REVIVING HUMAN RIGHTS LITIGATION AFTER *KIOBEL*

*By Vivian Grosswald Curran and David Sloss**

In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court held that "the presumption against extraterritoriality applies to claims under the [Alien Tort Statute (ATS)], and that nothing in the statute rebuts that presumption."[1] The Court preserved the possibility that claims arising from conduct outside the United States might be actionable under the ATS "where the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[2] However, the Court's decision apparently sounds the death knell for "foreign-cubed" human rights claims under the ATS—that is, cases in which foreign defendants committed human rights abuses against foreign plaintiffs in foreign countries.

The Court's decision overrules, *sub silentio*, a line of cases that originated with *Filártiga v. Peña-Irala*.[3] *Filártiga* and its progeny embraced three core principles. First, an individual who commits exceptionally heinous crimes is "*hostis humani generis*, an enemy of all mankind."[4] Second, an enemy of humankind who is present in the United States is subject to the jurisdiction of U.S. courts, even in foreign-cubed cases. Third, victims of exceptionally heinous crimes may bring civil suits against the perpetrators in U.S. courts, even in foreign-cubed cases, if the defendant is subject to personal jurisdiction in the United States.[5]

The *Filártiga* line of cases supported U.S. human rights policy by sending a clear message that the United States will hold human rights violators accountable and will not allow its territory to be a safe haven for international criminals. However, some ATS cases raised foreign policy difficulties by exposing government officials from important U.S. allies to the threat of civil liability in U.S. courts.[6] Justice Stephen Breyer's concurring opinion in *Kiobel* would have given the courts and the executive branch discretion to balance the risks against the benefits on a case-by-case basis.[7] The *Kiobel* majority, by contrast, preferred to "remand" the issues to Congress to obtain legislative guidance about how to balance the risks and benefits of civil litigation based on human rights violations committed abroad.[8]

This essay proposes a legislative response to *Kiobel* that would preserve some of the benefits of ATS human rights litigation, while minimizing the costs. Although the proposed legislation does not address the corporate liability questions that were at issue when the Supreme Court

* Vivian Grosswald Curran is Distinguished Faculty Scholar and Professor of Law at the University of Pittsburgh; David Sloss is Professor of Law and Director of the Center for Global Law and Policy at Santa Clara University School of Law.

[1] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013).

[2] *Id.*

[3] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

[4] *Id.* at 890.

[5] The second and third points are implicit in the court's rationale in *Filártiga* and its progeny, although the court did not state these points explicitly.

[6] *See, e.g.*, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (decision on ATS claim against former Israeli government official based on bombing of building in Gaza), *aff'g* 500 F.Supp.2d 284, 292 (S.D.N.Y. 2007).

[7] *See Kiobel*, 133 S.Ct. at 1673–77 (Breyer, J., concurring).

[8] *Id.* at 1669 (majority opinion) (explaining that the Court's decision "guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions . . . to the political branches").

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initially granted certiorari in *Kiobel*, the legislation would allow human rights victims to bring civil claims against perpetrators in some foreign-cubed cases. However, plaintiffs could not file such claims until after a federal prosecutor filed criminal charges against the perpetrator. This approach would allow federal executive officials to block claims that raised serious foreign policy concerns by choosing not to prosecute.[9] It would also promote a more robust dialogue between federal executive officials and groups representing prospective human rights plaintiffs.

The proposed legislation is modeled partly on pending French legislation, as well as existing Belgian and German legislation. Statutes in all three countries share two critical features (assuming the French bill becomes law).[10] First, victims of genocide, war crimes, and crimes against humanity have the right to initiate judicial proceedings against perpetrators who committed crimes extraterritorially, including in foreign-cubed cases. Second, public prosecutors in all three countries can block such judicial proceedings if they determine that a victim-initiated case would impair the state's foreign policy interests or would otherwise be contrary to public policy. The next section gives a brief overview of the foreign legislation. The concluding section explains and defends our proposal.

Legislation in Belgium, Germany, and France

Continental European legal systems derived from Roman law have a long, deeply engrained tradition of allowing victims to trigger criminal actions by constituting themselves as civil parties ("*parties civiles*") to the criminal trial, including in cases where the prosecutor decides not to proceed on behalf of the state. The function of criminal trials in civil law countries is similar to tort litigation in the United States, inasmuch as the *partie civile* mechanism enables victims to obtain compensation from perpetrators.[11] Under the traditional approach, continental European countries applied their criminal law extraterritorially, but their law did not reach foreign-cubed cases because various requirements of nationality and nexus restricted extraterritorial jurisdiction.

Belgium amended its criminal law in 1993 by adding a war crimes statute with a jurisdictional provision broad enough to reach foreign-cubed cases. A subsequent 1999 amendment added genocide and crimes against humanity to the class of foreign-cubed cases subject to prosecution in Belgian courts. Both amendments left untouched the traditional *partie civile* mechanism that allowed victim-triggered criminal proceedings, even in cases where the state initially chose not to prosecute.[12]

[9] By granting federal prosecutors the power to block civil tort claims, the proposed legislation would probably act as a bar to corporate liability, but we would not add explicit statutory language to preclude corporate liability.

[10] After the French Senate approved the bill, it was referred to the Committee on Constitutional Laws, Legislation, and General Administration of the Republic. *Justice: compétence territoriale du juge français pour les infractions visées par le statut de la Cour pénale internationale* [Law: territorial jurisdiction of French courts for offenses under the Statute of the International Criminal Court], DOSSIER DE L'ASSEMBLÉE NATIONALE [RECORD OF THE NATIONAL ASSEMBLY] (Feb. 26, 2013), *at* http://www.assemblee-nationale.fr/14/dossiers/article_689-11_code_procedure_penale.asp [hereinafter *Justice*]. From there, it will return to the National Assembly to be voted on by that chamber.

[11] *See* Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The* Lipietz *Case*, 56 AM. J. COMP. L. 363 (2008).

[12] *See* Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Act of 16 June

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Victim-initiated criminal proceedings in foreign-cubed cases created foreign policy problems for Belgium. By 2002, Belgium had been condemned by the International Court of Justice for having issued an international arrest warrant for the Congolese foreign affairs minister.[13] In addition, foreign states protested, and the United States threatened to move NATO's headquarters from Brussels unless Belgium changed the legislation.[14] In response, Belgium changed its law in 2003, preserving extraterritorial jurisdiction in some foreign-cubed cases.[15] However, the 2003 amendment limited the traditional *partie civile* mechanism by adding a requirement of prosecutorial approval. Currently, due to a 2005 Constitutional Court decision,[16] victims have a right to appeal a prosecutorial decision to block a *partie civile* action.[17]

In 2002, Germany enacted the *Völkerstrafgesetzbuch* (Code of Crimes Against International Law) to add provisions for genocide, war crimes, and crimes against humanity.[18] The statute *broadened* the extraterritorial scope of its courts' jurisdiction to reach foreign-cubed cases.[19] Like Belgium's revised law, the German law added an element of prosecutorial control over the traditional *partie civile* mechanism.[20] The German federal prosecution has adopted a broad interpretation of its statutory discretion to reject victim complaints,[21] but its decisions have been subject to victim appeal.[22] Thus, in both Belgium and Germany, victim-initiated foreign-cubed cases proceed, subject to an appealable prosecutorial decision to reject victim complaints.

In 2010, France amended its *Code de procédure pénale* (Code of Criminal Procedure)[23] by adding Article 689-11 to incorporate the Rome Statute of the International Criminal Court.[24]

1993 on the repression of serious violations of the international Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 additional to these Conventions], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1993; Loi relative à la répression des violations graves du droit international humanitaire [Law on the repression of serious violations of international humanitarian law], M.B., May 7, 2003.

[13] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 121 (Feb. 14).

[14] *See* Ambrose Evans-Pritchard, *US Threatens to Move NATO HQ out of Belgium*, TELEGRAPH, June 13, 2003, *at* http://www.telegraph.co.uk/news/worldnews/europe/belgium/1432913/US-threatens-to-pull-Nato-HQ-out-of-Belgium.html.

[15] CODE JUDICIAIRE/GERECHTELIJK WETBOEK [JUDICIAL CODE], Art. 144 quater (Belg.); CODE PÉNAL/STRAFWETBOEK [CRIMINAL CODE], Art. 12 bis, para. 2, titre préliminaire (Belg.). For an analysis immediately after the 2003 changes, see Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888 (2003).

[16] Cour Constitutionnelle/Grondwettelijk Hof [Constitutional Court], Décision No. 62/2005, Mar. 23, 2005, *at* http://www.const-court.be/cgi/arrets_popup.php?lang=en&ArrestID=1931 (Belg.).

[17] Loi du 22 mai 2006 modifiant certaines dispositions de la loi du 17 avril 1878 [Act of 22 May 2006 amending certain provisions of the Law of 17 Apr. 1878], M.B., July 7, 2006, 35,135.

[18] VÖLKERSTRAFGESETZBUCH [CODE OF CRIMES AGAINST INTERNATIONAL LAW], §§1, 7 (Ger.).

[19] *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 144–45 (2003).

[20] Gesetz zur Einführung des Völkerstrafgesetzbuches [Law on the Introduction of the International Criminal Code], June 26, 2002, BUNDESGESETZBLATT, TEIL I, at 2254 (Ger.).

[21] STRAFPROZESSORDNUNG [CODE OF CRIMINAL PROCEDURE], §153f (1)–(3) (Ger.) (relating to Code of Crimes Against International Law).

[22] In 2009, the Stuttgart Appeals Court upheld a decision rejecting a victim complaint against Donald Rumsfeld and others on behalf of Guantánamo Bay detainees. A further appeal was held inadmissible. *See* Center for Constitutional Rights, German War Crimes Complaint Against Donald Rumsfeld, et al. (filed Nov. 14, 2006), *at* http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al.

[23] Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale [Law 2010-930 of 9 Aug. 2010 on the adoption of the Rome Statute of the International Criminal Court], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Aug. 10, 2010, p. 14,678.

[24] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

Article 689-11 encompasses genocide, crimes against humanity, and war crimes.[25] Like Belgium and Germany, France added an element of prosecutorial discretion to limit victims' ability to initiate *partie civile* actions. Unlike Belgium and Germany, France retained a "habitual residency" requirement for defendants that precluded application of French criminal law to foreign-cubed cases.

On February 26, 2013, the French Senate voted to approve amendments to Article 689-11[26] aimed at facilitating the prosecution in France of international human rights crimes committed abroad.[27] One of the amendments removes the current "habitual residency" requirement for defendants, thereby permitting prosecution in foreign-cubed cases. Under the amended language, which was formulated to prevent trials in absentia,[28] the defendant would only need to "be located" in France at the time of the state's decision to prosecute.[29]

Another proposed amendment that did not pass would have eliminated prosecutorial control, restoring to Article 689-11 the traditional victim-triggered *partie civile* mechanism.[30] The "restoration" of the *partie civile* mechanism would have meant a return to the pre-2010 standard. The French minister of justice argued against the proposed amendment out of concern for difficulties that might arise in France's relation with other states, particularly if many victim-triggered actions were filed in France.[31] The final version approved by the Senate gives the prosecutor ultimate control, but it defers to the tradition of victim control by preserving some victims' rights. If the state decides not to prosecute, the prosecution must grant the victim a hearing if the victim requests one. If the prosecution does not change its decision after the hearing, it must issue a written statement of its reasons.[32]

In sum, France, like Belgium and Germany, would depart from civilian criminal law tradition by restricting victims' ability to bring *partie civile* actions and by expanding extraterritorial jurisdiction to encompass foreign-cubed situations. Experience has shown that this combination can combine deference to national foreign relations concerns with an ongoing commitment to effective international human rights prosecution in cases of grave international crimes.

Our Legislative Proposal

Why have France, Belgium, and Germany chosen to apply their criminal laws to foreign-cubed cases? The *Filártiga* model provides a plausible explanation. Like the Second Circuit in

[25] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE], Art. 689-11 (Fr.).

[26] Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale [Bill to amend Article 689-11 of the Code of Criminal Procedure], Sess. Ord. 2012–13, FR. SÉNAT DOC. No. 354 (Feb. 13, 2013), *available at* http://www.senat.fr/leg/ppl12-354.html. The National Assembly must also vote to approve this legislation before it can become law. *See Justice*, *supra* note 10.

[27] *See* Séance du 26 février 2013 [du Sénat] [Meeting of 26 Feb. 2013 of the Senate] (Fr.), TRAVAUX PARLEMENTAIRES (Fr.), *available at* http://www.senat.fr/seances/s201302/s20130226/s20130226002.html [hereinafter Séance].

[28] TRAVAUX PARLEMENTAIRES (Feb. 13, 2013) (citing Cass. crim. 10 janvier 2007) (Fr.) (holding by French supreme court of criminal law that defendants accused of grave crimes against humanity could not be tried in absentia).

[29] Proposition de loi, *supra* note 26 (noting that "*peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne soupçonnée de . . .*" ("may be prosecuted and tried by French courts, if he or she is located in France, anyone suspected of . . .").

[30] *See* C. PR. PÉN., Arts. 1, 2.

[31] *See id.*

[32] *See* Séance, *supra* note 27.

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Filártiga, these states recognize that a person who commits serious international crimes is an enemy of humankind. Moreover, the victims of such heinous crimes deserve effective remedies.[33] Finally, under the principle of universal jurisdiction, a state is authorized to prosecute international criminals whenever such criminals are present on the state's territory,[34] regardless of where the crime was committed and regardless of the nationalities of the perpetrators and victims.[35]

Yet the preceding survey of foreign legislation suggests that states perceive a trade-off between extraterritoriality and prosecutorial control. If victims have unlimited access to courts to bring claims for crimes committed anywhere in the world, foreign policy problems ensue. One way to mitigate those problems is to allow broad extraterritorial jurisdiction over foreign-cubed cases but to require victims to obtain prosecutorial approval before they can initiate legal proceedings against perpetrators. Germany, Belgium, and France (if the pending legislation is enacted) have all adopted some variant of this approach.

Obviously, the U.S. legal system is very different from the European civil law systems. Nevertheless, U.S. tort law is functionally similar to the traditional *partie civile* mechanism in civil law countries: both are designed to deter wrongdoers and compensate victims.[36] Given these similarities, the United States could remain faithful to the principles endorsed in *Filártiga*—and mitigate the associated foreign policy problems—by adopting a statutory supplement to the ATS modeled on European legislation. Specifically, Congress should create a statutory private right of action for genocide, war crimes, and crimes against humanity that is sufficiently broad to address foreign-cubed cases, but Congress should limit that right of action to cases in which federal prosecutors have filed criminal charges against the defendant.[37]

The United States already provides criminal jurisdiction over genocide committed anywhere in the world whenever the defendant is present in the United States.[38] Moreover, under current law and practice, genocide victims can lobby federal prosecutors to file criminal charges against alleged perpetrators. We propose a statutory private right of action to enable genocide victims to file civil tort actions against any perpetrators whom prosecutors have charged with genocide or related offenses.[39] This plan would give genocide victims in the United States civil remedies comparable to the remedies available to genocide victims in Belgium, Germany, and France.

[33] *See, e.g.*, Universal Declaration of Human Rights, Art. 8, GA Res. 217A (III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948) ("Everyone has the right to an effective remedy . . . for acts violating [his] fundamental rights . . . ."); International Covenant on Civil and Political Rights, Art. 2(3), Dec. 16, 1966, 999 UNTS 171 (obligating states "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy").

[34] Some states and commentators understand "universal jurisdiction" to include the possibility of trial in absentia. However, trial in absentia arguably violates a defendant's due process rights.

[35] *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §404 cmt. a (1987) ("Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them . . . . These offenses are subject to universal jurisdiction as a matter of customary law.").

[36] *See* Curran, *supra* note 11.

[37] Our proposal would not affect litigation under the Torture Victim Protection Act, 28 U.S.C. §1350 note, which already provides a private right of action for torture victims that is not subject to prosecutorial control.

[38] *See* 18 U.S.C. §1091(e)(2)(D).

[39] The genocide statute covers incitement, attempt, and conspiracy, as well as genocide. *See* 18 U.S.C. §1091(c), (d).

The situation with respect to war crimes is slightly more complicated. The current federal war crimes statute provides federal criminal jurisdiction over extraterritorial war crimes whenever "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States."[40] We propose amending the criminal statute to authorize federal criminal jurisdiction whenever the defendant is present in the United States. This scheme would enable prosecutors to reach some foreign-cubed cases, thereby harmonizing the jurisdictional reach of the war crimes statute with the genocide statute. As above, we propose a statutory private right of action to enable war crimes victims to file civil tort actions against any perpetrators whom prosecutors have charged with war crimes.

Expanding this proposal to address crimes against humanity would entail more far-reaching legislative changes. At present, no U.S. federal criminal statute targets crimes against humanity as such. Several antiterrorism statutes criminalize actions encompassing conduct that might be classified as crimes against humanity under international law.[41] However, current federal criminal statutes are not sufficiently broad to encompass the full range of conduct constituting crimes against humanity. Given that individuals who commit such crimes are generally viewed as "enemies of humankind," the United States has a moral duty (if not a legal duty)[42] to revise its criminal statutes to address the full range of crimes against humanity. Congress could accomplish this goal by adding a new statute to criminalize commission of a crime against humanity, as defined by the Rome Statute.[43] Like the genocide statute, the proposed statute should cover crimes against humanity committed anywhere in the world, provided that the perpetrator is present in the United States. For the reasons explained above, we would add a statutory private right of action to enable victims to file civil tort actions against any perpetrators whom prosecutors have charged with crimes against humanity.

Ultimately, our proposal is quite modest. Compared to *Filártiga* and its progeny, it would grant victims a rather limited right of access to federal courts, and only with respect to human rights violations that constitute grave international crimes. However, some limit on victims' rights is necessary to address the primary policy objection raised by *Filártiga*'s critics: that human rights litigation under the ATS interfered with the president's conduct of U.S. foreign policy. If adopted, our proposal would effectively eliminate that objection, preserve meaningful remedies for some human rights victims, and enable the United States to fulfill its time-honored commitment to human rights principles, thereby contributing to a more effective international human rights regime.

[40] 18 U.S.C. §2441(b).

[41] *See, e.g.*, 18 U.S.C. §1203 (implementing U.S. obligations under the International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205); 18 U.S.C. §2332f (implementing U.S. obligations under the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 UNTS 284).

[42] The preamble to the Rome Statute notes that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Rome Statute, *supra* note 24, pmbl. It is unclear whether the drafters believed that every state has a legal duty to criminalize crimes against humanity. If so, they did not specify the source of that duty.

[43] It is not unusual for Congress to define a federal crime by reference to international law. Perhaps the earliest example was a federal piracy statute enacted in 1819. *See* Act of Mar. 3, 1819, ch. 77, Pub. L. No. 15-77, 3 Stat. 510 (1819) (act protecting the commerce of the United States and punishing the crime of piracy).