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# Extracurricular International Criminal Law

*Mark A. Drumbl*
Class of 1975 Alumni Professor of Law and Director, Transnational Law Institute, Washington and Lee University, Lexington, VA 24450, USA

## Abstract

This article unpacks the jurisprudential footprints of international criminal courts and tribunals in domestic civil litigation in the United States conducted under the Alien Tort Statute (ATS). The ATS allows victims of human rights abuses to file tort-based lawsuits for violations of the laws of nations. While diverse, citations to international cases and materials in ATS adjudication cluster around three areas: (1) aiding and abetting as a mode of liability; (2) substantive legal elements of genocide and crimes against humanity; and (3) the availability of corporate liability. The limited capacity of international criminal courts and tribunals portends that domestic tort claims as avenues for redress of systematic human rights abuses will likely grow in number. The experiences of US courts of general jurisdiction as receivers of international criminal law instruct upon broader patterns of transnational legal migration and reveal an unanticipated extracurricular legacy of international criminal courts and tribunals.

## Keywords

legal migration – transplants – comparative international law – legacy – domestic incorporation of international criminal law – civil tort claims

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Domestic criminal law informs the register of international criminal law, whether formally through the development of general principles of law or informally through experience and analogy. Reciprocally, international criminal law also informs the register of domestic criminal law, whether formally through incorporation of treaty and custom or, once again, informally through experience and analogy. Circulation thereby arises within the curricular sphere of penal responsibility.

Might international criminal law nonetheless, and perhaps unexpectedly, stray elsewhere in domestic law? When it comes to municipal legal practice, might international criminal law cast a somewhat longer shadow, travel a bit farther, or leave a somewhat haler legacy?

This article assesses the jurisprudential impact of international criminal courts and tribunals on domestic civil litigation in the United States for gross human rights abuses, specifically in Alien Tort Statute (ATS)[1] claims brought in US federal courts. The ATS allows victims of human rights abuses to file tort-based lawsuits for violations of the laws of nations (a phrase taken to mean customary international law).

The analysis begins with the International Criminal Tribunal for Rwanda (ICTR). This article undertakes a search of references to ICTR case-law and materials in ATS judgments. It identifies a set of ATS judgments containing such references. Overwhelmingly, these judgments also include references to the work product of other international criminal courts and tribunals. US judges who cite to ICTR work product to determine the rule of application in an ATS dispute frequently invoke the case-law and materials of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC), the International Military Tribunal at Nuremberg (IMT), the American Military Tribunal at Nuremberg (AMT), and the International Criminal Court (ICC). Hence, this article references these cases and materials as well. The entangled nature of these citations suggests that US judges perceive international courts and tribunals as constituting some form of system.

This article therefore interrogates the migration of substantive criminal law from the public international domain to private municipal tort law. This article abstains from endorsing or challenging the desirability of tort-based claims or international criminal tribunals as modalities of post-conflict accountability. Its goal, rather, is to investigate judicial method and the role of transnational legal migrations therein.

1 28 U.S.C. § 1350 (2012). The ATS is also known as the Alien Tort Claims Act (ATCA) or Alien Tort Act (ATA).

Assuredly, the ATS retains key aspects of penal and international law[2] in that the tort claim hinges upon finding a breach of a customary international criminal norm. What is more: governmental and political entities, notably the US State Department, may express firm opinions regarding ongoing litigation – for example, how it interfaces with international comity – and may actively share that opinion with the deciding judges. On the other hand, ATS litigation departs from international criminal proceedings when it comes to venue (civil litigation at the national level), remedy (monetary damages), burden of proof (balance of probabilities), goals (compensation rather than incarceration), standing (private plaintiffs), actionability (only definable, universal, and obligatory customary international norms are enforceable), and management (national judges in courts of general jurisdiction).

ATS verdicts are infrequently enforced. Victims rarely collect. Individual defendants often are impecunious or outside the jurisdiction. At times, to be sure, cases are settled and compensation will pass hands as part of that settlement. That said, ATS litigation triggers expressive effects. It ventilates obscured tragedies and empowers victims who initiate claims. ATS litigation also educates the public. The judgment of the Second Circuit Court of Appeals in *Kadić* v. *Karadžić*, for example, widely disseminated the horrors of Bosnian rape camps and endemic gender-based violence at a time when the ICTY was still in its infancy.[3]

This article does not deliver quantitative or empirical results beyond the most rudimentary tabulations. This article simply identifies cases in which US federal judges adjudicating ATS disputes have relied upon ICTR cases and ICTR materials, and discusses how and for which purposes these materials – along with those of other international institutions – have been received. The research is best described as qualitative. These modest research findings nonetheless evoke a fascinating story of legal transplant, migration, digestion, legacy, and professionalism – on this latter point, the relationship of national judges with international law.

In light of the sharply limited capacity of international criminal courts and tribunals, domestic tort claims as avenues for redress of systematic human rights abuses will likely grow in number. The experiences of US courts

2 *See e.g.*, James G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', 47 *New York University Journal of International Law and Politics* (2014) 121–206, pp. 128–30 (describing international criminal law as the ATS's 'brother-in-arms' and noting that the ATS and international criminal law 'overlap substantively').

3 *Kadić* v. *Karadžić*, 70 F.3d 232 (2d Cir. 1995).

of general jurisdiction as 'receivers' of international criminal law reveal broader patterns of transnational legal migration and a largely unanticipated legacy of international criminal courts and tribunals. Distortions may nonetheless arise when international norms migrate into legal practices at the national level, in particular, when they do so in cognate legal regimes. These migrations constitute national practices indicative of 'comparative international law', namely, that international legal norms may take shape differently among, and within, various national jurisdictions. While international criminal lawyers may welcome the broad diffusion of international norms, including extracurricularly from the criminal to civil context in a rich array of venues, concerns emerge should the content of the norms fragment and, thereby, weaken international law's purported universality. The US experience is thereby instructive in terms of striking the appropriate relationship between national courts and international law. Should national courts serve as dispassionate law enforcers, as translators of law, or as engaged law creators? Should international judges be mindful of the at times unforeseen afterlife of the jurisprudence they create? Obversely, the US experience also raises questions as to whether the specialised, and at times inconsistent, work-product of the international criminal courts and tribunals is even suitable for broader dissemination and incorporation at the national level.

Part 1 introduces the ATS and its legal elements. ATS litigation remains in a fluid state. Hence, this introduction necessitates a discussion of the jurisdictional and extraterritorial concerns that infuse very recent ATS litigation. This introduction thereby provides a flavour of the kinds of ATS claims that may still be brought. Part 2 sets out the research methods and some preliminary findings. Part 3 discusses substantive aspects of citation by US judges to ICTR materials. Part 4 places these citations within the broader framework of judicial recourse to ICTY, ICC, IMT, and AMT materials in the adjudication of ATS disputes. At times, US judges replay amongst themselves debates that roil international judges and institutions regarding the correct interpretation of a point of substantive criminal law. Part 5 concludes.

## 1 The Alien Tort Statute, its Dénouement, and its Resilience

The ATS dates from the First Congress (1789). It is a succinct instrument that reads as follows: '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'. The ATS has limited legislative history. Its brevity nonetheless belies the tremendous jurisprudential complexity it has sired.

The ATS lay largely dormant for two centuries. Beginning in 1980 with the Second Circuit Court of Appeals' judgment in the *Filártiga* litigation, however, plaintiffs turned to the ATS to pursue redress in US courts for atrocity crimes.[4] Plaintiffs did so in a broad variety of factual circumstances, including when allegations involved abuses committed outside the United States by non-US nationals against non-US nationals. By definition, plaintiffs pursuing ATS claims will be foreign nationals. In many instances, however, plaintiffs present some connection to the United States, either because they are physically present in, had moved to, or are non-residents living in the US. These somewhat more nuanced realities contrast with essentialised depictions of ATS claims as 'foreign-cubed', rooted in pure universal civil jurisdiction, and utterly dissociated from the United States.

The initiation by plaintiffs, often times with the support of sophisticated activists, of ATS litigation has obliged US courts to determine whether a broad array of impugned acts actually constitute violations of the laws of nations. In its 2004 opinion in the *Sosa* case, the US Supreme Court ruled that, while the identification of substantive causes of action under the ATS should proceed cautiously, the statutory remedy is not to be limited only to those violations of the laws of nations acknowledged in 1789.[5] Rather, the remedy covers violations extant today that bear comparable universality and specificity to those that had been recognised in 1789. Courts are to invigilate this process of transhistorical analysis. Actionable contemporary norms must be of sufficiently definite, obligatory, mutual, and universal character. Although the 'law of nations' is taken by US courts to mean customary international law, the importation of these criteria qualifies general understandings of the elements of customary international law. While customary international law constitutes the rule of decision to determine a substantive violation of the ATS, another debate has erupted in ATS jurisprudence: whether customary international law or domestic US law ought to serve as the rule of decision in determining the modes by which an alleged tortfeasor becomes implicated in the tortious conduct. Overall, the tendency appears to be that customary international law should govern this latter determination as well.

A first generation of ATS claims pursued individuals based on their alleged direct involvement in atrocity crimes. A second wave that began in the 1990's

4 *Filártiga* v. *Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (involving a civil claim by two Paraguayan citizen parents against a Paraguayan police officer who tortured and killed their son in Paraguay; the family initiated the claim after both parties had emigrated to the United States).

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

targeted corporations on theories of aiding and abetting in the commission of atrocity crimes. This latter wave proved more controversial jurisprudentially (*i.e.* regarding modes of liability) as well as politically (*i.e.* risking a chilling effect on investment in developing nations, dragging US courts into disputes that lacked connections with the jurisdiction, and interfering with the conduct of US foreign relations).

These controversies suffused the *Kiobel* case, decided in April 2013 on jurisdictional grounds regarding the extraterritorial application of US statutes. Here, the US Supreme Court sharply curtailed the scope of future ATS claims by requiring proof of a compelling nexus with the United States:

> [E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[6]

These concerns have animated other recent US Supreme Court cases in divergent areas of the law, leading to a general reticence to exercise jurisdiction over disputes that lack a compelling nexus with the United States.[7] In this sense, US courts can be seen to respond to the emergent transnationalisation of disputes by retrenching the salience of geography, nationality, sovereignty, and territoriality.

The facts of *Kiobel* involved Nigerian citizens, albeit long-time legal residents of the United States on asylum grounds, who pleaded that Dutch, British, and Nigerian oil exploration and extraction corporations aided and abetted the Nigerian government in committing systemic human rights violations during the 1990s. All nine judges dismissed the case, holding that the factual context was too remote from the United States to justify allowing the claim to continue. Chief Justice Roberts – writing for a five justice majority – robustly applied the presumption against extraterritoriality to the ATS. Justice Kennedy[8]

6 *Kiobel* v. *Royal Dutch Petroleum Co*., 133 S.Ct. 1659, 1669 (2013).

7 *See e.g., Morrison* v. *National Australian Bank*, 561 U.S. 247 (2010). *Morrison* addressed the extraterritorial application of the US Securities Exchange Act of 1934. The Court held that the Act applied only to transactions involving services listed on domestic stock exchanges and to domestic transactions in other securities. *See also* EEOC v. *Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991) (construing a statute only to reach conduct within the United States unless Congress affirmatively declares that the statute applies to conduct abroad).

8 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) ('The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view this is a proper disposition').

and Justice Breyer (writing for himself and three others)[9] gestured in separate concurrences towards a slightly more generous approach to jurisdiction. Justice Alito, in contradistinction, drew a line that was even firmer than that of Chief Justice Roberts.

Following *Kiobel*, the Second Circuit in August 2013 restricted the application of the ATS in a case involving investment in *apartheid*-era South Africa.[10] The Second Circuit held that *Kiobel* barred claims against Ford, Daimler, and IBM (part of the well-known *Khulumani* litigation). This litigation initially targeted fifty companies for allegedly aiding and abetting the *apartheid* regime. Plaintiffs argued *inter alia* that IBM and Ford aided the *apartheid* government and armed forces by providing software and machinery, including computer systems that categorised the South African population by race. In April 2014, on remand to the district court, Judge Scheindlin permitted causes of action to continue against IBM and Ford (companies incorporated in the United States). In August 2014, however, Judge Scheindlin denied the plaintiffs' motion to amend their complaint, thus ending the litigation. She found that the claims did not sufficiently touch and concern the territory of the United States.

In October 2014, the Second Circuit nonetheless fashioned a more nuanced approach in a case (*Mastafa* v. *Chevron and Banque nationale de Paris* (*BNP*)) involving claims arising out of acts of atrocity committed in Iraq during the Saddam Hussein regime.[11] The *Mastafa* litigation was initiated by Iraqi women who were victims of torture by agents of the Hussein government or whose husbands were the victims of such torture. Plaintiffs, some of whom had become US citizens or permanent residents, claimed that defendant corporations aided and abetted these abuses by paying the Hussein regime kickbacks related to the Oil-for-Food Programme. It was alleged these kick-backs eventually served to finance acts of torture. In *Mastafa*, the Second Circuit Court of Appeals ruled that the alleged human rights abuses and the theory of aiding and abetting could be cognisably pleaded under the ATS. The Second Circuit also importantly ruled that the relevant conduct sufficiently touched

9 *Ibid.*, p. 1671 (Breyer, J., concurring) ('I would find jurisdiction under this statute where: (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind').

10 *Balintulo* v. *Daimler AG*, 727 F.3d 174 (2d Cir. 2013).

11 *Mastafa* v. *Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014).

and concerned the United States, thus squaring the facts at hand with the *Kiobel* test.[12] It specified:

> Chevron's oil purchases, financing of oil purchases, and delivery of oil to another U.S. company, all within the United States; and BNP's use of a New York escrow account and New York based 'financing arrangements' . . . facilitated that regime's violations of the law of nations, namely war crimes, genocide and other crimes against humanity.[13]

In another case decided in 2013, however, the Second Circuit dismissed an ATS claim because all of the conduct set forth in the complaint occurred in Bangladesh.[14] Other Circuit Courts of Appeal have also halted ATS litigation owing to extraterritorial concerns. A panel of three judges on the Ninth Circuit, for instance, applied *Kiobel* to dismiss a claim that two US-headquartered corporations were complicit in the 1998 bombing of a Colombian village by members of the Colombian air force.[15] The Eleventh Circuit dismissed a claim against Chiquita, a US corporation, alleging that Chiquita supported Colombian paramilitary forces responsible for torturing and killing banana-plantation workers, union members, and social activists.[16]

That said, in yet another case, the Ninth Circuit permitted plaintiffs to amend their complaint to meet the *Kiobel* 'touch and concern' standard.[17] A District of Columbia district court pursued a similar course of action in a long-standing dispute regarding injuries allegedly inflicted upon plaintiffs by

12 *Ibid.*, p. 193.

13 *Ibid.*, p. 195. Ultimately, however, the Court dismissed the claim on entirely separate grounds, deeming the allegation that the defendants acted with the purpose or intentionality of facilitating or advancing the commission of the crimes by another to be implausible.

14 *Chowdhury* v. *Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

15 *Mujica* v. *AirScan,* 771 F.3d 580, 596 (9th Cir. 2014).

16 *Cardona* v. *Chiquita Brands Int'l Inc.*, 760 F. 3d 1185 (11th Cir. 2014), *cert. denied* 135 S. Ct. 1842 (2015). *See also Doe* v. D*rummond Co.*, 782 F.3d 576, 592 (11th Cir. 2015) (defendants' alleged support of a US-designated terrorist organisation was insufficient to oust the *Kiobel* presumption and permit jurisdiction).

17 *Doe* v. *Nestle*, 766 F.3d 1013 (9th Cir. 2014) *rev'g and vacating* 748 F. Supp. 2d 1057 (C.D. Cal. 2010) [hereinafter *Doe* (2014)]. A petition for rehearing *en banc* was denied 788 F.3d 946 (9th Cir. 2015), with a dissent (by Bea J.) that referenced the Rome Statute in support of the proposition that it requires the heightened standard of purpose when it comes to aiding and abetting liability. A petition for writ of *certiorari* was filed 18 September 2015, and *cert* was denied by the US Supreme Court on 11 January 2016. *See infra* notes 77–79 and accompanying text for discussion of the reversed 2010 district court opinion.

Indonesian soldiers employed by corporate defendants to provide security at a natural gas facility in Aceh.[18] In an exhaustive analysis, this district court emphasised that the extraterritoriality bar will be displaced when the claims sufficiently touch and concern the United States because of: (1) substantial and specific domestic conduct relevant to the ATS claims, (2) US citizenship or corporate status of the defendant, and (3) the presence of important US national interests.[19] Applying this test to the facts at hand, the presiding judge ascribed considerable probative value to the allegations that corporate executives in the US received briefings on rape, torture, unlawful detention, assault, and killings committed in Aceh; that decision-making was US-based; that the defendant was incorporated in the US with a principal place of business in the US; and that security personnel were committing violations through the use of defendant's equipment.

The Fourth Circuit in *Al-Shimari* permitted claims to proceed against US defense contractor CACI for abuse and detention at Abu Ghraib.[20] The Fourth Circuit found that ATS claims related to the alleged torture at Abu Ghraib sufficiently touched and concerned the United States because of the defendant corporation's US status, the US citizenship of the defendant's employees, defendant's status as a contractor of the US government, the location where contracts were made, and allegations that the wrongful conduct in question occurred domestically in the United States (*i.e.* approving, encouraging, and covering up the alleged torture). In a district court case from the District of Columbia, moreover, the presumption against extraterritoriality was rebutted when a foreign defendant bombed a US embassy in Kenya, acts in furtherance of the terrorist plan took place in the US, and the violence was intentionally directed against the US government and employees.[21] Another district court case from New Jersey involving terrorism also survived a dismissal challenge, even though the alleged effects of the violations of the law of nations were entirely felt in Sri Lanka.[22] In yet another dispute – the *Lively* case – a United States district court in Massachusetts denied a summary

18 *Doe* v. *Exxon Mobil*, 2015 WL 5042118 (6 July 2015) (D.D.C.).

19 *Ibid.*, p. *7.

20 *Al Shimari* v. *CACI Premier Tech. Inc.*, 758 F.3d 516 (4th Cir. 2014).

21 *Mwani* v. *bin Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013).

22 *Krishanti* v. *Rajaratnam*, No. 2.09-cv-05395, 2010 WL 3429592 (D.N.J. 26 August 2010) (deeming the following factual allegations to be relevant: the defendant hosted meetings and fundraisers for a foreign terrorist organisation in the United States, donated money to a US-based group that was purposefully sent to the terrorist organisation, and created corporations in the United States to facilitate attracting additional donations).

judgment motion to dismiss in September 2013.[23] This case involves an ATS claim against Scott Lively, a pastor, brought by a Ugandan non-governmental organisation, Sexual Minorities Uganda, alleging violations of the laws of nations regarding the infliction of persecution against LGTBI persons in Uganda. Lively, a US citizen, allegedly fomented and attempted to foment these persecutory acts. In this case, the district court distinguished the facts from *Kiobel* because the defendant was an American citizen residing within his venue and the alleged tortious acts took place to a substantial degree within the United States over many years with only 'infrequent actual visits' to Uganda.[24]

What is the bottom line, then, when it comes to the ATS and extraterritoriality in the wake of *Kiobel*? Clearly, the range of claims that can be brought has narrowed. An ATS case cannot proceed if the asserted wrongful conduct has entirely occurred outside of the United States. A defendant's US citizenship (or mere corporate presence), while relevant, is not on its own dispositive to satisfy the requirement that the litigation sufficiently touches and concerns the United States. As is evident from the case-law, however, it is far too early to sound the death-knell of ATS litigation. Claims will continue, in particular, where the underlying conduct (including manufacture, financing, managing, or developing) occurs in the United States, where the conduct was intended to impact the United States, and where the United States may be harbouring an alleged wrongdoer.

These questions, while an essential introduction to the subject matter, also stray from the *raison d'être* of this article. Many years of ATS litigation offer a fascinating laboratory into the deployment of international criminal judgments and materials in domestic civil litigation for gross human rights abuses. It is towards this laboratory that this article now turns.

## 2 International Materials in ATS Litigation: Sources and Research Methods

ICTR case-law and materials are understood to mean: (1) judicial decisions of both the ICTR Trial Chambers and the Appeals Chamber; and (2) the ICTR

23 *Sexual Minorities of Uganda* v. *Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013) (denying defendant's motion to dismiss, finding sufficient allegations to state a claim under the ATS, and determining that 'the restrictions established in Kiobel on extraterritorial application of the ATS do not apply. . . where Defendant is a citizen of the United States and where his offensive conduct is alleged to have occurred, in substantial part, within this country'. *Ibid.*, p. 310.

24 *Ibid.*, p. 321.

Statute itself. A search of US federal judgments was initiated through the *WestlawNext* database platform in the summer of 2013.[25] This search generated an opening sample baseline of federal judgments.[26] Judgments decided since 2013 were subsequently integrated into the analysis, albeit on a piecemeal basis, in an effort to qualitatively assess the case law. A second database search was undertaken in the summer of 2015 to consolidate the findings.[27] The initial set of federal judgments generated by the search for references to ICTR cases and materials in ATS litigation was notable in the sense that, with only one exception, each of the federal judgments also contained a reference to the materials of one of the ICTY or the Nuremberg-era tribunals, often times both, and also at times to the materials of other international criminal courts or tribunals (ICC, for example).

One immediate observation is that ICTR case-law and materials appear only in a modest number of ATS cases. A number of caveats, however, pertain to this observation. Many cases that pop up in a search for ATS may only involve incidental reference thereto without necessarily involving litigation thereunder; others may involve strictly extraterritorial questions, to which the substantive law of the international tribunals is not germane, or invocation of *forum non conveniens* or political question doctrine (same irrelevance).[28] Since ATS

25 Cody Phillips undertook this search.

26 A search for 'ats' in federal materials yielded 1,247 cases. A search for 'atca' yielded 325 cases. In order to focus the research, Phillips began the analysis with the 75 cases that resulted from a search for '(ats or atca) and ictr'. He then analysed any additional cases identified by the following searches: '(ats or atca) and icty' (76 total results), '(ats or atca) and Nuremberg' (76 total results), '(ats or acta) and Rwanda' (62 total results), and '(ats or atca) and Yugoslavia' (65 total results). He also conducted searches individually combining 'ats' or 'atca' with the 'ictr', 'icty', 'Rwanda', 'Yugoslavia', and 'Nuremberg' without discovering any unanalysed results. This sample had 98 cases. Within each of the 98 cases in the sample, Phillips used the internal search function to identify any references to 'ictr', 'icty', 'Rwanda', 'Yugoslavia', or 'Nuremberg'. He did not record citations to other federal cases where the search terms were located in explanatory parentheticals. Of the 98 cases in the sample, 31 contained at least one reference to one, some, or all of the ICTR, ICTY, or Nuremberg Statutes or case-law. A total of 25 referenced the ICTR, 25 referenced the ICTY, and 21 referenced Nuremberg.

27 Annie Cox undertook this search.

28 Conversely, some ICTR citations in ATS cases do not relate to substantive points of customary international law. These, however, are rare. *See e.g.*, *Doe* v. *Nestle,* 748 F. Supp. 2d 1057, 1106 n.50 (C.D. Cal. 2010), *rev'd and vacated*, 766 F.3d 1013 (9th Cir. 2014) (citing the ICTR's 2003 *Semanza* trial chamber judgment in support of the appropriateness of citing Black's Law Dictionary when interpreting the decisions of the *ad hoc* tribunals; in *Semanza*, the Trial Chamber had cited to Black's *inter alia* for definitions of 'plan' and 'aid and abet').

claims began in earnest in the early 1980's, over a decade of ATS litigation preceded the creation of the ICTR and nearly two decades of this litigation took place prior to consistently produced ICTR case-law. Finally, it is plausible that a percentage of results yielded by the acronym ATS (or ATCA) involve totally unrelated subject-matter.

Citations to the case-law and materials of international criminal courts and tribunals in ATS litigation may be modest in number but they are neither sporadic nor intermittent. Nor are they thoughtless. International case-law and materials are deliberately invoked when it comes to determining the content of the law of nations. A district court in the District of Columbia, for example, described the ICTR and ICTY as 'authoritative' on the subject of interpreting customary international law.[29] A decade earlier, another district court judge had held:

> United States courts that have been required to describe elements of the 'law of nations' or other international law concepts have frequently turned to the decisions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and have, with apparently only one exception, approved of such decisions.[30]

US federal courts appear to consider the case-law and materials of international criminal courts and tribunals alternately as *sources* of international law[31] or as *evidence* of customary international law.[32] Although these materials

29 *Doe* v. *Exxon Mobil*, 2015 WL 5042118, p. *7 (6 July 2015) (D.D.C.) (noting also that '[t]he decisions of the International Military Tribunal at Nuremberg and the other post-World War II Nuremberg tribunals also provide authoritative guidance about the content of customary international law').

30 *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 226 F.R.D. 456, 478 n.21 (S.D.N.Y. 2005) (citation omitted). *Cf. Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322, 1344 (N.D. Ga. 2002) (noting that the statutes and opinions of the *ad hoc* tribunals are 'particularly relevant').

31 *See e.g.*, *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 30 (D.C. Cir. 2011), *vacated in part*, 527 Fed. Appx. 7 (2013) (mem), *remanded to* 69 F.Supp.3d 75 (D.D.C. 2013) [hereinafter *Doe VIII* (2011)] (citing Article 6 of the ICTR Statute among other international sources) ('Decisions of the courts established by the U.N. Security Council, the International Military Tribunal at Nuremberg established in the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis … and the several Nuremberg tribunals are recognised as an authoritative source of customary international law'); *Doe* (2014), p. 1020 (describing ICTR and ICTY decisions as 'authoritative sources of customary international law' and the SCSL *Taylor* decision as 'a proper source of international law for ATS claims').

32 *See Presbyterian Church* v. *Talisman*, 374 F. Supp.2d 331, 338 (S.D.N.Y. 2005) (Judge Cote holding that: 'Although the Tribunals do not create *new rules* of customary international

help identify and legitimate a rule of decision, this vacillation among US judges generates some doctrinal confusion. Furthermore, those courts that view these materials as sources hedge as to whether these are primary or subsidiary sources pursuant to Article 38 of the Statute of the International Court of Justice. The most representative way to typologise the approach of US federal judges, however, is that they turn to international case-law and materials (notably ICTR, ICTY, Nuremberg-era tribunals, and the ICC) as authoritative evidence of the existence and content of a customary rule (in other words, of the state of customary international law). To be sure, this approach is not without exception. For example, one Circuit Court of Appeals judge in 2007 chastised reliance on the 'unorthodox practices of the ICTY and ICTR', reasoning that judgments of the *ad hoc* tribunals were 'useless precedent on the issue of liability of private parties for violations of customary international law'.[33] Instead, this judge ruled that the Rome Statute (at the time signed by 139 countries and ratified by 105) and AMT cases were appropriate authorities to demonstrate the content of customary international law, in this particular case regarding elements of aiding and abetting liability. The fact that the judge in question devoted many pages of detailed text justifying his position indicates the level of seriousness with which the intersection of the work product of international criminal law institutions and national private law frameworks is taken in the context of ATS litigation.

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law, they occupy a special role in enunciating the current content of customary international law norms. ICTY and ICTR opinions typically engage in nuanced and exhaustive surveys of international legal sources, and as such, they are exceedingly useful as persuasive evidence of the content of customary international law norms'); *see also Almog* v. *Arab Bank*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007). In her 2005 opinion on the motion for judgment on the pleadings in *Presbyterian Church*, Judge Cote also emphasised the following indicia of the jurisprudential value of the ICTY and ICTR Statutes: (1) their creation by Security Council resolution, which are binding upon all member states; (2) the imperative nature of their prosecutorial mandates; and (3) their purpose to 'adjudicate violations of customary international law'. *Presbyterian Church*, 374 F. Supp. 2d at 338. Judge Cote also viewed decisions of the Nuremberg tribunals in this fashion. *Ibid.*, p. 336 n.10–11. *Quaere* whether it is appropriate for her to do so in light of the fact that these tribunals were established in very different fashion than the ICTY or ICTR. Judge Cote felt similarly about the ICC. *Ibid.*, p. 339. As regards the ICC, she noted: 'The objections raised by the United States [to the Rome Statute] centered on the *procedures* contained in the final draft … not the *substance* of the international legal rules contained therein'. *Ibid.*

33 *Khulumani* v. *Barclay Nat. Bank Ltd.*, 504 F.3d 254, 331, 335 (2nd Cir. 2007) (holding additionally that the ICTY and ICTR Statues are 'custom-made' and that they 'address particular international crises' in ways that 'are sometimes contrary to evolving norms of customary international law').

For the most part, references to ICTR materials in domestic ATS litigation primarily reinforce or confirm the existence of certain substantive rules of customary international law. At times, however, these references are jurisgenerative in that they establish new law, applicable directly at the national level, which may in fact be more progressive than the extant rules as generally understood. For example, *Lively* references ICTR judgments (and other international sources) to support the proposition that an orchestrated campaign of intimidation of LGBTI persons constitutes persecution as a crime against humanity.[34] A review of ATS jurisprudence reveals the tendency of certain US judges to tread cautiously with regard to the content of customary international law while other judges proceed quite audaciously. This observation gestures toward the attitudinal diversity among US federal judges.

In a number of instances, inconsistent treatment of the same putative rule arises among the differing judicial Circuits. This fragmentation may vex outside readers, but it actually is somewhat uneventful within the US federal system insofar as the different Circuits can proceed in their own directions. In situations of serious Circuit splits, however, the US Supreme Court steps in to resolve such *différends*. That said, this variability among judges and Circuits with regard to content and meaning might pose a *sui generis* set of challenges when it comes to international law as a rule of decision in light of international law's universalising aspirations as well as the ongoing relevance of positivistic notions of state consent. This variability may be problematic when it occurs *within* a national jurisdiction; as it may be problematic when it occurs as *among* different national jurisdictions. In both instances, courts, either within or among national systems, may seek to create international law rather than simply apply international law. Such juridical tendencies earned the scorn of Lord Hoffman in the *Jones* v. *Saudi Arabia* case, which involved a claim of torture brought in the United Kingdom and the applicability *inter alia* of immunities to international crimes. In discussing jurisprudence from Italy that dismissed immunities as a lower-order value, Lord Hoffman warned:

> It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.[35]

34 *Sexual Minorities of Uganda* v. *Lively*, 960 F. Supp. 304, 310 (D. Mass. 2013) ('[M]any authorities implicitly support the principle that widespread, systematic persecution of individuals based on their sexual orientation and gender identity constitutes a crime against humanity that violates international norms').

35 *Jones* v. *Saudi Arabia*, 14 June 2006, House of Lords, [2006] UKHL 26, [63] (appeal taken from [2004] EWCA Civ 1394). Sovereign immunity questions continue to be adjudicated in

The fact that many ATS cases are initially adjudicated on motions to dismiss or summary judgment motions – in which the facts are taken in the most favourable fashion for the plaintiffs and the legal standard of pleading is one of plausibility[36] – may encourage a slightly more purposive or elastic view of the content of customary international law. Many ATS judgments also arise on motions for leave to amend existing complaints. If and when matters go to trial, it is readily foreseeable that more restrictive interpretations would emerge.

A number of ATS cases involve the same disputes that sinuously wind their way up the judicial system, then are remanded back pursuant to interlocutory motions, only to wend their way up again. Litigation rotates around some epic claims: for example, *Khulumani* (South Africa), *Mujica* (Colombia), *Doe* v. *Exxon* (Indonesia), *Doe* v. *Nestle* (Côte d'Ivoire), *Presbyterian Church* (Sudan), and *Kiobel* (Nigeria). These disputes last for many years. The findings presented in this article include references to international materials in the same dispute as it works its way up and down varying trial and appellate levels of the federal judicial system, and then following appeal once again to remand at the trial level. In these situations, each individual court's discussion is included separately. This article discusses judgments even if subsequently overturned on points of law by an appellate circuit court. What is more, *en banc* appellate decisions may overturn (and vacate) decisions previously rendered by three-member appellate panels: in these instances, which may occur in ideologically fraught Circuits, this article includes both the initial appellate decision and the *en banc* decision. This article also discusses citations in dissenting opinions. The bottom line is to offer a qualitative snapshot of the various ways US judges rely on ICTR materials specifically and international materials generally.

Another complicating issue arises when international materials inform an initial determination of a substantive rule of customary international law, but then the US court opinion that effected the initial international citation itself becomes the ongoing point of reference to justify the existence of the substantive rule. In other words, court X comes to conclusion Y based on international materials. Then court A cites to conclusion Y, justifying the decision

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the Italian courts. *See e.g., Simoncioni* v. *Germany*, 22 October 2014, Constitutional Court, Judgment No. 238/2014, Gazzeta Ufficiale (spec. ser.), No. 45, 29 October 2014.

36 *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) ('To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face"'). In reviewing a motion to dismiss, the court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favour of the party that resists the motion.

based only on the precedent of court X instead of the international materials. Here, international law enters the domestic legal lexicon, but then sheds its international provenance. In a telling trend, several of the more recent ATS appellate opinions cite less frequently to international materials than had been the case in earlier opinions. In US courts, apparently, the legitimacy of a Circuit Court of Appeals citation (or even that of a district court) on a point of law tends to exceed what may be seen as the more *risqué* reliance on international sources, although international sources may have generated the initial substantive rule. In other national jurisdictions, *a contrario*, citation to an international source may be seen as conferring greater legitimacy or credibility to the assertion of the existence or content of a specific substantive rule of customary international law.

Which ICTR materials receive the most attention? The ICTR Statute is frequently cited. Citations also are made to a number of cases. When it comes to case citation, a fairly scattershot approach is taken. Citations are broadly dispersed and not clustered into one or two cases alone. On the other hand, some advantage emerges in terms of subsequent citation frequency for early adjudication in ICTR history. This, however, is likely nothing more than the simple gift of temporality. Another factor that would likely bear upon the frequency of citation – but that this research does not explore – is language, notably, whether specific judgments and materials are available in English.[37] Ostensibly, this variable would affect the accessibility of all international materials in US courts. I do not see this variable, however, as relevant in the case of the ICTR (or ICTY or ICC). The ICTR's official languages were English and French. Overwhelmingly, judgments have been rendered in or translated into English; all statutory and regulatory materials are available in English.

## 3 ICTR Citations and ATS Litigation: Substantive Aspects

Which of the ICTR's work has had the greatest impact in US courts, and in which areas of customary international law?

Citations to ICTR materials are diverse but cluster around three substantive areas: (1) aiding and abetting as a mode of liability; (2) the definition and legal elements of genocide and crimes against humanity; and (3) corporate liability. This Part considers each of these three areas in greater depth. In addition, stray references in ATS litigation to ICTR materials touch upon some residual issues, such as exhaustion of local remedies and conspiracy as applicable only to

37 Thanks to Kai Ambos for this point.

genocide or aggressive war.[38] Other occasional ICTR citations appear on the issue of command responsibility, for example as a liability theory in cases of failure to prevent the commission of crimes or to punish subordinates following the commission of crimes,[39] or, in addition, when contemplating the extension of command responsibility into the context of private companies.[40]

### 3.1 *Aiding and Abetting*

Establishing the availability and parameters of aiding and abetting liability under customary international law became particularly salient to ATS litigation once plaintiffs targeted corporations as defendants insofar as corporations could only be accessorily linked to the wrongdoing. ICTR materials inform judicial conversations about the existence of aiding and abetting liability under customary international law[41] and, secondly, help delineate the required elements of such liability (*i.e.* addressing whether a defendant need act only with knowledge of the criminal goals or must purposefully intend to facilitate those goals).

38 *Presbyterian Church* v. *Talisman*, 453 F. Supp. 2d 633, 663–64 (S.D.N.Y. 2006) (limiting conspiracy only to conspiracies to commit genocide and to wage aggressive war, and citing the *Nahimana* decision (and ICTR Statute) to emphasise the recognition of conspiracy only in the context of genocide). Relatedly, this judgment also contrasted the doctrine of conspiracy in the ICTR with US law's *Pinkerton* principle, under which a defendant 'could not be held liable under the ATS for the conduct of a co-conspirator merely because that conduct was foreseeable'. *Ibid.,* p. 665.

39 *Doe* v. *Qi*, 349 F. Supp. 2d 1258, 1330–33 (N.D. Cal. 2004) (relying on ICTR case-law to extend command responsibility beyond the context of military superiors alone).

40 *Giraldo* v. *Drummond Company*, 2013 WL 3873978 (N.D. Ala. 2013), *aff'd* 782 F. 3d 576 (11th Cir. 2015) (noting that, in the 2000 *Musema* Trial Judgment, command responsibility was used in the case of a director of a public factory and, hence, was not a basis to warrant doctrinal extension into the context of private companies).

41 *See e.g.*, *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (*per curiam*) (relying on different bases for aiding and abetting as theory of liability under the ATS). In his concurring opinion, Judge Katzmann relied heavily on international law as the appropriate rule of application. *Ibid.* at pp. 264–84. Judge Hall instead relied on federal common law. *Ibid.,* pp. 284–92. *See also Doe* v. *Nestle*, 748 F. Supp.2d 1057, 1079 (C.D. Cal. 2010) ('Aiding and abetting liability is prominent in the Nuremberg Tribunals, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Statute of the International Criminal Court'), *rev'd and vacated,* 766 F.3d 1013 (9th Cir. 2014); *see also ibid.,* p. 1079 n.25 (citing to Article 6 of the ICTR Statute); *Doe VIII* (2011), p. 31(citing Article 6 of the ICTR Statute among other international sources); *Presbyterian Church* v. *Talisman*, 453 F. Supp. 2d 633, 666 (S.D.N.Y. 2006); *In re* 'Agent Orange' Prod. Liab. Litig., 373 F.Supp. 2d 7, 54 (E.D.N.Y. 2005); *Almog* v. *Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Bowoto* v. *Chevron Corp.*, 2007 WL 2349343 (N.D. Cal. 14 August 2007); *Sexual Minorities of Uganda* v. *Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).

The existence of aiding and abetting liability is settled in ATS jurisprudence. Considerable fractiousness, however, emerges regarding the elements that a plaintiff must establish both in pleading and subsequently at trial. This fractiousness matches the reality that these questions are far from resolved in and among the practices of the various international criminal courts and tribunals.

The *actus reus* of aiding and abetting requires proof of providing assistance or other forms of support to the commission of a crime. This assistance must be substantial. Controversy arises, however, over whether international law imposes the additional requirement that assistance must be specifically directed towards the commission of the crime. In 2014, the ICTY resolved quarrels regarding proof of specific direction in *Šainović* when, overturning its own antecedent case-law, the ICTY Appeals Chamber ruled in favour of rejecting the specific direction requirement as part of the *actus reus* in contexts where the defendant is remote from the crimes.[42] In December 2015, the *Šainović* approach was affirmed by the ICTY Appeals Chamber in its judgment in *Stanisić & Simatović*. The ICTY's retreat from the specific direction requirement has

42 *Prosecutor* v. *Šainović*, 23 January 2014, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-05-87-A, Judgment, paras. 1617–25. In this case, the ICTY Appeals Chamber explicitly rejected the position on specific direction in the *actus reus* that had been adopted in the earlier and controversial *Perišić* case, *Prosecutor* v. *Perišić*, 28 February 2013, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-04-81-A, Judgment. In *Perišić*, it had been held that 'where the accused neither is a part of an organisation whose exclusive purpose is to commit crimes nor endorses a policy pertaining to their commission, individual criminal responsibility will not accrue except when the relevant assistance was specifically directed toward the commission of the criminal activities'. Charles Chernor Jalloh, 'International Decisions, Prosecutor v. Taylor', 108(1) *American Journal of International Law* (2014) 56–66, pp. 61, 66 n. 21 (noting also that the ICTY turned its attention to the issue owing to the 'need for legal certainty and predictability of the criminal law'). Jalloh observes that in *Šainović* the ICTY Appeals Chamber engaged in a 'careful subsequent review of national and international authorities', which 'amply showed that specific direction was never a legal ingredient of the *actus reus* of aiding and abetting'. *Ibid.* Hence, aiding and abetting liability requires only the provision of 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime', this being a standard that, according to the ICTY Appeals Chamber, reflects customary international law. *Šainović*, paras. 1626, 1649. Relatedly, the Appeals Chamber of the Special Court for Sierra Leone also decided not to pursue the specific direction requirement in the *Taylor* case. *See Prosecutor* v. *Taylor*, 26 September 2013, Special Court for Sierra Leone, Case No. SCSL-03-01-A, Appeals Judgment, para. 486. Because of the framing of the appeal by the defence, however, much of the discussion of specific direction in the *Taylor* appeals judgment took place within the elements of the *mens rea*. *Ibid.*, paras. 471–81.

nonetheless not defused this controversy within ATS adjudication. While noting the rejection of the specific direction test by the Special Court for Sierra Leone (SCSL) and some ICTY judgments (though not the repudiation of the test in *Šainović*), the Ninth Circuit nonetheless refused to formally relax the specific direction requirement for domestic purposes.[43] The District of Columbia Circuit, on the other hand, remains unflagging in its view that specific direction is not an element of aiding and abetting liability under customary international law.[44]

In addition, US courts have turned to ICTR authority to determine whether the *actus reus* of aiding and abetting requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.[45] In 2015, citing the ICTR appeals judgments in *Ndahimana* and *Nzahonimana*, a district court judge ruled that while a link or connection must be established between the aider and abettor's actions and the underlying crime, a 'cause-effect relationship' between the two is not required.[46]

The standard for *mens rea* in aiding and abetting triggers additional debate, notably, whether knowledge alone, given proof of the substantial effect of the defendant's acts upon the commission of the crime, suffices or whether purpose must be shown. US judges split when it comes to the knowledge or purpose element. Some rely on knowledge alone.[47] These judges, for example on the District of Columbia Circuit, have invoked ICTR materials.[48] The jurisprudence of the *ad hoc* tribunals is generally taken to affirm a knowledge standard. Other US judges, however, require the higher bar of intentionality. On this

43 *See Doe* (2014).

44 *Doe* v. *Exxon Mobil*, 2015 WL 5042118, p. *10 (6 July 2015) (D.D.C.). This judgment reviewed a series of ICTR cases (*Ndahimana*, *Ntawukulilyayo*, *Kalimanzira*) which it interpreted as invoking the specific direction requirement, but then discounted their interpretive value on a variety of grounds including lack of clarity and reliance on other international precedent that had since been superseded.

45 *Almog* v. *Arab Bank*, 471 F. Supp. 2d 257, 286 (EDNY 2007).

46 *Doe* v. *Exxon Mobil*, 2015 WL 5042118, p. *8 (6 July 2015) (D.D.C.).

47 *See e.g.*, *Romero* v. *Drummond*, 552 F.3d 1303 (11th Cir. 2008); Sinaltrainal v. Coca-Cola Co., 578 F. 3d 1252 (11th Cir. 2009).

48 *Doe VIII* (2011); *Doe* (2014), p. 1023 (citing to ICTY cases, the ICTR's *Kayishema* Judgment from 1999, and also the SCSL's Appeals Judgment in *Taylor*). Assessing the US case-law, Manuel Ventura argues that purpose does not reflect customary international law. Manuel J. Ventura, 'Farewell "Specific Direction": Aiding and Abetting War Crimes and Crimes Against Humanity in Perišić, Taylor, Šainović et al., and US Alien Tort Statute Jurisprudence', in: Stuart Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013* (Oxford University Press, Oxford, 2014), pp. 511–553, p. 513.

note, in the Second Circuit the appropriate test is whether the defendants acted with the purpose to aid and abet the violations of customary international law committed by someone else.[49] The Fourth Circuit approaches the question similarly. As discussed in detail *infra*, judges who prefer this option look beyond the *ad hoc* tribunals for support, and incline toward the Rome Statute as an authoritative source. The Ninth Circuit for its part has declined to formally establish whether a purpose or knowledge standard applies to aiding and abetting ATS claims.[50]

In addition, considerable confusion persists within ATS jurisprudence whether specific direction and purpose are *mens rea* or *actus reus* requirements.[51] At times, specific direction may be deployed as a proxy for purpose;

49 In the Second Circuit, as clearly announced in the 2009 *Presbyterian Church* case and echoed in the 2014 *Mastafa* case, the '*mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone'. *Mastafa*, 770 F.3d 170, 191–92 (2d Cir. 2014) (noting also 'the lack of a sufficient international consensus' for imposing individual liability for persons 'who knowingly (but not purposefully) aid and abet a violation of international law'). *See also Presbyterian Church of Sudan* v. *Talisman Energy*, 582 F.3d 244, 260 (2d Cir. 2009). The judgment in *Presbyterian Church* relied expressly on Judge Katzmann's earlier concurrence in the 2007 *Khulumani* litigation, which abundantly references international materials. The 2014 *Mastafa* opinion picked up this thread, noting: 'Judge Katzmann conducted a lengthy analysis of relevant sources of international law and concluded that "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime"'. *Mastafa*, 770 F.3d at p. 192.

50 *Doe* (2014), pp. 1023–24. The Ninth Circuit found sufficiently plausible evidence to satisfy the more 'stringent' purpose standard in this case and hence allowed the proceedings to continue without needing to resolve the legal question. However, Judge Rawlinson in dissent would adopt the approaches of the Second and Fourth Circuits and would 'definitely and unequivocally decide that the purpose standard applies to the pleading of aiding and abetting liability under the ATS'. *Ibid.*, p. 1029 (Rawlinson, J., dissenting).

51 *See* Ventura, *supra* note 48, p. 521. Uncertainty regarding categorisation of the specific direction requirement also arises within the international criminal tribunals. Ventura discusses at length the separate opinions of Judges Meron and Agius in *Perišić*, who proposed that specific direction could form part of the *mens rea* or the *actus reus* and, in fact, that it might be best to include it in the *mens rea* but that it was appropriate to follow the prior jurisprudence; Judge Ramaroson's separate opinion also felt that specific direction was implicit in the *mens rea*. The defence in the Charles Taylor case raised specific direction in its appeal but 'chose to concentrate on it more in the *mens rea* context … arguing that knowledge of crimes should not be enough, but instead "purpose" was required, and that "purpose" and "specific direction" were analogous'. *Ibid.*, p. 530 n.90.

*ipso facto*, then, a retreat from specific direction could be seen as a move towards knowledge. This malleability is unsurprising in light of just how complex the determination of these modes of liability has become under international law.

In sum, when it comes to aiding abetting liability, fragmentation at the international level appears to replicates itself nationally.

### 3.2 *Existence of Genocide and Crimes against Humanity under Customary International Law and Identification of Elements Thereof*

US judges consult ICTR materials in support of the prohibition of genocide and crimes against humanity as customary international law and, as a secondary matter, to clarify key elements thereof.[52] The majority of these citations cluster in determining crimes against humanity to be proscribed by customary international law.[53] An impulse may arise to cite to the ICTR (and the ICTY and Rome Statute) because of the absence of a comprehensive treaty prohibiting crimes against humanity, unlike the case with genocide. These judicial references intimate that the work of international criminal courts and tribunals can fill gaps when treaty law is unavailable to constitute first-best evidence of a rule of customary international law.

ICTR sources also help elucidate the elements of these crimes. ICTR materials have clarified the definition of genocide, of an enumerated group, and of the requisite level of intent;[54] and have legitimised the inference of genocidal intent from facts and circumstances.[55] ICTR materials have been invoked to assess the meaning of 'widespread' and 'systematic' attack for the purposes of the *chapeau* requirements of crimes against humanity,[56] along with the

52 *See e.g.*, *Krishanti* v. *Rajaratnam,* No. 2.09-cv-05395, 2010 WL 3429592, p. *8 (D.N.J. 26 August 2010) (turning to the ICTR Statute as proof of the list of specific crimes that can constitute crimes against humanity and noting the expansion of this list since Nuremberg).

53 *See e.g.*, *Doe* v. *Rafael Saravia*, 348 F. Supp. 2d 1112, 1115 (E.D. Cal. 2004).

54 *Abagninin* v. *AMVAC Chem. Corp.*, 545 F.3d 733, 739 (9th Cir. 2008) ('Decisions from international tribunals also reflect the specific intent requirement for genocide. The [ICTR's] definition of genocide was taken verbatim from the Genocide Convention'). Citing the ICTR's Trial Judgment in *Akayesu*, the Ninth Circuit held in this case that 'the ICTR defined genocide as a crime of specific intent'. *Ibid.*

55 *Presbyterian Church of Sudan* v. *Talisman Energy Inc.*, 226 F.R.D. 456, 479 (S.D.N.Y. 2005).

56 *Bowoto* v. *Chevron Corp.*, 2007 WL 2349343, p. *3 (N.D. Cal. 14 August 2007) (citing to the ICTR Statute for the substance of the *chapeau* requirements of crimes against humanity and that there must be a nexus between the acts of the defendant and these requirements). This opinion turned to the *Akayesu* judgment to define widespread as 'massive, frequent, large-scale action, carried out collectively with considerable seriousness and

meaning of 'attack' generally[57] and the level of knowledge of an accused to establish liability.[58] ICTR materials are also cited to define elements of persecution as a crime against humanity, including the purposive finding of protected groups in the *Lively* trial judgment.[59] The *Lively* court held that '[t]o properly plead persecution as a crime against humanity, Plaintiff must allege both the proper *actus reus* — denial of fundamental rights — and *mens rea* — the intentional targeting of an identifiable group'.[60] While recognising that 'many of the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people', the district court also noted that 'international courts have interpreted the identity of the group requirement broadly to encompass persecution of a discrete identity'.[61] This is strikingly purposive use of ICTR case-law as authority for the existence of a substantive rule that exceeds what is commonly accepted as the content of customary international law. US judges adjudicating ATS claims also have faced the challenge of identifying whether a food or medical blockade constitutes a crime against humanity.[62]

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directed against a multiplicity of victims' but, interestingly, also observed in a footnote that 'case law from the ICTR provides little guidance for the application of the *chapeau* elements, apparently because there was little dispute that the mass slaughter of Tutsis and their sympathizers constituted a widespread or systematic attack on a civilian population'. *Ibid.*, p. *3 n.2. The district court did not similarly qualify the relevance of ICTY jurisprudence. *Ibid. See also generally Doe* v. *Qi*, 349 F. Supp. 2d 1258, 1308 (N.D. Cal. 2004).

57 *Sexual Minorities of Uganda* v. *Lively*, 960 F. Supp. 2d 304, 319 (D. Mass. 2013). This opinion invoked *Akayesu* to hold that an attack, for the purpose of a crime against humanity, may be non-violent in nature. The Court quoted extensively from *Akayesu,* and noted that 'imposing a system of apartheid … or exerting pressure on the population to act in a particular manner, may come under the purview of attack, if orchestrated on a massive scale or in a systematic manner'. *Ibid.*

58 *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322, 1354 n.50 (N.D. Ga. 2002).

59 *Sexual Minorities of Uganda* v. *Lively*, 960 F. Supp. 304, 318 (D. Mass. 2013) (citing to *Nahimana*).

60 *Ibid.*, p. 317.

61 *Ibid.*, pp. 317–18.

62 *Sarei* v. *Rio Tinto*, 671 F.3d 736, 767–68 (9th Cir. 2011) (determining that deprivation of food or medicine owing to a blockade does not constitute actionable extermination or 'another inhumane act' under the *Sosa* test), *vacated*, 133 S. Ct. 1995 (2013) to follow *Kiobel*, *remanded to* 722 F.3d 1109 (9th Cir. 2013). On remand, the initial district court opinion to dismiss with prejudice was affirmed. A vacated opinion should have no precedential effect but *Doe* (2014) explicitly re-affirmed the analysis of the vacated 2011 *Sarei* opinion on the topic of corporate liability. The *Sarei* litigation involved a claim brought by

US courts have also turned to ICTR materials where a non-state actor is alleged to commit crimes against humanity, in particular, regarding the question whether the non-state actor must exercise a level of *de facto* control over territory in order to be held responsible.[63] In *Krishanthi* v. *Rajaratnam*, a district court found that the LTTE met this burden for the purposes of plausibility pleading. Whether the *de facto* control requirement firmly exists as an element of the plan or policy aspect of crimes against humanity under customary international law remains unclear.

### 3.3 *Corporate Liability*

ICTR materials have been interpreted as germane to the question whether corporations can be found criminally liable under international criminal law and, hence, by analogy to the question whether they may incur civil liability for violations of the laws of nations. US courts have failed to achieve consensus on these questions. Considerable fragmentation and vivid contestation persist.

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residents of Papua New Guinea against an international mining company. The Ninth Circuit Court relied *inter alia* on the ICTR's 2006 *Gacumbitsi* Appeals Judgment for the position that the plaintiff is required to show proof 'that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a widespread number of people to conditions of living that would inevitably lead to death'. *Sarei*, 671 F.3d at p. 768. Dissenting in part, Judge Pregerson held that the food and medical blockade constituted murder and torture by denying essential goods and services to thousands of people (thereby constituting a widespread and systematic attack against a civilian population), with both murder and torture being listed as specific crimes against humanity in the relevant instruments, including the Statute of the ICTR, articles 3(a) and (f). *Ibid.*, pp. 775–76.

63 *See Abagninin* v. *AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008) (emphasising a state actor requirement for crimes against humanity, but also recognising that crimes against humanity can flow from the actions of a non-state actor when this actor has *de facto* control over territory similar to that of a state or government); *Krishanti*, 2010 WL 3429592, p. *10 ('Decisions from the [ICTR] require that actions by a non-State organization be "instigated or directed by a Government or by any organization of group", as a way to exclude "the situation in which an individual commits an inhumane act . . . in the absence of any encouragement or direction from either a Government or a group or an organization"' (citing to the ICTR's *Kayishema and Ruzindana* Trial Judgments, and also the Ninth Circuit in *Abagninin*, which contains the exact same passage in support of a requirement that, for aiding and abetting a crime against humanity when committed by a non-state actor, that non-state actor must exert *de facto* control, that is, 'control similar to that of a State or government such as erecting checkpoints on main roads, increasing examples of command and control, developing civilian structures, and holding a substantial percentage of territory')).

While ICTR materials are seen as helpful to these debates, judges have drawn strikingly different inferences from them.

The District of Columbia Circuit in *Doe VIII* v. *Exxon* (2011),[64] and the Seventh Circuit in *Flomo* (2011),[65] each has held that corporations can be sued under the ATS. The *Doe VIII* litigation – staccato in nature because of appeals, reversals, *vacaturs*, and remands – continues: in July 2015, the district court allowed some of the ATS claims to continue because they displaced the presumption against extraterritoriality and because the law in the D.C. Circuit is clear that corporations can be sued under the ATS.[66] In *Doe VIII*, Judge Kavanaugh dissented in the Circuit Court of Appeals. He opined that the ATS did not reach corporate actors.[67] To buttress his conclusion, he referenced the ICTR as only having jurisdiction over natural persons. In this regard, the establishment of international tribunals to punish individuals may paradoxically crimp the ability of the law to reach entities or collectivities. The expansion of a system of international law that individualises guilt may narrow the range of appropriate defendants.

On the other hand, other judges have turned to the same set of ICTR materials and reached an opposite conclusion. For example, Judge Cote, in dismissing the motion for judgment on the pleadings in *Presbyterian Church*, held:

> [That] the ICTY and ICTR Statutes do not provide for corporate criminal liability for genocide and other atrocities carries very little weight as those Statutes were devised in the context of ethnic and tribal warfare where atrocities committed by private individuals, not corporations, loomed large. Such an argument is akin to claiming that a rule governing

64 *Doe VIII* (2011), p. 57 ('Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents').

65 *Flomo* v. *Firestone National Rubber Company*, 643 F.3d 1013, 1019 (7th Cir. 2011).

66 *Doe* v. *Exxon Mobil*, 2015 WL 5042118 (6 July 2015) (D.D.C.). Although the 2011 Circuit Court of Appeals opinion in *Doe VIII* frequently referenced in this Article has been vacated, the reasons for *vacatur* and the course of subsequent proceedings in the litigation reaffirm the legal analysis of the Court of Appeals on the critical points of jurisdiction, corporations as defendants, methodological recourse to international materials, and aiding and abetting liability.

67 *Doe VIII* (2011), pp. 83–84 (Kavanaugh, J., dissenting); *see also Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321–26 (2d Cir., 2007) (opinion of Judge Korman relying on several international sources, including the ICTR Statute, to express considerable skepticism regarding the existence of corporate liability under customary international law).

> the law of the sea has not reached the status of customary international law because a number of landlocked States have not accepted it.[68]

That said, and to be very clear, Judge Cote's view is no longer good law in her own jurisdiction, the Second Circuit. In 2010, the Second Circuit ruled that corporations may not be held liable for violations of international law under the ATS.[69] This 2010 ruling arose in the *Kiobel* litigation that eventually went to the Supreme Court. While it was widely anticipated at the time that the Supreme Court would decide *Kiobel* on the question whether corporations can be sued under the ATS, in part because of splits among lower courts, the Supreme Court subsequently ordered the case to be newly briefed and approached it from the unanticipated perspective of extraterritoriality and jurisdiction. The Supreme Court's opinion in *Kiobel* did not address corporate liability. Interestingly, in the 2014 *Mastafa* case, the Second Circuit did not seize the opportunity to dismiss the complaint because of the corporate nature of the two defendants. One judge (Judge Scheindlin in the *South African* litigation) has interpreted the US Supreme Court's mention in *Kiobel* that 'mere corporate presence' cannot overcome the presumption against extraterritoriality as implying the existence of corporate liability.

In September 2014, in *Doe* v. *Nestle*, the Ninth Circuit ruled that there is no categorical rule of corporate immunity or liability under the ATS. In this regard, the Ninth Circuit explicitly reaffirmed the corporate liability analysis it had previously reached pre-*Kiobel* in *Sarei* v. *Rio Tinto*.[70] This analysis requires that a court look, in each claim, to international law and determine whether corporations are subject to the norms underlying that specific claim.[71] Claims in the

68 *Presbyterian Church* v. *Talisman*, 374 F. Supp. 2d 331, 336 (S.D.N.Y. 2005) (motion for judgment on the pleadings); *see also ibid.*, p. 336 n.10 ('Indeed, for the purposes of this case, the value of the ICTY and ICTR Statutes, as well as the decisions of their Tribunals and ATS cases addressing similar subject matter … is that they confirm that customary international law prohibiting violations of *jus cogens* norms such as genocide applies to private actors *in addition to* state actors').

69 *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (relying on the lack of corporate liability in international tribunals as evidence of customary international law disfavoring corporate liability).

70 *Doe* (2014), pp. 1021–22 (affirming the three principles about corporate liability: no categorical immunity, liability under the ATS is independent of international norms of enforcement, and universal norms can provide the basis for an ATS claim against a corporation) (citing to *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747–65 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 722 F.3d 1109 (2013), *see supra* note 62).

71 *Doe* (2014), p. 1022 ('First, the analysis proceeds norm-by-norm').

*Doe* v. *Nestle* litigation – brought by former child slaves forced to harvest cocoa in Côte d'Ivoire – involved allegations that defendant corporations aided and abetted child slavery by providing assistance to the Ivorian farmers. The Ninth Circuit Court of Appeals held that the prohibition against slavery was universal and could be asserted against the corporate defendants. The Ninth Circuit had previously held in *Sarei* that the norms against genocide and against war crimes were applicable to corporations.[72] In *Sarei*, in fact, the Ninth Circuit had held that a norm could form the basis for an ATS claim even in the absence of a decision from an international tribunal enforcing that norm against a corporation. Returning to the *Doe* v. *Nestle* litigation, the Ninth Circuit held that 'corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations'.[73] Of significance is that the Ninth Circuit in *Doe* buttressed its finding with reference to Article 3(c) of the ICTR Statute. The Ninth Circuit noted that, pursuant to the ICTR Statute, the condemnation of 'persons responsible' for enslavement of civilian populations was 'broadly phrased', which it took as evidence that 'the prohibition against slavery applied to state actors and non-state actors alike, and there are no rules exempting acts of enslavement carried out on behalf of a corporation'.[74]

Circuit Court splits persist on the question whether corporations can be liable for ATS violations. Corporate liability under the ATS remains unresolved. This dissensus perhaps reflects – and contributes to – the ongoing (and seemingly intractable) debates under international law regarding corporate responsibility generally.

## 4 ICTR Citations within the Broader Corpus of International Criminal Law Materials

The search of the US federal judgments database organises itself around a search for ICTR cases and materials. Twenty-four of the twenty-five cases in the

72 *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 759–61 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 722 F.3d 1109 (2013), *see supra* note 62 (finding no bar to genocide liability under the ATS for corporations).

73 *Doe* (2014), p. 1021 (noting also that 'the absence of decisions finding corporations liable does not imply that corporate liability is a legal impossibility under international law' and 'that the lack of decisions holding corporations liable could be explained by strategic considerations').

74 *Ibid.*, p. 1022 (citing also to Article 5(c) of the ICTY Statute).

2013 baseline sample that reference ICTR cases and materials also reference ICTY materials. The work product of other international courts and tribunals also surfaces. To be clear, no independent search for ICTY, ICC, or Nuremberg-era materials ever was undertaken. The search was only for ICTR case-law and materials. In order to obtain a probative picture of the volume of references to other international institutions, searches with those institutions as the search term would have to be undertaken. It may well be that the number of ATS cases that reference ICTY case-law and materials while making no reference to ICTR materials is significant. The fact, however, that so many other international materials come up in a search for ATS judgments that reference ICTR materials demonstrates the entangled nature of these citations. The results of the ICTR search, notwithstanding their modesty, portend fascinating vignettes of authority, systematicity, legitimacy, and fragmentation within the work product of international criminal courts and tribunals.

The case-law and materials of the ICTY and ICTR overall tend to be cited by US judges in complementary, and often perfunctory, string fashion to support the same substantive legal rule. This methodology suggests that US federal courts view the ICTR and ICTY outputs as confirmatory of each other or, perhaps, that they determine the existence of a substantive legal rule of customary international law to emerge when the jurisprudence of the two *ad hoc* tribunals is aligned.[75] Ordinally, the palpable practice is to more prominently feature the ICTY's work. In this regard, the ICTR lurks somewhat in the shadows, so to speak. It is the less visible of the two: it is routinely there – to be sure – but in the distance.[76]

US federal courts also cite to the Rome Statute, to the SCSL, and to the 'Nuremberg' proceedings (both the IMT and the AMT). On rare occasion, the International Court of Justice also surfaces.[77] Within the text of ATS opinions, the Nuremberg-era sources typically precede discussion of the materials from the contemporary international tribunals. US courts thereby approach the development of a customary norm somewhat longitudinally, with citation to the *ad hoc* tribunals crystallising the current status of the norm. On the other

75 *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 278 n.14 (2d Cir. 2007) (Katzmann, J., concurring) (relying on the *Ntakirutimana* case in support of his proposition that the Appeals Chamber of the two *ad hoc* tribunals 'has made clear that the same law relating to modes of liability applies in both Tribunals').

76 In the *Doe* (2014) decision, for example, the work of the ICTR trailed that of the SCSL in terms of number of references, and well trailed that of the ICTY.

77 *See e.g.*, *Doe* v. *Nestle*, 748 F. Supp.2d 1057, 1068–69, 1083, 1126 (C.D. Cal 2010), *rev'd in part and vacated in part*, 766 F.3d 1013 (9th Cir. 2014).

hand, at times a perceived lack of clarity or continuity in the international jurisprudence militates in favour of US courts' finding that the norm lacks the requisite definiteness and universality. This occurred, for example, when one court faced the question whether 'moral support' and 'tacit encouragement and approval' could be included within the scope of aiding and abetting.[78]

The frequency of citation to the IMT and the AMT is noteworthy, in part simply because international criminal law has evolved so much since their operation 70 years ago. The IMT and AMT, nonetheless, greatly appeal to US judges and carry considerable legitimacy.[79] One may speculate why this is so: certainly, the iconicity of Nuremberg within the American vision of international justice looms large. From an instrumental litigation strategy, in any event, Nuremberg references fare as well as or better than citations to contemporary institutions. ATS litigants would be well-advised to reference the work product of the AMT and IMT in their pleadings. Interestingly, one of the citations to the ICTR *Akayesu* judgment in the ATS case-law is offered in support of the proposition that, in 1950, the International Law Commission formulated 'principles recognized in the [London] Charter … and in the judgment of the Tribunal', as a codification of certain legal principles applied by the

78 *Doe* v. *Nestle*, 748 F. Supp.2d 1057, 1103, 1108 (C.D. Cal 2010), *rev'd in part and vacated in part*, 766 F.3d 1013 (9th Cir. 2014). On this point, the district court referenced a number of ICTR cases (noting that omissions or failures to act give rise to aiding and abetting liability when there is a legal duty to act, hence, in contexts akin to command responsibility and citing *inter alia Kayishema* (May 1999 Trial Chamber)). This California district court additionally cited the *Kayishema* judgment in support of the proposition that, within discussions of command responsibility, 'authority' requires a high degree of control, either *de jure* or *de facto*, over the perpetrators, and noting that the defendant in *Kayishema* case was a *préfet* ('top regional executive'). *Ibid.*, pp. 1105–06. The district court also referenced *Akayesu* in this regard. *Ibid.*, p. 1106 (taking note of the defendant's role as a 'bourgmestre – i.e. town mayor with control over police' and citing to *Akayesu* 1998 Trial Judgment). Ultimately, the district court deployed these citations to limit the persuasive value of the ICTR's approach to aiding and abetting liability only to specific facts and individual defendants and, thereby, to restrict its value in the determination of the substantive content of customary international criminal law.

79 *See e.g.*, *Doe VIII* (2011), pp. 52–55; *Doe* v. *Nestle*, 748 F. Supp.2d 1057, 1084–1085, 1088–1093 (C.D. Cal 2010), *rev'd in part and vacated in part*, 766 F.3d 1013 (9th Cir. 2014); *Doe* (2014), p. 1020 (describing 'decisions of the post-World War II International Military Tribunal at Nuremberg' as 'widely recognized as a critical part of customary international law'); *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 293 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (urging the court to defer 'to the reasoned judgment rendered at Nuremberg' and viewing the *Ministries* case as an important benchmark).

Nuremberg tribunals.[80] To be clear, the *ad hoc* tribunals themselves have consistently ruled that World War II era jurisprudence is indicative of customary international law.

US courts cite to the Rome Statute as well. They do so despite the obvious reality that the United States is not a party thereto and, under President Bush, had in fact renounced its signature on the treaty. References to the Rome Statute are often made to consolidate, buttress, or support interpretations of the laws of nations grounded in citations to the *ad hoc* tribunals and Nuremberg-era institutions. References to the Rome Statute, however, also arise in contexts of dissonance and fragmentation, typically with regard to the requirements for aiding and abetting liability where the approach of the Rome Statute may be contrasted to that attributed to the ICTR and ICTY. Whereas the Rome Statute's approach is seen as propounding a specific intent requirement for aiding and abetting, ICTR and ICTY materials tend to be understood to support a knowledge requirement. So, for example, in *Doe VIII* it was held that the *ad hoc* tribunals 'have declared the knowledge standard suffices under customary international law'.[81] This means that the aider and abettor does not need to share the *mens rea* of the perpetrator but, rather, must only have knowledge that his or her actions will assist the perpetrator in the commission of the crime. The *actus reus* will be practical assistance, moral support, or encouragement which has a substantial effect on the perpetration of the crime.

As an aside, the AMT decision in *The Ministries* case[82] has been quizzically understood in ATS litigation as evidencing both the purpose standard[83] *and*

80 *Doe VIII* (2011), pp. 30–31 (D.C. Cir. 2011) (citing *Akayesu* 1998 Trial Judgment, para. 526).

81 *Ibid.*, p. 36; *see also ibid.*, p. 34 n.19 ('The knowledge standard appears to conform with the standard for aiding and abetting liability in many other countries, including France, Germany, England, Canada, Australia, and Switzerland'). Principally, the *Doe VIII* court relied on the work of the ICTY in this context, but cited to the *Ntakirutimana* Appeals Judgment (2004) and the *Musema* Trial Judgment (2000) as well. *Ibid.*, p. 34.

82 *United States* v. *von Weizsaecker* (*The Ministrie*s case), 11–13 April 1949, Nuremberg Military Tribunal.

83 The District of Columbia Circuit Court of Appeals in *Doe VIII* took issue with this approach: '[F]ocusing only on *The Ministries Case* overlooks the fact that in numerous decisions of the Nuremberg tribunals defendants were convicted as aiders and abettors based on a *mens rea* of knowledge and not purpose'. *Doe VIII* (2011), p. 38 (emphasising that, in the *Ministries* case, the tribunal acquitted Karl Rasche, a banker who had approved loans to corporations he knew engaged in slave labour, but who lacked the purpose to commit the crime). The SCSL in the *Taylor* Appeals Judgment interpreted Rasche's acquittal as implicating the *actus reus* of the crime, not the *mens rea*. Rasche's acquittal is somewhat of a historical anomaly; he was apparently the only AMT defendant to be held to a purpose standard. On the other hand, the nature of Rasche's involvement in atrocity does

the knowledge standard.[84] The *Zyklon B* case and the *Flick* case have been invoked for historical support to substantiate a knowledge standard.[85]

In the Second Circuit Court of Appeals opinion in *Presbyterian Church* and Judge Katzmann's concurrence in *Khulumani* it was held that liability may arise when a defendant provides practical assistance to the principal that has a substantial effect on the perpetration of the crime and does so purposefully to facilitate the commission of that crime. In reaching this conclusion, Judge Katzmann gestured towards the language of the Rome Statute and found it weightier because, in his view, the Rome Statute constitutes an authoritative expression of the legal views of a great number of states.[86] He did note, to be sure, that there was 'some support' for a 'definition of aiding and abetting that would lead to liability where an individual provides substantial assistance "with the knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal"'.[87] Notwithstanding these fissures, Judge Katzmann saw the purpose standard as 'well-established' and 'core'.[88]

The District of Columbia Circuit Court of Appeals in *Doe VIII*, on the other hand, rejected the Rome Statute as a source of the *mens rea* standard for aiding and abetting liability.[89] It did so because, in its opinion, the Rome Statute is a treaty and not customary international law. This Circuit Court of Appeals added that, in its view, the Rome Statute and the practice of the ICC was not unequivocal on the centrality of purpose as a legal element. Interestingly, in the *Aziz* case, the Fourth Circuit criticised the District of Columbia Circuit Court of Appeals for its treatment of the Rome Statute. The Fourth Circuit

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bear some parallels with those of other business actors sued under the ATS in their personal capacity and, by analogy, with corporate legal persons as well.

84 *Doe* (2014), p. 1023 (citing the *Ministries* case in support of the proposition that 'the defendant's knowledge regarding the intended use of a loan was sufficient to satisfy the *mens rea* requirement, but declining to find that the defendant satisfied the *actus reus* requirement').

85 *Ibid.*

86 *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 276 (2d Cir. 2007) (reporting that the Rome Statute has been signed by 139 countries, including 'most of the mature democracies of the world').

87 *Ibid.*, p. 278 (citing to an ICTY judgment).

88 *Ibid.*, p. 276 n.12.

89 *Doe VIII* (2011), p. 36 ('[T]he Rome Statute was not meant to affect or amend existing customary international law'); *Doe* v. *Exxon Mobil*, 2015 WL 5042118, p. *3 (6 July 2015) (D.D.C.) ('The Court of Appeals has held that the Rome Statute is not a persuasive source as to the content of customary international law').

agreed that the Rome Statute was not customary international law, but rejected the notion that its status as a treaty favours a preference for the approach of the *ad hoc* tribunals to aiding and abetting liability. The Fourth Circuit held that:

> We have no quarrel with the view of the *Doe VIII* majority that the Rome Statute does not express a rule of customary international law. We simply find the Rome Statute's *mens rea* standard for aiding and abetting liability, reached after prolonged negotiations among delegates from over 100 signatory nations, to be a more authoritative barometer of international expression on the subject.[90]

In *Aziz*, the Fourth Circuit also found that the fact that the 'Rome Statute is not binding on the United States … does not lessen its import as an international treaty and, thus, a primary source of the law of nations'.[91] Cycling back to Judge Katzmann's concurrence in *Khulumani*, the *Aziz* opinion held that defendants must be plausibly alleged to have the purpose of facilitating the violations. *Aziz* involved plaintiffs of Kurdish descent who were harmed by Iraqi government chemical weapon attacks or were relatives of those killed in such attacks. The defendant was a British company that sold a chemical which could be used to make mustard gas to another company that was a shell corporation facilitating acquisition of that chemical for the Iraqi company in violation of US law. The claim was dismissed because intentional conduct was insufficiently pleaded: an outcome similar to that in *Mastafa*. In *Aziz*, the Fourth Circuit considered the fragmentation among international criminal courts and tribunals and sources on this point as an indication of the vacillating and indeterminate nature of customary international law (*i.e.* calling customary international law an 'elusive system' for which the 'difficulties in appli[cation] … are manifest').[92]

The Ninth Circuit Court of Appeals distinguished the facts pleaded in the Ivorian child slavery case (*Doe* v. *Nestle*) from those in *Aziz* even within the legal context of a purpose standard. The Ninth Circuit was drawn to the inference 'that the defendants placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa [… noting that] the use of child slavery benefitted the

90 *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 400 n.12 (4th Cir. 2011).

91 *Ibid.*, p. 400.

92 *Ibid.*

defendants and furthered their operational goals …'.[93] The Ninth Circuit also noted the defendants' alleged lobbying efforts to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as 'slave free'.[94]

Insofar as the substantive rule of international law determines the rule of decision to be applied in ATS litigation, as the ICC remains and the *ad hocs* (and now the Mechanism (MICT)) wind down their work, it may be that the purpose requirement prevails over time. Treaty law can inform customary international law and can become compelling evidence thereof. On the other hand, actual ICC jurisprudence might incline away from the purpose requirement even if textually this language derives from the Rome Statute.[95]

## 5 Conclusion

This article opens two little windows. One window looks out to the relationship between penal law and tort law in redressing human rights abuses. The view from this window, to be sure, is limited by the fact that the ATS encases what is fundamentally a penal violation and attaches tort responsibility thereto rather than incarceration. It is for this reason, perhaps, that recourse to international criminal law materials remains largely uneventful in ATS tort-based litigation.

The second window, however, gives way to a much wider expanse. The landscape from this window is one of movement of international norms to the national level in different but cognate legal regimes. This article thereby identifies a new usage – in the case of the *ad hoc* tribunals, moreover, an after-life – of the work product of the international tribunals, to wit, international criminal law straying in extracurricular fashion into the domain of national tort law and

93 *Doe* (2014), p. 1024.

94 *Ibid.*, pp. 1017, 1025.

95 Rome Statute article 25(3)(c) provides that: 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … for 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'. Rome Statute article 25(3)(d), which addresses crimes committed by a group of persons acting with a 'common purpose', provides that anyone with 'knowledge of the intention of the group to commit the crime' may be held criminally liable. This standard appears to differ textually from the standard applicable to aiding and abetting in article 25(3)(c).

directly into the hands of national judges of general civil jurisdiction.[96] US courts, and thus US judges of general jurisdiction, engage, and remain engaged with, nettlesome questions central to the practice of international criminal law. They approach the subject matter creatively, and give life to international authorities in unexpected ways unforeseen to international criminal lawyers.

What to make of this extracurricular movement? On the one hand, these migrations facilitate wider awareness, recognition, and internalisation of international criminal law. It is not assured, however, that the content of the law thusly diffused is accurately appreciated by national judges, or is even capable of predictable appreciation, thereby imperilling international law's general aspirations of doctrinal consistency, universalism, and legitimacy. International jurisprudence – no different than any sources of law or precedent – may be misapplied, or wishfully applied, in national contexts. International judgments involving the specifics of a conflict or of a state with which national judges may have little familiarity may be particularly susceptible to error in terms of subsequent extracurricular application.

The turn by US judges to international materials in ATS litigation represents an example of what Anthea Roberts identifies as 'comparative international law', that is, the reality that national courts are more than just international law enforcers, but may also serve as international law creators, and that national variations in the judicialised domestication of international law is a subject worthy of study.[97] International law as shaped and created by national courts, which may lead to divergent results dependent on the court or jurisdiction in question, is, according to Roberts, a reality that ought to be central to any discussion of international law's sources. On this note, perhaps Lord Hoffman's admonition – discussed earlier in this paper – of national courts as international law creators is ill-placed. While the *Lively* court may be chastised for creating a new rule of international law, it may simply be unwise to expect a national court to exercise greater restraint in applying customary international law than national constitutional or human rights law. Acting in such a deferential fashion might excessively prioritise the place of legislatures and executives in the process of incorporating international law. Drawing from the work of

96 On the law and politics of cross-fertilisation, *see* Sergey Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-Fertilization', 84(3) *Nordic Journal of International Law* (2015) 371–403.

97 Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', 60 *International and Comparative Law Quarterly* (2011) 57–92, p. 60. Comparative international law studies how actors in different national and regional systems interpret, understand, and apply international law.

Karen Knop, who posits national courts as translators of norms rather than mere enforcers of norms, Roberts observes that 'even if national courts attempt to faithfully enforce international law, its domestication requires them to simultaneously assert their own legal language'.[98]

As among courts of various states, then, questions arise as to 'what extent national courts engage in strategic interpretation' of customary international law, rather than interpretation 'based on prevailing practice and *opinio juris*'.[99] Within the courts of a specific state, divergent understandings among national judges as to the substantive content of international law may reflect the most prosaic insights of legal realism: that is, the availability of international law may simply accord judges another tool or device to achieve what they already wish to achieve within the often fraught indeterminacy and selectivity of judicial method, in particular, in common law jurisdictions.

The purposes of tort law may differ so significantly from those of criminal law, either in general or specifically the case of massive human rights violations, that movement from one realm to the other should best be viewed cautiously. Extracurricular application could therefore be dissuaded. International criminal tribunals, on this note, might *ex ante* preempt such movement by declaring that their work product ought to have limited reach. Judges on international tribunals might thereby disclaim the possibility that their national counterparts operating in courts of general jurisdiction pick up their work product and apply it to private law disputes.

Care should be taken to differentiate legal migration from legal circulation. Circulation connotes an iterative cycle of refreshment and depletion and return; migration, the term I have deployed in this paper, may readily be taken to mean a unidirectional move to take root elsewhere, but migration might also imply a return of sorts, albeit not an iterative or routine one. In this latter regard, then, it might be of interest to systematically examine whether ATS jurisprudence informs, or even arises, in the judgments of the international criminal tribunals.

Manuel Ventura is one scholar who has considered this issue. He has not done so systematically, to be clear, but his work on aiding and abetting liability

98 *Ibid.*, p. 74; *see also ibid.,* p. 76 ('The repeated application of international law by the national courts of particular countries may, over time, lead to distinct dialects developing that exist somewhere between international and national law, and between law enforcement and creation').

99 Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation', 109(3) *American Journal of International Law* (2015) 514–533, p. 531.

provides some valuable insights. Ventura notes that defense teams at the ICTY and SCSL have relied on ATS cases, notably *Presbyterian Church*, in arguing for an enhanced purpose requirement for aiding and abetting liability. Ventura laments, however, that when the SCSL and ICTY judges came to visit, and then revisit, the specific direction requirement they failed to appreciate the pertinent analyses of US courts.[100] He suggests that the debate over the *mens rea* requirements that plague ATS litigation is a 'mirror image' to the debates over the requirements of the *actus reus* in cases of remoteness of the accused; yet, the international tribunals have failed to learn from the robust conversations that have occurred within the ATS context.[101] Ventura acidly notes:

> [D]espite the analysis of international law contained in *Presbyterian Church of Sudan, Doe VIII*, and *Aziz*, none of this case law was mentioned at all [in] the *Perišić* Appeal Judgment (though given the quality of its analysis, this may not be so shocking). The *Taylor* Appeal Judgment did refer to *Presbyterian Church of Sudan* and *Doe VIII* in its analysis, but the former only made an appearance as a faint '*contra*' footnote reference while the latter was footnoted only to support the (uncontroversial) position that the 1998 Rome Statute did not purport to codify international law. There was no substantive engagement or analysis of their respective reasoning, despite the fact that *Doe VIII directly* supported the SCSL's final position on the *mens rea* (and *actus reus*). [T]he *Šainović* Appeal Judgment should surely have noticed the split in US courts on the *mens rea* and its relevance to specific direction, particularly the fact that *Doe VIII* actually supported their conclusions on the customary definition of aiding and abetting. No exploration of this case law was ever attempted ether by the ICTY or the SCSL.[102]

Hence, while international norms may have extracurricular application in this specific instance at the domestic civil level, debates within the domestic civil level inspired by the international migration may simply stop there. A lack of endogeneity arises. As Ventura aptly notes, while US courts 'are cognisant of the discussions and debates in ICL', even in extracurricular contexts, 'international lawyers should also be similarly aware that there is more to ICL than the

100 Ventura, *supra* note 48, p. 546 ('There was no substantive engagement or analysis' of the reasoning in *Doe VIII* or *Presbyterian Church*).

101 *Ibid.*, p. 512.

102 *Ibid.*, pp. 546–47 (footnotes omitted).

four corners of The Hague'.[103] Ventura's admonition is pertinent. International law happens in many places far removed from its venerated centres. A new wave of scholarship is emerging which explores the diverse historical hinterland of international criminal law and hence epistemologically pluralises the roots from which we as international lawyers imagine our own discipline to grow.[104] As a profession, we would do well to embrace the diverse and disconnected venues – and the clever yet on occasion clumsy ways – in which international law is manufactured, often by *bricolage*. Fetishising the reified, and often languid, vortices of the high-profile international tribunals belies the vivacity and eclecticism of the places that make, apply, and chide international law.

103 *Ibid.*, p. 548.

104 Kevin Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford University Press, Oxford, 2013); Mark A. Drumbl, 'Stepping Beyond Nuremberg's Halo: The Legacy of the Supreme National Tribunal of Poland', 13:5 *Journal of International Criminal Justice* (2015) 903–932.