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International Law Limits on Investor Liability in Human Rights Litigation

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This Article assesses efforts in U.S. courts, principally under the federal Alien Tort Statute, to hold foreign investors indirectly liable for human rights violations committed by the governments of countries in which they do business. Such claims, though intended as remedies for international law violations, create substantial tensions with international law in two respects. First, to the extent they purport to regulate the non-U.S. activities of non-U.S. entities, they may conflict with international law principles of prescriptive jurisdiction, which limit a nation's ability to regulate the extraterritorial activities of non-nationals. Although an exception for universal jurisdiction allows nations to punish a few especially heinous international crimes without regard to territory or citizenship, it seems difficult to establish universal jurisdiction for most indirect investor liability claims, and in any event U.S. courts appear to have lost sight of this limitation. Second, investor liability suits may misconceive the source of customary international law principles. Because customary international law arises from the actual practices of nations followed out of a sense of legal obligation, its content cannot be derived from analogies to nations' practices in areas that are factually and normatively distinct. The only reliable evidence of nations' practices is what nations actually have done with respect to investor liability, and there is no consistent practice of imposing indirect liability on investors for host government abuses. While international law allows the United States to impose indirect investor liability upon its own corporations, the United States cannot claim to be doing so as a matter of enforcing existing international law, as the Alien Tort Statute appears to require, nor can it—consistent with international law—impose liability upon non-U.S. entities over which it lacks prescriptive jurisdiction.

I. INTRODUCTION

Investor liability litigation, which seeks to hold foreign investors responsible for human rights abuses in developing nations in which they do business, has proliferated in U.S. courts. Many of those claims differ from conventional human rights litigation—such as the landmark decision in *Filártiga v. Peña-Irala*[1]—because the investor-defendants are not alleged to have participated directly in the abuses in question. Investor liability claims proceed on theories of indirect liability, usually described as aiding and abetting the wrongful acts of the host government; in at least some cases the connection between the investor-defendant and the governmental miscon-

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

duct is quite attenuated. Cases testing this theory of liability now stand at crucial junctures in U.S. courts, and judges have produced an array of conflicting responses to them.[2]

This Article considers the potential tensions between an expansive version of indirect investor liability and international law. Because investor liability claims are themselves typically cast as efforts to find remedies for international human rights violations, their consistency with international law may often be assumed. As this Article describes, however, they create at least two important tensions with international—one doctrinal and one conceptual.

The doctrinal tension arises because many investor-defendants are not U.S. entities and most claimed harms occur outside the United States. The international law principles of prescriptive jurisdiction limit the ability of individual nations to regulate conduct of non-nationals beyond national boundaries.[3] The only exception to this rule with potential to be generally available in investor liability cases is for universal jurisdiction offenses—that is, for conduct so universally abhorred and condemned that under international law any nation may punish it. This exception has allowed U.S. courts to hear direct-liability human rights cases such as *Filártiga*, which rested on the proposition that the conduct at issue—torture—was a universal jurisdiction offense.[4] Subsequent courts appear to have lost sight of these principles, however, and, in particular, there has been little effort to establish that international law recognizes universal jurisdiction for indirect investor liability. Foreign nations—especially leading capital-exporters such as European

2. In one leading example, plaintiffs in federal court in New York seek damages on behalf of all persons who lived in South Africa between 1948 and 1994 and were injured by international law violations of the apartheid government; the defendants are various multinational corporations that did business in South Africa during this time. *In re* South Africa Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *aff'd in part*, *vacated in part*, *remanded sub nom.* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd without opinion sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (affirmed by default for lack of quorum). The court of appeals panel, reversing the district court's dismissal of the action, produced long and closely reasoned opinions reflecting three completely different views of the case. On petition for writ of certiorari, the U.S. Supreme Court lacked a quorum of unrecused judges, which by statute results in affirmance without opinion. 28 U.S.C. § 2109 (2006).

In another leading case, citizens of Sudan sued a Canadian oil exploration company operating in Sudan for injuries they sustained at the hands of the Sudanese government. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *appeal argued*, No. 07-0016-cv (2d Cir. Jan. 12, 2009). At the suggestion of Talisman Energy, the author submitted an amicus brief to the court of appeals supporting the defendants/appellees in this case. Brief of Amicus Curiae Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. May 7, 2007) (on file with the Harvard Law School Library). Portions of this article are based in part upon ideas developed in that brief, and I especially thank the brief's co-author, Samuel Estreicher, for his contributions to my thinking in this area. This article does not reflect the views of Talisman Energy, Inc., or any participant in that brief.

3. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT (THIRD)]; MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 318–26 (4th ed. 2003); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 240–56 (2006).

4. *See Filártiga*, 630 F.2d at 890.

Union member states—have begun to express concerns on this basis about the extension of U.S. liability rules in human rights litigation.[5]

Of course, Congress (and courts acting on its authority) may choose to violate international law and regulate conduct in the absence of prescriptive jurisdiction. But U.S. courts apply a longstanding interpretive presumption that ambiguous or generally worded statutes are not construed to violate international law if another interpretation is available.[6] The principal U.S. statute invoked in investor liability cases, the federal Alien Tort Statute ("ATS"), does not appear to provide unambiguous direction as to its jurisdictional reach and thus would not be appropriately applied to violate international law.[7]

This conclusion has two consequences for non-U.S. investor-defendants. First, U.S. courts cannot, consistent with international law, use purely domestic U.S. law—such as U.S. tort law—to impose aiding and abetting liability (contrary to what many plaintiffs and commentators have argued and what some judges have concluded). If the investor-defendant's conduct is not something international law condemns, the United States lacks jurisdiction to regulate it. Second, even if the investor's conduct arguably violates international law, U.S. courts cannot prescribe a remedy unless it is within the subset of international law violations subject to universal jurisdiction. Thus the proper analytical question in these cases, which no court has yet directly addressed, is whether an investor's involvement in the host government's misconduct constitutes a universal jurisdiction offense under international law.

Posing the analytical question in this way leads to the second tension, namely the broader conceptual difficulty these claims present: how should U.S. courts identify existing international law rules for investor liability? In the absence of a treaty, international law is understood to arise principally from the consistent common conduct of nations followed out of a sense of legal obligation.[8] The idea that investors are indirectly responsible for international law violations of their host governments has little basis in nations' practice—indeed, in its modern form it appears to be chiefly a U.S. phenomenon, and even in the United States it remains controversial. Courts and commentators who embrace investor liability in the United States do not, in

5. *See, e.g.*, Brief of Amicus Curiae the European Commission in Support of Neither Party at 4–13, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036 (arguing that the reach of U.S. liability rules in human rights cases is limited by international principles of prescriptive jurisdiction).

6. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

7. *See* 28 U.S.C. § 1350 (2006) (providing for jurisdiction for torts committed in violation of international law). Other possible sources of liability include the federal Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)), and the Antiterrorism Act of 1990, 18 U.S.C. §§ 2331–33 (1990), as well as general state tort laws. None of these provides clear direction with respect to jurisdictional reach under international law.

8. RESTATEMENT (THIRD) § 102 (1987); JANIS, *supra* note 3, at 41–44; MURPHY, *supra* note 3, at 12. R

any event, claim to be adopting a common practice of nations *with respect to investor liability*. Instead, they proceed by analogy to indirect liability in other contexts—most prominently, as applied to individual war crimes by the International Criminal Tribunals for Yugoslavia ("ICTY") and Rwanda ("ICTR").[9] From the Tribunals' decisions, the argument runs, one can identify a general principle of indirect responsibility that, when applied to investor liability claims, supports the proposition that the investors have violated international law.

These arguments by analogy are, however, misconceived to the extent they seek to identify *existing* customary international law. In the first place, isolated and episodic decisions of a few international tribunals are poor indicators of the common practice of nations. A wider examination of international practice suggests that there is little consensus on the requirements for indirect liability even in contexts distinct from foreign investment.

More fundamentally, to the extent international law is based on nations' common practices, it cannot rest on contestable analogies. That nations accept a principle of responsibility in one factual setting does not show that they accept similar principles in distinct factual settings where the balance of practical and normative considerations may be different. Only if the factual and normative considerations in the two situations are so similar as to be broadly compelling could nations' practices in one area be said necessarily to demonstrate what practices nations would adopt in another area. Otherwise, it might be the case that nations, once faced with the question, would adopt a different rule for the second area than for the first.

Investor liability illustrates this difficulty. Assume that international law, established by the specific practices of nations, imposes indirect liability upon individuals for war crimes where one person assists another—typically a member of the same military unit—in commission of such crimes. This practice, standing alone, does not show that nations necessarily would agree that indirect liability should be imposed on investors in countries whose governments violate human rights. Policymakers may believe that there are sound reasons for imposing liability in one case and not in the other. In particular, the policy implications of investment in abusive regimes are subject to substantial debate; one view is that economic progress and openness tend to ameliorate conditions over the long run, and thus investment should be encouraged rather than discouraged. One might further believe that a broad version of indirect investor liability might materially discourage foreign investment, thus ultimately harming economic and social conditions in developing nations. Whatever one's position in that debate, the conclusions are not compelled by the treatment of situations in which these considerations do not arise. As a result, the analogy to individual war crimes may or may not be a persuasive argument for *extending* international law, but it

9. *See infra* Part III.B.2.

cannot be a method of identifying *existing* international law. It will become international law only if nations are in fact persuaded by it.

Finally, tying the doctrinal and conceptual problems together, in investor liability cases against non-U.S. defendants the correct question is not whether the investors' conduct violated international law, but whether it violated the subset of international laws that gives rise to universal jurisdiction. This question cannot be answered—by analogy or otherwise—by the practices of international courts. It is a question of common practices in *national* courts and legislatures, where the question of universal jurisdiction arises, and it depends on establishing a consistent practice of nations claiming universal jurisdiction *with respect to indirect investor liability*.

When the question is put that way, this Article concludes, investor liability is hard to maintain against foreign defendants in U.S. courts except in cases where the investor expressly solicited and directed the governmental misconduct in such a way as to become directly liable. Indirect investor liability is largely unrecognized outside the United States. Arguments for its validity depend on extrapolations from abstract principles said to arise from cases whose facts and normative considerations are wholly distinct. As a result, it is best understood as a proposal to extend international law, not as a description of existing international law. That does not make it illegitimate, but it does make it inappropriately applied by U.S. courts on the basis of ambiguous U.S. statutes to entities beyond the United States' prescriptive reach.

The Article proceeds as follows. Part II provides an overview of investor liability litigation and the core legal arguments it confronts. Part III describes the general principles of prescriptive jurisdiction and argues that they should apply to investor liability cases. Part IV considers the consequences of applying prescriptive jurisdiction to investor liability suits. It first concludes that prescriptive jurisdiction can ordinarily be satisfied against non-U.S. defendants only for universal jurisdiction offenses. It then shows that a broad view of indirect investor liability cannot be grounded in existing international law, but rather depends on arguments that—properly conceived—amount to proposals for extending international law. Finally, it argues that, in any event, the existing practice of nations does not recognize indirect investor liability as a universal jurisdiction offense, and thus U.S. courts lack authority under international law to impose liability on non-U.S. investor-defendants for non-U.S. conduct.

II. An Overview of Investor Liability Litigation

In our imperfect world, human rights violations are widespread. An overriding question of our time is how most effectively to confront and mitigate these violations. Since the landmark decision in *Filártiga v. Peña-Irala*

(1980),[10] one strategy has involved private litigation in U.S. courts. In particular, plaintiffs have advanced claims, often with some success, that human rights abuses perpetrated around the world violate rules of customary international law, and as such are cognizable in private tort litigation under the Alien Tort Statute, which gives U.S. federal courts jurisdiction over tort actions brought by aliens for violations of a treaty or of customary international law.[11] Parallel claims have been made, albeit with less fanfare or success, under related federal and state laws. Although initially these cases focused on individual government officials (as in *Filártiga* itself) and foreign governments, difficulties arising from sovereign immunity, lack of personal jurisdiction, and inability to execute judgments limited their impact and effectiveness. In recent years, focus has shifted to suits against corporate defendants, in which such issues appear less daunting.

This Part briefly recounts the rise of human rights litigation and investor liability. It then describes the central legal issues investor liability presents.

A. Filártiga *and the Rise of ATS Litigation*

The federal Alien Tort Statute, originally enacted as part of the Judiciary Act of 1789, currently provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[12] It was rarely invoked until 1980, when it was invigorated by the decision in *Filártiga*. In that case, the court of appeals concluded that Joel and Dolly Filártiga could bring a claim under the ATS against Americo Peña-Irala, the former Inspector-General of Police of Asunción, Paraguay, for the torture and murder of Joelito Filártiga, Joel's son and Dolly's brother. The Filártigas and Peña-Irala were all citizens of Paraguay, and the events all took place there (though Peña-Irala ill-advisedly came to New York on a visitor's visa, giving U.S. courts personal jurisdiction over him). The court of appeals, reversing the district court, found that official torture violated customary international law and provided a basis for universal jurisdiction, which empowers all nations to prosecute perpetrators.[13] The Filártigas ultimately won a default judgment of over $10 million, though they never succeeded in collecting it.[14]

Filártiga prompted claims against various current and former officials of foreign governments on the basis of torture and other human rights viola-

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

11. 28 U.S.C. § 1350 (2006).

12. *Id.*

13. *Filártiga*, 630 F.2d at 890.

14. For a comprehensive record, see WILLIAM ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA (2007). For an engaging overview of the case and its legacy, see Harold Hongju Koh, Filártiga v. Peña-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45–76 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007).

tions. Many claims were successful (at least in the sense of obtaining a judgment, although recovery proved more elusive),[15] though others were turned aside because of immunity and similar considerations.[16] Though possessing wide theoretical implications, these claims faced limitations in practice: tangible success depended on an individual who had committed abuses abroad being found in the United States in a situation in which official immunity did not apply and, unlike Peña-Irala, in possession of sufficient assets to permit material recovery.

Filártiga and subsequent cases were not initially controversial, though the 1990s witnessed growing academic criticism led initially by Mark Weisburd,[17] and then most prominently by Curtis Bradley and Jack Goldsmith in the *Harvard Law Review*.[18] These critiques focused principally on U.S. domestic law—for example, whether the ATS provided a cause of action for *Filártiga*-type suits and whether U.S. federal courts could constitutionally hear non-U.S.-law controversies between two aliens. The Weisburd/Bradley/Goldsmith line of criticism prompted heated academic counterattacks,[19] and intermediate federal courts generally reaffirmed their *Filártiga* authority despite some scholars' reservations.[20]

Skirmishing over domestic law in ATS cases culminated in the U.S. Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*,[21] which might fairly be described as a defeat for both sides. *Sosa* appeared firmly to hold that federal courts had authority to entertain customary international law

15. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadić v. Karadžić, 70 F.3d 232 (2d Cir. 1995); *In re* Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

16. *See, e.g.*, Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994); *see also* David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255 (1995–96).

17. A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995).

18. Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis Bradley & Jack Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); *see also* Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (directly challenging *Filártiga*-type litigation).

19. Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Ryan Goodman & Derek Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Gerald Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 FORDHAM L. REV. 393 (1997). On the evolution of the controversy, see Ernest Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002). For my own views of the domestic law implications, which fall somewhere between the two camps, see MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 342–61 (2007); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002); Michael D. Ramsey, *Multinational Corporate Liability under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361 (2001) [hereinafter Ramsey, *Structural Concerns*]; Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187 (2001).

20. *See* Beth Stephens, *Corporate Liability Before and After* Sosa v. Alvarez-Machain, 56 RUTGERS L. REV. 995 (2004).

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

claims under the ATS, and it specifically endorsed *Filártiga*.[22] But the Court—reversing the court of appeals—also rejected the claims in the particular case as going too far beyond well-settled international law and cautioned against broad application of the *Filártiga* doctrine. As the Court put it, "we have no congressional mandate to seek out and define new and debatable violations of the law of nations"; rather, ATS claims depend on a "clear definition" of the offense under international law.[23]

Thus, *Sosa*, whatever else it may have done,[24] moved the spotlight in ATS cases at least in part from U.S. domestic law concerns to questions of international law. After *Sosa*, *Filártiga*-type suits could find relatively strong grounding in U.S. law but required a close examination of their grounding in international law.[25]

B. Unocal *and the Rise of Investor Liability Suits*

In 1996, a group of Burmese citizens and associations sued Unocal, Inc., a U.S. oil company, in federal court in California, alleging Unocal's complicity in an array of international law violations by the government of Myanmar (Burma). The gravamen of the complaint was that Unocal and its French partner, Total, S.A., had undertaken construction of a pipeline in Burma and that in the course of construction the Burmese government and especially the Burmese military, which provided security for the project, committed substantial human rights abuses. (The plaintiffs also named the Burmese government, but the court dismissed that claim on grounds of sovereign immunity.)[26]

Doe v. Unocal quickly became the leading investor liability case, though it ended inconclusively. After dismissal of plaintiffs' claims by the district court, reinstatement by the court of appeals, and a grant of rehearing en

22. *Id*. at 724–25.

23. *Id*. at 728, 732–33 & n.21.

24. For evaluations of *Sosa* from various perspectives, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007); William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635 (2006); Stephens, *supra* note 20. R

25. Scholarship on the international law implications of ATS claims is dwarfed by the volume of writing on their domestic law aspects. Particularly in light of *Sosa* and the rise of investor liability, however, the weight of scholarly attention is shifting toward international law as well. *See, e.g.*, Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004); Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post* Sosa v. Alvarez Machain, 74 U. CIN. L. REV. 105 (2005); Christiana Ochoa, *Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act*, 12 IND. J. GLOBAL LEGAL STUD. 631 (2005). For pre-*Sosa* views, see *18th Annual Symposium: Holding Multinational Corporations Responsible under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285 (2001) (essays by various authors); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 [hereinafter Bradley, *Universal Jurisdiction*]; Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001).

26. Doe I v. Unocal Corp., 963 F. Supp 880 (C.D. Cal. 1997).

banc, the parties settled shortly after the Supreme Court's decision in *Sosa*.[27] *Unocal* was soon replicated by investor liability suits across the United States, most of which remain pending in fairly preliminary postures. The investor liability approach offered potential solutions to the practical barriers to *Filártiga*-type litigation: unlike foreign governments, corporations lack sovereign immunity; compared to individuals, corporations were more likely to have assets and a presence in the United States.[28] Not surprisingly, claims proliferated in the wake of *Unocal*.[29]

To be sure, the broad success of investor liability suits in U.S. courts remains much in doubt on the basis of various procedural and prudential defenses rooted principally in U.S. law.[30] Nonetheless, courts are beginning to confront the issues of substantive law they present, and—as the next section recounts—consensus has proved difficult to achieve.

C. Central Legal Issues in Investor Liability Litigation

Investor liability claims[31] arise in a broad range of contexts. In some cases, the investor-defendant is alleged, through its employees and operations, to have itself directly injured the plaintiffs.[32] However, many of the most egre-

27. *Id.* (denying motion to dismiss); Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal 2000) (granting defendant's motion for summary judgment); Doe I v. Unocal Corp, 248 F.3d 915 (9th Cir. 2001) (affirming dismissal of French defendant); Doe I v. Unocal Corp, 395 F.3d 932 (2002) (reversing summary judgment as to ATS claims), *reh'g en banc granted*, 395 F.3d 978 (2003), *appeal dismissed*, 403 F.3d 708 (2005). Another early corporate case, Beanal v. Freeport McMoran, Inc., 197 F.3d 161 (5th Cir. 1999), was also filed in 1996 but was dismissed for failure to state a claim.

28. *See* Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DePaul L. Rev. 627, 650–56 (2002) (noting and criticizing these developments).

29. In addition to the South Africa and Sudan litigation mentioned, *supra* note 2, current leading cases include *Doe I v. ExxonMobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007) (suit by citizens of Indonesia against U.S. oil giant ExxonMobil for complicity in atrocities committed by the Indonesian government in the rebellious province of Aceh); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008) (suit by residents of Bougainville Island, in Papua New Guinea, for injuries relating to the mining activities of Rio Tinto, PLC, a British multinational); and *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *appeal argued* (2d Cir. Jan. 12, 2009) (suit by Nigerian citizens against the Anglo-Dutch oil company Royal Dutch-Shell for atrocities committed by the Nigerian government). R

30. For example, the South Africa litigation may yet be dismissed on the grounds that it interferes with the conduct of U.S. foreign policy, an issue pressed by the defendants and the U.S. government. *See* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 261–64 (2d Cir. 2007) (discussing issues on remand).

31. In adopting the term "investor liability," this Article focuses on the extent to which private investments and business operations abroad can be the basis of liability for host government abuses. It thus excludes from direct consideration other ways private liability might arise for government misdeeds.

32. *See, e.g.*, Abdullahi v. Pfizer, Inc., No. 05-4863-CV, 05-6768-CV, 2009 WL 214649 (2d Cir. Jan. 30, 2009) (allowing ATS claim against Pfizer for the company's alleged secret drug testing). The difficulty with these claims is that, while direct injuries at the hands of corporations are common enough, private injuries usually are not considered violations of international law: most international law violations require some degree of government participation, and those that do not (such as piracy, genocide, and war crimes) typically are not ones that corporations directly perpetrate. Thus, to the extent that investor liability needs a tie to international human rights law (as, for example, in ATS cases), direct corporate liability seems difficult to establish except under unusual circumstances. A number of ATS cases seeking direct corporate liability, especially in the environmental field, have been dismissed on the

gious human rights violations are committed by governments, albeit at times with the knowledge, encouragement, or outright participation of investors. Thus a central focus in the investor liability field is the extent to which investors can be indirectly liable for human rights violations of host governments that the investor is said to have encouraged, assisted, or tolerated.[33]

In this posture, the claims raise two main considerations. The first is the closeness and character of the connection needed between the investor's conduct and the ultimate harm inflicted by the government. The cases vary widely in their allegations on this point. Only a slight step away from direct injury cases are claims that the investor-defendant participated in planning or directing specific injurious behavior by the host government.[34] A middle ground consists of cases such as *Unocal*, in which the investors may have benefited directly from government abuses in constructing and protecting specific projects, but it is not clear that plaintiffs could prove the investors *solicited* the abuses, as opposed to merely investing and operating with knowledge of them.[35] At the far end of this spectrum are cases in which claims are brought against investors for knowingly investing in countries with abusive regimes, thereby contributing to those regimes' ability to continue in power. A leading example of the last type is the on-going litigation against an array of corporations that did business in apartheid South Africa,[36] where at least some of the claims appear to rest on little more than allegations that the defendants' operations aided the South African economy. A broad spectrum of potential liability therefore exists, with little agreement on where liability should be triggered.[37]

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ground that the alleged activity was not a violation of clearly established international law. *See, e.g.*, Flores v. Southern Peru Copper Co., 414 F.3d 233 (2d Cir. 2003); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999). Other direct liability claims have failed on procedural grounds. *See, e.g.*, Bano v. Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

This is not to say, of course, that direct liability cases are unimportant. For example, particularly with the increasing use of private contractors in military operations, war crimes claims against corporate defendants may become more common.

33. *See* 1 International Commission of Jurists, Corporate Complicity and Legal Accountability: Facing the Facts and Charting a Legal Path 1–16 (2008). The present Article does not address a distinct issue of secondary liability: under what circumstances parent corporations can be liable for harms caused by their subsidiaries.

34. *See, e.g.*, Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1197–98 (9th Cir. 2007), *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008) (alleging that the investor specifically directed government forces to engage in abuses to protect its mining operations).

35. Doe I v. Unocal Corp., 395 F.3d 932 (2002).

36. *In re* South Africa Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *aff'd in part*, *vacated in part*, *remanded sub nom.* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd without opinion sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (affirmed by default for lack of quorum).

37. Cases may be difficult to place on this spectrum because plaintiffs pursue various theories of liability. For example, the Sudan/Talisman litigation, *supra* note 2, appears to contain the entire spectrum: among other things, plaintiffs premised liability on (a) claims that the defendants specifically solicited the Sudanese government's abuses to protect oil-exploration investments (which would make R

A second and related issue is what source of law U.S. courts should use to answer the liability question. Some judges and commentators suggest that U.S. domestic law can provide the answer, although they disagree on what that answer is.[38] Others argue that the liability standard should arise from international law, again without agreement on the standard's content.[39] These debates yield at least four basic positions: a broad view of indirect liability based on U.S. law, a broad view based on international law, a narrow view based on U.S. law, and a narrow view based on international law.

Unocal, the foundational investor liability case, produced opinions which reflect three of the four positions. The district court found that indirect liability under the ATS required the investor-defendant to have "participated in or influenced," "conspired with," or "controlled" the government actors committing the violations, and it granted summary judgment on the ground that the requisite participation could not be shown.[40] The Court of Appeals for the Ninth Circuit reversed, setting the standard as whether the defendant gave "knowing practical assistance or encouragement that have a substantial effect on the perpetration of the crime" and specifically rejecting the need for the defendant's "active participation" in the abuses.[41] According to Judge Pregerson's majority opinion, this standard could be found in international law, principally on the authority of the *Prosecutor v. Furundžija* decision from the International Criminal Tribunal for Yugoslavia

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the case like *Sarei*); (b) claims that the defendants allowed the Sudanese government to use their facilities to commit abuses, perhaps knowingly but not intending that the abuses occur (similar to *Unocal*); and (c) claims that the defendants, by enhancing the government's oil revenues, knowingly enhanced the government's ability to commit abuses (akin to the apartheid litigation). The district court found no evidence to support the first claim and dismissed the remaining ones as not violating international law. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 667–68.

38. *See* Unocal, 395 F.3d at 964–78 (Reinhardt, J., concurring) (finding broad secondary liability on the basis of the Restatement (Second) of Torts); Khulumani, 504 F.3d at 284–90 (Hall, J., concurring) (same finding); 1 THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS, at 1A–37 (Ved P. Nanda & Ralph B. Lake eds., cumulative supp. 2008) (advocating Judge Reinhardt's approach).

39. *See* Unocal, 395 F.3d at 947–52 (finding a broad standard in international law); Khulumani, 504 F.3d at 264–84 (finding a narrow standard in international law); Talisman, 453 F. Supp. 2d at 667–68 (same finding). *See generally* Keitner, *supra* note 25, at 61–83 (discussing the various positions). R

40. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1306–07 (C.D. Cal 2000) (quotations and citations omitted). Specifically, the district court found that

> Plaintiffs present evidence demonstrating that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts. . . . Unocal and [the Burmese government] shared the goal of a profitable project. However . . . this shared goal does not establish joint action. Plaintiffs present no evidence that Unocal participated in or influenced the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal conspired with the military to commit the challenged conduct.

Id. (quotations and citations omitted).

41. Unocal, 395 F.3d at 947–48.

("ICTY").[42] The opinion quoted *Furundžija* as establishing that "it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime"; it is enough that the defendant "is aware that one of a number of crimes will probably be committed."[43]

Judge Reinhardt, concurring, disagreed that this standard could or should be grounded in international law;[44] he thought the appropriate source should be U.S. tort law and objected to resting on "an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal."[45] Ultimately, it likely would not have mattered for the *Unocal* litigation, because the panel majority thought the international rule approximated the rule in U.S. Restatement (Second) of Torts, on which Judge Reinhardt wanted to rely directly.[46] But Judge Reinhardt's concurrence highlighted an issue that would have great significance should one see differences between international and domestic law.

That debate came to a head in the South Africa apartheid litigation. The district judge dismissed the claims as a matter of U.S. law, which he found to disfavor aiding and abetting liability absent a clear statement in the governing law.[47] On appeal, a panel of the Second Circuit produced three divergent opinions. Judge Hall adopted Judge Reinhardt's view in *Unocal* that the Restatement (Second) of Torts could provide the standard, and that the standard was broad.[48] Judge Katzmann, in contrast, took Judge Pregerson's view that international law should provide the source of law. But unlike Pregerson, he thought international law recognized a narrower rule, chiefly on the authority of the statute of the International Criminal Court ("ICC"). Katzmann acknowledged the jurisprudence of the ICTY, on which Pregerson had relied, but found it not to be clearly accepted in international practice.[49] Judge Korman, the third panel member, would have affirmed the district court, finding no international or domestic law basis for indirect

42. *Id*. at 947–52; *see* Prosecutor v. Furundžija, Case No. IT-95-17/1 T (Trial Chamber, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

43. Unocal, 395 F.3d at 950.

44. Unocal, 395 F.3d at 964–78 (Reinhardt, J., concurring).

45. *Id.* at 967.

46. *Id.* at 974.

47. *In re* South Africa Apartheid Litigation, 346 F. Supp. 2d 538, 550–52 (S.D.N.Y. 2004) (citing Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994)).

48. Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 284–90 (2d Cir. 2007) (Hall, J., concurring). According to Judge Hall, the Supreme Court's intervening decision in *Sosa* did not require a different result, even though *Sosa* required a clear international law violation as a prerequisite to ATS liability. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 731–32 & n.21 (2004); *see also supra* text accompanying notes 21–23. In Hall's view, the clear violation of international law was supplied by the government's actions, and with that prerequisite satisfied, U.S. common law could determine the scope of the remedy. Khulumani, 504 F.3d at 284–90. R

49. *Id.* at 264–84 (Katzmann, J., concurring).

investor liability. As his next-best alternative, he joined Katzmann to provide a narrow scope of liability for the district court on remand.[50]

Where these cases leave matters is, as of the present writing, anyone's guess.[51] Centrally, though, the question framed by the appellate courts appears to be whether liability can arise where the investor merely knew of likely human rights violations, or whether liability should require some form of shared intent that the violations occur.

As set forth in subsequent sections, principles of international law have important and underappreciated implications for how these cases should be resolved. First, to the extent that the cases involve non-U.S. defendants and non-U.S. activities, the doctrine of prescriptive jurisdiction substantially limits the ability of U.S. courts to provide remedies. Second, to the extent that the cases depend on identifying the content of existing international law, U.S. courts and litigants have often approached that question in a loose and conceptually unsound manner.

III. Investor Liability and Prescriptive Jurisdiction

This Part examines the relationship between investor liability suits and prescriptive jurisdiction under customary international law.[52] It concludes that most investor liability suits involving non-U.S. defendants depend upon establishing universal jurisdiction for their international law validity. That conclusion has important implications for investor liability suits, as explored in Part IV.

First, contrary to many plaintiffs' contentions and some judicial opinions, investor liability in these cases—to be consistent with international law—cannot be premised merely upon U.S. law (such as common law tort principles). It must rest upon a violation of international law by the defendant that gives rise to universal jurisdiction (or upon the defendant's violation of the national law of some other country having a sufficient relationship with the defendant or the harm). Second, because universal jurisdiction may be difficult to establish in many such suits, the entire enterprise of investor liability in U.S. courts for non-U.S. entities rests on problematic foundations

50. *Id.* at 292–337 (Korman, J., concurring).

51. The U.S. Supreme Court lacked a quorum to consider a petition for certiorari in the South Africa litigation. Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008). The Second Circuit is, as of this writing, considering an appeal in the Sudan/Talisman litigation, which the district court dismissed under a standard derived from international law similar to the one Judge Katzmann adopted in the apartheid cases. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *appeal argued*, No. 07-0016-cv (2d Cir. Jan. 12, 2009). In the other advanced court of appeals litigation, the Bougainville/Rio Tinto case, the Ninth Circuit initially assumed a broad view of secondary liability while attempting to resolve other preliminary issues; that decision has now been superseded by an en banc decision returning the case to the district court without addressing secondary liability. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1197–98 (9th Cir. 2007), *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008).

52. Prescriptive jurisdiction may also be provided by treaty in particular cases, although there is no general treaty governing it. This Article does not consider treaty-based assertions of jurisdiction.

under international law. These international law difficulties in turn may pose practical barriers to such suits in U.S. court, because both the Supreme Court's decision in *Sosa* and the general presumption against interpreting statutes to violate international law[53] indicate that suits contrary to international jurisdictional principles should not proceed.

A. Prescriptive Jurisdiction in International Law

1. *General Principles*

Almost every comprehensive treatise on international law contains general principles along the following lines. Prescriptive (or regulatory) jurisdiction in customary international law refers to the ability of a nation to regulate—that is, attach legal consequences to—the conduct of individuals or groups.[54] Reflecting the fundamental association of sovereignty with territory in the modern international system, the central principle of prescriptive jurisdiction is that a nation can regulate conduct occurring within its own territory, even if done by citizens of other nations.[55] Regulation beyond its own territory, however, threatens to involve a nation in conflict with other sovereigns that may claim greater regulatory rights (especially, as will usually be the case, if the conduct occurs within another nation's sovereign territory).

As a result, customary international law pays close attention to claims of extraterritorial regulatory authority. Authorities appear to agree that customary international law, even in its most permissive scope, gives nations prescriptive (conduct-regulating) jurisdiction only if at least one of five possible bases is present: (a) the conduct has effects within the territory of the regulating nation ("effects" jurisdiction); (b) the defendant is a citizen of the regulating nation ("nationality" or "active personality" jurisdiction); (c) the regulating nation's central sovereign interests are threatened ("protective" jurisdiction); (d) the victim is a citizen of the regulating nation ("passive personality" jurisdiction); or (e) the defendant's actions are of universal concern ("universal" jurisdiction).[56]

53. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).

54. *See, e.g.*, JANIS, *supra* note 3, at 318–26; MURPHY, *supra* note 3, at 240–56; s*ee also* RESTATEMENT (THIRD) § 401 (1987) ("Under international law, a state is subject to limitations on . . . jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things . . . ."). R

55. JANIS, *supra* note 3, at 318–19; Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1463–67 (2008). R

56. *See, e.g.*, RESTATEMENT (THIRD) §§ 401–02 (1987); U.N. Int'l Law Comm'n, *Report of the International Law Commission, Fifty-Eighth Session*, Supp. No. 10, Annex E, at 520–23, U.N. Doc. A/61/10 (2006); JANIS, *supra* note 3, at 318–26; MURPHY, *supra* note 3, at 240–56. R

The Restatement (Third) and some writers additionally require that a nation's exercise of prescriptive jurisdiction be reasonable. *See* RESTATEMENT (THIRD) § 403 (1987). Other writers deny the existence of such a requirement in practice, and the U.S. Supreme Court arguably rejected it in the confusingly reasoned *Hartford Fire* case. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); William Dodge,

Some of these jurisdictional bases are more broadly accepted than others. Despite occasional complaints against extraterritorial jurisdiction in general, it seems firmly understood that a nation may regulate its citizens wherever they go in the world (although nations often choose not to do so).[57] Further, there is little doubt that a nation may regulate at least some conduct outside its territory that causes effects within its territory (at minimum, consider the example of a bullet fired across a national boundary).[58] The limits of "effects" jurisdiction remain debated, however. The United States takes a broad and controversial view: in antitrust law, in particular, the United States extends liability to anti-competitive agreements made and put into effect overseas if the agreement affects economic conditions in the United States.[59]

Protective and passive personality principles are less clearly accepted or defined. Protective jurisdiction refers to "jurisdiction over conduct outside [a nation's] territory that threatens its security"—a category that can be easily stated in the abstract but whose contours seem difficult to establish.[60] Passive personality jurisdiction refers to jurisdiction over foreign acts that injure a nation's citizens—that is, jurisdiction based on the "passive" victim of the conduct, in contrast to active personality (nationality) jurisdiction

Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism, 39 HARV. INT'L L.J. 101 (1998); Phillip Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53 (1995). For purposes of this Article, I assume that jurisdiction may be based on the five traditional sources without further consideration of reasonableness.

57. *See* JANIS, *supra* note 3, at 320–21; MURPHY, *supra* note 3, at 242–44; *see also* P. Arnell, *The Case for Nationality Based Jurisdiction*, 50 INT'L & COMP. L.Q. 955 (2001) (contrasting general acceptance with hesitation in U.K. lawmaking). The United States has long claimed jurisdiction to prescribe on the basis of nationality. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952) ("Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."); Blackmer v. United States, 284 U.S. 421, 436–37 (1932). However, most U.S. statutes are not expressly extraterritorial with respect to U.S. citizens, and U.S. courts apply a presumption against extraterritoriality. *See* E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991). R

58. At minimum, a narrow view of effects jurisdiction is widely shared, dating at least to the decision in The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Even the dissent in that case, which would not have allowed extraterritorial jurisdiction on the particular facts, acknowledged effects jurisdiction arising, for example, in the situation of bullets fired across the border. *Id.* at 34–39 (Loder, M., dissenting).

59. *See* Hartford Fire, 509 U.S. at 764; United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); RESTATEMENT (THIRD) § 402 cmt. d (1987); JANIS, *supra* note 3, at 322–24. For criticism, see, e.g., Andreas Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995); F.A. Mann, *The Doctrine of International Jurisdiction Revisited*, 186 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 9 (1984); Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 4 J. OF WORLD TRADE 5 (1997). For a leading argument against effects jurisdiction under U.S. law, see Parrish, *supra* note 55, at 1483–1501. Despite criticism, effects jurisdiction seems to be gaining support in national practice and commentary. *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (arguing against territorial focus in jurisdictional questions); Joseph Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 511 (1998) (describing European practices). R R

60. MURPHY, *supra* note 3, at 245; *see* IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION (1994). Uncontroversial examples might include counterfeiting currency or official documents. *See* RESTATEMENT (THIRD) § 402(3) (1987); MURPHY, *supra* note 3, at 245. R R

based on the citizenship of the perpetrator.[61] Passive personality remains disputed as a legitimate general basis of regulation, although it appears to be gaining greater acceptance for certain types of offenses such as terrorism.[62]

Finally, universal jurisdiction, because of its centrality to investor liability analysis, merits some elaboration. The basic concept is that some conduct is so heinous and disruptive of international order that it may be proscribed by any nation, without requiring any connection between the nation and the conduct, the perpetrator, or the victim. The paradigmatic example is piracy: traditionally, any nation that captured a pirate could punish the pirate's acts because the pirate was an "enemy of the human race."[63] Whether and to what extent this principle extends beyond piracy to offenses of a more modern character such as torture and genocide are controversial questions.[64] At minimum, though, we can say that universal jurisdiction extends only to the most extreme and universally condemned acts, and that it is infrequently invoked.[65]

2. *Judicial and Diplomatic Practice*

The basic contours of prescriptive jurisdiction can be seen in U.S. and international practice. First, principles of prescriptive jurisdiction are commonly applied in U.S. courts, primarily in connection with the *Charming Betsy* rule that ambiguous or generally worded statutes are construed not to violate international law.[66] In *United States v. Yousef*, for example, the court of appeals considered a criminal defendant's claim that his prosecution in the United States for conspiring to bomb aircraft in the Philippines would

61. Geoffrey Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 8 (1993).

62. MURPHY, *supra* note 3, at 244–45. The Restatement, completed in 1987, does not recognize passive personality jurisdiction, *see* RESTATEMENT (THIRD) § 402, but subsequent U.S. laws have made greater use of it. *See* U.N. Int'l Law Comm'n, *supra* note 56, at 524. R R

63. United States v. Smith, 18 U.S. 153, 161 (1820).

64. *See* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001); Diane Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057 (2004); Kenneth Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785 (1988); *see also* MURPHY, *supra* note 3, at 246 (noting that "[a] close analysis of the national laws of states worldwide . . . indicates that very few have national laws that assert jurisdiction solely on the basis of the universality principle."). For criticism of extended versions of universal jurisdiction, see Bradley, *Universal Jurisdiction*, *supra* note 25; Kontorovich, *supra* note 25; Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389. A growing number of international treaties provide for at least some form of universal jurisdiction over specified offenses, but these are distinct from customary rules. *See, e.g.*, MURPHY, *supra* note 3, at 246 n.53. R R R

65. *See* United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003) (finding that universal jurisdiction exists "only for [a] few, near-unique offenses").

66. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). On occasion, Congress has expressly incorporated an international law jurisdictional limit into U.S. legislation. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120002, 108 Stat. 1796, 2021 (1994) (describing U.S. special maritime jurisdiction as extending "[t]o the extent permitted by international law").

violate prescriptive principles and thus generally worded U.S. statutes should not be construed to cover his conduct. The court accepted the defendant's premise, referring to the "five well-recognized bases" of prescriptive jurisdiction in the terms set forth above,[67] although it rejected the defendant's claims on the merits.[68] Employing the prescriptive principles in this manner has a long history in U.S. courts,[69] and occasionally arguments based upon them have succeeded in limiting the jurisdictional scope of U.S. laws.[70]

Further, several aspects of U.S. commercial regulation are noteworthy for producing international controversy over claimed infringements of the customary limits on prescriptive jurisdiction. These longstanding disputes, substantially pre-dating the rise of investor liability, illustrate the entrenchment of prescriptive principles in international practice.[71]

Under the U.S. Export Administration Regulations ("EAR") and related export control provisions, the United States purports to regulate the overseas shipment of specified goods and technology with national security implications, even where neither the seller nor the buyer is a U.S. national and the transaction takes place entirely overseas.[72] The United States has expressly or

67. Yousef, 327 F.3d at 91 n.24. Specifically, the court identified the five principles as:

> (1) the 'objective territorial principle,' which provides for jurisdiction over conduct committed outside a State's borders that has, or is intended to have, a substantial effect within its territory; (2) the 'nationality principle,' which provides for jurisdiction over extraterritorial acts committed by a State's own citizen; (3) the 'protective principle,' which provides for jurisdiction over acts committed outside the State that harm the State's interests; (4) the 'passive personality principle,' which provides for jurisdiction over acts that harm a State's citizens abroad; and (5) the 'universality principle,' which provides for jurisdiction over extraterritorial acts by a citizen or non-citizen that are so heinous as to be universally condemned by all civilized nations.

Id.

68. *Id.* at 108–11 (finding the defendant's prosecution authorized by the protective principle and an anti-terrorism treaty).

69. *See, e.g.*, United States v. Neil, 312 F.3d 419 (9th Cir. 2002); United States v. Cardales, 168 F.3d 548 (1st Cir. 1999); United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994); United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985); United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974); United States v. Birch, 470 F.2d 808 (4th Cir. 1972); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967).

70. *See, e.g.*, United States v. Columba-Colella, 604 F.2d 356, 360 (5th Cir. 1979) (no prescriptive jurisdiction over Mexican defendant who arranged to sell a stolen car in Mexico).

71. For an overview of some of the central controversies, see Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625 (2008).

72. 15 C.F.R. §§ 734.3(a), 736.2(b)(2)-(3) (2008); U.S. DEP'T OF COM., GUIDANCE ON THE COMMERCE DEPARTMENT'S REEXPORT CONTROLS 2–5 (2008), *available at* http://www.bis.doc.gov/licensing/bis_reexport-controls.pdf. For extraterritorial application of these regulations, see Pan Asia Exim Enterprises PTE Ltd., Decision and Order, 62 Fed. Reg. 30,842–43 (June 5, 1997) (applying Export Administration Regulations to Singapore entity exporting U.S.-origin goods to Vietnam); Action Affecting Export Privileges, Delft Instruments, N.V., et al.; Decision and Order on Renewal of Temporary Denial Order, 56 Fed. Reg. 42,977 (Aug. 30, 1991) (applying related trade-control regime to Dutch companies that manufactured night-vision goggles in the Netherlands using some U.S. components); Press Release, Department of Justice, French Corporation Pleads Guilty to Conspiracy, Illegal Export, and Attempted Illegal Export of Cryogenic Submersible Pumps to Iran (Apr. 10, 2008), *available at* http://

implicitly offered three justifications for these regulations: that the goods or technology contain U.S. products; that the corporate entities involved, although incorporated outside the United States, are owned or otherwise controlled by U.S. entities and thus are U.S. nationals subject to regulation under the nationality principle; and that the matter relates to U.S. national security and thus is subject to U.S. regulation under the protective principle.[73] Significantly, the United States, in defending the reach of its laws and regulations, has not rejected the general idea of an international law limit on its prescriptive jurisdiction but has sought to justify its jurisdiction in particular cases by extensions of existing categories.

These arguments have fared poorly with the United States' principal trading partners. In several high-profile episodes, overseas subsidiaries of U.S. corporations have been directed by the countries of their incorporation to honor contracts in breach of U.S. export regulations, with the explanation that the U.S. regulations were invalid as beyond U.S. prescriptive jurisdiction. The classic case of Dresser Industries typifies the pattern: Dresser, a U.S. corporation, had a French subsidiary under contract to sell pipeline technology to the Soviet Union. The U.S. government, in response to the Soviet crackdown in Poland, directed that the sale not be made; it claimed jurisdiction over Dresser's French subsidiary because it was owned by Dresser.[74] French courts nonetheless required that the sale be made, dismissing the objection that it was contrary to U.S. law on the grounds that the subsidiary's place of incorporation, not its ownership, established its nationality, and that the United States had no other colorable claim to prescriptive jurisdiction over the sale.[75] A similar case arose in the Netherlands: the United States directed Sensor Nederland B.V., a Dutch subsidiary of a U.S. company, not to deliver pipeline technology to the Soviet Union, but a Dutch court ordered the delivery, rejecting Sensor Nederland's sovereign compulsion defense on the ground that the U.S. law violated the international rules of prescriptive jurisdiction.[76]

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www.bis.doc.gov/news/2008/doj04_10_08.html. On the Export Control Act and related issues of extraterritoriality, see Peter Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 41–43 (1998); Manfred Wolf, *Hitting the Wrong Guys: External Consequences of the Cuban Democracy Act*, 8 FLA. J. INT'L L. 415 (1993).

73. *See* Fitzgerald, *supra* note 72, at 41–43; Wolf, *supra* note 72, at 416; Ryngaert, *supra* note 71, at 627–28. **R**

74. *See* Controls on Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R., Interim Rule, 47 Fed. Reg. 141-01 (Jan. 5, 1982) (banning sale of pipeline technology); Dresser (France) S.A. Appellant; Decision and Order of Assistant Secretary for Trade Administration, Case No. 632, 47 Fed. Reg. 51,463-02 (Nov. 15, 1982) (decision on sanctions).

75. Fitzgerald, *supra* note 72, at 70–74. **R**

76. Compagnie Européenne des Pétroles S.A./Sensor Nederland B.V., Rb. Den Haag, Sept. 17, 1982 (Neth.), *reprinted in* 22 I.L.M. 66 (1983); *see* Fitzgerald, *supra* note 72, at 75; Wolf, *supra* note 72, at 416–17. The Dutch court specifically stated that the U.S. exercise of extraterritorial jurisdiction must be premised upon one of the traditional bases of prescriptive jurisdiction under international law and directly rejected the nationality and effects principles as inapplicable. 22 I.L.M. at 68–74 (ultimately concluding that the U.S. regulation "cannot be brought into compatibility with international law"); *see also* William Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans:* **R**

Extension of the U.S. regulations to non-U.S. entities in the pipeline controversy also provoked strong diplomatic opposition that invoked, among other things, the international law of jurisdiction. The European Community, which preceded the European Union, stated that it "considers that the Amendments to the Export Administration Regulations . . . are unlawful since they cannot be validly based upon any of the generally accepted bases of jurisdiction in international law."[77] Britain denounced the U.S. regulations as "an unacceptable extension of American extraterritorial jurisdiction in a way which is repugnant in international law."[78] A distinguished U.S. commentator, Monroe Leigh, wrote: "In the Dresser case, it seems apparent that neither of the traditional principles of jurisdiction—territoriality and nationality—justified the extension of U.S. export regulations to Dresser (France)."[79]

A second example of controversy over prescriptive jurisdiction arises in antitrust law. U.S. antitrust law purports to regulate overseas business combinations that have economic effects in the United States, even if the defendants are not U.S. entities and none of the regulated conduct takes place in the United States. Historically, this has been controversial internationally.[80] Again, the U.S. response is not to deny general limits on its prescriptive jurisdiction, but to argue that its antitrust laws come within a (very expansive) conception of effects jurisdiction, the idea that a nation may regulate conduct that has effects in its territory.[81] Initially, the nations whose businesses were principally affected strongly resisted this version of effects jurisdiction.[82] More recently, as other nations have widened their own antitrust jurisdiction, they have become more receptive to the U.S. position, not as a rejection of all limits on prescriptive jurisdiction but as acquiescence in the expansion of effects jurisdiction.[83]

Reflections on Freuhauf v. Massardy, 83 HARV. L. REV. 579, 581–82 (1970) (discussing a similar earlier case involving a French subsidiary of a U.S. corporation).

77. European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., *reprinted in* 21 I.L.M. 891, 904 (1982).

78. U.K. Statement and Order Concerning the American Export Embargo with Regard to the Soviet Gas Pipeline, *reprinted in* 21 I.L.M. 851, 851 (1982).

79. Monroe Leigh, *Export Administration Act—Extraterritorial Jurisdiction Over Foreign Incorporated Subsidiaries of U.S. Parent Companies Upheld in United States Court*, 77 AMER. J. INT'L L. 626, 627 (1983); *see also* ANDREAS LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 267–306 (2d ed. 1983) (criticizing the pipeline regulations on these grounds); Ryngaert, *supra* note 71, at 629–34 (discussing international reactions). R

80. P.C.F. Pettit & C.J.D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982). A classic dispute involved the bankruptcy of Laker Airways, allegedly as a result of collusion by European banks and air carriers. *See* Laker Airways Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984).

81. Parrish, *supra* note 55, at 1470–78. R

82. *See* James Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289 (1990); Paul Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL J. INT'L L. 173, 204 (2005).

83. *See* Joined Cases 89, 104, 114, 116, 117, 125–129/85, A. Åhlström Osakeyhtiö et al. v. Comm'n of the Eur. Cmty. (Wood Pulp Case), 1988 E.C.R. 5193, 5242–44; *see also* Friedberg, *supra* note 82; Parrish, *supra* note 55, at 1470–78; Stephan, *supra* note 82, at 204. R R

Controversies at the outer margin of extraterrorial antitrust law remain sharp. In *Hartford Fire Insurance Co. v. California*, a closely divided U.S. Supreme Court rejected attempts by foreign reinsurers, backed by their governments, to limit U.S. antitrust liability for actions done in Britain by non-U.S. entities that affected the U.S. insurance market. Justice Scalia, for the dissenters, argued that international law limits on prescriptive jurisdiction should guide the Court's interpretation of the scope of U.S. antitrust laws via the *Charming Betsy* rule, and he pointed to the international implications of not doing so.[84] More recently, in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, the Court used international prescriptive principles to limit U.S. antitrust laws' extension to foreign conduct not having an effect in the United States,[85] adopting arguments urged by foreign businesses and their supporting governments that relied on principles of prescriptive jurisdiction.[86] As Justice Breyer's opinion for the Court explained, "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and "[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."[87]

A third example is the infamous "Helms-Burton" Act of 1996, which, among other things, established a federal civil cause of action allowing any U.S. citizen whose property in Cuba had been expropriated by the Castro

84. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–19 (1993) (Scalia, J., dissenting) (expressly relying on the *Charming Betsy* rule and the international law of prescriptive jurisdiction); *see* Roger Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213 (1993); Dodge, *supra* note 56, at 134–43. R

85. 542 U.S. 155, 165–68 (2004). Particularly in antitrust, prescriptive principles are frequently described as matters of "international comity," but that should not obscure their basis in the jurisdictional rules of international law. *See* Hartford Fire, 509 U.S. at 820–21 (Scalia, J., dissenting) (relying on the Restatement (Third)'s prescriptive principles); Michael D. Ramsey, *Escaping International Comity*, 83 IOWA L. REV. 893, 906–31 (1998).

86. *See* Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 8–10, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226388; Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 4–6, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226388; Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 6–8, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226388; Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners at 19–22, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226388.

87. Empagran, 542 U.S. at 164. Justice Breyer's opinion also refers to "principles of prescriptive comity" as a basis of its decision and concludes that extension of U.S. law to the plaintiffs' claims would not be "reasonable." *Id.* This phrasing may suggest that the Court was applying a discretionary version of international comity rather than international law. Breyer's opinion, however, directly invokes "principles of customary international law" and immediately thereafter cites *Charming Betsy*, the sections of the Restatement (Third) describing the international law of prescriptive jurisdiction, and Justice Scalia's dissent in *Hartford Fire*, which relied on international law. *Id.* It thus seems clear that Breyer meant to rely on the international law of prescriptive jurisdiction, though perhaps on the more controversial portion of it reflected in Section 403 of the Restatement (Third). (It remains unclear, however, why—other than for reasons of stare decisis—the Court went on to indicate that an *Empagran*-type suit could be brought by the U.S. government rather than private plaintiffs, *see id.* at 164–65, which would seemingly not be the case if it violated international law.)

regime to sue companies that later "trafficked" in that property when doing business in Cuba.[88] Helms-Burton liability extended to non-U.S. entities and covered events happening entirely outside the United States with no effect inside it. Although it required plaintiffs to be U.S. citizens when the suit was filed, it did not require them to have held U.S. citizenship when the property was expropriated and thus extended to the many Cuban immigrants who later gained U.S. citizenship. As one commentator described it

> the Act contemplates that if an English company purchases sugar from a Cuban state enterprise and the English company also does business in the United States and accordingly is amenable to the judicial jurisdiction of a U.S. court, it would be liable to a U.S. national who could show that some of the English company's purchases consisted of sugar grown on the plantation that the plaintiff once owned.[89]

The Helms-Burton cause of action never took effect because a provision in the law allowed the president to defer its implementation,[90] and presidents consistently did so.[91] But even as a potential basis for liability, Helms-Burton raised a storm of international and domestic controversy.[92] A leading criticism was that it exceeded U.S. prescriptive jurisdiction by reaching conduct of foreign nationals outside the United States.[93] Specifically, none of the well-accepted bases of jurisdiction seemed to apply. The entities whose conduct was regulated were generally not U.S. entities, thus excluding the nationality principle; U.S. national security did not seem to be sufficiently implicated to invoke the protective principle; the passive personality principle, even assuming one accepted it, had not previously been understood to extend to the protection of victims who became citizens *after* the injury occurred; and although the confiscations possibly violated international law, universal jurisdiction against the "traffickers" seemed plainly not to exist. The United States relied mainly on the effects principle, arguing that the confiscations had a substantial effect in the United States, but that was plainly insufficient: the conduct regulated by Helms-Burton was the "traf-

88. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104–114, § 302, 110 Stat. 785, 815–18 (1996) (codified at 22 U.S.C. § 6081–85); *see* William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713 (1997); Andreas Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AMER. J. INT'L L. 419 (1996); Paul B. Stephan, *Creative Destruction—Idiosyncratic Claims of International Law and the Helms-Burton Legislation*, 27 STETSON L. REV. 1341 (1998).

89. Lowenfeld, *supra* note 88, at 426. R

90. Cuban Liberty and Democratic Solidarity Act § 306(b), 110 Stat. at 821.

91. *See* Ryngaert, *supra* note 71, at 638–39. R

92. For international reaction, see, e.g., Kim Campbell, *Helms-Burton: The Canadian View*, 20 HASTINGS INT'L & COMP. L. REV. 799, 803 (1997); Jurgen Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM INT'L L.J. 699, 704 (1997); Ryngaert, *supra* note 71, 645–48. R

93. Lowenfeld, *supra* note 88, at 430 (stating that the Act "seeks unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe"). *But see* Brice Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AMER. J. INT'L L. 434 (1996). R

ficking," whose effect within the United States was speculative at best.[94] One international committee reported in the aftermath of Helms-Burton:

> A prescribing state does not have the right to exercise jurisdiction over acts of trafficking abroad by aliens under circumstances where neither the alien nor the conduct in question has any connection with its territory and where no apparent connection exists between such acts and the protection of its essential sovereign interests.[95]

In sum, the idea of prescriptive jurisdiction is amply reflected in U.S. case law and international diplomatic practice.[96] To be sure, its contours are sharply disputed, both as to how many bases of prescriptive jurisdiction exist and as to how far they reach. But there seems to be firm support for the proposition that international law imposes some limits upon a nation's ability to regulate the extraterritorial conduct of non-nationals, and that these limits (except in the extraordinary case of universal jurisdiction) require some material connection between the conduct and the prescribing nation.

B. Prescriptive Jurisdiction and Investor Liability

This section considers whether the basic international rules of prescriptive jurisdiction apply to investor liability claims in U.S. courts. To begin, there should be little doubt that in the ordinary case, the United States may, if it chooses, make U.S. corporations subject to liability for human rights violations committed by the governments of nations in which they invest. The United States often does not regulate the conduct of its citizens abroad, and U.S. law is ordinarily presumed not to reach wholly foreign conduct absent a clear statement by Congress.[97] But this restraint is not required by international law, and the mere fact that a U.S. regulation is "extraterritorial" does not imply any infirmity in international law.[98] The nationality principle recognizes U.S. extraterritorial jurisdiction over U.S. persons, which in the modern era seems uncontroversially to include U.S.-incorporated corpora-

94. Lowenfeld, *supra* note 88, at 430–31 (calling this argument "no more than a play on words"). R

95. Inter-American Juridical Committee, *Opinion of the Inter-American Juridical Committee in Response to Resolution AG/DOC.3375/96 of the General Assembly of the Organization, Entitled "Freedom of Trade and Investment in the Hemisphere,"* ¶ 9(6), O.A.S. Doc. CJI/SO/II/doc.67/96 rev. 5 (Aug. 23, 1996).

96. A complete defense of the principle of prescriptive jurisdiction is beyond the scope of this Article, as it would entail substantial study of national practice outside the United States. However, the existence of the principle (as opposed to its precise contours) does not seem to be the subject of material debate; thus the evidence sketched in the text seems a sufficient basis on which to proceed.

97. *See* Smith v. United States, 507 U.S. 197, 204 (1993); E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); William Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 86 (1998).

98. *See* Ramsey, *supra* note 85, at 906–31 (distinguishing the two doctrines). R

tions.[99] Accordingly, for U.S. corporations in investor liability suits, the only question is whether domestic law regulates their activities (although in ATS cases that question may lead back into substantive international law).[100]

On the other hand, when the United States applies investor liability rules to the non-U.S. activities of foreign entities, the international rules of prescriptive jurisdiction appear to be implicated. Because the typical claim under the ATS and similar statutes differs somewhat from ordinary regulation, however, we should proceed cautiously.

As an initial matter, consider the simple case of a federal statute that prohibits overseas corporate conduct that Congress finds harmful to human rights. Congress has, for example, authorized the president to prohibit certain investments in Burma (Myanmar) in response to that nation's human rights record.[101] Of course, international law would ordinarily permit this statute to regulate the overseas conduct of U.S. corporations on the basis of nationality. But it seems equally clear that Congress's prohibition would be highly problematic if applied to non-U.S. corporations, at least to the extent that the corporate conduct had no material effects within the United States. In fact, the Burma statute applies only to U.S. corporations. Suppose, however, that Congress undertook to proscribe and punish all foreign investment in Burma. In most instances, it is hard to imagine such conduct even arguably coming within the effects, protective, or passive personality principles, even giving those principles their broadest scope. If justifiable at all, prohibitions of this sort, when directed to non-U.S. corporations abroad, would necessarily rest upon claims of universal jurisdiction.

For similar reasons, we might suppose that ATS suits and similar claims, to the extent they reach non-U.S. entities, depend upon establishing universal jurisdiction. Like the hypothetical Burma statute, ATS claims purport, on the basis of congressional authorization, to impose liability on non-U.S. entities for overseas investor conduct that (in the usual case) lacks the sort of material connection to the United States required by principles of prescriptive jurisdiction. Unless international law's prescriptive principles would regard ATS and similar claims differently from prosecution under ordinary U.S. criminal statutes, it seems that their consistency with international law must also depend on the presence of universal jurisdiction.

Before turning to universal jurisdiction, however, we should address several preliminary objections. There are at least three reasons one might think

99. Under the U.S. view as reflected in, for example, the Export Administration Regulations, nationality jurisdiction would extend to U.S.-owned corporations regardless of their place of incorporation, although that position remains controversial. *See supra* notes 72–76 and accompanying text. R

100. *See infra* Part III.B.2. In the ensuing discussion, I consider only applications of U.S. federal law. Issues arising from the application of U.S. state law are similar but may pose additional complications.

101. Foreign Operations, Export Financing, and Related Programs Act of 1996, Pub. L. No. 104–208, § 570, 110 Sta. 3009, 3009-166 (1996); Ex. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997).

the ATS and similar laws differ from conventional regulations of corporate activity in ways that make them less problematic under international law: they are civil rather than criminal; their standards emanate from courts rather than legislatures; and they involve enforcement of international interests rather than domestic interests.

1. *Prescriptive Jurisdiction in Civil Cases*

Most cases in which U.S. courts have applied principles of prescriptive jurisdiction, including the leading *Yousef* case discussed above, have been criminal cases and have expressly discussed limits on *criminal* jurisdiction.[102] Perhaps, then, prescriptive jurisdiction should be understood as a limit on criminal laws but not on private civil claims.

If there were ever a basis for this distinction, it seems to hold no longer. Most importantly, nations' practices do not reflect it. Nations generally do not impose civil liability in the absence of material links to their territory. When they do, they provoke outcry founded on the rules of prescriptive jurisdiction. For example, two of the three leading sources of conflict over extraterritorial U.S. laws discussed above involve laws authorizing civil suits: antitrust and Helms-Burton. U.S. antitrust law has both a criminal and a civil component, yet objections to the extraterritorial scope of U.S. antitrust law do not distinguish between the two; a classic controversy involved Laker Airways' *civil* suit against an alleged cartel of international air carriers.[103] Similarly, the leading modern U.S. Supreme Court cases, *Hartford Fire* and *Empagran*, involved civil claims.[104] *Empagran* in particular held that international principles of prescriptive jurisdiction, applied through the *Charming Betsy* interpretive rule, precluded Empagran's private civil suit against Hoffmann.[105]

Similarly, the controversy surrounding the Helms-Burton Act is revealing, for the Act's contemplated civil cause of action for "trafficking" bears a striking resemblance to ATS suits. As discussed above, victims of illegal nationalizations in Cuba could sue international corporations that later "trafficked" in the nationalized property. Objections to the law centered on international law limits on prescriptive jurisdiction without focusing on the fact that the law provided a private civil remedy instead of criminal sanctions. The leading defense of the law also did not rely on this distinction.[106]

102. *See supra* notes 67–69; *see also* United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003); *Jurisdiction with Respect to Crime: Draft Convention, with Comment, Prepared by the Research in International Law of Harvard Law School*, 29 AM. J. INT'L L., Supp. 3, at 435 (1935). R

103. *See* Laker Airways Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984).

104. *Hartford Fire* included civil claims by various state governments and by private parties. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). *Empagran* was entirely a private action. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

105. *Empagran*, 542 U.S at 164–68.

106. *See supra* notes 88–95. R

Parallel treatment of criminal and civil prescriptions is also reflected in modern treatise-writing. For example, the Restatement (Third) of Foreign Relations Law, section 402, describing prescriptive jurisdiction, does not limit its scope to criminal law and gives examples clearly encompassing civil liability.[107]

It is, moreover, hard to see a logical or practical basis for distinguishing civil and criminal jurisdiction in this regard. The basic concern is that nations should not regulate conduct that has limited connection with their territory, out of respect for the sovereign prerogatives of other nations and to minimize conflict with them.[108] A criminal sanction and a civil liability rule are different approaches to the same result—regulating conduct. Although criminal liability carries a stronger component of moral condemnation, the practical effect upon behavior—especially in the corporate context—is likely to be comparable. The infringement upon sovereignty and the likelihood of conflict thus remain. To return to the hypothetical Burma statute, would international concerns be mitigated if Congress, instead of criminalizing investment in Burma, provided a cause of action for any Burmese citizen to sue any corporation that invested there? The experience of Helms-Burton—a slightly less expansive version of this idea—suggests that international concerns would remain as great. The international concern arises from Congress's attempt to control extraterritorial conduct, not the way in which it does so.

Indeed, civil liability in some respects seems potentially more disruptive of the international order than criminal liability, at least in the context of the U.S. system. Because civil actions need not be brought by the government, they are not subject to prosecutorial discretion, which can take into account other nations' sovereign interests. Because civil actions have fewer procedural protections and a lower standard of proof, the possibility of error is much greater. In any event, there seems little basis on which to conclude that sovereignty-protecting concerns about extraterritorial regulation do not extend to regulations creating civil liability.

2. *Prescriptive Jurisdiction for Judicial Acts*

A second reason one might think investor liability cases differ from the paradigmatic prescriptive jurisdiction cases such as antitrust, export regulation, and Helms-Burton is that the latter involve legislative acts while the former are judicial. Prescriptive jurisdiction is sometimes also called "legis-

107. RESTATEMENT (THIRD) § 402 cmt. d (1987) (extending prescriptive jurisdiction limits to, for example, products liability); *see also* U.N. Int'l Law Comm'n, *supra* note 56, at 520–23 (discussing prescriptive limits on both criminal and civil laws). R

108. *See* Empagran, 542 U.S. at 164–65 (Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law . . . ." (citations omitted)).

lative" jurisdiction;[109] a separate category called "adjudicatory" jurisdiction addresses the reach of courts and revolves principally around whether the defendant has sufficient personal contacts with the place where the court is located.[110] If a corporation has sufficient contacts with the United States, should that not give U.S. courts jurisdiction to adjudicate claims against it, regardless of where those claims arose?

This argument (and use of the imprecise term "legislative jurisdiction") ignores the two distinct roles of a common law court. Common law courts apply legislative rules to the parties before them, and to do so they need jurisdiction over the parties. This requirement is what international law calls adjudicative jurisdiction. Common law courts also *create* rules, which they then apply to the parties over which they have adjudicative jurisdiction. As recognized in the United States at least since *Erie Railroad Co. v. Tompkins*, when a court creates a liability rule it acts as a sovereign lawmaker—that is, it acts in the same role as a legislature.[111] For this function, prescriptive jurisdiction is required. Viewed from outside the United States, what happens when a common law court creates a liability rule is that *the United States* creates a liability rule. Whether that rule is properly created by a court or a legislature (or an executive order, for that matter) is a question of internal law but has no external significance. As a leading textbook explains, prescriptive jurisdiction

> pertains to the power of a sovereign State to prescribe the substantive law governing particular conduct and it does not matter whether that law emanates from the constitution, the legislature, the executive or the courts of the sovereign. It is the sovereign power itself, not the power of courts as components of the institutional sovereign, that is at issue.[112]

Put another way, the Helms-Burton Act's "trafficking" liability would have been no more defensible under international law if it had been created

109. *See, e.g.*, Parrish, *supra* note 55, at 1462. R

110. MURPHY, *supra* note 3, at 253–54 (analogizing jurisdiction to adjudicate under international law to minimum contacts under the U.S. Constitution's Due Process Clause as reflected, for example, in Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)). R

111. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In contrast, when a U.S. court enforces law created by a foreign sovereign, it is not creating law and thus requires only adjudicatory, not prescriptive, jurisdiction.

112. ALAN SWAN & JOHN MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 769 (2d ed. 1999). According to the RESTATEMENT (THIRD) § 401 (1987),

> Under international law, a state is subject to limitations on . . . jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.

Legislative jurisdiction (like the related term legislative comity) is thus simply a misnomer. To the extent that I have used it in the past, *see* Ramsey, *supra* note 85, at 906, 919 nn.124–25, I withdraw it and apologize. R

by a common law court rather than enacted by Congress. In either case, the United States would be establishing a liability rule for foreign corporations doing business in Cuba. Establishing that rule would require prescriptive jurisdiction, whatever branch of the U.S. government purported to do it. Adjudicative jurisdiction would come into play only if suit were brought against a company having few contacts with the United States, but even a foreign company with much business in the United States would be entitled to object on prescriptive jurisdiction grounds to U.S. regulation of its unrelated actions overseas.

3. *Prescriptive Jurisdiction for Violations of International Law*

A third and more weighty objection to applying prescriptive jurisdiction limits in ATS and similar cases centers on the proposition that prescriptive jurisdiction limits the ability of a nation to impose *its own* rules extraterritorially. U.S. federal or state laws that create rules for the non-U.S. operations of non-U.S. entities implicate this limitation. In investor liability suits, however, the regulatory standard may be drawn from international law, not U.S. law. Arguably, prescriptive jurisdiction limits do not apply where the underlying conduct violates international law.[113] In such cases, the United States is applying not its own law but the law of the international community as a whole. In this sense, ATS suits might be analogous to cases enforcing foreign law in U.S. courts, which are routine and subject only to the limits of adjudicatory (not prescriptive) jurisdiction. Moreover, the potential conflicts of sovereignty against which prescriptive jurisdiction protects are greatly reduced, because the United States is (in theory, at least) applying a rule on which all nations agree.[114]

Relying on the existence of an international law violation to escape the limits of prescriptive jurisdiction is mistaken for several reasons. First, customary international law itself generally does not establish any particular

113. *See* U.N. Int'l Law Comm'n, *supra* note 56, at 520 (excluding from discussion of prescriptive jurisdiction situations in which a nation enforces foreign law or international law). **R**

114. Even if true, this objection would only partially insulate investor liability claims from international law criticism. Prescriptive jurisdiction would still require that the regulated investor's conduct itself violate international law; otherwise one could not say that the court was applying an international rather than a U.S. standard of conduct to the investor's activities. *See infra* Part III.A.

This requirement might as a matter of U.S. domestic law also seem to flow from the ATS itself. *See* Keitner, *supra* note 25, at 73–83 (arguing that the ATS's provision of jurisdiction over torts in violation of international law indicates that the defendant's actions themselves must violate international law); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (under the ATS, courts must consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued"). U.S. judges have not always agreed, however. *See, e.g.*, Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 284–90 (2d Cir. 2007) (Hall, J., concurring); Doe I v. Unocal Corp., 395 F.3d 932, 964–78 (9th Cir. 2002) (Reinhardt, J., concurring). Both Judge Reinhardt (pre-*Sosa*) and Judge Hall (post-*Sosa*) reasoned that the ATS required only a violation of international law by some entity (such as a government), and that U.S. tort law principles could then be applied to decide the extent of indirect liability of other entities (such as investors). *See* Keitner, *supra* note 25, at 73–83 (describing and criticizing this approach as a matter of domestic law). **R**

way that customary international law violations should be redressed. Although courts and commentators sometimes speak otherwise, it is not meaningful to say that customary international law provides or does not provide a cause of action or a right to sue for its violation. The decision whether to allow individuals to make claims in court, as opposed to offering some other kind of remedy, lies with individual nations. Thus an individual judicial claim based on customary international law depends on a national act to create liability and a right to sue. In this respect, enforcing international law is wholly distinct from enforcing foreign national laws, which themselves create liability and a right to sue.[115]

This view is consistent with the way the U.S. Supreme Court in *Sosa* understood the relationship between the ATS and international law. According to the Court, Congress in the ATS established federal jurisdiction for international claims, with the understanding that federal courts were empowered in some circumstances to create a federal common law cause of action for private litigants. The *Sosa* Court endorsed federal courts acting in such a way, to a limited extent: it said federal courts should recognize a cause of action only where the underlying international law was extremely clear and other prudential concerns were not present.[116] Thus the decision to create private liability (or not) lies with the U.S. federal courts, as a matter of federal common law, under authorization from Congress in the ATS. That is wholly consistent with the proposition that individual liability is a national, not an international, decision, even where the underlying conduct is internationally proscribed.[117]

This understanding is also compelled by international law, for it is the only way that the idea of universal jurisdiction as a whole makes sense. Under a different view, any nation could allow anyone to enforce any international law rule against any defendant. No one understands international law liability in this way, and it would make nonsense of the exception for universal jurisdiction. Under the basic theory of universal jurisdiction, *a few*

115. Thus, to be clear, investor liability claims based upon the substantive law of either the jurisdiction where the harm occurred or the jurisdiction of the investor-defendant's nationality would not be subject to any of the objections described here.

116. *See supra* note 23 and accompanying text. R

117. *See* Casto, *supra* note 24, at 638–44. As Professor Casto explains, "the norm that is enforced in ATS litigation comes from international law" and "[w]hen a court elaborates upon the existence and scope of the norm that is being enforced, the court is not engaged in judicial lawmaking. Rather, the court is simply discovering or expounding norms that already exist in international law." *Id.* at 643–44. Nonetheless, R

> ATS litigation . . . may present a number of substantive issues that do not bear on the lawfulness of the defendant's conduct. The clearest example is whether a private damage remedy is available. The *Sosa* Court expressly held that the creation of a private damage remedy is an act of judicial lawmaking. The tort remedy in ATS litigation does not come from international law. It is pure domestic law.

Id. The same analysis would presumably apply to state laws, or other federal laws, that established liability for international law violations.

especially heinous international wrongs are subject to prosecution everywhere.[118] That proposition necessarily assumes, however, that some international acts, though wrongful, are *not* so heinous as to be prosecutable by any nation. Piracy, the traditional example of universal jurisdiction, was unusual in that it—*unlike* most international law violations—could be prosecuted by any nation. Justice Breyer rightly explained in his concurrence in *Sosa*:

> substantive uniformity [under international law] does not *automatically* mean that universal jurisdiction is appropriate. Thus, in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong, but also on the jurisdictional principle that any nation that found a pirate could prosecute him. . . . Today international law will *sometimes* similarly 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.[119]

As Justice Breyer emphasized, this "procedural consensus" exists only for "a limited set of norms," not for all rules of international law.[120] Or, as he further explained in his opinion for the Court in *Empagran*, "even where nations agree about primary conduct . . . they disagree dramatically about appropriate remedies."[121]

In short, the reason that a national government's enforcement of a universal jurisdiction offense requires a special exception from the limits of prescriptive jurisdiction is that the creation of individual criminal or civil liability is a national regulatory act. The fact that the conduct it regulates is wrongful under international law does not show otherwise. There is simply no other conceptual explanation for the principle of universal jurisdiction.

This proposition has long been recognized in traditional human rights litigation, including *Filártiga*. As discussed above, the Second Circuit in that case emphasized that official torture had gained a status akin to piracy; the torturer had "become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[122] That conclusion was necessary to its holding, because otherwise the *Filártiga* court would not have been entitled under international law to create an ATS cause of action to

118. United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003).

119. Sosa v. Alvarez-Machain, 542 U.S. 692, 761–62 (2004) (Breyer, J., concurring) (emphases added).

120. *Id.* at 762. Justice Breyer labeled this principle a matter of "comity," but it is equivalent to what other writers call the international rules of prescriptive jurisdiction. *See* JANIS, *supra* note 3, at 318–25. **R**

121. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167 (2004).

122. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980); *see also* JANIS, *supra* note 3, at 325 (discussing *Filártiga* as an example of universal jurisdiction). **R**

cover the non-U.S. defendant's non-U.S. acts. As the European Commission pointed out to the U.S. Supreme Court in its amicus curiae brief in *Sosa*:

> [w]here the United States has jurisdiction to prescribe based on territoriality, nationality, or protection of its security interests, the ATS may be interpreted to incorporate all torts in violation of the law of nations. However, when the United States does not have jurisdiction under one of the traditional bases, it may exercise jurisdiction to prescribe only in accordance with the principles governing universal jurisdiction.[123]

In sum, the case for limits to investor liability based on prescriptive jurisdiction rests on four propositions. First, there seems little doubt that prescriptive limits would apply to analogous U.S. legislation criminalizing all foreign investment by non-U.S. entities in abusive regimes. Second, although prescriptive jurisdiction is often discussed in the context of criminal law, leading authorities and judicial and diplomatic practice extend it to civil claims as well, and the concerns that underlie limits on criminal liability appear also to apply to civil liability. Third, principles of prescriptive jurisdiction apply whenever a national government regulates conduct, regardless of whether that regulation emanates from a legislature, a common law court, or some other entity. Fourth, prescriptive jurisdiction limits a national government's ability to create liability even if the regulated conduct violates international law because the creation and imposition of liability remain national regulatory acts; there is no other way to understand the well-established limited exception for universal jurisdiction.

III. Applying Prescriptive Jurisdiction Rules to Investor Liability Litigation

The foregoing Part concluded that U.S. courts violate international law in investor liability cases if they act in the absence of prescriptive jurisdiction. This Part explores the implications of that conclusion.

A. The Need to Establish Universal Jurisdiction

To begin, as argued above, prescriptive jurisdiction plainly allows the United States to prescribe liability rules for U.S. corporations abroad.[124] The

123. Brief of Amicus Curiae the European Commission in Support of Neither Party at 4, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036. The European Commission thus assumed, without extended argument, that traditional rules of prescriptive jurisdiction applied to ATS cases. *See* Ryngaert, *supra* note 71, at 645 (arguing that the Helms-Burton Act's "trafficking" provisions would violate prescriptive jurisdiction even if the conduct it sought to regulate arguably violated international law). R

124. As indicated in connection with the discussion of the Export Administration Act, *see supra* notes 72–76 and accompanying text, there may be some disagreement as to what constitutes a "U.S. corporation." R

only prescriptive questions with respect to these defendants are whether the relevant U.S. lawmaker—Congress, state legislatures, or common law courts, as applicable—has authority under domestic law to do so, and has in fact done so.[125] Prescriptive jurisdiction is a material issue only where the defendants are foreign entities.

In those cases, however, prescriptive jurisdiction is—or should be—a very substantial issue. Mere presence in the United States, sufficient to convey "minimum contacts" for purposes of the U.S. law of personal jurisdiction, is not sufficient for purposes of prescriptive jurisdiction. Further, aside from universal jurisdiction, the international law bases of extraterritorial regulation usually will not exist in investor liability cases. The human rights abuses that are typically the subject of these cases rarely have substantial effects in the United States. U.S. sovereign interests are usually not threatened by them, so even a broad view of "protective" jurisdiction seems insufficient.[126] The victims are usually not U.S. citizens, especially not at the time the abuses are committed, so even embracing the "passive personality" principle would be insufficient.[127] Only universal jurisdiction provides a possible solution in the usual case against non-U.S. investors.[128]

This conclusion suggests four implications for the way U.S. courts should approach these cases. First, investor liability defendants are not similarly situated. The leading decisions—whether they ultimately accepted or rejected secondary investor liability—have viewed U.S. and foreign defendants the same way. Cases with both types of defendants have not discussed them separately, and cases with only foreign defendants have discussed cases with U.S. defendants as analogous.[129] But suits against foreign defendants raise

125. This inquiry may produce some confusion in ATS cases because the ATS appears to make violation of international law a prerequisite for liability under the ATS. Thus, the question of whether U.S. domestic law imposes liability may turn on whether the defendant's conduct violates international law. Nonetheless, the extent of liability ultimately turns on domestic law (the ATS) and—if only U.S. corporations are involved—does not implicate prescriptive jurisdiction. Congress, if it chose, could impose investor liability on U.S. corporations for actions that do not violate international law; such an extension would not implicate prescriptive jurisdiction.

126. This might not be true in cases involving international terrorism. *See* United States v. Yousef, 327 F.3d 56, 105 (2d Cir. 2003) (finding protective jurisdiction over extraterritorial terrorism offenses).

127. And, in any event, the ATS provides a remedy only to aliens. 28 U.S.C. § 1350.

128. As indicated above, *supra* note 111, this conclusion applies only to claims based on U.S. law. **R**
Enforcement of foreign national law does not implicate U.S. prescriptive jurisdiction, so investor liability claims under the law of the place of the conduct or of the nationality of the investor are not subject to objections on this ground.

129. *See, e.g.*, *In re* South Africa Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *aff'd in part*, *vacated in part*, *remanded sub nom*; Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd without opinion sub nom*; Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (affirmed by default for lack of quorum) (in suit against investors in apartheid South Africa, failing to distinguish between U.S. and non-U.S. investor-defendants); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *appeal argued*, No. 07-0016-cv (2d Cir. Jan. 12, 2009) (attaching significance to defendant's non-U.S. status only to determine choice-of-law questions on piercing the corporate veil); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008) (noting defendant's non-U.S. status but not finding it determinative).

questions of prescriptive jurisdiction that suits against U.S. defendants do not.

Second, the focus on prescriptive jurisdiction points to a resolution of the choice-of-law issue. Recall that there is a debate in ATS indirect liability cases over whether the liability rule should arise from international law (the position of Judge Pregerson in *Unocal* and Judge Katzmann in the South Africa litigation) or U.S. common law tort principles (the position of Judge Reinhardt in *Unocal* and Judge Hall in the South Africa litigation).[130] With respect to non-U.S. defendants, courts cannot draw conduct-regulating standards from U.S. principles of tort law, as Hall purported to do in the South Africa litigation, without violating international law.

Judge Hall's argument, following Judge Reinhardt in *Unocal*, was that once an international law violation by the host government is established, the jurisdictional prerequisite of the ATS (a tort in violation of international law) is established. The extent of liability, he went on to say, is an "ancillary" question that can be decided solely by reference to U.S. law, in connection with the U.S. court's function of establishing common law causes of action pursuant to the ATS.[131] Whether or not this is a correct view of the ATS in the abstract (and it seems difficult to reconcile with *Sosa* and with the ATS's text),[132] it simply does not recognize the problem of prescriptive jurisdiction.

Under international law, U.S. courts *are not permitted* to create common law liability for non-U.S. conduct of foreign defendants merely on the basis of U.S. domestic regulatory standards. It should be clear, however, that Hall's approach imposes on the investor a substantive rule of conduct rooted in U.S. law, not international law. Judge Reinhardt in *Unocal* did not encounter that problem because Unocal was a domestic corporation, but Hall's uncritical extension of Reinhardt's approach to non-U.S. defendants missed the international law implications. There is no requirement, in Hall's analysis, that U.S. tort principles even track international law, much less that they provide a basis for universal jurisdiction. To accept this view would be akin to allowing Congress to prescribe investment standards for the entire world.

Third, although Judge Katzmann's position in the South Africa litigation was closer to the right approach than Judge Hall's, his analysis also did not

130. *See supra* Part II.C.

131. *See* Keitner, *supra* note 25, at 73–74 (describing and criticizing this argument). R

132. The ATS's text itself indicates that it extends only to torts "in violation of" the law of nations. 28 U.S.C. § 1350. *Sosa* emphasized that the relevant question was whether the *defendant's* conduct violated international law. *See* Keitner, *supra* note 25, at 73–83 (arguing that as a matter of domestic law the ATS requires courts to look to international law rather the U.S. tort law to define secondary investor liability). This article does not take a position on that question, although elsewhere I have agreed with Professor Keitner and Judge Katzmann on this point. *See* Brief of Amicus Curiae Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States at 3–8, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. May 7, 2007) (on file with the Harvard Law School Library). R

take into account the international law requirements of prescriptive jurisdiction.[133] For Katzmann, the question under the ATS was not whether an international law violation occurred, but whether *the defendants* committed an international law violation. That view seems more comfortably to follow from *Sosa* than does Hall's. As applied to non-U.S. defendants, however, it does not go far enough. Not all violations of international law give rise to universal jurisdiction. Indeed, most do not. That a non-U.S. defendant's non-U.S. conduct violated international law is a necessary but not sufficient condition to allow U.S. courts to regulate it. Under international law, the question is not whether the defendants' conduct in investing in South Africa violated international law, but whether it subjected them to universal jurisdiction.

Fourth, this issue is important not just for international law but also for U.S. domestic law. As discussed above, since the early decision in *Murray v. Schooner Charming Betsy*,[134] U.S. courts apply a presumption that ambiguous statutes are not construed to violate international law.[135] Although the exact formulation and implementation of the *Charming Betsy* rule is debated,[136] in matters of jurisdiction it is commonly understood to limit generally worded statutes to the jurisdictional reach permitted by international law.[137] Thus, applied to the ATS, for example, this approach should mean that U.S. courts would not give the ATS a jurisdictional reach beyond what international law permits. Such a limitation seems particularly appropriate for the ATS, which was enacted to provide redress for international law violations. It would be odd if courts violated international law in its application.

B. The Difficulty in Establishing Universal Jurisdiction in Investor Liability Cases

This section turns to the question that should be asked with respect to non-U.S. investor-defendants: what sort of investor conduct gives rise to universal jurisdiction? It begins by surveying the arguments that indirect investor conduct violates established international law and finds them to be weak. Specifically, it argues that U.S. courts, litigants, and commentators have erred conceptually in two respects in exploring the international law of indirect investor liability. First, they have uncritically accepted isolated and episodic international practices—in particular, a few decisions of international tribunals—as evidence of the customary practices of nations. Second, rather than focus on actual international practice with respect to investor

133. *See* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 264–73 (2d Cir. 2007) (Katzmann, J., concurring).

134. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

135. RESTATEMENT (THIRD) § 114 (1987); Steinhardt, *supra* note 6, at 1100; *see, e.g.*, Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000). R

136. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495–504 (1998); Steinhardt, *supra* note 6, 1110–13. R

137. *See supra* notes 66–70 and accompanying text. R

liability, they have attempted to construct an international law of investor liability by analogy to practice in factually and normatively distinct contexts.

This section then argues that, even if an international law of secondary investor liability can be established, it does not command the universal abhorrence that can support universal jurisdiction. As a result, it concludes that international law permits U.S. courts to impose liability on non-U.S. investors for non-U.S. conduct only when the investor actually commits a universal jurisdiction offense, not when the investor has some indirect involvement in the offenses of a host government.

1. *Preliminary Assumptions*

To begin, I make three assumptions about international law, each of which is itself contestable. First, I assume that international law has a robust conception of universal jurisdiction in national courts. This proposition, though widely reflected in international law treatises, is far from fully established. Indeed, a leading authority surveying national practice finds only scattered claims of jurisdiction based solely on universality and concludes that these instances are insufficient to demonstrate state practice apart from the prosecution of piracy.[138] As part of this proposition, I further assume that the customary law of universal jurisdiction encompasses a fairly broad range of human rights abuses, including, for example, torture and extrajudicial killing (again, propositions widely reflected in treatises and U.S. court decisions but less easily grounded in the actual practices of nations).[139]

Second, I assume that corporations, like individuals, can violate universal jurisdiction rules. This proposition also is not easily established from state practice. It is not clear that there are *any* material examples outside the United States of national courts imposing criminal liability on corporations for international law violations.[140] Nonetheless, corporate responsibility

138. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 136–51 (2001). For criticisms of universal jurisdiction, see Bradley, *Universal Jurisdiction*, *supra* note 25; Kontorovich, *supra* note 25. R

139. *See* Bassiouni, *supra* note 138; Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 184 (2004); *see also* Kontorovich, *supra* note 25, at 155–61 (arguing that modern human rights standards do not share the conceptual characteristics that support universal jurisdiction for piracy). R R

140. The constituting document of the International Criminal Court, the Rome Statute of the International Criminal Court, which went into effect in among over 100 nations in 2002, specifically does not provide for corporate liability; its Article 25 applies only to individuals. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002. A leading commentary confirms that this was an intentional limitation that was heavily negotiated and adds that "there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems." Kai Ambos, *Article 25 ("Individual criminal responsibility")*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 743, 746 (Otto Triffterer ed., 2d ed. 2008). It does not appear that the United Nations' ad hoc criminal tribunals have adopted corporate criminal responsibility, and their governing statutes also appear to contemplate only individual responsibility. *See* 2 INTERNATIONAL COM-

under international law has been widely assumed in investor liability cases in the United States.[141]

Third, I assume that universal criminal jurisdiction of the sort discussed above lays the foundation for universal jurisdiction in *civil* cases. That assumption is necessary because, while some commentators may find sufficient practice of nations with respect to criminal prosecutions, even the strongest defenders of ATS-style litigation concede that there is essentially no practice of universal civil liability outside the United States.[142] Thus, universal jurisdiction in civil cases must rely on the idea that international law only establishes the norm and its gravity, leaving open to nations the power to adopt criminal or civil enforcement once an offender becomes an "enemy of all mankind."[143]

These assumptions, though themselves somewhat in doubt, move us only part way toward a broad view of investor liability. The difficulty is that investors do not often directly perpetrate conventional universal jurisdiction offenses, even if those offenses are defined broadly. As discussed above, a broad regime of investor liability depends upon establishing some form of secondary or accomplice liability. Thus, plaintiffs in the apartheid litigation contend that the corporate defendants aided and abetted the international crimes of the South African government, and plaintiffs in the *Unocal* litigation argued that Unocal aided and abetted the forced labor and related practices of the Burmese military.[144]

It should be clear that, even indulging the three assumptions at the outset of this section, indirect investor liability requires substantial additional demonstration. In particular, it requires showing (a) that international law recognizes indirect liability offenses under these circumstances; and (b) that indirect liability offenses are subject to universal jurisdiction. As set forth below, U.S. courts have struggled unsatisfactorily with the first proposition and ignored the second.

2. *Difficulties in Establishing an International Regime of Indirect Liability*

As an abstract matter, it seems clear that international criminal law embraces some degree of indirect liability. The difficulty is identifying what

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MISSION OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES 56 (2008) (noting that no international criminal tribunal has jurisdiction over corporations).

141. *See* Keitner, *supra* note 25, at 71–72. The proposition that corporations (as opposed to their members) are not subjects of international law has been considered and rejected by at least two district courts in investor liability cases. *In re* Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003). Both decisions, however, rested essentially on policy judgments rather than nations' practices. Most other investor liability cases, including *Khulumani* and *Unocal*, have assumed without discussion that corporate liability is available. R

142. Beth Stephens, *Translating* Filártiga, 27 YALE J. INT'L L. 1, 4–5 (2002).

143. *See id.* at 49 (quoting Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

144. *See supra* Part II.C.

that liability entails and how it applies to particular factual situations. This section evaluates the debate in the terms assumed by its leading judicial expositions: Judge Pregerson's opinion in *Unocal*, finding a broad view of indirect liability based on knowledge of the primary violation and substantial contribution to it,[145] and Judge Katzmann's opinion in the South Africa litigation, finding a narrow view of indirect liability that requires shared intent with the primary perpetrator.[146]

Judge Pregerson's opinion, though since withdrawn,[147] remains the leading judicial analysis of international law finding a broad version of indirect liability. It relied largely upon a single decision of the ICTY, *Prosecutor v. Furundžija*.[148] *Furundžija* did appear, at least in the abstract, to find what Pregerson said it found: a broad international concept of indirect liability not dependant upon shared intent with the perpetrator. But several factors make it a weak indicator of settled international law.

As an initial matter, because customary international law in its classic form arises from the practices of nations,[149] decisions of international tribunals do not *create* customary international law. They can be secondary evidence of what nations' practices are, if it appears that the tribunal sought to identify nations' practices and persuasively assembled evidence of them. But tribunal decisions are not authoritative in themselves; they are only as persuasive as the authorities on which they rely. In this case, the authorities are not persuasive as evidence of nations' practices.

Furundžija relied principally on cases from the post-World War II trials of Nazi offenders. At least three of these cases did appear to hold that knowledge without shared intent was sufficient for a conviction for accomplice liability, including one—the well-known *Zyklon B* case, involving prosecution of executives of the firm that supplied poison gas to the Nazis—whose facts somewhat resembled investor liability claims.[150] But as

145. Doe I v. Unocal Corp., 395 F.3d 932, 947–51 (9th Cir. 2002).

146. Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 264–84 (2d Cir. 2007) (Katzmann, J., concurring).

147. *See* Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (on grant of rehearing en banc).

148. Unocal, 395 F.3d at 950–51 (adopting what it called the "Furundžija standard"); *see* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Trial Chamber, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999). The panel majority also relied, less heavily, on a decision of the ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment (Trial Chamber, Jan. 27, 2000), that does not point to any additional international authority. The leading academic defense of broad indirect liability is Keitner, *supra* note 25, at 90–96, which also relies heavily on *Furundžija*. R

149. *See* RESTATEMENT (THIRD) § 102 (1987); JANIS, *supra* note 3, at 41–44; MURPHY, *supra* note 3, at 78–81. R

150. Furundžija, IT-95-17/1-T, ¶¶ 237–39 (citing Trial of Bruno Tesch and Two Others, 1 WAR CRIMES COMM'N, U.N. LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947) (British Military Court Hamburg, Germany) (*Zyklon B*); United States of America vs. Otto Ohlendorf, et al., 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 3 (1949) (British Military Court, Nuremberg, Germany, July 3, 1947 –Apr. 10, 1948) (*Einsatzgruppen*); and Trial of Franz Schonfeld and Nine Others, 11 WAR CRIMES COMM'N, U.N. LAW REPORTS OF TRIALS OF WAR CRIMINALS 69f (1949) (British Military Court, Essen, Germany, Jun. 11–26, 1946)); *see also* Keitner, *supra* note 25, at 91–92 (relying heavily on the *Zyklon B* case). In the *Zyklon B* case, the facts, as recounted by the court, indicate that the R

Furundžija acknowledged, the Nazi-era cases were not consistent on this point: the *Hechingen Deportation* cases, though initially adopting a broad standard for indirect liability at the trial level, were partially reversed on appeal (and some defendants exonerated) based on the proposition that "the aider and abettor has to have acted out of the same cast of mind as the principal"—the exact opposite of *Furundžija*'s standard.[151] In addition, at least one other major decision not mentioned in *Furundžija*, *United States v. von Weizsaecker,* also found knowledge without shared intent to be insufficient for indirect liability.[152] *Von Weizsaecker* is, like *Zyklon B*, somewhat similar factually to the investor liability cases: it involved the prosecution of a banker who, aware of Nazi crimes, lent money to Nazi enterprises.[153]

Further, it is not clear that even the Nazi-era cases relied on by *Furundžija* cleanly held what *Furundžija* said they held. In his leading treatise *International Criminal Law*, Professor Antonio Cassese—previously one of the judges in the *Furundžija* case—flatly asserts that knowledge without shared intent (plus substantial assistance) is sufficient for indirect criminal liability under international law, principally citing *Furundžija* and related cases. But Cassese acknowledges, speaking of the Nazi cases that were the sole source for *Furundžija*, that "in most of these cases the notion of aiding and abetting was not clearly defined as distinct from that of 'participation in a common purpose.'"[154] In the *Zyklon B* case, for example, the principal defendant apparently participated with Nazi officials in planning the use of the gas, although it is unclear how and whether this fact influenced the outcome.[155] Professor Cassese goes on to say that the "ICTR and ICTY have made a better jurisprudential contribution to the outlining and enunciation of the concept," again principally citing *Furundžija*.[156] Thus even Cassese seems to acknowledge that the Nazi-era cases themselves fall short of providing clear guidance on the question of indirect liability.

The varying and incompletely reasoned approaches of the Nazi-era cases should not be surprising. They were heard by various authorities—German courts, British military courts, and American military courts—operating under different constituting documents. The military orders establishing the

principal defendant, Bruno Tesch, was actually a direct participant in the extermination plans, although the court did not regard this as prerequisite to liability. *Schonfeld* and *Einsatzgruppen* involved the indirect liability of members of Nazi units for the direct crimes of other members of those units. These were the only cases mentioned by *Furundžija* as supporting its conclusion, though undoubtedly there are others.

151. *See* Furundžija, IT-95-17/1-T, ¶ 240 & n.262 (quoting and discussing *Hechingen Deportation* cases).

152. United States of America v. von Weizsaecker, et al., 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10, at 308, 622 (1997) (British Military Court, Nuremberg, Germany, Jan. 7–Nov. 18, 1948).

153. *See* Keitner, *supra* note 25, at 91–92 (acknowledging *von Weizsaecker* as contrary to *Furundžija* but finding it unpersuasive). R

154. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 217 & n.5 (2d ed. 2008).

155. Trial of Bruno Tesch, 1 U.N. LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 95. It may be that this fact helps explain the divergence between *Zyklon B* and *von Weizsaecker*.

156. CASSESE, *supra* note 154, at 217 & n.5. R

courts, and the courts themselves, had little precedent and arose and operated in the exigency of post-war occupation. It is doubtful that the details of the various courts' operations were internally consistent or fully theorized. As one authority describes, in the post-war tribunals, "the rules governing modes of participation [in criminal activity] were at first only rudimentary and fragmentary."[157]

It is also not clear that the Nazi-era cases, even if internally consistent, are sufficient to establish international custom on points of such detail. Though history has vindicated their essential judgment that individuals may be held criminally liable for such horrifying crimes, it is doubtful that every detail of their operation has been vindicated, and some details have been criticized. For example, the military courts operating under Allied Control Council Law 10 allowed criminal responsibility to be established merely by membership in a group whose other members committed abuses,[158] a proposition that seems, at minimum, debatable today.[159]

If the Nazi-era cases had given rise to a subsequent pattern of national and international practice on the question of indirect liability, that would be another matter, but they did not, and *Furundžija* did not contend otherwise. For example, with respect to domestic law, when the American Law Institute attempted to rationalize U.S. criminal law in the early 1960s with the production of the Model Penal Code, it adopted a view of accomplice liability that required the accomplice to act for the purpose of facilitating the crime—a narrower version of secondary liability than *Furundžija* attributed to the Nazi cases.[160] Thus there was clearly some debate on the matter among national systems. At the international level, little development of international criminal law occurred after the Nazi-era cases prior to the ICTY: while "the legal basis of international criminal law was largely secure . . . the community of nations lacked the will and ability to apply these principles."[161] Consequently, many details remained underdeveloped and unexplored. In any event, it is doubtful that widespread international prac-

157. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 117 (2005). For general background on the Nazi-era courts, see *id.* at 6–15.

158. "Any person without regard to . . . the capacity in which he acted, is deemed to have committed a crime . . . if he . . . was a member of any organization or group connected with the commission of any such crime." Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, § II(2)(e), Dec. 20, 1945, *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250 (1949).

159. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Stevens, J., plurality opinion) (rejecting liability under laws of war for conspiracy based on membership in terrorist organization).

160. MODEL PENAL CODE § 2.06 (1962). This also appears to be the rule for U.S. federal criminal law. *See* 18 U.S.C. § 2 (2006); *see also* United States v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006) (prosecution must prove that "the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime").

161. WERLE, *supra* note 157, at 15; s*ee also* 2 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES 28–30 (2008) (discussing evolution of international law of accomplice liability without identifying any material practice of nations between the Nazi-era cases and the ICTY). R

tices prior to the ICTY endorsed the broader view of indirect liability; at least, *Furundžija* did not cite any.[162]

Thus, the better conclusion is that the Nazi-era cases are subject to various interpretations on indirect liability and may not have had fully articulated bases; that subsequent international practice prior to the creation of the ICTR and ICTY did not further develop firm views of the matter; and that the ICTR/ICTY cases, especially *Furundžija*, drew plausible but contestable conclusions from them. As a result, *Furundžija* and related ICTY and ICTR cases are better understood as proposals for the further development of international law than as evidence of existing settled international law.

Finally, the key definition of indirect liability in *Furundžija* appears to be dicta, and, in any event, *Furundžija*'s facts are wholly distinct and resist analogy to investor liability cases. The defendant was part of a Croatian irregular military unit operating in Bosnia. He and an associate abusively interrogated a female detainee, and the associate raped her. Furundžija was prosecuted for complicity in the rape. He was shown to have arranged for and participated in the interrogation of the woman (for which he was separately convicted as a principal); he had been present (though not in the same room) when the rape occurred, had knowledge of it, and had not objected or interfered despite being in a command position.[163] *Furundžija* thus seems better understood as an example of liability arising from participation in the joint commission of crimes by a group (in this case a paramilitary unit), which is a distinct category of criminal liability.[164] As a leading text explains, joint criminal liability may exist where:

> one joint perpetrator commits excesses that go beyond the framework of the common [criminal] plan. A participant in a criminal undertaking who wishes to take part in a scheme based on a common plan can nevertheless be held accountable for consequences not included in the plan if they are the 'natural and foreseeable consequence' of the plan's execution.[165]

162. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 236–49 & n.262 (Trial Chamber, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999). *Furundžija* added only two other material authorities. It noted a prior ICTY decision, Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber, May 7, 1997), which, it said, took a similar view of the Nazi-era cases. That is largely true, although *Tadić* also involved the somewhat distinct issue of participation in a joint criminal enterprise, *see infra* note 166. Second, *Furundžija* mentioned the 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission, a non-binding instrument not purporting itself to reflect customary international law and not adopted by any nation. Furundžija, IT-95-17/1-T, ¶¶ 227–28, 242–43. The draft seems especially weak authority, particularly as it was superseded by the 2002 statute of the International Criminal Court, discussed below, *infra* note 176, which adopted a different view. R R

163. Furundžija, IT-95-17/1-T, ¶¶ 127–30.

164. WERLE, *supra* note 157, at 120–23. R

165. *Id.* at 123; *see also* CASSESE, *supra* note 154, at 189–213; Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 185–229 (Appeals Chamber, July 15, 1999). R

If that view accurately describes international criminal law, it would seem to encompass most if not all of the ICTY cases without reference to other types of indirect liability.[166] Furundžija himself, for example, had participated in some of the crimes of the group and thus could be liable for other foreseeable ones. It is not clear why the *Furundžija* court did not use this theory of liability.[167]

Aside from *Furundžija*, Judge Pregerson's only authority in *Unocal* for the international law of indirect liability was the ICTR decision in *Prosecutor v. Musema*.[168] *Musema* in turn merely stated its conclusion, without elaborate discussion of international sources, and did not purport to derive that conclusion from the Nazi-era cases or other international practices.[169] *Musema*, like *Furundžija*, involved a defendant who participated directly in the atrocities,[170] so it is far from clear that its discussion of abstract principles of law was a core component of its holding.

More broadly, the difficulty of focusing only on *Furundžija* and *Musema*, as Judge Pregerson did, is that they do not give a complete picture of relevant international law. First, *Furundžija* is only one piece of a much larger jurisprudence of the ICTY, and it is not clear how the abstract principles it announced relate to the rest of ICTY practice. For example, a subsequent case of the ICTY appeals chamber, *Prosecutor v. Vasiljević*, while embracing *Furundžija*'s proposition that indirect liability can sometimes exist without shared intent, also said that indirect liability in the situation it was considering required acts "specifically directed" at assisting the commission of the crime.[171] It is not clear if this was meant as a restatement or a modification of *Furundžija* nor how it would apply beyond the facts of the particular

166. *See* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 333–36 (2d Cir. 2007) (Korman, J., concurring) (noting that most if not all of the secondary liability cases from the ICTY and ICTR appear to fall into this category); 2 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES 27–28 (2008) (describing a number of ICTY and ICTR cases, including *Tadić*, in these terms). As noted, most of the Nazi-era cases also implicate this category. *See* CASSESE, *supra* note 154, at 217 & n.5. **R**

167. Professor Cassese acknowledges that ICTY opinions may engage in discussions "peripheral to the *ratio decidendi*" of a case in order to provide "clarification [that] might have some value for the future development of international criminal law." Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 589–90 (2004). Cassese defends the practice because

> the absence of an international law-maker and an international court with compulsory universal jurisdiction entails that many rules are not clear, particularly when they are of customary origin, and are thus open to differing interpretations—hence the need for courts gradually to spell out the contents of those rules, if need be through *obiter dicta*.

Id. at 590. Nonetheless, he adds that it "may also prove simply academic and sometimes also misleading for future courts pronouncing on the same matters." *Id*.

168. Doe I v. Unocal Corp, 395 F.3d 932, 950 (9th Cir. 2002).

169. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, ¶¶ 180–83 (Trial Chamber, Jan. 27, 2000).

170. *Id.*

171. Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 102 (Appeals Chamber, Feb. 25, 2004) (involving the successful prosecution of a member of a paramilitary unit who forceably escorted prisoners to a remote location where other members of his unit executed them).

case.[172] In any event, it is hard to get a practical picture of ICTY (or ICTR) jurisprudence from abstract statements in a very few decisions without reviewing the full range of secondary liability cases.[173]

Further, the ICTY/ICTR cases are only part of the international law picture. As Judge Katzmann emphasized in the South Africa litigation,[174] Judge Pregerson's rendition of the *Furundžija* standard seems counter to the one adopted by the International Criminal Court. The ICC, a permanent international court established by treaty among over 100 countries in 2002, has a detailed constituting document (known as the Rome Statute) that, among other things, defines offenses subject to its jurisdiction. The statute authorizes the ICC to punish aiders and abettors only when they act "[f]or the purpose of facilitating the commission of such a crime . . . ."[175] In adopting this language, one leading commentary reports, the drafters were

> introduc[ing] a subjective threshold which goes beyond the ordinary mens rea requirement within the meaning of article 30. The expression "for the purpose of facilitating" is borrowed from the [U.S.] Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge. The formula, therefore, ignores . . . the jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offense.[176]

Under this provision, another commentator emphasizes, "the mere knowledge that the accomplice aids the commission of the offence" is not sufficient; "rather he must know as well as wish that his assistance shall facilitate the commission of the crime. . . . [T]he aider and abettor must have '*double intent*' both with regard to the intentional commission by the principal and the requisite elements of his assistance."[177]

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172. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 667–68 (S.D.N.Y. 2006) (relying on *Vasiljević*, among other authorities, as establishing a narrow view of indirect liability in international law); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 278 n.15 (2d Cir. 2007) (Katzmann, J., concurring) (noting this tension in *Vasiljević* without attempting to resolve it).

173. A Westlaw search of the database of ICTY documents for "aiding and abetting" yields 423 results. For the ICTR database, there are 67 results from this search.

174. *See* Khulumani, 504 F.3d at 275–77.

175. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

176. Ambos, *Article 25*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 140, at 757. R

177. Albin Eser, *Article 20: Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 801 (Antonio Cassese et al. eds., 2002) (emphasis in original); *see also* WERLE, *supra* note 157, at 126–27 & nn.218–19 (contrasting the ICTY approach with the ICC approach and describing the latter as taken from the U.S. Model Penal Code); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 240 (Trial Chamber, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999) (acknowledging differing approach in the then-unratified ICC statute). R

Judge Katzmann in the South Africa litigation thought that the ICC statute (together with *von Weizsaecker*, the Nazi-era banking case) showed an international law principle of indirect liability requiring shared intent. Although he acknowledged the broader *Furundžija* standard from the ICTY, he thought the ICC showed it was not part of settled law.[178] He may have overstated the case: the ICC statute (like the ICTY statute and cases) is not direct evidence of customary international law and must be used cautiously. It is, rather, a treaty, albeit a treaty signed by a majority of nations. It does not necessarily reach all crimes encompassed by customary law, and it is conceivable that its drafters, while recognizing complicity-without-shared-intent as a crime, decided not to include it. The point of the ICC statute was not to encompass every possible criminal act. Further, the relevant ICC article has not been applied in practice, so it is hard to predict how ICC jurisprudence will develop; it is surely possible that it will evolve to reach a position not materially different from the ICTY.

Nonetheless, taken with the ambiguousness of the Nazi-era cases, the subsequent adoption of the U.S. Model Penal Code with a shared-intent requirement, the admitted aggressiveness of the *Furundžija* panel in dispensing with shared intent, and the absence of an extended pattern of international practice, what appears to emerge is a *debate* about the scope of indirect liability, with the ICC drafters representing a limited view (because they needed wide support) and *Furundžija* representing a broad view. Far from cleanly endorsing either side, the Nazi-era cases, on this view, represent early and incompletely articulated versions of the debate.

As a result, even assuming that indirect investor liability should be governed by the same standards as individual war crimes liability, it does not appear that clearly settled international law establishes indirect liability for conduct short of acting with a common purpose to commit the crime—or, in the case of a joint criminal enterprise, a related set of crimes. Rather, international law in this area appears to be unsettled and evolving.

3. *Broader Difficulties in Finding an International Law of Investor Liability*

A broader conceptual problem undermines the attempt to distill any international rule of indirect investor liability from the Nazi-era cases, *Furundžija*, the ICC, and related sources. Fundamentally, these authorities address a different question. As reflected in *Furundžija*, they ask when one individual can become liable for the misdeeds of another individual, usually

178. Khulumani, 504 F.3d at 270–77. Judge Katzmann's decision reflects substantial research and understanding of international law and relies on a multitude of sources. Most of these authorities, however, only indicate that indirect liability as an abstract principle is recognized in customary international law. That proposition would not seem readily contestable (although the lower court opinion, *In re* South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), could be read to deny it, so Katzmann's attention to it is understandable).

in the context of war or a war-like situation in which the individuals involved are acting as part of a criminal group or operation.[179]

When the focus shifts to investor responsibility for governmental actions, different values come into play. For example, as a factual matter it is usually not the case that the investor and the host government are partners in a joint criminal exercise, as in *Furundžija* and related cases. Further, as discussed below,[180] a fundamental question in investor liability is the extent to which investment in abusive host regimes should be encouraged or discouraged. That troublesome value judgment cannot be separated from the question of the standard for investor responsibility. Thus, individual liability cases like *Furundžija*, *Vasiljević*, and *Musema* simply are not conclusive in the investor liability context because they do not reflect all of the values tradeoffs of the investor cases. This is not to say that international law might not eventually adopt a strict standard for investor conduct; however, one cannot say that it already has, solely on the basis of the individual liability cases arising in wholly different contexts.

As a result, the determination of applicable international law in investor liability cases should not depend on the outcome of any elaborate tit-for-tat regarding the meaning of the Nazi-era cases, the authority of *Furundžija*, and so forth. All such discussions—Judges Katzmann's and Pregerson's included—reflect a misconception of how *existing* customary international law should be identified. They attempt to distill an abstract principle from one set of cases and apply it to other largely unrelated circumstances. That method may find echoes in American common law practices. It may be an appropriate way to suggest the future development of international law. But it cannot show the content of existing international law.

To see why, we must restate some basic principles. The core conception of customary international law is that its rules arise from the common practices of nations, done out of a sense of legal obligation.[181] To be sure, there are other more expansive versions of international law that include, for example, elements of moral judgment or natural law reasoning.[182] But these versions are heavily contested.[183] The only sense in which customary international

179. This is true, for example, of all of the leading ICTY and ICTR cases, including *Furundžija*, *Vasiljević*, *Tadić*, and *Musema*. It is also true of most of the relevant Nazi-era cases other than *Zyklon B* and *von Weizsaecker* (which reached opposing conclusions).

180. *See infra* text accompanying notes 190–193. R

181. *See, e.g.*, JANIS, *supra* note 3, at 41–48; MURPHY, *supra* note 3, at 78–80; RESTATEMENT (THIRD) § 102 ("[c]ustomary international law results from a general and consistent practice of States followed by them from a sense of legal obligation"). R

182. *See* MARTII KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2002) (tracing historical components of international law in the nineteenth and twentieth centuries); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 8–9 & n.41 (2008) (arguing that "international law scholars have never wholly rejected natural law theory" and that "there is much about international law that transcends the material, positive acts such as consent").

183. *See* DAVID J. BEDERMAN, SPIRIT OF INTERNATIONAL LAW 1–20 (2002); Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243, 1252–53 (2004).

law exists as a settled proposition is by reference to nations' common practices.[184]

If that is so, the content of international law cannot be determined merely from abstract principles and analogies. If the question is what nations have tacitly adopted through their conduct with respect to indirect investor liability, the only sound approach is to investigate what nations have actually done with respect to investor liability.[185] Other approaches are mere speculation as to what rule nations might adopt. To be sure, if we can establish what nations have done (and thus tacitly agreed to do) with respect to individuals' responsibility for war crimes of other associated individuals—as *Furundžija*, *Musema*, and *Vasiljević* purported to do—we can speculate that nations might think (a) that generally applicable abstract principles could be derived from that practice; and (b) that those abstract principles would apply to investor liability in a particular way. But until we see nations actually apply these principles, we can make no more than a guess.

Of course, we can be very confident in our guesswork if there is no material difference in the policies and value judgments in play in the first situation and the policies and value judgments in play in the second. If the law condemns a person for stealing a red car, we can be confident it also would condemn a person for stealing a blue car. Or, to take an example from the indirect liability cases, if international law condemns a person for driving prisoners to a location where it is known they are to be executed (the *Schonfeld* case), presumably it will also condemn a person for escorting prisoners on foot (*Vasiljević*) and—with only a slight extension—for holding prisoners in a place where it is known they will be raped (*Furundžija*). But once important new policies and value judgments are introduced, we cannot be confident about how they will be incorporated (even if we have strong views about how they should be incorporated).

Applied to investor liability, these observations suggest two necessary lines of inquiry. The first is to ask whether there is an existing international practice of indirect investor liability, or something quite similar to it. The answer appears to be no. Only a few Nazi-era cases—principally the *Zyklon B* case and *von Weizsaecker*—have facts even arguably comparable; they reach different results, and their theoretical and factual bases are not fully articu-

184. *See, e.g.*, THOMAS J. SCHOENBAUM, INTERNATIONAL RELATIONS—THE PATH NOT TAKEN: USING INTERNATIONAL LAW TO PROMOTE WORLD PEACE AND SECURITY 67–68 (2006) (arguing that international law cannot exist unless based on consent).

185. For the classic methodological approach, see The Paquete Habana, 175 U.S. 677 (1900) (evaluating international law rules on blockade as applied to fishing boats by reference to prior treatment of fishing boats in blockade situations). More recent discussions are to the same effect. *See* United States v. Yousef, 327 F.3d 56, 90–98 (2d Cir. 2003) (emphasizing practices of nations as the touchstone for determining customary international law); Flores v. Southern Peru Copper Co., 414 F.3d 233, 250 (2d Cir. 2003) (noting that "the usage and practice of States—as opposed to judicial decisions or the works of scholars—constitute the primary sources of customary international law.").

lated.[186] The ICTY and ICTR decisions that have been the subject of much judicial debate in the leading ATS cases involve distinct facts: most if not all of them, like *Furundžija* itself, concerned individuals acting together in a joint criminal paramilitary enterprise according to a common plan to violate international law, with the defendants acting as direct participants in the offenses for which they were convicted and sharing the broader criminal intent of the group.[187] At best, investor liability appears to be an area of unsettled and emerging law with little common national or international practice.[188]

The second inquiry is whether patterns of practice in other areas that are more fully developed—such as prosecution of the kind of offenses present in *Vasiljević* and *Furundžija*—generate the same constellation of policies and value judgments despite their distinct facts. Again, the answer appears to be no. As an initial matter, the factual contexts, including the defendant's proximity to the abuses and the relationship between the perpetrators and the indirect-liability defendants, are distinct. Reasonable people could disagree as to the moral and practical implications of these contextual differences.

Moreover, the policy implications are materially distinct. Indirect investor liability is controversial in part because of its uncertain effect on international economic development. Taken as a whole, investor liability claims seem to represent a substantial potential threat to foreign commerce and investment in developing nations. At least under their broadest versions, they may require no more investor wrongdoing than simply investing in nations whose governments commit known human rights abuses. Even if some further wrongdoing is ultimately required, it is hard to know in advance what acts would trigger liability or insulate an investor from it; the inquiry seems highly fact-intensive and subject to substantial litigation. As a result, if the suits become sufficiently widespread and successful, the per-

186. *See supra* notes 150–152 and accompanying text. Among other things, in the *Zyklon B* case apparently the defendants had not only supplied poison gas but agreed to train SS units to use it on confined human beings, indicating that their actions were "specifically directed" to facilitating the abuses; nothing similar could be shown in *von Weizsaecker*. *See* Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶¶ 102, 135 (Appeals Chamber, Feb. 25, 2004) (requiring that actions be "specifically directed" to facilitating abuses). R

187. *See* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 333–36 (2d Cir. 2007) (Korman, J., concurring). This fact pattern is apparent in all the prominently cited ICTY cases, including *Furundžija*, *Tadić*, and *Vasiljević*, as well as ICTR cases such as *Musema*. It is not clear if any ICTY/ICTR indirect liability cases fall outside the pattern. Whether or not this provides a doctrinally distinct category of liability, *see* WERLE, *supra* note 157, at 123 (suggesting that it does), it surely represents a *factually* distinct situation. R

188. *See* 1 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: FACING THE FACTS AND CHARTING A LEGAL PATH 2 (2008) (noting "discussions about whether and how to adapt the international human rights system so that it holds not only governments, but also companies, accountable"); *id.* at 3 (noting "considerable confusion and uncertainty about the boundaries of [the concept of corporate complicity] and in particular when legal liability, both civil and criminal, could arise").

ceived costs and risks of developing-world ventures may rise and such investment may be substantially deterred.[189]

One response, of course, is that investment in abusive regimes *should* be deterred, as a means of encouraging those regimes to change their approach or ultimately undermining them and providing for their replacement. But there is substantial debate over the best way to encourage abusive governments to reform. While one theory is that foreign investment should be limited, another is that foreign investment should be encouraged, on the ground that human rights protection is highly correlated with economic development; a third theory is that limitations on investment should be flexible and calibrated to achieve maximum impact depending on the particular situation. For example, the 1980s witnessed an intense public debate over how best to pressure apartheid South Africa, with substantial segments of opinion (including the U.S. government) concluding that significant engagement provided the best leverage.[190] Similar debate occurred more recently with respect to Burma,[191] and debate continues over whether China provides an opportunity to use investment and development for positive ends or represents a regime too oppressive to justify engagement.[192] Actual U.S. government policy reflects a combination—perhaps not a logical combination—of these approaches.[193]

A further response might be that investor liability suits target only the most abusive regimes, where (despite debate in other contexts) all would agree that investment is inappropriate. However, neither premise of this argument is correct. Nothing in the theory or practice of investor liability suits limits them to the most abusive regimes. Even relatively isolated incidents of abuse could give rise to a claim, if the abuse itself violated international law. Further, it is not the case that we can readily agree on complete

189. *See* Brief of National Foreign Trade Council et al. as Amici Curiae in Support of Petitioners at 7, American Isuzu Motors, Inc. v. Ntsebeza, 128 S.Ct. 2424 (2008) (No. 07-919), 2008 WL 437020; Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 370–73 (2008) (arguing that corporate ATS litigation may cause efficient investors with U.S. contacts to be replaced by inefficient investors without U.S. contacts, leading to a decline in general welfare).

190. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (imposing only limited trade sanctions on South Africa); Kevin Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987) (discussing debate between the U.S. government, which favored engagement, and state and local governments that favored withdrawal of investments).

191. *See* Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub. L. 104-208, 110 Stat. 3009, § 570 (1996); Executive Order 13,047, Prohibiting New Investment in Burma, 62 Fed. Reg. 28,301 (May 20, 1997); *see also* Crosby v. National Foreign Trade Council, 530 U.S. 363, 377–78 (2000) (contrasting "calibrated" federal approach with stronger sanctions adopted at local level).

192. *See* Colin L. Powell, *The Promise of China Trade*, WASH. POST, June 1, 2001, at A31 ("Trade with China is not only good economic policy; it is good human rights policy . . . .").

193. For example, as discussed below, the United States maintains an almost total ban on investment in Cuba, in large part grounded on the Castro regime's human rights record. It has adopted a flexible approach toward Burma (Myanmar) in response to the sort of abuses that prompted the *Unocal* litigation. *See supra* note 101. It imposes essentially no human-rights-related restrictions on trade with China despite substantial reports of abuses. All of these policies are, of course, controversial. R

disengagement from the most abusive regimes, nor how such regimes might be identified, as the intense debates over these matters reflect.

To highlight these points, consider the situation of Cuba. The United States maintains a near-total ban on economic relations with Cuba. Particularly after the end of the Cold War, the U.S. policy has been justified on the grounds that it will encourage the emergence of a less abusive regime.[194] That proposition, though, is controversial: lifting the embargo and allowing foreign investment in Cuba would arguably lead to less abusive conditions.[195] Other nations, especially in Europe, have proceeded on that theory, and their companies have made substantial investments in Cuba.[196] The argument for economic engagement may yet prevail in the United States, especially if a post-Castro regime indicates flexibility on human rights. However, although Cuba is far from the world's most abusive regime, it seems likely that violations of human rights protected by international law occur there and would not cease immediately even if the embargo were lifted. As discussed above, the potential investor liability under the Helms-Burton Act for "trafficking" in confiscated Cuban property has proved controversial and may deter investment in Cuba.[197] An expansive version of ATS investor liability could reproduce Helms-Burton on a larger scale, allowing claims to be brought either against European companies currently operating in Cuba or potentially against U.S. investors who undertake Cuban operations after the blockade is lifted. Without attempting to identify the best policy toward Cuba, it should be easy to see that this matter is highly controversial, and that it directly implicates the normative issues underlying investor liability litigation.

These economic development considerations simply are not present in *Vasiljević*/*Furundžija*-type prosecutions. To at least some people, they will likely suggest that a narrower standard of indirect liability might be more appropriate in investor liability cases than in individual war crimes prosecutions, where similar tradeoffs do not exist.[198] This is not to say that *Vasiljević*/*Furundžija*-type prosecutions are not supportive of indirect investor

194. *See* Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114 § 3, 110 Stat. 785 (1996) (adopting various policy statements reflecting this goal).

195. *See* Alberto Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. Int'l L. & Foreign Aff. 199, 253–54, 265–68 (2007).

196. *See* Wolf, *supra* note 72, at 418–19 (indicating Germany's preference for economic engagement with respect to Cuba). R

197. *See supra* text accompanying notes 88–95; *see also* Daniel Erickson, *The Future of American Business in Cuba: Realities, Risks and Rewards*, 14 Transn'l L. & Contemp. Probs. 691, 714 (2004). R

198. It is not unusual for a higher standard of liability to be established in one area than in another based on differing policy implications. For example, the U.S. Constitution's First Amendment, under its modern interpretation, sharply limits liability for defamation of public figures while allowing broader liability for similar defamation of non-public figures, based on the costs of an expanded liability regime in the former situation. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see also* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994) (declining to assume Congress would intend accomplice liability in one area just because it had established accomplice liability in other areas).

liability to any extent; it is only to say that reasonable people *might* not equate them. Once the latter proposition is conceded, one cannot say that *Vasiljević*/*Furundžija*-type prosecutions necessarily establish the practices of nations with respect to investor liability.

It is important to repeat that this analysis applies only to *identifying* settled international law. *Developing* customary international law for the future is a different matter and may proceed much more in the manner suggested by Judge Pregerson, Judge Katzmann, and other participants in the investor liability debate. If we can identify a pattern of international practice and distill an abstract principle from it, we can then argue that application of that abstract principle should yield a particular result in another area. That argument, though, is a proposal for an extension of international law, not an identification of existing international law. It will become international law if it is persuasive—that is, if nations adopt it in their practices.

It seems plausible to view the debates over indirect investor liability in this latter way—as proposals for the development of international law. We see principles in a factually distinct area (accomplice liability for individual war crimes), and debate whether and how much these principles should extend to indirect investor liability. The answer to that debate will not be found in logic, nor in which arguments appear persuasive to any particular commentator, judge, or individual nation, but in the subsequent practices of all nations.

4. *A Return to Universal Jurisdiction*

The foregoing subsections are in a sense merely prologue to this Article's ultimate conclusion. From an international perspective, nothing prevents the United States from adopting a contested view of the international law of investor liability. Whether that view actually becomes settled international law depends upon the subsequent actions of all nations. But international law could never advance if nations could not individually propose and adopt views not reflecting settled consensus.

To be sure, there is reason to think that the U.S. Supreme Court's decision in *Sosa*[199] and the structure of U.S. constitutional government more generally[200] disfavor using the ATS and related statutes as vehicles to advance contested views of international law. In particular, *Sosa*'s emphasis on clear definition of international rules as a prerequisite for finding an ATS cause of action, its description of the political branches as the more usual fora for advancing debated claims of international law, and its conclusion that Congress in the ATS had not authorized courts to seek out "new and debatable violations of the law of nations"[201] all indicate an attitude of judi-

199. Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 732–33 & n.21 (2004).

200. *See* Bradley et al., *supra* note 24, at 869; Ramsey, *Structural Concerns*, *supra* note 19, at 361–80. R

201. *Sosa*, 542 U.S. at 728.

cial restraint toward international law claims. These points, however, are matters of U.S. domestic law and policy, not international law.

What international law requires in this context is that the United States not impose contested views of international law on those outside its prescriptive jurisdiction. In this way, the analysis returns to the principle of universal jurisdiction. From an international perspective, the United States is free to impose indirect investor liability upon *its own* corporations and nationals. But the United States must be cautious in imposing investor liability on others. In particular, requiring a showing of universal jurisdiction over the alleged offense assures a broad international consensus on the substance of the rule and on the way in which it can be punished.

The foregoing discussion indicates a lack of international consensus regarding the substance of indirect investor liability. Even if there were consensus, however, it is important to remember that international consensus on misconduct *is not sufficient* to impose U.S. liability on non-U.S. defendants for non-U.S. conduct. Rather, under principles of prescriptive jurisdiction, a plaintiff should be required to show both that international law proscribes the conduct *and* that international law grants universal jurisdiction to redress the conduct.[202]

This showing seems especially difficult to make with respect to investor liability. There does not appear to be any sustained general practice of universal jurisdiction for aiding and abetting offenses in national courts.[203] There certainly is not any national practice of universal jurisdiction for indirect investor liability.[204] There is not even any practice at the level of international tribunals with respect to indirect investor liability.[205]

Further, there are reasons to think that primary conduct and secondary conduct might not be regarded as equivalently heinous crimes. The ICTY's jurisprudence, for example, reflects the European view that aiding and abetting is a lesser crime. In *Vasiljević*, for example, the trial chamber convicted the defendant as a co-perpetrator of the primary offense (murder of prisoners). The appeals chamber reversed the conviction on the ground that the defendant had not actually intended to kill the prisoners, but the appeals chamber found that the defendant could be convicted as an accomplice. The accomplice conviction, the court said, required reduction of the defendant's

202. *See supra* Part III.

203. Prosecution of secondary offenses in international courts such as the ICTY does not provide support here, because it says nothing about unilateral prosecutions. The latter are, for obvious reasons, much more problematic in terms of conflicting sovereignty.

204. Speaking of the ATS's application to corporate liability, a report of the International Commission of Jurists (a non-governmental organization) describes the U.S. approach as "unique." 3 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: CIVIL REMEDIES 6 (2008).

205. 2 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES 56–58 (2008).

sentence as a result of conviction for a lesser offense.[206] The ICC statute, whose provisions indicate what a large number of nations regard as the most heinous crimes, appears to encompass only a limited scope of accomplice liability.[207] Under U.S. federal law, the Supreme Court has found that secondary liability does not follow automatically from Congress' creation of primary liability and will not exist unless Congress specifically directs it.[208] And there are surely plausible moral arguments that—especially without shared intent—the culpability of the accomplice is less than that of the principal.

In sum, one cannot assume that secondary liability is subject to universal jurisdiction just because the principal's crime is. No widespread national practice supports such an assumption, either in the abstract or in the specific context of investor liability. Thus, even if one concludes that indirect liability appropriately extends to investors, U.S. courts cannot, consistent with international law, extend it to non-U.S. defendants for non-U.S. conduct.

IV. Conclusion

In investor liability cases under the ATS and similar laws, U.S. courts treat U.S. and non-U.S. defendants as similarly situated. As a matter of international law, they are not. Under the international law of prescriptive jurisdiction, the United States generally can create liability for non-U.S. conduct only with respect to its own nationals or for actions that have a material connection to the United States. Absent such connections, U.S. prescriptive authority depends on the existence of universal jurisdiction.

International law recognizes universal jurisdiction over no more than a handful of especially heinous acts. Universal jurisdiction depends on overwhelming substantive consensus on the scope and gravity of the offense, along with what Justice Breyer has called a "procedural consensus" that all nations may impose punishment without regard to their connection to the offense.[209] Although foundational ATS cases such as *Filártiga* recognized universal jurisdiction as a prerequisite to imposing U.S. liability on non-U.S. defendants, subsequent cases, especially in the area of investor liability, have lost sight of it.

Applied to investor liability cases, principles of prescriptive jurisdiction pose a formidable obstacle to suits against non-U.S. defendants. Most of those cases depend on establishing indirect liability (that is, that the inves-

206. Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶¶ 181–82 & n.291 (Appeals Chamber, Feb. 25, 2004). The U.S. Model Penal Code regards secondary liability as equivalent to the culpability of the principal, but that arises from the Model Penal Code's requirement of shared intent. *See supra* notes 160–162 and accompanying text. R

207. *See supra* notes 174–176 and accompanying text. R

208. Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994) (declining to find civil accomplice liability under the Securities Exchange Act of 1934).

209. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

tor is responsible for misconduct of the host government). There is no settled international practice of indirect liability in factual settings comparable to those presented by most investor liability claims; the practices on which the arguments principally rely arise in factually and normatively distinct contexts, such as rogue paramilitary organizations. Customary international law cannot be identified by analogy (unless the analogy is compelling) because it depends upon the actual conduct of nations, not upon contestable assessments of what nations will or should do. No consensus of nations—indeed, it would appear, no other nation—has actually adopted the proposed U.S. approach to investor liability. Thus investor liability, as pursued in U.S. courts, is a proposal for an extension of international law, not a description of existing international law.

But even if a substantive consensus on investor liability could be demonstrated on the basis of factually and normatively distinct cases, that would still not establish the existence of universal jurisdiction, which exists only for the most universally recognized and condemned offenses. There appears to be no widespread practice of invoking universal jurisdiction to punish indirect offenses in national courts, and there clearly is no consensus with respect to universal jurisdiction for indirect investor liability.

Of course, U.S. courts must apply U.S. law, even if it runs counter to international principles. But U.S. courts ordinarily construe broadly worded statutes not to violate international law if another construction is available.[210] The U.S. laws under which investor liability is sought, such as the ATS, do not unambiguously direct their application in violation of international law. In particular, because the ATS was enacted to assure U.S. respect for international law,[211] it would be especially odd if U.S. courts violated international law in implementing it.

As a result, except in unusual cases, U.S. courts lack authority to impose investor liability on non-U.S. defendants. In any event, before they do so, U.S. courts need to revise their approach to non-U.S. defendants to assure that they act with a basis in the international rules of prescriptive jurisdiction.

210. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

211. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).