

Human Rights Abuses as Tort Harms: Losses in Translation

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This Article provides the first-ever examination of the normative challenges posed by bringing international human rights claims in state courts under the common law of torts. It argues that the normative structure of the private law of torts cannot adequately address the very different concerns at stake when addressing public harms. Torts address issues that arise between two parties and those parties alone. But public law addresses harms done simultaneously to individuals and to the body politic. Redress for public harms should encompass both individual and systemic remedies, but tort law offers only the former. Instead of advancing tort claims, advocates should urge state courts to exercise their concurrent jurisdiction over the customary international legal norms incorporated into the federal common law to hear claims for violations of international human rights.

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I. INTRODUCTION

Unless advocates make careful choices about where and under what theories to file the next generation of human rights cases in the United States, the impending shift from federal to state courts will rob those cases of their public character and will reduce them to “garden variety municipal torts.”¹ Such an outcome will threaten the ability of such litigation to catalyze the kind of systemic change necessary to address human rights abuses.

Since 1980, U.S. courts have provided a forum, under the Alien Tort Statute (ATS), sometimes referred to as the Alien Tort Claims Act (ATCA), in which victims of human rights violations from all over the world could seek redress (in the form of civil damages) for their abuses against the individuals who perpetrated them.² In the early years of ATS litigation, the cases almost exclusively arose when foreign plaintiffs sued foreign natural persons for conduct that occurred in a foreign country.³ Starting in the mid-1990s more cases began to be filed against multinational enterprises (MNEs) for their conduct overseas.

For the better part of four decades, ATS cases have commanded a significant share of the attention of scholars and advocates concerned with enforcing human rights.⁴ This is in part because at the time of its inception, ATS litigation was one of very few available

¹ District Judge Woodlock first used that phrase in the ATS context in his opinion in *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995) (“[R]eading [28 U.S.C.] § 1350 as essentially a jurisdictional grant only and then looking to domestic tort law to provide the cause of action mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort.”). See *infra* Part III, for a fuller discussion of the ways in which classical tort law is unsuitable for describing human rights violations.

² 28 U.S.C. § 1350 (1994).

³ These are frequently referred to as “foreign cubed” cases. The term “foreign cubed” is generally credited to Stuart M. Grant and Diane Zilka. See generally Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, in CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES (NUMBER B-1442) 91, 96 (Practising L. Inst. ed., 2004).

⁴ ATS litigation has generated over 227 law review articles (with ATS or ATCA in the title alone) and 223 cases. Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1751–52 (2014) (“The history of international human rights litigation under the ATS is well known. Since *Filártiga v. Peña-Irala*, such litigation has become something of a cottage industry, with over 150 cases filed alleging the commission of a tort in violation of the law of nations.”).

enforcement mechanisms for the then-nascent body of international human rights law. It is also in part because even as the international human rights regime came into its own and more enforcement mechanisms came into existence, their institutional architects by and large adopted soft-law approaches more akin to diplomacy than to adjudication.⁵ At the time the Second Circuit Court of Appeals decided the first ATS case in 1980, human rights had barely begun its transformation from political aspirations to legal standards. The United Nations Human Rights Commission (“the Commission”) was established by the Charter of the United Nations in 1946 but focused on promulgating human rights texts and treaties rather than on serving as an enforcement mechanism.⁶ The Commission produced the first major international human rights treaties in 1966 but they did not enter into force until 1976.⁷ The committees charged with overseeing the implementation of those treaties adopted the model of diplomatic dialogue common to other United Nations (UN) committees rather than a more oppositional model based on adjudication.⁸ The Inter-American Court of Human Rights was established pursuant to the American Convention on Human Rights in 1979, but the court did not issue its first judgment on the merits in a contentious case until 1988.⁹ Other regional mechanisms, like the African Commission on Human and Peoples Rights and the European Court of Human Rights, are limited by resource constraints, state

⁵ Eric Posner captures the weakness of international human rights enforcement mechanisms. ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 39–52 (2014). Posner is generally skeptical of the value and efficacy of international human rights discourse, but many of the same points are made by ardent supporters. See, e.g., GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (3d ed. 2007).

⁶ *Brief Historic Overview of the Commission on Human Rights*, UNITED NATIONS HUM. RTS. OFFICE OF THE HIGH COMM’R, <http://www.ohchr.org/Documents/HRBodies/CHR/BriefHistoric.doc> (“For the first 20 years (1947-1966), the Commission concentrated its efforts on standard-setting.”).

⁷ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁸ The committees exercise the latter function only when expressly authorized to do so by countries that ratify a separate treaty. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>.

⁹ Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

intransigence, and limited powers. None of the bodies at the international or regional levels involve claims against individuals, only against states.

ATS litigation, on the other hand, has provided international law with a much-needed and much sought-after path to liability for individuals (whether natural or corporate).¹⁰ This litigation has offered victims of human rights abuses, war crimes, and crimes against humanity a chance to face their abusers directly and to have a court of law adjudicate their cases. Judges who deliberated on the interpretation of international human rights law became connected to their counterparts in the global legal conversation that shapes the world's increasingly shared understanding of transnational legal norms. Judges in ATS cases have interpreted and applied international law regarding, among other things, torture,¹¹ extrajudicial execution,¹² disappearance,¹³ arbitrary detention,¹⁴ incitement to genocide,¹⁵ and human trafficking.¹⁶ Importantly, the ATS also offered one of the few ways to hold MNEs accountable for their complicity in human rights abuses.¹⁷ Although damage awards in

¹⁰ See *infra* notes 17–18 and accompanying text.

¹¹ See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding that torture violates the law of nations and that the ATS gives federal courts subject matter jurisdiction over such claims).

¹² See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (awarding over forty-seven million dollars to plaintiffs who suffered human rights violations, including extrajudicial execution, due to the actions of the Guatemalan Defense Minister).

¹³ See *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (awarding plaintiff four million dollars in total damages on claims of torture, prolonged arbitrary detention, and disappearances); see also *Reyes v. Grijalba*, No. 02-22046-civ-lenard/klein (S.D. Fla. Mar. 31, 2006) (awarding plaintiffs forty seven million dollars for torture and disappearances in Honduras), <http://www.ccrjustice.org/sites/default/files/assets/files/Reyes%20v%20Grijalba%20%20final%20judgment%20Mar%202006.pdf>.

¹⁴ See *Kpadeh v. Emmanuel*, 261 F.R.D. 687 (S.D. Fla. 2009) (awarding plaintiffs over twenty-two million dollars for Charles “Chuckie” Taylor’s human rights violations in Liberia, including arbitrary detention).

¹⁵ See *Mushikiwabo v. Barayagwiza*, No. 94-cv-3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 8, 1996) (awarding plaintiffs about \$105 million on claims of incitement to genocide during the Rwandan genocide).

¹⁶ See *United States v. Bianchi*, 386 F. App’x 156 (3d Cir. 2010) (ordering defendant to settle with trafficked minors for \$725,000 for engaging in child sex trafficking); *Aguilar v. Imperial Nurseries*, No. 3-07-cv-193, 2008 WL 2572250 (D. Conn. May 28, 2008) (entering judgment against defendants who forced twelve trafficked Guatemalan plaintiffs in Connecticut to work for little pay at a tree nursery).

¹⁷ The power of MNEs, in many cases, rivals or exceeds the power of many states. MNEs have the ability to inflict harms on the same scale and of the same character as states’ violations of human rights norms. Thus, although MNEs are not states and

ATS cases were rarely collected, judgments in favor of plaintiffs contributed to the doctrinal and normative development of international law and provided ammunition for advocacy against offending governments or MNEs.¹⁸

But in the 2013 case of *Kiobel vs. Royal Dutch Petroleum*, the Supreme Court closed the door on most, if not all, claims under the ATS in U.S. courts.¹⁹ In *Kiobel*, twelve Nigerian plaintiffs sued on behalf of their relatives who had been detained, tortured, given show trials, and executed by the Nigerian military in retaliation for peacefully protesting aggressive oil exploitation in their homeland. The plaintiffs contended that Royal Dutch Petroleum's local subsidiary, Shell Petroleum Development Company of Nigeria, provided funds, food, and a base of operations to the soldiers and therefore was complicit in the soldiers' violations of international law.²⁰ Ultimately at issue in *Kiobel* was whether the ATS gave the courts jurisdiction over acts that occurred outside of U.S. territory.²¹ The Court unanimously

therefore do not have obligations under international human rights law, scholars, advocates, and major institutional players have been searching for both theoretical and practical ways to hold MNEs accountable for human rights violations. See, e.g., LARA JILL BLECHER ET AL., CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS: NEW EXPECTATIONS AND PARADIGMS (2015); NICOLA M. C. P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY (2002).

¹⁸ See generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). In this seminal article, Koh identifies ATS cases and other similar actions as part of an emerging trend he dubs transnational public law litigation (TPL). TPL is generally understood to involve states, government officials, and private individuals suing one another, and being sued in turn, in cases that require the simultaneous application of domestic law and international law (both treaty-based and customary). ATS cases are not the only example of TPL. Other examples include: *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India* in December, 1984, 809 F.2d 195 (2d Cir. 1987) and *Philippines v. Marcos*, 653 F. Supp. 494 (S.D.N.Y. 1987). These, however, are the minority when compared to the volume of ATS litigation. Since *Filártiga*, there have been about 173 judicial opinions regarding the ATS. Donald R. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 713 (2012); see also Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357 (2011).

¹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁰ *Id.* at 1663.

²¹ This was not the original issue on which the Court granted certiorari. Plaintiffs appealed the Second Circuit Court of Appeals' finding that the ATS did not cover acts undertaken by corporations but only natural persons. Petition for Writ of Certiorari at 10, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2011 WL 2326721, at *10 (arguing that the decision "asserts a radical overhaul of all existing ATS jurisprudence . . . by creating a blanket immunity for corporations engaged or complicit in universally condemned human rights violations"). After oral arguments on that question, the Court took the unusual step of ordering re-argument on the question of whether the presumption of

concluded that it did not, reviving a presumption against the extraterritorial application of the laws of the United States.²² Finding no evidence of Congressional intent to extend the ATS to conduct in foreign countries, the Court ruled that the presumption applied, that plaintiffs did not have a cause of action under the ATS.²³ Furthermore, the court held that “even 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.”²⁴

Although the criteria announced by the Court could, in theory, be satisfied fairly easily, lower courts applying *Kiobel* have held plaintiffs seeking to overcome the presumption on extraterritoriality to an extremely high standard.²⁵ Plaintiffs in *Balintulo v. Daimler AG*,²⁶ the long-running apartheid case, argued in the Second Circuit that their claim met *Kiobel*’s “touch and concern” standard because the defendants, corporations that had allegedly assisted South Africa in the maintenance of the *apartheid* regime, were U.S. nationals.²⁷ The Second Circuit was unconvinced.²⁸ The plaintiffs’ assertion that their claims arose in part from actions taken inside the United States by the defendants did not sway the court.²⁹ Other courts have taken a similarly stringent view of the requirements of the “touch and concern” standard.³⁰

extraterritoriality applied to the ATS. Brief of Amici Curiae Washington Legal Foundation and Allied Educational Foundation in Support of Respondents on Reargument at 3, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 3245484, at *3.

²² *Kiobel*, 133 S. Ct. at 1669 (“[T]he presumption against extraterritoriality applies to claims under the ATS, and . . . nothing in the statute rebuts that presumption.”).

²³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 140 (2d Cir. 2010) *aff’d*, 133 S. Ct. 1659 (2013) (“It bears underscoring that the purpose of the ATS was not to encourage United States courts to create new norms of customary international law unilaterally.”).

²⁴ *Kiobel*, 133 S. Ct. at 1669.

²⁵ Marco Basile, *Nine Months Later: Kiobel in the Courts*, AJIL UNBOUND (Jan. 28, 2014, 3:59 PM), <http://www.asil.org/blogs/nine-months-later-kiobel-lower-courts>.

²⁶ 727 F.3d 174 (2d Cir. 2013).

²⁷ *Id.* at 189; *see also* Basile, *supra* note 25.

²⁸ *Balintulo*, 727 F.3d at 191 (explaining that “[p]laintiffs’ . . . case-specific policy arguments miss the mark”).

²⁹ *Id.* at 192 (holding that the defendants could not be held vicariously liable for their conduct under the ATS because their agents “did not commit relevant conduct within the United States giving rise to a violation of customary international law—that is, because the asserted ‘violation[s] of the law of nations occur[ed] outside the United States’”) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)).

³⁰ Basile, *supra* note 25 (“*Balintulo* . . . is representative of lower courts’ approach . . . [O]ther federal courts have ruled that it is insufficient that a defendant corporation is a U.S. national (*Adhikari*), made some decisions in the United States

The upshot of the *Kiobel* decision and the few cases applying it thus far is that the Court has closed the doors of federal courts to most international human rights cases. That is not to say that *all* human rights claims arising overseas are forever barred. A few avenues remain. Advocates will no doubt continue to take advantage of the Torture Victims Protection Act (TVPA)³¹ and the Violence Against Women Act (VAWA)³²—both providing a statutory basis for victims of harms suffered overseas to bring claims in U.S. courts. Another potential route is to take action against individual corporate officers for actions in the United States.³³ But the TVPA, the VAWA, and the speculative possibility of suing corporate officers collectively cover only a small fraction of the claims previously available under the ATS, which included any claim arising under the “law of nations” as the term was defined by the Supreme Court.³⁴

By barring all or most ATS cases in federal courts, the Supreme Court has cleared the conceptual space previously occupied by advocacy under and analysis of the ATS.³⁵ Scholars and advocates have begun to explore that newly vacated space, advancing several creative approaches to holding human rights abusers—especially MNEs—

regarding the conduct (*Giraldo*), or had ‘substantial operations in this country,’ including billions of dollars of assets (*Rio Tinto*). Other courts have held that it’s insufficient that a defendant had taken refuge in the United States to avoid prosecution (*Dacer*) or that a defendant ‘specifically directed’ an online propaganda campaign at persons living in the United States (*Chen Gang*).”).

³¹ The TVPA allows a torture victim to initiate civil suits in the United States against the perpetrator for damages. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1994)), <http://thomas.loc.gov/cgi-bin/query/z?c102:H.R.2092.ENR> [hereinafter TVPA].

³² The VAWA, for example, mandates that victims cannot be forced to pay for a rape exam, ensuring that the victim’s protection order is enforced and increasing the rate of prosecution against perpetrators. For a full list, see *Factsheet: The Violence Against Women Act*, THE WHITE HOUSE, http://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf.

³³ See JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES (2015), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (discussing the issue and possible solutions); see also *Corporations Must be Held Accountable for Human Rights Violations*, UNITED NATIONS HUM. RTS. OFFICE OF THE HIGH COMM’R (Feb. 20, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/CorporationsMustBeHeldAccountableForHRViolations.aspx>.

³⁴ See *infra* notes 92–98 and accompanying text.

³⁵ See *supra* note 4 and accompanying text. It is important to note that the decline in the fortunes of the ATS was by no means wholly caused by the Court’s decision in *Kiobel*. See also Susan Simpson, *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2 (Nov. 11, 2009), <http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/>.

accountable. One such approach rests on the contention that the interests of both multinational corporations and the individuals potentially harmed by those corporations' activities would be well served by an International Court of Civil Justice (ICCJ) empowered to hear claims for damages brought by individuals.³⁶ An ICCJ would obviate the need to reform national legal systems in ways that might be difficult and complicated.³⁷ Other commentators argue directly for undertaking the difficult and complicated task of reforming national legal systems to close off the escape routes currently available to MNEs.³⁸ Still others argue that international human rights law needs to be amended to provide explicitly for individual and corporate liability for human rights abuses.³⁹

Some commentators have suggested focusing on the political branches of state government.⁴⁰ Governors, for instance, have been very active in international affairs in ways that, while profound, seem not to have spurred concerns about encroachment on the foreign relations power of the federal executive.⁴¹ Governors respond to the demands made by foreign governments and international institutions, enter into international agreements, and impose, often at their discretion, sanctions authorized by the state legislature.⁴² Surely where such an exercise of state executive power on the international stage is unremarkable, governors could be urged to act by, for example, importing international human rights standards into state administrative regulations.

³⁶ Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (2014); Maya Steinitz & Paul Gowder, *Transnational Litigation as Prisoner's Dilemma*, N.C. L. REV. (forthcoming 2016).

³⁷ See Steinitz, *supra* note 36 (discussing the "problem of the missing forum" where U.S. courts will send a case back to the courts of the country where the injury occurred on a *forum non conveniens* motion, then refuse to enforce the judgment produced by those same courts on the grounds of corruption in the judicial system).

³⁸ Janet Dine, *Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?*, 3 J. HUM. RTS. & ENV'T. 44 (2012).

³⁹ HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION (4th ed. 2016) (unpublished manuscript).

⁴⁰ Zachary D. Clopton, *State Law Litigation of International Norms: Horizontal and Vertical Dimensions*, 108 AM. SOC'Y OF INT'L L. PROC., 2014, at 433–36.

⁴¹ Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2391–92 (2006) ("[G]overnors can also take a more direct and assertive role in foreign policy by negotiating and entering into international agreements . . . These agreements seek to regulate a variety of international matters such as fuel tax allocation, crossborder motor vehicle regulation, natural resources management, and even greenhouse gas emissions.").

⁴² *Id.* at 2385.

Similarly, at least one commentator has noted that state legislatures could be urged to pass some version of a state ATS explicitly authorizing ATS-style claims in state courts.⁴³ Such a statute would give the legislature(s) involved the chance to dispel much of the ambiguity created by the sparse language of the ATS by, for instance, specifying the international law claims being authorized.⁴⁴

Many scholars and advocates, however, are not ready to give up on the possibility of bringing human rights claims in U.S. courts under existing law. In exploring ways to preserve the advantages of ATS litigation mentioned above, these stalwarts are therefore turning their attention to state courts as the next vanguard of human rights litigation in the United States.⁴⁵ The move to state courts offers several advantages. First and foremost, it would not require marshaling international consensus, the way an ICCJ would, or engaging in extensive domestic legal reform, the way establishing enterprise liability in dozens of successive countries would. Furthermore, assuming that plaintiffs are fortunate enough to establish personal jurisdiction, state courts are the only place where individual agents of the state might be called to account for human rights violations that fall short of war crimes or crimes against humanity.

The most important advantage of state courts might be their freedom from the constitutional limitations imposed on the jurisdiction of federal courts. As courts of general jurisdiction, state courts would be able to entertain ATS-like claims as torts without an enabling statute. After all, “[a]lmost every international law violation is also an intentional tort. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment.”⁴⁶ That would, in

⁴³ See generally Clopton, *supra* note 40.

⁴⁴ See generally Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023 (2015) (discussing the need for such a statute on the federal level and the elements that might be included). See also Ernest A. Young, *The Constitution Outside the Constitution*, 177 YALE L.J. 408 (2007); Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. 93 (2007).

⁴⁵ See Alford, *supra* note 4; Childress III, *supra* note 18, at 743. The Irvine Law Review also recently published a symposium issue on human rights litigation in state courts. See generally Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *After Kiobel: International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013); see also Patrick J. Borchers, *Conflict of Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45 (2013); Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013); Chimène I. Keitener, *State Torts and Transitory Torts in Transnational and Human Rights Cases*, 3 U.C. IRVINE L. REV. 81 (2013).

⁴⁶ Alford, *supra* note 4, at 1750.

theory, free state courts from the straightjacket imposed on federal courts by the Supreme Court's ruling in *Sosa v. Alvarez-Machain*.⁴⁷ It could also make it easier for plaintiffs to prove their cases since the elements of assault, for instance, are considerably easier to show than the elements of torture.⁴⁸ In addition, nearly every legal system provides some kind of remedy for tort harms, reducing the danger that choice-of-law analyses favoring the law of the place of injury would deprive plaintiffs of a cause of action.⁴⁹

But state courts are hardly a panacea. Potential plaintiffs will face obstacles such as obtaining personal jurisdiction,⁵⁰ surviving *forum non conveniens* motions,⁵¹ overcoming common law doctrines of immunity, and conforming to the requirements of due process⁵²—not to mention the logistical difficulties of locating evidence and witnesses overseas and producing them in the United States. Perhaps the disparity between the apparent ease of translating human rights abuses into tort harms and the difficulty of finding a way through the barriers to accessing state courts explains why scholars have, to date, focused almost exclusively on the latter issue.

This Article instead focuses on what happens if those barriers are overcome, showing that translating human rights abuses into tort harms sacrifices normativity at the altar of practicality, and in so doing undermines many of the aims that have animated the last thirty years of human rights litigation in federal courts. In so doing, this Article assumes, for the sake of argument, that committed and formidable advocates will in some cases manage to overcome the obstacles to access and will succeed in bringing international human rights cases,

⁴⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (“Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”). To take but one example, international human rights law requires that individuals, who are arrested and imprisoned, have their case assessed by a judge “promptly.” ICCPR, *supra* note 7, art. 9. While someone who was administratively detained (i.e. imprisoned without warrant, probable cause, or other legal authority) or arrested and jailed for an extended period of time might have a claim of false imprisonment, the prohibition on extended, unreviewed detention would probably not rise to the level of the law of nations as defined by the Supreme Court in *Sosa*.

⁴⁸ Whytock et al., *supra* note 45, at 6.

⁴⁹ David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 101 (2013).

⁵⁰ Borchers, *supra* note 45, at 49.

⁵¹ *Id.*

⁵² *Id.* at 58; Hoffman & Stephens, *supra* note 45, at 9 n.57 and accompanying text.

appropriately translated into torts, into state courts. It then asks the question: What would success look like? Human rights law is a body of public law that ultimately aims to delineate the appropriate boundaries of the relationship between the governing and the governed. ATS cases, although taking the typically private-law form of individual claims for damages, largely preserved that public character. Indeed, both advocates and courts went to great lengths to argue for public international law, and *not* municipal tort law, private law, to be the law of decision in ATS cases. If the public character of ATS cases is worth preserving, the success or failure of that preservation adds another dimension to questions about the future after *Kiobel* and about the viability of translating human rights abuses into torts.

This Article will tease out the tension inherent in the public/private dichotomy by showing, in Part II, that courts repeatedly evinced a strong preference for public international law over private tort law. In so doing, the courts added a “public international tort” to the two “constitutional torts” recognized by the Supreme Court in *Monroe v. Pape*⁵³ and in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁵⁴ These “public torts” are carefully constructed hybrids of public and private law. Part III will argue that fully translating human rights harms into tort claims upends that careful construction by showing, first, that the notion of equality underlying tort law is incompatible with the very different notion of equality at stake in addressing public harms and, second, that the remedies adequate for addressing violations of the public and private law are different in kind. Finally, Part IV will propose a novel approach that would preserve the advantages of turning to state courts after *Kiobel* without sacrificing the normative value of describing public harms using the public law. Advocates should bring cases in state courts under the federal common law of customary international law, which state courts are compelled to apply under the presumption of concurrent jurisdiction.

⁵³ *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by* *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). *Monell* “overrules” *Monroe* only to the extent that it removes immunity from § 1983 claims for municipalities.

⁵⁴ 403 U.S. 388 (1971).

II. THE PUBLIC INTERNATIONAL TORT

Time and again, starting with *Filártiga v. Peña-Irala*⁵⁵ in 1980 and continuing through the foundational first fifteen years of jurisprudence, courts were called on to decide—among many other challenging legal questions—whether the rule of decision in ATS cases was international law or municipal torts. Time and again, starting with *Filártiga*, the courts decided on international law. In so doing, they replicated the model of the constitutional tort developed in the two decades preceding the revival of the ATS.

A. *Hostis Humani Generis*

ATS cases did not have to be international human rights cases. They became such as the result of the conscious choices of advocates and judges, which included explicitly rejecting domestic tort law as inadequate to capture the magnitude of human rights abuses and favoring public international law as the rule of decision in ATS cases.⁵⁶

In 1980, the case of *Filártiga*⁵⁷ revolutionized human rights advocacy by giving victims of human rights abuses a forum in the federal courts of the United States where they could bring cases against their foreign oppressors for acts that took place on foreign soil.⁵⁸ The ATS, originally passed by Congress as part of the Judiciary Act of 1789, later became codified in its modern form in § 1350 of the U.S. Code as *Alien's action for tort*.⁵⁹ The text of the statute is only thirty-three words long. It reads in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶⁰ In the nearly two

⁵⁵ 630 F.2d 876 (2d Cir. 1980).

⁵⁶ See William S. Dodge, *Alien Tort Litigation: Road Not Taken*, 89 NOTRE DAME L. REV. 1577 (2014), for a thorough and incisive history of those decisions and their implications.

⁵⁷ 630 F.2d at 876 (finding that torture violated the law of nations as defined in the ATS, and thus set the precedent for U.S. federal courts to have jurisdiction over cases concerning torts committed abroad that violated international law); see also BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS xxii (2d ed. 2008) (noting that *Filártiga* was “the first successful use of the [ATS] to enable victims of international human rights violations to sue in U.S. courts”).

⁵⁸ Such fact patterns have come to be called “foreign cubed” or “f-cubed” by ATS practitioners. See *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008) (“This is the first so-called ‘foreign-cubed’ securities class action to reach this Circuit.”) (citing *Grant et al.*, *supra* note 3, at 96 (coining the term “foreign-cubed”)), *aff’d*, 561 U.S. 247 (2010).

⁵⁹ 28 U.S.C. § 1350 (2012). See also, Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1470 (2014).

⁶⁰ § 1350.

hundred years that the statute was on the books prior to *Filártiga*, it was applied only a handful of times,⁶¹ and none of those cases dealt with the newly invented body of international human rights law.⁶²

At the outset of the modern era of ATS litigation, it was therefore unclear whether such claims would survive an objection to jurisdiction, much less what the rule of decision would be should a court reach the merits. The *Filártiga* case came about when Dr. Joel Filártiga and his daughter Dolly, who were living in the United States, learned that Americo Norberto Peña-Irala (“Peña”) was living in New York City.⁶³ Peña, a former Inspector General in the Paraguayan police force, had tortured Joelito (son to Joel and brother to Dolly) to death in retaliation for his father’s political views.⁶⁴ In a landmark decision, the Second Circuit found that the ATS did grant jurisdiction over claims such as the Filártigas’, provided that the allegations made in the complaint in fact constituted a violation of international law.⁶⁵

Although the primary issue in *Filártiga* was jurisdiction,⁶⁶ the arguments of the parties, the decision of the Second Circuit, and the decision of the district court on remand, framed much of the subsequent debate about the proper rule of decision. In the district court, in support of their argument that the claim satisfied the jurisdictional requirements of the ATS, the Filártigas submitted affidavits from titans of international law confirming that the prohibition of torture had coalesced into a norm of customary international law.⁶⁷ The defense did not contest plaintiffs’

⁶¹ See Simpson, *supra* note 35.

⁶² When *Filártiga* was first filed in 1979, human rights law was barely ten years old. Although the Charter of the United Nations mentions human rights, and the United Nations (UN) General Assembly passed the Universal Declaration of Human Rights in 1948, the first legal instruments containing human rights obligations were opened for signature in 1967 and entered into force in 1976. See ICCPR, *supra* note 7; ICESCR, *supra* note 7.

⁶³ *Filártiga v. Peña-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

⁶⁴ *Id.* at 878.

⁶⁵ *Id.* at 887–88.

⁶⁶ *Id.* at 887 (“[W]e reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.”).

⁶⁷ The plaintiffs had to rely on customary international law, or the law of nations. The other prong of the ATS, the treaties of the United States, was unavailable to them since the United States had yet to ratify a treaty that prohibited torture. It has since ratified the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. See WILLIAM J. ACEVES, *THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILÁRTIGA V. PEÑA IRALA* 334 (2007) (“By virtue of, *inter alia*, article 5 of the Universal Declaration [of Human Rights] and Article 7 of the Covenant [on Civil and Political Rights], torture is an offense against the Law of Nations While the real

characterization of international law at either the trial or appellate level.⁶⁸ Rather, the defendants argued that the constitutional limits on the causes of action over which Congress could grant federal jurisdiction—through § 1350 or any statute—were limited (at most) to a small subset of international law encompassed by the operation in U.S. jurisprudence of the term of art “the law of nations.”⁶⁹ The defense went further and implicitly ceded the question of whether torture was a violation of customary international law. The defense argued that the court should ignore the many treaties and other international declarations cited by the plaintiffs, *not* because the plaintiffs misconstrued the current state of international law, but because customary international law on its own was incapable of creating enforceable obligations in U.S. courts outside a narrow band of breaches of the law of nations.⁷⁰ The defense relied in part on language from the Second Circuit’s opinion in *Dreyfus v. Von Fink* suggesting that the international law could not reach the question of a state’s treatment of its own citizens.⁷¹ In other words, rather than contest the claim that customary international law prohibited torture, the defense argued that the prohibition did not matter because the law of nations in the United States was restricted to state-state disputes.⁷² Thus when the Second Circuit interpreted the scope of § 1350 as encompassing international law generally (as opposed to the constrained version argued for by the defense), the plaintiffs’ version of that general international law stood unopposed.

Although deciding only the question of jurisdiction, the Second Circuit expressed its holding in such strong language that its opinion exerted significant influence on the next decade-and-a-half of debate over the applicable law. This debate was conducted, at least in part, over the effect of the choice of law on the ability of U.S. courts to live

party in interest in these offenses against human rights is the individual, it has long been recognized that such offenses vitally affect relations between states.”) (affidavit of Myres S. MacDougal, Professor of Law at Yale Law School).

⁶⁸ *Id.* at 298.

⁶⁹ *Id.* at 302 (“Where in this grant is the authority of Congress to confer upon the United States District Courts jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations?’”).

⁷⁰ *Id.* at 305–06 (“Indeed, that statute [§ 1350] could not be construed to confer jurisdiction over a case such as this, because, if it were, it would be beyond the authority granted to Congress by Article III of the Federal Constitution.”).

⁷¹ *Id.* at 305 (citing *Dreyfus v. von Finck*, 534 F.2d 24, 30–31 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976)).

⁷² *Id.* at 302 (explaining that cases “have restricted the phrase ‘law of nations’ to relations between states rather than among individuals”).

up to their obligation to enforce the collective will of the community of nations. The court held, for instance, relying in part on the plaintiffs' uncontested expert opinions,⁷³ that:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.⁷⁴

The Second Circuit dismissed the notion from *Dreyfus* relied on by *Filártiga*—that international law encompassed only obligations of states vis-à-vis other states—as “clearly out of tune with the current usage and practice of international law.”⁷⁵ Finally, the Second Circuit concluded with a now-famous passage that painted the ability of torture victims to pursue civil liability against their torturers as an important part of modernity's quest to perfect the relationship of a state to its citizens. Because of its influence on the conceptualization of ATS cases as human rights (as opposed to tort) claims, the passage is worth quoting in full:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their

⁷³ ACEVES, *supra* note 67, at 584 (“The Filártigas submitted the affidavits of a number of distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture as alleged in the complaint.”). The court went on to quote the experts extensively in a footnote. *See id.* at 584 n.4.

⁷⁴ *Id.* at 585–86.

⁷⁵ *Id.* at 745 (citing *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)) (providing a copy of the court opinion in *Filártiga v. Peña-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984)).

individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.⁷⁶

Although the Second Circuit did not decide the issue of the law to be applied to the case's merits—and even suggested that the law of the place of injury, Paraguay, might apply,⁷⁷—the court clearly signaled its understanding that the ATS served functions distinctly in the realm of public law: states' peaceful foreign relations and the rights-based restraints on those states' treatment of the people in their territory. It is important to emphasize that this language suggested not only that international law might be an appropriate rule of decision, but that courts might even be *obliged* by the weight and significance of the rights at stake to choose international law.

In the trial on remand, the plaintiffs built on the expansive opinion of the Second Circuit to argue that the law of Paraguay inadequately captured the nature of torture. They argued that the problem of torture is by definition international and that it is universally condemned: "Thus, present in this case is the compelling interest of the community of nations as well as this nation in the condemnation of torture. It is not a simple crime but a crime which transcends the balance of civilization itself."⁷⁸ The transcendent nature of torture meant that it should not be reduced to national law.⁷⁹ The district court agreed, deciding the question of whether "the 'tort' to which the statute refers mean a wrong 'in violation of the law of

⁷⁶ *Filártiga*, 630 F.2d at 890.

⁷⁷ The court discussed the doctrine of transitory tort at length, where a tortfeasor may be sued in U.S. courts for a tort committed abroad, and where courts would normally apply the law of the place of injury. In that context, the court noted, in passing, that the law of Paraguay may be applied to the merits. *ACEVES*, *supra* note 67, at 593–94.

⁷⁸ *Id.* at 673.

⁷⁹ *Id.* at 680–81 ("Thus only a remedy tailored to effectuate the purposes of the international guarantees of human rights is consistent with the concurrence of the nations that torture is absolutely forbidden and that its practices violates international law. In such a setting, it is clear that the needs of the international community can be met not by mere application of the law of one or another nation state having an interest in the matter, but by an application of the law directed by international principles and practice itself.").

nations' or merely a wrong actionable under the law of the appropriate sovereign state"⁸⁰ firmly in favor of international law, even quoting favorably the Second Circuit's language about the torturer as *hostis humani generis* and noting that "[w]e are dealing not with an ordinary case of assault and battery."⁸¹

The continued influence of the *Filártiga* formulation shows up in the important concurring opinion by Judge Edwards of the D.C. Circuit Court of Appeals in *Tel-Oren v. Libyan Arab Republic*.⁸² The plaintiffs in *Tel-Oren* were the family members and survivors of the 1978 attack by members of the Palestine Liberation Organization (PLO) on civilians in Israel.⁸³ The militants from the PLO pulled vehicles off a road, held the passengers captive, and tortured some and killed others, before Israeli police finally stopped them.⁸⁴ The district court dismissed the case, and the D.C. Circuit Court of Appeals upheld the dismissal.⁸⁵ In his concurring opinion, Judge Edwards noted that he agreed with the dismissal because the PLO, as a non-state entity, could not have the same obligations under international law as states.⁸⁶ He felt compelled, however, to write a concurring opinion setting out his conclusion that the ATS *would* provide a cause of action given different facts, in contrast to Judge Bork who believed it would not.⁸⁷ Judge

⁸⁰ *Id.* at 74. William J. Aceves also noted:

In order to take the international condemnation of torture seriously this court must adopt a remedy appropriate to the ends and reflective of the nature of the condemnation. Torture is viewed with universal abhorrence; the prohibition of torture by international consensus and express international accords is clear and unambiguous; and, "for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind." **We are dealing not with an ordinary case of assault and battery.** If the courts of the United States are to adhere to the consensus of the community of humankind, any remedy they fashion must recognize that this case concerns an act so monstrous as to make the perpetrator an outlaw around the globe.

Id. at 748 (emphasis added) (citing *Filártiga*, 630 F.2d at 884, 888, 890).

⁸¹ *Id.* at 748.

⁸² 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

⁸³ *Id.* at 774.

⁸⁴ *Id.* at 775–77.

⁸⁵ *Id.* at 775 (majority opinion) (per curiam); see also *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 551 (D.D.C. 1981).

⁸⁶ *Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring).

⁸⁷ *Id.* at 775 ("I write separately to underscore the rationale for my decision; I do this because, as will be apparent, there are sharp differences of viewpoint among the judges who have grappled with these cases over the meaning and application of 28 U.S.C. § 1350 (1976).").

Edwards ultimately agreed with the *Filártiga* approach, quoting (yet again) its characterization of the torturer (along with pirates and slave traders) as *hostis humani generis*⁸⁸ in support of the conclusion that international law from time to time produces norms of such strength and subject to such common consensus that they would give rise to civil liability.⁸⁹ Although conceding that he preferred to apply international law to ATS cases, Judge Edwards acknowledged that doing so would saddle federal judges with the immense burden of deriving specific standards of liability from an amorphous body of law.⁹⁰ He therefore offered an alternative formulation, under which the ATS would be merely the jurisdictional hook, and judges would apply tort law to the merits.⁹¹

The district court in *Xuncax v. Gramajo*⁹² closely compared the international law and municipal law approaches outlined by Judge Edwards in *Tel-Oren*, the latter of which had also been applied by the Ninth Circuit only a year earlier.⁹³ The plaintiffs in *Xuncax* were indigenous persons from Guatemala who had either been tortured by Guatemalan security forces or whose family members were tortured—sometimes to death—by those same forces.⁹⁴ They sued Hector Gramajo, the former Minister of Defense and, before that, commander of the military division with authority over their home region.⁹⁵ In rejecting the application of domestic law in favor of international law,

⁸⁸ *Id.* at 781 (“The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them.”).

⁸⁹ *Id.* (“The inference is that persons may be susceptible to civil liability if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law.”). Judge Edwards went further, identifying candidates for inclusion in the law of nations, understood in this context to consist of norms of sufficient strength and universality. These included “(a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights.” *Id.*

⁹⁰ *Id.* (stating that “[w]hile [the *Filártiga* formulation] approach is consistent with the language of section 1350, it places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.*, the ‘law of nations’—standards of liability applicable in concrete situations”).

⁹¹ *Id.* at 782.

⁹² 886 F. Supp. 162 (D. Mass. 1995).

⁹³ See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1476 n.10 (9th Cir. 1994).

⁹⁴ *Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass. 1995).

⁹⁵ *Id.* at 171.

the court weighed several factors, including fidelity to the plain language of the statute, the amount of flexibility a solution under international law would afford the courts, and the ability of the federal judiciary to shoulder the interpretive burden described by Judge Edwards.⁹⁶ In a passage especially important in the present context, the court discussed the difference between applying tort law and international law:

[L]ooking to domestic tort law to provide the cause of action mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. This is not merely a question of formalism or even of the amount or type of damages available; rather it concerns the proper characterization of the *kind* of wrongs meant to be addressed under § 1350: those perpetrated by *hostis humani generis* (“enemies of all humankind”) in contravention of *jus cogens* (peremptory norms of international law). In this light, municipal tort law is an inadequate placeholder for such values.⁹⁷

The *Filártiga* formulation became so cemented, and the application of international law so well-accepted by courts, that by the time the Supreme Court finally considered the ATS, the question of using it as a grant of jurisdiction and relying on tort law as the rule of decision did not even come up. In *Sosa v. Alvarez-Machain*, the Court decided that while the ATS was purely jurisdictional and did not itself create a cause of action, at least some wrongs under international law entered the common law and would provide the cause of action to go along with the jurisdictional grant of the ATS.⁹⁸ Urging judicial restraint in making new common law, the Court held “that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”⁹⁹ Although the Court did not specify which norms would make the cut, it suggested that the standards articulated by earlier courts, such as *hostis humani generis*,

⁹⁶ *Id.* at 181–84.

⁹⁷ *Id.* at 183.

⁹⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

⁹⁹ *Id.*; see also Michael Wells et al., *Why Constitutional Torts Deserve a Book of Their Own*, 22 SEATTLE U. L. REV. 857, 857 (1999) (“Over thirty years ago, Marshall Shapo coined the term ‘constitutional tort’ to denote a suit brought against an official, charging a constitutional violation and seeking damages.”).

would serve as a useful guide.¹⁰⁰ Although the Court favorably cited Judge Edwards's *Tel-Oren* concurrence,¹⁰¹ its understanding was certainly more restrictive than his.¹⁰²

Whatever the limitations and whatever the identity of the norms that comprised the set of the law of nations as it existed in the federal common law, the Supreme Court in *Sosa* cemented the role of international law in deciding ATS cases. The Court thereby confirmed the Second Circuit's creation of a new "public tort" analogous to the "constitutional torts" the Court had recognized in the previous two decades.¹⁰³

B. *The Impact of ATS Litigation*

ATS cases have changed the legal landscape in ways that are important and worth preserving.¹⁰⁴ They provide individual victims with a way to pursue accountability (albeit in the form of civil liability) for the specific person(s) who violated their rights. The impact of that development is difficult to overstate. Despite the comparatively recent rise of individual rights under international law,¹⁰⁵ individual remedies remain elusive even today. These remedies were almost entirely unknown in 1980 when the Second Circuit decided *Filártiga*. Although individuals today have more options available for seeking judicial¹⁰⁶ (or

¹⁰⁰ *Sosa*, 542 U.S. at 732 ("This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court."); *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

¹⁰¹ *Sosa*, 542 U.S. at 886.

¹⁰² Judge Edwards included indefinite detention in his list of possible offenses that would give rise to civil liability. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

¹⁰³ See *infra* Part II.C.

¹⁰⁴ See generally Koh, *supra* note 18.

¹⁰⁵ The international community manifested its moral commitment to the protection of individual rights with the unanimous passage of the Universal Declaration of Human Rights by the General Assembly in 1948, and its legal commitment to the same principles with the entry into force of the International Covenant on Civil and Political Rights in 1976 and the International Covenant on Economic, Social, and Cultural Rights in 1976. See ICCPR, *supra* note 7; ICESCR, *supra* note 7; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁰⁶ Today, victims may bring human rights cases before the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights. Of the three, only the ECHR was active in the early days of ATS litigation in the United States. And while international human rights adjudication is an important advancement, these three tribunals cannot possibly

at least institutional)¹⁰⁷ declarations that state conduct violates human rights law, mechanisms other than the ATS for seeking individual accountability—outside the trials of a few dozen defendants in international criminal trials over the last twenty years—are vanishingly rare.¹⁰⁸

ATS cases also provide international law with a much sought-after enforcement mechanism. The dearth of such mechanisms (alleviated somewhat but not eliminated in recent years)¹⁰⁹ is in tension with international human rights law's emphasis on remedies for victims and accountability for individual perpetrators of human rights abuses.¹¹⁰ Many international instruments, including treaties to which the United States is a party, provide for both remedies and accountability, and further place the burden for providing them squarely on states.¹¹¹ The Universal Declaration of Human Rights (UDHR), for instance, states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."¹¹² The International Covenant on Civil and Political Rights requires each state party to provide victims with an effective, officially determined, and enforceable remedy.¹¹³

shoulder the burden of being the only available forums. Indeed, by their own terms, these courts prefer enforcement in domestic courts. See *How the Court Works*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=> (last visited Dec. 20, 2015), for an explanation of how the ECHR processes cases and an overview of its budget.

¹⁰⁷ Most of the major human rights treaties are overseen by UN committees. In some instances, those committees may hear individual complaints from citizens of countries that have elected to allow such complaints. The committees in such instances, however, only have the power to declare that the complaining party's rights were violated but not to order remedies. See *Human Rights Treaty Bodies*, UNITED NATIONS, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm> (last visited Dec. 29, 2015).

¹⁰⁸ That is not to say that individual remedies or some measure of individual accountability are nonexistent.

¹⁰⁹ See *supra* notes 8–9 and accompanying text.

¹¹⁰ See *infra* Part III.B.

¹¹¹ Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555, 569 (2013).

¹¹² Universal Declaration of Human Rights, *supra* note 105; see also GWYNNE SKINNER ET AL., THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS (Dec. 2013), <https://willamette.edu/wucl/pdf/faculty/The%20Third%20Pillar%20hi%20res%20FINAL.pdf>.

¹¹³ ICCPR, *supra* note 7, art. 2 states:

3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,

The Convention Against Torture is even more specific, requiring states to ensure, through their domestic legal systems, that “the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation”;¹¹⁴ that “competent authorities proceed to a prompt and impartial investigation” of allegations of torture;¹¹⁵ and that perpetrators of torture be prosecuted or extradited.¹¹⁶ Even international tribunals that hear cases brought by individuals against states evince a structural preference for domestic enforcement.¹¹⁷ ATS cases provided a way to pursue that enforcement in a way that very few other legal mechanisms in the world do.¹¹⁸

ATS cases give judges in the United States the opportunity to participate in the global conversation that shapes transnational legal norms—norms increasing in scope and character.¹¹⁹ Law, even in areas

notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

¹¹⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 14, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

¹¹⁵ *Id.* art. 12.

¹¹⁶ *Id.* arts. 6–7.

¹¹⁷ In human rights courts, where individuals may bring cases against states, that preference is expressed through the doctrine of the exhaustion of domestic remedies. *See generally* ANTONIO AUGUSTO CANCADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF INDIVIDUAL RIGHTS* (1983). In the context of individual international criminal liability, the International Criminal Court (ICC) self-consciously departed from the positioning of its predecessors as hierarchically superior to domestic courts and adopted the principle of complementarity, which permits the ICC to exercise jurisdiction only in the absence of good faith investigations at the national level. *See* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *YALE J. INT'L L.* 383, 386 (1998) (“[C]omplementarity would replace the primacy of international tribunals with priority for national courts.”).

¹¹⁸ *See* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT'L L.* 1, 32 (2002) (“No other legal system has a comparable statute.”). That is not to say that ATS cases are unique in the world. *See* Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 *AM. J. INT'L L.* 846, 846–51 (2013).

¹¹⁹ *See, e.g.*, Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 37 (1993); *see also* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *COLUM. J. TRANSNAT'L L.* 485 (2005); Kanishka Jayasuriya, *Globalization, Law, and the*

usually thought of as purely domestic, is no longer formed and applied exclusively within the closed borders of the sovereign state.¹²⁰ Much ink has been spilled over the question of whether, and to what extent, the United States should internalize the norms of international law.¹²¹ Global legal norms, however, are not static entities such that the United States can only incorporate them wholesale or leave them alone. They change, emerge, and evolve in part through international judicial conversation.¹²² Human rights litigation places judges in the United States inside that conversation and thereby gives them a role in the ongoing creation and development of international and transnational legal norms.¹²³

Civil litigation in general, and ATS cases in particular, provide a cutting-edge mechanism for victims to pursue MNEs that may have committed or been complicit in human rights abuses. While it is true that only states have international legal obligations, with the exception of individuals under international criminal law, MNEs increasingly wield power equal to—if not surpassing—many states and have shown themselves capable of conduct and harms that, if committed by a state, would qualify as grave violations of human rights law.¹²⁴ In the past decade, the topic of “business and human rights” has garnered much attention from officials, advocates, and academics. As a result of that attention, major institutions such as the UN and the Organization for Economic Cooperation and Development (OECD) have promulgated new norms urging MNEs to comply with international human rights standards.¹²⁵ While these high-profile initiatives have generated

Transformation of Sovereignty: The Emergence of Global Regulatory Governance, 6 IND. J. GLOBAL LEGAL STUD. 425 (1999).

¹²⁰ See generally Shapiro, *supra* note 119.

¹²¹ See *infra* Part IV.A.

¹²² Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1123 (2000).

¹²³ Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 558 (2005).

¹²⁴ Major ecological catastrophes are a clear example of this phenomenon. But corporations engage in a wide variety of behavior that would qualify as human rights abuses if they were states, such as forced evictions and suppression of free speech and association. See, e.g., *Whose Development?: Human Rights Abuses in Sierra Leone's Mining Boom*, HUM. RTS. WATCH (Feb. 19, 2014), <http://www.hrw.org/reports/2014/02/19/whose-development-0>; *“They Know Everything We Do”: Telecom and Internet Surveillance in Ethiopia*, HUM. RTS. WATCH (Mar. 25, 2014), <http://www.hrw.org/reports/2014/03/25/they-know-everything-we-do>.

¹²⁵ See generally ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <http://www.oecd.org/corporate/mne/48004323.pdf>; UNITED NATIONS HUM. RTS. OFFICE OF THE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE

ongoing momentum,¹²⁶ the only complaint procedure created so far is a soft-law process under the OECD, which allows individuals or organizations to initiate a non-binding mediation process against MNEs for failing to comply with the OECD's guidelines.¹²⁷ Civil litigation offers a hard-law alternative to such soft-law mechanisms, thereby improving the chance that plaintiffs will actually recover damage awards (or settlements); that MNEs will actually modify their behavior to conform more closely to human rights standards; and that MNEs will contribute more effectively to democratic development in the countries in which they operate.¹²⁸

Finally, bringing human rights into U.S. courts on behalf of foreign plaintiffs makes the power of the human rights vocabulary and concepts more widely available to domestic public interest advocates.¹²⁹ Although the United States has long been a supporter of human rights abroad, the rhetoric of the international human rights movement has historically struggled to find footing within the United States.¹³⁰ Today,

UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹²⁶ A UN working group continues to engage both states and businesses in the development and application of the Guiding Principles.

¹²⁷ See *The OECD Guidelines for Multinational Enterprises*, OECD WATCH, <http://oecdwatch.org/oecd-guidelines> (last visited Dec. 21, 2015) for a description of the complaint procedure. See Skinner, *supra* note 111, for an excellent and comprehensive treatment of the ways in which advocates have sought judicial remedies against corporations for human rights abuses and the obstacles they commonly face.

¹²⁸ See Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 223 (2008) ("A corporation that abets human rights abuses will not impart democratic values or provide a model for positive change."). It is important to note in the context of the discussion of MNEs that international human rights law and the law applied in ATS cases—and, by extension, the argument presented in this Article—are only concerned with the conduct of MNEs insofar as that conduct was undertaken in conjunction with (e.g., conspiring, aiding, or abetting) states. Only states may violate international law, and only state action triggers the public/private distinction advanced herein. This Article does not take a position on the much more difficult question of whether the power of MNEs and their consequent ability to visit the same magnitude of harms as states can or should cause us to treat them differently than other private actors.

¹²⁹ See *The Bringing Human Rights Home Lawyers' Network*, COLUM. L. SCH. HUM. RTS. INST., <http://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network> (last visited Feb. 13, 2015) [hereinafter Human Rights Institute]. The Bringing Human Rights Home Lawyers' Network has proven invaluable and provided several "big wins." Domestic advocates have learned to use transnational public relations strategies to advance their goals. Chicago police torture cases are examples of other notable successes of Bringing Human Rights Home.

¹³⁰ See BRINGING HUMAN RIGHTS HOME x (Cynthia Soohoo et al. eds., 2007) ("[B]y

however, domestic advocacy using the language of international human rights is commonplace,¹³¹ as is using international forums to catalyze domestic social change.¹³² ATS litigation played a key role in that resurgence by educating U.S. lawyers and judges in international law, who in turn disseminated the lessons to their peers engaged in “purely” domestic advocacy.¹³³ In that sense, ATS provided an entry point into U.S. social justice discourse for the rhetoric and techniques of international human rights advocacy.

All of the foregoing advantages of transnational public law litigation (TPL) depend on the admixture of private and public litigation and are therefore imperiled to the extent that the public law aspects of human rights litigation (international law) are exchanged for a purely private approach (torts).

C. Private Rights for Public Wrongs

The story of the emergence of human rights litigation in U.S. courts is also the broader story of the emergence of the idea of private rights of action for public wrongs. By explicitly rejecting “garden variety municipal torts” as inadequate and instead embracing international law as the rule of decision in ATS cases, advocates and courts fashioned the third “public tort” in twenty years. The first successful modern ATS case, filed in 1979, was preceded by the Supreme Court’s 1961 decision creating “constitutional torts” in

the 1950s the separation between international human rights and domestic civil rights appeared complete.”).

¹³¹ The Human Rights Institute at Columbia University, for example, maintains The Bringing Human Rights Home Lawyers’ Network, a large and active group of activists seeking to use international human rights norms in domestic social justice advocacy. See Human Rights Institute, *supra* note 129.

¹³² Many domestic advocacy organizations, for instance, prepare reports to the United Nations when it periodically reviews the performance by the United States of its obligations under human rights treaties. In 2013, for instance, more than forty-seven civil society organizations in the United States submitted reports to the Human Rights Committee detailing ways in which the United States violates its obligations under the ICCPR. See *ICCPR Newsletter No. 2: List of Issues Submissions*, U.S. HUM. RTS. NETWORK, <http://www.ushrnetwork.org/news-updates/iccpr-newsletter-no-2-list-issues-submissions> (last visited Oct. 21, 2015).

¹³³ See *BRINGING HUMAN RIGHTS HOME*, *supra* note 130, at 217–19 (“ATS cases concerning human rights abuses abroad have required federal judges to apply (and thus learn about) international human rights law. The cases have played an important role in educating U.S. lawyers and judges about international human rights law and building case law on which they can rely.”).

Monroe,¹³⁴ which reimagined § 1983,¹³⁵ and its 1971 decision in *Bivens*,¹³⁶ which recognized a right of action for damages against federal officials violating constitutional rights. Those cases and their progeny set the precedent for the application of private law remedies to breaches of public duty (constitutional rights) later built on by ATS cases for breaches of a different public duty (international law). It is important to note that the argument here is not that early ATS cases explicitly drew on *Monroe* or *Bivens* to reach their decisions. Rather it is to make the point, as have other commentators, that the three types of cases—§ 1983, *Bivens*, and ATS—are similar enough to group together into the category of “public torts.”¹³⁷

It is important to note here that § 1983 allows for claims in equity as well as for damages. The former conforms more closely to the public law litigation model (discussed *infra*) while the latter—like *Bivens* actions and ATS cases—mix private remedies and public harms.

¹³⁴ *Monroe v. Pape*, 365 U.S. 167, 187 (1961). See *supra* note 53 for further explanations regarding the “overruling” of *Monroe*. See generally Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1721–25 (1989) (describing the origins of tort rhetoric in constitutional tort actions).

¹³⁵ 42 U.S.C. § 1983 (1994).

¹³⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹³⁷ See, e.g., Koh, *supra* note 18, at 2347–48 (“Like its domestic counterpart (christened fifteen years ago by Abram Chayes), transnational public law litigation seeks to vindicate public rights and values through judicial remedies. In both settings, parties bring ‘public actions,’ asking courts to declare and explicate public norms, often with the goal of provoking institutional reform. Much as domestic public law litigants have pursued *Bivens* and § 1983 litigation in federal courts seeking redress, deterrence, and reform of state and federal institutions through judicial enunciation of constitutional norms, transnational public law litigants have sought redress, deterrence, and reform of national governmental policies through clarification of rules of international conduct.”). See also *Bivens*, 403 U.S. at 388; William Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 645 (2006) (explaining that “[b]ecause ATS litigation in *Sosa*’s wake is so obviously analogous to *Bivens* litigation, the same caution is pertinent to crafting tort remedies for violations of international law”). Casto characterizes all three types of claims as “mosaic actions,” meaning that the cause of action (norm) generally comes from one body of law while the remedy comes from another. In other words, “mosaic actions” are causes of action made up of a patchwork of different legal systems and rules. *Id.* at 640 (“In each case [with litigation involving § 1983 or ATS] the norm to be remedied comes from one body of law—the Constitution in one; international law in the other—while the remedy comes from a different source—the Congress in § 1983 litigation; the federal courts in ATS litigation. When the norm and remedy are joined, a cause of action is created.”). Additionally, “[l]ike in ATS litigation, the norm in *Bivens* that made the defendant’s conduct illegal came from one body of law, the Constitution, and the federal judiciary supplied the remedy through judicial legislation.”).

The term “constitutional torts” is usually taken to encompass both equity and damage actions under § 1983. But since the latter is more important to the argument presented in this Article, the term will be used to refer, collectively, to *Bivens* actions and claims for damages under § 1983 but to exclude equity claims under § 1983.

Several features of classical private litigation were upended by the rise in the mid-twentieth century of what commentators came to call “public law litigation.”¹³⁸ Private lawsuits under the classical model had been understood to be primarily bipolar, in the sense that they involved two opposed parties whose interests were similarly opposed.¹³⁹ Court cases were zero-sum, winner-take-all affairs.¹⁴⁰ A gain for one of the bipolar parties was a loss for the other. Litigation was aimed at retrospective relief.¹⁴¹ The available remedies were inextricably linked to the nature of the harm.¹⁴² For instance, the compensation available for a breach of contract would be linked to plaintiff’s loss, and the damages in tort would be linked to the extent of the plaintiff’s injuries. Lawsuits were self-contained in the sense that they were aimed only at resolving the immediate dispute between the parties by payment, performance, or enforcement of the *status quo* without further involvement by the court.¹⁴³ Finally, the parties to the dispute would have both initiated and controlled the lawsuit, serving as the fact-finders while the trial court judge served as a neutral arbiter.¹⁴⁴

Public law litigation broke away from each element of the classical model. *Brown v. Board of Education* serves as an excellent example of that rupture. *Brown* explicitly sought to advance the interests of all black schoolchildren.¹⁴⁵ It did so through the class action mechanism, but other cases at the time arrived at similarly broad representation directly, by taking advantage of newly relaxed joinder rules, and indirectly, by attempting to exert systemic influence through statutory and constitutional interpretations.¹⁴⁶ Furthermore, the aims of *Brown*

¹³⁸ Harvard Law Professor Abram Chayes coined the term in an influential article published in 1976. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976).

¹³⁹ *Id.* at 1282.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1282–83.

¹⁴³ *Id.* at 1283.

¹⁴⁴ Chayes, *supra* note 138, at 1283.

¹⁴⁵ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁴⁶ Chayes, *supra* note 138, at 1284 (“School desegregation, employment discrimination, and prisoners’ or inmates’ rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined

were prospective, in addition to retrospective. Plaintiffs were not simply seeking compensation for past injuries, but also judicial protection from similar future injuries.¹⁴⁷ They sought a fundamental change in the way the government operated. That fundamental change came by way of an injunction; the increased reliance on equity in public law litigation severed the strong link in private law litigation between the right and the remedy since an injunction necessarily deals with contingencies and future probabilities. By definition, the ongoing and systemic nature of the injunction in *Brown* meant that the litigation was not self-contained in the sense that the issue was disposed of by a single act (such as payment of damages) such that the judge's attention was freed for other things. Rather, it required significant and ongoing judicial attention.

Constitutional torts, like ATS cases, combine elements of the models of classical private litigation and modern public law litigation into a hybrid, or "mosaic," action.¹⁴⁸ They link public norms with the private remedy of damages.¹⁴⁹ The litigation is bipolar (private) in the sense that it involves two individual parties, yet they are not the same *type* of party. One is a public agent while the other is not, and their interests are therefore not as symmetrically opposed as those of two private parties. While the litigation is retrospective, about an "identified set of completed events"¹⁵⁰ (private), it is also prospective, seeking "norm enunciation"¹⁵¹ and institutional change (public). Unlike public law litigation, however, where equitable remedies break the traditional link between right and remedy, public tort litigation restores that link by seeking damages derived from the harm suffered. In that sense, public tort cases are self-contained; the judge's involvement ends with ordering or denying damages. She will not become embroiled in managing a long-running and complex social program, such as school desegregation, or an environmental cleanup. Nor will she be called on, in either the merits or the remedial phase, to play a significant role in fact-finding.

to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.”).

¹⁴⁷ *Id.*

¹⁴⁸ Casto, *supra* note 137, at 639–41.

¹⁴⁹ *Id.* at 640.

¹⁵⁰ Chayes, *supra* note 138, at 1282.

¹⁵¹ Koh, *supra* note 18, at 2349.

The most important aspect of public torts in the present context is the decision of the courts to supplant private law with public law as the rule of decision, while retaining the bipolar structure and remedies of private litigation.¹⁵² Briefly examining the Supreme Court's reasoning in justifying the creation of constitutional torts in *Monroe* and *Bivens* will help to illuminate what is at stake in deciding whether to translate human rights abuses into tort claims. In *Monroe*, thirteen Chicago police officers entered the Monroe home—without a warrant or probable cause—and forced the six members of the family to stand naked in the living room while they ransacked the house in search of evidence related to a recent murder.¹⁵³ The police then detained Mr. Monroe, the father, for an additional ten hours of interrogation, denied him access to an attorney, and then finally released him without charges. In Justice Douglas's majority opinion, the Supreme Court held that plaintiffs retained a federal cause of action for violations of their constitutional rights by state officials acting under color of state law even if that state's common law of torts already provided a remedy.¹⁵⁴

By explicitly making the federal remedy available, even if a remedy in tort was available in state courts, Justice Douglas implicitly established a preference for the constitutional approach over the common law one. Much of the reasoning in the opinion rested on the legislative history of § 1983 and the historical background against which it had been enacted.¹⁵⁵ In the aftermath of the Civil War, lawless state officials allowed the Ku Klux Klan to engage in open campaigns of violence. But Justice Douglas did not base the Court's opinion in 1961 on the existence of the kind of lawlessness at the state level that existed in 1871. Quite the opposite, the Court held that "[t]he federal

¹⁵² In a sense, *Filártiga* can be read as a contest over the enforcement of the bright-line classical separation of private from public claims. As the defense noted at the initial trial:

[P]laintiffs appear to confuse the whole of international law, which may very well concern itself with private claims, with the law of nations, which governs "questions of right between nations." In clear and obvious terms, § 1350 grants federal jurisdiction only over torts committed "in violation of the law of nations." It does not purport, either expressly or otherwise, to bestow jurisdiction over claims based on private international law. Insofar as plaintiffs' claim sounds in the latter, it cannot be heard in a federal forum.

ACEVES, *supra* note 67, at 526 (citations omitted).

¹⁵³ *Monroe v. Pape*, 365 U.S. 167 (1961). See *supra* note 53 for explanations regarding the "overruling" of *Monroe*.

¹⁵⁴ *Id.* at 183.

¹⁵⁵ *Id.* at 172–80.

remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”¹⁵⁶ While the majority opinion is silent on why that federal remedy might be preferred, even to practically available (as opposed to theoretically available) state remedies, the concurring opinion of Justice Harlan anchors the preference, in part, on the insufficiency of at least some state remedies for at least some deprivations of constitutional rights.¹⁵⁷ Justice Douglas did not, however, completely remove torts from the picture, noting in an influential dictum that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”¹⁵⁸ The precise relationship of tort concepts to § 1983 actions continues to confound courts and scholars, but it is clear that *some* relationship exists and that both are, in one way or another, at play.¹⁵⁹

In contrast to ATS and § 1983 claims, which were provided for by statute, the Court in *Bivens* derived an implied right of action from the importance of the rights guaranteed by the Constitution and the need to provide a remedy for the unique harm that occurs when an agent of the government violates those rights.¹⁶⁰ The case arose when federal agents stormed the plaintiff’s house without a warrant and arrested him after humiliating him in front of his wife and children.¹⁶¹ His home was searched before he was taken into custody where he was interrogated, booked, and subjected to a visual strip search.¹⁶² In the

¹⁵⁶ *Id.* at 183.

¹⁵⁷ *Id.* at 196 n.5. (“There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right It would indeed be the purest coincidence if the state remedies for violations of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.”) (Harlan, J., concurring).

¹⁵⁸ *Id.* at 187 (majority opinion).

¹⁵⁹ See, e.g., Sheldon H. Nahmod, *Section 1983 and the “Background” of Tort Liability*, 50 IND. L.J. 5 (1974); Michael L. Wells, *Civil Recourse, Damages-As-Redress, and Constitutional Law*, 46 GA. L. REV. 1003 (2012); Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

¹⁶⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 (1971). Justice Douglas noted the following, citing Justice Harlan’s concurring opinion in *Monroe*: “The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court’s opinion today discusses in detail.” *Id.* at 409 (citing *Monroe*, 365 U.S. at 195 (Harlan, J., concurring)).

¹⁶¹ *Id.* at 389–90.

¹⁶² *Id.* at 390. *Bivens* asserted that his Fourth Amendment rights were violated

Supreme Court, the government argued that privacy interests protected by the common law were at stake in the case, as opposed to constitutional rights, and that the case would therefore be properly resolved in state court under the common law of torts.¹⁶³

The Court disagreed, emphasizing the difference between the relationship of a citizen to the state and the relationships among private individuals:

Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.¹⁶⁴

Indeed, the Court went on to note that the relationships are so fundamentally different that “[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.”¹⁶⁵ Thus, the Court in *Bivens* declared explicitly what it had only hinted at in *Monroe*: that certain harms caused by public officials can only properly be treated as violations of the public law even if the same harm, caused by a private person, would be susceptible to claims under private law.¹⁶⁶

Hence the Court conceived of constitutional torts as not only offering plaintiffs a way to be compensated for the harms they suffered, but also as engaging in the project of redrawing or reinforcing the appropriate lines between the exercise of state power and the protection of individual rights.¹⁶⁷ The latter became the defining project of the civil rights era.

because the arrest occurred with an unreasonable amount of force and made without probable cause. *Id.* He also claimed that he suffered great humiliation, embarrassment and mental suffering as a result of the unlawful conduct. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 391–92.

¹⁶⁵ *Id.* at 394.

¹⁶⁶ *Bivens*, 403 U.S. at 394. As Justice Douglas noted, citing Justice Harlan’s concurring opinion in *Monroe*, “The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court’s opinion today discusses in detail.” *Id.* at 409 (citing *Monroe*, 365 U.S. at 195 (Harlan, J., concurring)).

¹⁶⁷ *Bivens*, 403 U.S. at 391–92.

Of course, the choice to create public torts (the constitutional torts of *Monroe* and *Bivens* and the public international torts of the ATS) can be understood as a matter of preference, depending on which bundles of goods might be produced by which tactics and trial strategies. Will torts versus human rights result in a higher chance of a favorable verdict and award? How does that balance against the potential loss of the moral victory afforded by a judicial pronouncement that the defendant violated human rights standards? In that sense, perhaps the courts in public torts cases were only expressing a contingent, all-things-considered preference for public law over private law when they repeatedly chose the former over the latter. Yet that reading seems to ignore the strength of the courts' language, the way their creation of public torts stemmed from a sense of obligation, and their sense of themselves as engaged in drawing the boundaries of acceptable exercises of state power against individuals.

If, as suggested by the courts' language, there is a strong normative justification for preferring public law to private law as the rule of decision in public torts, then the notion of translating human rights claims into the language of torts becomes less of a tactical balancing act and more an approach that, having been considered, should be abandoned or at the least seriously questioned.¹⁶⁸ Part III of this Article will advance such a strong normative justification, showing that the notion of equality that permeates the law of torts is wholly inadequate for redressing public harms. Since that argument questions the project of translating human rights claims into torts, Part IV will offer a novel alternative to translation.

III. CLASH OF NORMATIVITIES

What was behind the courts' preference for the language of international law, or constitutional rights, over that of torts? What did Justice Brennan mean in *Bivens* when he said that "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising

¹⁶⁸ Having said that, injured plaintiffs, particularly those who are the victims of human rights abuses, should not be held hostage to the normative prescriptions of legal scholars. To the extent that a claimant seeks only compensation for her injuries, nothing should prevent her from securing that compensation through whatever legal avenues might be available to her. This Article rather proceeds on the assumption that at least some plaintiffs and advocates intend to pursue human rights claims in state courts in order to achieve at least some of the broader, systemic results such litigation has been aimed at in the past. It is to the latter group that the argument herein is directed.

no authority other than his own[?]" If the injuries in either case would be the same, what is the source of the greater harm in the case of a violation of rights by an agent of the state?

A. *The Inevitably Public and Political Commitment to Torture*

1. A Problem with the Rule of Law

The first hint of an answer can be found by examining the mistake commentators make in the commonly repeated assertion that "[a]lmost every international law violation is also an intentional tort. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment."¹⁶⁹ While torture may encompass, among other things, acts of assault and/or battery, the reverse is not true. Assault does not encompass torture. At the most basic level, this difference can be appreciated by comparing the legal definitions of the two wrongs. The common law tort of battery is usually defined as the intentional causation of harmful or offensive contact with another person without that person's consent.¹⁷⁰ A common definition of torture is:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁷¹

On a purely textual level, then, it becomes clear that battery fits neatly into the definition of torture but not vice-versa; the definition of battery lacks, among other features of torture, the requirement that the act(s) be undertaken by a public official pursuant to a program of punishment, interrogation, intimidation, or discrimination. There are other salient differences. While the statute of limitations for battery varies from state to state, two years is common.¹⁷² Under U.S. law, the

¹⁶⁹ Alford, *supra* note 4, at 1750.

¹⁷⁰ RESTATEMENT (SECOND) OF TORTS § 13 (1965).

¹⁷¹ CAT, *supra* note 114, art. 1.

¹⁷² See, e.g., CAL. CIV. PROC. CODE §§ 335.1, 349.4 (West 2015); VA. CODE ANN. § 8.01-243 (2015).

statute of limitations for a torture claim is ten years,¹⁷³ while under international law there is no statute of limitations.¹⁷⁴

There must be strong public reasons to justify the different standards of liability imposed under international law and under most domestic systems for public officials who violate international human rights law and private citizens who commit torts. Without these reasons, human rights laws—at least those with tort analogues—may be void on rule of law grounds. Analyzing the rule-of-law issues raised by the translation project will show that any legal system which proscribes human rights abuses *qua* human rights abuses necessarily commits itself to at least a weak version of the typically Continental view that individuals exercising a public function are, legally at least, categorically different than private actors pursuing private ends. Among other things, the rule of law requires that laws be general in the sense that they apply equally to everyone.¹⁷⁵ The precise contours of the principle of generality are contested, but most commentators would agree that a law imposing different standards of liability on different classes of citizens for the same acts without adequate justification fails to satisfy the requirement.¹⁷⁶ In comparing human rights abuses and tort harms, the question then becomes why it might be the case that a public official tortures while a private citizen batters. The answer to that question will provide the first step in the normative argument against translating human rights abuses into tort harms.

It is clearly the character of the individual undertaking the conduct designated “torture,” rather than the nature of the conduct itself, that must provide the justifiable distinction if one is to be

¹⁷³ See TVPA, *supra* note 31.

¹⁷⁴ CAT is silent in the issue of any limitation on the time within which victims must claim redress, but the Committee against Torture has addressed the issue. See Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 9, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012), http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf (“On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them.”).

¹⁷⁵ See Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1036–45 (2014).

¹⁷⁶ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624 (1958); see, e.g., JOHN RAWLS, A THEORY OF JUSTICE 237 (Oxford Univ. Press rev. ed. 1999) (also giving “like cases alike” conceptions of generality). See also F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (“[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”).

provided at all. If it were simply a matter of wishing to classify battery undertaken in order to interrogate, intimidate, punish, coerce, or discriminate (call these forms “battery-plus”) differently than other forms of battery (“ordinary” forms of battery, such as getting into a bar fight), there would be no need to restrict the class of persons to which the law applies. Indeed if acts of battery-plus were in and of themselves more offensive than acts of ordinary battery, lawmakers would have every incentive to make enhanced penalties and longer statutes of limitation for battery-plus general. But they are not.

It must, then, be something in the nature of a public official acting in a public capacity that justifies differentiating between torture and battery. This might at first seem puzzling since the Anglo-American common law tradition has long treated public officials just like ordinary citizens for the purposes of assessing tort liability.¹⁷⁷ Civil law traditions, by contrast, treat public officials—as representatives of the nearly metaphysical entity that is the state—as coordinately superior to private individuals.¹⁷⁸ Since human rights law by its own terms applies only to state actors, maintaining strict adherence to the common law tradition of non-differentiation leads to the rule of law problem described above. Any cause of action that singles out public officials, such as in *Bivens* and § 1983 claims, is susceptible to the same problem. A resolution to the apparent tension can be found in the theory that individuals exercising a public function stand in a different legal relationship to others than do individuals acting in their private capacity.¹⁷⁹

Those differing relationships are precisely what makes translating human rights abuses into tort harms inapposite. Specifically, the notions of equality that animate tort law and those that animate the public law, as well as the scope of the duties generated by each, set them too far apart for the latter to be useful in addressing the former.

¹⁷⁷ See generally A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, (8th ed., Macmillan & Co. 1915) (1885). See also M. Allars, *Tort and Equity Claims Against the State*, in 2 ESSAYS ON LAW AND GOVERNMENT: THE CITIZEN AND THE STATE IN THE COURTS 49, 49–100 (Paul Desmond Finn ed., 1996); Peter Cane, *Damages in Public Law*, 9 OTAGO L. REV. 489 (1997–2000).

¹⁷⁸ See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 94 (3d ed. 2007) (“In private legal relations [including tort law] the parties were equals and the state the referee. In public legal relations the state was a party, and as representative of the public interest (and successor to the prince) it was a party superior to the private individual.”).

¹⁷⁹ See generally Peter Cane, *Tort Law and Public Functions*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 148 (John Oberdiek ed., 2014).

2. Unequal Equalities

The operation of the concepts of vertical and horizontal equality, defined below, work in diametrically opposite ways when applied to private harms than when applied to public harms. The narrow conception of equality on which the private system of tort law rests is incompatible with the broader notion of equality at stake when addressing public wrongs. Claims under § 1983, *Bivens*, and the ATS dealt with the incompatibility, albeit incompletely, by specifically requiring the application of the public law itself to the merits of the case, thereby offering at least the possibility that judicial decisions will serve to enunciate norms and to identify a policy or practice that was unlawful.¹⁸⁰ Tort law, on the other hand, lacks the tools to address that incompatibility, and framing human rights violations as “garden variety municipal torts” brings the conceptual tension into stark relief.

There are of course many tort theories, which diverge wildly in their understanding of the desired ends of a system of tort law and of the optimal institutional arrangements required to achieve those ends.¹⁸¹ But one need not adopt any particular perspective to understand the problems that arise when treating public wrongs as torts because a similar notion of equality underlies most—or at least most non-instrumentalist—tort theories.¹⁸² A word here about nomenclature: contemporary tort theories fall roughly into two categories. The first derives (often, though not exclusively) from the Aristotelean tradition¹⁸³ and is concerned with “such notions as corrective justice, rights, duty, fairness, reciprocity, non-instrumentalism, and deontology.”¹⁸⁴ These tend to focus on individuals as the proper locus of analysis. In the present context, the term “rights-based” will suffice to describe this category.¹⁸⁵ Theories in the second category are concerned more with the systemic attributes of the tort law as they relate to the achievement of such moral ends as

¹⁸⁰ See *supra* Parts II.A–B.

¹⁸¹ See PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 179, for an excellent overview of the current state of thinking.

¹⁸² See Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 17 (2011), for the claim that morality underlying tort law is equality-based. See also Ofer Grosskopf, *Horizontal Equality and the Law of Torts*, in HUMAN RIGHTS IN THE PRIVATE LAW 357, 357 (Daniel Friedmann ed., 2001) (“In its core, tort law clearly reflects a notion of equality; no man is allowed to cause damage to his fellow since no one is superior to another.”).

¹⁸³ See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 99 (1995).

¹⁸⁴ Stephen Perry, *Torts, Rights and Risk*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 179, at 38.

¹⁸⁵ *Id.*

welfare maximization or efficiency.¹⁸⁶ This Article will refer to such theories as “instrumentalist” (although other names are common, such as “economic, functionalist, pragmatist, welfarist, utilitarian, and consequentialist”¹⁸⁷).

In both versions, tort law rests on some notion of equality. But “equality” is a hotly contested word that admits of many definitions. The most basic understanding of equality is to treat like things alike. But that of course begs, at a minimum, the questions of what constitutes sufficient similarity to qualify, and what constitutes similar treatment for those who do qualify. In instrumentalist versions, equality is a fairly stripped-down idea of two individuals who have the same freedom to pursue their own (private) purposes and projects, and therefore the same ability to bargain for the costs and benefits of that activity.¹⁸⁸ Tort law then assigns to judges the role of fixing and ensuring the distribution of those costs and benefits.

Equality in rights-based theories looks at the bundles of rights. A detailed examination of the nature of equality and its relationship to tort law is far beyond the scope of this Article. One particular aspect, however, is important in the present context: most rights-based tort theories emphasize issues of *vertical* equality and reject any hint of *horizontal* equality. Ensuring vertical equality means treating the plaintiff and the accused tortfeasor as existing in a closed universe. Under this notion, the parties are abstracted from their respective positions in society, as well as their positions relative to one another. Vertical differentiators, like wealth, class, or other markers of status and hierarchy, are stripped away and the parties are made (conceptually) equal. What matters in this closed universe is that both parties are accorded by the political and legal institutions of the society in which they find themselves (or sue, or are sued) with the same bundle of rights and obligations.¹⁸⁹ Some, but not all, of those rights

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 928 (1994) (“[The Coasian] position is remarkable for its formalism: In its abstraction of the parties from the context of accidents they lose their character as *tortfeasor* or *victim*—roles that, on this model, are interchangeable and so without their ordinary content. That content, as reflected in traditional conceptions of tort law, has to do with the perceived direction of causation of the accident, with the parties’ relative activity and passivity in bringing it about, or with other differentia in the parties’ concrete relation to the occurrence of the accident. Disregarding this relation, the Coasian model posits a formal equivalence, just as in the theory of the market, which the tort model consciously emulates.”).

¹⁸⁹ See Jan Klabbbers, *Doing the Right Thing? Foreign Tort Law and Human Rights*, in

give rise to correlative duties in the other party. The legal question then boils down to whether those rights and duties were breached in a way that caused compensable injury.¹⁹⁰ So if a billionaire were run over by a harried, minimum-wage service employee on her way to work, the law would not take into account the infinitesimally small wealth of the service employee in comparison to the billionaire in determining how much was owed in damages.

A formulation that captures both the instrumentalist and rights-based versions of equality has it that tort law assumes a “juridical equality” between the parties.¹⁹¹ Here, the modifier “juridical” makes it clear the salient features for identifying “like” cases are *legal* features (as distinguished from, say, social or economic features). Instrumentalist and non-instrumentalist theories may describe that juridical equality in different terms, of course. The former may focus on the parties’ equal (legal) freedom to bargain and to pursue their own ends, while the latter may focus on the individuals’ reciprocal bundles of rights and duties.

Broader normative theory gives a much deeper meaning to “equality,” of course, and many theorists take the tort system to task for failing to address *horizontal* inequality—that is, for excluding any notion of distributive justice that addresses all similarly situated individuals in a society whether or not they happen to be involved in a court case.¹⁹² Critiques from the distributive justice angle argue that

TORTURE AS TORT 553, 558 (Craig Scott ed., 2001) (“[H]uman rights typically deal with individuals as part of larger communities. By contrast, private law, and tort law in particular, brackets any social relation that individuals may have, instead focusing on the purely bilateral relation between victim and tortfeasor.”).

¹⁹⁰ See Grosskopf, *supra* note 182, at 359 (“This . . . process is designed to allow the courts to take into account only one basic variable, namely whether a wrong was committed between the parties, and by default to reject all other possible variables, such as the parties’ identity, needs or wealth, as irrelevant, and hence illegitimate.”).

¹⁹¹ Cane, *supra* note 179, at 148 (“Mainstream theoretical accounts of the nature of tort law and tort liability, whether instrumentalist or non-instrumentalist, generally assume that both parties to a tort action are ‘juridically equal’ private agents pursuing their own projects and purposes.”).

¹⁹² See WEINRIB, *supra* note 183, at 206–14 (differentiating tort law, which the author claims expresses corrective justice, from “politics,” which he claims expresses horizontal equality and distributive justice); see also JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 9 (2001) (explaining that “tort law is best explained by corrective justice”); ERNEST WEINRIB, *CORRECTIVE JUSTICE* 2 (2012) (“Corrective justice is the term given to the relational structure of reasoning in private law”); Stephen Perry, *On the Relationship Between Corrective and Distributive Justice*, in *OXFORD ESSAYS IN JURISPRUDENCE* 238–62 (Jeremy Horder ed., 2000); Martin Stone, *The Significance of Doing and Suffering*, in *PHILOSOPHY AND THE LAW OF TORTS* 131 (Gerald Postema ed., 2001).

the fiction that makes the narrow, juridical conception of equality work—that the parties exist in a closed universe separated from their actual social condition—may serve the individuals involved in the case but fails society as a whole. It does so by failing to situate the potentially tortious behavior in the broader social system in which that behavior operates and in which its toleration (including by assigning a dollar value to its exercise) has systemic effects.¹⁹³ So understood, torts should incorporate horizontal equality by giving significant weight to the role and effects of tortious behavior all across society, not just to the injurer and the injured.¹⁹⁴ Those advancing the dominant, rights-based theories of torts defend the rejection of horizontal equality by arguing that torts at the bedrock normative level, is about correcting the specific results of specific wrongful behavior. Therefore, “[t]he claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another. A person does not . . . have a claim in corrective justice to repair *in the air*, against no one in particular.”¹⁹⁵

These understandings of horizontal and vertical equality and how they apply to the classical law of torts governing private interactions between private individuals (individuals exercising their freedom to pursue their own projects and purposes) help to illuminate the ways in which the narrow model of juridical equality falls apart in the case of public wrongs. First, the notion of vertical equality cannot apply where one of the parties is a public agent exercising a public function.¹⁹⁶ The victim of a *public* wrong and the alleged wrongdoer do not have the same bundle of rights and obligations because they are, in a sense, completely different kinds of actors. The former is a citizen, but the latter is the representative of the state and an extension of the powers granted to it by citizens collectively—such as the monopoly over the use of force. That is not to say that the looming threat of force is the factor that disrupts the equal bilateral relationship of private actors. It is only to illustrate one of the many ways in which a public official is both authorized and constrained by an entirely different set of rights and duties than an ordinary citizen.¹⁹⁷ Private individuals, for instance,

¹⁹³ Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 195 (2000).

¹⁹⁴ *Id.*

¹⁹⁵ Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53, 66–67 (David G. Owen ed., 1995).

¹⁹⁶ ROBERT STEVENS, TORTS AND RIGHTS 219–20, 225–28 (2007).

¹⁹⁷ Cane, *supra* note 179, at 154 (“[S]tatutory and constitutional provisions may impose on public agents duties . . . that private agents do not have and that are

are free to pursue their own projects and are under no obligation that those projects advance the public good, or that they refrain from using their resources for personal, instead of common, gain. Yet those are precisely the constraints we put on the state and on agents of the state exercising their public function.¹⁹⁸ As clarified below, this is neither a stark division nor a binary choice between private individual or public agent. Rather, it is a continuum.¹⁹⁹

The second problem that arises when considering applying classical torts to public wrongs is that the notion of horizontal equality takes on a distinctly different character and becomes intrinsic to the harm, rather than becoming an optional “bonus,” the justification for which may be debated depending on one’s theoretical tendencies. Remedies that address only the disequilibrium between the two parties to a lawsuit cannot reach the harm done to a body politic by a wrongful policy or practice. The reason that judicial review or legislative reform are the traditional legal remedies for public wrongs is because a policy, practice, or law that violates the legal protections afforded to individuals is itself offensive to the legal regime that guarantees those rights, and judicial review “fixes” the entire regime. It is not simply a matter of the abstracted binary relationship between two people, but instead an injury that implicates the nature of the proper relationship of a citizen to governmental power and authority. Whereas injury to an individual can be remedied by compensating her for the value assigned to those injuries, the harm to the social contract cannot be remedied except by changing the offensive policy or practice.

Consider the contrasting cases of a pedestrian hit by a speeding car and a murder suspect tortured to produce a confession. Consider further that the torturing officer’s superiors are either complicit in, or willfully ignorant of, her conduct but that there is no written or formal rule or policy condoning torture. In the former instance, the driver’s duty would only be to those pedestrians she might be in danger of injuring at any given time, but certainly not to all pedestrians anywhere

correlative to rights [P]ublic agents may enjoy statutory protection from tort liability that private agents do not.”).

¹⁹⁸ Cane, *supra* note 179, at 151 (“In this sense, states pursue public projects and purposes, and a public interest, which are distinguishable from and may conflict with the personal projects, purposes and interests of particular private agents. To be justified within this framework of thought, the state’s claimed monopoly of legitimate coercion must be used (only) in the public interest and to promote public purposes, but consistently with preserving for private agents the largest possible measure of freedom to pursue their own projects and purposes.”).

¹⁹⁹ See *infra* note 200 and accompanying text.

and at any time. Furthermore, the driver can only be said to have violated that duty with respect to the person she sideswiped. We would not say that the other pedestrians, those who arrived home safely, were somehow injured by the accident; by breaking the arm of the victim, the driver did not break the arms of all pedestrians everywhere. The victim's injuries were her own. The essentially self-contained nature of such injuries is what makes it possible to conceptually cordon off such private torts from one another and to abstract tort victims from other members of society who suffer similar harms from non-tortious sources or causes.

The police officer and her colluding superiors, by contrast, do have a duty to everyone (at least everyone in the territory over which they have authority). When the officer tortures one person, it is true that only that one person suffers the physical injuries. In that sense the harms are not shared. The injury, however, is to the relationship between the government and the governed, specifically defined in the Constitution and international law to exclude torture. The victim's right to a relationship that excludes torture is diminished, but so is that of every other individual in the officer's territory because in the moment that torture became approved or tolerated, everyone in the city went from living under a regime that prohibited it to one that allowed it. Classifying the victim's torture as assault and battery and the police officer as an individual tortfeasor would result in the victim being compensated but would ignore systemic characteristics of the case. Such a characterization would fail to address the role of the officer's superiors and to provide a remedy to the rest of the population for the harm done to their rights. Public harms are not susceptible to being described as self-contained and are thus much more difficult to fit into the abstracted binary universe required by tort law. The horizontal aspect of equality becomes non-optional in the case of public wrongs because horizontal elements are intrinsic to the duty, the harm, and the proper remedy.

The inclusion of horizontal elements of equality in public torts need not be absolute. The above discussion considers situations where the public wrongs are undertaken according to a policy or practice. One could argue that situations where an official was acting outside of established policies and practices—a rogue agent—would be closer to the classical model of torts since the harm would be more closely restricted to the individual victim. Take the example of a homicide detective who systematically tortures confessions from African-

American suspects.²⁰⁰ Assume that his superiors are completely unaware of his conduct (and that their ignorance is reasonable rather than willful). The argument would be that the broader public in this case is not injured. Since the detective's superiors did not approve of or willfully ignore his conduct, the broader public's right to live under a government that refrains from torture has not been affected. In that sense, it would be more appropriate to pay compensation to the rogue's victim *alone*, rather than to push for unnecessary institutional changes.

Although it is conceptually possible for such acts to be undertaken in isolation by rogue agents, that may not always be the case. In the Chicago police torture case, for instance, the police department and the city of Chicago went to great lengths to cover up Detective Burge's crimes. The more that the organization around the "rogue" is involved, the more the bad actor's activities become a practice rather than an aberration and the more horizontal political equality is implicated. At any rate, the point here is not to offer a detailed defense of particular sharp divisions along the continuum of public wrongs to which public remedies are intrinsic and those for which some kind of private remedy would be adequate. The point, rather, is to note that the continuum exists. Also, the more the duties, injuries, and desirable remedies in a case implicate horizontal political inequality, the more inappropriate it is to shoehorn those cases into an abstracted binary universe absent of horizontal considerations.

The public tort schemes under § 1983, *Bivens*, and the ATS circumvent those problems in the ways described *supra* in Part II.C, but classical tort law has trouble adequately accounting for such distinctions. This will be shown in the next section by highlighting the extent to which international law's remedies for breaches of human rights obligations combine both horizontal and vertical elements of equality.

²⁰⁰ This is an actual case. Chicago homicide detective John Burge tortured confessions from more than 100 African-American suspects using techniques such as electroshock. See Special Projects Conclusion Rep. from Investigator Michael Goldston for the Office of Prof'l Standards, to Chief Admin. of Office of Prof'l Standards 6 (Sept. 28, 1990), <http://peopleslawoffice.com/wp-content/uploads/2012/02/Goldston-Report-with-11.2.90-Coversheet.pdf> ("In the matter of alleged physical abuse, the preponderance of the evidence is that abuse did occur and that it was systematic The type of abuse described was not limited to the usual beating, but went into such esoteric areas as psychological techniques and planned torture.").

B. Horizontal Equality and Remedies for Public Harms

Comparing the duties and remedies at stake in a human rights case decided under international law and a torts case decided under the common law reinforces the conclusion of the theoretical inquiry: the *private law* of tort law cannot adequately address violations of *public law*.

The proposal that victims of human rights violations could pursue claims under the law of torts in state courts is premised on the idea that “[t]he same facts that give rise to international human rights violations almost always will also constitute a domestic or foreign tort.”²⁰¹ Several commentators have noted that nearly every jurisdiction has a body of law that provides for civil liability for certain injuries.²⁰² This is seen as an advantage because state courts in tort cases would apply choice of law principles to determine whether to apply the law of the place of injury or the law of the forum. Unless the United States had a compelling interest in the case, the usual result of the choice of law analysis would be the law of the place of injury.²⁰³ The universality of tort-like legal norms is therefore an important part of the argument that victims may still find compensation.²⁰⁴ Although many plaintiffs in ATS cases have pleaded state law tort violations, in the end they were adjudicated under federal/international law rather than under the ATS.²⁰⁵ Several other ATS cases actually proceeded in state courts.²⁰⁶

First, briefly, the duties that give rise to public harms are different than the duties that give rise to private harms. This stems from the

²⁰¹ Alford, *supra* note 4, at 1761.

²⁰² STEPHENS ET AL., *supra* note 57, at 120 (“The same conduct that constitutes a violation of international human rights norms usually also violates the law of the place where it occurred and the law of the forum state . . .”); *see also* Hoffman & Stephens, *supra* note 45, at 18–19.

²⁰³ Chimene Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 81 (2013).

²⁰⁴ *See* Alford, *supra* note 4. Although other systems may recognize tort harms, they frequently restrict the amount of damages available. Borchers, *supra* note 46, at 52–55.

²⁰⁵ *See* Hoffman & Stephens, *supra* note 45, at 15 (“The state law claims often drop out when plaintiffs obtain a judgment on the international human rights claim.”).

²⁰⁶ *See, e.g.,* *Alomang v. Freeport-McMoran, Inc.*, 718 So. 2d 971 (La. Ct. App. 1998). In *Alomang*, the Louisiana Court of Appeals itself translated the plaintiff’s claims, which were originally stated in terms of international law. When the defendant objected on the grounds of lack of subject matter jurisdiction, the appeals court noted that “[a]lthough the emphasized language quoted above from the opinion of the trial court creates the impression that the claims of the plaintiff are limited to ‘human rights violations and foreign environmental damages,’ plaintiff’s actual allegations are far broader. Plaintiff also alleged that members of the purported class have sustained personal injury damages . . .” *Id.* at 972.

unbridgeable vertical inequality between public officials exercising public functions and private individuals. That is what the Supreme Court was insinuating in *Monroe* and *Bivens* when it established a preference, at least in some circumstances, for the application of constitutional law over the common law. Preserving that difference is one of the issues at stake in deciding whether to translate human rights abuses into tort harms. Because a human rights abuse is committed by (or, in the case of corporations, in complicity with) a public official exercising a public function, torture, by definition, cannot be committed by a private individual—only a state official. As one commentator observed:

Thus, if torture paradigmatically involves official acts, such as those committed by government agents or, at least, under colour of law, then it becomes awkward to completely ignore this official aspect and instead focus on the individual relation between torturer and victim. To do so would be tantamount to denying the official element of torture, and thereby to render it indistinguishable from assault or battery or other forms of inflicting pain.²⁰⁷

In other words, a police officer has a duty not to torture the citizens under her care that is different in kind and in origin from the duty of private individuals to refrain from intentional battery. Casting the former as the latter obscures which kind of duty the wrongdoer violated.

That distinction is important because human rights abuses, as opposed to torts, require remedies tailored to their nature as public harms. Since international human rights law is directed not only at addressing the harms to individuals but also to protecting all individuals from similar harms, the remedies for human rights abuses encompass both the kinds of aims characteristic of public law—such as reforming the institutional structures that made the torture possible in the first place—and of private law—such as providing the victim with monetary compensation.²⁰⁸ International human rights law specifies

²⁰⁷ Klabbers, *supra* note 189, at 558.

²⁰⁸ See Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 9, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012), <http://coremanipur.org/2013/10/08/general-comment-no-3-of-the-un-committee-against-torture/> (follow “General Comment No 3 on Article 14 CAT” hyperlink) (discussing the implementation of article 14 by States parties); see also 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/>

five aspects for the effective redress of grave human rights abuses: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²⁰⁹ Some of those aspects touch both the individual and the body politic. Restitution, for instance, requires states to place the victims—to the extent possible given each specific case—in the position they were in prior to the abuse.²¹⁰ But restitution is not only about the victim as an isolated individual: “For restitution to be effective, efforts should be made to address any structural causes of the violation”²¹¹ Compensation and rehabilitation, on the other hand, are specifically related to the individual. Nevertheless, “monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment.”²¹²

The elements of satisfaction and the guarantee of non-repetition are almost entirely state-centric and highlight the understanding in international law that human rights violations require the state to initiate institutional reform to protect those in its territory from further violations. Satisfaction, among other things, requires that states publicly acknowledge the violation:

This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember[,]”[] which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.²¹³

RemedyAndReparation.aspx [hereinafter Basic Principles and Guidelines].

²⁰⁹ See Comm. Against Torture, *supra* note 208, at 2.

²¹⁰ See Declaration of Basic Principles of Just. for Victims of Crime and Abuse of Power ¶ 8, G.A. Res. 40/34 A, U.N. Doc. A/RES/40/34 (Nov. 29, 1985), <http://www.un.org/documents/ga/res/40/a40r034.htm> (explaining that “[o]ffenders or third parties . . . should . . . make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.”).

²¹¹ Comm. Against Torture, *supra* note 208, at 2.

²¹² *Id.*

²¹³ LOUIS JOINET, COMM. ON HUMAN RIGHTS, THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES, E/CN.4/Sub.2/1997/20/Rev.1, at para. 17 (Oct. 1997), <http://www.derechos.org/nizkor/impu/joinet2.html>.

That requirement is particularly important in light of the potential translation of international human rights abuses into tort harms. Although the obligation to acknowledge the violation rests on the wrongdoing state, the underlying rationale for the obligation—the rights of the individual victims to truth and of the broader society to knowledge in service of future prevention—would be satisfied at least to some extent by a neutral court finding a violation of international human rights law. Returning to the facts of *Filártiga*, the Second Circuit Court of Appeals declared publicly and eloquently that Peña, and by direct implication, Paraguay, engaged in torture. But it seems difficult to argue that the desire for truth and remembrance would have been as well satisfied, if satisfied at all, by a state court in New York awarding the Filártigas damages for wrongful death.

Satisfaction and the guarantee of non-repetition require not only truth, but also accountability of the individuals who commit the abuses and of the system in which they operate.²¹⁴ Individual accountability in this context includes the obligation to investigate alleged abuses and to pursue “judicial and administrative sanctions against persons liable for the violations.”²¹⁵ Institutional accountability requires states to identify and change the aspects of its system that contributed to the violations. Since many human rights are closely tied to core government functions such as the maintenance of law and order or the management of the political process, the required changes could be far ranging, such as providing for:

[C]ivilian oversight of military and security forces; ensuring that all judicial proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting human rights defenders . . . establishing systems for regular and independent monitoring of all places of detention; providing . . . [and] training for law enforcement officials as well as military and security forces on human rights law.²¹⁶

²¹⁴ Satisfaction and the guarantee of non-repetition may require, in addition to accountability, depending on the situation, additional actions such as “effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth . . . assistance in the recovery, identification, and reburial of victims’ bodies . . . an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim . . . public apologies . . . [and] commemorations and tributes to the victims.” Comm. Against Torture, *supra* note 208, at 4.

²¹⁵ See Basic Principles and Guidelines, *supra* note 208.

²¹⁶ Comm. Against Torture, *supra* note 208, at 4.

In summary, international law requires, among other things, the following: a finding that the individual accused of violating human rights standards was performing a public function (or, in another formulation, acting under the color of law); a determination that the acts she is alleged to have undertaken violated the specific human rights standard complained of (e.g., torture); and, in the event the two conditions are satisfied, a finding of redress that addresses the harm to the victim while simultaneously ensuring both individual accountability for the perpetrator and institutional accountability for the system in which she operates. While TPL fails to perfectly satisfy all of those requirements, it goes significantly further towards doing so than municipal tort law.

IV. A BETTER APPROACH

The successful transition of human rights litigation in the United States away from federal courts and into state courts depends on both the availability of international law to state courts and the extent of those courts' discretion to decline to hear international law claims. Fortunately, state courts can, and indeed must, hear claims arising under the federal common law of customary international law, which at least includes the kinds of claims recognized by the Supreme Court in *Sosa*. To date, commentators have largely ignored the possibility that state courts might be forced to hear human rights cases under human rights law, perhaps because the actual prospect of state court litigation of international human rights cases was not of practical and immediate concern until the Supreme Court shut the doors of federal courtrooms in *Kiobel*. Part IV will analyze the feasibility of such a transition, discussing both requirements—availability and discretion—in turn. The first subsection will sketch out the “modern” position endorsed by the Court that international law is part of U.S. law and will advance a reading of *Kiobel* under which the Court left the modern position undisturbed. Building on the conclusion that federal common law continues to provide claims under customary international law after *Kiobel*, the next subsection will argue that the Supremacy Clause requires state courts to hear those claims (with narrow exceptions).

A. *States and International Law*

Although much scholarly contention exists regarding the status of international law in the American legal system, courts have adopted

what has come to be called the “modern” position.²¹⁷ This position asserts that the “[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several states.”²¹⁸ The modern position thus unambiguously holds that international law is federal law and preempts contrary state law.²¹⁹ A brief excursion into the underpinnings of the modern position will help to illuminate the kind of influence federal decisions will likely exert over the range of claims state courts might recognize under international law and their flexibility in interpreting international law norms.

Prior to the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*,²²⁰ international law was part of the general law of the United States and was therefore available to any court at any level.²²¹ Its incorporation into U.S. law was unambiguous, captured in the oft-quoted opinion of the Court in *The Paquete Habana*: “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of

²¹⁷ In some instances, scholars from different camps construe the same decision in very different ways to support very different arguments. In that sense, the degree of unanimity of the courts is a matter of interpretation. It is worth noting, however, that even those launching the most direct attack on the modern position acknowledge its pervasiveness. See Carlos Manuel Vasquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1609–18 (2011).

²¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1) (1987). See also Ryan Goodman & Derek P. Jinks, Filártiga’s *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

²¹⁹ Vasquez, *supra* note 217, at 1497–98 (“Reflecting the settled view regarding the status of customary international law in the U.S. legal system at the time that it was approved in 1987, the *Restatement* asserts that such law has the status of federal law. As such, it preempts inconsistent State law; State courts must follow federal court interpretations of it; and State court interpretations of it are reviewable in the federal courts.”).

²²⁰ 304 U.S. 64 (1938).

²²¹ See *Swift v. Tyson*, 41 U.S. 1 (1842); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); see also Koh, *supra* note 218, at 1831 (“Thereafter, federal courts construed both commercial and noncommercial rules of customary international law so regularly that Justice Gray provoked no dissent when he wrote: ‘International law is part of our law’”); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 371 (2002) (explaining that “federal courts for nearly 100 years applied ‘general’ law . . . sometimes called the ‘law merchant[.]’—[that] was ‘a subset of the law of nations’”).

right depending upon it are duly presented for their determination.”²²² Under the “Swiftian” general law approach, both federal and state courts were free to apply and interpret international law but neither could review the decisions of the other.²²³ The general law model was intended to result in the harmonization of judicial opinion on important topics of law, but lacked a mechanism for reliably generating that harmonization.²²⁴ Thus, amidst increasing concerns about federalism and uniformity, the Supreme Court in *Erie* announced the end of the general law and severely limited the content of the federal common law.

The uniformity concerns of the *Erie* Court apply directly to international law given the potential for individual states’ actions in contravention of international law to harm the nation as a whole and to undermine the ability of the executive branch to conduct foreign relations.²²⁵ The first argument to that effect came shortly after the Court’s decision in *Erie*. Philip Jessup, who would later become a judge on the International Court of Justice in The Hague, published an essay in which he argued that the decision did not change, but rather reinforced, the status of international law as part of the federal common law. Jessup argued that “[a]ny question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power.”²²⁶

Justice Harlan, writing for an 8-1 majority in *Banco Nacional de Cuba v. Sabbatino*, later quoted Jessup’s reasoning approvingly.²²⁷ The Court cited several reasons for agreeing with Jessup. One is that, in

²²² The Paquete Habana, 175 U.S. 677, 700 (1900).

²²³ Young, *supra* note 221.

²²⁴ See *Erie*, 304 U.S. at 74 (“Experience in applying the doctrine of *Swift v. Tyson* had revealed it defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.”).

²²⁵ That strong interest in strong uniformity is sometimes called the “one voice” position. Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233, 233 (2012) (“A common theme in foreign affairs law is the importance of the US speaking with ‘one voice’ to the international community. Speaking with one voice, so the story goes, ensures that the US is not embarrassed by multiple, inconsistent pronouncements from the several states or the different branches of the national government when it takes a position on a foreign affairs issue.”).

²²⁶ Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 743 (1939).

²²⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

concept, foreign relations fell firmly in the realm of federal powers.²²⁸ Another reason is that leaving international law to the states posed the danger of fragmentation, and therefore, the “rules of international law should not be left to divergent and perhaps parochial state interpretations.”²²⁹ The Court here appeared to make a structural argument: if states could violate international law, they could invite repercussions on the United States as a whole. International law provides that states (the word “state” in this context refers to sovereign nations) as a whole are held to be responsible for violations of international law, even violations by some sub-unit (such as a regulatory agency, or one of the several states).²³⁰ In other words, a state (say, Canada) affected by the breach of an American state (say, Michigan dumping toxic waste across the international border) could enact countermeasures, such as economic sanctions, against the entire United States.²³¹ The American Founders recognized the problem inherent in unfettered state conduct in the realm of international law; in fact, the lack of federal control over international law during the time of the Articles of Confederation was a major driver of the new Constitution’s adoption, and ensuring that the national government would be able to conduct foreign policy was at the forefront of the Founders’ minds.²³² Thus, leaving states to their unfettered discretion in interpreting and applying international law would both create a free rider problem (where the country subsidizes states’ international law violations) and encroach on the foreign affairs power of the federal government.

²²⁸ *Id.* at 425 (explaining that “an issue concerned with a basic choice regarding competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law”). *See also* Koh, *supra* note 218.

²²⁹ *Sabbatino*, 376 U.S. at 425. While Judge Harlan’s “endorsement of Jessup’s view that customary international law is federal law is admittedly dictum, . . . it was well-considered dictum.” Vasquez, *supra* note 217, at 1536; *see also* Koh, *supra* note 218.

²³⁰ *See* U.N. Int’l Law Comm’n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

²³¹ *See* Vasquez, *supra* note 217, at 1517–19.

²³² *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 19 (Max Farrand ed., 1937) (“[Edmund Randolph] then proceeded to enumerate the defects . . . that particular [S]tates might by their conduct provoke war without controul [sic] . . .”); *see also id.* at 24–25 (“[Randolph] observed that . . . [i]f a state acts against a foreign power contrary to the laws of nations or violates a treaty, [the Confederation] cannot punish that State, or compel its obedience to the treaty . . . It therefore cannot prevent a war.”); JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (1787), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 35, 35–36 (Ralph Ketcham ed., 2006); Vasquez, *supra* note 217, at 1519 n.110.

Sosa, to some extent, supports the modern view by holding that “[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”²³³ By implication, the claims under international law that the Court does recognize are, indeed, part of the federal common law.²³⁴ As Judge Fletcher of the Ninth Circuit Court of Appeals observed, “we [now] know . . . that there is a federal common law of international human rights based on customary international law.”²³⁵ Judge Fletcher further noted that “we also [now] know . . . that the federal common law of customary international law is federal law in both the jurisdiction-conferring and the supremacy-clause sense.”²³⁶ But did that federal common law of customary international law survive *Kiobel*? If so, in what form?

The federal common law of customary international law must have survived *Kiobel* intact. Much has been made of the ambiguity of Chief Justice Roberts’s opinion, but ultimately the resolution of the question regarding *Kiobel*’s treatment of international law turns on what the Court *did not* say. The difficulty arises from the Court’s choice to deploy the presumption against extraterritoriality—a canon of statutory construction—in a situation where there was no appropriate statute to construct. The Court in *Sosa* held, and the Court in *Kiobel* affirmed, that the ATS was merely a jurisdictional grant while the federal common law of international law provided the cause of

²³³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004). The majority is silent on which claims, exactly, might qualify. Justice Breyer, however, in a separate opinion, suggested that “[t]oday international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. That subset includes torture, genocide, crimes against humanity, and war crimes.” *Id.* at 762 (Breyer, J., concurring) (citations omitted).

²³⁴ Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2254 (2004). This understanding of *Sosa* is not, however, universally shared. See, e.g., Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 919–24 (2007); Ernest A. Young, *Federal Suits and General Laws: A Comment on Judge Fletcher’s Reading of Sosa v. Alvarez-Machain*, 93 VA. L. REV. ONLINE 33 (2007).

²³⁵ William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 664 (2007).

²³⁶ *Id.*

action.²³⁷ But the presumption of extraterritoriality does not apply to purely jurisdictional statutes.²³⁸ Nor could a canon of statutory construction apply to the common law. What, then, did the Court mean when it noted that “we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS”²³⁹ or that “the principles underlying the presumption against extraterritoriality constrain the courts exercising their power under the ATS[?]”²⁴⁰ Some commentators argue that the opinion was at best ambiguous and at worst manipulative,²⁴¹ while others read it as clearly reaching the federal common law of international law in addition to the ATS.²⁴²

Both analyses miss that the Court conspicuously fails to address any of the touchstones of the analysis of the status of international law in U.S. law. The Court in *Sosa* examined all the precedents a student of the modern position would expect to conclude that customary international law is indeed part of U.S. law: *The Paquete Habana*,²⁴³ *Sabbatino*,²⁴⁴ *Erie*,²⁴⁵ and esteemed commentators such as Emmerich de Vattel²⁴⁶ and Justice Jessup.²⁴⁷ Furthermore, the Court provides a cause of action for violations of a certain subset of the law of nations. Justice Roberts’s failure to deal with even one of those sources in *Kiobel*, would seem to indicate that the Court was chary of fiddling with its conclusions about the status of international law in the United States—particularly when it could dispense with federal litigation under the ATS by construing the statute alone. Absent evidence that the Court

²³⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (“The ATS, on the other hand, is ‘strictly jurisdictional.’”) (quoting *Sosa*, 542 U.S. at 713).

²³⁸ See Louise Weinberg, *What We Don’t Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1474 (“Roberts clearly understood that a canon of statutory construction cannot be imposed in a blanket way on a grant of jurisdiction.”). See also *Kiobel*, 133 S. Ct. at 1664 (“We typically apply the presumptions to discern whether an Act of Congress *regulating conduct* applies abroad.”) (emphasis added); William S. Dodge, *Guest Post: Dodge—The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), <http://opiniojuris.org/2014/01/28/guest-post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/>.

²³⁹ *Kiobel*, 133 S. Ct. at 1664.

²⁴⁰ *Id.* at 1665.

²⁴¹ Weinberg, *supra* note 238.

²⁴² Young, *supra* note 44.

²⁴³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004).

²⁴⁴ *Id.* at 726.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 714.

²⁴⁷ *Id.*

in *Kiobel* reinterpreted any of the relevant precedents that informed its characterization of the federal common law of customary international law in *Sosa*, the conclusion must be that the characterization remains intact.

Having established that at least some norms of customary international law are part of the federal common law, the Court failed to specify whether it was restricting the causes of action under the ATS because: (a) only those international norms enjoying “definite content and acceptance among civilized nations”²⁴⁸ are part of the federal common law (“Option A”); or (b) some larger body of international norms are part of the federal common law, but out of judicial restraint the Court would only recognize causes of action for the subset of those norms enjoying “definite content and acceptance among civilized nations”²⁴⁹ (“Option B”). It is crucial to distinguish here between *claims* available under the federal common law of international law and the *norms* of the federal common law of international law. The two categories might be, but need not be, coextensive. Federal law is full of norms that provide no basis for recourse to the courts.²⁵⁰ Hence the category of international law norms may be significantly larger than the category of federal claims available under those norms.

This is important because state courts, as courts of general jurisdiction, do not require a specific jurisdictional grant like federal courts do—constrained by Article III of the Constitution.²⁵¹ The Court’s finding in *Kiobel* that the jurisdiction conferred by the ATS on federal courts did not extend outside the territory of the United States would not therefore bind state courts when considering the extent of their own jurisdiction.²⁵² Nor would state courts obviously be bound by the Court’s determination in *Sosa* of the *claims* available under the federal common law since that decision construed the limits of federal, not state, jurisdiction.²⁵³ Under Option B (where the category of norms

²⁴⁸ *Id.* at 694.

²⁴⁹ *Sosa*, 542 U.S. at 694.

²⁵⁰ Indeed, as the Court acknowledges in *Sosa*, “[a]ccordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.” *Id.* at 727.

²⁵¹ U.S. CONST. art. III.

²⁵² Recall the Court’s holding in *Sosa* that the ATS was a mere jurisdictional grant. *Sosa*, 542 U.S. at 694 (explaining that “the ATS is a jurisdictional statute creating no new causes of action”).

²⁵³ See Vasquez, *supra* note 217, at 1626 (“The Court in *Sosa* did not directly address whether the States were permitted to recognize a right of action for damages to enforce norms of international law not meeting the heightened standard of clarity and

is larger than the category of claims) state courts would therefore be free to consider human rights claims for violations of customary international norms that fall short of the Court's lofty standard in *Sosa*. Under Option A (where the categories of norms and claims are coextensive), such additional claims would not be available to states because they would not be part of the federal common law.²⁵⁴

There are several reasons to be hesitant about embracing Option B. First, the Court's restraint in implying new causes of action suggests that it was concerned about intruding on the foreign affairs prerogative of the executive and legislative branches:

[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.²⁵⁵

If the Court was concerned that federal judicial action on certain types of weaker international law claims could encroach on the discretion of the political branches, it would be counterintuitive to suppose that the Court would acquiesce in state courts entertaining such weaker claims. Another reason to be wary is that state courts extending too far past the doctrinal limits established by federal courts could tempt the Supreme Court to bring the "dormant implied international relations clause"²⁵⁶ out of retirement to invalidate state acts that touch, even lightly, on foreign policy.²⁵⁷

At the least, then, those international law claims that would pass *Sosa*'s stringent standards are available to state courts (Option A). But the ability to apply international law is not the same as the willingness

breadth of acceptance that it articulated.").

²⁵⁴ Of course this presupposes that courts will continue to endorse the modern view. The revisionist position and most of the views advanced as intermediate positions would argue (albeit for different reasons) that international law remains available to the states without regard for the actions of the federal government. *See id.*

²⁵⁵ *Sosa*, 542 U.S. at 727.

²⁵⁶ Fletcher, *supra* note 235, at 667.

²⁵⁷ *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (invalidating a state probate statute due to "state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government").

to do so. The next section will show that if human rights cases make it into state courts (past a host of constitutional and procedural obstacles), those courts will be compelled to apply the federal common law of international law.

B. *Mandatory State Court Jurisdiction over International Law*

If the foregoing analysis is correct and federal common law continues to provide causes of action under the law of nations after *Kiobel*, then state courts will have no choice but to hear such claims unless the federal causes of action are excluded by a neutral rule of judicial administration.²⁵⁸ Commentators have recognized for some time that state courts have concurrent jurisdiction over international law claims.²⁵⁹ Indeed, the original text of the statute expressly provided for the concurrent jurisdiction of state courts.²⁶⁰ Assuming that international law remains part of the federal common law after *Kiobel*, there is every reason to believe that state courts retain that concurrent jurisdiction *and* that they must exercise it when called upon to do so. State courts have at best limited discretion to refuse to entertain federal claims, which has been established precedent since the end of the Civil War when, in *Clafin v. Houseman*, the Court read the Supremacy Clause to require state courts to apply federal law.²⁶¹ It is

²⁵⁸ Haywood v. Drown, 556 U.S. 729, 735 (2009) (“So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second ‘[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.’”) (citations omitted).

²⁵⁹ William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 509 (1986) (“The logical conclusion in view of the general presumption of concurrent jurisdiction and the codification of section 1350 is that the states have concurrent jurisdiction over all cases arguably within the statute.”); Joan Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741, 748 (1985) (“In state courts the claim would simply be treated as a cause of action arising under federal common law, and any court of general jurisdiction could probably take cognizance of it. There is no barrier to state courts entertaining cases arising under international law, and the ordinary concurrent jurisdiction of state and federal courts is appropriate for international cases.”).

²⁶⁰ In its original form, the Judiciary Act of 1789 read, in pertinent part, that district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” The Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73, 77. Nor should the later deletion of the phrase be read as Congressional intent to establish exclusive federal jurisdiction. See Casto, *supra* note 259, at 508 n.232.

²⁶¹ *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) (noting that state and federal law “together form one system of jurisprudence, which constitutes the law of the land for

worth emphasizing in this context that international law, generally speaking, is federal law in the Supremacy Clause sense.²⁶² Despite a series of vehement attacks by scholars skeptical of according international law the status of federal law,²⁶³ no court has yet adopted a view contrary to the Restatement's formulation.²⁶⁴ *Claflin* established the presumption of concurrent jurisdiction for federal statutory law, and subsequent cases held that the presumption includes federal common law as well.²⁶⁵ From the inception of the modern presumption of concurrent jurisdiction, the Court recognized that in some instances state courts might validly decline to hear federal claims, asserting by implication that state courts might escape the presumption where they lacked the competence to hear the kind of

the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent"). *Testa v. Katt* approvingly quoted language from a prior case:

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

Testa v. Katt, 330 U.S. 386, 392 (1947) (quoting *Mondou v. N.Y., New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912)).

²⁶² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. d (1987) ("International agreements of the United States other than treaties (see § 303), and customary international law, while not mentioned explicitly in the Supremacy Clause, are also federal law and as such are supreme over State law. Interpretations of international agreements by the United States Supreme Court are binding on the States. Customary international law is considered to be like common law in the United States, but it is federal law. A determination of international law by the Supreme Court is binding on the States and on State courts.").

²⁶³ Opponents of the modern position fall into one of two camps: revisionist or intermediate. For the revisionist position, see, for example, Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815 (1997); and Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 *HARV. L. REV.* 2260 (1998). For the intermediate position, which has several variations, see A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 *YALE J. INT'L L.* 1 (1995) and Young, *supra* note 221, at 370.

²⁶⁴ It is worth noting, however, that the American Law Institute has begun work on the Restatement (Fourth) of Foreign Relations Law. Many of the main players from all sides of the academic debate are participants in the project.

²⁶⁵ See *Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

claim being brought.²⁶⁶ Beginning almost immediately, the Court began to more clearly identify, and to narrow, the grounds on which a state court might validly decline jurisdiction over federal claims.²⁶⁷ In *Testa v. Katt* the Court indicated that state courts were not free to refuse to hear federal claims where “[state] courts have jurisdiction adequate and appropriate under local law to adjudicate this action.”²⁶⁸ It is at this juncture that the importance of categorizing ATS cases alongside *Bivens* and § 1983 cases reasserts itself.

The Court took the opportunity, in a series of cases arising from the reluctance of state courts to entertain § 1983 cases against state officials, to limit significantly the ability of state courts to refuse to hear federal claims. In the Court’s view, only two circumstances warranted such refusal: where Congress expressly created exclusive federal jurisdiction, or where there exists an application of a “neutral state rule regarding the administration of the courts.”²⁶⁹ In several of those cases, the Court found state courts presumptively competent to hear federal cases where the state judicial power, understood broadly, empowered state courts to hear the types of cases and issue the type of relief at stake in the federal claim.²⁷⁰ The implication of the Court’s jurisprudence on the presumption of concurrent jurisdiction is that states need not establish courts of general jurisdiction, but if they do so then those courts must entertain federal claims which require hearing the type of claim (such as injury caused by a public official) and issuing the type of remedy (such as equitable relief or monetary damages) that those

²⁶⁶ *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) (“Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction.”).

²⁶⁷ *Mondou v. N.Y., New Haven, & Hartford R.R. Co.*, 223 U. S. 1, 57 (1912) (“The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.”).

²⁶⁸ *Testa v. Katt*, 330 U.S. 386, 394 (1947).

²⁶⁹ *Howlett v. Rose*, 496 U.S. 356, 392 (1990).

²⁷⁰ *See Felder v. Casey*, 487 U.S. 131, 146 n.3 (1988) (where the Court looked to “common law tort analogues” to evaluate the competence of state courts); *see also* *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) (“[W]here the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim.”).

state courts are competent to adjudicate.²⁷¹

In practice, then, the validity of any given state court's refusal to hear claims arising under the federal common law of customary international law would depend on whether such refusal rested on a neutral rule of judicial administration. The Court has approved several of these, including: statutes requiring at least one party is a resident of the state;²⁷² venue laws that restricted jurisdiction where the cause of action arose outside the territory of the state;²⁷³ and *forum non conveniens*.²⁷⁴ And so we return to the observation made at the outset of this Article. Plaintiffs will face many barriers to bringing human rights claims in state courts. Some are constitutional, such as the limits on general personal jurisdiction over foreign corporate subsidiaries.²⁷⁵ Others are procedural, such as *forum non conveniens*.²⁷⁶ Barriers will vary from state to state. But this Article is not about the barriers to accessing state courts; it is about what happens in the likely event that ambitious advocates and motivated plaintiffs overcome those barriers. As the foregoing analysis makes clear, plaintiffs who make it past the doors of state courts will find themselves facing judges required by the Supremacy Clause of the U.S. Constitution to hear claims arising under those norms of customary international law that have become part of the federal common law.

V. CONCLUSION

All the groundbreaking advantages of litigation under the ATS that have occupied scholars and advocates since the Second Circuit's landmark decision in *Filártiga* stand to be lost if the next generation of human rights claims in the United States is brought in state courts as tort claims. Like all public torts, the public international torts

²⁷¹ See *Howlett*, 496 U.S. at 380 ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, bottomed deeply in the belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."); see also *Haywood v. Drown*, 556 U.S. 729, 740 (2009) ("We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with local policy.").

²⁷² See, e.g., *Douglas v. N.Y., New Haven, & Hartford R.R. Co.*, 279 U.S. 377 (1929).

²⁷³ See, e.g., *Herb v. Pitcairn*, 324 U.S. 117 (1945).

²⁷⁴ See, e.g., *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950).

²⁷⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856–57 (2011).

²⁷⁶ Whytock et al., *supra* note 45, at 6.

recognized under federal common law blend public-law and private-law remedies into a hybrid that more closely adheres to the international legal standards for redress of international human rights violations rather than either standard public-law remedies or strictly private-law ones. The former—judicial review and legislative reform—ignore the injury to specific victims in favor of systemic change. The latter rejects systemic considerations and focuses exclusively on the parties, abstracted from their respective positions (official or not) in society. Redress for public harms should encompass both kinds of remedies, an avenue offered only by public torts.

Advocates seeking to translate international human rights abuses into tort harms in order to gain access to state courts are not only sacrificing normativity on the altar of practicality, but are doing so unnecessarily. State courts may be *compelled* to hear cases arising under customary international law as part of the federal common law. But even if they are not, many state courts have shown their willingness to recognize public torts when the underlying rights are compelling and the claimants have no alternative remedies. The next generation of human rights cases in the United States should therefore be filed as international human rights cases. No translation necessary.