

## MASS TORTS AND UNIVERSAL JURISDICTION

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### 1. INTRODUCTION

The technologies of the present era mean that injuries have become more massive in dimension. Mass torts affect greater numbers of people and larger geographical areas. Consequently, they can cross borders, affecting the populations of multiple countries.<sup>1</sup> Mass catastrophes need not involve intentional wrongdoing, of course. The devastating 1986 accident at the Chernobyl Nuclear Power Plant, for example, resulted from a design failure combined with inadequately trained personnel.

United States law has two mechanisms in tort law for remedying mass catastrophes. The first, applicable to unintentional as well as intentional torts, is the class action lawsuit, which has no functional equivalent in the civil law nations of Continental Europe. The unintentional tort is not the subject of this essay. The second, restricted to cases involving *jus cogens* violations (namely, violations of human rights so grave as to be against international customary law, or the “law of nations”), is universal jurisdiction pursuant to the Alien Tort Statute (ATS). Universal jurisdiction for *jus cogens* violations does have a functional equivalent in civil law States, but not in their tort law.<sup>2</sup>

Traditionally, civil law legal systems have restricted universal jurisdiction to criminal actions. This distinction generally has been viewed as a seminal difference between the United States and the

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<sup>1</sup> For a list of countries affected by the Chernobyl disaster, see *In Focus: Chernobyl*, INT’L ATOMIC ENERGY AGENCY, <http://www.iaea.org/newscenter/focus/chernobyl/faqs.shtml> (last visited Feb. 25, 2013) (discussing the impact of the disaster on Finland, Norway, Sweden, Germany, Russia, Belarus, and other countries of the former Soviet Union).

<sup>2</sup> Until the recent Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), federal appellate courts had been applying the ATS extraterritorially since 1980. The statute, enacted in 1789 but rarely applied, was revived in 1980 in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

rest of the world, a view shared both by common law and civil law jurists. It should be noted that few countries in the world have the common law system, as it has been 'exported' from Great Britain only to regions that had once been part of the former British Empire. Antonio Cassese has praised the ATS for filling the gap for individuals where neither an international entity nor the territorial State would have afforded a forum,<sup>3</sup> but expresses the concern that the civil—as opposed to criminal—law nature of the ATS creates “the danger for courts of [the United States] of setting themselves up as universal judges of atrocities committed abroad, a sort of humanitarian imperialism.”<sup>4</sup> Similarly, in *Kiobel*, the Second Circuit articulated the goal of avoiding legal imperialism as a reason for immunizing corporations from liability under the ATS. Such concerns were also expressed by several justices of the Supreme Court at both *Kiobel* oral arguments.<sup>5</sup>

Though ATS opponents claim that international law does not recognize civil universal jurisdiction, international legal theory does not pose an obstacle to a State's grant of civil jurisdiction for extraterritorial matters. In his highly respected work, Ian Brownlie states that “in principle [there is] no great difference between the problems created by the assertion of civil and criminal jurisdiction over aliens.”<sup>6</sup> The Permanent Court of International Justice defined national prerogatives for extraterritorial jurisdiction broadly in the much-cited 1927 *S.S. Lotus (France v. Turkey)* case.<sup>7</sup> Although the significance of the broad language in *Lotus* is a matter of dispute, the International Court of Justice (ICJ) has never rejected *Lotus*, although the 1970 *Barcelona Traction* decision<sup>8</sup> qualified *Lotus* by calling to mind that limits exist and that a State

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<sup>3</sup> See ANTONIO CASSESE, INTERNATIONAL LAW 393 (2d ed. 2005) (noting the “great significance of these US court decisions”).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 2013 WL 1628935 (U.S. Apr. 17, 2013) (No. 10-1491), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491rearg.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf); Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf).

<sup>6</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (7th ed., 2008).

<sup>7</sup> *The Case of the S.S. "Lotus" (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 46 (Sept. 7).

<sup>8</sup> *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 64, ¶3 (Feb. 5) (separate opinion of Judge Fitzmaurice).

has “an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.”<sup>9</sup>

The ATS itself states only that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.”<sup>10</sup> In his concurring opinion in *Sosa v. Alvarez-Machain*,<sup>11</sup> Justice Breyer analyzed the ATS’s reach as the intersection of several factors when he reasoned that “international law will sometimes . . . reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior”<sup>12</sup> and that such “subset includes torture, genocide, crimes against humanity, and war crimes.”<sup>13</sup>

Despite the distinctive official restriction of universal jurisdiction to the criminal law domain in civilian nations, universal and extraterritorial ATS civil jurisdiction is not significantly distinctive from the criminal-law universal and extraterritorial jurisdiction that has become part of international customary law for *jus cogens* violations. This functional equivalence has been obscured because the identical official categories of criminal and non-criminal law exist in both legal orders, such that there is a natural, automatic tendency to assume in both common law and civil law States that both systems categorize the ‘criminal’ and the ‘civil’ in fundamentally the same way. In fact, as discussed below, the most substantively significant aspects of the civilian criminal trial are reproduced by the U.S. tort trial, and vice versa. Thus, ATS universal jurisdiction would place the United States within the community of nations; it would not isolate the United States from that community, and the extraterritorial effects of the statute similarly would be akin to those of criminal law universal jurisdiction in civilian nations.

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<sup>9</sup> *Id.* at 105 ¶ 70.

<sup>10</sup> 28 U.S.C. § 1350 (2006).

<sup>11</sup> 542 U.S. 692, 760 (2004) (Breyer, J., concurring).

<sup>12</sup> *Id.* at 762 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1986)).

<sup>13</sup> *Id.* (citing INT’L LAW ASS’N, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES 2 (2000)).

## 2. KNOCKING AT THE CIVILIAN DOOR

For some time, the peculiarities of modern mass catastrophes and increased transnational jurisdictional fluidity have brought the American class action tort suit and the ATS increasing attention and interest in Continental Europe. Already in 1994, a French scholar proposed that the modern mass tort called for legal categorization that did not yet exist. He proposed a “grand-scale tort” (*un délit à grande échelle*).<sup>14</sup> Calais-Aulois would like a mass compensation mechanism that does not require proof of criminal intent, and where the law’s focus is brought to bear on the result, rather than the act.<sup>15</sup>

The American class action tort suit became familiar to Continental European lawyers and scholars with the Holocaust-related cases brought in U.S. courts starting in the mid-1990s. These cases involved current or former nationals or residents of their own countries and sought multi-million dollar compensation from their institutions and companies for misdeeds taken in complicity with Nazi Germany. In 2006, in the *Lipietz* case, a French lawyer who was precluded from pursuing a criminal action<sup>16</sup> brought an action in tort law against the French government and the Société Nationale des Chemins de Fers, the national railway company, for actions taken by both entities against his clients, two cousins who had been persecuted under the anti-Semitic laws of the Vichy régime (1940–1944). The underlying acts were grave crimes against humanity. The lower court, to the surprise of many, found for the plaintiffs, in what remains a

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<sup>14</sup> See Jean Calais-Aulois, *Les délits à grande échelle en droit civil français*, 46 REVUE INTERNATIONALE DE DROIT COMPARÉ 379, 380 (1994) (setting forth a new form of tort characterized not by the state of mind of the actor, but by the enormity of the damage done). In a similar vein, see Claude Lienhard, *Pour un droit des catastrophes*, chron., LE DALLOZ 91 (1995).

<sup>15</sup> Calais-Aulois, *supra* note 14, at 386.

<sup>16</sup> The reasons were somewhat complex, and had to do with the state the French law when the suit originally was brought. The larger procedural context of the case, which involved acts from over half a century in the past, concerned a legal impossibility of damages for victims such as the plaintiffs until the French courts reversed themselves on the issue in recent cases, the most famous of which was Papon. For a more detailed account of this case, see Tribunal administratif [TA] [administrative tribunal] Toulouse, 2e ch., June 6, 2006, No. 0104248 (Fr.), available at <http://lipietz.net/IMG/pdf/TaToulouseJugementLipietz.pdf>. An English translation by Anne Witt, as revised by Vivian Grosswald Curran, is available at *The Lipietz Judgment in English*, ACACCIA (July 6, 2006), <http://www.acaccia.fr/The-Judgment-Lipietz-in-English.html>.

landmark case inasmuch as the French government did not appeal the verdict. The appellate court reversed, however. It said the case should have been brought in criminal court, a ruling affirmed by the Supreme Court (*Conseil d'État*).

In recent years, both Italy and Greece have allowed civil proceedings and damages to be awarded against Germany for *jus cogens* violations: massacres, torture and the like. Though, those judgments proved unenforceable. The Brussels I Convention that makes all judgments in *civil and commercial matters* applicable automatically throughout the European Union was held by the European Court of Justice (ECJ) to be inapplicable.<sup>17</sup> In accordance with the reasoning of the German courts which had refused enforcement, the ECJ reasoned that the underlying issues were not of a civil nature, the judgments indeed having been based on *jus cogens* violations, and, therefore, that Brussels I did not apply. In March 2012, just days after the first (February 28, 2012) Supreme Court oral argument in *Kiobel*, however, a Dutch court granted civil damages to a Palestinian doctor for torture and imprisonment endured in Libya under the Qaddafi régime in connection with the Bulgarian nurses' affair.<sup>18</sup> On October 11, 2012, another Dutch court decided that it had jurisdiction over Shell in a suit brought by Nigerians for polluting the Niger Delta.<sup>19</sup>

Such suits show the force of transnational legal communication and the transnationalization of injuries. Traditional legal categories in the systems of Continental Europe, derived from Roman law, do not, however, include the tort action where crimes warranting universal jurisdiction are at issue.

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<sup>17</sup> See Case C-292/05, *Lechitrou v. Fed. Republic of Ger.*, 2007 E.C.R. I-1540.

<sup>18</sup> Rb. Gravenhage [Court of First Instance of The Hague] 21 maart 2012 [Mar. 21, 2012], m nt. Van der Helm 400882/HA ZA 11-2252 (El Hojouj/Derbal) (Neth.).

<sup>19</sup> See Denis Burke, *Verdict Due in Case Against Shell*, FRIENDS OF THE EARTH INTERNATIONAL (Jan. 21, 2013, 6:05 PM), <http://www.foei.org/en/what-we-do/climate-and-energy/latest-news/verdict-due-in-case-against-shell>. See also *Dutch Court Largely Rejects Nigerians' Case Against Shell*, VOICE OF AMERICA (Jan. 30, 2013), <http://www.voanews.com/content/dutch-court-largely-rejects-nigerians-case-against-shell/1593790.html>.

### 3. ATS UNIVERSAL JURISDICTION: UNIVERSAL OR SINGULAR?

#### 3.1. *The Tort Action in the Civil Law World: A Private Affair*

It should perhaps have been clear at the outset from the first *Kiobel* oral argument that corporate liability under the ATS was not going to be the issue of interest to the Supreme Court, although it was the sole issue to have been appealed to the Court. Before the plaintiffs' attorney had finished his first sentence, Justice Kennedy interrupted to state that, for him, the case turned on whether the United States was alone in having universal jurisdiction in *civil* cases. Other justices echoed his concern. Justice Roberts asked whether it would not in and of itself be a violation of international law to be the only country to grant civil universal jurisdiction for crimes against humanity.

The isolation of the United States in this respect, other than for a few very recent cases in the Netherlands,<sup>20</sup> seems to be taken for granted. One typically sees in international law books and treatises the categorizations of criminal and civil law used to delineate the actions for *jus cogens* violations that can be subject to universal jurisdiction. The United States is then named alone for its civil universal jurisdiction. In terms of ATS viability, however, it is germane to see that the reasons civilians reject universal civil jurisdiction do not apply to the United States legal system. This is because United States tort law is functionally more equivalent to civilian criminal law than to civilian tort law. To the question of whether the United States is alone, the answer is that it is not because the civil/criminal categorizations are misleading.

The traditional civilian legal system rejects the tort action for universal *jus cogens* suits with good reason. Civilian tort suits are often entirely in writing, with no live testimony. The concept of the trial as formed in the common law system is sufficiently different from the civilian tort action that the word *trial* perhaps should be avoided when referring to the civilian tort action. If one looks at the word used in a number of the original languages, it is the word with the same etymology as the English word for

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<sup>20</sup> See *supra* notes 18-19 and accompanying texts. In the most recent case, four Nigerians sued Dutch Shell in the Netherlands for pollution damages caused by its Nigerian subsidiary. It was the first time a Dutch court had entertained such a suit against a multinational parent company, but in January, 2013, the court dismissed charges against all but the subsidiary.

'process': in German *Prozeß*, in French *procès*, in Italian *processo*. The concept indeed denotes a process, a series of events, with no concentrated oral event as its focal point. The civil trial never has a jury in the civilian system. It is private. Nothing is in the public domain. In some countries like France, the lawyers' submissions to court are their own private intellectual property. While in some countries, a computerized system makes all court decisions available (although the manner in which the legal system functions is such that meaningful understanding of any court decision requires its interpretation by influential scholars), in other countries, lower court decisions are unpublished and unavailable even to the legal community at large. One has to request permission of the court to read them, which may or may not be granted, at the court's discretion.

Contingency fee arrangements of the United States sort are deemed unethical in the civil law legal orders of Continental Europe. In addition to national statutes barring these arrangements, the Code of Conduct of the Council of Bars and Law Societies of Europe does so as well.<sup>21</sup> Class actions are not permitted as they are seen as violating the principle that law must in every case be individual. In *Lipietz*, the French case mentioned above in which the lower court ruled in favor of two cousins who had sued for wartime atrocities committed against them, after the lower court's decision, this principle meant that thousands of individual plaintiffs brought similar suits, flooding the system. There was no procedure for bringing all of the suits of the similarly situated plaintiffs to be adjudicated together. Each plaintiff had to hire a lawyer, none on a contingency fee basis. The appellate court decisions ended those suits. Affirming the appellate court, the Supreme Court found that a political resolution already existed for these cases, referring to a French compensation commission that had been established in conjunction with a bilateral treaty negotiated with the United States. Where no political solution has been found, other resolutions sometimes have been fashioned. In some cases of mass catastrophes, the government has undertaken

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<sup>21</sup> See COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS, art. 3.3 (2006) ("A lawyer shall not be entitled to make a *pac-tum de quota litis*.") available at [http://www.ccbe.eu/fileadmin/user\\_ upload/NTCdocument/EN\\_Code\\_of\\_conductp1\\_1306748215.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf).

to compensate thousands of victims, with subsequent subrogation rights to sue the wrongdoers in the victims' stead.<sup>22</sup>

Without the possibility of contingency fee arrangements or class actions, it is much harder to gain access to the civil courts. Such a situation would be intolerable in cases of heinous crimes, such as *jus cogens* violations. In addition, the lawyer in Continental European civilian systems is more passive than in the United States system. There is no equivalent to discovery. It is the judge who is responsible for developing evidence. By contrast, in the United States, the lawyer who brings the tort action on a contingency fee basis may be motivated by the very public debate that could not exist for a civil suit in Continental Europe. The plaintiffs would be entitled to a jury and newspapers would be reporting on the events that transpired each day at the concentrated oral event that is the pivotal element of the U.S. tort trial. Where, as in ATS cases, the allegations concerned grave crimes against humanity or other matters of great public interest, media attention would be intense. The public would become a participant in a societal discourse about the case.

### 3.2. *The Criminal Action in the Civil Law World: Functionally Equivalent to the American Tort Action*

Giving victims access to the court system, allowing them to pursue financial compensation, and entering the public debate are functions that the civilian *criminal* trial accomplishes. Like the tort trial in the United States, criminal trials in civil law systems have a concentrated oral phase that is covered by the media extensively when issues of public interest are at stake. Criminal trials thus enter the public discourse and debate of society. Unlike in the United States, victims typically can become part of the criminal trial in civil law legal systems. The most frequent method for victims to join the criminal trial is as a civil party to the trial, a *partie civile*. The victim becomes a participant, able to testify and to question the defendant. It is a role that victims' rights movement groups have tried to achieve for trials in the United States, but

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<sup>22</sup> This was the case, among others, when HIV-contaminated blood was disseminated by a central authority to hospitals, and then to patients, creating many thousands of victims in France. See Calais-Auloy, *supra* note 14, at 379 n.4 (citing works on this subject).

without success, as a result of United States due process concerns for defendants.

The *partie civile* structure solves many of the problems for *jus cogens* crimes that would exist in civil law systems if they were to grant universal jurisdiction for *jus cogens* crimes in civil court without further systemic adaptations. For one, *parties civiles* make use of the State's resources in criminal trials, which means the vast powers of investigation of the prosecutor. Since the tort trial does not have contingency fee arrangements, victims would be put to great personal expense in tort actions. We have noted above that civilian lawyers are more passive than judges, in comparison to lawyers in the United States. In some (but not all) civilian states, prosecutors are magistrates; thus, they are trained as judges, and they are adept at investigation.

In civil law systems, the vast powers of the civilian prosecutor and the relatively more passive role of the lawyer are balanced by the prosecutor's being a neutral, non-partisan figure, with the task of pursuing exculpatory evidence as much as inculcating evidence. Prosecutors are unelected civil servants whose professional advancement does not hinge on accumulating large numbers of convictions. In some countries, like France, the prosecutor can appeal a *conviction* if he or she concludes, for example, that the court imposed a stiffer sentence on the defendant than was justified.

Equally important in assessing the ATS in the context of the law of other nations is the twofold traditional theory in civil law states that victims can initiate prosecutions and that prosecutors do not have discretion to forgo prosecution if they determine a crime to have been committed. This theory means that, like in the U.S. tort action, the victim will have effective access to the judicial system. The rule against prosecutorial discretion tends to be relaxed in universal jurisdiction cases. Belgium is an example of a country that introduced such discretion for universal jurisdiction matters, but it has a narrower meaning than the term as used in the United States.

The criminal trial in civilian legal orders resembles the U.S. tort trial more than the civilian tort trial does. The reasons for restricting universal jurisdiction to criminal actions in the civilian systems are attributable to aspects of their tort actions that do not exist in U.S. tort actions. Conversely, U.S. criminal law would create some difficulties for typical victims in ATS suits inasmuch as

prosecutors may choose not to pursue such cases, given the uncertainties of winning.

Each system's universal jurisdiction laws seem best suited to the goals both legal orders share of permitting victims effective access to their judicial system and to ensuring a vigorous public debate about important social, political, and legal issues.

#### 4. THE SUPRANATIONAL PERSPECTIVE

The shrinking world has been bringing us together, but not necessarily facilitating our reading each other accurately. The European Union, however, has by now developed fora in which jurists from both common and civil law systems have been working together for decades, and have developed mutual understanding. This does not mean, of course, that when European court decisions are interpreted in the various Member States that they are not renationalized, that common law aspects of a decision are not recivilianized in civil law states, and vice versa.

It, therefore, may not be surprising that it was the European Union, unlike its individual Member States, which wrote an amicus brief to the Supreme Court in *Kiobel*, supporting universal jurisdiction under the ATS. It had no trouble understanding that the civil courts of the United States did not signify a violation of international law standards. It specified two provisos. The first was that ATS universal jurisdiction be limited to those criminal matters subject to universal jurisdiction under international law.<sup>23</sup> The Supreme Court already has required this limitation since *Sosa*, however, giving a highly restrictive scope to acts coming within the ATS' purview. In addition, the European Union would require plaintiffs to exhaust local remedies to the extent that this action is not futile.<sup>24</sup>

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<sup>23</sup> Brief of the European Commission as Amicus Curiae in Support of Neither Party at 13-23, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), available at <http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20%28Revised%29.pdf>.

<sup>24</sup> Brief of the European Commission as Amicus Curiae in Support of Neither Party at 30-35, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), available at <http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20%28Revised%29.pdf>.

## 5. CONCLUSION

It is a truism that the question posed can determine the answer that will be provided in response. The Supreme Court took the unusual step of ordering a rehearing in *Kiobel* so that the issue of extraterritoriality could be briefed and argued in the second round. At both oral arguments it asked two questions. One of those questions may be viewed as the wrong question and one as the right question to ask.

As the above makes clear, the wrong question – or the question to unravel so as to avoid the pitfall of a misleading answer that falls into the trap of the question’s formulation – was whether the United States is alone in allowing universal civil jurisdiction for *jus cogens* crimes, since, properly analyzed, the “civil” of the United States substantively is analogous to the “criminal” of the civilian world in the matter of universal jurisdiction. In the end, the Supreme Court majority decided to reject extraterritoriality for the ATS so as, among others reasons, to avoid what it believed would be the consequence, namely “mak[ing] the United States a *uniquely* hospitable forum for the enforcement of international norms.”<sup>25</sup>

But underneath this question, the Court was asking the right question for every ATS case, most international law cases, and an increasing number of cases that United States lawyers and judges face and will be facing on a daily basis: what is the law of other nations? With respect to the ATS, we cannot understand customary international law, or the “law of nations,” without understanding foreign nations. International law is hard to sever from the States that have formed it and from the legal orders of those States. Foreign law matters.

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<sup>25</sup> *Kiobel*, 133 S. Ct. at 1668 (emphasis added).