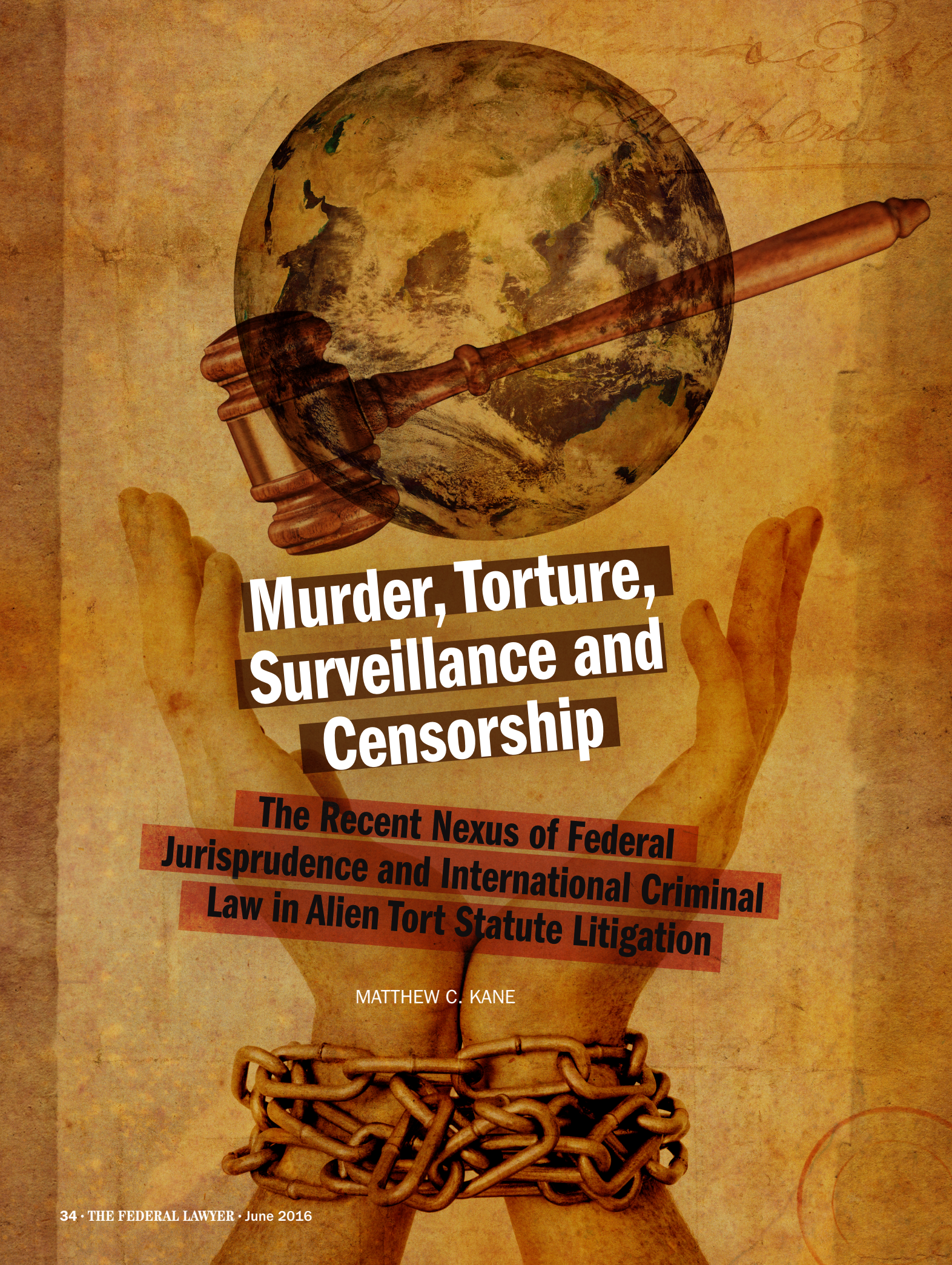

Murder, Torture, Surveillance and Censorship

The Recent Nexus of Federal Jurisprudence and International Criminal Law in Alien Tort Statute Litigation

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The stuff of nightmares became reality for Falun Gong practitioners in China. A spiritual movement in its infancy,[1] Falun Gong became the focus of the Chinese government's ire. There is no adequate explanation for why the government determined that Falun Gong was such a threat. While it did spread with extraordinary rapidity across geographic, generational, and social divides, it appears little different than qigong and tai chi, which have been practiced for generations. Certainly the increased focus on self-cultivation, based on the principles of truthfulness, compassion, and forbearance, did not justify the increased attention.

But within just a few short years, Falun Gong devotees were facing extreme persecution. Reports include more than 2,000 deaths, tens of thousands of detentions, often at labor reeducation camps, and various forms of torture.[2] Perhaps even more shocking were the accusations of organ harvesting while victims were conscious and unsedated.[3] While the precise extent and nature of the Chinese government's conduct is debatable, the U.S. Congress, the State Department, and numerous other sources have condemned the persecution of the Falun Gong.[4]

Plainly lacking a meaningful forum for legal redress within China, Falun Gong advocates filed suit in the Northern District of California with Cisco Systems, the technological giant, squarely in their crosshairs. The plaintiffs contended that:

> Cisco knowingly, purposefully and intentionally designed, implemented and helped to maintain the Golden Shield system [a surveillance and internal security network] in collaboration with the Party and Public Security officers in regions across China, under the direction and control of Defendants in San Jose … Cisco knew and intended that the apparatus would be utilized … to eavesdrop, tap, and intercept the communications of Falun Gong believers [and] apprehend, interrogate, ideologically convert, and in other ways torture, arbitrarily arrest, and detain them because of their religious beliefs, with the specific purpose of suppressing Falun Gong believers.[5]

So just how does one go from persecution in China to litigation against a U.S. technology firm in California?

The Evolution of the Alien Tort Act

To answer the question, we must begin with a look back to the birth of our nation. In 1789, the U.S. Congress enacted the Alien Tort Statute (ATS). Codified at 28 U.S.C. § 1350, the ATS reads 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." It appears to have received little attention at the time of its enactment, perhaps intended as a response to contemporary wrongs against foreign ambassadors,[6] and lay dormant for nearly two centuries.

However, in the late 1970s, the ATS was successfully used by plaintiffs to obtain a judgment against a Paraguayan police official accused of torturing his relative to death in retaliation for the family's political activities. There, the Second Circuit determined that the act should be construed "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[7] On remand, the district court ultimately awarded the plaintiffs a total judgment of $10,385,364.[8]

A quarter century later, as the ATS continued to receive broader application in the lower courts, the U.S. Supreme Court first addressed the statute in detail, considering whether the plaintiff could state a cause of action arising from a CIA-staged abduction in Mexico and covert rendition to the United States. In *Sosa v. Alverez-Machain,*[9] the Court rejected the proposition that the ATS created a new cause of action in favor of a reading, similar to the view espoused by the Second Circuit two decades before, that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the laws of nations."[10] Consequently, what was intended by the phrase "law of nations" became the primary concern. At the time of the enactment of the ATS, the Supreme Court reasoned, only three primary offenses would have been considered: "violation of safe passages, infringement of the rights of ambassadors, and piracy."[11] Limiting actions to those offenses did not reflect the present state of the "law of nations;" however, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[12] Thus the Supreme Court endorsed the Second Circuit's determination that "for purposes of civil liability, the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*—an enemy of all mankind"—while finding that the false arrest accusations in the case before it were insufficient.[13] Ultimately, *Sosa* held that the ATS permitted suits for a very limited class of torts, opening the debate for what would or would not qualify as a violation of customary international law.

A decade later, the Supreme Court again took up the application of the ATS in *Kiobel v. Royal Dutch Petroleum Co.*[14] Refugees had sued Royal Dutch Petroleum and Shell Transport and Trading Company for atrocities related to oil exploration in Ogoniland, in the delta region of Nigeria. The plaintiffs contended that the companies had persuaded the Nigerian government to rape, kill, and beat villagers opposed to company efforts and then directly supported those committing the atrocities by providing staging areas, food, transportation, and compensation. The Supreme Court was plainly concerned, at least in part, about the potential for diplomatic strife if the U.S. courts became involved in the domestic affairs of other countries. Consider, for example, the case of the Falun Gong: One can imagine that U.S.-Chinese relations would be challenged if a jury determined that the Chinese government had committed atrocities against its people, a necessary predicate to a U.S. company assisting in those atrocities. Regardless of motivation, the Court, without further delineating the scope of the "law of nations," greatly restricted the application of the ATS by excluding cases where the "relevant conduct" took place outside the United States. Thus, there

must exist claims that "touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application."[15]

International Criminal Law and the Alien Tort Statute Today

For those now seeking redress under the ATS, four elements must be alleged: (1) they are aliens, (2) they are pressing a tort action, (3) the tort was a violation of the law of nations or a treaty of the United States, and (4) the claims touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality.[16] While alien status and tort action determinations are seemingly straightforward, questions over what is a violation of the law of nations—i.e., present customary international law—as well as what "touches and concerns" the United States are now central to ATS litigation.

Customary international law is comprised of "rules that states universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[17] Sources of customary international law "include international conventions, international customs, 'the general principles of law recognized by civilized nations,' 'judicial decisions,' and the works of scholars."[18] Specifically, courts and parties have relied on international criminal law principles derived from the jurisprudence of the International Military Tribunal (Nuremberg), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Special Court for Sierra Leone (SCSL), as well as the Rome Statute for the International Criminal Court (ICC).[19]

Looking to these sources, it is clear that the commission of certain acts enumerated in the foundational documents of each court would meet the customary international law standard and serve as a basis for tort liability. Such violations would include genocide (enumerated acts such as killing members of a national, ethnic, racial, or religious group, with the intent to destroy, in whole or in part, that group), crimes against humanity (murder, enslavement, deportation or forcible transfer, torture, rape, or other inhumane acts, committed as part of a widespread [or] systematic attack directed against a civilian population), and war crimes (including various acts such as murder, mutilation, and cruel treatment against persons taking no active part in the hostilities).[20] In addition, courts have not limited themselves to the core crimes embodied in the various international criminal tribunal statutes, at least where there is little controversy as to the heinous nature of the alleged acts. Thus, for instance, in *Doe I v. Nestle,* the Ninth Circuit wasted little effort in finding that slavery is universally prohibited and thus grounds for an ATS claim, relying on precedent from the tribunals.[21] However, none of the tribunals include a stand-alone crime of slavery (although, slavery might well be the predicate act, which coupled with a specific mens rea, could be a violation of one of the enumerated crimes).

Other sources would likely be necessary to determine whether nonenumerated conduct would rise to the level of a violation of a customary international law. For instance, in *Filartiga*, the Second Circuit examined the issue of torture and concluded: "In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the of nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[22] *Sosa,* in turn, relied on *Filartiga's* holding that torture was the equivalent of other violations of the law nations as well as Congress' passage of the Torture Victim Protection Act.[23] In addition, Justice Stephen Breyer's concurrence noted that torture was part of universally condemned behavior for which universal jurisdiction existed, citing various international cases and authoritative texts.[24] Conversely, courts have rejected "terrorism" as a violation that would trigger the ATS, finding the term to be too broad and lacking international consensus.[25]

Accessorial Responsibility Under Customary International Law

Of particular importance in current litigation is a question not about the particular atrocity alleged and whether it is a violation of the law of nations but rather what conduct gives rise to individual criminal responsibility under customary international law. In addition to the direct liability of the individual committing the act or expressly ordering the commission of genocide, actors may be held accountable under other theories such as conspiracy or, of great instant importance, aiding and abetting in the commission of the atrocity. In regard to the latter theory, the mens rea component has resulted in a split among the circuits, with the Ninth Circuit likely to espouse its position when ruling on the Falun Gong plaintiffs' appeal.

David Scheffer, former U.S. Ambassador at Large for War Crimes Issues and now professor of law and director of the Center for International Human Rights at Northwestern Pritzker School of Law, has submitted amicus briefs on this issue in a number of ATS cases, including *Doe I v. Cisco.* Scheffer is in a rather unique position, having negotiated the statutes for the ICTR, ICTY, SCSL, ECCC, and the ICC—the very sources relied upon to determine customary international law—on behalf of the United States. Scheffer notes that "[m]ultinational corporations sued for atrocity crimes overseas typically are investigated for complicity in the commission of such crimes, which is why a pragmatic standard for aiding and abetting, one that reflects the reality of how such heinous assaults on humankind actually are plotted and carried out, is so important for federal courts to understand."[26]

The Second and Fourth Circuits have applied a "purpose" standard, relying primarily on language in the Rome Statute that, read without context, arguably imposes liability on a person who "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission.…"[27] Meanwhile, the D.C. Circuit and the Eleventh Circuit have both determined that aiding and abetting liability requires a simple "knowledge" standard—that is, the actor "knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance."[28] Additionally, without actually deciding the question, the Ninth Circuit has clearly suggested that the knowledge standard is appropriate, noting its use at Nuremberg and that it "has also been embraced by contemporary international criminal tribunals."[29]

While acknowledging the existence of an outlier case, Scheffer's amicus brief in *Doe I v. Cisco* lists 10 cases from various tribunals that find the accessorial mens rea simply requires knowledge.[30] Specific quotes from the ICTY—"the mens rea is the knowledge that these acts assist the commission of the offense"—and the SCSL—"the accused must have knowledge that his acts or omissions assist the perpetrator in the commission of the crime"—provide strong evidence of the appropriate state-of-mind standard required under customary international law.[31]

Scheffer also addresses the "purpose of" language in Article

25(3)(c) of the Rome Statute relied on by the Second and Fourth Circuits. He notes that: (1) it is not necessarily a reflection of customary international law, as the document was the subject of extensive negotiation and compromise (of which he was personally a part); and (2) it must be read in conjunction with Article 30, entitled "Mental Element," which provides that the necessary intent exists where, "[i]n relationship to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[32] Thus, Scheffer unequivocally has concluded that "[t]he knowledge standard for aiding and abetting has become customary international law."[33]

The Future of International Criminal Law in Federal Courts

Soon, the Ninth Circuit will determine whether the Falun Gong practitioners can assert a claim in federal court against a company purportedly responsible, at least in part, for the atrocities committed against them. Similar litigation continues throughout the United States, including suits against Exxon based on conduct of Indonesian soldiers used for security at certain natural gas facilities; a Chilean Army lieutenant for the torture and murder of a family member; and a conservation group for piracy as a result of their attempts to halt whaling activities.[34]

As it seems unlikely the split between the circuits on the mens rea of aider and abettor liability will resolve itself, the Supreme Court will likely address the standard in the near future. In the meantime, as Scheffer notes, the knowledge standard "is the standard that corporate counsel should be focused on when advising clients (including before they get into trouble) and the one that some of the circuits are enforcing." Regardless of how this particular issue is resolved, international criminal law will continue to maintain a central role in ATS litigation. Moreover, while the ATS provides perhaps the most broadly litigated aspect of international criminal law in the federal system, it is certainly not the only means by which such issues are brought before our judiciary. A remarkably nuanced—albeit incomplete—account of the genocide in Rwanda can be gleaned from federal opinions,[35] as can details of other atrocities through criminal prosecutions, immigration appeals, and civil litigation. In addition, war crimes and other similar acts are regularly addressed in court-martials, which can be subject to review by the Supreme Court in limited circumstances, and litigation relating to the military commissions has directly involved international criminal law.[36]

As long as the law of nations remains amorphous—as it must, given its continued evolution and diverse sources—its application in our domestic courts will be challenging. The interconnectivity of our world will only continue to increase; thus, practitioners should be aware, at a minimum, of the existence of international criminal law and the potential for its appearance in federal litigation.

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Endnotes

[1]Master Li Hongzhi's seminal text *Zhuan Falun* was published in 1992 and has become widely disseminated around the world. It is *available at* en.falundafa.org/eng/pdf/ZFL2014.pdf.

[2]A. Jacobs, *China Still Presses Crusade Against Falun Gong*, N.Y. Times, Apr. 27, 2009, www.nytimes.com/2009/04/28/world/asia/28china.html; L. Lemish, *Why Is Falun Gong Banned*, New Statesman, Aug. 19, 2008, www.newstatesman.com/blogs/the-faith-column/2008/08/falun-gong-party-chinese; Amnesty International, *Torture in China: Who, What, Why and How*, Nov. 11, 2015, www.amnesty.org/en/latest/campaigns/2015/11/torture-in-china-who-what-why-and-how.

[3]*Falun Gong, Organ Harvesting in China, and the Human Rights Case for an Independent Congressional Investigation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on International Relations,* 109th Cong. (2006) (statement of K. Allison, Director, University of Minnesota Medical School Program on Human Rights and Health).

[4]*See* Pub. L. No. 106-286, § 202, 114 Stat. 880, 893 (2000) (citing to the Department of State's 1999 Country Reports on Human Rights Practices for the People's Republic of China). There is some recent suggestion that the widespread persecution may be coming to an end, as those most responsible appear to have been removed from power. H. He, *News Report Suggests Chinese Leadership Disavows Persecution of Falun Gong*, Epoch Times, Jan. 21, 2016, www.theepochtimes.com/n3/1947371-news-report-suggests-chinese-leadership-disavows-persecution-of-falun-gong.

[5]*Doe I et al. v. Cisco Systems Inc. et al.,* Case No. 5:11-CIV-02449-EJD, Order Granting Motion to Dismiss, No. 117, Sept. 5, 2014.

[6]*Kiobel v. Royal Dutch Petroleum Co.*, --- U.S. ---, 133 S. Ct. 1659, 1666-1667 (2013).

[7]*Filartiga v. Pena-Irala*, 630 F.2d 876, 885, 887 (2d Cir. 1980) (Explaining that the constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.)

[8]*Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

[9]542 U.S. 692 (2004).

[10]*Id.* at 720.

[11]*Id.* at 724.

[12]*Id.* at 732.

[13]*Id., quoting Filartiga,* 630 F.2d at 890.

[14]133 S. Ct. 1659 (2013).

[15]*Id.* at 1669 (Explaining that under analysis, it would reach too far to say that mere corporate presence suffices).

[16]*Doe I v. Cisco Sys.,* No. 117 at 7, (citing *Mwani v. Bin Laden,* 947 F. Supp. 2d 1, 3 (D.D.C. 2013) and *Kiobel,* 133 S.Ct. at 1669).

[17]*Doe I v. Nestle USA Inc.*, 766 F.3d 1013, 1019 (9th Cir. 2014) *cert. denied sub nom. Nestle U.S.A. v. John Doe I*, No. 15-349, 2016 WL 100380 (U.S. Jan. 11, 2016), (quoting *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254, 267 (2d Cir. 2007)).

[18]*Id.*

[19]*Id.* at 1020.

[20]*Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244, 256-257 (2d Cir. 2009).

[21]*Doe I,* 766 F.3d at 1022.

[22]*Filartiga,* 630 F.2d at 880.

[23]*Sosa*, 542 U.S. at 728, 732.

[24]*Id.* at 762.

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Real and lasting progress is achievable principally through the professional and personal contacts made through on-site extended visits. For example, my experiences under the Fulbright exchange program let me accomplish much toward support for democratization and the rule of law in Bulgaria. Shorter, or truncated, experiences, as in Afghanistan, left me with the conclusion that little had been accomplished. The U.S. government can do much better. ⊙

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[25]*In re Chiquita Brands Int'l Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1317 (S.D. Fla. 2011), discussing *Saperstein v. Palestinian Authority,* No. 04-20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006), *Barboza v. Drummond Co.,* No. 06–61527, Slip op., DE 39 (S.D.Fla. July 17, 2007), *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C.Cir. 1984).

[26]Statement on file with author. *See also,* D. Scheffer, *The Impact of the War Crimes Tribunals on Corporate Liability for Atrocity Crimes under US Law*, in Corporate Social Responsibility?: Human Rights in the New Global Economy, (Charlotte Walker-Said & John Kelly eds., Univ. of Chicago Press 2015).

[27]*Aziz v. Alcolac Inc.*, 658 F.3d 388, 397, 400 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *see also,* Rome Statute for the International Criminal Court, Art. 25(3)(c).

[28]*Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005). The D.C. Circuit's current position is unclear, as the seminal case adopting the knowledge standard (*Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 38 (D.C. Cir. 2011)) was vacated in light of intervening changes in governing law regarding the extraterritorial reach of the Alien Tort Statute, *see Kiobel* … and the standard to be applied for aiding and abetting liability, *see Prosecutor v. Perisic,* Case No. IT-04-81-T Judgment (Feb. 28, 2013). *Doe v. Exxon Mobil Corp.*, 527 F. App'x 7 (D.C. Cir. 2013). However, on remand, the district court again concluded that a defendant is only liable for aiding and abetting if they know that their acts assist the commission of the principal offense. *Doe v. Exxon Mobil Corp.*, No. CV 01-1357(RCL), 2015 WL 5042118, at *10 (D.D.C. July 6, 2015).

[29]*Doe I,* 766 F.3d at 1023.

[30]*Doe v. Cisco,* Case No. 15-16909, Dkt. No. 14-1, Motion for Leave to File an Amicus Curiae Brief in Support of Appellants and Reversal (9th Cir. Jan. 11, 2016) at 7. Notably, the outlier case is *Prosecutor v. Perisic,* Case No. IT-04-81-T Judgment (Feb. 28, 2013), the genesis of the confusion in the D.C. Circuit's position. Four of the cases identified by Scheffer post-date that decision, casting significant doubt over any argument that it reflects current customary international law.

[31]*Id., quoting Prosecutor v. Propovi*ç Case No. IT-05-88-A, Judgment, ¶ 1758 (ICTY Jan. 30, 2015) and *Prosecutor v. Taylor,* Case No. SCSL-03-01-T, Judgment, ¶ 487 (SCSL May 30, 2012).

[32]*Id.* at 12.

[33]Statement on file with author.

[34]*Doe v. Exxon Mobil Corp.*, No. CV 01-1357(RCL), 2015 WL 5042118 (D.D.C. July 6, 2015); *Jara v. Nunez*, No. 613CV1426ORL-37GJK, 2015 WL 8659954 (M.D. Fla. Dec. 14, 2015); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, No. C11-2043JLR, 2015 WL 9308296 (W.D. Wash. Dec. 21, 2015).

[35]*See* my recent scholarship on this issue, *The United States as an Essential Forum for Litigating the Genocide in Rwanda*, In the Shadow of Genocide: Memory, Justice and Transformation Within Rwanda (S. Wolfe, T. Ansah & M. Kane eds., forthcoming); author draft *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2652730.

[36]*See e.g., Al Bahlul v. United States,* 792 F.3d 1, 43 (D.C. App. 2015) (Explaining that the plaintiff argued that conspiracy is not an offense under customary international law).