THE STATUTE OF LIMITATIONS FOR ALIEN TORTS: A REEXAMINATION AFTER *KIOBEL*[1]

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The recent Second Circuit ruling in *Kiobel v. Royal Dutch Petroleum*[3] that corporations may not be held liable under the Alien Tort Statute (ATS, formerly ATCA)[4] has shaken many human rights activists and internationalists. If this holding is upheld, it will require major reformulation of pending complaints. Although *Kiobel* may make the road difficult for ATS plaintiffs, the court's insistence on adhering solely to customary international law in determining jurisdictional issues may benefit ATS plaintiffs in other areas, most notably by contributing to the argument against the imposition of a statute of limitations on claims under the ATS.[5] Contrary to this position, the Ninth Circuit, in *Wesley Papa, et al.* v. *United States and the U.S. Immigration & Naturalization Service*, was the first to apply a ten year statute of limitations to ATS claims.[6] This holding has been cited in several other cases within the Ninth and Second Circuits.[7] However, the imposition of time limitations on ATS claims has been rebuffed by other U.S. courts.[8] This article concludes that not only does imposition of a statute of limitations negate the purpose of the ATS,[9] but also the Ninth Circuit's reasoning in favor of time limitations does not hold in the face of *Kiobel*.[10]

I. THE PURPOSE OF THE ATS:[11] UPHOLDING *JUS COGENS* NORMS

The ATS,[12] a simple pronouncement within the Judiciary Act of 1789, states 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

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1. Kiobel v. Royal Dutch Petrol Co., 621 F.3d 111, (2d Cir. 2010).

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3. *Kiobel*, 621 F.3d 111, 121.

4. 28 U.S.C. § 1350 (2011).

5. *Kiobel*, 621 F.3d 111; 28 U.S.C. § 1350.

6. Papa v. U.S., 281 F.3d 1004, 1012–13 (9th Cir. 2002); 28 U.S.C. § 1350.

7. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

8. *See, e.g., In re* Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

9. 28 U.S.C. § 1350.

10. *Kiobel*, 621 F.3d 111.

11. 28 U.S.C. § 1350 (2011).

12. *Id.*

nations or a treaty of the United States."[13] This provision is the mechanism by which civil actions may be filed for violations of international law committed abroad by perpetrators who are found in the United States. In the landmark case of *Filártiga v. Peña-Irala*,[14] the ATS, after lying dormant for nearly 200 years, was invoked against a former Paraguayan official who committed acts of torture in Paraguay, and later moved to the United States.[15] Plaintiffs, the family of a torture victim, filed suit in the Second Circuit, which found the defendant liable. Perhaps recognizing the significance of the case, the court was careful to state that "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."[16]

Although there is no legislative history for the ATS,[17] it is understood that "violations of the law of nations" was meant to encompass the then generally recognized prohibitions of international law against piracy, violations of safe conduct, and infringement on the rights of ambassadors.[18] Since *Filártiga*,[19] courts have expanded this list of "specific, universal, and obligatory"[20] prohibitions to include prohibitions against "atrocity crimes."[21] These crimes are commonly understood to include genocide, crimes against humanity (including torture, prolonged arbitrary detention, and forced migration or disappearances), and war crimes (also including torture and ethnic cleansing).[22] Additionally, liability under the ATS[23] has been found for aiding and abetting any of these crimes. Atrocity crimes are recognized under international law as *jus cogens* (Latin for "compelling law"), fundamental norms from which no derogation is permitted.[24]

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13. *Id.*

14. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

15. *Id.* at 876–877.

16. *Id.* at 888.

17. 28 U.S.C. § 1350 (2011).

18. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

19. *Filártiga*, 630 F.2d 876.

20. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). *See also* Flores v. S. Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003) (explaining that U.S. courts have consistently used the phrase "customary international law" and the "law of nations" interchangeably).

21. Term coined by David Scheffer, former U.S. Ambassador-At-Large for War Crimes. *See, e.g.*, David Scheffer, *Genocide and Atrocity Crimes*, 1.3 GENOCIDE STUD. & PREVENTION 229 (2006); *see also* David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law,"* 2.1 GENOCIDE STUD. & PREVENTION 91 (2007).

22. Pamela J. Stephens, *Spinning Sosa: Federal Common Law, The Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L. J. 1, 5 (Spring 2007).

23. 28 U.S.C. § 1350 (2011).

24. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (5th ed., 1998); R. v. Bow St. Metro. Stipendiary Magis., *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C.

Violations of *jus cogens* norms are considered to be particularly heinous crimes that, by virtue of their commission, impact all states. While customary international law is determined by *opinio juris* (general agreement by states to be legally bound by such custom) and widespread state practice,[25] *jus cogens* norms have the highest and most significant status under international law. This status has been seen by some commentators as implicating universal jurisdiction by all states and imposing a duty on all states to prosecute or extradite perpetrators.[26] In *Kiobel*, Judge Cabranes stated that "the substantive law that determines our jurisdiction under the ATS is [not] the domestic law of the United States . . . [but] the specific and universally accepted rules [of customary international law]."[27] Therefore, courts should look to customary international law as the substantive law that determines jurisdiction with respect to time limitation of claims brought under the ATS.[28]

II. THE NINTH CIRCUIT'S REASONING IN *PAPA*

In *Papa*,[29] the family of Brazilian national Mauricio Papa filed ATS[30] and other claims against the Immigration and Naturalization Service stemming from Papa's death while in INS custody.[31] Although Papa died in 1991, his family did not file suit until 1999. The District Court initially dismissed the claims under California's one-year statute of limitations for death caused by commission of a tort, but the Ninth Circuit reversed, finding instead that the applicable statute of limitations was ten years, pursuant to the provisions of the Torture Victim Protection Act (TVPA).[32] Because "[t]he TVPA, like the ATCA, furthers the protection of human rights . . . and employs a similar mechanism for carrying out these goals: civil actions."[33] The court concluded, "All these factors point towards borrowing the TVPA's statute of limitations for the ATCA."[34] It has been commented that "[t]he decision in *Papa* should serve as the basis to harmonize the limitations period to be used in ATCA actions and has the potential to bring to an end the inconsistent decisions as to the applicable

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(H.L.) 147, 174 (appeal taken from Eng.). *See also* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

25. Continental Shelf (Libya/Malta), 1985 I.C.J. 13 (Jun. 3).

26. M. Cherif Bassiouni, *Crimes Against Humanity*, CRIMES OF WAR PROJECT, *available at* http://www.crimesofwar.org/thebook/crimes-against-humanity.html.

27. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 118 (2d Cir. 2010).

28. 28 U.S.C. § 1350 (2011).

29. Papa v. U.S., 281 F.3d 1004, 1008 (9th Cir. 2002).

30. 28 U.S.C. § 1350.

31. *Papa*, 281 F.3d 1004.

32. *Id.* at 1012–13; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

33. *Papa*, 281 F.3d at 1012.

34. *Id.*

time period."[35] However, there are several problems with this view.

First, while the TVPA, enacted in 1991, has all too often been referenced interchangeably with the ATS,[36] it is in fact a federal statute governed by U.S. federal law[37] rather than the international law invoked in the 1789 Judiciary Act. The TVPA does provide for civil remedies against individuals who commit acts of torture or extrajudicial killing,[38] but that is where the similarities between the TVPA[39] and the ATS[40] end. The TVPA is narrowly applicable to individuals acting with official authority conferred by a foreign nation.[41] The TVPA also makes no reference to international law or the "law of nations."[42] The ATS,[43] on the other hand, is applicable to individuals (and potentially corporations, pending an appeal of *Kiobel*[44]) who commit any of several atrocity crimes as defined above, whether in private or official capacities.[45]

Moreover, the ATS specifically refers to the "law of nations" as the applicable law,[46] a reference thoroughly embraced and analyzed by the *Kiobel* court in its determination regarding corporate liability.[47] Judge Cabranes noted that the Second Circuit had previously looked to customary international law to determine questions of jurisdiction under the ATS.[48] Therefore, the court reasoned, it must continue to examine jurisdictional issues under the ATS[49] through the lens of international law. It is inappropriate to impose an identical time limitation for ATS and TVPA violations, which are not governed by the same law, merely because the two statutes can be associated by subject matter.

Rather, following the court's analysis in *Kiobel*,[50] customary

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35. J. Romesh Weeramantry, *Time Limitations Under the United States Alien Tort Claims Act*, 851 INT'L REV. RED CROSS, 627, 631 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5SSE46/$File/irrc_851_Weeramantry.pdf.

36. 28 U.S.C. § 1350.

37. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

38. Torture Victim Protection Act § 2(a).

39. *Id.*

40. 28 U.S.C. § 1350.

41. Torture Victim Protection Act § 2(a).

42. *Id.*

43. 28 U.S.C. § 1350.

44. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111 (2d Cir. 2010).

45. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

46. 28 U.S.C. § 1350.

47. *Kiobel*, 621 F.3d 111, 120.

48. *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (foreign government officials may be liable for crimes under the ATS); *Kadic*, 70 F.3d at 239–41 (private individuals may be liable for crimes under the ATS); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009) (aiders and abettors may be liable for crimes under the ATS); 28 U.S.C. § 1350.

49. 28 U.S.C. § 1350.

50. *Kiobel*, 621 F.3d 111.

international law must be examined to determine the statute of limitations for violations that are covered by the ATS.[51] This article will follow Judge Cabranes' pattern of analysis, by examining the pronouncements of international tribunals, international treaties and conventions, state practice, and the work of international legal scholars.[52] This article concludes that one of the main characteristics of *jus cogens* norms violations is that "they do not lapse with time."[53]

III. INTERNATIONAL TRIBUNALS

The decisions of international tribunals have been largely silent on the question of a statute of limitations for crimes within their jurisdiction. This silence is due to the fact that the founding instruments of the tribunals have eschewed such limitations. The Charter of the International Military Tribunal that sat at Nuremberg contained no statute of limitation,[54] nor did the Charter of the International Military Tribunal for the Far East that sat at Tokyo.[55] Additionally, Control Council Law No. 10, which adapted the norms of the Nuremberg Charter for use by the Allied courts in Europe, stated clearly that

> [i]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.[56]

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51. 28 U.S.C. § 1350 (2011).

52. *See, e.g.*, *Kiobel*, 621 F.3d at 239–41 (holding that private individuals may be liable for crimes under the ATS); *Filártiga*, 630 F.2d at 880 (2d Cir. 1980) (holding that foreign government officials may be liable for crimes under the ATS); *Presbyterian Church of Sudan*, 582 F.3d at 258–59 (2d Cir. 2009) (holding that aiders and abettors may be liable for crimes under the ATS).

53. Joan Sánchez, *Inter-American Court, Crimes Against Humanity and Peacebuilding in South America*, 20 (Institut Català Internacional per la Pau, ICIP Working Paper 2010/02), *available at* http://www.gencat.cat/icip/pdf/WP10_2_ANG.pdf.

54. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

55. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (General Orders No. 1), *amended by* General Orders No. 20, Apr. 20, 1946, T.I.A.S. No. 1589, 4 Bevans 20 [hereinafter Tokyo Charter].

56. Control Council Law No. 10, [Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity], Dec. 20, 1945 Official Gazette: Control Council for Germany art. II, para. 5.; 36 I.L.R. 31(1946).

Similarly, the decision of the Supreme Court of Israel in the infamous trial of Adolf Eichmann, while not making a specific pronouncement on time limitations, underscored the "universal character of the crimes in question that vests in each State the power to try and punish anyone who assisted in their commission."[57]

Following the precedent set by the Nuremberg and Tokyo tribunals, the International Criminal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) excluded time limitations from their statutes.[58] Each respective tribunal's jurisdiction extends over acts of genocide, war crimes, crimes against humanity, and grave breaches of the Geneva Conventions,[59] which are the same acts that implicate the jurisdiction of the ATS.[60] However, the ICTY stepped beyond silent acquiescence to the principle of excluding time limitations. In *obiter dictum*, the court in *Prosecutor v. Anto Furundzija*[61] held that "it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that . . . torture may not be covered by a statute of limitation."[62] Following this statement to its natural conclusion, violations of *jus cogens* norms may not be subject to a statute of limitation. This conclusion is borne out by the fact that the rules of the most recent U.N.-established tribunals in Cambodia and East Timor provide explicitly that there shall be no statute of limitations. In Cambodia this rule applies to genocide and crimes against humanity; in East Timor, this rule applies to genocide, war crimes, crimes against humanity, and torture.[63]

Based upon the Nuremberg Charter,[64] both the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights

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57. CrimA 336/61 Eichmann v. Att'y Gen. of Isr. 16(1) IsrSC 2033 [1962] (Isr.), *reprinted in* 36 I.L.R. 277 (1968).

58. Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Int'l Criminal Tribunal for Rwanda, Statute of the International Tribunal (Jan. 2010), http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf.

59. *Id.*

60. 28 U.S.C. § 1350 (2011).

61. Prosecutor v. Anto Furundzija, Case No. IT-95-17/I-T10, Judgement, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

62. *Id.* ¶¶ 156–57.

63. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of the Crimes Committed During the Period of Democratic Kampuchea, arts. 4–5, NS/RKM/1004/006, Oct. 27, 2004; U.N. Transitional Admin. in E. Timor (UNTAET), Reg. No. 2000/15, Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, UNTAET/REG/2000/15, § 17 (June 6, 2000).

64. Nuremberg Charter, *supra* note 54.

(IACHR) have expressly upheld the principle that atrocity crimes have no statute of limitation. France's 1964 law, providing that crimes against humanity were not subject to any statute of limitations,[65] was challenged before the ECHR in the 1990s by two defendants convicted for crimes committed during World War II.[66] The defendants claimed infringement of their rights under Article 7 of the European Convention on Human Rights, which provides, in full:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.[67]

The ECHR found in both cases that the French law was legal pursuant to Article 7(2), as the Nuremberg Charter had established the acts committed by the defendants to be crimes under international law, and had treated them as imprescriptible.[68]

Similarly, the IACHR has reiterated on numerous occasions that "no domestic law or regulation—including amnesty laws and statutes of limitation—may impede the State's compliance with the court's orders to investigate and punish perpetrators of human rights violations. . . . This conclusion is consistent with the letter and spirit of the [American]

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65. Loi 64-1326 du 26 Décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité [Law 64-1326 of Dec. 26, 1964 Tending to Establish the Limitations for Crimes Against Humanity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 29, 1964, p. 11788.

66. Touvier v. France, App. No. 29420/95, 88-B Eur. Comm'n H.R. Dec. & Rep. 148 (1997); Papon v. France, App.No. 54210/00, 2002-VII Eur. Ct. H.R §90.

67. Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 213 U.N.T.S. 221.

68. *Touvier*, 88-B Eur. Comm'n H.R. Dec. & Rep. 148 ("[[T]he offense of crimes against humanity and its imprescriptibility was included in the Statute of the International Tribunal at Nuremberg (annexed to the Allied Agreement of August 8, 1945), which the French law of December 26, 1964 specifically cites to conclude that crimes against humanity are imprescriptible." (author's translation)); *see also* Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, 179–80 (2010) (*quoting* Touvier) ("[T]he only principle in matters of the prescription of crimes against humanity that one may derive from the IMT Charter is the principle of imprescriptibility.").

Convention [on Human Rights], as well as general principles of international law."[69]

Finally, the *Kiobel* court relied heavily on the fact that drafters of the Rome Statute of the International Criminal Court (ICC) specifically excluded corporate liability from the ICC's jurisdiction as evidence that corporate liability has not risen to the level of customary international law.[70] On the point of time limitations, the Rome Statute is clear that "[t]he crimes within the jurisdiction of the Court [genocide, war crimes, and crimes against humanity] shall not be subject to any statute of limitations."[71] Moreover, during the Rome Statute negotiations,

> [w]ith the exception of a handful of delegations . . . no one spoke against the principle that the crimes within the jurisdiction of the [c]ourt should not be subject to any statutory limitations. Even countries that applied a statute of limitations for every crime in their national system accepted this.[72]

Referring back to *Sosa* court's statement that the rule of international law must be "specific, universal, and obligatory," [73] this statement is hard evidence that by 1998, customary international law did not allow statutes of limitation to be applied to the most serious crimes under international law.

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69. Moiwana Village v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (June 15, 2005). *See also* Barrios Altos v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 41 (Nov. 30, 2001); Trujillo Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 106 (Feb. 17, 2002); Gómez-Paquiyauri Brothers v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 151 (July 8, 2004); Bulacio v. Argentina, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 117, 142 (Sept. 18, 2003); Blanco Romero v. Venezuela, Merits, Reparations, and Costs, Order, Inter-Am. Ct. H.R. (sec. C) No. 138, ¶ 98 (Nov. 28, 2005).

70. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 138 (2d Cir. 2010).

71. Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90.

72. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 204–05 (Roy S. Lee ed., 1999). *See also*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 18, 1998, *Consideration of the Question Concerning the Finalization and Adoption of a Convention on the Establishment of an International Criminal Court in Accordance with General Assembly Resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997*, ¶¶ 76, 82, U.N. Doc. A/CONF.183/C1/SR.8 (June 19, 1998). The United States later refused to ratify the treaty on other grounds. *See, e.g.*, David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2001–2002).

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

IV. INTERNATIONAL TREATIES AND CONVENTIONS

Next, it is important to examine the pronouncements of all relevant international treaties and conventions and analyze state adherence to such agreements as proof of force. The first express pronouncement of the principle of non-prescription for atrocity crimes occurred over forty years ago in the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (U.N. Convention).[74] The U.N. Convention, which came on the heels of the Nuremberg trials,[75] recalled numerous resolutions of the General Assembly and the Economic and Social Council that affirmed the "principles of international law recognized by the Charter of the International Military Tribunal at [Nuremberg]" and noted that "none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation."[76] The U.N. Convention further noted that applying a statute of limitations to war crimes and crimes against humanity prevents the "prosecution and punishment" of perpetrators, finally stating unequivocally that "it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."[77]

Despite the fact that the United States is not party to the U.N. Convention, there were many other nations at the time of promulgation that

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74. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218, at 40 (Nov. 26, 1968) [hereinafter U.N. Convention].

75. There was a fear that "Nazis who had not yet been brought to justice would escape prosecution because the German Statute of Limitations was about to expire." Sadat, *supra* note 69, at 176.

76. U.N. Convention, *supra* note 75, at pmbl.

77. *Id.* art. 1. Article 1 of the U.N. Convention provides:

> "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Id.

believed that "the principle of the non-applicability of statutes of limitation to war crimes had already been recognized in international law."[78] This principle was based on the notion that "[w]ar crimes and crimes against humanity can in no way be equated with crimes under municipal law."[79] Even more compelling is the fact that Articles 1(a) and (b) of the U.N. Convention prohibits the imposition of a statute of limitations on war crimes, crimes against humanity, and genocide, as defined by the four Geneva Conventions[80] and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[81] The United States has signed and ratified all of these instruments,[82] which, in the style of the Nuremberg Charter,[83] do not contain a statute of limitations. Several commentators have argued that the U.N. Convention is to be read in conjunction with those treaties and as formally establishing the imprescriptibility of the crimes contained therein.[84] For instance, Chile, which has not ratified the U.N. Convention,[85] has concluded that the U.N. Convention has declaratory rather than constitutive effect.[86]

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78. Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 482 (1971). The Soviet Union representative also stated that "the Convention, when adopted, would not make new law, but merely reaffirm an existing principle of international law." *Id.* at 482 n.30.

79. *Id.* at 484.

80. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

81. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

82. U.N. Convention, *supra* note 75 (signatories available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en).

83. Nuremberg Charter, *supra* note 54.

84. Christine Van den Wyngaert & John Dugard, *Non-Applicability of Statute of Limitations*, *in* THE ROME STATUTE: A COMMENTARY 887 (Antonio Cassese ed., 2002) ("It is possible to view this Convention as declaratory of customary international law as it stood in 1968 with the result that core crimes committed thereafter were imprescriptible.").

85. U.N. Convention, *supra* note 75 (signatories available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en).

86. Van den Wyngaert & Dugard, *supra* note 86.

86. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 diciembre 2006, "Casa Molco." Rol de la causa: 559-2004, Sala Penal (Chile) ("The Convention is not limited to stating this rule, but rather affirms it, since it already represented customary international law.") (author's translation) *available at* http://www.cecoch.cl/htm/revista/docs/estudiosconst/revistaano_5_1_htm/sentenci_molco5_1-2007.pdf.

The U.N. Convention, sparsely ratified due to its retroactive applicability and lack of clarity regarding definitions,[87] was followed by the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity[88] and the 1994 Inter-American Convention on Forced Disappearance of Persons.[89] The latter convention unequivocally adopted the principle of imprescriptibility, but applied the principal to offenses committed after its passage. The prohibition against torture, also widely acknowledged to have entered the realm of customary international law,[90] has been codified in the 1984 United Nations Convention Against Torture,[91] the 1985 Inter-American Convention to Prevent and Punish Torture,[92] and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Punishment.[93] These treaties do not contain statutes of limitation for the crime of torture.

The *Kiobel* court noted that it cannot be said that "treaties on specialized questions codify . . . customary international law" without an "existing or even nascent norm."[94] However, from Nuremberg onward, statutes of limitation have been inapplicable on atrocity crimes. The above treaties all affirm that norm. Any argument regarding the number of signatories to each treaty may be answered with an analysis of the practice of individual countries.

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87. Miller, *supra* note 79, at 488. *See also* JEAN-MARIE HENCKAERTS ET AL., INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 615 (2005); Van den Wyngaert & Dugard, *supra* note 86, at 887 ("The limited ratification of [the U.N. Convention] does not necessarily contradict [the imprescriptibility of genocide, war crimes, and crimes against humanity] as the principal objection to this Convention was its retrospectivity.").

88. European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity, Jan. 25, 1974, C.E.T.S. No. 082 (demonstrating that efforts to establish a European Convention preceded negotiations on the U.N. Convention.).

89. Inter-American Convention on Forced Disappearance of Persons art. 7, Jun. 9, 1994, 33 I.L.M. 1529.

90. Winston Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 86 (2001); Erika de Wet, *The Prohibition on Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L. L. 1, 97–121 (2004); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 459 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T-10, Judgment, ¶¶ 160–61 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *available at* http://www.icty.org/x/cases/furundzija/tjug/en/furtj981210e.pdf.

91. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

92. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67

93. European Convention for the Prevention of Torture and Inhuman or Degrading Punishment, Nov. 26, 1987, E.T.S. No. 126.

94. Kiobel v. Royal Dutch Petrol Co., 621 F.3d 111, 139 (2d Cir. 2010).

V. THE INDIVIDUAL PRACTICE OF VARIOUS COUNTRIES

"Widespread state practice" is one barometer for determining customary international law. (The other is *opinio juris*). The *Kiobel*[95] court had no state principle to analyze, since no other state has an identical statute to the ATS,[96] which can impose civil liability for atrocity crimes. However, there is plenty of state practice confirming that non-applicability of time limitations is customary for atrocity crimes.

For instance, France announced as early as 1964 that crimes against humanity were not subject to a statute of limitations.[97] Germany's *Völkerstrafgesetzbuch*, established in 2002, supplemented German law regulating crimes against international law and reflected the Rome Statute of the International Criminal Court.[98] The *Völkerstrafgesetzbuch* establishes in Article 1, Section 5, that there shall be no statute of limitations for genocide, crimes against humanity, and war crimes.[99] In commentary on the *Völkerstrafgesetzbuch*, Professor Russell Miller states that

> the explanatory materials also note that the absence of a statute of limitations is not exceptional in German criminal law as murder and genocide have long been free of a statute of limitations. The explanatory materials further suggest that the absence of a statute of limitations is not really more exceptional than the twenty or thirty year statutes of limitation applying to a number of other criminal provisions, which establish, *de facto*, a limitless opportunity to prosecute.[100]

In addition to France and Germany, the United Kingdom criminalized genocide in the Genocide Act of 1969,[101] which was replaced in 2001 by

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95. *Id.*

96. 28 U.S.C. § 1350 (2011).

97. Loi 64-1326 du 26 Décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité [Law 64-1326 of December 26, 1964 Tending to Establish the Limitations for Crimes Against Humanity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 29, 1964, p. 11788.

98. Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90

99. VÖLKERSTRAFGESETZBUCH [VStGB] [Code of Crimes Against International Law], June 26, 2002, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 2254, art. 1(5) (Ger.).

100. Russell Miller, *Domesticating International Criminal Law: Germany's Proposed Völkerstrafgesetzbuch (International Law Criminal Code)*, 2 GER. L. J. 10-11 (2001), *available at* http://www.germanlawjournal.com/article.php?id=31.

101. Genocide Act, 1969, c. 12 (Eng.).

the International Criminal Court Act.[102] This Act implemented the provisions of the Rome Statute[103] and does not provide a statute of limitations on the crimes of genocide, war crimes, and crimes against humanity.[104] Additionally, Section 134 of the Criminal Justice Act establishes universal jurisdiction over acts of torture committed after 1988 without imposing a statute of limitation on such acts.[105] Similarly, Sweden enacted the Cooperation with the International Criminal Court Act in 2002,[106] and recently modified it to include a provision regarding the non-applicability of statutes of limitation for genocide, war crimes, and crimes against humanity.[107]

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102. International Criminal Court Act, 2001, c. 17, sched. 10 (U.K.).

103. *Id.* pt. 1, sec.1; Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90.

104. International Criminal Court Act, 2001, c. 17, sched. 8 (U.K.).

105. Criminal Justice Act, 1988, c. 33, § 134 (U.K.). It should be noted that there are inconsistencies between the UK laws that confer jurisdiction over UK residents (e.g., genocide and crimes against humanity) and laws that are applicable to any persons found in the UK (e.g., war crimes in international armed conflicts and torture). *See* JOINT COMMITTEE ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP: UK LAW ON GENOCIDE (AND RELATED CRIMES) AND REDRESS FOR TORTURE VICTIMS, 2008–09, H.C. 553, H.L. 153, ¶¶ 27–30 (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/ 153/153.pdf.

106. LAG OM SAMARBETE MED INTERNATIONELLA BROTTMALSDOMSTOLLEN (Svensk Forfattningssamling [SFS] 2002:329) (Swed.).

107. Review Conference of the Rome Statute, May 31–June 11, 2010, *Compilation on Implementing Legislation 2010*, 45, RC/ST/CP/M.2 (Jun. 1, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/CP-M.2.Compilation-I.pdf. In addition to these examples, other European countries that currently have no statute of limitations for atrocity crimes include the Netherlands (Wet Internationale Misdrijven [International Crimes Act] §13, June 19, 2003Stb./S. 2003 at.270); Spain (The Organic Act art. 131 (B.O.E. 2003 283)); Belgium (Loi relative à la répression des violations graves de droit international humanitaire—Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht [Act Concerning the Punishment of Grave Breaches of International Humanitarian Law] of Feb. 10, 1999, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1993, 92860) (an English translation of the Act, as amended, is published in 38 I.L.M. 918 (1999)); Norway (Straffeloven [Criminal Code] Kap. 16); Finland (Laki rikoslain muuttamisesta [Law Amending the Penal Code], 212/2008, May 1, 2008); Armenia (K'reakan Orensgrk'I [Criminal Code] art. 75); Bosnia-Herzegovina (Kazneni zakon [Criminal Code] art. 19); Bulgaria (KONSTITUTSIYATA [CONSTITUTION] July 13, 1991, State Gazette No. 56/13.07.1991, art. 31(7)); Croatia (Kaznenog Zakona [Criminal Code] art. 18(2), Narodne novine [Official Gazette] No. 110 of Oct. 21, 1997, Jan. 1, 1998); Portugal (Lei 31/2004, de Julho 22, 2004, I-A Diário da República [Official Gazette] No. 171, art. 7)); Hungary (1978. évi. IV. törvény a Büntető Törvénykönyv (Act IV of 1978 on the Criminal Code) art. 33(2), *available at* http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/).

Italy's Corte Suprema di Cassazione in *Priebke*[108] found that a former Nazi war criminal, responsible for the massacres of Italian citizens during World War II, could be tried despite the passage of more than fifty years since the massacres. The man could be tried because statutory limitations were held inapplicable for war crimes and crimes against humanity, pursuant to the principle of *jus cogens*.[109] Commentary on *Priebke*[110] has noted that the court established a logical premise that "[a]ll norms of municipal law inconsistent with the above are thus non-applicable."[111] Italy is not a party to the U.N. Convention,[112] which further supports the argument that the "non-applicability of statutory limitations to war crimes [is] a peremptory norm of general international law."[113]

Much of Latin America has also embraced the imprescriptibility of atrocity crimes, whether through incorporation of the Rome Statute rules[114] or provisions in domestic penal codes. Argentina, for example, expressly stated in the 2001 Law to Implement the Rome Statute that crimes against humanity, war crimes, and genocide were not subject to a statute of limitations.[115] The principle was defended by Argentinean courts as early as 1989 when, in response to an extradition request from Germany, the La Plata Federal Court of Appeals found that in recognizing the primacy of international law, crimes against humanity were not subject to a statute of limitation.[116] Later, in the 2004 *Enrique Lautaro Arancibia Clavel* case,[117]

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108. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/95, "Priebke, Erich s/ solicitud de extradición," Colección Officiál de Fallos de la Corte Suprema de la Nación [Fallos] (1995-318-2148) (Arg.). Erich Priebke was extradited from Argentina to Italy. He was tried and convicted in Italy in 1998. Cass., *Priebke*, Judgment of 16 November 1998 (It.).

109. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 159 (3rd ed. 2009).

110. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/95, "Priebke, Erich s/ solicitud de extradición," Colección Officiál de Fallos de la Corte Suprema de la Nación [Fallos] (1995-318-2148) (Arg.).

111. Sergio Marchisio, *The Priebke Case Before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 1 Y.B. INT'L HUMAN. L. 344, 352 (1998).

112. U.N. Convention, *supra* note 75 (signatories available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en).

113. *National Case Law: Haas and Priebke Cases, Military Court of Appeal of Rome*, INT'L COMM. OF THE RED CROSS, http://www.cicr.org/ihl-nat.nsf/a42a5edc55787e8f41256486 004ad09b/0370fc27370b3776c1256c8c0055e44d!OpenDocument.

114. Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90.

115. Law No. 25390, Jan. 16, 2001, [2001-A] A.L.J.A. 27 (Arg.) (adopting Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90).

116. Cámara Federal de Apelaciones de La Plata [Federal Court of La Plata], 30/8/1989, "J.F.S.L. s/ Extradición," El Derecho [E.D.] (1990-135-326) (Arg.).

the Supreme Court of Argentina affirmed this principle due to the status of crimes against humanity (including genocide, torture, and forced disappearances) as the most serious crimes under international law.[118]

In Chile, the Supreme Court recognized in 2006 that the non-applicability of statutory limitations to atrocity crimes was accepted as a norm of customary international law.[119] In 2007, the Supreme Court of Chile extradited Alberto Fujimori (former Peruvian president) to Peru after determining that atrocity crimes had no statute of limitation under international law.[120] Chile adopted the Rome Statute into domestic law in 2009, including imprescriptibility.[121]

Suriname, a nation under pressure during the *Moiwana Village*[122] case before the IACHR (a case that involved the massacre of village inhabitants—mostly women and children—during the Surinamese civil war in 1986), bowed to international custom and amended the Penal Code to include that the "right to prosecute does not expire if the matter in question concerns, *inter alia*, a 'crime against humanity' or a 'war crime.'"[123] Colombia,[124] Costa Rica,[125] Bolivia,[126] Panama,[127] Peru,[128] and many of

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117. Corte Supreme de Justicia [CSJ] [Supreme Court of Justice], 24/8/2004, "Arancibia Clavel, Enrique Lautaro y otros," Collección Officiál de Fallos de la Corte Suprema de la Nación [Fallos] (2004-327-3294) (Arg).

118. *Id.*

119. Sentencia de la Corte Suprema de Justicia de Chile [CSJN], Sala Penal, 13/12/2006, "*Caso Molco*," (559-2004).

120. Segunda Sala de la Corte Suprema de Justicia de la Republica [CSJ] [Second Chamber of the Supreme Court], 9/21/2007, "Juzgamiento al Ex Presidente Alberto Fujimori/Resolucio´n de Extradicio´n," Rol N°
3744-07 (Chile).

121. Law No. 104, Agosto 1, 2009, DIARIO OFICIAL [D.O.] (Chile).

122. Moiwana Village v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (June 15, 2005).

123. *Id.* ¶ 86(41).

124. L. 975/2005, Julio 25, 2005, [45] DARIO OFICIAL [D.O.] 980 (Colom.).

125. Sentencia [S.] No. 00230, de las 9:39 a.m., 1 Dec. 1996, [Constitutional Chamber of the Supreme Court of Justice] (Costa Rica), *available at* http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=83830&strTipM=T&strDirSel=directo.

126. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/4/1993, "Sentencia pronunciada en los juicios de responsabilidad seguidos por el Ministerio Publico y coadyuvantes contra Luis Garcia Meza y sus colaboradores" (Bol.), *available at* www.derechos.org/nizkor/bolivia/doc/meza.html ("Bolivia, as a member of the United Nations, signed the Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, which declares the imprescriptibility of such crimes regardless of the date on which they were committed or whether they were committed in times of war or peace. This principle is in accordance with the Statute of the International Military Tribunal at Nuremberg and confirmed by General Assembly resolutions . . .") (author's translation).

127. Corte Suprema de Justicia [CSJ] [Supreme Court of Justice], 26/1/2007, "Aníbal Salas Céspedes," (Pan.).

128. Tribunal Constitucional [T.C.] [Constitutional Court] 18 Marzo 2004, "Genaro

their neighbors have also recently implemented measures or issued judgments affirming that no statute of limitations is applied to atrocity crimes. Elsewhere in the world, countries as diverse as Russia,[129] New Zealand,[130] the Republic of Korea,[131] Australia,[132] Canada,[133] Kenya,[134] and Rwanda,[135] among others, have already eliminated prescription on such crimes.

Beyond the adoption of this principle in international law, it has already been implemented in U.S. law. For instance, the War Crimes Act of 1996[136] provides that Americans can be prosecuted in federal criminal courts for violations of Common Article 3 of the Geneva Conventions.[137] This Act, which was passed by an overwhelming majority of the United States Congress,[138] contains no statute of limitations for crimes committed during war.[139] It was even cited as a means to try the second Bush

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Villegas Namuche," Rol de la causa: 2488-2002-HC/TC (Peru).

129. UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 78(5) (Russ.).

130. International Crimes and International Criminal Court Act 2000, sec. 12(1)(a)(vii) (N.Z.).

131. (Act on the Punishment, etc. of Crimes within the Jurisdiction of the International Criminal Court), Act No. 8719, Dec. 21, 2007, art. 6 (S. Kor.).

132. *International Criminal Court Act 2002* (Cth) sec. 2(1), sch. 1 (Austl.) (incorporating provisions of the Rome Statute).

133. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

134. The International Crimes Act, (2009) § 7(g) (Kenya).

135. Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since Oct. 1, 1990, No. 8, art. 37 (1996) (Rwanda).

136. 18 U.S.C. § 2441 (1996).

137. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.").

138. 142 Cong. Rec. H 8621 (1996); 142 Cong. Rec. S 6948 (1996).

139. 18 U.S.C. § 2441(a).

administration for their actions in Iraq.[140] More recently, the Genocide Accountability Act[141] and the proposed Crimes Against Humanity Act[142] explicitly deny a time limitation for prosecuting atrocity crimes. The Genocide Accountability Act amends 18 U.S.C. §1091, which has been part of the United States Code since 1987, and states in part (f) that "in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation."[143] The exact same language can be found in part (d) of the proposed Crimes Against Humanity Act.[144] Similarly, the Patriot Act states that there is no statute of limitations for certain acts of terror,[145] which, under international law, have been considered crimes against humanity.[146]

It should be pointed out that all of these examples involve criminal law, rather than the civil jurisdiction conferred by the ATS.[147] However, civil jurisdiction under the ATS has always been based on criminal acts,[148] an inherent duality of the ATS. Originally conceived to address the "three specific offenses against the law of nations addressed by the criminal law of England [and identified by Blackstone],"[149] the *Sosa*[150] court widened the jurisdiction, as previously discussed, to include acts of genocide, crimes against humanity, and war crimes.[151] No other country in the world has a statute conferring civil jurisdiction for criminal acts; however, that is precisely the reason the United States should look to comparable domestic criminal codes, which confer jurisdiction for the same acts, for guidance on the question of a statute of limitations. The *Kiobel* court, in its exhaustive reasoning, cited *only* international criminal tribunals in determining the scope of ATS civil jurisdiction.[152] If the *Kiobel*[153] reasoning is to stand,

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140. R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html.

141. 18 U.S.C. § 1091(f) (2007).

142. S. 1346, 111th Cong., 1st Sess. (2010).

143. 18 U.S.C. § 1091(f).

144. S. 1346, § 519(d), 111th Cong., 1st Sess. (2010). Most recent text *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s111-1346.

145. As provided by Title 8, § 809 of the Patriot Act provides no SOL for certain terrorism offenses, specifically those under 2332b(g)(5)(B). Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. 107–56, § 809 (amending 18 U.S.C. § 3286 (year)).

146. Antonio Cassese, *Terrorism as an International Crime*, *in* ENFORCING INTERNATIONAL NORMS AGAINST TERRORISM 213, 222–23 (Andrea Bianchi & Yasmin Naqvi eds., 2004).

147. 28 U.S.C. § 1350 (2011).

148. *Id.*

149. Kiobel v. Royal Dutch Petrol Co. 621 F.3d 111, 125 (2d Cir. 2010).

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

151. *Id.* at 762.

152. *Kiobel*, 621 F.3d at 123–25.

courts must use the same international criminal law sources to determine the question of temporal jurisdiction.

Also, the gravity of the act should dictate the statute of limitations. Returning to the importance of *jus cogens* norms, when considering the most heinous violations, whether these violations are categorized as criminal or civil does not matter. What matters is whether the acts in question qualify as violations of *jus cogens*. If so, customary international law does not allow a statute of limitations. As stated by former Ambassador, David Scheffer, "[t]he United States must eliminate any possibility that it would remain a safe haven for war criminals and other perpetrators of atrocities who reach American shores and seek to avoid accountability for atrocity crimes."[154] The realization of this principle should not depend on whether a remedy is civil or criminal. Both civil and criminal remedies are punitive to current perpetrators and aim to deter future perpetrators. In particular, within the ATS,[155] the acts under discussion are of such severity that the fact that the United States offers both remedies should be a source of pride rather than unease.

Furthermore, some courts within the United States have ruled in favor of eliminating statutes of limitation for atrocity crimes. In *Agent Orange*,[156] a case involving claims under the Alien Tort Statute, the Eastern District of New York found:

> [a]lthough the United States is not a signatory to either the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity or the Rome Statute, these instruments suggest the need to recognize a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity.[157]

To summarize this Article's analysis of international treaties and state practice, the "recent trend to pursue . . . national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes [and other atrocity crimes] into customary international law."[158]

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153. *Id.* at 111.

154. David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L HUM. RTS. 30, (2009).

155. 28 U.S.C. § 1350 (2011).

156. *In re* Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

157. *Id.* at 63.

158. HENCKAERTS ET AL., *supra* note 89, at 615.

VI. WORKS OF PUBLICISTS

The *Kiobel* court noted that the works of publicists (well-known legal scholars) are relevant sources for determining customary international law when they are used as "trustworthy evidence of what the law really is."[159] Trusted international legal scholars have demonstrated that there is no statutory limitation for atrocity crimes under customary international law. "The non-applicability of statutory limitations to war crimes and crimes against humanity has been well recognized in international law since the 1960s," states Professor William Schabas in his commentary on Article 29 of the Rome Statute.[160] Indeed, Professor J.E.S. Fawcett wrote in 1965 that "[t]o bring certainty [to the prosecution of atrocity crimes], international rules were developed which bind all States as generally recognized principles of law."[161] Professor Fawcett then recommended that, pursuant to these obligations under international law, both of the then-existing governments of East Germany and West Germany should declare that no statute of limitations be imposed upon atrocity crimes committed during World War II.[162]

Many legal scholars have affirmed this principle, including Judge Antonio Cassese, former President of the ICTY.[163] Judge Cassese analyzes state practice, the decisions of regional courts, and the promulgation of the U.N. and other conventions, and concludes, "[S]pecific customary rules render statutes of limitation inapplicable with regard to some crimes: genocide, crimes against humanity, torture."[164] Judge Cassese maintains that aside from widespread state practice supporting the imprescriptibility of atrocity crimes:

> The application of statutes of limitation to the most serious international crimes proves contrary to the very nature of international rules prohibiting such crimes. These are so

159. *Kiobel*, 621 F.3d at 131, 142 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

160. Professor Schabas is the Director of the Irish Center for Human Rights at the National University of Ireland, the respected author of twenty-one books on international human rights law, and a delegate to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15–July 17, 1998.

161. J.E.S. Fawcett, *A Time Limit for Punishment of War Crimes*, 14 INT'L & COMP. L. Q. 627, 630 (1965). Professor Fawcett is Professor Emeritus of International Law at the University of London, and former President of the European Commission on Human Rights.

162. *Id.* at 632.

163. Judge Cassese is currently the President of the Special Tribunal for Lebanon, which was established by the United Nations Security Council in 2007. S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

164. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319 (2003).

> abhorrent that their authors must be punished, even after the lapse of much time . . . [such crimes] affect the whole international community and not only the community of the state on whose territory they have been perpetrated[165]

Judge Cassese is joined in this view by U.N. human rights expert Louis Joinet, who stated in his 1997 report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities that "prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible."[166] Further, Judge Bruno Simma of the International Court of Justice pointed out that the *Pinochet* case[167] established that the "[i]mprescriptibility of war crimes, crimes against humanity and genocide may be considered part of customary [international] law."[168]

Finally, David Scheffer, former United States Ambassador at Large for War Crimes Issues, writes that "statutes of limitations [for atrocity crimes] have been abandoned in international and much foreign practice in light of the magnitude and serious character of [these crimes]."[169] Scheffer recommended to a U.S. Senate subcommittee on human rights that they "[c]ontinue to eliminate from U.S. law all statutes of limitation for atrocity crimes."[170] Such a move would include removing the *de facto* ten-year statute of limitation on claims brought under the ATS.[171]

VII. COMPLICATIONS UNTANGLED

Despite the clarity of international law on the issue of statutory limits for atrocity crimes, there are a number of complications in eliminating the statute of limitations that are likely to be raised. The first, and perhaps most pervasive, "complication" is the "slippery slope" argument, that eliminating the statute of limitations will open the door to frivolous litigation based on acts that occurred decades prior.[172] This point is easy to counter. The *jus cogens* principle that claims arising out of atrocity crimes should be

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165. *Id.* at 318. *See also*, RUTH TEITEL, TRANSITIONAL JUSTICE 62–67 (2000).

166. U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) at 24, E/CN.4.Sub.2/1997/20 Rev. 1 (Oct. 20, 1997).

167. R. v. Bow St. Metro. Stipendiary Magis., *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. (H.L.) 147, 174 (appeal taken from Eng.).

168. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L. L 302, 315 (1999).

169. Scheffer, *supra* note 158.

170. *Id.*

171. 28 U.S.C. § 1350 (2011).

172. *See, e.g.*, Tim Kline, *Door Ajar, or a Floodgate?: Corporate Liability After Sosa v. Alvarez-Machain*, 94 KY. L.J. 691 (2005–2006).

litigated means that it should not matter whether the crimes are old or recent, as long as the litigation may provide a remedy for victims. As far as opening the door to frivolous claims, a ban on the statute of limitations does not serve to widen the substantive grounds of an allowable claim under the ATS. As established in *Sinaltrainal v. Coca-Cola Company*,[173] such claims must be pled with particularity.[174] Only if claims adhere to the rigorous *Twombly* pleading standard[175] set forth by the Supreme Court will plaintiffs be allowed to move forward.[176] This requirement ensures that frivolous or inadequately-supported claims (whether brought within five or fifty years of the associated acts) under the ATS[177] will be denied in U.S. courts. In the campaign for full enforcement of international human rights standards, it is detrimental to be an alarmist who views the judiciary as a collective pushover rather than as a group of thoughtful jurists who are fully aware of the dangers that they themselves would face if the pleading standards weren't fully applied.

The second complication is the prospect of negative relations with the home countries of defendants in ATS[178] suits. This complication is an issue that has the potential to emerge in any case involving foreign defendants, whether private individuals, corporations, or sovereigns. The United States has measures in place, including the Act of State doctrine,[179] the Foreign Sovereign Immunities Act,[180] and opinions of the State Department,[181] to ensure that when court action is a potential threat to foreign relations, the cases are carefully analyzed by the judiciary before being either dismissed

173. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

174. *Id.* at 1266.

175. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (establishing a two-pronged analysis to determine the adequacy of a complaint: (1) while the Court must accept well-pled facts as true, it is not required to adopt a plaintiff's legal conclusions; (2) the mere possibility that the defendant acted unlawfully is insufficient to survive a motion to dismiss; well-pled allegations must move a claim "across the line from conceivable to plausible.").

176. *Sinaltrainal*, 578 F.3d at 1266.

177. 28 U.S.C. § 1350 (2011).

178. *Id.*

179. *See, e.g.*, Underhill v. Hernandez, 168 U.S. 250, 254 (1897) (explaining the prerogative of the Executive Branch in foreign affairs).

180. 28 U.S.C. § 1602–1611 (2011); *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 75 (2d Cir. 2008) (upholding immunities for foreign government officials acting in their official capacities); Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2189 (2009) (affirming the Executive's power to waive applicability of an FSIA exception allowing claims against foreign states (considered state sponsors of terrorism) for acts arising from terrorist acts).

181. *See, e.g.* Brief for Republic of South Africa as Amici Curiae Supporting Respondents, Khulumani v. Barclay Nat'l Bank, app. ¶ 4 (Statement of Brigitte Sylvia Mabandla, Minister of Justice & Constitutional Development), 504 F.3d 254 (2d Cir. 2005) (No. 05-2141).

or allowed to move forward. For example, during the *Khulumani*[182] case before the Second Circuit, the South African Minister of Justice and Constitutional Development sent a declaration to the Southern District stating that "[these issues] should be and are being resolved through South Africa's own democratic processes."[183] The U.S. State Department also weighed in, concluding that "the [apartheid litigation] risks potentially serious adverse consequences for significant interests of the United States."[184] The Second Circuit found, however, that "not every case 'touching foreign relations' is non-justiciable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis."[185] Such judicial discretion must be applicable to all ATS[186] cases in order to ensure that justice in the human rights context is served at all possible times, notwithstanding political threats.

A third, and legitimate, fear is that the right to be tried without undue delay, along with issues of practicality, is compromised by removing the statute of limitations from these core crimes. At least one commentator has noted "[t]hat the threat of civil litigation must come to an end at some stage is a long-established rule of public policy and a practical necessity."[187] However, there is no reason why the concepts of practicality and undue delay (a "reasonable time" requirement) should not be divorced from a statute of limitation. As explained by the commentators on the Rome Statute,

> [t]here is a fundamental difference between the two categories of time limits . . . . Limitation statutes usually do not allow a judicial assessment of the (seriousness of the) facts and the context of the case and the way it has been processed by the prosecution and the defence. On the

182. Khulumani v. Barclay Nat'l Bank, No. 03 Civ. 4524, 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009).

183. Brief for Republic of South Africa as Amici Curiae Supporting Respondents, Khulumani v. Barclay Nat'l Bank, app. ¶ 4 (Statement of Brigitte Sylvia Mabandla, Minister of Justice & Constitutional Development), 504 F.3d 254 (2d Cir. 2005) (No. 05-2141) (quoting Decl. by Penuell Mpapa Maduna, prior Minister of Justice & Constitutional Development, filed in the district court).

184. Letter from William H. Taft IV, Legal Adviser, Dep't of State Washington, to Shannen W. Coffin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, at 2 (Oct. 27, 2003).

185. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 263 (2d Cir. 2007) (citing Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 69 (2d Cir. 2005)).

186. 28 U.S.C. § 1350 (2011).

187. Weeramantry, *supra* note 35, at 632.

> contrary, the 'reasonable time' requirement permits a judicial assessment of the case.[188]

For example, the 1984 Convention Against Torture, which imposes no statute of limitations, contains provisions disallowing claims that are considered to be "abuses of right."[189] Removing the statute of limitations from ATS[190] claims, therefore, does not prevent a United States judge from analyzing the case and using her/his discretion to dismiss cases not brought by plaintiffs within a reasonable period of time. A "reasonable period" will differ for every ATS[191] case, due to the nature of the claims. In some circumstances it could be possible for victims of international crimes to find their way to the United States and file suit within ten years, but in others it may not. It may also take ten or more years for perpetrators to set foot in the United States, where they may then be sued.[192] Such fact-specific decisions are better left to the discretion of federal judges when they arise, rather than to the mercy of a hard statute of limitations.

VIII. CONCLUSION

A brief disclaimer should be issued here that this analysis does not rely upon the final holding of the *Kiobel*[193] court. The questions asked were different, and the conclusion of that court—that corporations are not subject to liability under the ATS[194] —has been extremely controversial and is now on petition for certiorari before the U.S. Supreme Court. What this article posits is that the *Kiobel*[195] court was correct in its threshold assessment that the applicable law for ATS[196] questions is customary international law.[197] It is only logical, then, that customary international law, not U.S. federal law (i.e., the TVPA[198]), dictate the statute of limitations for the ATS.[199] And

188. Van den Wyngaert & Dugard, *supra* note 86, at 874.

189. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

190. 28 U.S.C. § 1350.

191. *Id.*

192. Judge Cassese expounds on this idea, stating that "if the victims of their relatives do not set in motion criminal proceedings, normally this failure is not due to negligence or lack of interest; initiating such proceedings may indeed prove 'psychologically painful, or politically dangerous, or legally impossible'; as for the national authorities failure to prosecute, it may be due to political motivations which the passage of time may sooner or later efface." CASSESE, *supra* note 168, at 318–19

193. Kiobel v. Royal Dutch Petrol Co., 621 F.3d 111, (2d Cir. 2010).

194. 28 U.S.C. § 1350 (2011).

195. *Kiobel*, 621 F.3d 111.

196. 28 U.S.C. § 1350.

197. However, it may be found that the *Kiobel* court erred in their analysis of customary international law regarding the liability of corporations for atrocity crimes.

198. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

customary international law, whether in the form of tribunals, treaties, state practice, or the writings of scholars, does not allow a statute of limitations for acts of genocide, war crimes, and crimes against humanity.

The United States has embarked upon a renewed campaign to demonstrate and promote human rights standards in the past two years, including membership in the U.N. Human Rights Council and submission of its first Periodic Review on November 5 of 2010. The effort, however, will be incomplete if perpetrators of atrocity crimes are allowed to avoid liability in the United States because of a technicality that minimizes the ability to hold them liable for their actions. To that end, loopholes such as a statute of limitations must be eliminated for these acts—not only in order to comply with international legal standards, but to enable United States courts to lead state-level jurisprudence on genocide, crimes against humanity, and war crimes.

199. 28 U.S.C. § 1350.