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THE WHOLE WIDE WORLD: RECOGNIZING JUS COGENS VIOLATIONS UNDER THE ALIEN TORT STATUTE

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INTRODUCTION

In August 2014, the international community learned that members of the Islamic State of Iraq and al Sham (ISIS) had committed widespread human rights abuses—including but not limited to sexual slavery, torture, and killing—against the Yazidis,[1] a religious community[2] with origins in Iraq.[3] Two years later, a United Nations commission declared the ongoing activity genocide.[4] The commission urged the United Nations Security Council to refer the matter to the International Criminal Court or to create

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1. United Nations Human Rights Council, Thirty-Second Session, Independent International Commission of Inquiry on the Syrian Arab Republic (Commission), A/HRC/32/CRP.2 (June 15, 2016).

2. *Id.* at 3.

3. *Id.*

4. The Commission details the Yazidis treatment by ISIS as follows:

> ISIS has sought to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIS fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis. The public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis of Sinjar, composing the majority of the world's Yazidi population, in whole or in part.

Id. In August 2017, the Iraq Government requested the assistance of the UN Security Council in holding ISIS accountable for crimes against humanity. *See* Letter from Ministry of Foreign Affairs of the Republic of Iraq Addressed to United Nations Secretary General: From Republic of Iraq (Aug. 14, 2017). https://en.calameo.com/read/005253664097abb2342ef

an *ad hoc* tribunal to address these atrocities.[5] Because of their heinousness, genocide, torture, and a small group of other acts are, at international law, considered *jus cogens* violations, a calumny to every nation.[6] Also known as universal offenses, these acts are the business of every State, their remedy every State's responsibility.[7] Given their global character, efforts at their redress, at least theoretically, carry reduced comity risks.[8]

However, despite the gravity of the harm inflicted on the Yazidis by ISIS perpetrators and the imputed offense of the international community, at this writing, the International Criminal Court has not prosecuted an ISIS perpetrator and the United Nations has not convened a related *ad hoc* tribunal.[9] The civil justice system available to the Yazidis may offer little more hope. There are obvious rule of law challenges in Iraq and Syria, casting doubt on the capacity of these States to vindicate human rights claims in a way that would provide recompense for harm. Additionally, in the United States, the landmark Alien Tort Statute (ATS)[10]—which, in years past, provided jurisdiction to those similarly situated to the Yazidis—is in retreat. The ATS cannot serve as an option for the Yazidis if U.S. courts continue to narrowly read the recent United States Supreme Court cases *Kiobel v. Royal Dutch Petroleum Shell* and *European Community v. RJR Nabisco* to the end of foreclosing a claim of direct liability against a natural person for even the most extreme human rights atrocities because the conduct relevant to the claim did not literally occur in the territorial United States.[11]

The ATS states simply that "[t]he 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."[12] The statute provides jurisdiction only;[13] it does not provide a cause of action, as some

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5. 5. *Id.* at 1.

6. *See generally* United Nations General Assembly, International Law Commission, Sixty-Ninth Session, Second Report on *Jus Cogens*, Dire Tladi, Special Rapporteur, March 16, 2017 (Second Report) [hereinafter: Tladi, Second Report].

7. *Id.*

8. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in judgment).

9. To date (May 29, 2018), the International Criminal Court has not opened a case concerning the ISIS persecutions. Likewise, to date, no *ad hoc* tribunal has been established to address these persecutions.

10. 28 U.S.C. § 1350 (1948).

11. *See generally Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013); *European Cmty. v. RJR Nabisco, Inc.*, 135 S. Ct. 2090 (2016).

12. 28 U.S.C. § 1350.

13. *Sosa*, 542 U.S. at 724 ("[T]he ATS is a jurisdictional statute creating no new causes of action . . . .").

courts once thought.[14] The Supreme Court made this much needed clarification in *Sosa v. Alvarez-Machain*, its first foray into the morass that has become ATS jurisprudence.[15] Notwithstanding this clarification, there remain questions about the statute's operation, particularly since *Kiobel*, in which the Court held that the statutory canon of interpretation known as the "presumption against extraterritoriality" applies to the ATS.[16] According to the Court, this presumption protects international relations as it prevents U.S. courts from adjudicating matters that principally occurred overseas.[17] The presumption means what its name implies: "[that] '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'"[18] The Court further held that the presumption applied to the ATS can only be displaced if the claim alleged pursuant to the statute "touch[es] and concern[s]"[19] the United States "with sufficient force."[20] The Court suggested that lower courts make this determination by identifying the location of the "relevant conduct" that gave rise to the claim.[21]

Prior to *Kiobel*, plaintiffs had some, if not much, success bringing human rights claims under the ATS, including where the conduct giving rise to the claim occurred in a foreign State and all the parties were foreign. There was no requirement pre-*Kiobel* that a claim have a U.S. connection, whether literal or metaphorical, to ground subject matter jurisdiction under the statute. Many types of claims worked to sustain ATS jurisdiction: those against natural[22] and juridical[23] persons, those alleging direct[24] and indi-

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14. *Id.* ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."); *Kiobel*, 569 U.S. at 115 ("The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action."); *see also* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1941 (2010), for a thorough discussion about the interrelationship between international law and federal common law in ATS jurisprudence.

15. *See Sosa*, 542 U.S. at 692.

16. *Kiobel*, 569 U.S.at 117.

17. *Id.* at 115-16.

18. *Id.* at 115 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010)).

19. *Id.* at 124-25.

20. *Id.* at 125.

21. *Id.* at 124.

22. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

23. *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009); *Bowoto v. Chevron*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008).

rect[25] liability, those with[26] and without[27] U.S. connections, and those with admixtures of the above.

This seemingly "come one, come all" approach to ATS jurisdiction has spawned numerous debates about the proper scope of the statute.[28] *Kiobel* settled few of them[29] and created more. Indeed, it held that the plaintiff must allege some meaningful U.S. connection for the law of nations violation to be recognized under the ATS.[30] It did not, however, provide any guidance for determining what satisfies. It did not discuss the particular type of person (natural or juridical) subject to ATS jurisdiction. It did not address the kind of liability (direct or indirect) recognized under the statute. It did not consider the significance of the type of international law violation alleged (*jus cogens* or not).

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24. *Abebe-Jira*, 72 F.3d 844; *Filartiga*, 630 F.2d 876; *Mehinovic*, 198 F. Supp. 2d 1322.

25. *In re Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Xuncax*, 886 F. Supp. 162.

26. *Abdullahi*, 562 F.3d 163; *Bowoto*, 557 F. Supp. 2d 1080.

27. *In re Marcos Human Rights Litig.*, 978 F.2d 493; *Filartiga*, 630 F.2d 876; *Mehinovic*, 198 F. Supp. 2d 1322.

28. 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, 44 (2002) ("As applied to the broad range of transnational law litigation, including *Filártiga*-type cases, the key step is to recognize that this well-established international law doctrine authorizes jurisdiction over *civil* claims as well as criminal prosecutions.") (emphasis added); Charles F. Marshall, *Re-Framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 612–13 (1996) ("*Filartiga* never confronts the historical evidence pointing out the real purpose of the original § 1350: to allow aliens to bring suits in U.S. federal courts in order to avoid a foreign conflict with the alien's home state. Allowing [this] jurisdiction . . . might often trigger the opposite effect of instigating such conflict.") (citation omitted); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 71 (1985) ("In the aftermath of *Filartiga v. Pena-Irala*, federal courts have frequently expressed confusion and disagreement concerning the meaning and application of the Alien Tort Statute."); *see also* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 400-01 (1985) ("Important as *Filartiga* is in establishing that torture violates customary international law, the case is even more significant in demonstrating to lawyers the growing importance of customary international human rights law and graphically illustrating how they should go about proving it in cases before domestic courts.").

29. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) ("*Kiobel* (quite purposely) did not enumerate the specific kinds of connections to the United States that could establish that ATS claims 'touch and concern' this country.").

30. *See Kiobel*, 569 U.S. at 124.

The Supreme Court further added to the uncertainty about the breadth of the statute with its decision in *RJR Nabisco*. Although this case did not concern the extraterritorial application of the ATS, it did concern the extraterritorial application of a statute—the Racketeer Influenced Corrupt Organizations Act (RICO)[31]—thus giving the Court an opportunity to pronounce broadly on the approach that lower courts should take when confronted with the question of the extraterritoriality of any statute.[32] The Court stated that lower courts must apply a two-step framework. They must: (1) consider "whether the statute gives a clear, affirmative indication that it applies extraterritorially";[33] and (2) if it does not, determine "[i]f the conduct relevant to the statute's focus occurred in the United States."[34] If such conduct occurred in the United States, according to the Court, then the statute may be applied no matter "if other conduct occurred abroad."[35] If, however, relevant conduct "occurred in a foreign country,"[36] the Court opined, then ATS jurisdiction will not lie "regardless of any other conduct that occurred in U.S. territory."[37]

In prescribing this framework, the Court noted that a statute's focus determines the kind of conduct that is relevant. However, it also observed that it had not previously identified the focus of the ATS.[38] (It did not do so in the instant case either.) Thus, to the already crowded *Kiobel* debate, *RJR Nabisco* adds new questions about relevant conduct, including its substantive criteria and territorial limits. *Kiobel* certainly raised questions about relevant conduct but there the Supreme Court did not expressly prescribe a test or jurisdictional framework reliant on a consideration of this notion, allowing courts to determine independently if, when, and how they might consider relevant conduct when determining the propriety of ATS jurisdiction. Subsequent to *Kiobel*, many courts have considered this concept when engaged in this inquiry.[39] However, it was not until the Supreme Court decided *RJR Nabisco* and enunciated its two-step framework that clarity regarding the meaning and scope of relevant conduct became essential. That clarity begs. The Court's recent decision in *Jesner v. Arab Bank, PLC* likewise provides no answer to these questions. There, the Court held that "for-

31. *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2096 (2016).
32. *Id.*
33. *Id.* at 2101.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *See* discussion *infra* at 21-25.

eign corporations may not be defendants in suits brought under the ATS."[40] It reasoned that Congress, given its law-making and foreign policy-setting roles, must determine whether ATS liability should be extended to foreign corporations, not courts.[41] While an unquestionably landmark decision, *Jesner* does not expand or limit the capacity of the ATS to ground jurisdiction over a claim of direct liability against a natural person for a *jus cogens* violation. That capacity continues to be determined by *Jesner*'s antecedents *Kiobel* and *RJR Nabisco*.

This article contends that the jurisprudential lacunae created by *Kiobel* and *RJR Nabisco*—regarding the kind of liability, class of defendant, type of international law violation, and degree of extraterritoriality cognizable under the ATS—allow for the kind of claim that the Yazidis might bring pursuant to the statute. Despite the conduct relevant to their claim likely occurring entirely abroad, this group, foreign nationals, might be poised to sue their individual perpetrators, also foreign nationals, in the United States. Should they allege direct liability for genocide and torture, amongst other abuses, their claims would concern *jus cogens* violations.[42] They would thus bring the now fraught "foreign-cubed claim," alleging that the defendants were directly liable for breaching the most sacrosanct of international law standards.

That said, despite their clear injury, the Yazidis might be another set of similarly situated plaintiffs left remediless in the aftermath of *Kiobel*. Because these plaintiffs' claims were foreign-cubed, courts did not find anything that displaced the presumption against extraterritoriality.[43] In other words, courts looked for relevant conduct in the territorial United States and found none. Thus, courts dismissed these claims, along with many of their kin, including those alleging aiding and abetting liability against both natural and juridical persons for *jus cogens* violations that occurred abroad.[44]

Kiobel, however, does not appear to contemplate the significance of allegations of direct liability—whether for a *jus cogens* violation or not—and nor does it appear to consider the significance of allegations against a natural person.[45] *RJR Nabisco* does not concern an ATS claim at all.[46] As

40. 40. 138 S. Ct. 1386, 1407 (2018).

41. 41. *Id.* at 1407-1408.

42. *See* discussion *infra* at 8-15.

43. *Id.*

44. *See* Ursula Tracy Doyle, *The Evidence of Things Not Seen: Diving Balancing Factors from Kiobel's "Touch and Concern" Test*, 66 HASTINGS L. J. 443,444-45 (2015).

45. *See generally Kiobel*, 569 U.S. 108.

46. *See generally RJR Nabisco*, 136 S. Ct. 2090.

noted, it regards the extraterritoriality of RICO,[47] a legal scenario that does not lend itself to discussion about the nuances of claims brought pursuant to the ATS. It certainly does not fill in the blanks left by *Kiobel* concerning the substantive and territorial reach of the ATS. These cases, then, should not preclude the kind of claim ascribed here to the Yazidis.

As many courts—domestic, foreign, and international—have observed, *jus cogens* norms are in a class by themselves.[48] Because they are singular, this article asserts that the United States Supreme Court must clearly and expressly pronounce if all claims concerning their violation are insufficient to ground ATS jurisdiction without a territorial U.S. connection. This requirement seems particularly necessary in the case of a direct liability claim against a natural person given the immediacy of such a charge. A *jus cogens* claim pursuant to this construct is simply too serious to be subsumed by holdings directly responsive to an entirely different set of facts, requiring an entirely different legal analysis. This article, then, posits that neither *Kiobel* nor *RJR Nabisco* mandates the summary dismissal of the ATS claim that possesses the features of the would-be Yazidi case because that case would allege facts that the Supreme Court has not expressly precluded as a ground for recognizing ATS jurisdiction.

Put another way, *Kiobel* and *RJR Nabisco* arguably leave room for the kind of claim, pursuant to the ATS, considered in the seminal case *Filartiga v. Pena-Irala*.[49] There, the United States Court of Appeals for the Second Circuit recognized that torture is a violation of the law of nations and thus cognizable under the ATS.[50] It then concluded that ATS jurisdiction was proper in the case before it, which alleged direct liability for torture, and was brought by Paraguayan nationals against another Paraguayan national for conduct that occurred in Paraguay.[51] *Filartiga* was the first of many

47. *Id.* at 2098.

48. *See generally* Tladi, Second Report *supra* note 6, at 11-13 (observing the numerous courts that recognize and accord legal meaning to *jus cogens* norms, including the Supreme Court of Argentina, Swiss Federal Supreme Court, Supreme Court of Zimbabwe, International Court of Justice, International Criminal Tribunal for the Former Yugoslavia, Court of First Instance of the Court of Justice of the European Union, European Court of Human Rights and the Inter-American Commission on Human Rights).

49. *Filartiga*, 630 F.2d at 876.

50. *Id.* at 884 ("Having examined the sources from which customary international law is derived-the usage of nations, judicial opinions and the works of jurists-we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.").

51. *Id.* at 878. This is the case that launched a thousand lawsuits as it demonstrated to the world that the United States had a statute which allowed for subject matter

decisions, pre-*Kiobel*, where courts were apparently compelled by the gravity of the alleged violation, allowing such an allegation to overcome any claim that the matter lacked a sufficient nexus with the United States to sustain subject matter jurisdiction under the ATS.[52]

In some of these cases, courts also considered the meaning at international law of the *jus cogens* claim; they did not solely recognize the tragedy of the alleged facts that gave rise to the claim.[53] They acknowledged that the *jus cogens* breach was the gravest at international law and caused global injury.[54] These courts considered the significance of the *jus cogens* claim in ATS jurisprudence broadly but also in a subspecies of this jurisprudence involving foreign official immunity.[55] This article suggests that an allegation of direct liability for a *jus cogens* violation against a natural person warrants this level of scrutiny (and perhaps this is especially so when mass atrocity is at issue, as would be the case for the Yazidis).

Part I of this article discusses the theoretical underpinnings of the *jus cogens* norm. Part II considers the treatment by courts, pre-*Kiobel*, of claims of direct liability against a natural person for *jus cogens* violations brought pursuant to the ATS. Part III discusses *Kiobel* and its implications for these claims. Part IV explores courts' handling of ATS cases with *Filartiga*-type[56] features post-*Kiobel*. Part V discusses *RJR Nabisco* and its meaning for ATS cases. Part VI discusses courts' handling of ATS cases with *Filartiga*-type features post-*RJR Nabisco*.[57] Part VII discusses the significance of recent cases where courts allowed allegations of *jus cogens* violations to defeat foreign official immunity. Finally, Part VIII suggests how courts should decide the question of ATS jurisdiction, in light of these two cases, when the claimant alleges direct liability against a natural person for a *jus cogens* violation.

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jurisdiction over the most egregious human rights abuses, even if the parties were foreign and the offense occurred abroad.

52. *See* discussion *infra* at 15-18.

53. *Id.*

54. *Id.*

55. *See* discussion *infra* at 30-33.

56. *See* Stephens, *supra* note 28, at 44 for an early use of this term.

57. At this writing, there are only two cases post-*RJR Nabisco* that come close to being "*Filartiga*-types": *Adhikari v. Kellogg, Brown & Root*, 845 F.3d 184 (5th Cir. 2017) and *Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1136-39 (E.D. Wash. 2017). A foreign-cubed case, where the plaintiffs allege direct liability against a natural person for torture, *Adhikari* closely tracks *Filartiga*. By contrast, *Salim* is foreign-squared. The plaintiffs and place of injury are foreign but the defendants are U.S. nationals. The plaintiffs do, however, allege that these defendants are directly liable to them for torture. *See* discussion *infra* at 28-30.

I. JUS COGENS

Per the Vienna Convention on the Law of Treaties, a *jus cogens* norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[58] The norm possesses the highest status of all international law,[59] binds every State[60] and endeavors to "protect the fundamental values of all human life."[61] While there are efforts to add to the list of *jus cogens* norms,[62] consensus exists for the peremptory status of genocide, torture, aircraft hijacking, war crimes, the slave trade, and the improvident use of force.[63] The *jus cogens* norm (and its qualifying conduct) derives from customary international law and, like it, exists somewhat in the ether.[64] However, unlike customary international law, the existence of the norm does not require State consent.[65] Moreover, unlike its customary kin, the *jus cogens* norm applies even to the persistent objector.[66]

Today there is increased interest in the idea of this norm. Recently, the United Nations General Assembly appointed a Special Rapporteur, Dire Tladi, to study the concept of *jus cogens*, and to issue a series of reports

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58. Vienna Convention on the Law of Treaties, art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). In general, courts seem to follow the United States Supreme Court's lead in *The Paquete Habana*, 175 U.S. 677 (1900), regarding the elucidation of customary international law, to determine how to identify a *jus cogens* norm. There, the Court opined that "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . ." *Id.* at 700. Pursuant to this approach, when determining which norms have risen to the level of *jus cogens*, courts consider the works of other courts and scholars. *See Sosa*, 542 U.S. at 731-32; *Siderman de Blake v. Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992); *see generally Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2007); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

59. Tladi, Second Report *supra* note 6, at 12-14.

60. *Id.* at 15.

61. *Id.* at 10.

62. *See* discussion *infra*, at n. 198.

63. *See Bigio v. Coca Cola*, 239 F.3d 440, 448 (11th Cir. 2000) (quoting with approval Rest. (Third) of Foreign Relations § 404 (1987)); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, 2012 I.C.J. Reports 422, 457 (July 20).

64. Tladi, Second Report, *supra* note 6, at 22-23.

65. *Id.* at 14-15.

66. *Id.*

documenting the origins, content, exercise, and enforcement of this norm.[67] To date, the Special Rapporteur has issued three reports, which discuss the history and past uses of the norm,[68] the criteria for the norm,[69] and the relationship of the norm to other sources and rules of international law.[70] In one report he observed the norm's pride of place, stating that "the norms of *jus cogens* protect the fundamental values of international law"[71] and that "[t]his notion has never been seriously questioned."[72] Likewise, he reported that "the view that *jus cogens* norms are hierarchically superior to other rules and norms of international law is generally accepted."[73]

Given the seriousness and the supremacy of the norm, historically, its violation exposed the perpetrator to the exercise of universal jurisdiction on the theory that the conduct was so abhorrent that it offended the family of nations, thus allowing each of its members to hold the perpetrator accountable.[74] Universal jurisdiction, at least theoretically, can be imposed crimi-

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67. United Nations General Assembly, International Law Commission, Sixty-Eighth Session, First Report on *Jus Cogens*, Dire Tladi, Special Rapporteur, March 8, 2016, at 4 [hereinafter: Tladi, First Report]. The First Report noted that while many States supported the effort to increase understanding of the *jus cogens* norm some others questioned the propriety of this work altogether. The report observes that "[t]he United States 'did not believe it would be productive for the [International Law] Commission to add the topic of *jus cogens* to its agenda.'" *Id.* at 5. It further observes that France was unsure that the Commission could reach "consensus," and that the Netherlands did not see where States were in need of clarification on the norm. *Id.* However, the report notes that "[m]any delegations reflected on the growth of jurisprudence on the topic of *jus cogens*" and that "Finland, speaking on behalf of the Nordic States, referred to decisions at both 'the international and national levels' invoking *jus cogens*." *Id.* at 6.

68. 68. *See generally* Tladi, First Report, *supra* note 67.

69. 69. *See generally* Tladi, Second Report, *supra* note 6.

70. 70. *See generally* United Nations General Assembly, International Law Commission, Seventieth Session, Third Report on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, Special Rapporteur, February 12, 2018.

71. Tladi, Second Report, *supra* note 6, at 10.

72. *Id.* at 11.

73. *Id.* at 14-15.

74. *See* Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. I. INT'L L. 1151, 1154 (2015) (recognizing that "the doctrine of *jus cogens* is a product of the same tradition of international law as the Nuremberg prosecutions that followed the Second World War."); Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 19 CORNELL L. REV. 1303, 1306-1307 (2014) (observing that "the concept of universal jurisdiction can transform exercises of extraterritorial jurisdiction into exercises of territorial jurisdiction because U.S. courts are applying the substance of an international law that covers the globe" and that "the international law of universal jurisdiction puts everyone every-

nally or civilly.[75] Pursuant to the Restatement (Fourth) on Foreign Relations:

> International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, slave trade and torture, even if no specific connection exists between the state and the persons or conduct being regulated.[76]

This power arguably allows a State, for example, to apprehend an alleged perpetrator of a universal offense and hold them accountable in a domestic criminal court.[77] The Restatement further states that "universal jurisdiction as a matter of criminal law is well accepted under international law"[78] but that "the permissibility and limits of universal civil jurisdiction remain controversial."[79]

Indeed, while there are numerous examples of the exercise of universal criminal jurisdiction, there are far fewer of its civil counterpart. However, before *Kiobel*, many courts in the United States, exercised universal civil jurisdiction pursuant to the Alien Tort Statute.[80] Despite this history, some

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where on notice that they can be held to account anywhere for certain serious offenses against international law—such as piracy, torture, genocide, and terrorist acts like hostage taking and plane bombing"); REST. (FOURTH) ON FOREIGN RELATIONS § 217 cmt. a (noting that "a state may exercise such jurisdiction with respect to an offense committed by a foreign national against a foreign national that took place outside its territory"); *but see* Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars But Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1673 (2014) (observing that "*Kiobel* can be understood as not involving the extraterritoriality presumption, but rather its more obscure cousin—the presumption against universality").

75. REST. (FOURTH) OF FOREIGN RELATIONS § 217 cmt. d.

76. 76. Rest. (Fourth) of Foreign Relations § 217.

77. *See id.* at § 217 cmt. b. International criminal tribunals may also seek to pursue such an offense upon the tribunal's charter or other international agreement. *Id.*

78. 78. Rest. (Fourth) of Foreign Relations § 217 cmt. d.

79. 79. *Id.*

80. 80. In *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995), the court opined that although universal jurisdiction is usually a criminal exercise, international law also allows for its civil expression under the ATS. Similarly, in *Presbyterian Church of Sudan v. Talisman*, the court stated that "states may exercise universal jurisdiction over acts committed in violation of *jus cogens* norms." 244 F. Supp. 2d 289 (S.D.N.Y. 2003). The court continued that "[t]his universal jurisdiction extends not merely to criminal liability but may also extend to civil liability." *See* Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 Duke L. J. 1023, 1029, 1033 (2015) (asserting that "the ATS amounts to a uniquely American form of universal jurisdiction" and that "[u]niversal jurisdiction thus counts on domestic courts to enforce principles of international law").

courts, including the United States Supreme Court, have raised questions about the scope of this license for fear that this expansive form of jurisdiction will frustrate comity.[81] This concern underlies the Court's decision in *Kiobel*.[82]

A noble idea, borne of the desire of nations to tread lightly when their interests intersect with those of sister nations, comity has become a touchstone for courts confronted with foreign-featured cases, especially universal civil jurisdiction cases, typified by the pre-*Kiobel* ATS cases.[83] Indeed, the Supreme Court deemed the application of the presumption against extraterritoriality to the ATS necessary to "protect against unintended clashes between [U.S.] laws and those of other nations."[84] It repeated this theme throughout *Kiobel*, further opining that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but what courts may do."[85] The Court also expressed concern that the application of the ATS to extraterritorial conduct could result in "other nations . . . applying the law of nations . . . [to] hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[86] (As this article attempts to show, pursuant to universal jurisdiction, this possibility already exists.)

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81. 81. The Supreme Court has also underscored the primacy of comity when determining the outer limits of general personal jurisdiction and the reach of a federal statute. In *Daimler AG v. Bauman*, concerning allegations of corporate complicity in the human rights abuses during Argentina's "Dirty War," the Court opined that the "[United States Court of Appeals for the Ninth Circuit] . . . paid little heed to the risks to international comity its expansive view of general jurisdiction posed." 571 U.S. 117 (2013).

82. 82. *See generally Kiobel*, 569 U.S. 108. The Court also raises the comity issue in *Jesner* but, as noted above, decides the case on other grounds.

83. Comity also provides a respectable explanation for a court's refusal to exercise the jurisdiction that it lawfully possesses. According to scholar William S. Dodge, over time the concept of comity has splintered into numerous principles—e.g., "prescriptive comity" ("deference to foreign lawmakers"), "adjudicative comity" ("deference to foreign courts") and "sovereign party comity" ("deference to foreign governments as litigants"). *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2099 (2015). This complexity has served to confuse some courts and forestall some arguments. Nonetheless, most likely few would argue against the propriety of a court considering comity when asked to adjudicate a matter with significant foreign features.

84. *Kiobel*, 569 U.S. at 115-16 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

85. *Id.*

86. *Id.* at 124. The Court reiterates this point, regarding the perceived vulnerability of corporations, in *Jesner*. *See* 138 S. Ct. at 1405-1406.

Additionally, many years before *Kiobel*, Justice Breyer, in his *Sosa* concurrence, expressed apprehension about the possibility of ATS litigation "undermin[ing] the very harmony that it was intended to promote."[87] He noted that, in the foreign-cubed case, comity issues are especially prevalent. However, quite importantly, he opined that the prosecution of offenses that are subject to universal jurisdiction are inherently compliant with international comity,[88] observing that "[t]he fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity."[89] Moreover, he opined that:

> [A]llowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction . . . suggests that *universal tort jurisdiction would be no more threatening*.[90]

A categorical bar by the Court against the exercise of universal civil jurisdiction, on the ground that it thwarts comity, would starkly conflict with Justice Breyer's stated belief about the relationship between these two aspects of international law. This article contends that the Court did not go this far when it recognized that the presumption against extraterritoriality applied to the ATS and conduct relevant to the ATS claim must touch and concern the United States for ATS jurisdiction to lie. The Court assertedly did, however, speak to these matters out of a concern for comity, and indeed there is certainly evidence of foreign State pushback to the exercise of ATS jurisdiction.

Perhaps the paradigmatic example of such resistance—even disdain—to the exercise of universal civil jurisdiction pursuant to the ATS is South Africa. South African President Thabo Mbeki objected to this jurisdiction in *In Re South African Apartheid Litigation*, a group of ATS cases filed

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87. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in judgment).

88. *Id.*

89. 89. *Id.* at 762.

90. *Id.* (citing REST. (THIRD) OF FOREIGN RELATIONS § 404 cmt. b (1987)) (emphasis added). But what a difference ten years makes. At no point in *Kiobel* did Justice Breyer, in his concurrence, or Justice Roberts, in his majority opinion, identify the underlying offenses as of universal concern (despite that they included torture) to say the least warranting of ATS jurisdiction, indicating that such a claim must do more for jurisdiction under the ATS. Perhaps an allegation of direct liability against a natural person would suffice.

against a spate of corporate actors and others for allegedly aiding and abetting the South African apartheid regime, resulting in the torture and extrajudicial killing of South Africans.[91] In a letter to the court, Mr. Mbeki made it very clear that South Africa, as a sovereign State, had a right to determine the resolution of claims resulting from its apartheid era in a way and place that it saw fit.[92] That way was the Truth and Reconciliation Commission, and that place South Africa. Notably, this letter gives no quarter to universal jurisdiction as generally conceived at international law. Numerous other States have expressed their opposition to the exercise of universal civil jurisdiction in the United States. Australia, Germany, the Netherlands, and the United Kingdom regularly oppose such jurisdiction when exercised in ATS cases.[93]

However, comity was, in fact, the reason that Congress passed the ATS,[94] and it might require the exercise rather than the rejection of jurisdiction.[95] Indeed, some foreign sovereigns have so requested. In *Sarei v. Rio Tinto*, a foreign-cubed matter which concerned allegations of aiding and abetting torture, the Papua New Guinea Government assented to the exercise of ATS jurisdiction[96] after first contesting it.[97] The Bolivian Government behaved similarly in *Mamani v. Berzain*, another foreign-cubed case, concerning alleged extrajudicial killings committed by former Bolivian government officials against political protestors.[98] Courts should not, then, assume comity issues in ATS cases, even those with foreign-cubed claims.[99]

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91. *Khulumani v. Barclay Nat. Bank*, 504 F.3d 254, 299 (2d Cir. 2007).

92. *Id.*

93. Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel*, 569 U.S. 108 (No. 10-1491); Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, 569 U.S. 108 (No. 10-1491); Brief of the Governments of the United Kingdom and Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of Defendants-Appellees/ Cross-Appellants, *Rio Tinto v. Sarei*, 569 U.S. 945 (2013) (Nos. 09-56381, 02-56256, 02-56390).

94. *See* discussion *infra* at 15-16.

95. 95. *See Jesner*, 138 S. Ct. at 1435 (Sotomayor, J., dissenting).

96. *Sarei*, 671 F.3d at 757 (judgment vacated by *Rio Tinto v. Sarei*, 569 U.S. 945 (2013)).

97. *Id.*

98. *Mamani v. Berzain*, 21 F. Supp. 3d 1353, 1367 (S.D. Fla. 2014).

99. In two foreign-squared cases, with overwhelmingly foreign features, the State where the direct injury occurred also consented to the exercise of ATS jurisdiction. The South African government of Joseph Zuma, who assumed the presidency immediately after Thabo Mbeki, consented to ATS jurisdiction in the expansive apartheid litigation in the United States. Brief for the United States Amicus Curiae Supporting Appellees, at

The exercise of ATS jurisdiction over claims of direct violation of a *jus cogens* norm against a natural person should further alleviate comity issues because the alleged offense is severe, the connection between that offense and the alleged offender is close, and the offense is upon each State. Moreover, the State where the relevant conduct literally occurred might identify less with a defendant that is not a corporation[100] and thus intertwined with the business of the State.

Some scholars believe that in *Kiobel* the Supreme Court abolished universal civil jurisdiction in United States courts and that it did so out of comity concerns.[101] This article contends that courts should not read *Kiobel* as having this effect on all universal claims nor opine that all ATS claims raise forbidding foreign relations issues. Neither in *Kiobel* nor in *RJR Nabisco* did the Court per se prohibit foreign-cubed cases where the plaintiff alleges direct liability for a *jus cogens* violation against a natural person. Moreover, this article suggests that the seriousness of the *jus cogens* claim, its implications at international law, and reduced comity risk warrant an express dictate from the Court if it deems these claims beyond the reach of the ATS. Without this clarity, lower courts should not deny ATS jurisdiction on the ground that the relevant conduct giving rise to the *jus cogens* violation did not occur in the territorial United States. The courts should, in essence, treat these cases the way some courts did before *Kiobel*; they should, when appropriate, allow the exercise of universal civil jurisdiction.

II. PRE-*KIOBEL* CASES

The ATS was enacted in 1789, as a part of the First Judiciary Act of the United States Congress,[102] to protect foreign relations and to hold to account the "enemy of all mankind," the pirate, and anyone who would harbor him.[103] As others have observed, the statute "lay dormant" for

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¶ 3, *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), (Nos. 09-2778-cv, 09-2779-cv, 09-2780-cv, 09-2781-cv, 09-2783-cv, 09-2785-cv, 09-2787-cv, 09-2792-cv, 09-2801-cv, 09-3037-cv.) (Germany, the home State of some of the defendants in this case, continued to oppose the exercise of ATS jurisdiction.) Likewise, the Ecuadorian government also consented to ATS jurisdiction in *Jota v. Texaco Inc.*, which concerned allegations of environmental degradation and related personal injuries by Texaco in Ecuador. 157 F.3d 153, 158 (2d Cir. 1998).

100. This is not at all to say that corporations should not be subject to ATS jurisdiction.

101. *See* discussion *infra* at 21-22.

102. 28 U.S.C. § 1350.

103. *Id.* This statute was spawned, in part, by congressional concern over the possible inability of the United States to provide legal redress to a French ambassador who was assaulted on United States soil and a Dutch ambassador whose domestic servant

roughly 200 years[104] until it was resuscitated by *Filartiga*.[105] The first case of its kind, *Filartiga* accomplished two key things. It clarified that torture is a violation of customary international law[106] and suggested the correctness of recognizing ATS jurisdiction despite that the parties were foreign and the signal event occurred in a foreign State.[107] (Indeed, the *Filartiga* Court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, *regardless of the nationality of the parties*"[108] and that "whenever an alleged torturer is found and served with process by an alien within our borders, Section 1350 provides federal jurisdiction.").[109]

Before *Kiobel* it was not uncommon for plaintiffs, like those in *Filartiga*, to seek ATS jurisdiction premised on direct liability claims against natural persons. These claims were generally foreign-cubed, with little to no connection to the territory of the United States. Frequently, they also concerned a *jus cogens* violation. Given the severity of the claim and the model created by *Filartiga*, courts were wont to recognize ATS jurisdiction. In *Abebe-Jira v. Negewo*, for example, the United States Court of Appeals for the Eleventh Circuit upheld the recognition of ATS jurisdiction[110] where the plaintiff, an Ethiopian national, alleged that an Ethiopian government official "tortured and interrogated [her] for several hours."[111] The plaintiff further alleged that this official supervised and "participated directly"[112] in some of the torture, which included whipping her on her legs and back while she was naked and bound.[113] Additionally, she alleged that all of these events occurred in Ethiopia.[114]

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was arrested after a New York official, without privilege, entered the ambassador's home in the United States. As a result of these specific incidents the statute was principally concerned, at its creation, with infringements on the rights of ambassadors and violations of safe conduct, as well as piracy, a signal challenge of the day.

104. Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1774 (2014); *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1637 (2014).

105. *Filartiga*, 630 F.2d 876 (2d Cir. 1980).

106. *Id.* at 884.

107. *Id.* at 878.

108. *Id.* (emphasis added).

109. *Id.*

110. *Abebe-Jira v. Negewo*, 72 F.3d at 846.

111. *Id.* at 845.

112. Id.

113. *Id.*

114. *Id.* at 845-46.

Similarly, in *Mehinovic v. Vuckovic*, the United States District Court for the Northern District of Georgia also recognized jurisdiction where the plaintiffs, Bosnia-Herzegovina nationals, sued a soldier in the Bosnian Serb Army, alleging that the soldier tortured them while they were detained, without charge, at a police station in Bosanski Samac.[115] The court noted that "[the plaintiff] was beaten with batons and then with a baseball bat . . . forced to spread his legs and . . . beaten on his genitals."[116] Additionally, the court observed that the defendant kicked the plaintiff in the face, disfiguring him and "causing him to be unable to eat for 10 days."[117] The court further concluded that ATS jurisdiction was proper because "official torture" violates customary international law.[118] As these two cases show, in this pre-*Kiobel* era, courts were willing to recognize ATS jurisdiction over foreign-cubed claims against a natural person alleging direct liability for a *jus cogens* violation.

During this time, courts were also willing to recognize ATS jurisdiction over a claim that alleged indirect liability for a *jus cogens* breach, such as torture. In *In re Estate of Marcos Human Rights Litigation*, the United States Court of Appeals for the Ninth Circuit deemed ATS jurisdiction appropriate where the plaintiffs sued the estate of former President of the Philippines, Ferdinand Marcos, and his daughter, Imee Marcos-Manotec, for aiding and abetting the torture and wrongful death of a Philippine national.[119] The plaintiffs alleged that the defendants engaged in this conduct in the Philippines, "pursuant to martial law declared by Marcos."[120] In reaching its decision the court opined that "the prohibition against official torture 'carries with it the force of a *jus cogens* norm,' which 'enjoy[s] the highest status within international law.' "[121]

Similarly, in another suit against the estate of former President Marcos, the Ninth Circuit again concluded that ATS jurisdiction was proper

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115. *Mehinovic*, 198 F. Supp. 2d at 1331-32.

116. *Id.* at 1333.

117. *Id.*

118. *Id.* at 1344-45.

119. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 495, 503 (9th Cir. 1992).

120. *Id.* at 496.

121. *Id.* at 500 (quoting *Siderman*, 965 F.2d at 715) (internal citation omitted). *Siderman* is a seminal case on the formation and authority of *jus cogens* norms. Its discussion about the hierarchy of these norms demonstrates some of the decision's pedagogical value: "[T]he supremacy of *jus cogens* extends over all rules of international law; norms that have attained the status of *jus cogens* 'prevail over and invalidate international agreements and other rules of international law in conflict with them.'" *Siderman*, 965 F.2d at 716 (quoting REST. (THIRD) FOREIGN REL. § 102 cmt. k (1987)).

where the plaintiffs alleged aiding and abetting liability for torture.[122] In reaching its conclusion the court observed that during the Marcos administration "up to 10,000 people in the Philippines were allegedly tortured, summarily executed or disappeared at the hands of military intelligence personnel acting pursuant to martial law declared by Marcos."[123]

Also, in *Xuncax v. Gramajo*, the United States District Court for the District of Massachusetts recognized ATS jurisdiction[124] where nine Guatemalan nationals sued a former official of the Guatemalan government for aiding and abetting torture, summary execution and forced disappearance, amongst other claims.[125] The plaintiffs alleged that all of the subject acts occurred in Guatemala.[126] In reaching its decision the court noted the significance of *Filartiga* and non-derogable norms, stating that the ATS is designed to address acts "perpetrated by *hostis humani generis* ('enemies of all mankind') in contravention of *jus cogens* (peremptory norms of international law)."[127]

Finally, in *Paul v. Avril*, a magistrate for the United States District Court for the Southern District of Florida recognized ATS jurisdiction where six Haitian nationals sued another Haitian national, a military leader, for events that occurred in Haiti.[128] The plaintiffs alleged aiding and abetting liability for torture, amongst other acts—including dragging, beating, withholding medical treatment, and starvation—that occurred in Haiti.[129] They specifically alleged that they were subject to these acts upon defendant's "order, approval, instigation, and knowledge"[130] and that "[n]one of the acts enunciated are alleged to have been committed by [the defendant] himself."[131]

In each of these cases, the courts cited to *Filartiga*, in some way, when analyzing the soundness of ATS jurisdiction. This seminal case's impact on early ATS cases, particularly those that alleged a *jus cogens* violation, was profound. This article suggests the continued viability of this pioneering case, despite the recent narrowing of ATS jurisdiction, because neither *Ki-*

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122. *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

123. *Id.* at 1469.

124. *See Xuncax,* 886 F. Supp. at 189.

125. *Id.* at 169-71.

126. *Id.*

127. *Id.* at 183.

128. *Paul v. Avril,* 812 F. Supp. 207, 209 (S.D. Fla. 1993).

129. *Id.* at 209.

130. *Id.*

131. *Id.*

obel nor *RJR Nabisco* reach claims of direct liability for a *jus cogens* violation against a natural person, the prototypical *Filartiga*-type claim.

III. KIOBEL

Kiobel, like most other ATS cases against a corporation, concerned an allegation of indirect liability for a *jus cogens* violation.[132] The plaintiffs, residents of Nigeria's Ogoniland, alleged that Royal Dutch Petroleum Company, Shell Transport and Trading Company, and Shell Petroleum Development Company of Nigeria (collectively "Shell"), aided and abetted the Nigerian government in committing torture, amongst other atrocities, against them.[133] The Supreme Court affirmed the dismissal of the case by the Second Circuit, concluding that no conduct relevant to the ATS claim occurred in the United States.[134] It specifically stated:

> On these facts, all the relevant conduct took place outside the United States. And 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. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[135]

In reaching this decision the Court did not seem to consider the significance of a claim alleging indirect versus direct liability, a claim alleging a tort against a juridical versus a natural person, or a claim alleging a violation of a non-peremptory versus a peremptory or *jus cogens* norm.[136]

The Court seemed to consider only the character of the claim before it—the foreign-cubed claim—with little to no connection to the United States, alleging the aiding and abetting of a law of nations violation (including *jus cogens*) against a corporation. Pursuant to *Kiobel*, such a claim, it appears, cannot sustain ATS jurisdiction.[137] Both the Court's holding and Justice Breyer's concurring opinion reveal the justices' focus on the scope of the ATS when applied to *corporate* defendants. As noted, at the end of

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132. *See generally Kiobel*, 569 U.S. 108.

133. *Id.*

134. *Id.* at 124. The Second Circuit, however, dismissed the case on the ground that the ATS does not confer jurisdiction over corporations. *See Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 149 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). *Jesner*, of course, affirms the view that the ATS does not confer jurisdiction over foreign corporations. *See* 138 S. Ct. at 1407.

135. *Kiobel*, 569 U.S. at 125 (citing *Morrison*, 561 U.S. at 264–73).

136. *See generally Kiobel*, 569 U.S. 108.

137. *Id.* at 125.

the opinion, after providing the touch and concern language, the Court stated, "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices [to rebut the presumption against extraterritoriality].

If Congress were to determine otherwise, a statute more specific than the ATS would be required."[138] That these are the last words of the opinion,[139] rather than some broader, more abstract, or theoretical language about the definitive reach of the ATS, furthers the notion that the *Kiobel* holding was largely about the instant facts before the Court—regarding the extraterritorial reach of the statute when corporations are sued pursuant to ATS jurisdiction—and little more.[140] (That is not in the least to say that to the Court the question of United States nexus would be immaterial when the defendant is a natural person).

Because of the specific facts in *Kiobel* and the Court's fact-specific holding, it is unclear whether the holding precludes ATS jurisdiction over a foreign-cubed claim alleging the aiding and abetting of a law of nations violation (whether of a *jus cogens* norm or not) against a natural person. The appropriate effect of *Kiobel* on this kind of claim is not apparent because the only difference between this claim and the kind of claim brought in *Kiobel* is the type of defendant. That said, the *Kiobel* holding significantly focuses on corporations. Consequently, the difference in type of defendant may be a dispositive one. It seems far clearer, though, that *Kiobel* did not preclude ATS jurisdiction over the foreign-cubed claim where the plaintiff alleges direct liability for a *jus cogens* violation against a natural person.

In *Kiobel*, the plaintiffs, Nigerian nationals, alleged that Shell should be held liable for torture and crimes against humanity, amongst other claims, because it "*provid[ed]* the Nigerian forces with food, transportation, and compensation, as well as . . . *allow[ed]* the Nigerian military to use [Shell's] property as a staging ground for attacks."[141] In virtually every way the Court seemed compelled by the notion of distance in these facts: (1)

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138. *Id.*

139. *Id.*

140. Some of Justice Breyer's language reinforces the conclusion that the *Kiobel* holding principally concerned corporate defendants. He stated:

> Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction . . . it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind."

Id. at 140 (Breyer, J., concurring in judgment) (citations omitted).

141. *Id.* at 113-114 (emphasis added).

distance of the defendants to the plaintiffs' harm; (2) distance of the plaintiffs' injury to the forum State; and (3) distance of the plaintiffs themselves to the forum. These features, arguably, would not be present with the claim of direct liability for a *jus cogens* violation against a natural person.

First, because the plaintiff would be alleging direct liability for the violation, there would be no distance between the defendant and the plaintiff's harm. Second, because the alleged harm would be a *jus cogens* violation, it would be considered an offense against every State.[142] Third, because the alleged harm would be a *jus cogens* violation, every State has an interest in prosecuting the perpetrator regardless of the nationality of the plaintiff. Moreover, as shown, pre-*Kiobel*, an allegation of a *jus cogens* violation, for some courts, was a legal show-stopper given that such an offense is considered among the most egregious known to humankind and that, as such, international law authorizes every State to confer jurisdiction—indisputably criminal and theoretically civil[143]—over the alleged offender. Accordingly, there is nothing in *Kiobel* that should prevent this result today when the claim alleges direct liability against a natural person for a *jus cogens* violation.[144] *Kiobel* simply did not speak to these allegations. Regardless, these allegations, by definition, touch and concern every State given the nature of the *jus cogens* norm and the significance of its breach at international law.[145] Many courts, however, have concluded that the *Kiobel* holding commands one outcome if the claim at issue is foreign-cubed, regardless of any different treatment warranted by the class of the defendant, the type of harm, or the nature of the liability. (In his *Kiobel* concurrence, Justice Breyer noted the relevance of the distinction between the categories of liability when concluding that the facts of *Kiobel* were insufficient for a finding of ATS jurisdiction, observing that "the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others . . . to do so.").[146]

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142. *Siderman*, 965 F.2d at 715 ("In the words of the International Court of Justice, these norms, which include 'principles and rules concerning the basic human rights of the human person,' are the concern of all states; 'they are obligations *erga omnes*.'") (quoting The Barcelona Traction, Light & Power Co. (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 3, 32 (Feb. 5)).

143. *Kadic*, 70 F.3d at 240.

144. This argument also likely applies to the juridical person defendant.

145. *See* Colangelo, *supra* note 74, at 1327 ("Indeed . . . the exercise of universal jurisdiction is not really extraterritorial; rather, it is the decentralized enforcement by domestic courts of an international law that covers the globe.") (citation omitted).

146. *Kiobel*, 569 U.S. at 140 (Breyer, J., concurring in judgment).

IV. POST-KIOBEL CASES

After *Kiobel* was decided many scholars pronounced the death of universal jurisdiction pursuant to the ATS. Professor Wallach stated that the case "brought to an end the thirty-year experiment lower federal courts had been conducting with universal civil jurisdiction under the ATS"[147] and that "*Kiobel* leaves no doubt that courts cannot apply federal law to claims under the ATS unless there is a sufficiently strong connection between the United States and the conduct forming the basis for the alleged torts."[148] Similarly, Professor Ku asserted that "both the opinion for the Court by Chief Justice John Roberts and the main concurring opinion by Justice Stephen Breyer refused to interpret the ATS as authorizing universal jurisdiction."[149] Additionally, Professor Altholtz said that "[i]n *Kiobel*, the Supreme Court majority rejected [the idea that the ATS provided universal jurisdiction] and narrowed U.S. court jurisdiction to suits that 'touch and concern' U.S. interests."[150] Professor Kontorovich also suggested that the "retrenchment"[151] reflected in *Kiobel* was predictable given international law trends[152] and opined that "*Kiobel* is the next major step in a broad disengagement from [universal jurisdiction] by leading Western nations."[153]

However, others considered where the ATS might still have capacity to vindicate human rights abuses. Professor Stephens asserted that Justice Breyer's opinion—offering various ways that an ATS claim could touch and concern the United States—might suggest a way "forward."[154] She also observed that "[t]he Supreme Court's narrow holding in *Kiobel* should not bar claims against U.S. corporations or claims against foreign corporations

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147. 147. David Wallach, *The Irrationality of Universal Civil Jurisdiction*, 46 GEO. J. INT'L L. 803, 828 (2015).

148. *Id.*

149. Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT'L L. 835, 835 (2013).

150. Roxana Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CALIF. L. REV. 1495, 1498 (2014).

151. Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1673 (2014).

152. *Id.* (observing that "[u]niversal jurisdiction, which had seemed an ascendant law doctrine in the 1990s, has in the past decade encountered a significant backlash, leading ultimately to its destabilization and retrenchment").

153. *Id.*

154. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1541 (2014) ("Viewed as an elaboration of the issues raised by Justice Kennedy, Justice Breyer's concurring opinion could inform application of a *Sosa-Kiobel* ATS standard going forward.").

with substantial ties to the United States."[155] Additionally, Professors Curran and Sloss proposed legislation to resolve the issues posed by ATS jurisdiction but also to provide access to a remedy for those who need the jurisdiction most.[156]

The debate about the reach of the statute continues. In its midst are courts strictly circumscribing this reach. Few of those courts consider the significance of ATS jurisdiction premised on allegations of direct liability for a *jus cogens* violation against a natural person. Many dismiss forthwith ATS claims with these features, according them no legal value whatsoever. Quite the contrary, to a substantial degree, the cases post-*Kiobel* (and post-*RJR Nabisco*) demonstrate that many courts are applying a test to ATS claims that facially precludes appropriate consideration of *Filartiga*-type claims. When confronted with the question of ATS propriety, these courts apply *Kiobel*'s touch and concern test. In the doing, they determine whether any relevant conduct[157] occurred in the territorial United States. If it did, they allow ATS jurisdiction. If it did not, they disallow it. Many courts take this approach—privileging territoriality—without any express requirement in *Kiobel* to do so. These courts do not consider liability, defendant, nor norm differentials.

In *Warfaa v. Ali*, the United States Court of Appeals for the Fourth Circuit provides the paradigmatic example of a court's improvident dismissal of an ATS claim pursuant to the theory that relevant conduct must occur in the territorial United States to sustain ATS jurisdiction.[158] A foreign-cubed case, *Warfaa* concerned an allegation of direct liability for torture against a natural person. Indeed, the plaintiff and the defendant were Somali nationals and the events that gave rise to the plaintiff's injury occurred in Somalia.[159] The court, thus, affirmed the district court's dismissal of this claim on the ground that the claim did not "touch[ ] and concern[ ]" the United States sufficient to rebut the presumption against extraterritoriality.[160]

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155. Beth Stephens, *Extraterritoriality and Human Rights After Kiobel*, 28 MD. J. INT'L L. 256, 274 (2013).

156. Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation After Kiobel*, 107 AM. J. INT'L L. 858, 862 (2013) ("We propose a statutory private right of action to enable genocide victims to file civil tort actions against any perpetrators whom prosecutors have charged with genocide or related offenses.").

157. Many courts have determined the presence or absence of relevant conduct without inquiry into the focus of the ATS. Other courts have attempted to define the focus as safely and predictably as possible.

158. *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016).

159. *Id.* at 656.

160. *Id.* at 661.

The court reflexively applied *Kiobel* in reaching this conclusion.[161] In the process, it used a version of the touch and concern test not articulated by the Supreme Court in *Kiobel*. The court stated that "[a] plaintiff may rebut the presumption in certain narrow circumstances: when extensive United States *contacts* are present and the alleged conduct bears such a strong and direct connection to the United States that it falls within *Kiobel*'s limited 'touch and concern language.' "[162] In *Kiobel* the Supreme Court never spoke of "contacts" when speaking about this test. The use of that word suggests that the Court requires an actual, literal, physical connection to the United States for the test to be met. If this is what the Court meant, it did not say it in *Kiobel* (Admittedly, there is now a stronger argument to make that *RJR Nabisco* requires this test but this article still contends otherwise.). The significance of the Fourth Circuit's misunderstanding of the touch and concern test is that this misapprehension prevented the court from seeing other ways that the claim implicated the United States.

As discussed above, a *jus cogens* violation affects every State. The *Warfaa* Court, though, failed to consider the significance of the *jus cogens* claim before it. The plaintiff sought ATS jurisdiction pursuant to his allegation of a direct commission of such a violation.[163] To wit, the plaintiff alleged that an officer in the Somali government, along with others, tortured him by beating him multiple times,[164] shooting him in the wrist and leg,[165] and then leaving him for dead.[166] That the alleged torture occurred in Somalia[167] should not have resulted in summary dismissal of his ATS claim given that a *jus cogens* violation anywhere is as good as a *jus cogens* violation everywhere. That is the nature of the tort. Accordingly, the court should have considered the import of the plaintiff's *jus cogens* claim within the context of the plaintiff's request for ATS jurisdiction.[168] The court

161. *Id.* at 662-63 (Gregory, J., dissenting). The dissent, however, correctly observed that the instant case was distinguishable from *Kiobel* because there was a safe harbor issue and the matter concerned a natural person and not a corporation. It additionally noted that "[b]lithely relying on the fact that the human rights abuses occurred abroad ignores the myriad ways in which this claim touches and concerns the territory of the United States." *Id.* at 663.

162. *Id.* at 660 (emphasis added).

163. *Id.* at 656-57. As well, the court did not consider prevention of safe harbor as one of the bases for recognizing ATS jurisdiction.

164. *Id.* at 656.

165. *Id.*

166. *Id.*

167. *Id.* at 660-61.

168. *See also id.* at 662 (Gregory, J., dissenting) (observing that "no circuit court has decided a post-*Kiobel* ATS case premised on principal liability brought against an individual defendant who has sought safe haven in the United States, a key difference

should have also considered the implications of the plaintiff's allegation of direct (rather than indirect) liability against a natural (rather than juridical) person.

Similarly, in *Jara v. Nunez*, the United States District Court for the Middle District of Florida dismissed the plaintiffs' claims on the ground that all of the relevant conduct occurred abroad.[169] There, the plaintiff sued a member of General Augusto Pinochet's army for torture and extrajudicial killing.[170] According to the complaint, "Defendant ordered his subordinates to torture [the plaintiff's decedent] and then '*personally subjected* [him] to the game of Russian roulette, putting [him] in fear of his life' and ultimately killing him."[171] The decedent and the defendant were Chilean nationals[172] and the shooting occurred in Chile.[173] The court did not consider the significance of the plaintiff's claim of direct liability against a natural person for a *jus cogens* violation.

Likewise, in *Sikhs for Justice v. Nath*, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the claim brought pursuant to the ATS because all of the relevant conduct occurred overseas.[174] There, the plaintiffs, Indian nationals, alleged that another Indian national, amongst others, committed grave human rights abuses against them, all in the territory of India.[175] The court agreed with the rejection of ATS jurisdiction despite the plaintiffs' claim of direct liability for a *jus cogens* violation.[176]

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the majority does not address" and that "the analysis and relevant considerations may differ where the defendant is a natural person").

169. *Jara v. Nunez*, No. 6:13-cv-1426-Orl-378GJK, 2015 WL 12852354, at *4, (M.D. Fla. April 14, 2015) ("*Kiobel* forecloses all of Plaintiffs' ATS claims because the tortious conduct took place entirely outside the United States. Though *Kiobel* provides for some possible extraterritorial application of the ATS, the wholly foreign conduct here . . . simply does not 'touch and concern' the United States with such force as to overcome the presumption against extraterritoriality.") (citations omitted).

170. *Id.*

171. *Id.* at *2 (emphasis in original).

172. *Id.* at *3-*4. However, by the time that the court decided the question of ATS jurisdiction, the defendant was a United States citizen.

173. *Id.* at *4.

174. *Sikhs for Just. Inc. v. Nath*, 596 Fed. Appx. 7, 9 (2d Cir. 2014).

175. *See generally Sikhs for Just. Inc.*, 596 Fed. Appx. 7.

176. *Id.* at 9. Additionally, in *Fotso v. Cameroon*, No. 6:12 CV 1415-TC. 2013 WL 3006338, *7, (D. Or. June 11, 2013), the United States District Court for the District of Oregon, dismissed a plaintiff's torture claim against a public official, brought pursuant to the ATS. The parties were all Cameroon nationals and the underlying conduct occurred in Cameroon. However, the plaintiff alleged a direct *jus cogens* offense against a natural person. This notwithstanding, the court dismissed the matter with great

These cases show that, when resolving the question of ATS jurisdiction, some courts do not consider the import of claims that allege a *jus cogens* violation, direct liability, or a natural person offender. Four years after deciding *Kiobel*, the Court decided *RJR Nabisco*, which, among other things, regarded the general approach that a court should follow when considering the extraterritorial application of a statute.[177] The decision, however, offers little, if anything, to clarify the substantive and geographic reach of the ATS.

V. RJR NABISCO

The European Community (EC) sued RJR Nabisco, in a United States court, under the Racketeer Influenced Corrupt Organizations Act (RICO), on the ground that the company had engaged in a complex money laundering scheme involving cigarette sales in the European Union (EU).[178] The EC sought to apply RICO to alleged conduct that occurred in the EU.[179] In determining whether the statute applied extraterritorially, the United States Supreme Court concluded that it must apply the following two-step framework:

> At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[180]

The Court cited its holding in *Kiobel* when it enunciated this scheme.[181] The significance of the framework to ATS cases, however, is

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dispatch, noting that the presumption against extraterritoriality applied and that "[a]ccordingly, plaintiff concedes his claims against the individual defendants."

177. *RJR Nabisco*, 136 S. Ct. at 2090.

178. *Id.* at 2098.

179. *Id.* at 2097-98.

180. *Id.* at 2101.

181. *Id.*

unclear but potentially substantial. *Kiobel* disposed of any ambiguity regarding whether the plain language of the statute evidences congressional intent that it apply extraterritorially.[182] According to the Court, it does not. So, the issue for ATS claims is not Step 1 but rather Step 2—and Step 2 offers little to direct the court seized with a claim brought pursuant to the statute. Because the Supreme Court has yet to identify the "focus" of the ATS or the requisite character, kind, and quantum of conduct that is relevant to that focus, the language in Step 2 suggests nothing regarding the conduct that might pass jurisdictional muster. Moreover, Step 2 is subject to more than one interpretation. It might mean that ATS jurisdiction is proper if relevant conduct occurred in the United States and nowhere else; or, that ATS jurisdiction is proper if relevant conduct occurred in the United States despite that it might have also occurred in a foreign State; or, ATS jurisdiction is not proper if relevant conduct occurred in a foreign State even if relevant conduct also occurred in the United States. Further, it is anyone's guess what any of these interpretations mean to the foreign-cubed *jus cogens* claim alleging direct liability against a natural person.

There are additional key questions about the reach of the ATS that neither *Kiobel* nor *RJR Nabisco* answer. Both Justice Kennedy's and Justice Breyer's concurrences in *Kiobel* speak to the possibility of ATS jurisdiction being appropriate under circumstances not considered by the Court in the majority opinion. Importantly, their opinions suggest that the emphasis that the *Kiobel* majority opinion placed on relevant conduct in the United States might not be appropriate for all ATS cases. In his concurrence, Justice Kennedy observed that the Court left "open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute"[183] and that "[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases [not] covered . . . by the reasoning and holding of today's case."[184] He further opined that in those cases "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[185] Similarly, in his concurrence, Justice Breyer stated that the *Kiobel* opinion did not answer the requisite question of precisely when the ATS can be applied extraterritorially and that, instead, "[i]t leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome.' "[186]

182. *Kiobel*, 569 U.S. at 117.

183. *Id.* at 125 (Kennedy, J., concurring).

184. *Id.*

185. *Id.*

186. *Id.* at 131-32.

Justice Kennedy, however, joined the majority opinion in *RJR Nabisco*. Given his observations in *Kiobel*, revealing an understanding about the nuances in ATS cases, it is difficult to see how he would agree to a reading of the ATS that would completely bar jurisdiction unless relevant conduct occurred in the territorial United States, as one reading of the two-step framework would require.[187] Perhaps more plausible is that Justice Kennedy does not read Step 2 in the *RJR Nabisco* framework as strictly as others might.[188] More specifically, Justice Kennedy's presence in the *RJR Nabisco* Majority might mean that the Court did not intend for Step 2 to preclude jurisdiction over *every* claim brought pursuant to the ATS that lacks relevant conduct in the territorial United States.

This article suggests that neither *Kiobel* nor *RJR Nabisco* strictly foreclose ATS jurisdiction premised on direct liability of a natural person for a *jus cogens* claim. However, if courts read Step 2 to require relevant conduct in the territorial United States, then Step 2 will foreclose this kind of claim.

VI. POST-RJR NABISCO CASES

Because *RJR Nabisco* was fairly recently decided, very few commentators to date have published about its significance to ATS cases. In one of the few works that engage this question, Professor Swaine underscores that *RJR Nabisco* evidences the Court's increased focus on "territoriality"—as opposed to extraterritoriality—when determining the reach of a U.S. statute.[189] Similarly, in his work, Professor Gevurtz observes that, with *RJR Nabisco*, the Court made it more difficult to seek redress "under federal law for injuries suffered abroad."[190] Certainly these are facts about the case with which ATS plaintiffs must contend.

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187. *See id.* at 125 (Kennedy, J., concurring). His *Kiobel* concurrence was brief and somewhat cryptic so what, if anything, it, in fact, presaged is certainly subject to another interpretation.

188. *See, e.g., Adhikari*, 845 F.3d 184.

189. Edward T. Swaine, *Kiobel and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere*, 69 OKLA. L. REV. 23, 25 (2016) ("Unsurprisingly, given its title, this Article puts a heavy emphasis on territoriality—not, it should be stressed, as a matter of normative preference, but purely as a reflection of the Court's recent cases. It is accordingly inconsistent with some of the more expansive readings of the ATS, though it stops short of Justice Alito's prescription.").

190. Franklin A. Gevurtz, *Building A Wall Against Private Actions for Overseas Injuries: The Impact of RJR Nabisco v. European Community*, 23 U.C. DAVIS J. INT'L L. & POL'Y 1, 2 (2016) ("In perhaps another skirmish between the forces of globalization and those who want to fence the world out, Justice Alito in *RJR Nabisco v. European Community* . . . raised the presumption against extraterritoriality into a

In the two cases post-*RJR Nabisco* that, to date, deal substantively with the ATS, *Adhikari v. Kellogg, Brown & Root*,[191] and *Salim v. Mitchell*,[192] the courts indeed privilege territoriality. In *Adhikari*,[193] the plaintiffs alleged that the defendant was directly liable for forced labor and human trafficking in Iraq.[194] There, the United States Court of Appeals for the Fifth Circuit applied *RJR Nabisco*'s two-step framework. It opined that, at Step 2, "[i]f we conclude that the record is devoid of any domestic activity relevant to Plaintiffs' claims, our analysis is complete: as in *Kiobel*, the presumption against extraterritoriality bars the action."[195] But, as stated above, Step 2 of the framework lends itself to more than one reading and this court's is just one. Nonetheless, compelled by a strict interpretation of *RJR Nabisco*, the court looked for U.S.-based conduct that reached the level of "relevant" and, finding none,[196] affirmed the district court's dismissal of the ATS claim (this, despite the defendant's status as a United States corporation). Although the court acknowledged that the plaintiffs alleged "direct liability for the tort of human trafficking and forced labor"[197]—which some authorities view as *jus cogens* violations[198]—it accorded no legal significance to the heinousness of the alleged offenses or the alleged direct commission of them by the defendant.

By contrast, the dissent observed that Step 2 of the framework "leaves open the questions of how to interpret the focus, and how courts should proceed when there is potentially relevant conduct both within and outside the United States."[199] The dissent also recognized the significance of "the nature of the defendant's liability (*direct or indirect*)[200] as well as the signif-

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substantially greater barrier against those seeking relief under federal law for injuries suffered abroad.").

191. *Adhikari*, 845 F.3d 184.

192. *Salim*, 268 F. Supp. 3d 1132 (2017).

193. *See generally Adhikari*, 845 F.3d 184.

194. *Id.* at 192.

195. *Id.* at 195 (citing *Kiobel*, 569 U.S. at 108 (2013)).

196. *See generally Adhikari*, 845 F.3d 184.

197. *Id.* at 197.

198. *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 686 (S.D. Tex. 2009) ("It is apparent from the findings of both judicial and academic authorities, discussed later in this Memorandum and Order, that human trafficking and forced labor, whether committed by states or private individuals, have been recognized as violations of *jus cogens* norms, and therefore fall within the jurisdictional grant of the ATS."); *Doe v. Unocal*, 395 F.3d 932, 945 (9th Cir. 2002), *on reh'g en banc sub nom. Doe v. Unocal*, 403 F.3d 708 (9th Cir. 2005) ("[F]orced labor is so widely condemned that it has achieved the status of a *jus cogens* violation.").

199. *Adhikari*, 845 F.3d at 208 (Graves, J., dissenting).

200. *Id.* (emphasis in original).

icance of the "type of violation alleged,"[201] in determining the propriety of ATS jurisdiction. It deemed these inquiries vital, "above and beyond necessary allegations of relevant conduct occurring in the United States."[202]

In *Salim*, the United States District Court for the Eastern District of Washington, like the Fifth Circuit in *Adhikari*, focused on territoriality and recognized ATS jurisdiction in the matter before it. There, the court considered allegations of direct liability against natural persons for torture. The plaintiffs specifically alleged that defendants "designed, implemented, and personally administered an experimental torture program for the U.S. Central Intelligence Agency,"[203] which caused the plaintiffs' extreme injuries. The court concluded that the "focus test" did not apply but that, even if it did, the allegations would satisfy.[204] The court did apply *Kiobel*'s touch and concern test, finding it met given that the defendants, two psychologists, were U.S. nationals and conducted much of their work on U.S. territory.[205]

While each of these decisions concerned allegations of torture, neither meaningfully acknowledged that torture is a *jus cogens* violation. As a consequence, neither determined the legal significance of this fact. Instead, the court in *Adhikari* considered the location of relevant conduct strictly, as many courts did after *Kiobel*, irrespective of the gravity of the inquiry concerned, and, accordingly, did not deem ATS jurisdiction appropriate because no "relevant conduct" occurred in the territorial United States. The court in *Salim* deeply contemplated the seriousness of the claims of torture—albeit without evaluating them within the context of *jus cogens*. The court sustained ATS jurisdiction because the defendants were U.S. nationals and engaged in conduct on U.S. territory. Each of these courts, though, had an opportunity to discuss the significance of a *jus cogens* violation and the directness of the claim of liability and neither pursued it.

VII. FOREIGN OFFICIAL IMMUNITY CASES

There is a line of cases, however, that fully contemplates the allegation of a *jus cogens* violation. These cases hold that even an allegation of indirect liability for this breach is so significant that it can strip a foreign offi-

201. *Id.*

202. *Id.*

203. *Salim*, 268 F. Supp. 3d at 1160. ("As to ATS jurisdiction, the legal landscape is evolving, but this court finds the touch and concern test of *Kiobel* and *Doe I v. Nestle*, 766 F.3d 1013 (9th Cir. 2014), to be the appropriate and controlling standard.").

204. *Id.* at 1161 ("The court does not agree with the formulation of the 'focus test' as presented by the Fifth and Second Circuit cases . . . but if required to utilize the focus inquiry, the court would find it met.").

205. *See id.* at 1153.

cial of prosecutorial immunity. In *Yousuf v. Samantar*, Somali nationals sued a former senior official of the Somali government for torture, extrajudicial killing, and other acts, and sought jurisdiction pursuant to the ATS.[206] The plaintiffs alleged that they were subjected to the acts "by government agents under the command and control of [the defendant]."[207] They did not allege that the defendant directly committed these acts. The defendant contended that he was protected by common law immunities[208] because any actions that formed the basis of the plaintiffs' claim "were taken in the course and scope of his official duties."[209]

The United States Court of Appeals for the Fourth Circuit disagreed, concluding that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."[210] The court's decision to deny immunity was led by the gravity of the alleged offense, irrespective of the foreign-cubedness of the claim or the indirectness of the liability. Accordingly, there would seem to be nothing about *Kiobel* or *RJR Nabisco* that would alter this case outcome.

Similarly, in *Cabiri v. Assasie-Gyimah*, the plaintiff, a Ghanaian national, sued a Ghanaian government official in the United States District Court for the Southern District of New York, seeking jurisdiction under the ATS.[211] The plaintiff alleged that he was imprisoned for one year on suspicion of planning a government overthrow and that, during that time, he was tortured while the defendant interrogated him.[212] Upon the defendant's motion to dismiss under the Foreign Sovereign Immunities Act (FSIA), the court opined that "the FSIA 'will not shield an official who acts beyond the scope of his authority,'"[213] and that "the alleged acts of torture committed by [the defendant] fall beyond the scope of his authority."[214] The court then

206. *Yousuf v. Samantar*, 699 F.3d 763, 766 (4th Cir. 2012), *cert. denied*, 571 U.S. 1156 (Jan. 13, 2014).

207. *Id.*

208. *Id.*

209. *Id.* at 767.

210. *Id.* at 777.

211. *Cabiri v. Assasie-Gyimal*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

212. *Id.* at 1191. *See* Weatherall, *supra* note 74, at 1153 ("Although such conduct is often taken under 'color of law,' violations of *jus cogens* fall outside the official capacity of State officials and are consequently not attributable to the State, depriving that official of immunity *ratione materiae* [State immunity for official acts].").

213. *Id.* at 1197 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990)).

214. *Id.* at 1198.

determined that the plaintiff had jurisdiction pursuant to the ATS.[215] This rationale, again, should hold under existing Supreme Court precedent.

Additionally, in *In re Estate of Marcos*, the Ninth Circuit held that foreign sovereign immunity would not shield the estate from *jus cogens* claims brought pursuant to the ATS.[216] The court deemed *jus cogens* violations beyond the scope of authority of a government official and accordingly not protected by foreign sovereign immunity.[217]

Conversely, in *Dogan v. Barak*, the court opted not to follow cases that denied immunity to a foreign official accused of a *jus cogens* violation, despite that it "agree[d] in principle that immunity doctrines should not shield persons who violate *jus cogens* norms."[218] The court was compelled by what it saw as the larger goal of preventing the "eviscerati[on] [of] the immunity of all foreign officials."[219] Despite this outcome, the court did evaluate the significance of the *jus cogens* claim,[220] where the plaintiffs accused a former Israeli foreign minister of liability for causing torture and extrajudicial killing.[221]

To determine whether this official was entitled to immunity despite this allegation, the court performed a balancing test. It found that the need to protect the goal of immunity (e.g., disallowing suits over State conduct so that States are free to act) outweighed the need to protect the goal of the international law community (e.g., vindicate a bedrock norm designed to hold accountable those responsible for the gravest human rights abuses). The court's decision was aided substantially by a formal statement from the Israeli Government asserting that the defendant was acting within the scope of his duties when the subject events occurred[222] and a Suggestion of Immunity from the United States Government, also supporting the defendant.[223] The statement from the Israeli Government served to convince the court that the defendant was not at any relevant time engaged in *ultra vires* conduct, altogether challenging the plaintiffs' argument that the defendant's conduct violated an international norm.

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215. *Id.*

216. *Marcos*, 25 F.3d at 1472.

217. *Id.*

218. *Dogan v. Barak*, No. 2:15 CV-08130-ODW(GSJx) 2016 WL 6024416 at *10 (citing *Yousuf*, 699 F.3d at 775-77).

219. *Id.*

220. *Id.*

221. *See generally Dogan*, 2016 WL 6024416.

222. *Id.* at *11.

223. *Id.* at *10. The United States Government argued that the court should not recognize a *jus cogens* exception to foreign official immunity.

Despite the differences between these decisions, all of them show that some courts, in some factual settings, pause to consider the significance of the *jus cogens* claim before them. In *Yousuf*, *Cabiri*, and *In re Estate of Marcos*, at least, the courts took the *jus cogens* claims so seriously that they deemed them preemptive of the defendants' immunity. When considering the propriety of ATS jurisdiction over claims of direct liability for a *jus cogens* violation against a natural person, courts should certainly evaluate the legal significance of that violation. International law demands this treatment given that a *jus cogens* norm endeavors to protect individuals from the most heinous conduct; it reigns supreme over other international law norms, offends every State and requires every State's attention. *Kiobel* and *RJR Nabisco* do not command a different response. Neither case concerned these *Filartiga*-type facts. Moreover, a *jus cogens* violation, because of its abhorrence and function at international law, touches and concerns every nation. Conduct that is relevant for one State should be relevant for another.

The United States is, irrespective of *Kiobel* and *RJR Nabisco*, subject to international law. There is no opt-out option for any State from the category of international law known as *jus cogens*. The question, though, is whether these two cases allow the vindication of this norm through the ATS. This article contends that they do.

VIII. RECOMMENDATIONS

The *jus cogens* norm is *sui generis*. Given the seriousness of its violation, as well as the guidance of *Kiobel* and *RJR Nabisco*, this article recommends that when confronted with a request for ATS jurisdiction over a claim alleging direct liability for a *jus cogens* violation against a natural person, courts do the following[224]:

(1) assume that the obvious is the focus of the ATS jurisdiction over a claim by a foreign national alleging a tort in violation of international law;[225]
(2) determine whether violation of the *jus cogens* norm in question falls within the focus;
(3) if it does not, end the inquiry;
(4) if it does, determine the conduct relevant to that focus;

224. Focusing on *jus cogens* breaches imposes a limit on the kind and quantity of claims subject to the treatment proposed.

225. *See Adhikari*, 845 F.3d at 197 ("[T]he focus is on conduct that violates international law, which the ATS seeks to regulate by giving federal courts jurisdiction over such claims."); *Mustafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014) ("[T]he focus of the ATS is on conduct and the location of that conduct.").

(5) recognize that no territorial limit applies to conduct relevant to a *jus cogens* violation;
(6) recognize that a *jus cogens* violation touches and concerns every State, including the United States;
(6) consider the significance of an allegation of a direct violation of a *jus cogens* norm;[226]
(8) consider the significance of such an allegation against a natural person;[227] and
(9) consider comity concerns.[228]

Such an approach might add clarity to an opaque jurisdictional process and allow more detailed consideration of the kinds of claims that gave rise to the ATS in the first place, e.g., international law violations as heinous as piracy.

CONCLUSION

Neither *Kiobel* nor *RJR Nabisco* expressly prohibit a *Filartiga*-type claim and so, barring relevant Supreme Court or congressional action, courts should not reflexively dismiss these claims on the ground that no conduct relevant to the focus of the ATS occurred in the United States. In evaluating what remains of ATS jurisdiction after these two decisions, it is important to remember some key realities. There is nothing different about the ATS itself from *Filartiga* to today. There is nothing different about the scope of the law of nations violations recognized under the statute. Likewise, there is nothing different about the meaning of a *jus cogens* violation. Finally, there is nothing in *Kiobel* and *RJR Nabisco* that expressly addresses *Filartiga*-type facts, so the *Filartiga*-type claim should not necessarily be subject to the same fate as the *Kiobel*-type claim.

Pre-*Kiobel* courts were compelled by allegations of direct liability for a *jus cogens* violation. Despite *Kiobel*'s and *RJR Nabisco*'s circumscription of some ATS claims, as noted above, that circumscription does not, *ipso facto*, preclude jurisdiction over all ATS claims. Given a claim of direct

226. Perhaps such an allegation would suggest a degree of culpability that warrants immediate judicial attention. That is not at all to say that facts alleging aiding and abetting liability, particularly against a corporation, cannot be egregious and reflect a culpability as profound as the most heinous claim of direct liability for a *jus cogens* violation against a natural person.

227. Perhaps such an allegation would allow the court to hold to account the very person responsible for committing the *jus cogens* violation.

228. Perhaps there would be limited foreign affairs implications to an exercise of universal jurisdiction if the defendant is a natural person and sued for a *jus cogens* violation. Quite unlike a corporation, a natural person is not likely to be so closely intertwined with a State despite that person's nationality.

liability for a *jus cogens* violation against a natural person, the nationality of the parties and the location of the offending conduct should, even under *Kiobel* and *RJR Nabisco*, become much less relevant. The fact of a *jus cogens* violation presupposes the offense of every State. By this logic such an offense should not offend comity (the main reason that the Supreme Court restricted ATS jurisdiction in the first place) or at least not in a way that the international community is unprepared to countenance.

Courts should in no way, of course, assume that *Kiobel* and *RJR Nabisco* mean nothing for some types of claims brought pursuant to the ATS. *Kiobel* involved a claim of indirect liability for a *jus cogens* violation against a corporation. There, the Court was clearly concerned with the effect of the extraterritorial application of the ATS on corporations and not natural persons. The *Kiobel* holding, then, should be viewed in the light of the *Kiobel* facts and applied accordingly. *RJR Nabisco* concerned a RICO claim against a corporation. It did not concern a *jus cogens* claim against a natural person. Courts should also limit its utility pursuant to its facts. Courts should not assume that either of these cases poses an insurmountable barrier to foreign-cubed claims. As the foregoing discussion attempts to demonstrate, the ATS continues to be viable for some of these claims—including the kind perhaps brought by the Yazidis.