

## AGORA: *KIOBEL*

### ATTORNEY GENERAL BRADFORD'S OPINION AND THE ALIEN TORT STATUTE

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In debates over the scope of the Alien Tort Statute (ATS), one historical document has played an especially prominent role. That document is a short opinion by U.S. Attorney General William Bradford, issued in the summer of 1795, concerning the involvement of U.S. citizens in an attack by a French fleet on a British colony in Sierra Leone.<sup>1</sup> In the opinion, Bradford concluded that “[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States.”<sup>2</sup> He also expressed the view that the actors could be prosecuted for crimes on the high seas, while noting that “some doubt rests on this point” in light of the language of the relevant criminal statute.<sup>3</sup> Finally, he stated—in an obvious reference to the ATS<sup>4</sup>—that

there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .<sup>5</sup>

The Bradford opinion contains one of the few early historical references to the ATS,<sup>6</sup> so it not surprisingly has received a lot of attention. Numerous academic articles, judicial opinions,

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<sup>1</sup> See *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795) [hereinafter Bradford opinion].

<sup>2</sup> *Id.* at 58.

<sup>3</sup> *Id.* at 58–59. The statute in question, the “Act in addition to the act for the punishment of certain crimes against the United States,” was enacted in June 1794 and is also known as the “Neutrality Act.” 1 Stat. 381 (1794). The Neutrality Act prohibited various actions by U.S. citizens, including the conduct of hostilities against nations with which the United States was at peace. Its provisions were generally limited to conduct within the “territory or jurisdiction” of the United States.

<sup>4</sup> As is well known, the ATS originated as a provision in section 9 of the Judiciary Act of 1789 and provided that the federal district courts would “have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” 1 Stat. 73, 77 (1789). The current (similarly worded) version of the ATS is set forth at 28 U.S.C. §1350.

<sup>5</sup> Bradford opinion, *supra* note 1, at 59.

<sup>6</sup> The ATS is also mentioned briefly in several early district court decisions. See *Bolchos v. Darrel*, 3 F.Cas. 810, 810 (D.S.C. 1795) (No. 1,607) (suggesting that the ATS provided an alternate basis for jurisdiction, in addition to admiralty jurisdiction, in a dispute with a U.S. citizen over ownership of slaves on board a captured Spanish ship seized by a French captain and brought into a U.S. port); *McGrath v. Candalero*, 16 F.Cas. 128, 128 (D.S.C. 1794)

and litigation briefs have invoked the Bradford opinion, for a variety of propositions.<sup>7</sup> Reliance on the opinion has increased since the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, in which the Court cited the opinion in support of the proposition that the ATS provides jurisdiction over certain common law causes of action derived from the law of nations.<sup>8</sup> As an illustration of its perceived significance, both sides discussed the opinion in the oral argument before the Supreme Court in the first hearing in the pending ATS case, *Kiobel v. Royal Dutch Petroleum Co.*<sup>9</sup>

Bradford noted in his opinion that he had "perused and considered" both a "communication from his Britannic Majesty's minister plenipotentiary to the Secretary of State" and an accompanying memorial.<sup>10</sup> After conducting archival research in the records of the U.S. Department of State and the British Foreign Office, I have obtained copies of these two documents, both of which I have transcribed as appendices to this essay.<sup>11</sup> I have also discovered additional diplomatic material relating to the dispute, which I will summarize and quote below. While these documents do not contain any "smoking guns," they do provide additional context for understanding the potential significance of the Bradford opinion for contemporary debates over the scope of the ATS.

This essay begins by describing two of the current ATS debates—the application of the ATS to conduct that occurs outside the United States, and the allowance of aiding and abetting liability under the ATS—and how the participants in those debates have invoked the Bradford opinion. It then considers the implications of the additional documents that I have found for those debates, and it reaches two conclusions. First, the Bradford opinion provides support for the extraterritorial application of the ATS to the conduct of U.S. citizens, but it does not suggest that such application would be proper with respect to the conduct of foreign citizens. Second, the opinion does not provide support for aiding and abetting liability, at least as that concept has been applied in modern ATS litigation. The essay concludes by noting an important connection between the ATS and U.S. responsibilities under international law.

(No. 8,810) (reasoning that a U.S. citizen suing an alien for a tort can seek attachment, and noting by analogy that "[i]f an alien sue here for a tort under the law of nations or a treaty of the United States, against a citizen of the United States, the suit will be sustained"); *Moxon v. The Fanny*, 17 F.Cas. 942, 948 (D. Pa. 1793) (No. 9,895) (noting in passing, in a case involving the seizure in U.S. waters of a British ship by a French privateer, that a suit for restitution of property was not a suit for a "tort only" under the terms of the ATS).

<sup>7</sup> See *infra* part I.

<sup>8</sup> See 542 U.S. 692, 721 (2004).

<sup>9</sup> See Transcript of Oral Argument at 10–11, 30, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 28, 2012). The *Kiobel* case involves the issue of corporate liability under the ATS. After the argument, the Court directed that the case be reargued during the October 2012 Term and that the parties address the following additional issue: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 1738, 1738 (Mar. 5, 2012). A continually updating set of documents on the Supreme Court proceedings in *Kiobel* is available at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al>.

<sup>10</sup> Bradford opinion, *supra* note 1, at 58.

<sup>11</sup> Both documents—the letter from George Hammond to Edmund Randolph (June 25, 1795) (Hammond letter) and the memorial (Macaulay/Tilley memorial), included here as appendices 1 and 2, respectively—are handwritten and contained in the U.S. National Archives II in College Park, Maryland, on Microfilm M-50, Roll 2, in the Department of State Records of "Diplomatic Correspondence, Notes to the Department from Foreign Legations and Ministers and Embassies in Washington." As this essay was being prepared for publication, the petitioners in *Kiobel* submitted a supplemental brief that also contains transcriptions of these documents. See Petitioners' Supplemental Opening Brief, apps. A, B, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 6, 2012).

## I. TWO CURRENT ATS DEBATES

This part describes two contemporary debates concerning the scope of the ATS—relating to extraterritoriality and aiding and abetting liability—and it explains how the Bradford opinion has been invoked in those debates.

### *Extraterritorial Application*

When the ATS was enacted, prescriptive jurisdiction (the authority of a nation to apply its laws to regulate conduct) was thought to be highly territorial. An influential Dutch scholar, Ulrich Huber, had written in the 1600s that the “laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.”<sup>12</sup> Echoing Huber and subsequent commentators, the U.S. Supreme Court Justice Joseph Story explained in his conflict of laws treatise that “no state or nation can, by its laws, directly affect, or bind . . . persons not resident therein,” because to do so “would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation.”<sup>13</sup> A potential exception to the territorial nature of prescriptive jurisdiction was for the regulation of a nation’s own citizens. As the U.S. Supreme Court stated in the early 1800s, “the legislation of every country is territorial; that beyond its own territory, *it can only affect its own subjects or citizens.*”<sup>14</sup>

Another exception to territorial limitations on prescriptive jurisdiction concerned the prosecution of piracy. At the time that the ATS was enacted, it was understood that pirates were *hosti humani generis*—enemies of all mankind. As a result, they could be prosecuted wherever they were found, regardless of their nationalities or where their acts of piracy took place.<sup>15</sup> In *Sosa* the Supreme Court surmised that one of the tort actions that historically could have been brought under the ATS was an action for piracy.<sup>16</sup> If so, that would suggest that the ATS was not limited to acts occurring within the United States. A conclusion that the ATS historically could have been used to address piracy would not necessarily show, however, that the ATS also extended to conduct committed within the territory of a foreign sovereign; piracy involves conduct in places outside of any nation’s territorial jurisdiction, such as most notably the “high seas.”<sup>17</sup>

<sup>12</sup> Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*, cited and quoted in Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, 13 ILL. L. REV. 375, 376, 403 (1918–19).

<sup>13</sup> JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC §20 (1834).

<sup>14</sup> *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807) (emphasis added); see also *The Apollon*, 22 U.S. 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens.*”) (emphasis added).

<sup>15</sup> See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (referring to piracy as “an offence against the universal law of society, a pirate being deemed an enemy of the human race”); *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 152 (1820) (stating that persons committing piracy “are proper objects for the penal code of all nations”); see also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 190 (2004) (“For as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century), any nation could try any pirates it caught, regardless of the pirates’ nationality or where on the high seas they were apprehended.”).

<sup>16</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

<sup>17</sup> Congress has the constitutional authority to “define and punish piracies and felonies committed on the high seas.” U.S. CONST. Art. I, §8, cl. 10 (emphasis added). The federal criminal piracy statute is therefore not surprisingly limited to conduct on the high seas. 18 U.S.C. §1651. See also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 72 (1769) (“The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony”).

International norms of prescriptive jurisdiction are less territorial today. Nevertheless, U.S. courts still apply a presumption against extraterritoriality, pursuant to which federal statutes will be construed not to apply to foreign conduct absent clear congressional intent.<sup>18</sup> The Supreme Court has explained that this presumption “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters,”<sup>19</sup> and that it also “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>20</sup> Even when the presumption is inapplicable or is overcome, the Supreme Court has directed that ambiguous statutes should be construed “to avoid unreasonable interference with the sovereign authority of other nations.”<sup>21</sup>

Modern ATS litigation almost always involves conduct that took place outside the United States. Until recently, however, courts were generally not concerned about extraterritoriality when applying the ATS. These ATS cases involve alleged violations of international law, and the perception has been that the application of international law does not raise the same prescriptive jurisdiction issues raised by the extraterritorial application of national law.<sup>22</sup> In addition, some courts and commentators have pointed out that it is not uncommon to adjudicate even purely domestic law torts that occur abroad, pursuant to the common law doctrine of “transitory torts.”<sup>23</sup>

The phenomenon of ATS litigation against corporations has triggered increased attention to the extraterritoriality question because some of the law applied in these cases appears to be

there.”). The original federal piracy statute, enacted in 1790, extended not only to the high seas but also to “any river, haven, basin or bay, out of the jurisdiction of any particular state.” An Act for the Punishment of Certain Crimes Against the United States §8, 1 Stat. 112, 113–14 (1790). Modern international law defines piracy as encompassing acts either on the high seas or “in a place outside the jurisdiction of any State.” See, e.g., UN Convention on the Law of the Sea, Art. 101(a), *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

<sup>18</sup> See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S.Ct. 2869, 2877 (2010); *Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The presumption against extraterritoriality has been applied by U.S. courts since early in the nation’s history, at least with respect to the extraterritorial conduct of foreign citizens. See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 632–34 (1818) (holding that the federal piracy statute should not be construed to apply to a robbery committed on the high seas by foreign citizens on board a foreign ship).

<sup>19</sup> *Morrison*, 130 S.Ct. at 2877.

<sup>20</sup> *Arabian American Oil*, 499 U.S. at 248.

<sup>21</sup> *F. Hoffmann-La Roche Ltd. v. Empagran*, 542 U.S. 155, 164 (2004).

<sup>22</sup> See, e.g., *In re South African Apartheid Litig.*, 617 F.Supp.2d 228, 246–47 (S.D.N.Y. 2009) (“The [ATS] does not by its own terms regulate conduct; rather it applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives.”); see also William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 37 (2010) (“Courts do not apply U.S. substantive law in ATS cases; they apply customary international law.”), at [http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online\\_51\\_Dodge.pdf](http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online_51_Dodge.pdf). But see Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271, 298 (2009) (“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.”).

<sup>23</sup> See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). When adjudicating foreign torts, however, courts do not necessarily apply U.S. law. Under the approach of the RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934), the law where the tort occurred would normally be applied, pursuant to the principle of *lex loci delicti*. *Id.* §377. Under the approach of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969), the law of the place with the “most significant relationship to the occurrence and the parties” would apply. *Id.* §145; see *Sosa v. Alvarez-Machain*, 542 U.S. at 707–10 (noting that under both of these approaches foreign law will often be applied). While the district court in *Filártiga* looked in part to foreign law in adjudicating the tort in that case, see 577 F.Supp. 860, 864 (E.D.N.Y. 1984), most subsequent ATS decisions have not done so, and the Supreme Court in *Sosa* appeared to suggest that the law governing the cause of action in an ATS case is coming from U.S. federal common law, not the law of the place where the tort occurred. See *infra* text accompanying note 99.

coming from domestic rather than international law. Most of the corporate ATS cases concern alleged human rights abuses, but there is little direct support in international law for corporate liability for such abuses. International criminal tribunals, starting with the Nuremberg Tribunal, have consistently exercised jurisdiction only over natural persons, not corporations. Although there was a proposal to grant the International Criminal Court jurisdiction over corporations, that proposal was rejected.<sup>24</sup> Moreover, although some treaties specifically refer to corporations and other “legal persons,”<sup>25</sup> human rights treaties do not. As a UN report issued in 2007 noted, “States have been unwilling to adopt binding international human rights standards for corporations.”<sup>26</sup>

It is possible to argue, of course, that customary norms of international law apply to corporations even if the jurisdiction of international tribunals and the provisions of human rights treaties do not.<sup>27</sup> But some judges have gone further and argued that the lack of direct support for corporate liability in international law is beside the point because the issue of whether corporations can be sued under the ATS should be determined as a matter of U.S. domestic law, not international law. These judges distinguish between “conduct-governing norms” and “remedial” norms, arguing that only the former need to be grounded in international law and that the issue of corporate liability falls into the latter category.<sup>28</sup> Whatever the merits of this

<sup>24</sup> The treaty for the International Criminal Court limits the Court’s jurisdiction to “natural persons.” Rome Statute of the International Criminal Court, Art. 25(1), July 17, 1998, 2187 UNTS 90. The French delegation proposed granting the ICC jurisdiction over corporations and other “juridical” persons, but the proposal was rejected. See Albin Eser, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 779 (Antonio Cassese et al. eds., 2002).

<sup>25</sup> See, e.g., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 2, Dec. 17, 1997, S. TREATY DOC. No. 105-43, 37 ILM 1 (“Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”).

<sup>26</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, para. 44, UN Doc. A/HRC/4/35 (Feb. 19, 2007), at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=12900](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=12900).

<sup>27</sup> See, e.g., *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011) (“It is neither surprising nor significant that corporate liability hasn’t figured in prosecutions of war criminals and other violators of customary international law. That doesn’t mean that corporations are exempt from that law.”); see also Brief for the United States as Amicus Curiae Supporting Petitioners at 20, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (2012) (“At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors.”). But see Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353, 355 (2010) (“Customary, as opposed to treaty-based, international law has never recognized the imposition of direct duties on private corporations.”).

<sup>28</sup> See, e.g., *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011) (reasoning that “corporate liability differs fundamentally from the conduct-governing norms at issue in *Sosa*, and consequently customary international law does not provide the rule of decision”); *Flomo*, 643 F.3d at 1019 (“We keep harping on criminal liability for violations of customary international law in order to underscore the distinction between a principle of that law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy.”); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 175 n.33 (2d Cir. 2010) (Leval, J., concurring only in the judgment) (“[I]nternational law outlaws certain forms of abhorrent conduct and in general leaves to individual nations how to enforce the proscription.”). In a much discussed, but cryptic, footnote in *Sosa*, the Supreme Court stated that a “related consideration” in deciding whether to allow a claim under the ATS “is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” 542 U.S. at 732 n.20. This footnote could be read to suggest (for example) that ATS suits can be brought against corporations only to the extent that international law specifically applies to

argument, basing corporate liability under the ATS on domestic law presents more directly the issue of extraterritoriality.

Corporate ATS litigation has also highlighted the issue of extraterritoriality because of the tensions that this litigation has generated with some of the countries where the corporations are based. Foreign governments have made their concerns about extraterritorial application of the ATS known directly to the Supreme Court. In the pending *Kiobel* case, for example, the United Kingdom and the Netherlands filed a joint amicus brief arguing that U.S. jurisdiction over the case was improper because the “alleged wrongs occurred entirely within a foreign territory and involved only foreign governments and nationals,”<sup>29</sup> and Germany filed an amicus brief arguing that “there should be a strong presumption against allowing courts of the United States to project U.S. law into foreign countries through the *de facto* fashioning of federal common law.”<sup>30</sup>

While emphasizing that the allowance of ATS claims should be “subject to vigilant door-keeping” and that courts should consider the “practical consequences” of making a particular claim available,<sup>31</sup> the Court in *Sosa* did not provide much guidance about whether or to what extent the ATS applies to foreign conduct. In that case, there was foreign conduct (short-term arbitrary arrest), but unlike most extraterritorial ATS cases, the conduct was connected to actions taken within the United States (directions from the U.S. Drug Enforcement Agency).<sup>32</sup> Moreover, the ATS claim in *Sosa* was rejected on other grounds, so the Court did not need to address the issue of extraterritoriality.<sup>33</sup> It should be acknowledged, however, that the Court cited, with favor, the Second Circuit’s seminal decision in *Filártiga v. Peña-Irala*, which involved extraterritorial conduct by a foreign citizen.<sup>34</sup> Nevertheless, in describing some of the reasons for judicial caution in applying the ATS, the Court noted that there was a risk of

them, or that the ATS will support only direct liability for corporations, not secondary liability such as for aiding and abetting.

<sup>29</sup> Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 31, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012); *see also* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 24, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 13, 2012) (“Because they regard the choices of legal processes and remedies as such important sovereign rights, the Governments object to the efforts of U.S. litigators and judges to bypass the legal systems of other sovereigns by deciding civil cases involving foreign parties where there is no significant nexus to the U.S.”).

<sup>30</sup> Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents at 15, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 2, 2012); *see also* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, at 17 (June 2012) (“Such ATS suits have often triggered foreign government protests.”).

<sup>31</sup> 542 U.S. at 729, 732–33.

<sup>32</sup> *See id.* at 698 (noting that “the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial”).

<sup>33</sup> *Id.* at 738 (declining to allow claim of short-term arbitrary arrest because the conduct “violates no norm of customary international law so well defined as to support the creation of a federal remedy”). In a brief signed by both the Justice Department and the State Department, the U.S. government argued in *Sosa* that “[n]othing in [the ATS], or in its contemporary history, suggests that Congress contemplated that suits would be brought based on conduct against aliens in foreign lands.” Brief for the United States as Respondent Supporting Petitioner at 48, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), at <http://www.justice.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf>.

<sup>34</sup> *See* 542 U.S. at 731 (“The position we take today [i.e., not requiring a separate statutory cause of action] has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filártiga v. Peña-Irala*, 630 F.2d 876 (CA2 1980) . . . .”); *id.* at 732 (citing *Filártiga* for the proposition that the Court’s announced standard for recognizing ATS claims “is generally consistent with the reasoning of many of the courts and judges who faced

“adverse foreign policy consequences” in applying the ATS to the conduct of foreign governments abroad and that this application should be allowed, “*ifat all*, with great caution.”<sup>35</sup> Thus, although the Court in *Sosa* did not address the issue of extraterritoriality directly, it appears to have been attentive to concerns about applying the ATS to conduct in other countries.

Lower-court judges have been at odds concerning the implications of the Bradford opinion for this extraterritoriality issue. In the opinion, Bradford stated that “[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States.”<sup>36</sup> He then stated that, although he believed that “crimes committed on the high seas *are* within the jurisdiction of the district and circuit courts of the United States,” the wording of the Neutrality Act left this claim in some doubt.<sup>37</sup> Judges have reached differing conclusions about the link between these propositions (lack of judicial cognizance over foreign transactions and doubt about criminal jurisdiction over conduct on the high seas) and Bradford’s subsequent reference to the ATS.<sup>38</sup>

Some judges have concluded that the Bradford opinion supports application of the ATS to conduct in foreign countries.<sup>39</sup> Other judges have argued that the opinion supports only the exercise of ATS jurisdiction in the United States and on the high seas.<sup>40</sup> Still other judges have contended that, to the extent that the opinion supports the extraterritorial application of the ATS, this is true only for conduct by U.S. citizens.<sup>41</sup> The D.C. Circuit has described the Bradford opinion as the “authority most on point” for determining whether the ATS was intended to allow for extraterritorial causes of action, while also noting that the opinion “is not a model of clarity.”<sup>42</sup>

the issue before it reached this Court”). In *Filartiga*, the Second Circuit allowed two Paraguayan citizens to sue another Paraguayan citizen under the ATS for torture committed in Paraguay.

<sup>35</sup> *Id.* at 727–28 (emphasis added).

<sup>36</sup> Bradford opinion, *supra* note 1, at 58.

<sup>37</sup> *Id.* at 58–59.

<sup>38</sup> See *supra* notes 2–5 and accompanying text.

<sup>39</sup> See, e.g., *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 781 (9th Cir. 2011) (McKeown, J., concurring in part and dissenting in part) (“At the time of its enactment, the ATS was intended to encompass conduct both within and beyond the United States, including both crimes against foreign ambassadors in the United States and piracy. . . . An opinion by Attorney General Bradford in 1795—a mere six years after adoption of the ATS—confirms this interpretation.”); see also William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 503 (1986) (“The plunder of Sierra Leone is of particular importance because the Attorney General’s opinion—like much of the modern litigation under [the ATS]—dealt with a transitory tort action arising out of events in a foreign country.”).

<sup>40</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d at 142 n.44 (“In concluding that the Sierra Leone Company could bring suit against the American individuals involved in the French attack on the colony, Attorney General Bradford circumscribes his opinion, appearing to conclude that the Company could *not* bring suit for the actions taken by the Americans in a foreign country, but rather, could sue only for the actions taken by the Americans on the ‘high seas.’”); see also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“To the extent an opinion of one Attorney General matters to judicial interpretation of the ATS, the Bradford opinion supports the view that the ATS applies to conduct in U.S. territory and on the high seas, but it does not support the conclusion that the ATS extends to conduct in foreign countries.”).

<sup>41</sup> See *Sarei*, 671 F.3d at 811 (Kleinfeld, J., dissenting) (“Attorney General Bradford’s opinion does not support federal jurisdiction under the Alien Tort Statute for foreign-cubed cases [i.e., cases where the plaintiff and defendant are non-U.S. citizens and the conduct takes place abroad].”).

<sup>42</sup> *Exxon Mobil*, 654 F.3d at 23–24.

*Aiding and Abetting Liability*

The ATS is limited to torts committed in violation of international law. Violations of international law, whether customary or treaty based, often require state action.<sup>43</sup> This requirement applies even for violations of many international human rights norms, such as the prohibition on torture.<sup>44</sup> Nevertheless, since the mid-1990s, ATS suits increasingly have been brought against private corporations. The decision that helped pave the way for this litigation, *Kadic v. Karadzic*, did not involve a corporate defendant.<sup>45</sup> Rather, it involved a suit by Croat and Muslim citizens of Bosnia-Herzegovina against Radovan Karadžić, the leader of a breakaway Bosnian-Serb republic, for atrocities committed under his command. In allowing the case to proceed, the Second Circuit first noted that the violation of some norms of international law, such as the prohibitions on genocide and war crimes, do not require state action.<sup>46</sup> As for the violations that do require state action, the court reasoned that the breakaway republic might properly be considered a state for these purposes.<sup>47</sup> Even if it was not a state, however, the court concluded that Karadžić's actions could still be considered state action for purposes of liability under the ATS if he had "acted in concert" with the Yugoslav government.<sup>48</sup>

The *Karadzic* decision made clear that nonstate actors could potentially be sued under the ATS. Since the decision, numerous ATS suits have been brought against a particular type of nonstate actor—corporations—relating to their involvement with abusive foreign governments.<sup>49</sup> For a variety of reasons, corporate defendants are attractive targets for ATS suits: corporations do not benefit from the sovereign immunity doctrines that apply to governmental defendants; most large corporations have a presence in the United States, making it easy to obtain personal jurisdiction over them in this country; they typically have substantial assets that can be reached by U.S. courts; and they have an incentive to settle cases in order to avoid bad publicity.<sup>50</sup>

Many of the ATS cases brought against corporations do not allege that the corporations themselves committed human rights violations. Instead, they allege that the corporations "aided and abetted" human rights violations by foreign government officials. Outside the context of the ATS, the Supreme Court has stated that for civil statutes imposing damages

<sup>43</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 1, introductory note (1987) (observing that international law "deals with the conduct of nation-states and their relations with other states, and to some extent also with their relations with individuals, business organizations, and other legal entities"); 1 OPPENHEIM'S INTERNATIONAL LAW §6 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("States are the principal subjects of international law.").

<sup>44</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 43, §702 & cmt. b. For example, the UN Convention Against Torture covers only torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1(1), Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 113.

<sup>45</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>46</sup> *Id.* at 240.

<sup>47</sup> *Id.* at 244–45.

<sup>48</sup> *Id.* at 245.

<sup>49</sup> One of the first ATS suits brought against a corporate defendant was *Doe I v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003).

<sup>50</sup> For corporate settlements, see, for example, Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL INSIGHTS (Sept. 9, 2009), at <http://www.asil.org/insights090909.cfm>.

liability, “there is no general presumption that the plaintiff may also sue aiders and abettors”<sup>51</sup>—even though, as the Court acknowledged, aiding and abetting “is an ancient criminal law doctrine.”<sup>52</sup>

The ATS refers to torts “committed in violation of” international law and does not mention secondary liability. Nevertheless, the lower federal courts have generally accepted the availability of aiding and abetting liability in ATS cases, largely because such liability has support in international criminal law (with respect to the prosecution of natural persons).<sup>53</sup> Courts have reached this conclusion despite the fact that the Bush administration, in briefs signed by both the Justice Department and the State Department, argued that aiding and abetting liability should not be allowed under the ATS unless specifically approved by Congress.<sup>54</sup> The courts have disagreed, however, over the proper standard to be applied for such liability. In particular, they have disagreed about whether it is sufficient for the plaintiff to show that, in becoming involved with the foreign government, the defendant corporation had knowledge of the government’s human rights abuses, or whether the plaintiff must also show that the corporation acted with the purpose of facilitating the abuses.<sup>55</sup>

A number of courts have cited the Bradford opinion in support of the proposition that aiding and abetting claims may be brought under the ATS.<sup>56</sup> They point out, in particular, that in the opinion, Bradford took notice of allegations that U.S. citizens “voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast.”<sup>57</sup> One judge has disagreed, noting that, “because

<sup>51</sup> Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 182 (1994); see also Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (reaffirming *Central Bank*); Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 689 (7th Cir. 2008) (Posner, J.) (en banc) (“[S]tatutory silence on the subject of secondary liability means there is none.”).

<sup>52</sup> *Central Bank*, 511 U.S. at 181.

<sup>53</sup> See, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 30–32 (D.C. Cir. 2011); Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring); see also *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130 (2d Cir. 2010) (“[I]t was only because we looked to international law that we were able to recognize a norm of aiding and abetting liability under the ATS.”). For an argument that judicial allowance of aiding and abetting liability under the ATS is inconsistent with *Sosa*, 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, 926–29 (2007).

<sup>54</sup> See, e.g., Brief for the United States as Amicus Curiae in Support of Petitioners at 8, Am. Isuzu Motors, Inc. V. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919) (“[T]he creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction.”), at <http://www.justice.gov/osg/briefs/2007/2pet/5ami/2007-0919.pet.ami.pdf>.

<sup>55</sup> Compare, for example, *Exxon Mobil*, 654 F.3d at 39 (knowledge standard), with *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (purpose standard), and *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398–401 (4th Cir. 2011) (same).

<sup>56</sup> See, e.g., *Exxon Mobil*, 654 F.3d at 29 (“[T]he 1795 opinion of Attorney General Bradford stated that civil recovery could be had in federal court against U.S. citizens who ‘aided and abetted’ the French privateer fleet in its plunder of Sierra Leone.”); *Khulumani*, 504 F.3d at 288 n.5 (Hall, J., concurring) (citing Bradford opinion in support of the proposition that “the Founding Generation nevertheless understood the [ATS] encompassed aiding and abetting liability”); *Almog v. Arab Bank PLC*, 471 F.Supp.2d 257, 286 n.34 (E.D.N.Y. 2007) (citing Bradford opinion for the proposition that “[g]oing back over 200 years, contemporaneous with the enactment of the ATS, aider and abettor liability was contemplated under the ATS”); *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1174 n.6 (C.D. Cal. 2005) (contending that “the 1795 opinion of then-Attorney General William Bradford supports the conclusion that there is aiding and abetting liability under the ATS”).

<sup>57</sup> Bradford opinion, *supra* note 1, at 58 (emphasis added).

the conduct [at issue in the Bradford opinion] involved direct participation by American citizens, who acted with the intent to make the attack succeed, it seems likely that Bradford recognized all of the perpetrators as joint tortfeasors, as that term was understood at the time.”<sup>58</sup>

## II. THE BRADFORD OPINION IN CONTEXT

The Bradford opinion concerned events that had taken place in Sierra Leone in the fall of 1794.<sup>59</sup> Sierra Leone was a British colony, consisting primarily of former slaves and others of African descent, many of whom had been freed by the British during the Revolutionary War and had initially relocated to Halifax, Nova Scotia. The colony was managed by the Sierra Leone Company, which was incorporated through an act of Parliament in 1791.<sup>60</sup>

France and Britain had been at war since February 1793. The U.S. government was seeking to stay neutral in the war, and to that end President Washington had issued a proclamation of neutrality in April 1793, and Congress had enacted a criminal statute relating to breaches of neutrality in June 1794. Conduct by the French in the United States (such as outfitting privateers in U.S. ports and setting up consular courts to adjudicate the seizure of prize ships), as well as conduct by U.S. citizens in serving on French privateers and otherwise assisting the French war effort, had been a repeated source of friction between the United States and Great Britain.<sup>61</sup>

As recounted in the documents transcribed in appendices 1 and 2, a French fleet attacked the Sierra Leone colony in late September 1794, and at least two U.S. citizens were involved in the attack.<sup>62</sup> News traveled slowly back then, and the British government and newspapers did not learn of the attack until early 1795. Soon thereafter, Britain’s foreign secretary, Lord William Grenville, “unofficially” sent a copy of a memorial about it to John Jay, who was still in London after having completed negotiations on the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain, also known as the “Jay Treaty.”<sup>63</sup> The memorial that Grenville enclosed was written jointly by Zachary Macaulay, the acting governor of the Sierra Leone colony, and John Tilley, an agent of the proprietors of Bance Island,

<sup>58</sup> *Khulumani*, 504 F.3d at 329 (Korman, J., dissenting).

<sup>59</sup> For additional discussion of these events, see CHRISTOPHER FYFE, *A HISTORY OF SIERRA LEONE* 59–61 (1962).

<sup>60</sup> An earlier British settlement had been established in Sierra Leone in 1787, but the settlement had failed due to disease, crop failure, and hostility from the indigenous population. See ADAM HOCHSCHILD, *BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE’S SLAVES 174–77* (2005); see also SUBSTANCE OF THE REPORT DELIVERED BY THE COURT OF DIRECTORS OF THE SIERRA LEONE COMPANY TO THE GENERAL COURT OF PROPRIETORS, ON THURSDAY THE 27TH MARCH, 1794, at 3–8 (describing founding of the Sierra Leone colony).

<sup>61</sup> For discussion of these events, see WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* (2006), and CHARLES S. HYNEMAN, *THE FIRST AMERICAN NEUTRALITY: A STUDY OF THE AMERICAN UNDERSTANDING OF NEUTRAL OBLIGATIONS DURING THE YEARS 1792 TO 1815* (1974).

<sup>62</sup> The U.S. citizens, David Newell and Peter Mariner, were involved in the slave trade, and the Sierra Leone colony had apparently given sanctuary to two slaves who had escaped from a ship belonging to Newell. See ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* 156 (2012).

<sup>63</sup> Letter from Lord William Grenville, Foreign Secretary, to John Jay, Special Envoy to Great Britain (Feb. 10, 1795), in *The Papers of John Jay*, at <http://www.columbia.edu/cu/lweb/digital/jay/>.

a slave-trading station about eighteen miles up the Sierra Leone River from Freetown.<sup>64</sup> In his cover letter, Grenville noted that he would be writing to Britain's minister plenipotentiary in the United States, George Hammond, to direct him "to make a Representation on the subject." Grenville also remarked that he "hoped that this occasion may be taken for making a striking example," and that he had "sometimes thought that an order to some of our officers to try some of these people as Pirates, might be useful, in order to apprise the citizens of the U.S. of the Law of Nations on that subject."

On February 15, 1795, Jay replied to Grenville that he would "take the first opportunity of transmitting a copy of this memorial informally to the President, and with it a copy of the Sierra Leone Report lately published."<sup>65</sup> The published report that he was referring to was probably the 1794 report of the Court of Directors of the Sierra Leone Company, a document that describes the founding and history of the colony to date.<sup>66</sup> On February 25, Jay forwarded Grenville's letter and the memorial to President Washington, along with the published report.<sup>67</sup>

Subsequently, on April 15, Grenville sent a draft diplomatic note, along with the Macaulay/Tilley memorial, to Hammond.<sup>68</sup> Grenville described the memorial as "complaining of the violent & illegal Conduct of certain American subjects and stating their respective Claims to Satisfaction and Compensation for the injuries they have thereby sustained."<sup>69</sup> He asked Hammond to "immediately present this Note with its Inclosures to the American Secretary of State, and transmit to me by the first Opportunity the Answer which you may receive from that Gentleman."<sup>70</sup>

Again, communications were slow. After receiving the materials from Grenville, Hammond prepared a final copy of the diplomatic note and, on June 25, sent it, along with the Macaulay/Tilley memorial, to the U.S. secretary of state, Edmund Randolph.<sup>71</sup> The following day, Randolph sent a note to Hammond stating that he would deliver an answer "after having an opportunity of consulting the Attorney General, who is not now in town."<sup>72</sup> A few days later,

<sup>64</sup> Macaulay kept a journal for the benefit of the chairman of the Sierra Leone Company, and his journal entry for November 15, 1794, notes that Tilley had proposed that Macaulay "should join him in a memorial to the [British] Secretary of State respecting the conduct of the Americans on the coast." LIFE AND LETTERS OF ZACHARY MACAULAY 81 (1900).

<sup>65</sup> Letter from John Jay, Special Envoy to Great Britain, to Lord William Grenville, Foreign Secretary (Feb. 15, 1795), in *The Papers of John Jay*, *supra* note 63.

<sup>66</sup> See e-mails from David Hoth, Co-editor, *The Papers of George Washington*, to Kristina Alayan and Curtis Bradley (May 15, 2012) (on file with author). This report was issued in March 1794, before the attacks in question. The subsequent 1795 Court of Directors report does discuss the attacks, but the report was not issued until late February 1795, after Jay had sent his letter to Washington. Interestingly, the 1795 report contains a footnote suggesting that the fleet that carried out the attack may not have had a regular commission from the French government. See SUBSTANCE OF THE REPORT OF THE COURT OF DIRECTORS OF THE SIERRA LEONE COMPANY, DELIVERED TO THE GENERAL COURT OF PROPRIETORS, ON THURSDAY THE 26TH OF FEBRUARY, 1795, at 14 n<sup>o</sup>; see also FYFE, A HISTORY OF SIERRA LEONE, *supra* note 59, at 59 ("[T]he filthy, ragged crews represented the Jacobin terror already suppressed in France a few months earlier."); CLAUDE GEORGE, THE RISE OF BRITISH WEST AFRICA 34 (1904) (noting that the 1795 report "discloses the fact that the attack upon Sierra Leone was not made by the French Government, but by a company of privateers").

<sup>67</sup> See Letter from John Jay, Special Envoy to Great Britain, to George Washington, President (Feb. 25, 1795), in *George Washington Papers at the Library of Congress*, at <http://memory.loc.gov/ammem/gwhtml/>.

<sup>68</sup> Letter from Lord William Grenville, Foreign Secretary, to George Hammond, His Majesty's Minister Plenipotentiary (Apr. 15, 1795), British National Archives, FO [Foreign Office] 5/9.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *supra* notes 10–11 and accompanying text.

<sup>72</sup> Note dated June 26, 1795, U.S. National Archives II, Department of State Records of "Miscellaneous Correspondence—Domestic Letters," Microfilm M40, Roll 8.

Randolph sent a note to Attorney General Bradford that asked him “at the shortest moment possible, to answer the enclosed memorial of Mr. Hammond, respecting the proceedings at Sierra Leone,” and that stated that “an opinion in writing is requested.”<sup>73</sup> The exchanges between Hammond and Randolph, and between Randolph and Bradford, took place in Philadelphia, the U.S. national capital at the time. In the meantime, Hammond had written to Grenville, informing him that he had conveyed the materials to Randolph and was awaiting the promised legal analysis from Bradford.<sup>74</sup> Hammond also observed that after learning about the Sierra Leone attack, he had made inquiries about the citizens involved. Finding that one of them, Peter Mariner, had served in the British navy and may even have been born in Great Britain, Hammond said that he had been inclined to have Mariner apprehended at sea, “impress him as a British seaman, and send him a prisoner to England.”<sup>75</sup> But Hammond said he would “suspend any request of that nature for the present.”<sup>76</sup>

Bradford issued his opinion on July 6. That same day, Randolph forwarded the opinion to Hammond, noting that “[h]aving just received [the attorney general’s] sentiments, I now transmit a copy of them, as being those of the Executive.”<sup>77</sup> The opinion was thus prepared in about a week. It also occurred at a time when the Washington administration was confronted with other, more pressing business, including what to do about British seizures of U.S. vessels and their cargoes and whether to proceed with ratifying the Jay Treaty.<sup>78</sup> After receiving the opinion from Randolph, Hammond forwarded it to Lord Grenville in London without commenting on its substance.<sup>79</sup> At this point, the matter appears to have been largely put to rest from a diplomatic standpoint.

Bradford’s opinion was a response to a specific set of complaints, as described in the diplomatic note from Hammond and the Macaulay/Tilley memorial. In construing the Bradford opinion, it is useful to have those materials in mind. As noted earlier, I will argue that those materials are suggestive of two points. First, the Bradford opinion provides support for the extraterritorial application of the ATS to the conduct of U.S. citizens, but not to the conduct of foreign citizens. Second, the opinion does not support aiding and abetting liability under the ATS, at least as modern ATS cases have applied that concept.

### *Extraterritorial Application*

Some judges have suggested that in referring to the ATS, Bradford had in mind only conduct that occurred either in the United States or on the high seas. That seems unlikely, however, given the nature of the complaints that he was addressing. Many of the allegations specifically

<sup>73</sup> Note dated June 30, 1795, U.S. National Archives II, Department of State Records of “Miscellaneous Correspondence—Domestic Letters,” Microfilm M40, Roll 8.

<sup>74</sup> Letter from George Hammond, His Majesty’s Minister Plenipotentiary, to Lord William Grenville, Foreign Secretary (June 28, 1795), British National Archives, FO 5/9.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Letter from Edmund Randolph to George Hammond, July 6, 1795, U.S. National Archives II, Department of State Records of “Miscellaneous Correspondence—Domestic Letters,” Microfilm M40, Roll 8.

<sup>78</sup> See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 420–26 (1993).

<sup>79</sup> Letter from George Hammond, His Majesty’s Minister Plenipotentiary, to Lord William Grenville, Foreign Secretary (July 18, 1795), British National Archives, FO 5/9.

concerned pillaging and destruction of property in Freetown. As Bradford himself noted in his opinion, the complaint was that U.S. citizens were involved in “attacking the settlement, and plundering or destroying the property of British subjects on that coast.”<sup>80</sup> Moreover, the letter from Hammond and the Macaulay/Tilley memorial were focused on breaches of neutrality by the U.S. citizens, offenses that can occur just as easily on land as at sea. Thus, for example, the gravamen of the complaint in the Macaulay/Tilley memorial was that there had been “wanton aggressions on the part of subjects of a neutral government” and that these acts were “contrary to the existing neutrality between the British and American Governments.”<sup>81</sup> Bradford’s opinion, too, was focused on breaches of neutrality, referring both to the Neutrality Act and a treaty, most likely the peace treaty between the United States and Great Britain that ended the Revolutionary War.<sup>82</sup>

While it is conceivable that some of the actions in question could have constituted piracy, that was not the focus of either the materials before Bradford or his opinion. The letter from Hammond did refer to “piratical aggression,” but the core of his complaint was that citizens of a neutral power had engaged in hostilities “against the Colony of a Power with whom France only was at war,” and the Macaulay/Tilley memorial similarly alleged that the actions of the U.S. citizens were “contrary to the existing neutrality between the British and American Governments.”<sup>83</sup> Moreover, Bradford did not mention the federal piracy statute, even though the criminal statute that he did mention (the Neutrality Act) made clear that “nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty or other law of the United States.”<sup>84</sup> As a result, in stating that those who were injured “by these acts of hostility” could sue under the ATS, Bradford appeared to be endorsing extraterritorial application of the statute.

It should be noted, however, that those judges and litigants who have claimed that the opinion supports the extraterritorial application of the ATS even to conduct abroad by non-U.S. citizens appear to be reading too much into it. The central focus of the materials before Bradford, and of his opinion, was on the conduct of U.S. citizens, namely David Newell and Peter Mariner. Hammond noted, for example, that up to this point the king of England had shown forbearance “towards those Citizens of the United States who have been found in the actual

<sup>80</sup> Bradford opinion, *supra* note 1, at 58.

<sup>81</sup> Macaulay/Tilley memorial, *supra* note 11.

<sup>82</sup> Article VII of the treaty stated that “[t]here shall be a firm and perpetual peace between his Britannic Majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease.” Definitive Treaty of Peace, U.S.-Gr. Brit., Art. VII, Sept. 3, 1783, 8 Stat. 80. While acknowledging that Bradford’s reference may have been to the peace treaty, Tom Lee suggests that Bradford was in fact referring to the Jay Treaty. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 891–92 (2006). That seems unlikely, though, since the Jay Treaty was not in effect at the time of the Sierra Leone attack and, when Bradford wrote his opinion, had not yet been ratified by either the United States or Great Britain. In any event, the issue is not material to this essay.

<sup>83</sup> As noted above, in his communication with John Jay in London, Lord Grenville remarked that U.S. citizens taking part in hostilities should perhaps be tried as pirates, although he seemed to have in mind British rather than U.S. prosecutions. In his journal, Macaulay also noted that he thought that if Mariner were apprehended, he might be subject to being tried as a pirate. LIFE AND LETTERS OF ZACHARY MACAULAY, *supra* note 64, at 70–71. Neither item appears to have been before Bradford, however, when he wrote his opinion.

<sup>84</sup> 1 Stat. 381, 384 (1794).

commission of acts of hostility against his Majesty's subjects,"<sup>85</sup> and Bradford addressed in his opinion the exercise of jurisdiction over "acts of hostility committed by American citizens."<sup>86</sup>

There is an important, but often overlooked, connection between this issue of citizenship and the constitutional authority of the federal courts under Article III of the Constitution to hear ATS cases. An ATS case involving U.S. citizen defendants would fall within the provision in Article III for "alienage diversity" jurisdiction—that is, jurisdiction over controversies between aliens and U.S. citizens.<sup>87</sup> The Article III basis for hearing ATS suits between aliens is much less clear, at least when the suits involve alleged breaches of the law of nations rather than a treaty.<sup>88</sup> It has long been established that suits between aliens do not fall within Article III alienage diversity jurisdiction.<sup>89</sup> Article III contains specific clauses for certain cases likely to involve law of nations issues, such as cases involving ambassadors and admiralty cases.<sup>90</sup> But outside of those contexts, it is not clear what the Article III basis for jurisdiction would be in an ATS case between aliens.<sup>91</sup>

It might be argued that cases involving alleged violations of the law of nations arise under the laws of the United States for purposes of Article III. As numerous scholars have concluded, however, the law of nations was treated as general common law in the nineteenth and early twentieth centuries, not federal law.<sup>92</sup> Consistent with the non-federal law status of the law of nations, the Supreme Court held in the early nineteenth century that a case involving the application of admiralty law—a branch of the law of nations—does "not, in fact, arise under the Constitution or laws of the United States."<sup>93</sup> Moreover, the Supreme Court during the nineteenth and early twentieth centuries consistently declined to review state court decisions concerning the law of nations, on the ground that the cases did not arise under federal law.<sup>94</sup> Furthermore, numerous statements from the Founding period suggest that the phrase "Laws of the

<sup>85</sup> Hammond letter, *supra* note 11.

<sup>86</sup> Bradford opinion, *supra* note 1, at 58.

<sup>87</sup> U.S. CONST. Art. III, §2, cl. 1 (stating that the judicial power shall extend to "controversies . . . between a state, or the Citizens thereof, and foreign states, Citizens or subjects").

<sup>88</sup> During the original argument before the Supreme Court in *Kiobel*, Justice Alito inquired about the Article III basis for an ATS suit between aliens. Transcript of Oral Argument, *supra* note 9, at 51.

<sup>89</sup> See, e.g., *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

<sup>90</sup> U.S. CONST. Art. III, §2, cl. 1 (stating that the judicial power shall extend to "all Cases affecting Ambassadors, other public Ministers and Consuls" and "all Cases of admiralty and maritime Jurisdiction").

<sup>91</sup> For an extended consideration of this question, along with a suggestion that the ATS was intended to implement diversity jurisdiction, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002). For responses, see Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649 (2002), and William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 526 n.377 (2011) (agreeing with the diversity interpretation of the ATS); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 824 (9th Cir. 2011) (Ikuta, J., dissenting) (same).

<sup>92</sup> See, e.g., William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 671 (2007) ("[C]ustomary international law in the nineteenth century was general rather than federal law."); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832 (1989) ("The law of nations was classified as 'general law' in the sense that *Swift v. Tyson* later employed the term."); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 374 (2002) ("Almost all participants in current debates over customary international law appear to agree that, prior to the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, that law had the status of 'general law'").

<sup>93</sup> *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545 (1828).

<sup>94</sup> See, e.g., *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1876) (holding that the Court lacked jurisdiction to review issues concerning "the general laws of war, as recognized by the law of nations" because such

United States” in Article III was understood as referring only to federal statutes.<sup>95</sup> As Justice Story would later explain in his influential constitutional law treatise, “cases arising under the laws of the United States are such, as grow out of the legislation of congress.”<sup>96</sup> Article III concerns therefore provide an additional reason for construing the ATS not to apply to conduct by foreign citizens.

*Sosa* might implicitly provide an answer to these Article III concerns, but it is an answer that brings one back to the issue of extraterritoriality. The Court in *Sosa* reasoned that although the ATS was jurisdictional in nature, it “was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.”<sup>97</sup> It further stated that “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 [the ATS] was enacted.”<sup>98</sup> In light of these statements, *Sosa* can be read to suggest that the ATS has delegated to the federal courts the authority to develop federal common law causes of action for the modest number of claims allowed pursuant to that decision.<sup>99</sup> If so, then cases involving that federal common law arguably arise under the laws of the United States for purposes of Article III.<sup>100</sup> But relying on domestic federal common law for the cause of action—like relying on federal common law for the existence of corporate liability—highlights the issue of extraterritoriality, since it becomes more evident that ATS cases involve the projection of American law abroad.<sup>101</sup>

issues did not involve “the constitution, laws, treaties, or executive proclamations, of the United States” but rather concerned only “principles of general law alone”).

<sup>95</sup> See Bradley, *supra* note 91, at 606–8 (documenting these statements); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 35 (2009) (“The framing and ratification of [Articles III and VI of the Constitution] lend support to the argument that ‘Laws’ meant acts of Congress, not forms of customary law, including the customary law of nations.”).

<sup>96</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1641 (1833); see also, e.g., PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 99 (1824) (observing that in adopting the phrase “Laws of the United States” in Article III “the framers of the Constitution only meant the statutes which should be enacted by the national Legislature”).

<sup>97</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721 (2004).

<sup>98</sup> *Id.* at 732 (emphasis added).

<sup>99</sup> See, e.g., Bradley et al., *supra* note 53, at 895 (“[T]he Court [in *Sosa*] inferred, from a jurisdictional statute that enabled courts to apply CIL as general common law, the authorization for courts to create causes of action for CIL violations, in narrow circumstances, as a matter of post-*Erie* federal common law.”); Ramsey, *supra* note 22, at 298 (“According to the Court [in *Sosa*], 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.”); cf. *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 752 (9th Cir. 2011) (“[I]t is by now widely recognized that the norms *Sosa* recognizes as actionable under the ATS *begin* as part of international law—which, without more, would not be considered federal law for Article III purposes—but they *become* federal common law once recognized to have the particular characteristics required to be enforceable under the ATS.”).

<sup>100</sup> Cf. *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1972) (“[Section] 1331 [federal question] jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.”); see also Bradley et al., *supra* note 53, at 906 n.204 (“This Article III problem is addressed, however, if the claim has the status of federal common law, because federal common law (unlike general common law) is considered part of the ‘Laws of the United States’ for purposes of Article III.”); Carlos M. Vazquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AJIL 000, 000 (2012) (contending that “the Article III question is a simple one in the light of the Court’s holding in *Sosa* that the cause of action in suits brought under §1350 is supplied by federal common law”).

<sup>101</sup> See John O. McGinnis, *Sosa and the Derivation of Customary International Law*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 481, 482 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (“*Sosa* thus suggests that the content of international law in American jurisprudence will be viewed through the imperatives of American jurisprudence, not simply those of international jurisprudence,

*Aiding and Abetting Liability*

In modern ATS cases, the aiding and abetting concept has been used to extend liability to actors, typically corporations, that do not themselves violate international law but, instead, allegedly support or facilitate the international law violations of foreign governments. When read in context, the Bradford opinion provides little support for this sort of secondary liability, contrary to what some judges have reasoned. That does not mean, of course, that the opinion constitutes affirmative evidence against aiding and abetting liability under the ATS, but it does mean that support for such liability must be sought elsewhere.

As an initial matter, it is worth noting that in using the phrase “aided, and abetted” in his opinion, Bradford merely purported to be summarizing the complaints before him, not commenting on the scope of U.S. law, let alone the ATS. In any event, it is clear from the materials to which Bradford was responding that the U.S. citizens in question were alleged to be direct participants in the attacks, not mere aiders and abettors of the attacks. Indeed, Hammond contended in his complaint that the U.S. citizens

have taken so decided and leading a part in the business, that the French crews and vessels employed on the same occasion, appear rather in the light of Instruments of hostility in their hands than as Principals in an enterprise undertaken against the Colony of a Power with whom France only was at war.<sup>102</sup>

The Macaulay/Tilley memorial provided details in support of this characterization. It stated, for example, that the U.S. citizens “did voluntarily join themselves to the French fleet,” that one of them (Newell) “voluntarily assist[ed] in piloting the said French fleet” and also led a party of French soldiers in Freetown, and that the other (Mariner) “did in like manner voluntarily assist in conducting the said French fleet” and “was exceedingly active in promoting the pillage” of Freetown.<sup>103</sup> The memorial did state that the U.S. citizens “were aiding and abetting in attacking and destroying the property of British subjects,”<sup>104</sup> but what the memorial clearly communicated and expressed is that the U.S. citizens were taking a direct part in the attacks and destruction. Consistent with this understanding, Bradford’s opinion described the conduct in question as “acts of hostility committed by American citizens.”<sup>105</sup>

That this situation was not one of aiding and abetting in the modern sense is confirmed by considering the international law violation that was the subject of the British complaint—namely, that U.S. citizens had violated the international laws of neutrality. Thus, the Hammond letter stated that the actions of the U.S. citizens were “contrary to all the principles of Justice and all the established rules of neutrality,” and the Macaulay/Tilley memorial stated that the actions were “contrary to the existing neutrality between the British and American

making the domestic version of international law a parochial one.”). For an argument that federal common law should be understood as applying to all aspects of ATS litigation, “with certain aspects of ATS litigation governed by federal common law that is tightly linked to international law, other aspects governed by federal common law that is not derived from international norms, and still others that fall somewhere in between,” see Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1933 (2010).

<sup>102</sup> Hammond letter, *supra* note 11.

<sup>103</sup> Macaulay/Tilley memorial, *supra* note 11.

<sup>104</sup> *Id.*

<sup>105</sup> Bradford opinion, *supra* note 1, at 58.

Governments.”<sup>106</sup> These statements did not contend that the U.S. citizens had facilitated *someone else’s* breaches of international law, which is the type of aiding and abetting claim made in modern ATS litigation.<sup>107</sup> Indeed, it is not even clear if the French fleet in the Sierra Leone incident was violating international law, since the French and the British were at war. If not, then the *only* international law violations in question were those of the U.S. citizens.<sup>108</sup> To put it differently, “aiding and abetting” in this situation was not a secondary form of liability—it was what constituted a breach of neutrality.<sup>109</sup>

That said, it is possible that the French did violate international law in the Sierra Leone attack, either because they were not properly authorized by France to wage hostilities or because they violated the laws of war in their conduct—and there are hints of at least the latter in the materials. In particular, it might be argued that the French had violated customary international law rules disallowing pillage or plunder. If so, some of the statements in the Macaulay/Tilley memorial could be read to suggest that the U.S. citizens encouraged or facilitated such a violation by the French, especially the statements that “David Newell was active in exciting the French soldiery to the commission of excesses” and that Peter Mariner “was exceedingly active in promoting the pillage of the place.”

However, while pillage or plunder does violate the modern laws of war, the norms against this conduct were much weaker at the time of the Sierra Leone attack. Burlamaqui had stated in his mid-eighteenth-century treatise, for example, that “[t]his right of spoil, or plunder, extends in general to all things belonging to the enemy.”<sup>110</sup> Vattel similarly noted that troops “are allowed whatever they can take on certain occasions when the general permits pillaging.”<sup>111</sup> In any event, even for the allegations in the Macaulay/Tilley memorial about “exciting” or “promoting” excesses by the French, it is clear that Newell and Mariner were described as having taken a direct part in carrying out these excesses. Moreover, as noted above, the asserted premise for liability of the U.S. citizens, as stated in the Macaulay/Tilley memorial,

<sup>106</sup> Macaulay/Tilley memorial, *supra* note 11.

<sup>107</sup> Blackstone distinguished between “principals” and “accessories.” See BLACKSTONE, *supra* note 17, at 34–35. A principal “in the first degree,” according to Blackstone “is the actor, or absolute perpetrator of the crime.” A principal “in the second degree” is “present, aiding, and abetting the fact to be done.” By contrast, an accessory “is not the chief actor in the offence, nor present at it’s [sic] performance, but is somehow concerned therein, either *before* or *after* the fact committed.” Under Blackstone’s analysis, the U.S. citizens involved in the attack on Sierra Leone would be considered principals, not accessories.

<sup>108</sup> Consider, by contrast, *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795), an admiralty case decided shortly after Bradford’s opinion. There, the Supreme Court held that a French citizen was not entitled to retain a Dutch ship as a prize because (among other things) he had acted in concert with a U.S. citizen in taking the ship and had thereby “abetted” a violation of both a treaty between the United States and Holland, and the law of nations governing neutrality. See *id.* at 156 (Paterson, J.); *id.* at 167 (Iredell, J.).

<sup>109</sup> By linking the ATS to violations of the international law of neutrality, these materials might also call into question the Supreme Court’s suggestion in *Sosa* that the ATS historically encompassed only three law of nations claims (for offenses against ambassadors, violations of safe conducts, and piracy). See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004). It should be noted, however, that the breach of neutrality that Bradford was addressing implicated a treaty, whereas the Court in *Sosa* was discussing only the historic claims under the unwritten law of nations.

<sup>110</sup> J. J. BURLAMAQUI, THE PRINCIPLES OF POLITIC LAW, pt. IV, ch. VII, at 290 (1748) (Thomas Nugent trans., 1752).

<sup>111</sup> EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS, bk. III, ch. ix, §164 (1758) (Charles G. Fenwick trans., 1916); see also WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE (2007) (discussing how norms against plunder developed after this time period). Citations to Vattel for this and other doctrinal propositions do not require acceptance of Vattel’s particular jurisprudential approach to international law. Cf. Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AJIL 000 (2012).

was that the citizens were acting “contrary to the existing neutrality between the British and American Governments,” not that they had facilitated war crimes. Similarly, the legal materials referred to by Bradford in his opinion—namely, the peace treaty with Britain and the Neutrality Act—concerned breaches of the law of neutrality, not offenses against the customary laws of war.

### III. CONCLUSION

I take no position in this essay on whether or to what extent historical materials like the Bradford opinion should affect modern interpretations and applications of the ATS. My point is simply that if one is going to rely on materials such as these, it is important to understand the context in which they were generated. The Bradford opinion was a response to a specific set of complaints by the British government, and those complaints shed light on Bradford’s analysis, especially with respect to the issues of extraterritoriality and aiding and abetting liability.

At a more general level, these materials illustrate what a number of scholars and judges have suggested is a likely connection between the ATS and U.S. responsibilities under international law. Under the customary international law of the late 1700s, when the ATS was enacted, the United States would have had a duty to ensure that certain torts in violation of international law, especially those committed by its citizens, were punished and redressed.<sup>112</sup> A variety of scholars and judges have reasonably speculated that the ATS was designed to provide a federal forum for cases that implicated this responsibility.<sup>113</sup> The Supreme Court in *Sosa* adverted to this purpose in referring to “this narrow set of violations of the law of nations . . . threatening serious consequences in international affairs.”<sup>114</sup>

In his diplomatic complaint, Hammond invoked this idea of governmental responsibility, demanding that the United States provide “ample indemnification of the parties aggrieved” and “exemplary punishment of the offenders as may satisfy the just claims of the British government.”<sup>115</sup> Bradford’s response was, in essence, that the United States was doing all that it

<sup>112</sup> Blackstone stated, for example, that “where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.” BLACKSTONE, *supra* note 17, at 68. Vattel similarly stated that a “sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it.” VATTTEL, *supra* note 111, bk. II, ch. iv, §77; *see also, e.g.*, BURLAMAQUI, *supra* note 110, pt. IV, ch. III, at 255 (discussing responsibilities of nations for the conduct of their citizens); SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM, bk. VIII, ch. VI, §12 (1688) (C. H. Oldfather & W. A. Oldfather trans., 1934) (same).

<sup>113</sup> *See, e.g.*, Bellia & Clark, *supra* note 91, at 448–49; Lee, *supra* note 82, at 883; John M. Rogers, *The Alien Tort Statute and How Individuals “Violate” International Law*, 21 VAND. J. TRANSNAT’L L. 47, 48–60 (1988); *see also* Ali Shafi v. Palestinian Auth., 642 F.3d 1088, 1099 (D.C. Cir. 2011) (Williams, J., concurring) (“The concern was that U.S. citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system. Similarly, foreign violators, if sufficiently linked to the United States, could create an incident threatening the United States’s peace.”).

<sup>114</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). The executive branch recently emphasized the potential link between the ATS and U.S. responsibility under international law in its supplemental brief in the *Kiobel* case. *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 30, at 3 (“Courts . . . should be guided at least in general terms by the legislative purpose to permit a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the United States accountable, which is an important touchstone for determining whether U.S. courts should be deemed responsible for affording a remedy under U.S. law.”).

<sup>115</sup> Hammond letter, *supra* note 11.

reasonably could to deter and prosecute this conduct, and that the victims would have the option of a civil suit, in which it would also be easier to present evidence from a distance than in a criminal proceeding. Whatever one may think about the adequacy of this response,<sup>116</sup> this sort of episode seems a far cry from modern ATS litigation, in which U.S. courts are not being asked to vindicate U.S. responsibilities under international law but rather to sit in judgment on the actions of foreign governments and their corporations.

## APPENDIX 1

### LETTER FROM GEORGE HAMMOND, MINISTER PLENIPOTENTIARY TO THE UNITED STATES FROM GREAT BRITAIN, TO EDMUND RANDOLPH, U.S. SECRETARY OF STATE, JUNE 25, 1795

The Undersigned Minister Plenipotentiary of the Britannic Majesty has received instructions to lay before the Government of the United States the inclosed memorial from the acting Governor of the British Colony of Sierra Leone on the coast of Africa, and from the Agent of Messrs John and Alexander Anderson, Proprietors of Bance Island on the same Coast.

The Undersigned in communicating this Paper to the Secretary of State does not think it necessary to dwell either on the nature or the importance of the particular transactions which are there stated.

He would not however do justice to the friendly dispositions of his Court, or to the principles upon which the present political relations of the two Countries are established, if upon an occasion of so serious, and in its extent, of so unprecedented a nature, he were not to remark that the line of forbearance hitherto pursued by His Majesty under the circumstances of similar though less aggravated offences cannot be considered as applicable to the present case.

The Citizens of the United States mentioned in the inclosed paper, if they were not originally the authors of the expedition against the Settlements at Sierra Leone, have taken so decided and leading a part in the business, that the French crews and vessels employed on the same occasion, appear rather in the light of Instruments of hostility in their hands than as Principals in an enterprise undertaken against the Colony of a Power with whom France only was at war.

The forbearance hitherto shewn by the British government towards those citizens of the United States who have been found in the actual commission of acts of hostility against his Majesty's subjects has proceeded partly from an unwillingness to carry to their full extent

<sup>116</sup> The proprietors of Bance Island, John and Alexander Anderson, were not satisfied. In November 1796, they wrote to Lord Grenville in an effort to have the British government seek reparations on their behalf from the United States, possibly through arbitration under one of the commissions established by the Jay Treaty. The Andersons argued that the possibility of bringing a civil claim was "elusory,"

not only because they are advised and conceive that it is doubtful whether Injuries committed in the manner and under the circumstances herein complained of by your Memorialists can be cognizable before any civil tribunal, but also because they find upon enquiry (even admitting that their case may be so cognizable by the peculiar Institutions of the American Law) that a recourse to that Law would in the end prove nugatory, because the Individuals concerned so far from being in circumstances to answer damages to the extent of the Loss which they have unjustly and wantonly occasioned to your Memorialists are in fact in Insolvency and desperate circumstances.

against the Individuals of a friendly nation measures of severity which would however have been justified by the indisputable Laws of Nations, and partly from the persuasion that these acts however frequent have arisen at least in some degree from an ignorance on the part of the persons concerned, with respect to the extent of the crime which they were committing, and of the consequences to which they were making themselves liable. But even the circumstance of that forbearance entitles His Majesty to expect that more attention will be paid to His representations on the occasion of a transaction of this nature and extent of that complained of in this Memorial.

It might be stated with truth that under all the circumstances of the Case these proceedings could hardly have been justified even by any state of hostility between two countries who had felt a common interest in the cause of humanity and in the general welfare of mankind. How much more reason is there then for complaint when these acts are committed by the Citizens of a Power with whom His Majesty is living on terms of perfect Amity, and towards whom He has been anxious to shew every degree of attention and friendship.

On all these grounds this case must be felt to be of a nature which calls for the most serious attention of both governments; and the rather, because it appears by other accounts which have been received by the British government, that similar practices are daily multiplying in the West Indies and elsewhere. The King is confident that the United States will feel the necessity of adopting the most vigorous measures with a view to restrain in future such illegal and piratical aggressions which must be as repugnant to the wishes and intentions of the American government as they are contrary to all the principles of Justice and all the established rules of neutrality. And His Majesty insists on the present occasion, that to the ample indemnification of the parties aggrieved will be added such exemplary punishment of the offenders as may satisfy the just claims of the British government, and secure for the two Countries the uninterrupted enjoyment of that intercourse of friendship and good understanding which proceedings of the nature complained of have so obvious a tendency to disturb.

Geo. Hammond

Philadelphia  
25 June 1795

## APPENDIX 2

MEMORIAL OF ZACHARY MACAULAY, ACTING GOVERNOR OF THE SIERRA LEONE COLONY, AND JOHN TILLEY, AGENT OF THE PROPRIETORS OF BANCE ISLAND, SENT TO LORD GRENVILLE, BRITISH FOREIGN SECRETARY, NOVEMBER 28, 1794

To the Right Honorable Lord Grenville,  
One of His Majesty's Principal  
Secretary's of State.

The Memorial of Zachary Macaulay, acting Governor of the Honorable the Sierra Leone Company's Colony of Sierra Leone, on the coast of Africa, and of John Tilley agent of Messrs John and Alexander Anderson, Merchants in London, and proprietors of Bance Island, an establishment on the said coast, Sheweth

That on the 28th of September last a French fleet consisting of one fifty gun ship, two frigates, two armed brigs, with several armed prizes, did enter the river Sierra Leone, and did take the Honorable the Sierra Leone Company's chief establishment of Freetown, and also Bance Island, the establishment as is stated above, of Messrs John and Alexander Anderson's.

That, contrary to the existing neutrality between the British and American Governments, certain American subjects trading to this coast, did voluntarily join themselves to the French fleet, and were aiding and abetting in attacking and destroying the property of British subjects, at the above named places and elsewhere, as your memorialists will take the liberty of stating more particularly to your Lordship.

That an American subject of the name of David Newell commanding a schooner called the Massachusetts, belonging to Boston in the state of Massachusetts, the property as your memorialists believe of Daniel Macniel, a Citizen of Boston in the said state of Massachusetts, did with the consent and concurrence of the said Daniel Macniel who was then and there present, voluntarily assist in piloting the said French fleet, from the Isle de Los to the river Sierra Leone.

That when the French had taken Freetown, the said David Newell, did land there with arms in his hands and at the head of a party of French soldiers whom he conducted to the house of the acting Governor one of your memorialists.

That the said David Newell did make use of violent and threatening language towards your said memorialists and others, declaring aloud that it was now an American war, and he was resolved to do all the injury in his power to the persons and property of the inhabitants of Freetown.

That the said David Newell was active in exciting the French soldiery to the commission of excesses, and was aiding and abetting in plundering of their property the Honorable the Sierra Leone Company and other individuals British subjects.

That on the same day, namely the 28th day of Sept. last, the said David Newell, did assist in piloting a French frigate up the River Sierra Leone to Bance Island, which place was attacked by the said frigate and two other vessels, and on the 30th day of September was taken and destroyed.

That as a reward to the said Daniel Macniel and to the said David Newell for their services, the French Commodore did deliver to the said David Newell, on board the schooner commanded by him called the Massachusetts, a considerable quantity of goods, which had been the property of British subjects.

That another American subject of the name of Peter William Mariner, who during the last war had acted as a Lieutenant on board of one of his Majesty's ships but now commanding a Schooner, belonging to New York called the \_\_\_\_\_, the joint property as your memorialists believe of Geo Bolland, late of the Island of Bananas, on the coast of Africa, a British subject, and \_\_\_\_\_ Rich a citizen of New York did in like manner voluntarily assist in conducting the said French fleet from the Isle de Los to the river Sierra Leone.

That the said Peter Wm Mariner did also land at Freetown in company of the French with arms in his hands and was exceedingly active in promoting the pillage of the place.

That the said Peter Wm Mariner was more eager in his endeavors to injury the persons and property of British subjects than the French themselves, whom he the said peter Wm Mariner instigated to the commission of enormities by every means in his power, often declaring that his heart's desire was to wring his hands in the blood of Englishmen.

That on the 29th days of Sept. last the said Peter Wm Mariner did voluntarily go in a sloop commanded by him, and carrying American colours in pursuit of a sloop belonging to the said Messrs John and Alexander Anderson of London, which had taken refuge in Pirate's bay, in the River Sierra Leone.

That on that same day, the said Peter Wm Mariner did seize the said sloop and did deliver her up as a prize to the French Commodore.

That the said Peter Wm Mariner did receive from the French Commodore as a reward for his exertions, a Cutter which had been the property of the Honorable the Sierra Leone Company, called the Thornton, together with a considerable quantity of goods, which had been the property of British subjects.

That the said Peter Wm Mariner did also carry off from Freetown and apply to his own use a great variety of articles the property of British subjects; particularly a library of books belonging to the Honorable the Sierra Leone Company, which there is reason to believe would not have been carried off by the French.

That on the 7th day of Oct. last the said Peter Wm Mariner did receive on board the said Cutter Thornton, commanded by him, a number of armed Frenchmen, with whom and in company of a French armed brig, he did voluntarily go in pursuit of a ship in the offing which proved to be the Duke of Buccleugh of London, John Maclean master.

That by the orders of the said Peter Wm Mariner, a boat belonging to the said Duke of Buccleugh was seized and the chiefmate of the said Duke of Buccleugh who was on board the boat made prisoner.

That the said Peter Wm Mariner did hail the said Duke of Buccleugh and did desire the said John Maclean to strike his colours and to surrender to the said Cutter Thornton which the said Peter Wm Mariner commanded. That on the said John Maclean refusing to strike the said Peter Wm Mariner did fire a four pound shot at the said Duke of Buccleugh.

That on the 9th day of October last the said Peter Wm Mariner did in the said Cutter Thornton commanded by him voluntarily accompany three French vessels in pursuit of the ship Harpy of London, Daniel Telford Master, which ship they captured.

That the said Peter Wm Mariner did shew himself on all occasions the determined and inveterate enemy of British subjects, and was a cause together with the before mentioned persons Daniel Macniel and David Newell of considerably more injury being done to British property on this coast, than without their aid would have been done.

That your memorialists are ready to produce legal evidence of the above facts, which they submit to your Lordship's judgment in the confidence that they will be taken into serious consideration both that the parties concerned may obtain such redress as is to be had, and that such wanton aggressions on the part of subjects of a neutral government may meet their due punishment.

That, in confirmation of the above, your memorialists do affix to these presents which are contained on this and the seven preceding pages, their hands and seals at Freetown this 28th day of Nov, 1794.

Signed Zachary Macaulay

John Tilley