Holding Corporations to Account. Crafting ATS suits in the UK

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The traditional province of international law is in the regulation of relations between States. However, with the tribunals at Nuremberg and Tokyo established at the end of the second world war, for the first time it became possible for individuals to incur criminal liability in respect of violation of a core of norms of customary international law, such as the prohibitions on war crimes and crimes against humanity. This process has continued with the UN’s establishment in 1993 and 1994 of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’) respectively, culminating with the establishment of the International Criminal Court in 2002. Although there have been no comparable institutions with power to award civil compensation for violations of the norms covered by the international criminal tribunals, the US courts have developed a jurisprudence on civil liability of individuals for violating norms of customary international law, either directly, or as aiders and abetters. The gateway for this development has been the Alien Tort Statute 1789. The contours of this nascent international civil law have been developed in the US federal courts by transplanting the principles under which international law imposes criminal liability on individuals into the field of civil liability in tort. Until recently, it was assumed that corporations could incur civil liability under the ATS. In September 2010 in Kiobel v. Royal Dutch Petroleum Co, the Second Circuit decided that this is not the case. Civil liability under customary international law is evidenced by the sources which established criminal liability and none of the international criminal tribunals has ever been given jurisdiction over legal persons. However, subsequent decisions in other Circuits have affirmed that corporations can incur liability under the ATS. The question was referred to the US Supreme Court who gave judgment on 13 April 2013. However, the Supreme Court said nothing about this issue, and, instead, decided the claim on
the basis of the territorial limits of jurisdiction under the ATS. This paper will analyse the development of ATS law on the civil liability of corporations under customary international law and will then consider whether international law can ground a civil cause of action before the courts of the United Kingdom so as to provide a means of holding multinational corporations to account for their involvement in human rights abuses.

Foreign Investment and resource development in the developing world is often a focus for human rights abuses by States. Two notorious examples from the mid-1990s are the abuses committed by the Burmese military while providing security for the Yadana pipeline and the suppression of the protests against Shell’s activities in Ogoniland culminating in the execution of Ken Saro-Wiwa. Such abuses frequently go hand in hand with allegations of complicity on the part of multinational corporations that are involved in resource extraction in the State in question. In July 2005 Professor John Ruggie was appointed as the Special Representative of the Secretary-General of the UN on the issue of human rights and transnational corporations and other business enterprises. His 2008 report concluded that ‘The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.’¹

¹ A/HRC/8/5. 7 April 2008. Professor Ruggie’s work concluded in 2011 with the endorsement by the UN Human Rights Council on 16 June of his “Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework” which sets out the ‘Protect, Respect, Remedy’ framework to address these governance gaps.
This paper will consider the role of civil suits against corporations in closing this governance gap. Any norm of civil liability under customary international law will have to be developed in national courts, in the absence of any international tribunals with power to award compensation. The primary development in this area has been the voluminous litigation under the Alien Tort Statute of 1789 since the revival of this dormant statute with the 1980 decision of the Second Circuit in *Filartiga v. Pena-Irala.* Since then, the federal courts of the US have been engaged on a judicial experiment in defining the contours of civil liability for violations of international law, although claims based on violations of customary international law have also been brought before the courts of Canada and of England.  

Before considering the nature of the US jurisprudence under the ATS that has emerged over the last thirty years, one should pause to consider why such suits are being brought. Violations of international law will involve tortious conduct. Torture, for example, will constitute trespass to the person. Why, then, do victims of such violations choose to base

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4 Claims based on torture were brought in *Al Adsani v. Kuwait,* fn 94, and *Jones v. Kingdom of Saudi Arabia,* fn 98, but were dismissed on grounds of sovereign immunity. In Ireland in *The Toledo,* (1995) 2 Irish Law Reports Monthly, p 30, a claim was brought by a shipowner against the Irish State in respect of a violation of the norm of customary international law, being the prima facie right of vessels in distress to the have access to a place of refuge in the nearest maritime State in which such facilities were available. On the facts, the claim was unsuccessful because the right of access was not absolute and was modified by countervailing considerations such as the risk of oil pollution or of the vessel’s sinking or hindering navigation should it be admitted into Irish waters.
their suits in the US on violations of customary international law? First, there is the jurisdictional gateway to the federal courts that is given under the ATS where there is a civil action by an alien for a tort committed in violation of the law of nations. For example, in the landmark decision of *Filartiga*, the plaintiff and the defendant were both Paraguayan and therefore the plaintiff would have been unable to sue under the diversity jurisdiction created under 28 USC § 1332. Where the plaintiff is not resident in the US and the claim involves events that took place outside the US, the US courts may decline jurisdiction over the suit.\(^5\) Indeed, many claims against corporations under the ATS have no connection with the US, other than the presence of a subsidiary corporation within the US, enabling the foreign parent corporation to be served with proceedings. This was the case in *Kiobel* which involved Dutch and English corporations being sued by Nigerian plaintiffs in respect of events which took place in Nigeria. Second, it may be easier to resist an application to stay proceedings on grounds of forum non conveniens if the claim is brought under the ATS rather than as an ordinary tort claim.\(^6\) Third, the substantive law of liability is determined by international law, as developed through the jurisprudence of the international criminal tribunals, rather than by reference to the law of the State in which the violations occurred. Fourth, the courts are free

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5 *Doe v. Exxon Mobil Corp* 658 F.Supp.2d 131 (D.D.C. 2009). Non-resident aliens had standing to sue only: (1) where the res is the United States; (2) where the statutory scheme allows suits by non-resident aliens; and (3) where a nonresident alien is seized abroad and transported back to the United States for prosecution. The Circuit Court for District Columbia has recently reversed the dismissal of the non-federal tort claims, holding that prudential standing is to be analysed on a case by case basis based on the zone of interests of the law applicable to the plaintiff’s cause of action, and that no special rule applies to claims by non-resident aliens. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, (C.A.D.C. 2011).

6 This seems to have been the view expressed in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000), although in *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534, (S.D.N.Y., 2001) it was held that ATS claims are to be treated in the same way as any other claims when applying a *forum non conveniens* analysis.
to develop limitation periods other than those applicable in tort actions. For example, in ATS suits, a ten year period of limitation has been applied, by analogy with the limitation period contained in the Torture Victims Protection Act 1991. Finally, there is the greater adverse publicity for a corporation in being held liable for complicity in a breach of customary international law as opposed to incurring liability for a ‘garden variety tort’.

The development of customary international law through ATS suits in the US courts may, however, come to an abrupt halt in the future. On 17 April 2013 the US Supreme Court unanimously held that there was no jurisdiction under the ATS for the claims brought against Shell. The majority held that the question was not whether a proper claim had been stated under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. The majority held that the ATS was subject to a canon of statutory interpretation known as the presumption against extraterritorial application which provides that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none”. To rebut the presumption the ATS would need to evince a “clear indication of extraterritoriality”, which it did not. Although the ATS covered actions by aliens for violations of the law of nations, that did not imply extraterritorial reach, for violations affecting aliens could occur either within or outside the United States. In *Kiobel* all the relevant conduct took place outside the United States. Even where the claims did touch and concern the territory of the United States...

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7 *Papa v. U.S.*, 281 F.3d 1004, (9th Cir. 2002). The ATS itself contains no express limitation period.

8 ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.


10 ibid (slip op., at 16)
States, they had to do so with sufficient force to displace the presumption against extraterritorial application.\footnote{ibid (slip op. at 17–24).} Mere corporate presence would not suffice.

Justice Kennedy concurred but noted that it was proper for the Court “to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute [...]Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.” Justice Breyer agreed with the result but did not invoke the presumption against extraterritoriality.\footnote{The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas. See ante,at 10. That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies.} Instead he would find jurisdiction under the ATS where: (1) the alleged tort occurs on American soil, and (2) the defendant is an American national; or (3) the defendant’s conduct substantially and adversely affects an important American national interest, including a distinct interest in preventing the United States from becoming a safe harbour (free of civil as well as criminal liability) for a torturer or other common enemy of mankind (as was the case in\footnote{§404 of the Restatement explains that a “state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,” and analogous behavior.} Filartiga). A few days later on 22 April 2013 in\footnote{Daimler Chrysler AG v. Bauman (No. 11-965) the Supreme Court granted the defendant’s petition for a writ of certiorari to determine “whether it violates due process for a court to exercise jurisdiction” under the ATS to hear claims against a German corporation for conduct outside the United States. The Court held that it did not violate due process to do so.} Daimler Chrysler AG v. Bauman (No. 11-965) the Supreme Court granted the defendant’s petition for a writ of certiorari to determine “whether it violates due process for a court to exercise jurisdiction” under the ATS to hear claims against a German corporation for conduct outside the United States.
general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.\textsuperscript{14}

Accordingly, future ATS claims will need to show that there is a distinctively US interest involved which is sufficient to rebut the presumption against extra-territorial application. A claim against a US parent corporation, where its subsidiary is alleged to have aided and abetted violations of international law in a foreign jurisdiction, would have to show complicity in that offence occurring within the US. This would involve a similar analysis to that which would have to be undertaken in determining whether the parent company could be held liable through piercing of the veil, agency, or through direct liability – ie that the parent company, in the US, aided and abetted the violations of international law in the foreign jurisdiction.

1. Corporate liability under the ATS.

\textsuperscript{14} The petition set out the following facts. “Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to \textit{general} personal jurisdiction in California—\textit{and} can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents—\textit{because} it has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities.”
The Alien Tort Statute 1789 provides that 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' This Act lay dormant for nearly two centuries until 1980 when it was successfully invoked in a claim for damages in *Filartiga v. Pena-Irala*. The plaintiff, the sister of a Peruvian who had been tortured in Peru, successfully invoked the Act to obtain an award of damages against her brother’s torturer, who was then living in Brooklyn. The decision in *Filartiga* has generated a flood of cases by aliens before the federal courts of the United States, in which claims for compensation against individuals have been based on alleged violations of international law. Two landmark decisions opened up the scope of ATS as a means of proceeding against corporations in respect of their involvement with violations of the customary international law. The first was the Second Circuit’s decision in 1995 in *Kadic v. Karadzic* that the ATS could grant jurisdiction over claims against non-state actors, individuals who were not acting in an official capacity. Most established norms of customary international law only proscribe the conduct of States rather than that of private actors. However, there exists a core of *ius cogens* norms in respect of which non-state actors may incur liability. These are the prohibitions against piracy, slave trading (extending to slavery and use of forced labour), war crimes, and genocide. The Second Circuit held that individual participants in the civil war in the former Yugoslavia, who were not acting in a State capacity, could be held directly liable under ATS in respect of violations of such norms. Where other norms, such as torture, were involved, a non-state actor could incur liability only if it had acted under ‘color of law’ under §1983. The jurisprudence under §1983 has been

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15 *Filartiga* n2.


17 §1983 derives from the Civil Rights Act 1871, and provides:
used to invest the actions of private actors with a State characteristic so as to bring their actions within the jurisdiction created by the ATS or to link private actors to the actions of State actors, what has been referred to as ‘reverse state action’.

The second was the Ninth Circuit's majority decision in *Doe I v. Unocal Corp*\(^\text{18}\) which extended the finding in *Kadic* to the secondary liability of non-state actors, including corporations\(^\text{19}\), for aiding and abetting violations of customary international law, provided the norm violated was one for which the private actor could incur liability directly.\(^\text{20}\) The claim arose out of Unocal’s participation as a joint venturer in the Yadana pipeline project in Burma in the 1990s. The Burmese military provided security for the project and it was alleged that during the course of the project they forced the plaintiffs to work on the project, forcibly relocated various villages, and committed numerous acts of violence, torture and rape in connection with the forced labor and forced relocations. Applying *Kadic* the majority

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\text{‘Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State… subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law….’}
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\(^{18}\) 395 F.3d 932 (9th Cir. 2002).


\(^{20}\) In 1997 in *Doe v. Unocal Corp*, Judge Paez had held that the ATS granted jurisdiction for a claim against a corporation in respect of its alleged complicity in forced labour practiced by the security forces of the Burmese state. Claims had previously been brought against a corporation under the ATS in *Amlon Metals, Inc. v. FMC Corp.*, 775 F.Supp. 668, (S.D.N.Y. Oct 16, 1991) but had been dismissed on the ground that the plaintiffs had failed to state a violation of the law of nations.
decided that a non-state actor could be held directly liable in civil proceedings under the ATS if it committed a breach of a norm of customary international law which governed the conduct of non-state actors – such as the prohibitions on piracy, slave trading/slavery/forced labour, genocide, crimes against humanity, and war crimes. It could also incur a secondary liability for aiding and abetting breaches of such core norms by state actors.\textsuperscript{21} The applicable norm of customary international law was to be found in *Prosecutor v. Furundžija*\textsuperscript{22} in which the International Tribunal for the former Yugoslavia had held that “the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”\textsuperscript{23} The Tribunal had then gone on to define the *mens rea* for aiding and abetting as actual or constructive (i.e., “reasonabl[e]” “knowledge that [the accomplice’s] actions will assist the perpetrator in the commission of the crime.”\textsuperscript{24} This requirement was satisfied through evidence of the knowledge of various senior UNOCAL executives who were involved in the pipeline project. Judge Reinhardt, however, concluded that the issue of secondary liability in an ATS claim fell to be determined under principles of domestic federal tort law. The Ninth Circuit’s decision was vacated in February 2003 and an *en banc* rehearing reordered, primarily to

\textsuperscript{21} This was an alternative method of linking the corporation to the violations committed by Burmese state actors to the reliance on the US domestic law of ‘color of law’ to be found in s.1983. The District Court had held that Unocal had not acted under ‘color of law’ and also that they had not acted as aiders and abetters.


\textsuperscript{23} ibid at 235. The Tribunal based its *actus reus* standard for aiding and abetting chiefly on decisions by American and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of the Second World War. See *id.* at 195-97.

\textsuperscript{24} At 245.
clarify whether international law or federal tort law was the applicable law for an ATS claim.\textsuperscript{25} However, before the case could be reheard the parties agreed a settlement.

In 2004 the Supreme Court considered the scope of the ATS for the first time in \textit{Sosa v. Alvarez-Machain}.\textsuperscript{26} The plaintiff’s claim was based on an allegation that he had been unlawfully abducted from Mexico for 24 hours to bring him back to the US to face trial. Justice Souter, giving the principal majority opinion, held that the Act was jurisdictional and created no new causes of action. However, the drafters of the Act understood that federal common law would provide a cause of action for the three violations of international law thought to carry personal liability at the time - offences against ambassadors, violation of safe conducts, piracy. New private claims under federal common law could be recognised for violations of norms of international law, but only those which had the same definite content and acceptance among civilized nations as did the three historical paradigms at the time ATS was enacted. A related consideration was whether international law extended the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant was a private actor such as a corporation or individual.\textsuperscript{27} Justice Breyer substantially agreed with Justice Souter but pointed out that substantive uniformity on a norm of international law would not automatically lead to universal jurisdiction. There also had to be a procedural consensus whereby there was universal jurisdiction by which, as was the case with piracy, any nation could prosecute a subset of universally condemned behaviour - such as torture,

\textsuperscript{25} 403 F.3d 708, (9th Cir. 2005). The effect of vacating the decision is that it has no precedential effect and may not be cited on the Ninth Circuit.


\textsuperscript{27} \textit{Sosa} fn 20.
genocide, crimes against humanity, war crimes. Criminal jurisdiction necessarily contemplated a significant degree of civil tort recovery as well.

I shall now analyse the development of litigation against corporations under the ATS after *Sosa*, following which I shall then proceed to consider the possible structure of civil liability under customary international liability that might come to be developed under English law. The US courts in ATS cases against corporations have had to deal with the following issues.

*(i) What norms of customary international law ground a cause of action?*

Only a few ATS claims against corporations allege a direct violation of a *ius cogens* norm.\(^{28}\) However, contrary to the view expressed by Justice Breyer in *Sosa* that there must be both substantive and procedural consensus on norms of customary international law, the federal courts have recognised that an ATS action may be brought in respect of a range of norms of customary international law under which criminal liability could not be incurred by a non-state actor, such as those prohibiting: torture; extra-judicial killing; arbitrary denationalisation and apartheid by state actors; cruel and inhuman treatment;\(^{29}\) non-consensual experimentation by private actors.\(^{30}\)

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\(^{28}\) For example, in *Adhikari v. Daoud & Partners* 697 F.Supp.2d 674,(S.D.Tex.,2009) and *John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988, (S.D.Ind.,2007) claims were made against corporations for trafficking in forced labour.

\(^{29}\) *In re South African Apartheid Litig.* 617 F.Supp.2d 228 (S.D.N.Y. 2009).

\(^{30}\) *Abdullahi v. Pfizer Inc.*, 562 F.3d 163 (2\(^{nd}\) Cir. 2009).
The federal courts have adopted three approaches to link corporations to primary violations committed by state actors. First, there is the ‘color of law’ jurisprudence under §1983 in linking non-state actors with violations of customary international law which is still routinely accepted in ATS suits. However, there is much force in the findings of Judge Illston in *Bowoto v. Chevron Corporation* that as the Supreme Court in *Sosa* had clearly stated that the scope of liability had to be decided by international law, there was no room for the application of domestic law to determine the liability of non-state actors in respect of violations of customary international law.

Secondly, secondary liability may be determined by reference to domestic US law. Plaintiffs have been keen to argue for this position for two reasons. First, to avoid a finding that corporations are not capable of incurring civil liability under customary international law as they cannot be subject to criminal liability thereunder. Second, to take advantage of a knowledge based mens rea requirement under federal common law, the position being uncertain under customary international law. The Ninth Circuit in *Unocal* (2002) and the Second Circuit in *Khulumani v. Barclays Nat. Bank Ltd* were divided on this issue. In the latter case, the matter was remitted to the District Court and in 2009 Judge Schiendlin held that the question of accomplice liability was to be determined by reference to customary international law, reasoning that: ‘Although cases in this Circuit have only required consultation of the law of nations concerning the existence of substantive offences, the language and logic of *Sosa* require that this Court turn to customary international law to

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32 *Khulumani v. Barclays Nat. Bank Ltd* 504 F.3d 254 (2nd Cir. 2007) Judge Hall adopted Judge Reinhardt’s view in *Doe I v. Unocal Corp.*, 2002 fn 17 that secondary liability was an ‘ancillary matter’.

33 n28.
ascertain the contours of secondary liability as well.’ Aiding and abetting claims created liability for a distinct form of conduct. Judge Schiendlin then went on to state:

‘As the ATS is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary liability must stem from international sources. Ideally, the outcome of an ATS case should not differ from the result that would be reached under analogous jurisdictional provisions in nations such as Belgium, Canada or Spain...The imposition of liability based on a cause of action derived after the conduct in question from an amalgamation of the law of nations and federal common law would raise fundamental fairness concerns.’\(^{34}\)

This approach has since been confirmed on two occasions by the Second Circuit, first, in 2009 in *Presbyterian Church of Sudan v. Talisman Energy* \(^{35}\) and secondly, in 2010 in *Kiobel v. Royal Dutch Shell*. \(^{36}\) However, the position of other circuits on this issue is divided.\(^{37}\)

Thirdly, the corporate defendant may be held liable under customary international law for aiding and abetting a violation of international law. The existence of a norm of customary international law imposing civil liability for aiding and was challenged by Judge Sprizzo in *In re: S.African Apartheid Litig.* \(^{38}\) in which he held that sources relating to criminal responsibility for aiding and abetting under international criminal law could not establish a

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\(^{34}\) at 256.

\(^{35}\) 582 F.3d 244 (2nd Cir.2009).

\(^{36}\) 621 F.3d 111, (2nd Cir 2010).

\(^{37}\) Customary international law was applied in the District Court in the ninth circuit in *Bowoto v. Chevron* fn 41 and by the District Court in *Abecassis v. Wyatt*, 704 F.Supp.2d 623 (S.D.Tex.,2010.) whereas in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir.2005), the Eleventh Circuit applied domestic law.

norm of international law imposing civil liability on aiders and abetters.\textsuperscript{39} His finding was reversed in the Second Circuit in 2007\textsuperscript{40} where all three judges held that liability for aiding and abetting could be alleged in an ATS claim, although there was disagreement as to whether this was to be determined in accordance with principles of US tort law or by reference to the principles of international criminal law. Judge Katzman, applying norms of international criminal law, held that the past reliance on criminal law norms was entirely appropriate given that international law did not maintain a hermetic seal between criminal and civil law.\textsuperscript{41}

The existence of such a norm is, therefore, well established in the federal courts and furthermore the general consensus is that it extends beyond those norms for which a non-state actor could be held directly liable. A contrary position was taken by Judge Illston in \textit{Bowoto v. Chevron Corp} in 2006\textsuperscript{42}, holding that the international law norms invoked by the plaintiff (the prohibition of torture, and of extra-judicial killing) placed no direct liability on a private party so it would be inappropriate to allow liability to be imposed on a private party for aiding and abetting a breach of such a norm. However, in 2007 she reversed this finding, accepting that it had been based on the faulty premise that if a party could not be liable a principal it could not be liable as aider and abetter.\textsuperscript{43} Consequently, civil liability for aiding and abetting could arise under the ATS in respect of any norm of customary international law that was sufficiently established under the criteria set out by the Supreme Court in \textit{Sosa}. This

\textsuperscript{39} See, too, \textit{Doe v. Exxon} 393 F.Supp.2d 20 (D.D.C. 2005) where Judge Oberdorfer held that there was no civil liability for aiding and abetting under customary international law.

\textsuperscript{40} \textit{Khulumani v. Barclays Nat. Bank Ltd} 504 F.3d 254 (2nd Cir. 2007).

\textsuperscript{41} at 270.


approach has subsequently been applied in *In re South African Apartheid Litig.*\(^{44}\) in respect of aiding and abetting the norms prohibiting apartheid and arbitrary denationalisation by state actors.

(ii) The content of the international law norm on aiding and abetting

Having established that there are norms of customary international law relating to aiding and abetting and that, in ATS cases, these extend to aiding and abetting violations of norms which do not constitute international crimes, we now turn to the substance of the aiding and abetting norms that have been derived from international criminal law. As regards the elements of the *actus reus* of criminal liability for aiding and abetting under international law, the federal courts have turned to two sources of customary international law; the Nuremburg trials, and the decisions of the ICTY and ICTR. The *actus reus* for aiding and abetting under international criminal law was defined by the ICTY Tribunal in *Prosecutor v. Furundzija,* as ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.’\(^{45}\) The assistance must be substantial but need not be the *sine qua non* of the offence, and liability may be incurred even if the crimes could have been carried out through different means or with the assistance of another. This definition has been adopted in ATS cases, although in *Doe I v. Unocal* the majority in the Ninth Circuit expressed doubts as to the reference to ‘encouragement or moral support.’\(^{46}\)

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\(^{44}\) 617 F.Supp.2d 228 (S.D.N.Y. 2009)

\(^{45}\) fn14.

\(^{46}\) fn21 However, the full *Furundzija* definition of the *actus reus* requirement has been applied in *Bowoto v. Chevron Corp.*, fn 42 and *In re South African Apartheid Litig*, fn 44.
In *In re South African Apartheid Litig.* Judge Schiendlin, adopting the *Furundzija* standard, started her analysis by noting that merely doing business in a state which was committing violations of customary international law would not be sufficient to constitute the *actus reus* of aiding and abetting. The claims arose out of the business relationships between the South African government during the apartheid period and various corporations; automotive corporations who had provided vehicles to the security forces; computer corporations who had provided hardware and software that had been used to effect the denationalisation of black South Africans; banking corporations who had lent money to the South African defence force and had adopted racially discriminatory employment practices. In determining whether or not the alleged assistance had had a ‘substantial effect’ on the commission of the crime, guidance could be obtained from a comparison of two Nuremberg decisions. In *The Ministries Case* Rasche who had supplied loans to the SS was found not guilty, while in the *Zyklon B* case Tesch who had supplied poison gas to death camps was found guilty. The two cases could be distinguished by reference to the quality of the assistance provided to the primary violator.

Accordingly, some specific link was required between the state’s violation of customary international law and the corporation’s assistance of that violation. The facts alleged by the plaintiffs against the automotive defendants disclosed just such a direct link through the sale of specialised military vehicles to the South African Government, as well as

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47 fn 44.

48 The plaintiffs also alleged that the corporate defendants were directly liable for violations of customary international law.


50 1 Law Reports of Trials of War Criminals 93-103 (1947).
the provision of components of vehicles allegedly used by the internal security forces to patrol the townships.\textsuperscript{51} Similarly a very direct link with violations of the norms against arbitrary denationalisation and apartheid by a state actor would be established by the sale of computers to the governments of South Africa and of the bantustans for use in the process of registering individuals, prior to the removal of their South African citizenship, and their segregated in particular areas of South Africa. In contrast, the \textit{actus reus} of aiding and abetting was not made out against Barclays whose race-based employment practices followed the geographic segregation already established by the South African Government and involved acquiescence in, rather than the provision of essential support for, apartheid. Nor would the \textit{actus reus} of aiding and abetting be made out by the provision of loans and purchase of South African defense forces bonds. Supplying a violator of the law of nations with funds- even funds that could not have been obtained but for those loans - was not sufficiently connected to the primary violation.

As regards the \textit{mens rea} requirement of aiding and abetting, the federal courts have considered a third source, the Rome Statute establishing the International Criminal Court. This contains a definition of \textit{mens rea} for international criminal liability of accessories, but is silent as regards \textit{actus reus}. The three sources of international law relied on by the federal courts have given conflicting indications as to whether the \textit{mens rea} of aiding and abetting under international law requires intentional assistance or whether knowing assistance will suffice. The first source, the Nuremberg jurisprudence contains decisions in which either knowledge or intent has been required to establish the culpability of the party providing assistance to the violation of a norm of customary international law. In the \textit{Zyklon B} case, the

\textsuperscript{51} This would also satisfy the \textit{actus reus} requirement as regards aiding and abetting extra-judicial killing, but not as regards cruel inhuman and degrading treatment, unlawful detention, and torture.
owner of Tesch and Stabenow and a senior official, Weinbacher, were hanged on the basis that they accepted and processed orders for Zyklon B which were then shipped directly to the SS concentration camps where they were then used to exterminate allied nationals. Their knowledge of the intended use of the product coupled with its substantial assistance in the violation of international law made them liable as aiders and abettors. In contrast in US v. von Weizsaecker (the Ministries case)\textsuperscript{52} Rasche, Chairman of Dresdner Bank, was charged with lending money to SS enterprises which he knew were making use of forced labours, but acquitted. However, another banker, Puhl, was found guilty as an accessory to crimes against humanity in that he knowingly participated in the disposal of gold, including gold teeth and crowns, and valuables taken from Holocaust victims. The second source, the decisions of the ICTY and ICTR, leans towards a knowledge standard.\textsuperscript{53} However, the waters are muddied by the Appeal Chambers statement in Prosecutor v. Vasiljevic\textsuperscript{54} that the actus reus of aiding and abetting required that the accused had carried out 'acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime [emphasis added]'.

The third source is the 1998 Rome Statute establishing the International Criminal Court. Article 25(3)(c) provides that a person “shall be criminally responsible and liable for punishment for a crime” if that person “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission (emphasis added).” However, art. 25(3) does not exist in isolation, and has to be read in conjunction with art. 30. Paragraph one

\textsuperscript{52} 14 Trials of War Criminals Before the Nuernberg Military Tribunals, at 478 (1950)

\textsuperscript{53} In Furundzija, n 21, knowledge was held to be the basis of the mens rea of aiding and abetting.

provides, ‘Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.’ Paragraph two then provides that a person has intent where: ‘(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events (emphasis added).’

The courts of the Second Circuit have differed in their identification of the mens rea for aiding and abetting under customary international law. The key question is whether it is necessary that the accomplice intended to further the primary violation of the law of nations or whether mere knowledge would suffice. In *Khulumani v. Barclay Nat. Bank Ltd* 55 the Second Circuit split on this issue. Judge Hall applied federal law which applied a knowledge test in civil claims against aiders and abetters. Judge Katzman and Judge Korman both held that intention was required under customary international law, although Judge Korman held that aiding and abetting claims could not be brought against corporations. Judge Katzman’s judgment is particularly significant as it forms the basis for the subsequent decision of the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* on this issue.56 He held that art. 25 (3)(c) of the Rome Statute constituted authoritative guidance on the international law standard for mens rea in criminal proceedings against aiders and abetters, ‘because, unlike other sources of international legislation, it articulates the mens rea required for aiding and abetting liability.’ He recognised that the Rome Statute had yet to be considered by the International Criminal Court and that its precise contours and the extent to

55 504 F.3d 254, (2nd Cir. 2007)

56 582 F.3d 244 (2nd Cir. 2009)
which it may differ from customary international law thus remain somewhat uncertain.’ The Rome Statute’s mens rea standard was consistent with the application of accomplice liability under other sources of customary international law, in particular the Ministries case at Nuremburg in which the tribunal declined to impose criminal liability on the banker, Rasche, in respect of making a loan to the SS.

The matter was remitted to the district court for reconsideration by Judge Schiendlin. She noted that the vast majority of international legal materials specified knowledge and, after examining the Nuremburg decisions, concluded that the Rasche case was not authority for requiring intent as the basis of the decision was that there was no actus reus. She then turned to the Rome Statute and concluded that this was not intended to eliminate rights existing under the law of nations. ‘Nevertheless, where the Rome Statute explicitly deviates from the law of nations, it could fairly be assumed that those rules are unique to the ICC, rather than a rejection of customary international law.’ In the absence of an explicit deviation in the Rome Statute with regard to aiding and abetting liability, art. 25(3)(c) could reasonably be interpreted to conform to pre-Rome Statute customary international law. 57

Judge Schiendlin also pointed out that a secondary purpose could be inferred from knowledge of the likely consequences of an act. ‘This logic is particularly prominent in the case of a person or corporation who provides the means by which a crime in violation of the law of nations is carried out, as the primary purpose – profit - is furthered by the success of 57 Article 10 of the Rome Statute, which provides ‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’ would appear to support this view. However, this article appears in Part Two of the Statute, ‘Jurisdiction, Admissibility and Applicable Law’, whereas article 25 appears in Part Three ‘General Principles of Criminal Law’.
an ongoing crime. Thus it may reasonably be inferred that an arms dealer providing weapons to perpetrators of a genocide tacitly supports the genocide, as it creates demand for that increases profit.’ Article 30(2) of the Rome Statute also had to be taken into account. Judge Schiendlin reasoned that even assuming that art. 25(3)(c) carried an intent requirement, the context of the Rome Statute did not require that an aider or abettor share the primary actor's purpose. Rather it meant that the *actions* must be taken intentionally, and not under duress. However, art. 30(2) provided for a knowledge requirement for the *mens rea* requirement relating to the outcome - rather than the act. ‘Under the Rome Statute-and under customary international law - there was no difference between amorality and immorality. One who substantially assisted a violator of the law of nations was equally liable if he or she desires the crime to occur or if he or she knows it will occur and simply does not care.’

This analysis is supported by the pre-trial decision in *Prosecutor v. Lubanga* in which the ICC stated that the volitional element in art. 30(2) ‘also encompasses other forms of the concept of *dolus* which have already been resorted to by the jurisprudence of the *ad hoc* tribunals, that is: i. situations in which the suspect, without having the concrete intent to

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58 This provides that a person has intent where: ‘(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence *or is aware* that it will occur in the ordinary course of events’ (emphasis added).

59 However, Ambos has argued that the formulation ‘the formulation [in art.25(3)(c)] confirms the general assessment that subparagraph (c) provides for a relatively low objective but relatively high subjective threshold (in any case higher than the ordinary *mens rea* requirement according to article 30).’ ‘Article 25. Individual criminal responsibility.’ In: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court. München 2nd ed. 2008, 743-770

60 Situation in the Democratic Rep. of Congo, ICC-01/04-01/06-803-tEN, ICC Pre-Trial Chamber Decision on the Confirmation of Charges ¶¶ 326-338 (Jan. 29, 2001).
bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions (also known as *dolus directus* of the second degree); and ii. situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).’ In the second situation, where the risk of bringing about the objective elements of the crime is substantial, the suspect’s acceptance can be inferred from: ‘(i). the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and (ii). the decision by the suspect to carry out his or her actions or omissions despite such awareness.’ If, however, the risk of bringing about the objective elements of the crime is low, the suspect must have ‘clearly or expressly accepted the idea that such objective elements may result from his or her actions.’

Subsequently in October 2009 in *Presbyterian Church Of Sudan v. Talisman Energy, Inc.*, the Second Circuit decided that the *mens rea* of aiding and abetting under customary international law required intention rather than knowledge, adopting Judge Katzman’s analysis put forward in *Khulumani v. Barclay Nat. Bank Ltd*. The Second Circuit had heard argument in January 2009 before Judge Schiendlin’s decision on this issue in *In re: South African Apartheid Litig.* The Second Circuit’s analysis of this issue is somewhat brief and, unlike that engaged in by Judge Schiendlin in fails to take account of art. 30(2) of the Rome Statute, or of the fact that the decision in *US v. Von Weizsaecker* was based on the absence of the *actus reus* of aiding and abetting. The decision also fails to address the question of

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61 582 F.3d 244 (2nd Cir. 2009)

62 fn43.
whether the Rome Statute was intended to change customary international law. This is disputed by Professor Scheffer, the lead US negotiator for the Rome Statute, who states that he does not ‘does not recall hearing directly or being advised by his Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations where the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law’ and that ‘the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court.’ There is also the fact that Article 25(3)(d) provides liability for an individual who “contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose” where such contribution is “intentional” and either “made with the aim of furthering the criminal activity or criminal purpose of the group” or “made in the knowledge of the intention of the group to commit the crime.”

The above arguments formed the basis of the recent decision of the majority of the Court of Appeals for the District of Columbia in Doe v. Exxon Corporation holding that customary international law on aiding and abetting was to be found in the decisions of the ICTY and ICTR and that, in any event, the Rome Statute contemplated mens rea requirement based on knowledge rather than intention. As with the issue of corporate liability under the ATS, another circuit split has opened up.

(iii) Corporate liability under customary international law?


64 654 F.3d 11, (C.A.D.C. 2011).
Corporate defendants have argued that the ATS does not cover claims against them because corporations are not the subjects of customary international law. The essence of such arguments is that civil liability of non-state actors under customary international law will be imposed in circumstances when criminal liability would be imposed on them, either primarily or secondarily, for violation of a norm of customary international law. Therefore, if a corporation is incapable of incurring criminal liability under customary international law, it must follow that it is also incapable of incurring a civil liability under the ATS for violation of the law of nations. In 2003 in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Judge Schwarz rejected these arguments and held that a corporation could be sued under the ATS. 65 Although the Nuremberg proceedings in *Flick* and *Krauch* were brought against individual executives of IG Farben and Krupp respectively, the tribunals in both cases spoke of offences being committed by the corporation. Furthermore, corporations were not unknown to international law and numerous treaties had imposed liability directly on them in treaties such as the 1969 International Convention on Civil Liability for Oil Pollution Damage, and economic sanctions imposed by the UN Security Council had also entailed duties for corporations. In addition, the 1948 UN Universal Declaration of Human Rights bound corporations through its reference to ‘every individual and every organ of society.’ The Convention set out various rights, the most basic of which, such as the prohibitions on slavery and torture, had become part of customary international law.

After the decision in *Sosa* the case came back before Judge Cote for reconsideration of this issue. 66 Talisman, argued that, as no treaty or international tribunal decision imposed

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liability on corporations for violations of customary international law relating to human rights, corporate liability was not part of the customary international law governing violations of *ius cogens* norms. Judge Cote held that one of the clearest means for determining the content of a rule of customary international law was to examine situations where a governmental institution asserts a claim purportedly based on the customary rule, and to consider, as part of state practice, whether States with competing interests object. However, in ATS cases, where objections by implicated foreign governments were not uncommon, no such objection had ever been raised on the ground that the defendant was a corporation. This provided compelling evidence of state practice.

Until recently the only judicial support for the view that there is no basis for imposing liability on corporations under customary international law was to be found in the minority judgment of Judge Korman in the Second Circuit in *Khulumani v. Barclay Nat. Bank Ltd* 67 where he held that the criminal law sources cited only encompassed natural persons and therefore did not establish a norm of customary international law that imposed civil liability on corporations. When the case was remitted to the District Court, in *In re: South African Apartheid Litig.* 68 Judge Schiendlin dealt briefly with the point by stating that the ATS liability of corporations was a long-settled question in the Second Circuit. 69

This is no longer the case for the Second Circuit’s position on this issue changed drastically with its majority decision in *Kiobel v. Royal Dutch Petroleum Co.*, on 21

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67 504 F.3d 254, (2nd Cir. 2007).

68 fn 43.

69 The Second Circuit heard argument on this point in January 2010 but, to date, has not given its judgment.
The same court as had decided *Presbyterian Church Of Sudan v. Talisman Energy, Inc.*, in 2009 now considered the issue of whether the ATS reached corporate defendants. The majority, whose opinion was given by Judge Cabranes, held that it did not. Judge Cabranes reviewed the development of international law as it applied to individuals from the starting point of the Nuremberg trials which made explicit what had previously been implicit the proposition that individuals could incur liability for committing international crimes. However, at Nuremberg this principle had been expressly confined to natural persons. Although the tribunals had the authority to declare an organisation to be criminal, this was with a view towards facilitating the imposition of liability on the individual members of the organisation. The tribunals had no jurisdiction to impose criminal liability on the organisation itself. All subsequent international criminal tribunals from the ICTY and ICTR to the ICC had possessed jurisdiction over natural persons, but not over legal persons.

The Rome Statute which created the International Criminal Court provided for jurisdiction over ‘natural persons’ and French proposals for bringing in corporations and other juridical person had been rejected. The ATS tort jurisdiction extended to those individuals who had committed international crimes and it, therefore, followed, that it could not extend to corporations, although individual perpetrators in a corporation could still incur liability.

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70 621 F.3d 111 (2nd Cir. 2010). Shortly before the decision, the district court in California in *Doe v. Nestle S.A*, 748 F.Supp.2d 1057, (C.D.Cal. 2010) had held that ATS claims could not be pursued against corporations.

71 The Second Circuit treated this issue as a jurisdictional issue. Therefore, although it had not been raised by the defendant, they were able to consider the issue *sua sponte*.

72 Unlike the Nuremburg tribunals, these subsequent tribunals had not been given jurisdiction to declare organisations to be criminal.

International law and not domestic law determined the reach of the ATS. International law determined both the ‘what’ - the norm that was broken - and the ‘who’ – the persons liable for breach of that norm. For this reason, the norm for aiding and abetting was to be found in international law, rather than in domestic law. Footnote 20 of Justice Souter’s opinion in Sosa also mandated that the courts use international law to determine the subjects of international law. Judge Schwarz’s 2003 judgment in Talisman was flawed in that it over-valued treaties imposing liabilities on corporations as evidencing a norm that corporations were the subjects of customary international law.

In contrast, Judge Leval, dissenting, looked to customary international law to determine the norms imposing liability, including those relating to aiding and abetting, and then to domestic law to supply the remedy for breach. The second stage determined who could be liable and as corporations were subject to civil liability under US domestic law, they could also be liable under the ATS. Judge Leval pointed to two opinions of US Attorney Generals, in 1795 and 1907, in which the view had been expressed that corporations could incur liability for breaches of customary international law, and could also advance claims for wrongs done to them under customary international law. Judge Leval was of the view that the majority had misunderstood how the law of nations functions. ‘Civil liability under the ATS for violation of the law of nations is not awarded because of a perception that international law commands civil liability throughout the world. It is awarded in U.S. courts because the law of nations has outlawed certain conduct, leaving it to each State to resolve questions of civil liability, and the United States has chosen through the ATS to impose civil liability. The majority's ruling defeats the objective of international law to allow each nation to formulate its own approach to the enforcement of international law.’ However, Judge

Leval agreed that the case should be dismissed, because the plaintiffs had failed to show evidence that the corporation had acted with the purpose of assisting the state actors’ violations of customary international law. On 4 February 2011 the Second Circuit denied the plaintiff’s petition for a panel rehearing.\(^75\)

A circuit split on this issue has recently opened up with contrary decisions in three other Circuits. In *Doe v. Exxon* the majority of the Court of Appeals for District Columbia held that the norms of conduct in an ATS suit were derived from customary international law but not the norms of attribution, which fell under domestic law.\(^76\) In *Flomo v. Firestone Natural Rubber Co., LLC*, the seventh circuit held that there was a norm of customary international law by which corporations could be held civilly liable in respect of their primary or secondary involvement in violations of *ius cogens* norms of customary international law.\(^77\) Judge Possner held that the factual premise underlying the majority’s decision in *Kiobel* was incorrect and that at Nuremberg two measures had specifically provided sanctions against organisations: Council Law No. 2, “Providing for the Termination and Liquidation of the Nazi Organizations” \(^78\); Control Council Law No. 9, “Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,” under which the seizure of all IG Farben’s assets was ordered with a direction that some of them be made “available for reparations.” \(^79\) Judge Possner noted, ‘And suppose no corporation *had* ever been punished

\(^75\) 642 F.3d 268, (2\(^{nd}\) Cir. 2011).

\(^76\) fn 43.

\(^77\) 643 F.3d 1013, (7\(^{th}\) Cir. 2011).

\(^78\) Oct. 10, 1945, reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 131 (1945);

for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. There were no multinational prosecutions for aggression and crimes against humanity before the Nuremberg Tribunal was created.’ Thirdly, there is the decision of the Ninth Circuit in *Sarei v. Rio Tinto Plc*, in which it was held that corporations could incur liability as aiders and abetters of violations of customary international law. Judge Schroeder noted; ‘We, however, believe the proper inquiry is not whether there is a specific precedent so holding, but whether international law extends its prohibitions to the perpetrators in question. After *Sosa* we must look to congressional intent when the ATS was enacted. Congress then could hardly have fathomed the array of international institutions that impose liability on states and non-state actors alike in modern times. That an international tribunal has not yet held a corporation criminally liable does not mean that an international tribunal could not or would not hold a corporation criminally liable under customary international law.’

Where does this leave suits against corporations under the ATS? Clearly, these will no longer be possible in the Second Circuit, unless there is a contrary decision from the Supreme Court. However, as Cassel has pointed out, a finding that corporations are not subject to liability under customary international law would mean that ATS suits would be directed at individual executives instead, with their corporation having to indemnify them in respect of any liability incurred.’ Indeed, Judge Cabranes specifically mentioned that this possible

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80 671 F.3d 736, (9th Cir. 2011).

81 On 22 April 2013 the US Supreme Court granted the defendant’s petition for a writ of certiorari and the Ninth Circuit’s judgment was vacated, and the case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Kiobel.

avenue of suit remained possible under the ATS. On 6 June 2011 the Kiobel plaintiffs filed their petition for a writ of certiorari presenting two questions: whether corporate liability was a question of jurisdiction or of merits; whether corporations are immune from tort liability for violations of the law of nations. This issue was argued before the Supreme Court at the end of February 2012, following which the Supreme Court called for further argument on the issue of the jurisdictional reach of the ATS. This issue formed the basis of their eventual decision on 17 April 2013. No decision was given on the questions in respect of which the petition for the writ of certiorari was filed. Accordingly, there remains a circuit split on this issue.

(iv) Tertiary liability

A finding of vicarious liability through agency, or a piercing of the corporate veil of the subsidiary, will be crucial to the success of a claim against a parent corporation in respect of violations of customary international law committed by a subsidiary, either directly or as an aider and abetter. In ATS cases the federal courts have had to decide this issue by reference to domestic law on these issues, in the absence of clear standards under international law. In 2009 in In re: South African Apartheid Litig. Judge Schiendlin held that although the ATS requires the application of customary international law whenever possible, it was necessary to rely on federal common law in limited instances in order to fill gaps. Vicarious liability was

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83 Liability of a corporation may not, however, necessarily translate into a liability on the part of its officers. The finding of knowledge in the ATS proceedings against Unocal was, based on the knowledge of Unocal directors, Imle and Beach. However, in the parallel tort proceedings before the Superior Court of California, Judge Chaney dismissed the negligence claims against these individuals in the absence of any evidence that the activity of the Myanmar military was under their control and that they had negligently failed to take action to avoid the harm.

84 fn 44.
clearly established under customary international law, obviating any concerns regarding universality. Command responsibility, the military analogue to holding a principal liable for the acts of an agent, was firmly established by the Nuremberg Tribunals.\textsuperscript{85} However, as the international law of agency had not developed precise standards in the civil context, federal common law principles concerning agency would be applied. In contrast, in 2006 Judge Cote in \textit{Presbyterian Church Of Sudan v. Talisman Energy, Inc.}, applying the conflicts of law of the forum, New York, had previously held that this issue fell to be determined under the law of the place of incorporation of the company whose veil is to be pierced.\textsuperscript{86} The allegation that the subsidiaries had acted as agents of the parent would be determined either under the law of Sudan as the \textit{lex loci delicti} and domicile of most plaintiffs, or of the law of Canada, as domicile of Talisman, with a presumption in favour of the former.

2. \textbf{International law as a cause of action before the courts of the United Kingdom}

The UK has no statute such as ATS 1789. This, however, is not a significant obstacle to the development of civil accountability of corporations before the UK courts in respect of direct and secondary violations of customary international law. The ATS is jurisdictional and does not create a cause of action for violations of the law of nations. The cause of action must be generated by federal common law. In the UK, art. 2 of the Brussels Regulation will require


\textsuperscript{86} 453 F. Supp. 2d 633 (S.D.N.Y. 2006).
the courts to exercise jurisdiction over a defendant domiciled within the jurisdiction. If an action were brought against an English parent company in respect of the acts of its foreign subsidiary, jurisdiction would be established under this provision as regards the parent company. Unlike the position in the US, the UK courts will be unable to stay such proceedings on grounds of *forum non conveniens*. The critical question is whether violations of customary international law generate a distinct cause of action under English law. The answer to this question depends upon how the English courts have dealt with the relationship between international law and domestic law. There are two doctrines on this issue. The first is the doctrine of incorporation under which the rules of international law are incorporated into UK law automatically and considered to be part of UK law unless they are in conflict with an Act of Parliament. The second is the doctrine of transformation under which the rules of international law are not to be considered as part of UK law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom.

In criminal proceedings the theory of transformation has been applied. In *Pinochet (3)* the House of Lords were faced with Spain’s request to extradite Pinochet to face criminal charges relating to charges involving torture that had occurred while he was President of Chile. For this to happen, the charges against him in Spain also had to constitute criminal

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87 Alternatively, art.5(3) provides an alternative place of suit for tort claims, namely, ‘the courts for the place where the harmful event occurred or may occur;’

88 A claimant might also serve the subsidiary out of the jurisdiction with the leave of the court under PD 6B 3.1.(3).

89 *Owusu v. Jackson* [2005] 2WLR 942 (ECJ).

acts in the UK. Torture committed outside the UK became criminal only when s.134 of the Criminal Justice Act 1988 brought into force the provisions of the UN Convention against Torture which established universal criminal jurisdiction for torture.  

This came into force on 29 September 1989, and therefore Pinochet could be extradited only in relation to charges of torture that had taken place between that date and the end of his Presidency in 1990.  

Subsequently, the House of Lords has held in *R v. Jones (Margaret)* that international law does not create new criminal offences and therefore the defendants could not advance a defence in criminal proceedings that their conduct had been directed at preventing an international crime. Historically, the courts may have recognised breaches of international law, such as piracy, violations of safe conduct and the rights of ambassadors, as creating domestic crimes. However, since *R v. Kneller* the courts had refused to create any new criminal offences. That was entirely for matter for Parliament. The fact that conduct had achieved the level of a crime under international law did not mean that the same conduct would be a crime under domestic law. However, their Lordships stressed that they were

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91 Lord Millett, however, was of the view that the conduct alleged had become criminal before that date when it had become a criminal offence under customary international law.

92 The 1984 Convention impliedly removed the immunity enjoyed by former heads of state and accordingly Pinochet lost his immunity from criminal proceedings once the UK and Chile had ratified the Convention. However, Pinochet retained his immunity as head of state in respect of torture committed before that date, even though it could be said that torture had already become a crime under international law before that date.


94 Previously, in *Hutchinson v. Newbury Magistrates Court*. (2000) ILR 499, the Divisional Court had held that, although 'waging aggressive war' was a crime under international law, it could not be relied to provided a defence to domestic criminal proceedings due to uncertainty as to how the incorporation of international law would work in the domestic system.

making no finding as regards the potential role of customary international law in civil proceedings.

In contrast, in civil proceedings since the decision of the Court of Appeal in Trendtex Trading Corp v. Central Bank of Nigeria the theory of incorporation has held sway.\textsuperscript{96} The issue was whether to recognise the development in international law under which there was no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature. The Court of Appeal held that the defendant bank was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to immunity from suit. Lord Denning and Shaw LJ then went on to consider the position in the event that the bank had been regarded as part of the government of Nigeria. What was the effect of the development in international law that had removed sovereign immunity in respect of commercial transactions by government entities?\textsuperscript{97} Lord Denning and Shaw LJ took the view that the doctrine of incorporation applied, in which case the bank would have been unable to rely on sovereign immunity in relation to commercial transactions.\textsuperscript{98}


\textsuperscript{97} These developments were evidenced by decisions in Belgium, Holland, West Germany, and, most authoritatively, by the US Supreme Court’s decision in Alfred Dunhill of London Inc v. Republic of Cuba. 425 US 682 (1976).

\textsuperscript{98} This issue is analysed in detail in the ‘Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad’ by the International Law Association Human Rights Committee (2001) EHLR 129. However, the discussion on \textit{forum non conveniens} predates the decision in Owusu fn 85.
However, to incorporate customary international law into domestic law is not a straightforward matter. In *Maclaine Watson v. Dept of Trade and Industry*[^99], which arose out of the collapse of the Tin Council, one of the issues before the Court of Appeal was whether there was a rule of international law that member States participating in an international organisation, in this case the International Tin Council, could be sued in respect of liabilities incurred by such organisations. Nourse LJ was of the view that there was a rule of international law to this effect which would simply be transposed into national law. Nourse LJ dealt with the argument that the rule of international law existed only on the international plane as follows. ‘Above all, there being no clear and definite consensus amongst the sources which we may consult, we ought to welcome an opportunity of supplementing them with reason and justice. Is it not both reasonable and just, and also proper, to impute to the members an intention that they should meet the bill for any amounts outstanding on the I.T.C.’s tin and loan contracts?’ Nourse LJ concluded that it was just and proper for the members of the ITC to incur joint and several liability in national courts in respect of undischarged liabilities of the ITC. However, Kerr LJ was of the view that, even if there were such a rule under international law, the rule did not extend to the municipal plane so as to allow the members of the organisation to be sued in national courts. ‘Thus, it may well be that if an international association were to default upon an obligation to a State or association of States or to another international organisation, then the regime of secondary liability on the part of its members would apply as a matter of international law.’ To transpose this liability to the national sphere ‘would be tantamount to legislating on the plane of international law; an impossible concept, unfortunately.’[^100] The issue was not re-considered when the case


[^100]: Ralph Gibson LJ held that ‘Where the contract has been made by the organisation as a separate legal personality, then, in my view, international law would not impose such liability upon the members, simply by
came before the House of Lords where the decision was based on an analysis of treaty rights rather than the application of customary international law.

There have since been two cases in which the claimants based their claims not only on conventional intentional torts, but also on a violation of the international prohibition against torture. The first was *Al Adsani v. Govt of Kuwait* 101 in which the Court of Appeal held that the s.1 of the State Immunity Act 1978 102 precluded a civil suit being brought against a foreign state for breach of this norm, notwithstanding the fact that torture is recognised as a *ius cogens* norm of customary international law 103, and that the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Punishment, expressly grants universal criminal jurisdiction against torturers. The decision was subsequently upheld by a majority decision of the European Court of Human Rights. 104

The second was *Jones v. Govt of Saudi Arabia*. 105 An attempt was made to argue that an exception to the principles set out in the 1978 Act existed when a civil claim in respect of torture was brought both against the Kingdom of Saudi Arabia and against an individual state

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102 ‘A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part.’
103 This is a rule of customary international law that has received sufficiently widespread acceptance as to be binding even on those states that do not accept it.
Initially, the claimants had been denied leave to serve proceedings out of the jurisdiction Colonel Aziz because the Kingdom of Saudi Arabia was entitled to claim immunity on his behalf. The Court of Appeal held that a State's immunity was *ratione personae*, and accordingly the claim against the Kingdom of Saudi Arabia should be dismissed under s. 1 of the 1978 Act. However, the immunity of an official was *ratione materiae* only, and torture could not be treated as the exercise of a State function so as to attract immunity *ratione materiae* in either criminal or civil proceedings against individuals. The question of whether a claim for systematic torture should be allowed to proceed required the court to consider and balance all relevant factors, including the considerations underlying State immunity, jurisdiction and the availability of an alternative forum, at one and the same time.

However, the House of Lords overruled the decision, on the grounds that the 1984 UN Convention against Torture provides no exception to the principle of sovereign immunity in relation to civil proceedings. Although the 1984 Convention established universal criminal jurisdiction in respect of torture\(^\text{107}\), this did not translate into universal civil jurisdiction and accordingly sovereign immunity could still be invoked in respect of civil claims against individuals who had committed torture. The Convention dealt with civil proceedings in art. 14.1 but this only required a state to grant a civil remedy in respect of torture committed within its jurisdiction. As to the fact that the prohibition on torture was a *ius cogens* norm, Lord Hoffmann approved the following observations of Hazel Fox (*The Law of State Immunity*, p 525): “State immunity is a procedural rule going to the jurisdiction of a national

\(^{106}\) *Propend Finance Pty v. Sing.* (1997) 111 ILR 611, CA.

\(^{107}\) Their Lordships noted that the decision in *Pinochet 3* created an exception to sovereign immunity only in relation to criminal proceedings.
court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a *jus cogens* mandate can bite.” The sources of international law did not show that ‘the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged.’108

Their Lordships, though, made no comment on whether a violation of the international prohibition on torture gave rise to a cause of action separate from that arising under domestic tort law. The basis of the decision is that the norm of customary international law relating to sovereign immunity had not been displaced by the 1984 Convention and gives no guidance as to whether or not the doctrine of incorporation applies in respect of civil proceedings. It would, therefore, seem that there is still some scope for making a claim on the basis of a breach of a violation of a norm of customary international law. The decisions in *Al Adsani* and *Jones* rule out any civil claims against a State or its officials where the State claims immunity, but have no effect on claims against private parties. Corporations who collude in international crimes committed by officials of foreign States are unlikely to be regarded as agents and the foreign State in question will, therefore, be unable to claim sovereign immunity on their behalf.

This raises the question of whether norms of customary international law, other than the prohibition on torture, might also create causes of action, and whether liability can be

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108 para 45.
incurred by private parties who aid and abet violations of such norms by state actors. The issue could become important if in future claims were to be brought before the UK courts arising out of facts similar to those in the US litigation in *Unocal*. The advantage to a claimant in arguing its claim in this way would be to take advantage of the rules of customary international law that relate to the imposition of aiding and abetting liability on non-state actors. English law does not allow a party who aids and abets a tort to incur civil liability.\(^{109}\)

To be a joint tortfeasor a party must procure the tort or be part of a common venture with the tortfeasor. Facilitation will be insufficient to ground liability.

However, the rules of customary international law as to when a private actor may incur criminal liability in respect of aiding and abetting may have a wider scope than the English law on joint tortfeasors. The US cases such as *Unocal* disclose the following pattern. The foreign subsidiary is alleged to have known of the human rights violations of its foreign partner, to have benefited from them and to have done nothing to prevent it. It is also alleged to have provided substantial assistance to the party that actually commits the violations, through provision of dual-use services that are capable both of benefitting the commercial joint venture while at the same time enabling the foreign state party to perpetrate violations of the law of nations. Yet there is no suggestion that the foreign subsidiary has procured the violations, nor that the violations form part of the common purpose of the subsidiary and its foreign state partner. Therefore, it is unlikely that the subsidiary would be found liable as a joint tortfeasor. This factor, therefore, provides a reason why claimants may still seek to rely

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\(^{109}\) "Mere facilitation of the commission of a tort by another does not make the defendant a joint tortfeasor and there is no tort of "knowing assistance" nor any direct counterpart of the criminal law concept of aiding and abetting: the defendant must either procure the wrongful act or act in furtherance of a common design or be party to a conspiracy." Rogers, W, *Winfield and Jolowicz on Tort*, 18th ed (2010), Sweet and Maxwell, at 21.2.
on a cause of action deriving from a breach of customary international law as generating a cause of action, providing *mens rea* is established by reference to knowledge rather than intention.

3. How might corporate liability for aiding and abetting violations of international law develop under English law?

The first question is whether the English courts will accept that there is a norm of customary international law under which non-state actors can incur civil liability. Such a norm will have to be evidenced by State practice in national courts as there is no international mechanism by which civil liability can be imposed on non-state actors. The voluminous ATS litigation in the US will provide an important part of evidence of State practice, as will the recognition of civil claims based on breaches of customary international law before the Canadian courts\(^\text{110}\) and the fact that no challenge was made to the pleading of a cause of action based on torture before the English courts in *Al Adsani and Jones v. Saudi Arabia*.\(^\text{111}\) Gallagher\(^\text{112}\) has pointed out that the recognition of ATS judgments as a source of customary international law has been confirmed by the Appeal Chamber of the ICTY in allowing an amendment to an appeal, arguing for a ‘purpose’ based test for *mens rea* for aiding and abetting on the grounds that this is what was applied by the second circuit in 2009 in *Talisman*.\(^\text{113}\)

\(^{10}\)Fn ?

\(^{11}\)In *Trendtex* the Court of Appeal found that the norm of customary international law on sovereign immunity had been changed by decisions of national courts, particularly that of the US Supreme Court.


\(^{13}\)General Ojdanic’s Motion to Amend his Amended Notice of Appeal of 29 July 2009, *Sainovic* and others (IT-05-87-A), Defence, 15 October 2009
Second, is civil extra-territorial jurisdiction prohibited by customary international law? In *Jones v. Saudi Arabia* the House of Lords approved the critical comments on universal jurisdiction under the ATS that had been made in international decisions such as *Democratic Republic of Congo v. Belgium*. However, those decisions were made in the context of criminal proceedings and it is doubted whether there is any norm of customary international law relating to extra-territorial civil proceedings. Furthermore, many of the cases brought against corporations under the ATS have involved proceedings against a US parent corporation, within US jurisdiction. Its liability for its foreign subsidiary’s complicity in violations of customary international law will be based on its acts and omissions within the jurisdiction. In these circumstances the UK courts would have jurisdiction over the claim under art. 2 of the Brussels Regulation.

Third, how will a claim based on a violation of a norm of customary international law be dealt with under the Rome II Regulation? The basic rule relating to the proper law of torts is to be found in art.4(1):

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115 Lord Bingham stated at para 27 ‘Fourthly, there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should.’ However, Shaw, *International Law* (8th ed) (2008), CUP, at 652, notes that the rarity of diplomatic protests have lead some writers to conclude that customary international law does not prescribe any particular regulations to restrict courts’ jurisdiction in civil matters.

‘the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.’

On facts like those in *Unocal* this would mandate the application of the law of the state in which the forced labour had occurred. A claim based on a violation of international law would raise the question of whether international law was incorporated into the domestic civil law of the country in question. If the answer were ‘no’, the Rome II Regulation contains two provisions which permit a derogation from the rule in art. 4. First, art. 16 which provides ‘Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation’. For this to apply the court would have to classify the imposition of civil liability for violations of customary international law as a mandatory law of the forum. It might be objected that international law permits but does not require national courts to make available such a remedy. Secondly, art. 26 which provides, ‘The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre

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117 In [1999] ECR I-8453 (C-369/96) Jean-Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup, Sofrage SARL the ECJ defined ‘public order’ legislation as ‘national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State’. Recital 32 of the Regulation cites ‘the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded’ as an example of circumstances that could be regarded as being contrary to the public policy (ordre public) of the forum.
public) of the forum.\footnote{Kuwait Airways Corp v. Iraqi Airways (Nos 4 and 5) [2002] UKHL 19; [2002] 2 AC 886.is an example of where the English courts have refused to apply a particular foreign law on such a basis under the common law conflicts rules.} Again, the court would have to conclude that the application of art. 4 would be contrary to the public policy of the forum whose domestic legal order had incorporated the norms of customary international law.

Fourth, what norms of customary international law can give rise to civil liability on the part of non-state actors? The two civil claims advanced before the English courts so far have been in respect of torture. The breach of this norm can entail criminal liability for individual officials, but not for non-state actors, as by definition torture must be perpetrated by a State actor. However, the relevant norm can be derived by identifying those norms of customary international law which directly affect individuals, whether State officials or non-state actors. These norms are those in respect of which individuals can incur criminal liability – the prohibitions on piracy, genocide, war crimes, crimes against humanity, torture. It may be the case that a greater range of norms, which only affect states, could become the subject of civil liability through the imposition of aiding and abetting liability on non-state actors. Thus, in \textit{In re: South African Apartheid Litig.} Judge Schiendlin held that a corporation could incur liability for aiding and abetting apartheid, even though that prohibition of customary international law did not directly apply to non state actors. However, the relevant norm that is derived from international criminal law is that aiding and abetting international crimes is wrongful. International crimes are those for which sanctions have been applied against individuals, whether state actors or non-state actors, pursuant to the various international tribunals that have been established since Nuremburg. It should, therefore, not be possible to
incur a civil liability for aiding and abetting apartheid as it would be impossible for an individual to incur criminal liability for this conduct.\textsuperscript{119}

Fifth, if these norms are identified by reference to international criminal law, do they reach corporations? To date, corporations have not been the subjects of international criminal law, although it is clear that under international law corporations can have rights\textsuperscript{120} and be subject to obligations.\textsuperscript{121} The Nuremburg Trials, the ICTY and ICTR, the provisions of the ICC are all limited in their reach to proceedings against individuals. Nehrlich has addressed this point as follows:

A norm of criminal law describing a crime may be understood as comprising two sub-norms: the first, most elementary, sub-norm consists of a prohibition of certain conduct, such as the prohibition to kill another person. To make it a norm of criminal law, however, a second sub-norm is required, which provides that the consequence of any contravention of the first sub-norm is criminal punishment. In international criminal law, this structure can best be observed in respect of war crimes, where the prohibition of certain conduct is generally contained in a rule of international

\textsuperscript{119} Therefore, aiding and abetting torture, would not give rise to civil liability under international law. In Guerrero & Others v. Monterrico Metals Plc a case on this basis was recently brought in tort in respect of alleged complicity of a parent company with violent police suppression in Peru of environmental protests. A freezing order was obtained over the parent corporation’s assets, [2009] EWHC 2475 (QB). The trial was scheduled to start in October 2011 but the case settled in July 2011.

\textsuperscript{120} Corporations may commence arbitration proceedings against foreign states under Bilateral or Multilateral Investment Treaties, such as NAFTA. States may claim compensation from other states in respect of expropriations of the properties of corporations, as in the Chorzow Factory, (1928) PCIJ Series A no 17, and Barcelona Traction, ICJ Reports (1970) 3, 9 ILM (1970) 227, cases.

\textsuperscript{121} A number of treaties impose liabilities directly on corporations, such as the 1969 International Convention on Civil Liability for Oil Pollution Damage.
humanitarian law, be it customary or conventional in nature; the second sub-norm is often grounded in international custom.\textsuperscript{122}

Thus, international criminal proceedings against individuals evidences the prohibition of international law that binds all persons, natural or juridical, even though no international tribunals have been established with power to hear criminal cases against non-natural persons. This argument is supported by Judge Schwarz’s analysis of the point in \textit{Talisman} (2003) in which he noted that the IMT in the Farben and Krupp cases spoke of the corporations as having violated international law, even though the proceedings were against their individual executives. It is also echoed in the observations of Judge Shahabudeen in \textit{Certain Phosphate Lands in Nauru} ‘In international law a right may well exist even in the absence of any juridical method of enforcing it … Thus, whether there is a right to contribution does not necessarily depend on whether there exists a juridical method of enforcing contribution.’\textsuperscript{123}

Sixth, how should aiding and abetting liability be addressed? Should this be a matter for domestic law, or should the standards of customary international law on criminal liability for aiding and abetting be applied? Under English law the issue of vicarious liability has been regarded as substantive rather than procedural.\textsuperscript{124} The same analysis must apply to aiding and abetting liability in which case the rules of customary international law will be applied. However, the content of such rules is far from clear. The approach of the US courts in ATS cases points to the norms of international criminal law as the source of the norms on civil liability for violations of international law. This would require the English courts to grapple

\textsuperscript{122} JICJ 8 (2010) 895 at 898.

\textsuperscript{123} at 290.

\textsuperscript{124} \textit{Church of Scientology of California v. Commissioner of Police} (1976) 120 SoJ 690 (CA).
with the question of what constitutes the *mens rea* for international crimes – whether this it to be derived from the Rome Statute and, if so, whether it is to be derived from art.25(3) or from art. 30(2). Furthermore, given that in many legal systems criminal liability does not automatically equate with civil liability – as witness the status of those who assist a crime or a tort under English law – it is by no means obvious that secondary liability should be based on the principles applied to criminal liability under customary international law. One alternative would be to look for common principles on joint liability in tort across different jurisdictions as the basis for customary international law. This approach was advocated by Judge Simma in the ICJ *Oil Platforms* case\(^\text{125}\) and by Judge Shahabudeen in the ICJ *Nauru* case.\(^\text{126}\) Another, advocated by, Clapham, as regards aiding and abetting breaches of customary international law that do not constitute international crimes, would be to apply the principles dealing with the complicity of States set out in the ILC’s Articles on State Responsibility, adopted in 2001, art. 16 of which provides:

> ‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

> (a) That State does so with *knowledge* of the circumstances of the internationally wrongful act; and

> (b) The act would be internationally wrongful if committed by that State (emphasis added).’\(^\text{127}\)

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\(^{125}\) *Oil Platforms (Islamic Republic of Iran v. US)*, Judgment ICJR (2003) 161, 324


However, it is most likely that the courts of the UK would determine this issue under domestic law, applying the applicable rules in the Rome II Regulation on Non-Contractual Obligations, which would also govern issues of a parent company’s liability in respect of defaults of its subsidiary.\footnote{Article 15 provides that ‘The law applicable to non-contractual obligations under this Regulation shall govern... in particular (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;.... (g) liability for the acts of another person;’ Accordingly, claims against a parent corporation in tort, whether vicariously through a finding of agency on the part of the subsidiary, or through a piercing of the corporate veil of the subsidiary, would come within the scope of the Regulation. Previously, the English courts have applied English law to this issue, as in \textit{Adams v. Cape Industries}\footnote{Previously, the English courts have applied English law to this issue, as in \textit{Adams v Cape Industries}\[1990] Ch 433 (CA) and \textit{Kensington International v. Republic of Congo.} [2005] EWHC 2684 (Comm): [2005] All ER (D) 370 (Nov). However, Karen Vandekerckhove in 'Piercing the Veil: A Transnational Approach' Kluwer Law International (2007) argues that this issue should be determined by the \textit{lex societatis}.} [1990] Ch 433 (CA) and \textit{Kensington International v. Republic of Congo.} [2005] EWHC 2684 (Comm): [2005] All ER (D) 370 (Nov). However, Karen Vandekerckhove in 'Piercing the Veil: A Transnational Approach' Kluwer Law International (2007) argues that this issue should be determined by the \textit{lex societatis}.}

Finally, how are parent companies responsible for violations of customary international law committed by their subsidiaries? In the absence of any rules of customary international law on this issue, the law applied would be determined under the Rome II Regulation on Non-Contractual Obligations.\footnote{Previously, the English courts have applied English law to this issue, as in \textit{Adams v Cape Industries}\[1990] Ch 433 (CA) and \textit{Kensington International v Republic of Congo.} [2005] EWHC 2684 (Comm): [2005] All ER (D) 370 (Nov). However, Karen Vandekerckhove in 'Piercing the Veil: A Transnational Approach' Kluwer Law International (2007) argues that this issue should be determined by the \textit{lex societatis}.} Under art. 4 the default rule is that the law to be applied would be that of the State in which the damage occurred. The rule applies irrespective of whether that State is a member of the EU. Article 15 provides that ‘The law applicable to non-contractual obligations under this Regulation shall govern... in particular (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;.... (g) liability for the acts of another person;’ Accordingly, claims against a parent...
corporation in tort, whether directly\textsuperscript{130}, vicariously through a finding of agency on the part of the subsidiary, or through a piercing of the corporate veil of the subsidiary, would come within the scope of the Regulation.

\textbf{Conclusion}

The past four years have seen varying fortunes for foreign plaintiffs seeking redress from US corporations under the ATS. In October 2009 the Second Circuit in \textit{Presbyterian Church of Sudan v. Talisman Energy}\textsuperscript{131} ruled that the \textit{mens rea} for aiding and abetting under customary international law was one of purpose, based on art. 25(3)(c) of the Rome Statute, rather than one of knowledge as had been established by the decisions of the ICTY and ICTR. Worse was to come in September 2010 when the Second Circuit in \textit{Kiobel} ruled that ATS claims cannot be brought against corporations, as the norms of customary international law on civil liability reflect those on criminal liability and these only affect natural persons. However, other circuits have not followed this lead. In July 2011 corporate liability under the ATS was reaffirmed in three circuits in \textit{Exxon Mobil, Sarei,} and \textit{Flomo}. The latter decision is particularly hopeful in that it reaffirms a knowledge, rather than a purpose, standard for aiding and abetting. The Supreme Court’s decision in 2013 in \textit{Kiobel} has not resolved this circuit split on the civil liability of corporations under the ATS. This was the initial issue

\textsuperscript{130}This was the basis on which a parent corporation was held to be liable in the recent Court of Appeal decision in \textit{Chandler v Cape Plc} [2012] EWCA Civ 525, [2012] 1 W.L.R. 3111. The parent company was held liable on the basis of a voluntary assumption of responsibility for the health and safety policy in the group of companies.

\textsuperscript{131}582 F.3d 244 (2\textsuperscript{nd} Cir. 2009)
before the Supreme Court and has been put to one side by the reframing of the question before it following the initial hearing in February 2012.

However, the development of jurisprudence on corporate civil liability for violations of customary international law that has taken place since 1997 under the ATS is likely to come to a standstill, following the decision of the Supreme Court in *Kiobel*. The effect of the decision is that there will be screening out of most ATS claims against corporations in future and the US contribution to the development of international law will diminish. A further development which will limit the extra-territorial scope of the ATS is the tightening up of the rules regarding service by ‘presence’ following the Supreme Court’s 2011 decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*. Following this decision it is doubtful that Shell would have been subject to general jurisdiction by reason of its “Investor Relations Office” in New York. This decision will have the effect of screening out many claims which appear to have no connection with the US, such as *Kiobel* – foreign plaintiff, foreign defendant, acts all taking place in foreign jurisdictions.

One possible alternative outlet for claims based on violations of customary international law is 28 USC §.1331 which gives federal courts jurisdiction over matters arising under the Constitution and federal laws. In *Bodner v. Banque Paribas* it was held that US citizens could sue a French bank in respect of the looting of their possessions in World War Two, which constituted a war crime. In contrast in *Xuncax v. Gramajo* it was

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133 *Bodner v. Banque Paribas*, 114 F. Supp 2d 117 (EDNY 2000), at 127. As US citizens they could not have recourse to ATCA. Neither, given the nature of the violation of customary international law, could they have recourse to the TVPA.
held that federal law gave rise to no autonomous right to sue for breaches of customary international law. In *Sosa* Justice Souter said of *Erie R. Co. v. Tompkins*, that it ‘did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.’ Footnote 18 goes on to state, ‘*Sabbatino* itself did not directly apply international law, see 376 U.S., at 421-423, 84 S.Ct. 923, but neither did it question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts, 376 U.S., at 425, 84 S.Ct. 923 (citing Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939)).’ There still seems room to argue that norms of customary international law of the requisite strength identified in *Sosa* could be said to form part of federal common law and so provide a cause of action in the federal courts pursuant to §1331, or, indeed, under the diversity jurisdiction provided by §1332. Another avenue would be for plaintiffs to bring their claims in tort in the federal courts under diversity jurisdiction, or in tort in the state courts.\(^1\)

The UK courts have yet to grapple with these issues. The only ATS-type case to come before the High Court to date is *Guerrero & Others v. Monterrico Metals Plc*\(^2\) which was pleaded as a tort claim.\(^3\) However, the pleading of torture as a distinct cause of action in *Al*  

\(^1\) 304 U.S. 64, (1938)  
\(^2\) As to this, see Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, (2012).  
\(^3\) [2009] EWHC 2475 (QB). see fn 115.

Tort claims against parent corporations in respect of the activities of their overseas subsidiaries are a speciality of London solicitors, Leigh Day who acted for the claimants in *Guerrero*. However, the changes
Adsani and Jones v. Saudi Arabia is the tip of an iceberg which may well lead to a future claim in the English courts against a company based on its alleged complicity in international crimes. In such circumstances the court would have to consider anew the issue raised in Kiobel as to whether international law authorizes states to impose civil liability on corporations that participate in international crimes. Even if the UK courts accepted that this was the case, there would still be several obstacles to claimants in basing their civil claim against a UK company on its participation in international crimes. It would have to satisfy the actus reus requirement of aiding and abetting which would require a specific connection with the human rights violation in question. Merely doing business in an oppressive regime would be insufficient. It would also have to satisfy the mens rea requirement. If this were to be based on the jurisprudence of the ICTY and ICTR knowledge would suffice. However, if it were to be based on the 1998 Rome Statute, art. 25(3)(c) would require that the actus reus to have been done “[f]or the purpose of facilitating the commission of such a crime...’ This requirement of shared intention would raise the bar of liability and would exclude liability in most of the aiding and abetting cases which have been brought before the US courts in ATS cases. However, an acceptance of the ICTY ‘knowledge’ standard as the mens rea for aiding and abetting, would not be the end of the matter. There would still be formidable problems in holding a UK parent corporation liable for aiding and abetting committed by its overseas

introduced by the Legal Aid, Sentencing and Punishment of Offenders Act (‘LASPO’) 2012 on 1 April 2013 restricting the amount recoverable in costs by a successful claimant may make it more difficult for them to take on claims involving small numbers of plaintiffs in the future. In Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard, 3 U.C. IRVINE L. REV. (2013) 127, 133, Michael D. Goldhaber notes “The three keys to Leigh Day’s funding model were the ability to recover from defendants’ full legal costs, success fees, and litigation insurance premiums (which protected plaintiffs against the risk of covering a victorious defendant’s costs). Sure enough, LASPO generally eliminated the recovery of success fees and insurance premiums while limiting cost recovery to “proportionate” costs.
subsidiary. The corporate veil would have to be pierced or there would have to be a finding that the subsidiary acted as the parent’s agent. Both issues would be determined under the domestic law of the country in which the damage occurred.
The traditional province of international law is in the regulation of relations between States. However, with the tribunals at Nuremberg and Tokyo established at the end of the second world war, for the first time it became possible for individuals to incur criminal liability in respect of violation of a core of norms of customary international law, such as the prohibitions on war crimes and crimes against humanity. This process has continued with the UN’s establishment in the 1993 and 1994 of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’) respectively, culminating with the establishment of the International Criminal Court in 2002. Although there have been no comparable institutions with power to award civil compensation for violations of the norms covered by the international criminal tribunals, the US courts have developed a jurisprudence on civil liability of individuals for violating norms of customary international law, either directly, or as aiders and abetters. The gateway for this development has been the Alien Tort Statute 1789. The contours of this nascent international civil law have been developed in the US federal courts by transplanting the principles under which international law imposes criminal liability on individuals into the field of civil liability in tort. Until recently, it was assumed that corporations could incur civil liability under the ATS. In September 2010 in Kiobel v. Royal Dutch Shell, the Second Circuit decided that this is not the case. Civil liability under customary international law is evidenced by the sources which established criminal liability and none of the international criminal tribunals has ever been given jurisdiction over legal persons. However, subsequent decisions in other Circuits have affirmed that corporations can incur liability under the ATS. The question was referred to the US Supreme Court who gave judgment on 13 April 2013. However, the Supreme Court said nothing about this issue, and, instead, decided the claim on
the basis of the territorial limits of jurisdiction under the ATS. This paper will analyse the development of ATS law on the civil liability of corporations under customary international law and will then consider whether international law can ground a civil cause of action before the courts of the United Kingdom so as to provide a means of holding multinational corporations to account for their involvement in human rights abuses.

Introduction

1. Corporate liability under the ATS.

(i) What norms of customary international law ground a cause of action?

(ii) The content of the international law norm on aiding and abetting

(iii) Corporate liability under customary international law?

(iv) Tertiary liability

2. International law as a cause of action before the courts of the United Kingdom
3. How might corporate liability for aiding and abetting violations of international law develop under English law?

Conclusion