not recognize causes of action brought under the ATS for violations of the law of nations where all of the relevant conduct has taken place in the territory of a foreign State, both the claimant and the defendant are foreign nationals, and the defendant is a corporation who is trading shares on a US stock exchange with an office in the United States at the time when the action is brought.

In addition to not offering any general guidance on the instances when causes of action brought under the ATS may regulate conduct with an extraterritorial dimension, the Supreme Court's judgment raises a question relating to this matter that it left unanswered. Having found that the 'mere corporate presence' of the defendants did not rebut the presumption against extraterritoriality, Chief Justice Roberts continued and stated that:

> [E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.[30]

This statement is significant for two reasons. First, by recognizing that the facts of the claim may rebut the presumption against extraterritoriality, the Supreme Court has confirmed, albeit implicitly, that transnational human rights cases may continue to be brought under the ATS. Had the claim been disposed of solely on the basis that the text, history and purpose of the ATS failed to rebut the presumption, future actions for violations committed abroad could only be brought if the Supreme Court were to overturn this finding. Whilst not impossible, the likelihood of this happening is somewhat slim. More important for present purposes, this statement, secondly, creates much uncertainty over

[28] ibid. [29] ibid at 1677–1678. [30] ibid at 1669.

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which transnational human rights claims will 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritoriality. Commenting on this matter, Justice Alito recognized that '[t]his formulation obviously leaves much unanswered'.[31] It was further noted by Justice Breyer that the decision 'leaves for another day the determination of just when the presumption against extraterritoriality might be "overcome"'.[32]

Kiobel has not ruled out the possibility for actions to be brought under the ATS which assert universal civil jurisdiction.[33] While civil claims cannot be brought against foreign corporations (with a mere corporate presence in the United States) for violations committed against foreign nationals abroad, there remains a possibility that the presumption against extraterritoriality will be displaced if such actions were brought against foreign individuals present in the United States at the time when proceedings are initiated.[34] In the words of Justice Kennedy, '[t]he opinion for the Court . . . leave[s] open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute'.[35]

The Concurring Opinion of Justice Breyer did not leave such a question unanswered. As mentioned above, Justice Breyer held that the ATS would provide jurisdiction to a cause of action where 'the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind'.[36] Justice Breyer later clarified in his judgment that the jurisdictional basis envisaged by this scenario was the principle of universality.[37] Endorsing the decision of the Court of Appeals for the Second Circuit in *Filártiga*, he stated that:

> Jurisdiction was deemed proper [in this case] because the defendant's alleged conduct violated a well-established international law norm, and the suit

[31] ibid at 1669. [32] ibid at 1673.

[33] cf JG Ku, '*Kiobel* and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute' (2013) 107(4) AJIL 835.

[34] The presence of the individual defendant in the United States at the time when proceedings are initiated would allow for the service of process so as to establish personal jurisdiction. As already noted, personal jurisdiction is part of enforcement jurisdiction and not prescriptive jurisdiction. On a separate point, the US Supreme Court recently held in *Daimler AG v Bauman*, 134 S. Ct. 746 (2014), that a court could not exercise personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performed services on its behalf in the United States. The underlying issue concerned proceedings being brought by several Argentinian nationals under, *inter alia*, the ATS in a US District Court against a German corporation for alleged human rights violations performed by another subsidiary of the defendant in Argentina.

[35] *Kiobel* (n 2) at 1669. [36] ibid at 1674.

[37] cf Ku (n 33) 838. Wuerth (n 2) has noted that 'Justice Breyer might be best understood as endorsing universal civil jurisdiction with a kind of subsidiary requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendant's residence there' (619). For the view that this passage conflates prescriptive and enforcement jurisdiction see, generally, O'Keefe (n 7).

> vindicated our Nation's interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct.[38]

In addition, he cited with approval the assertion of universal civil jurisdiction made by the US Court of Appeals for the Ninth Circuit in its decision of *In re Estate of Ferdinand Marcos, Human Rights Litigation.*[39]

The ambiguity created by *Kiobel* will no doubt lead to cases finding their way before the Supreme Court seeking further guidance on the reach of the ATS. It seems likely that, if presented with this question in the future, the Supreme Court will find that actions may be brought under the ATS which assert universal civil jurisdiction over the harm caused by individuals who are present in the United States at the time when proceedings are initiated. Two points support this suggestion. First, although the five Justices who formed the majority were silent on this issue, the remaining four were of the opinion that the ATS would provide jurisdiction for such an action. In this regard it is worth recalling that what divided the Supreme Court was not the conclusion reached on the extraterritorial scope of the ATS, but the reasoning that should be employed in arriving at the conclusion. Secondly, a body of jurisprudence making such an assertion of jurisdiction is well established under the ATS. As identified by Justice Breyer, the Supreme Court previously referred to *Filártiga* and *Marcos* with approval in its earlier decision in *Sosa v Alvarez-Machain*.[40]

III. THE LAWFULNESS OF UNIVERSAL CIVIL JURISDICTION

With the narrow reasoning in *Kiobel* leaving open the possibility for actions to continue being brought under the ATS that assert universal civil jurisdiction, the final part of the discussion turns to consider whether such assertions of jurisdiction are lawful under international law and makes particular reference to State practice relating to this decision.

A. The Legal Framework of Jurisdiction in International Law

It is well known that the international legal order is formed of independent and equal sovereigns co-existing with one another. International law recognizes the horizontal nature of the legal order by allocating States a *prima facie* exclusive prescriptive jurisdiction over conduct and the consequences of events occurring within their sovereign territory. The non-intervention in internal

[38] *Kiobel* (n 2) at 1675.

[39] 25 F. 3d 1467 (CA9 1994). The facts of the case concerned Philippine nationals bringing a civil action under the ATS against the former president of the Philippines for acts of torture and summary execution committed in the Philippines. The defendant was served with process in Hawaii where he had fled to from the Philippines.

[40] *Sosa* (n 4) at 732, noted by Breyer J, *Kiobel* (n 2) at 1675.

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matters that take place in another State is considered to be essential in maintaining peaceful relations and international stability.

The decision of the Permanent Court of International Justice in the *Lotus* case identified that international law does not prevent States from extending the application of their domestic laws to regulate conduct and the consequences of events occurring in the territory of another State.[41] For such assertions of extraterritorial prescriptive jurisdiction to be lawful, international law requires that they are supported by a permissive international norm recognized by either custom or treaty.[42] The established principles of extraterritorial prescriptive jurisdiction broadly recognize that States are entitled to regulate conduct and the consequences of events occurring abroad when they enjoy a sufficiently close connection to them.[43] Detailed rules which resolve how competing assertions of prescriptive jurisdiction that assert regulatory authority over the same conduct are yet to be established in international law. In any event, practice exists which recognizes that a State may only assert extraterritorial prescriptive jurisdiction over conduct once local domestic remedies have been exhausted (where available) in the States bearing a link of territoriality or nationality to the conduct.[44]

With respect to enforcement jurisdiction, international law allocates a generally exclusive competence on States to give effect to prescribed legal rules within their territories.[45] This is, however, subject to the narrow exception that

[41] *The Case of the S.S. 'Lotus'* (*France v Turkey*), Judgment of 7 September 1927, Series A, No 10, at 19.

[42] cf the early *dictum* in the *Lotus* case, ibid, at 19, which suggested that States are presumed to have an unlimited competence to prescribe their laws over extraterritorial conduct and events, subject only to express prohibitions imposed by norms of international law. This framework of extraterritorial prescriptive jurisdiction has more recently been described by the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3, as 'represent[ing] the high water mark of laissez-faire in international relations' (at [51]). More significantly, this framework of extraterritorial prescriptive jurisdiction has since been rejected by State practice. See, for example, the decision of the South African Constitutional Court in *Kaunda and Others v President of the Republic of South Africa*, 2004 (10) BCLR 1009, at [38]–[42]; and the Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v Royal Dutch Petroleum*, No 10-1491 (13 June 2012) (Supplemental Brief) at 11. See, however, *The Queen v Ahmad* [2011] NTSC 71, at [48].

[43] Mann (n 7) 49. This formulation has general application and applies in both a criminal and civil context: FA Mann, 'The Doctrine of Jurisdiction in International Law Revisited after Twenty Years' (1984) 186 Hague Recueil 19, 29.

[44] See eg Brief of the Governments of the Netherlands and the United Kingdom (n 42) 33–4; Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v Royal Dutch Petroleum*, No 10-1491 (2 February 2012) at 14; and Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance in *Kiobel v Royal Dutch Petroleum*, No 10-1491 (13 June 2012) at 22–23. The US Supreme Court appeared to endorse this requirement in *Sosa*, (n 4) at 733, n 22, as did the Concurring Opinion of Breyer J in *Kiobel* (n 2) 1674 and 1677.

[45] The *Lotus* case (n 41) at 18 and 23; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case (n 42) at [54].

States may consent for others to exercise enforcement jurisdiction within their territory. A State that exercises enforcement jurisdiction in another State's territory without its consent violates the sovereignty of that State.[46]

B. Customary International Law

One of the recognized principles of extraterritorial prescriptive jurisdiction in which States are considered by international law as having a sufficiently close connection with the impugned conduct is the principle of universality. Customary international law deems all States as having an entitlement to exercise universal jurisdiction owing to the particularly heinous and destructive nature of the conduct. The universal principle permits States to criminalize specific offences in their domestic legal systems perpetrated by non-nationals against other non-nationals that are performed entirely in the territory of a foreign State.[47] This principle is widely accepted by States in a criminal context.[48] A survey of State practice reveals, however, that customary international law does not recognize the principle as applying in a civil context.[49]

The very limited State practice on universal civil jurisdiction is mostly offered by the United States. Of course, in order to create a customary rule the practice must be accompanied by the necessary belief that assertions of universal civil jurisdiction are lawful. Having disposed of the claim by invoking a domestic canon of statutory interpretation, the Supreme Court in *Kiobel* gave no consideration to this matter. However, the Concurring Opinion of Justice Breyer, which identified the jurisdictional reach of the ATS, claimed that applying the statute in the manner he suggested was 'analogous to . . . the approaches of a number of other nations',[50] and 'consistent with international law'.[51] The correctness of this view faces both doctrinal and evidential difficulties, and is, therefore, somewhat doubtful.

In support of these suggestions, Justice Breyer made reference to civil law States that have enacted legislation establishing universal criminal jurisdiction

[46] See eg *Attorney General of the Government of Israel v Eichmann* (1961) 36 ILR 5.

[47] The uncertainty that remains over which crimes are subject to the universal principle is beyond the discussion of this paper.

[48] For an early review of State practice on the universal principle, see the Harvard Research on International Law, 'Jurisdiction with Respect to Crime' (1935) 29 AJIL Supp 435, 563–92. For a more recent survey see UN General Assembly, Report of the Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/66/93 (20 June 2011).

[49] cf C Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' (2007) 38 NYIL 3, 28–32 and 52, advocating for the lawfulness of universal civil jurisdiction on the basis that it is not prohibited by custom. As mentioned already, this framework of jurisdiction has been rejected by international law. Such a point has not gone unnoticed by Ryngaert himself when writing elsewhere: C Ryngaert, *Jurisdiction in International Law* (OUP 2008) 21 and 26–7.

[50] *Kiobel* (n 2) at 1677.

[51] ibid at 1675. See, also, the Concurring Opinion of Breyer J in *Sosa* (n 4) at 762–763, where he held that assertions of universal civil jurisdiction respect international comity and are in accordance with international law.

and allow for civil actions to be attached to criminal proceedings (a process commonly referred to as *actions civiles*).[52] While this argument does envisage a way in which civil compensation might be obtained from an assertion of universal criminal jurisdiction, it cannot be said that this has led to the formation of a customary rule on universal civil jurisdiction. The first difficulty with this argument is that States enact legislation establishing universal criminal jurisdiction either pursuant to a treaty obligation or under the belief that they are entitled to do so as a matter of customary law. A corresponding assertion of universal civil jurisdiction made by attaching a civil claim to the prosecution of a crime under this legislation simply lacks the necessary *opinio juris* to create a rule of custom. *Actions civiles* are more properly regarded as a separately established legal procedure which have unintentionally, on the part of the State, created the possibility for civil actions to be attached to crimes being prosecuted under the universal principle. In addition, in the States where *actions civiles* may be brought, there is a notable lack of any widespread and consistent practice of civil actions being attached to the (few) criminal prosecutions which assert universal criminal jurisdiction so as to create a rule of custom.

Justice Breyer also made reference to the Restatement (Third) of the Foreign Relations Law of the United States,[53] and suggested that his findings on the jurisdictional application of the ATS were 'consistent with the approaches set forth in the Restatement'.[54] Once again, problems arise with the material cited by Justice Breyer that seek to support his conclusions drawn. The Restatement recognizes that under the universal principle a State 'has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern'.[55] It then goes on to observe that universal jurisdiction is not limited to criminal law:

> In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.[56]

The Restatement is correct in recognizing that international law does not 'preclude' universal civil jurisdiction. This comment, however, cannot be taken too far. As already mentioned, assertions of extraterritorial prescriptive jurisdiction will only be lawful when supported by a permissive international norm. Importantly, what the Restatement does not do is recognize international law as permitting exercises of universal civil jurisdiction. Justice Breyer's

[52] ibid at 1676. See also D Donovan and A Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100(1) AJIL 142, 154; and Amnesty International, *Universal Jurisdiction: The Scope of Universal Civil Jurisdiction* (2007) AI Index: IOR 53/008/2007, 4–10.
[53] *Kiobel* (n 2) at 1673. [54] ibid at 1677. [55] Section 404. [56] ibid, cmt b.

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suggestion that his jurisdictional application of the ATS is 'consistent with the approaches set forth in the Restatement'[57] therefore appears to be incorrect.[58]

Further reference was given to the 'international jurisdictional norms to help determine the statute's jurisdictional scope' by Justice Breyer.[59] It will be recalled that although Justice Breyer dismissed the claim in *Kiobel* on the basis that the conduct and defendant corporations lacked sufficient nexus with the United States, he held that actions which assert universal civil jurisdiction could be brought under the ATS against individuals.[60] The different findings on the extraterritorial application of the ATS reached by drawing a distinction between the legal personalities of the defendants is not supported by the jurisdictional rules on universality. The universal principle regulates the conduct and consequences of events performed by non-nationals of the prescribing State, irrespective of whether they are natural or legal persons. Issues of legal personality are, of course, relevant when determining which defendants may be held liable for violations of international law in claims brought under the ATS.

Despite these shortcomings, Justice Breyer's Concurring Opinion still constitutes practice which provides evidence of a customary rule. Evidence of further practice of the United States which supports universal civil jurisdiction is provided by statements made by the US Government in its *amicus curiae* brief submitted to the Supreme Court in *Kiobel*.[61] The *amicus curiae* brief noted that, according to the US Department of State, 'recognizing a cause of action in the circumstances of *Filartiga* is consistent with the foreign relations interests of the United States'.[62] Moreover, it was claimed that the 'United States does not suggest that an extraterritorial private cause of action would violate international law in [*Kiobel*]'.[63] In addition, the United States enacted the Torture Victim Protection Act (TVPA) in 1991 to create a cause of action against an individual for acts of torture and extrajudicial killing committed

[57] *Kiobel* (n 2) at 1677.

[58] Similarly, the US Court of Appeals for the Second Circuit in *Kadic v Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995) cited section 404 cmt b as authority for the proposition that 'international law also *permits* states to establish appropriate civil remedies . . . such as the tort actions authorized by the Alien Tort Act' (emphasis added).

[59] *Kiobel* (n 2) at 1673.

[60] See the discussion at notes 36–9.

[61] The US Government had previously taken the position in *Sosa* that the ATS did not apply extraterritorially: Brief for the United States as Respondent Supporting the Petitioner in *Sosa v Alvarez-Machain*, No 03-339 (January 2004) at 46–49. This view was, however, based on the presumption against extraterritoriality rather than international law considerations.

[62] Supplemental Brief for the United States as *Amicus Curiae* (n 42) at 13.

[63] ibid at 14, fn 3. Distinguishing this case from *Filártiga*, the US Government went on to suggest that the Supreme Court 'should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct' (at 21).

under authority or colour of law of any foreign nation.[64] The TVPA was passed by Congress to provide a modern cause of action for claims that had been brought under the ATS, and was considered to be in accordance with international law when enacted.[65]

The *amicus curiae* brief submitted by Argentina to the Supreme Court in *Kiobel* similarly claimed that international law 'allow[s] countries to offer a civil forum to aliens suing their oppressors for human rights violations committed in foreign States'.[66] Actions brought under the ATS were said to be consistent with international law as they formed part of its renewed focus after the Second World War to end impunity and provide compensation to individuals for human rights violations.[67] In addition, it was suggested that such actions did not involve the United States projecting its laws abroad as '[t]he basic legal principles . . . are not prescribed by the United States but by International Law'.[68] Once again, although the *amicus curiae* brief provides evidence of State practice contributing towards the formation of a customary rule, difficulties arise as to whether the beliefs actually held are in accordance with international law. It may certainly be noted that a trend towards States providing reparation for violations of human rights has become discernible in international law over recent years.[69] However, it is not the case that this movement has conferred on individuals a right to be provided with redress through civil proceedings in a State's domestic courts,[70] particularly where the violations have been committed abroad.[71] Moreover, the action brought under the ATS is not prescribed by international law as was suggested by Argentina, but rather the US common law. In *Filártiga*, the District Court for the Eastern District of New York held on remand that the common law provided a civil remedy for violations of the law of nations, and reference would only be made to international law when determining the substantive principles applicable to this action fashioned by the common law.[72] This finding was subsequently

[64] 28 USC section 1350.

[65] Senate Report, No 249, 102d Cong, 1st Sess. (1991).

[66] Brief for the Government of the Argentine Republic as *Amicus Curiae* in Support of the Petitioners, *Kiobel v Royal Dutch Petroleum*, No 10-1491 (13 June 2012) at 6–7.

[67] ibid 7–12.

[68] ibid 13. See, similarly, AJ Colangelo, '*Kiobel*: Muddling the Distinction between Prescriptive and Adjudicative Jurisdiction' 28 MdJIntlL 65 (2013).

[69] See eg UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 21 March 2006, UN Doc/RES/60/147 (2006).

[70] See H Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 86; and A Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 LJIL 173, 180.

[71] See the Separate Opinion of Koroma J in *Case Concerning Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*), Judgment of 3 February 2012 at [9].

[72] See (n 5) at 863. The remedies awarded were also governed by the common law (at 863–867).

endorsed by the US Supreme Court in *Sosa*,[73] and in *Kiobel* it was stated that:

> The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.[74]

The European Commission (EC) submitted an *amicus curiae* brief on behalf of the European Union (EU) arguing that an 'assertion of universal civil jurisdiction is consistent with international law if confined by the limits in place for universal criminal jurisdiction'.[75] This statement did not represent the views of EU Member States. Rather than suggest that the Member States had ceded their competence for collective views to be presented on their behalf,[76] the *amicus curiae* brief identified that it was submitted in order to satisfy the EU's treaty obligation to engage in external actions seeking cooperation in international relations in order to support human rights and the principles of international law.[77] The EC's *amicus curiae* brief therefore does not constitute State practice which may create a customary rule. At best, it may only be taken as evidence of the existence of customary international law with respect to this matter.[78] Doubts, however, arise with respect to the accuracy of the views submitted in the EC's *amicus curiae* brief.

In support of its suggestion that universal civil jurisdiction is lawful, the EC referred to 'the national legislation of several [European] States . . . [which] expressly allows for universal *civil* jurisdiction in exceptional circumstances'.[79] This claim was unsubstantiated and no evidence

[73] *Sosa* (n 4) at 724.

[74] *Kiobel* (n 2) at 1666. See, similarly, the Supplemental Brief for the United States as *Amicus Curiae* (n 42) at 2.

[75] Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v Royal Dutch Petroleum*, No 10-1491 (13 June 2012) 17.

[76] Moreover, and considered in more detail below, both the joint *amicus curiae* brief submitted to the Supreme Court by the Netherlands and the United Kingdom, as well as the *amicus curiae* brief submitted by Germany, took a different position to that of the EC with respect to the lawfulness of universal civil jurisdiction. See the discussion at notes 97–105.

[77] See (n 75) 2, citing art 21(2)(b) of the Treaty of the European Union. It was further identified that the EU had an interest in ensuring that EU-based natural and legal persons were not at risk of being subjected to the laws which did not respect the limits imposed by international law (at 2–3).

[78] cf Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' (2007) 38 NYIL 3 (n 49) 55–6, commenting on the Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Sosa v Alvarez-Machain*, No 03-339 (23 January 2004). International organizations can contribute to the formation of customary rules when providing a forum in which member States of the organization engage in a practice concerning matters of international law. It is, however, the activities of the individual member States themselves, rather than those of the international organization, which provide the necessary practice. An illustration of this point is provided by the decision of the Assembly of the African Union on the Abuse of the Principle of Universal Jurisdiction, which recognized universal (criminal) jurisdiction as a principle of international law (Assembly/AU/Dec.199(XI)). As the Assembly is composed of heads of State and government, the decision thus constitutes evidence of State practice on this matter.

[79] See (n 75) 24 (emphasis in the original).

was provided by the EC of States that have actually enacted such legislation.[80] The *amicus curiae* brief also identified the recent Dutch decision of *El-Hojouj v Derbal*,[81] in which a foreign national (who resided in the Netherlands) was allowed to successfully bring a civil claim against Libyan State officials for acts of torture committed in Libya. Judgment in this decision was rendered on the basis of procedural rules of private international law allowing Dutch courts to exercise, in exceptional cases, a 'forum of necessity' jurisdiction[82] when it would be unacceptable for cases to be submitted to a foreign court, and existed a sufficient connection with the Dutch legal system.[83] This decision was mistakenly believed by the EC to be an assertion of universal civil jurisdiction. Although the Dutch court heard a dispute that concerned harm being suffered by a non-national from conduct performed extraterritorially by another non-national, it cannot be said that this conduct was regulated under the principle of universality. This is because the merits of the claim were decided in accordance with Libyan law rather than Dutch law.[84] As such, the Netherlands did not exercise prescriptive jurisdiction over the conduct.[85]

In addition, the EC suggested that the harmonized rules established by the Brussels I Regulation[86] and the Lugano Convention[87] have created a practice on universal civil jurisdiction. Under the harmonized rules, all Member States of the European Union, as well as Switzerland, Norway and Iceland, are required to recognize and enforce judgments for civil damages entered in any other State bound by the regime.[88] Referring to the decision in *El-Hojouj*

[80] The supporting reference made by the EC to A Nuyts, *Study on Residual Jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)*, General Report (3 September 2007), chs 16 and 21, was concerned with civil courts exercising jurisdiction on a "forum of necessity" basis. As discussed in more detail below, this is an issue of enforcement jurisdiction concerned with when a court may hear a claim, rather than prescriptive jurisdiction.

[81] Rechtbank's Gravenhage, Case No 400882/HA ZA 11-2252 (21 March 2012).

[82] In private international law, jurisdiction is concerned with whether a court is a competent forum to determine a case involving a foreign element. If found to be a competent forum, it is then considered which law should be applied to determine the case by applying the relevant choice of law rule.

[83] Art 9(c) of the Dutch Code of Civil Procedure.

[84] See (n 81) at [2.3]. In this regard, it has been noted by Akehurst that: '[i]n civil law[,] legislative jurisdiction and judicial jurisdiction do not necessarily coincide. A court may have jurisdiction and yet apply foreign law' (M Akehurst, 'Jurisdiction in International Law' (1972–73) 46 BYIL 145, 179).

[85] For this reason, the Netherlands claimed in its joint *amicus curiae* brief (n 42) that this decision 'is consistent with international law limits on jurisdiction' (at 22–23).

[86] Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L12/1.

[87] Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (2007), 2007 OJ L339/3.

[88] Arts 33(1) and 38(1).

as well as the possibility of bringing *actions civiles*, the *amicus curiae* brief suggested:

> As a result, even those States that do not recognize universal civil jurisdiction on a national basis can be required to enforce a judgment on such [a] basis by courts of other States bound by the regime.[89]

The suggestion that the enforcement of a civil judgment which regulates conduct under the universal principle results in the forum State making such an assertion of jurisdiction is also mistaken. Universality is a principle of prescriptive jurisdiction.[90] In the envisaged situation, the forum State is not applying its laws to regulate the conduct giving rise to the judgment that it seeks to enforce.[91] As well explained by Mann, '[e]nforcement jurisdiction . . . concerns not the law prescribed by a State to *regulate*, *inter alia*, acts outside its own territory, but the lawfulness of the State's own *acts* to give effect to such regulation'.[92] The forum State is thus only exercising enforcement jurisdiction over the conduct, and is consenting, under the harmonized rules, for judgment entered in the prescribing State to be recognized and enforced in its territory.[93]

Akehurst has claimed that '[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests'.[94] With respect to claims brought under the ATS, it has been suggested by Cassese that States have acquiesced to assertions of universal civil jurisdiction and implicitly accepted its lawfulness through non-contestation.[95] This is not the case. The Nigerian Government lodged a formal objection with the US Attorney General when proceedings were first initiated in *Kiobel*, identifying that the US had unlawfully asserted jurisdiction over conduct that had taken place in Nigeria and thereby gravely undermined its sovereignty.[96] In addition, the Governments of the Netherlands and the United Kingdom

[89] See (n 75) at 25.

[90] O'Keefe (n 7) 744 and 750.

[91] Arts 36 of the Brussels I Regulation and the Lugano Convention specifically provide that under no circumstances may an enforcing court review the substantive basis of a foreign judgment.

[92] Mann (n 43) 34 (emphasis in original).

[93] A further difficulty with the EC's suggestion that the requirement to recognize and enforce judgments under the harmonized rules have created a practice on universal civil jurisdiction is that transnational human rights claims brought against States and their officials fall outside the *ratione materiae* scope of the Brussels I Regulation and Lugano Convention. In *Lechouritou v Federal Republic of Germany*, C-292/05, [2007] ECR I-1519, the European Court of Justice held that a claim for damages brought in a Greek court against Germany in respect of massacres committed by the occupying forces during the Second World War were not 'civil matters' within the meaning of art 1 of the Regulation. Disputes resulting from the exercise of public powers were held to be beyond the scope of the legal rules regulating private individuals contained in the Regulation.

[94] Akehurst (n 84) 176.

[95] A Cassese, 'When May Senior State Officials Be Tried for International Crimes?' (2002) 13 EJIL 853, 859–60.

[96] Supplemental Brief for Respondents, *Kiobel v Royal Dutch Petroleum*, No. 10-1491 (1 August 2012) at 5.

submitted a joint *amicus curiae* brief to the Supreme Court making clear that '[t]he basic principles of international law have never included civil jurisdiction for claims by foreign nationals against other foreign nationals for conduct abroad'.[97] Both States had an interest in the decision given that the defendants, Royal Dutch Petroleum and Shell, were respectively incorporated in their territories. Their *amicus curiae* brief further said that for the ATS to allow such claims to be brought 'would clearly interfere with other nations' sovereignty and be plainly inconsistent with international law'.[98] Moreover, whilst the practice of States has come to recognize universal criminal jurisdiction, it does not follow that the international rules which apply in one field of law automatically apply in another:

> [I]t is widely recognized that criminal and civil jurisdiction are two distinct regimes. Extrapolating universal civil jurisdiction from the existence of universal criminal jurisdiction is not a proper application of international law: in particular, it is not consistent with the way in which international law develops. Such a principle must first be well-established and practiced by States to emerge as a new basis of civil jurisdiction under international law.[99]

This argument is certainly correct.[100] By way of analogy, when determining the customary rules on immunity from civil jurisdiction, consideration is not given to the practice which has developed in the criminal context.[101] Additional practice of the United Kingdom which supports the view that international law does not recognize universal civil jurisdiction may be found

[97] Supplemental Brief of the Netherlands and United Kingdom (n 42), at 6. The *amicus curiae* brief mistakenly read the jurisdictional assertion in *Filártiga* as being based on active personality rather than universality (at 15). At the time that the impugned acts were committed for which damages were awarded by the District Court, the defendant had no links of nationality (or residency) with the United States. This misreading of the decision was unfortunate as it led to the Governments suggesting that it should not be overruled by the Supreme Court (at 16). Breyer J subsequently stated in his Concurring Opinion that 'the United Kingdom and the Netherlands, while not authorizing such damages actions themselves, tell us that they would have no objection to the exercise of American jurisdiction in cases such as *Filartiga*' (at 1676).

[98] ibid.

[99] ibid 17.

[100] cf L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) 3; B Van Schaack, 'Justice without Borders: Universal Civil Jurisdiction' 99 ASIL 120 (2005) 120; Donovan and Roberts (n 52) 153–4; and Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' (2007) 38 NYIL 3 (n 49) 25–7.

[101] See eg the recent decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State* case, at [81]–[91]. For an illustration that the international rules applicable in one field of law do not automatically apply in another, see *Jones v Saudi Arabia* [2006] UKHL 26, at [19] and [32], where the House of Lords referred to its earlier decision in *R. v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (*No 3*) [2000] 1 AC 147 to note that its findings on immunity *ratione materiae* in criminal proceedings for torture did not apply to civil proceedings concerning whether a State was entitled to plead immunity *ratione materiae* on behalf of its officials for similar acts.

in statements made in Parliament,[102] as well as the House of Lords' decision in *Jones*.[103]

Similar opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of an alien's civil claim against foreign defendants for alleged activities that caused injury on foreign soil was made by Germany in its *amicus curiae* brief submitted to the Supreme Court in *Kiobel*. Such exercises of jurisdiction made under the ATS were 'likely to interfere with foreign sovereign interests in governing their own territories and subjects',[104] and said to be 'contrary to international law'.[105]

A number of other States have also made protests to other claims that have been brought under the ATS.[106] As noted by the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, the ATS is a 'very broad form of extraterritorial jurisdiction . . . [that] has not attracted the approbation of States generally'.[107] States which have specifically protested to assertions of universal civil jurisdiction made under the ATS include Australia,[108] Canada,[109] El Salvador,[110] Indonesia,[111] South Africa[112] and Switzerland.[113]

The foregoing thus demonstrates that there is insufficient evidence of a widespread and consistent State practice accepted as law to create a rule of customary international law on universal civil jurisdiction.[114]

[102] See the comments of Lord Hunt, the (then) Parliamentary Under-Secretary of State for the Ministry of Justice, in respect of the Torture (Damages) (No. 2) Bill 2009: Hansard, 2008–09, vol 701, No 94 (16 May 2008) at col 1228. See also the Memorandum Submitted by the Ministry of Justice to the Joint Committee on Human Rights, *Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims, Twenty-fourth Report of Session 2008–09*, HL Paper 153, HC 533, at paras 20–21.

[103] Jones v Saudi Arabia [2006] UKHL 26. n 101, at [27] and [34]. See also the comments made at [99].

[104] Brief of the Federal Republic of Germany (n 42) 2. See also the comments made at 9 and 10.

[105] ibid 1.

[106] The protests have not only objected to exorbitant assertions of jurisdiction, but also to claims being brought against foreign corporations.

[107] See (n 41) at [48].

[108] Brief of the Governments of the Commonwealth of Australia, The Swiss Confederation and The United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of the Petitioner, *Sosa v Alvarez-Machain*, No 03-339 (23 Jan 2004). See also the decision of the New South Wales Court of Appeal in *Zhang v Zemin* [2010] NSWCA 255, at [120]–[121].

[109] Brief of *Amicus Curiae* of the Government of Canada in Support of Dismissal of the Underlying Action, *Presbyterian Church of Sudan v Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009); and Diplomatic Note UNGR0023 submitted to the US Department of State by the Government of Canada in connection with *Presbyterian Church of Sudan v Talisman Energy* (14 January 2005) (on file with author).

[110] Brief of the Republic of El Salvador as *Amicus Curiae* in Support of Appellant, *Chavez v Carranza*, No 06-6234 (23 April 2008), at 4 and 12.

[111] Letter from the Government of Indonesia submitted to the US Department of State in connection with *DOE VIII v Exxon Mobil Corp*. (15 July 2002) (on file with author). One of the defendants (PT Arun NGL) was a joint venture company mostly owned by the Indonesian State.

[112] Declaration of Justice Minister Maduna, filed in the case of *In re South African Apartheid Litigation*, No 02 MDL 1499 (11 July 2003) (on file with author).

[113] See (n 108).

[114] For the view that the violation of customary norms of *jus cogens* do not create universal civil jurisdiction, see PD Mora, 'The Legality of Civil Jurisdiction over Torture under the Universal

C. Conventional International Law

Several treaties have been enacted by States which establish a jurisdictional framework permitting the domestic courts of contracting parties to criminally prosecute certain offences under the principle of universality. States have not as of yet, however, implemented an international convention providing the necessary legal basis to support such an assertion of jurisdiction in the civil context.

Uncertainty has surrounded whether Article 14 of the Convention against Torture 1984[115] (CAT) establishes a framework of universal civil jurisdiction, and requires contracting parties to provide an enforceable right to compensation in their domestic legal systems for acts of torture that have been committed abroad and have no nexus with the forum State. Article 14(1) provides that:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

As can be seen, the provision is simply silent with regard to its territorial application. The Committee against Torture recently issued a General Comment which stated that 'the application of article 14 is not limited to victims who were harmed in the territory of the State party'.[116] It further identified that contracting parties are under a duty to enact legislation providing victims of torture with the right to seek an effective judicial remedy,[117] and that 'article 14 requires . . . that all victims of torture . . . are able to access [this] remedy'.[118] This General Comment, like all others, is non-binding on contracting parties.[119] It therefore does not constitute an authoritative interpretation of Article 14 which States are obliged to follow. The Committee itself has recognized that it is just a 'monitoring body created by the States parties themselves with declaratory powers only'.[120] In this regard, Lord Hoffmann in *Jones* rightly noted that '[t]he committee has no

Principle' [2009] 52 GYIL 367, 384–90. See, more recently, Brief of the Governments of the Netherlands and the United Kingdom (n 42) 16. cf A Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 307–10; and K Parlett, 'Universal Civil Jurisdiction for Torture' (2007) 4 EHRLR 385, 399.

[115] The United Nations Convention against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment, 10 December 1984. At the time of writing there are 155 States party to the Convention, including Nigeria and the United States.

[116] General Comment No 3, *Implementation of Article 14 by States Parties* (2012), CAT/C/GC/3, at para 22.

[117] ibid, at para 20.

[118] ibid, at para 22.

[119] International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (2004) at paras 15–16.

[120] General Comment No 1, *Implementation of Article 3 of the Convention in the Context of Article 22* (1998), A/53/44, at para 9.

legislative powers'.[121] Despite the existence of academic opinion suggesting that Article 14(1) establishes universal civil jurisdiction,[122] the better view still remains that, in accordance with international practice, States are only obliged to provide a judicially enforceable civil remedy to torture victims who have suffered harm within their territorial jurisdiction.[123] This point was expressly made by the United States in an understanding when ratifying the CAT.[124]

IV. CONCLUSION

The Supreme Court in *Kiobel* has left open the possibility for transnational human rights claims that assert universal civil jurisdiction over the harm caused by individuals to continue being brought under the ATS. Although uncertainty surrounds the exact limits which international law places on exercises of prescriptive civil jurisdiction, this paper has shown that Justice Breyer's endorsement of universal civil jurisdiction is unconvincing and that such extensions of sovereign regulatory authority fail to find the necessary legal basis in either customary or conventional international law. Despite the existence of strong arguments in favour of recognizing universal civil jurisdiction so as to allow remedies to be provided to individuals who have suffered gross violations of human rights, the fact remains that value-orientated policy consideration cannot provide a substitute for the consent of States in the development of international law.[125] The current position under international law is that assertions of universal civil jurisdiction unlawfully interfere with the territorial integrity of the State in which the conduct occurred.

[121] See *Jones* (n 101) at [57]. This comment was motivated by the Committee's recommendation that Canada provide compensation to all victims of torture following its decision in *Bouzari v Islamic Republic of Iran* [2004] OJ No 2800, where a civil action for torture was barred on the grounds of State immunity: CAT/C/CR/34/CAN (2005), para 5(f). More recently, the Committee against Torture made the same recommendation and suggested that Canada should also 'consider amending the State Immunity Act to remove obstacles to redress for all victims of torture': CAT/C/CAN/CO/6 (2012), para 15. This recommendation is, however, inconsistent with the position taken in its General Comment were it stated that 'granting immunity *in violation of international law*, to any State or its agents . . . is in direct conflict with the obligation of providing redress to victims': see (n 115) at para 42 (emphasis added). For the view that the grant of immunity in *Bouzari* was not in violation of international law see the recent decision of the ICJ in *Jurisdictional Immunities of the State* case. For an extensive comment on the correctness of this decision see PD Mora, 'Jurisdictional Immunities of the State for Serious Violations of International Human Rights Law or the Law of Armed Conflict' (2012) 50 CYIL 243.

[122] See Orakhelashvili (n 114) 310–16; CK Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18 EJIL 921; and K Metcalf, 'Reparations for Displaced Torture Victims' 19 Cardozo JIntl&CompL (2011) 451, 461–8.

[123] See further Mora (n 114) 371–80, and the arguments made therein. See also the recent practice to this effect of the United Kingdom Government in *Jones and Others v The United Kingdom* [2014] ECHR 32, at [178].

[124] *The Report of the Committee on Foreign Relations*, Senate Exec Rep No 30, 101st Cong, 2d Sess. 1 (1990), II (3), Appendix A.

[125] cf Parlett (n 114) 399.