

AGORA: REFLECTIONS ON *KIOBEL*

Excerpts from the
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INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

KIOBEL v. ROYAL DUTCH PETROLEUM CO.: THE SUPREME COURT AND THE ALIEN TORT STATUTE

The U.S. Supreme Court has finally decided *Kiobel v. Royal Dutch Petroleum Co.*¹ It is the Court's second modern decision applying the cryptic Alien Tort Statute (ATS), which was enacted in 1789.² Since the 1980 court of appeals decision in *Filartiga v. Pena-Irala*³ permitting a wide range of human rights cases to go forward under the statute's auspices, the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States.⁴ The statute itself and the decisions that it generates also serve as state practice that might contribute to the developing customary international law of civil universal jurisdiction, immunity for defendants in human rights cases, the duties of corporations, and the right to a remedy for violations of fundamental human rights.⁵ During the 1990s, the ATS became the focal point for academic disputes about the status of customary international law as federal common law.⁶ Indeed, to the extent that the "culture wars" have played out in U.S. foreign relations law, the ATS has been their center of gravity.⁷

The *Kiobel* decision was slow to arrive, in part because the Court took the unusual step of putting the case over from one Term to the next so that it could order supplemental briefing and a second oral argument on the statute's extraterritorial application.⁸ Certiorari had been

¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² The statute reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350 (2006).

³ 630 F.2d 876 (2d Cir. 1980).

⁴ See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

⁵ See *Jones v. Saudi Arabia* [2006] UKHL 26, [13]–[14] (appeal taken from Eng.) (Lord Bingham); *id.* at [38]–[39] (Lord Hoffmann); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AJIL 142, 146–49, 153–54 (2006); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802–09 (2002); Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 160–62 (2010); *cf.* 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. 30, UN Doc. A/HRC/4/35 (Feb. 19, 2007).

⁶ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

⁷ See, e.g., David J. Bederman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475 (2001).

⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 1738 (2012) (mem.) (restoring case to active docket).

granted in 2011 to consider whether corporations could be liable under the ATS. The initial round of briefing focused on that issue, which had generated a split among circuit courts.⁹

But the decision seemed overdue for another reason as well. After more than thirty years of extensive high-profile litigation along with sustained academic commentary, a large and seemingly ever-growing number of basic questions about the statute still remained unanswered. These questions included not only the amenability of corporations to suit and the statute's extraterritorial application, but also the potential immunity of individual defendants,¹⁰ the appropriate deference to afford the U.S. government as to the statute's interpretation and case-by-case application,¹¹ the existence and scope of an exhaustion requirement,¹² the application of the *forum non conveniens* doctrine,¹³ the viability of aiding and abetting claims,¹⁴ the source of applicable law,¹⁵ and the statute's purpose and substantive scope.¹⁶ The Court's first modern ATS case, *Sosa v. Alvarez-Machain*,¹⁷ clarified that the ATS permitted federal common law claims based on contemporary customary international law norms of requisite specificity and universality, but this standard itself generated uncertainty,¹⁸ and the opinion explicitly left open issues of deference and exhaustion.¹⁹ As lower courts and litigants hacked their way through a thickening jungle of unresolved ATS issues, clarification from Congress or the Supreme Court felt long overdue.²⁰

⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 472 (2011) (mem.) (granting certiorari); see also *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated*, 133 S.Ct. 1995 (2013) (mem.); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

¹⁰ See, e.g., *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *petition for certiorari filed*, 81 USLW 3503 (Mar. 04, 2013) (NO. 12-1078, 12A707).

¹¹ See *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1193–94, 1196–99 (2009).

¹² *Sarei v. Rio Tinto*, *supra* note 9; *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 825–26 (9th Cir. 2008) (en banc). In the 2013 memorandum decision in *Rio Tinto*, 133 S.Ct. 1995, the Supreme Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of its decision in *Kiobel*.

¹³ *Compare Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103–06 (2d Cir. 2000) (*forum non conveniens* disfavored in ATS cases), *with* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum* (No. 10-1491), *supra* note 1, at 25 n.13 (explicitly disagreeing with the Second Circuit's analysis in *Wiwa*).

¹⁴ See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 21 (arguing that some aiding and abetting liability claims should not go forward under the ATS).

¹⁵ *Compare Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 284–92 (2d Cir. 2007) (Hall, J.), *aff'd sub nom due to lack of a quorum*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (mens rea for aiding and abetting supplied by federal common law), *with Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (mens rea supplied by customary international law). See also Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

¹⁶ See Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 641–42 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461 (1989); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

¹⁷ 542 U.S. 692 (2004).

¹⁸ *Compare Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (holding that claims of cruel, inhuman, and degrading treatment do not meet the *Sosa* test), *with In re S. African Apartheid Litig.*, 617 F.Supp.2d 228, 253–55 (S.D.N.Y. 2009) (holding to the contrary). See also *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1284 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc).

¹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. at 724–25, 733 n.21; see also *id.* at 761 (Breyer, J., concurring in part and concurring in the judgment); *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *cf. id.* at 714 (Scalia, J., concurring). *But see id.* at 733–38 (Kennedy, J., dissenting).

²⁰ The Court appeared poised to consider the ATS in a 2008 case raising issues of deference to the executive branch and of aiding and abetting liability, but it lacked a quorum. *Khulumani v. Barclay Nat'l Bank Ltd.*, *supra* note 15. Congress codified some claims that had been brought under the ATS by creating a federal cause of action

The Court's *Kiobel* decision definitively resolved one important question: the presumption against extraterritoriality applies to the ATS.²¹ On the facts of the case—the relevant conduct took place within the territory of a foreign sovereign, the claims did not “touch and concern” U.S. territory, and the foreign defendants had no more than a “corporate presence” in the United States—the Court held that the presumption was not overcome.²² Although four justices disagreed about the invocation of the presumption, the Court was unanimous in deciding that the claims lacked sufficient connection with the United States. The plaintiffs lost 9 to 0.

Going forward, if courts apply a strong version of the presumption and only permit claims based on conduct in the United States allegedly in violation of a norm of international law that meets the *Sosa* standard, then ATS litigation as we know it today is effectively dead, as some commentators have already predicted.²³ Other commentators assert, however, that the *Kiobel* presumption is not that robust.²⁴ In particular, it is unclear whether conduct in the United States that aids and abets an egregious violation of international law elsewhere is actionable after *Kiobel*, and whether the aiding and abetting conduct itself would have to meet the *Sosa* standard for specificity and universality. As such issues are litigated in the lower courts, ATS cases will become even less certain, at least in the short term. Some of the unresolved ATS questions may take a back seat as the courts interpret *Kiobel*, but other questions, such as those concerning the purpose of the statute and appropriate level of deference to the executive branch, may assume even greater significance.

The first part of this International Decision discusses the *Kiobel* case and analyzes its potential significance for ATS litigation. Parts II and III analyze the *Kiobel* opinion in terms of separation of powers and the development and enforcement of customary international law.

I. WHAT REMAINS OF THE ALIEN TORT STATUTE?

Background: ATS Litigation and Kiobel

Kiobel arose out of conduct that took place in Ogoniland, Nigeria, an oil-rich region of the Niger delta. During the early 1990s, residents of Ogoniland protested the environmental effects of oil extraction, including gas flares and the construction of pipelines. The Nigerian government attempted to quell the unrest, sometimes violently, and in 1994, several Ogoni leaders were murdered. Nine Ogoni were sentenced to death for the murders in a 1995 trial that was widely viewed as lacking basic procedural protections. Among those sentenced to

for torture and extrajudicial killing. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, sec. 2, 106 Stat. 73 (1992). The statute does not apply to corporations. *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702 (2012).

²¹ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1668–69.

²² *Id.* at 1669.

²³ See Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS, Apr. 17, 2013, at <http://opiniojuris.org/2013/04/17/kiobel-insthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/>; see also Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, ASIL INSIGHTS (Apr. 18, 2013), at <http://www.asil.org/insights130418.cfm>. Several commentators have predicted that future ATS-type claims will be brought in state courts or under state law. See Christopher A. Whytock, Trey E. Childress & Mike Ramsey, *After Kiobel: Human Rights Litigation in State Courts and Under State Law*, U.C. IRVINE L. REV. (forthcoming 2013) (evaluating the viability of such claims).

²⁴ See Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013), at <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>.

death and subsequently executed was Ken Saro-Wiwa, an author and outspoken leader of the Ogoni. His quickly became a cause célèbre.

Events in Ogoniland provided the basis for several lawsuits filed in the United States against an individual and entities related to the corporation now known as Royal Dutch Shell.²⁵ These cases include *Kiobel*. The complaint alleged that Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in England), and Shell Petroleum Development Company of Nigeria (incorporated in Nigeria) aided and abetted the Nigerian military in committing extrajudicial killing, torture, crimes against humanity, and other human rights violations. The plaintiffs, including Esther Kiobel, whose husband was one of the men sentenced to death and executed in 1995, now live in the United States, where they have been granted political asylum.²⁶

When it was filed in 2002, the *Kiobel* case reflected broad changes in ATS litigation. Early cases, like *Filartiga* itself, were generally brought by public interest organizations against individual defendants, frequently former government officials with few resources. Beginning in the mid-1990s, however, ATS litigation focused increasingly on corporate defendants such as Barclay National Bank, Chevron, Del Monte, Ford, IBM, Rio Tinto, Talisman Energy, and Unocal, all of whom allegedly aided and abetted foreign governments' human rights violations such as slave labor, extraordinary rendition, apartheid, war crimes, and torture.²⁷ Major law firms represented these deep-pocket defendants, and plaintiffs were sometimes represented by private, for-profit lawyers working on a contingency fee. The cases increased dramatically in their scope and complexity. Suits against corporate defendants also caused concern about ATS litigation within the U.S. Department of State, especially under the George W. Bush administration. The government began to advocate for the dismissal of many suits (including some against individuals)²⁸ based on the presumption against extraterritoriality, foreign policy considerations, and the rejection of aiding and abetting liability.²⁹

The Supreme Court itself limited the scope of the ATS in the 2004 *Sosa* decision.³⁰ That case was brought by a Mexican doctor against a Mexican citizen based on an abduction that took place in Mexico at the instigation of the U.S. Drug Enforcement Agency.³¹ In *Sosa*, the

²⁵ See generally *1980s to the New Millennium*, at <http://www.shell.com/global/aboutshell/who-we-are/our-history/1980s-to-new-century.html>. Other lawsuits included *Wiwa v. Shell Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*. These cases settled in 2009. See Settlement Agreement and Mutual Release, available at http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT_Signed-1.pdf.

²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1662–63.

²⁷ See, e.g., *Khulumani v. Barclay Nat'l Bank Ltd.*, *supra* note 15; *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, *supra* note 18; *Settlement in Principle Reached in Unocal Case*, EARTHRIGHTS INT'L, Dec. 13, 2004, at <http://www.earthrights.org/content/view/104/62/>; Peter Spiro, *Chevron Wins ATS Case. Will Corporations Fight, Not Settle?*, OPINIO JURIS (Dec. 2, 2008), at <http://opiniojuris.org/2008/12/02/chevron-wins-ats-case-will-corporations-fight-not-settle/>. Occasional cases are brought against corporations based on primary rather than secondary liability. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

²⁸ See, e.g., Brief of United States as Respondent Supporting Petitioner at 46–50, *Sosa v. Alvarez-Machain* (No. 03-339), *supra* note 17.

²⁹ See, e.g., *id.*; Brief for the United States as Amicus Curiae at 5–12, *Presbyterian Church v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); Brief for the United States as Amicus Curiae at 2–3, *Khulumani v. Barclay Nat'l Bank Ltd.* (Nos. 05-2141, 05-2326), *supra* note 15; Brief for the United States as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); see generally Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773 (2008).

³⁰ *Sosa v. Alvarez-Machain*, *supra* note 17.

³¹ *Id.* at 697–99.

Court held that a contemporary ATS claim must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” of piracy, safe conducts, and assaults against ambassadors.³² The *Sosa* opinion urged “judicial caution” in recognizing ATS causes of action, in part based on concerns about their potential impact on U.S. foreign relations.³³ Alvarez-Machain’s claims of arbitrary arrest and detention were rejected because the Court was not convinced that they violated sufficiently specific binding norms of customary international law.³⁴

The district court in *Kiobel* dismissed some claims, such as forced exile, because they did not meet the *Sosa* test.³⁵ It also dismissed the Nigerian corporation from the case for lack of personal jurisdiction.³⁶ Although the Dutch and UK defendants had also raised personal jurisdiction defenses in their answers to the complaint, they did not pursue these arguments, probably because the Court of Appeals for the Second Circuit had previously held (in a different ATS case) that the federal courts in New York had general jurisdiction over them based on their offices in New York City.³⁷ In its *Kiobel* decision a three-judge panel of the Second Circuit reasoned that corporations could not be held liable under the ATS, and it accordingly dismissed the case over a strong dissent from Judge Leval.³⁸ The Second Circuit then denied the petition for rehearing en banc by a 5-5 vote.³⁹

The 2011 grant of certiorari by the Supreme Court was not surprising in light of this division within the Second Circuit itself and the split between that circuit and other circuits on the question of corporate liability under the ATS.⁴⁰ Moreover, although the Supreme Court had lacked a quorum in the South African apartheid cases,⁴¹ in *Kiobel* none of the justices recused themselves, perhaps making it an attractive case in which to consider the ATS. On the same day as the *Kiobel* grant of certiorari, the Court also granted certiorari in a Torture Victim Protection Act⁴² (TVPA) case raising questions of corporate liability, affording the Court the opportunity to consider this issue under both statutes in the same Term.⁴³

³² *Id.* at 725, 731–32.

³³ *Id.* at 727–28.

³⁴ *Id.* at 736–37.

³⁵ 456 F.Supp.2d 457, 464 (2006), *aff’d in part, rev’d in part*, 621 F.3d 111 (2nd Cir. 2010), *aff’d*, 133 S.Ct. 1659 (2013).

³⁶ *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (KMW) (HBP), 2010 WL 2507025 (S.D.N.Y. June 21, 2010).

³⁷ See *Wiwa v. Royal Dutch Petroleum Co.*, *supra* note 13. Some justices in *Kiobel* appeared to question whether the personal jurisdiction by the New York courts over the Dutch and UK defendants would pass constitutional muster. See *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1678 (Breyer, J., concurring in the judgment). The Court has subsequently granted certiorari in another ATS case based on general personal jurisdiction, but this time the defendant has the preserved the argument. *DaimlerChrysler, A.G. v. Bauman*, 133 S.Ct. 1995 (2013) (mem.) (granting certiorari).

³⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff’d*, 133 S.Ct. 1659 (2013).

³⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2d Cir. 2011).

⁴⁰ This split intensified after the plaintiffs petitioned for a writ of certiorari. See *Flomo v. Firestone Natural Rubber Co.*, *supra* note 9; *Sarei v. Rio Tinto*, *supra* note 9; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011)

⁴¹ See Linda Greenhouse, *Conflicts for Justices Halt Apartheid Appeal*, N.Y. TIMES, May 13, 2008, at A14.

⁴² See *supra* note 20.

⁴³ *Mohamad v. Palestinian Auth.*, *supra* note 20. The questions of corporate liability in *Kiobel* and *Mohamad* reached the Court at a time when many observers described its decisions as favoring corporations. See *Corporations and the Court*, ECONOMIST, June 25, 2011, at 75.

The first round of *Kiobel* briefing in the Supreme Court focused on corporate liability. At the first oral argument in February 2012, however, the statute's application to conduct outside the United States was discussed extensively.⁴⁴ The Court thereafter directed supplemental briefing on "[w]hether and under what circumstances the [ATS] 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."⁴⁵ The briefing attracted the input of many amici, including the governments of Argentina, Germany, the Netherlands, the United Kingdom, and the United States, as well as the European Commission, scholars, nonprofit organizations, and corporations.

The Majority Opinion and Justice Alito's Concurrence

Chief Justice Roberts wrote the Court's opinion for a five-justice majority, holding that the presumption against extraterritoriality applied to the ATS and that it mandated dismissal of the case. Based on the "perception that Congress ordinarily legislates with respect to domestic, not foreign matters,"⁴⁶ the presumption prevents conflicts between the United States and foreign sovereigns that might result from the application of U.S. statutes to conduct abroad.⁴⁷ It applies to statutes that "give[] no clear indication of an extraterritorial application."⁴⁸

Most recently, in the 2010 case *Morrison v. National Australia Bank, Ltd.*,⁴⁹ the Court had applied the presumption to the Securities Exchange Act. Some of the alleged fraud in that case took place in the United States, and the U.S. government argued that the presumption should not apply. The Court ordered dismissal, however, because the securities had been bought and sold on foreign securities exchanges.

The Securities Exchange Act and other statutes to which the presumption applies differ from the ATS in some potentially relevant respects, as both the petitioners and Justice Breyer's concurrence point out.⁵⁰ Most of the majority's opinion is spent explaining why the presumption nevertheless applies. First, the Supreme Court held in *Sosa* and reaffirmed in *Kiobel* that the ATS is a "purely jurisdictional" statute that does not directly regulate conduct. Instead, it delegates to federal courts the power to recognize causes of action based on customary international law.⁵¹ The *Kiobel* majority also acknowledged that the presumption against extraterritoriality is not jurisdictional but is, instead, a substantive or "merits" determination that heretofore has been applied to statutes that prohibit specific conduct without language indicating extraterritorial application.⁵² Petitioners therefore maintained that, since the language

⁴⁴ Transcript of Oral Argument at 6–13, *Kiobel v. Royal Dutch Petroleum Co.* (No. 10-1491), *supra* note 1 (oral argument of Paul Hoffman on behalf of the petitioners on February 28, 2012).

⁴⁵ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1663 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 8).

⁴⁶ *Id.* at 1672 (Breyer, J., concurring in the judgment) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869, 2877 (2010)).

⁴⁷ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

⁴⁸ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1664 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. at 2878).

⁴⁹ 130 S.Ct. 2869.

⁵⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1672 (Breyer, J., concurring in the judgment).

⁵¹ *Sosa v. Alvarez-Machain*, *supra* note 17, at 714, 724–25; *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1664.

⁵² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1664.

of the ATS is jurisdictional and does not directly regulate conduct, the presumption did not apply.⁵³ The *Kiobel* majority rejected this argument, however, reasoning that “danger of unwarranted judicial interference in the conduct of foreign policy” is heightened, not diminished, in the ATS context “because the question is not what Congress has done but instead what courts may do.”⁵⁴

Second, Justice Breyer emphasized that since the ATS is explicitly designed to provide redress to aliens for violations of international law, it arguably does govern foreign matters.⁵⁵ The *Kiobel* majority disagreed as a textual matter, however, because tortious conduct against aliens in violation of international law can occur within U.S. territory.⁵⁶ Indeed, the historical basis for the statute (as understood in *Sosa*) includes some “notorious episodes” that took place in the United States.⁵⁷

Third, *Sosa* had apparently interpreted the ATS as providing redress for piracy, an application of the statute to conduct outside the United States, which suggests that the presumption does not apply because, as the majority acknowledged, the “Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application.”⁵⁸ In response, the majority focused again on the potential foreign policy consequences of the ATS, which are less pronounced for piracy because, it reasoned, this offense occurs on the high seas rather than “within the territorial jurisdiction of another sovereign.”⁵⁹

The majority opinion concluded its discussion of the presumption by pointing out that, if the Court interpreted the ATS as providing a “cause of action for conduct occurring in the territory of another sovereign,” the decision could result in “diplomatic strife” and open up the possibility that foreign nations might “hale our citizens” into their courts for conduct occurring in the United States.⁶⁰ The presumption ensures that such risks are taken by the political branches, not the courts—a recurring theme of the majority opinion—and one that is discussed at more length in part II, below.

Finally, in a short paragraph the Court applied the presumption to the facts in *Kiobel*. Following *Morrison*, all the Court *needed* to say was that the conduct that generates the cause of action (and thus was the focus of congressional concern) took place neither in the United States nor on the high seas (like piracy, which the Court seemed to accept as an ATS violation).⁶¹ Indeed, Justice Alito (joined by Justice Thomas) wrote separately to underscore this point: relying on *Morrison*, he argued that unless the conduct that violates international law and gives rise to the cause of action under the *Sosa* standard took place in the United States, the presumption bars the suit.⁶² Full stop. But Chief Justice Roberts added two additional considerations—

⁵³ Petitioners’ Supplemental Opening Brief at 34, 2012 WL 2096960, *Kiobel v. Royal Dutch Petroleum Co.* (No. 10–1491), *supra* note 1.

⁵⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1664.

⁵⁵ *Id.* at 1671–72 (Breyer, J., concurring in the judgment).

⁵⁶ *Id.* at 1665 (majority opinion).

⁵⁷ *Id.* at 1666–67.

⁵⁸ *Id.* at 1667.

⁵⁹ *Id.* Justice Breyer disagreed with this conclusion, reasoning that piracy takes place aboard vessels that are equivalent to the sovereign territory of their home country. *Id.* at 1672 (Breyer, J., concurring in the judgment).

⁶⁰ *Id.* at 1668–69 (majority opinion).

⁶¹ *Id.* at 1667.

⁶² *Id.* at 1669–70 (Alito, J., concurring).

prompting the Alito/Thomas concurrence to lament that the majority “obviously leaves much unanswered.”⁶³

This closing paragraph of the majority opinion reasoned that if the “claims” “touch and concern the territory of the United States,” they must do so with “sufficient force” to displace the presumption, language that may suggest “touch and concern” with “sufficient force” means something *less* than domestic conduct that violates international law under the *Sosa* test. Otherwise, why not just write the latter and avoid the Alito/Thomas concurrence? Examples of claims involving conduct within the United States that might satisfy Chief Justice Robert’s language but not the Alito/Thomas concurrence could include the design, manufacture, or testing of products;⁶⁴ supervision or management;⁶⁵ financing;⁶⁶ or providing a “safe harbor” within the United States to alleged perpetrators of acts abroad.⁶⁷ Other possibilities might include conduct elsewhere that was intended to have an impact in the United States,⁶⁸ conduct in territory under the control of the United States, or conduct in a “failed state” that may not qualify as a foreign sovereign.⁶⁹ The last example involves conduct outside the United States but not necessarily within the territory of a foreign sovereign, making it arguably akin to piracy. Although the Court appeared to accept piracy-based ATS claims, the Chief Justice also reasoned that the “pirates may well be a category unto themselves,”⁷⁰ perhaps suggesting that the ATS would not reach other violations of international law occurring outside the territory of any foreign sovereign.⁷¹

The Court’s next sentence added a second consideration. It reasoned that corporations are often “present” in many countries, so this “presence” alone is not enough to displace the presumption. Again, this language appears unnecessary unless some other kind of presence might suffice, such as the physical presence of individual defendants or the incorporation of legal entities under domestic state law.⁷² To be sure, the Court did not decide that such cases *could* go

⁶³ *Id.* at 1669.

⁶⁴ See, e.g., *In re S. African Apartheid Litig.*, 346 F.Supp.2d 538, 545 (2004) (“the South African police shot demonstrators from cars driven by Daimler-Benz engines,” [and] the regime tracked the whereabouts of African individuals on IBM computers”) (citation omitted).

⁶⁵ See, e.g., *Sosa v. Alvarez-Machain*, *supra* note 17, at 698 (“[T]he [Drug Enforcement Agency] approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.”)

⁶⁶ See, e.g., *In re S. African Apartheid Litig.*, 346 F.Supp.2d at 545 (alleging that the apartheid-era government of South Africa “received needed capital and favorable terms of repayment of loans from defendant banks”).

⁶⁷ See Roger Alford, *Kiobel Insta-Symposium: Degrees of Territoriality*, OPINIO JURIS (Apr. 22, 2013), at [http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/\(listing examples\)](http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/(listing%20examples)); *In re S. African Apartheid Litig.*, *supra* note 18.

⁶⁸ See, e.g., *Magnifico v. Villanueva*, 783 F.Supp.2d 1217 (S.D. Fla. 2011) (alleging fraud and human trafficking in the Philippines designed to bring forced laborers to the United States).

⁶⁹ See, e.g., *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc) (alleging that human rights abuses took place in Abu Ghraib prison, Iraq, when it was under the complete control of the United States); *Yousuf v. Samantar*, *supra* note 10 (alleging conduct that took place in Somalia, which is sometimes described as a “failed state”).

⁷⁰ *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1667.

⁷¹ The majority opinion later reasons that the ATS should not be interpreted to “provide a cause of action for conduct occurring in the territory of another sovereign.” *Id.* at 1669.

⁷² See William S. Dodge, *Kiobel Insta-Symposium: The Pyrrhic Victory of the Bush Administration Position in Kiobel*, OPINIO JURIS, Apr. 23, 2013, at <http://opiniojuris.org/2013/04/23/kiobel-insta-symposiumthe-pyrrhic>

forward; it merely left the possibility open, perhaps because the Court could not agree or did not wish to resolve more than it had to in this case. The Court did not directly address the question on which it originally granted certiorari—corporate liability under the ATS—but the opinions arguably assume the viability of ATS suits against corporations.

Not surprisingly, these ambiguities in the majority opinion have already generated spirited commentary on what *Kiobel* will mean for future ATS cases. The blogospheric spin is well under way.⁷³

Justice Kennedy's Concurrence

Justice Kennedy's short concurrence in *Kiobel* may establish him as the "swing vote" in future ATS cases, as he is in so many other profoundly contested areas of law. Justices Alito and Thomas lamented the Court's "narrow approach," but Justice Kennedy celebrated it: "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition."⁷⁴ The last paragraph of the chief justice's opinion seems specifically written to keep Justice Kennedy's vote and thereby ensure a majority.

Justice Kennedy's opinion goes on to note that with the TVPA, Congress has created a "detailed statutory scheme" to address some human rights abuses committed abroad.⁷⁵ His fourth and final sentence says that other cases "with allegations of serious violations of international law principles protecting persons" may arise that are not covered by the TVPA or by the "reasoning or holding of today's case."⁷⁶ Those disputes may require "some further elaboration and explanation" as to the "proper implementation of the presumption."⁷⁷

The last sentence of Justice Kennedy's opinion, like the first, suggests that the ambiguity in the last paragraph of the majority opinion was not accidental, nor was it manufactured through wishful thinking by the plaintiffs' bar. Although it seems clear that Justice Kennedy would not go as far as Justices Alito and Thomas in foreclosing future ATS cases, on its face Justice Kennedy's opinion merely states that issues are left open—not that he would ultimately resolve them in one way or another. The opinion seems carefully crafted to reveal little more than the author's openness to persuasion from either side in future cases.

Justice Kennedy's reference to the TVPA as a "detailed statutory scheme" is interesting because the ATS most certainly is not. It is, instead, an open-ended delegation of common law-making power to the federal courts, although the history of the statute and concerns about federal common law led the *Sosa* Court to construe the delegation narrowly. Even the Court's narrowing in *Sosa* had unavoidable elements of common law reasoning, for it interpreted the 1789

victory-of-the-bush-administration-position-in-kiobel/ (noting that the Court's language on corporate presence "should send chills down the spines of corporations domiciled in the United States (and their general counsels)").

⁷³ Compare Hathaway, *supra* note 24, with Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and What That Can Tell Us About How to Read Kiobel)*, SCOTUSBLOG (Apr. 19, 2013), at <http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/>.

⁷⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1669 (Kennedy, J., concurring).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

statute in light of *Erie*,⁷⁸ the modern reluctance to infer private rights of action, and contemporary developments in customary international law.

If there is a statutory analog to the ATS, perhaps it is the Sherman Act, which delegates broad discretion to the federal courts to develop the substantive rules of antitrust.⁷⁹ The presumption against extraterritoriality applies to the Sherman Act, too, or at least it did at one time. Indeed, the most famous U.S. case applying the presumption is an antitrust case: *American Banana v. United Fruit Co.*, which dismissed a suit between two U.S. companies based on anticompetitive conduct abroad.⁸⁰ Moreover, one of the reasons for the presumption is to prevent international strife,⁸¹ and in “almost no other area has the extraterritorial application of U.S. law sparked as much protest from other nations as it has in the area of antitrust.”⁸² Yet the presumption is not applied today to the Sherman Act, based apparently on the Court’s understanding that the purpose of the statute could not be realized if it applied only to conduct in the United States.⁸³ Because the presumption goes to the substantive reach of the statute, it follows that a significant delegation of substantive lawmaking power by Congress to the courts (an unusual feature of both the Sherman Act and the ATS) also includes a delegation with respect to the “proper implementation of the presumption” (to use Justice Kennedy’s language), thereby enabling courts to ensure that the statute’s goals are achieved. The Sherman Act analogy supports this claim, and nothing in the Court’s opinion in *Kiobel* is explicitly to the contrary.

The purpose of the ATS is contested, however, as already noted. One academic view, consistent with much of the majority’s opinion, holds that the statute provided a remedy for violations of international law for which the United States could otherwise be held responsible, including injury to foreign officials that occurred in the United States.⁸⁴ In light of the historical record, this view is plausible, but the text of the ATS itself is not limited in this way. Justice Breyer understands the statute as an effort to avoid a “safe harbor” for those who violate international law and to provide redress for those injured by “today’s pirates”—in part because international law imposed a duty on states not to give pirates safe harbor.⁸⁵ Interestingly, the majority opinion does not explicitly reject Justice Breyer’s historical understanding, but it does emphasize that the historical context is not enough to displace the general application of the presumption.

⁷⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁷⁹ See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429–30 (2008).

⁸⁰ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

⁸¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1669; see generally John Knox, *A Presumption Against Extrajurisdictionality*, 104 AJIL 35, 379–88 (2010) (discussing the purposes of the presumption).

⁸² William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 99 (1998).

⁸³ In *Hartford Fire Ins. Co. v. California*, Justice Souter noted the *American Banana* cases but then said without explanation that “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” 509 U.S. 764, 795–96 (1993); see also *id.* at 814 (Scalia, J., dissenting) (stating that the presumption has been “overcome” in Sherman Act litigation and citing earlier decisions of the Court and the Second Circuit). Even when the Court declines to apply the Sherman Act to conduct abroad, it does not do so based on the presumption. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). Today, amendments to the Sherman Act may make its extraterritorial application clear, but the Court had already ruled that the statute applied extraterritorially in *Hartford Fire Ins. Co.*

⁸⁴ See *supra* text accompanying notes 56–57.

⁸⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1672–74 (Breyer, J., concurring in the judgment).

There is an even broader historical narrative, however—one that was suggested by *Sosa*'s reference to prize litigation.⁸⁶ As a weak nation at the end of the eighteenth century, the United States not only sought to avoid violating international law (although it certainly did that)⁸⁷ but also affirmatively benefited from a strong *overall* system of international law with robust enforcement mechanisms, including the law of neutrality as implemented by prize courts.⁸⁸ To put the point in the context of piracy, as a weak naval power that profited greatly from commercial shipping, the United States had a strong interest in the judicial enforcement of laws against piracy in courts around the world,⁸⁹ as it also did with regard to other norms of international law. Unfortunately, the text and history of the ATS do not give much guidance in selecting among plausible accounts of its purpose. Thus, implementing the presumption to effectuate the purposes of the statute will not resolve all uncertainty around the statute's application, but it might convince some justices not to apply the presumption as broadly as Justice Alito's opinion and the *Morrison* precedent suggest.

Justice Breyer's Concurrence

Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, concurred in the Court's judgment but disagreed with its reasoning. Justice Breyer thought the presumption inapplicable, citing the text of the statute and its application to piracy, as discussed above.⁹⁰ Instead of the presumption, Justice Breyer would look to "international jurisdictional norms" to determine the jurisdictional reach of the ATS, in combination with *Sosa*'s concern about generating friction.⁹¹ According to Justice Breyer, this analysis entails that the statute applies when the alleged tort occurred "on American soil," when the defendant is an American national, or when "the defendant's conduct substantially and adversely affects an important American national interest." American interests include preventing torturers and other "common enem[ies] of mankind" from finding a "safe harbor" in the United States.⁹²

The interpretation of the ATS endorsed by Justice Breyer would allow cases like *Filartiga* and *Marcos*, in which the defendants had taken up residence in the United States, to go forward.⁹³ The *Sosa* opinion cited these two cases with approval,⁹⁴ a consideration that might

⁸⁶ The historical record suggests that the ATS covered neither prize nor piracy, see Lee, *supra* note 16, at 866–68, but the point here is that for the same reason that prize and piracy were actionable in federal courts, the United States as a weak nation generally had a strong interest in the creation and enforcement of international law, as it could not depend on force alone to achieve its foreign policy objectives.

⁸⁷ Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1668 (citing Bradley, *supra* note 16, at 641–42).

⁸⁸ JOHN FABIAN WITT, *LINCOLN'S CODE* (2012).

⁸⁹ See FRANK LAMBERT, *THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 6–7* (2005).

⁹⁰ See *supra* text accompanying note 59.

⁹¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1673 (Breyer, J., concurring in the judgment).

⁹² *Id.* at 1671.

⁹³ *Filartiga v. Pena-Irala*, *supra* note 3, at 878–79 (2nd Cir. 1980) (noting that Pena-Irala had sold his house in Paraguay and came to the United States with his partner; the couple resided in the Brooklyn until their tourist visa expired and they were deported); *In re Marcos Litigation*, 25 F.3d 1467, 1469 (9th Cir. 1994) (noting that Marcos had fled the Philippines for Hawaii in 1986, where he was subsequently sued).

⁹⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1675 (Breyer, J., concurring in the judgment) (citing *Sosa v. Alvarez-Machain*, *supra* note 17, at 732).

matter for justices especially concerned with stability and consistency from the Court.⁹⁵ Although the TVPA now provides a cause of action for the precise conduct at issue in *Filartiga*, some justices (including Kennedy) hinted at oral argument that they might be unwilling to rule inconsistently with that case.⁹⁶ The facts of *Kiobel* did not satisfy Justice Breyer's test, however, as the defendants' only connection to the United States was a New York office owned by an affiliated company that helped attract capital investors.⁹⁷ Justice Breyer did not embrace universal civil jurisdiction, despite his concurring opinion in *Sosa*, which appeared to adopt that doctrine. This issue is addressed in more detail in part III.

II. *KIOBEL* AND SEPARATION OF POWERS

The *Kiobel* decision's ultimate impact on ATS litigation may be determined in part by the views of the executive branch.⁹⁸ The Court stressed that the "political branches" and not the courts should make the foreign policy judgment involved in applying the statute to "conduct occurring in the territory of another sovereign."⁹⁹ It is unclear, however, whether the Court was referring only to Congress and its legislative capacity or meant to include the executive branch's use of amicus briefs and statements of interest. In future litigation the issue is most likely to arise (at least in the short term) by the government arguing that a particular case or class of cases should go forward under the ATS despite the presumption. If the upshot of *Kiobel* is a desire to shift decision making to a politically accountable actor with greater expertise in foreign affairs, then deferring to the executive branch is consistent with the presumption. However, if the point of the presumption is to leave decision making with Congress, as some language in *Kiobel* suggests,¹⁰⁰ then there is little basis for deferring to the executive. The Court has suggested in *Sosa* and *Altmann* that the executive might receive case-by-case deference,¹⁰¹ and Justice Breyer mentioned this possibility more than once in his concurring opinion in *Kiobel*.¹⁰² The issue of deference to the executive came up at oral argument in *Kiobel*, and in the end the

⁹⁵ *Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55, 142 (2005). Fealty to *Sosa* probably explains why the Court persisted in the view that the ATS applies to piracy, even while conceding that piracy made application of the presumption less clear. The respondents had argued that piracy does not come within the ATS, see Transcript of Oral Argument, *supra* note 44, at 23–26 (oral argument of Kathleen Sullivan on behalf of respondents on October 1, 2012), and there is historical support for that position. See Lee, *supra* note 16, at 866–68.

⁹⁶ Transcript of Oral Argument, *supra* note 44, at 23–24, 37 (oral argument of Kathleen M. Sullivan on behalf of respondents on October 1, 2012).

⁹⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1667 (Breyer, J., concurring in the judgment).

⁹⁸ The issue can arise in two postures. First, there might be a direct conflict between the presumption (no extra-territorial application) and the views of the executive (apply the statute extraterritorially); this kind of conflict has been discussed extensively by academics but has not been resolved by courts. Second, the executive may submit its views on whether the presumption applies at all or is overcome on the facts of the case.

⁹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1668–69 (2013).

¹⁰⁰ *Id.* at 1664, 1666, 1668 (referring to the views of Congress).

¹⁰¹ *Sosa v. Alvarez-Machain*, *supra* note 17, at 733 n.21 (2004) (noting a "strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *id.* at 761 (Breyer, J., concurring in part and concurring in the judgment); *Republic of Austria v. Altmann*, *supra* note 19, at 701–02 (similar). *But see id.* at 735–36 (Breyer, J., dissenting).

¹⁰² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1671, 1674, 1677 (Breyer, J. concurring in the judgment).

Court did not defer to the government's argument opposing the application of the presumption to the ATS.¹⁰³

The following subsections analyze the deference due to the executive branch on a case-by-case basis and on the general principles governing the application and scope of the presumption.¹⁰⁴ It considers doctrine and theory, as well as the significance of the government's change in position from administration to administration.

Doctrine

The U.S. government argued that the presumption against extraterritoriality should not apply to the ATS.¹⁰⁵ This interpretation is not entitled to *Chevron* deference¹⁰⁶ because the ATS does not delegate any sort of authority to the executive branch, nor is this interpretation binding on the courts as a result of the president's constitutionally based lawmaking power.¹⁰⁷ At the oral argument in *Kiobel*, the solicitor general said the executive branch's position was entitled only to "persuasiveness" deference.¹⁰⁸ This low level of deference to the executive's views on general interpretive principles for the ATS is in keeping with the Court's recent cases on the presumption against extraterritoriality.¹⁰⁹ It is also consistent with the Court's refusal to defer to the executive's views on the general interpretation of statutes and common law doctrines dealing with foreign relations.¹¹⁰ More broadly, empirical evidence shows that "persuasiveness" or "consultative deference"—in which the Court does not invoke one of the doctrinal

¹⁰³ Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 3 (arguing that "canons of statutory construction, such as the presumption against extraterritorial application of an Act of Congress" are "not directly applicable" in ATS cases).

¹⁰⁴ To illustrate this distinction, courts might defer on a case-specific basis (for example, "this case against IBM based on its conduct in South Africa does not threaten U.S. foreign relations or foreign policy"), or they might defer on more general principles (for example, "cases against U.S. nationals should go forward, even if based on conduct abroad"). See *Republic of Austria v. Altmann*, 541 U.S. at 701–03 (giving the government's views on statutory interpretation "no special deference" but suggesting that deference might be afforded to the State Department's "opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct"). Deference on more general principles is like the deference sought by the executive branch on the applicability of the presumption. Notice that general principles advocated by the executive in one case might be inconsistent with case-specific deference in another.

¹⁰⁵ Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 3, 15–22.

¹⁰⁶ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *cf. Republic of Austria v. Altmann*, 541 U.S. at 701–02.

¹⁰⁷ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420–21 (2003); see also Lewis S. Yelin, *Head of State Immunity as Sole Executive Branch Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011).

¹⁰⁸ See Transcript of Oral Argument, *supra* note 44, at 44 (oral argument by General Donald B. Verrilli for the United States as amicus curiae, supporting respondents on October 1, 2012); see also *Republic of Austria v. Altmann*, 541 U.S. at 701–02 (views of the U.S. government as to the interpretation of Foreign Sovereign Immunities Act, see *infra* note 126, are "of considerable interest to the Court," but "they merit no special deference"); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000) (suggesting that "persuasiveness deference" is appropriate in ATS cases).

¹⁰⁹ The government also opposed the presumption and lost in *Morrison v. Nat'l Austl. Bank Ltd.*, *supra* note 46, see Paul B. Stephan, *Morrison v. Nat'l Australia Bank, Ltd.: The Supreme Court Rejects Extraterritoriality*, ASIL INSIGHTS (Aug. 2, 2010), and in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). It unsuccessfully advocated for the presumption in *Sosa*, *supra* note 19, and in *Rasul v. Bush*, 542 U.S. 466 (2004). Cases in which the Court has agreed with the executive include *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), *Smith v. United States*, 507 U.S. 197 (1993), and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

¹¹⁰ *Republic of Austria v. Altmann*, 541 U.S. at 701–03; *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400 (1990).

deference regimes but still seems to at least consider the views of the agency in question—is a common form of deference.¹¹¹ Apparently even more common, however, are cases in which the agency makes some sort of finding or submission that the Court effectively ignores.¹¹² That is what happened in *Kiobel*.

The “case-by-case” deference mentioned favorably in *Altmann* and *Sosa* apparently refers to something stronger than persuasiveness deference, but it has no obvious doctrinal home.¹¹³ As other scholars have put it, the law is “peculiarly” unsettled about the basis for deference to the executive branch in foreign relations cases.¹¹⁴ Again, neither *Chevron* nor executive lawmaking deference applies, and some scholars emphasize that deference is inconsistent with the judiciary’s constitutional function of resolving cases. Moreover, in the act-of-state context—another area of federal common law pertaining to foreign affairs and international law—the Court has rejected various balancing tests and forms of case-by-case deference in favor of across-the-board determinations about the applicability of the doctrine.¹¹⁵ The act-of-state decisions would generally suggest that the Court should apply the presumption against extraterritoriality without affording the government any particular deference. Also worth noting is that Justice Kennedy’s dissenting opinion in *Altmann* strongly disagreed with the majority’s reference to case-by-case deference in the immunity context,¹¹⁶ which suggests that his (potentially dispositive) vote in ATS cases may afford little deference of any sort to the government. In lower courts, review of ATS cases over the past decades suggests that they are applying something like persuasiveness deference to case-by-case submissions about the foreign relations impact of particular cases.¹¹⁷ The Court’s language in *Altmann* and *Sosa*, however, may have led to greater deference to the executive branch in more recent litigation.¹¹⁸ Finally, in other contexts, scholars have noted the diminishing utility of doctrines involving multiple deference categories.¹¹⁹

In short, it is a doctrinal mess.

¹¹¹ See William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1111–15 (2008).

¹¹² *Id.* at 1117, 1119 (noting that in 53.6 percent of cases surveyed, “the Court invoked no deference regime at all,” and asking “why the Court so often opts not to invoke a deference regime, especially given the range of deference regimes available and the Court’s strong rhetorical support for them”).

¹¹³ The political question and international comity doctrines might apply, but that is uncertain, as is the relationship between those doctrines and deference to the executive branch.

¹¹⁴ Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198 (2007) (noting that “the law has—peculiarly—not settled on a general principle of deference when an executive agency advances an interpretation of a statute that has foreign relations implications”).

¹¹⁵ In *First National City Bank v. Banco Nacional de Cuba*, a three-justice plurality accepted the so-called “Bernstein exception,” pursuant to which courts will not apply the act of state doctrine if the State Department says that they should not. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764–70 (1972). Six justices explicitly rejected the exception, however. *Id.* at 772–73 (Douglas, J., concurring in result); *id.* at 773 (Powell, J., concurring in the judgment); *id.* at 785–93 (Brennan, J., dissenting); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964) (expressing skepticism about a reverse-Bernstein exception); *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 408 (rejecting an expansion of the act of state doctrine for cases that the State Department determines would embarrass foreign sovereigns).

¹¹⁶ *Republic of Austria v. Altmann*, *supra* note 19, at 735–36 (2004) (Kennedy, J., dissenting).

¹¹⁷ See Stephens, *supra* note 29, at 787–88 (surveying lower court cases).

¹¹⁸ *Developments in the Law—Access to Courts*, *supra* note 11, at 1193–99.

¹¹⁹ See Peter Strauss, “Deference” Is Too Confusing: Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012).

Theory

As a matter of theory, there is a facially appealing argument that courts should give very strong, *Chevron*-level deference to executive branch interpretations of the ATS, including questions of extraterritoriality, based on both democratic accountability and expertise.¹²⁰ This argument relies on a simple calculus that compares the executive branch to the courts or that compares the rationales for deference in foreign relations cases to *Chevron* cases.¹²¹ For a variety of familiar reasons, it is argued, the executive branch is better positioned than courts to predict how a class of cases or a specific case will affect U.S. foreign policy and interests, including the potential for negative consequences that the presumption against extraterritoriality is designed to prevent.¹²² If mistakes occur, the president can be held politically accountable; courts cannot. Accordingly, in interpreting the ATS generally and in evaluating its foreign policy implications in particular cases, the executive branch easily wins over courts, and deference (even in the absence of any delegation) is better justified in the foreign relations cases than even in *Chevron* cases.¹²³

This reasoning is flawed, however, even on its own terms, at least with respect to case-by-case deference.¹²⁴ Courts did employ a very strong form of deference to the executive in one particular type of foreign relations case, and this approach impeded rather than advanced U.S. foreign policy interests. For decades, the courts gave broad deference to the executive branch both for case-by-case determinations of foreign state immunity and for the general principles that should guide immunity determinations when the executive branch made no submission. The result: foreign countries lobbied the State Department aggressively, and over time the department's decisions became inconsistent and unsatisfactory both to the department itself and to foreign sovereigns.¹²⁵ Eventually, at the request of the State Department, a statute was passed to vest courts, not the executive, with the power to make foreign sovereign immunity determinations.¹²⁶

Affording the government a high level of deference in ATS cases could have the same effect because it will frequently create the same incentives for foreign sovereigns: rather than submit amicus briefs to the courts, they will send their diplomats to the State

¹²⁰ Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181–98 (2004) (defending judicial deference to the executive branch in ATS cases based on democratic accountability and expertise); Posner & Sunstein, *supra* note 114.

¹²¹ See Posner & Sunstein, *supra* note 114, at 1204–07; Ku & Yoo, *supra* note 120, at 188–99. Most of the academic response to the pro-deference position has focused on national security cases and statutes that constrain or empower the executive. See, e.g., Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007). Neither is at issue here.

¹²² *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1699.

¹²³ See Posner & Sunstein, *supra* note 114; Ku and Yoo, *supra* note 120.

¹²⁴ There are also doctrinal and potential constitutional problems with these arguments, see *infra* text accompanying notes 105–19.

¹²⁵ *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations, H. Judiciary Comm.*, 94th Cong. 34–35 (1976) (testimony of Monroe Leigh, legal adviser, Department of State) (testifying that case-by-case deference means that “the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something,” and adding that “in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures”).

¹²⁶ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.); *Republic of Austria v. Altmann*, *supra* note 19, at 715–38 (2004) (Kennedy, J., dissenting).

Department.¹²⁷ The State Department makes more submissions on general principles than on a case-by-case basis in ATS litigation and is well-aware of the dangers of pressure from foreign sovereigns.¹²⁸ In this context, the reaction of foreign sovereigns to an adverse court decision is less harmful to U.S. foreign policy than the reaction to an adverse decision of the State Department.¹²⁹ In other words, the theorists have incorrectly assumed that the foreign policy costs of the decision do not depend on whether the decision is made by the courts or the executive.¹³⁰ The problem of foreign sovereigns pressuring the State Department has led Congress to legislate concerning immunity, and it has been a factor in the Supreme Court's refusal to accord broad deference to the government in developing and applying the act of state doctrine.¹³¹ These considerations suggest that if courts do afford deference on a case-by-case basis in ATS cases, that level of deference should be low—that is, an ill-defined level of deference that looks something like “persuasiveness” or an analogy to *Skidmore* deference.¹³² A low-level of deference diminishes the accountability-based rationale, however, because domestic interest groups, like foreign sovereigns, will have difficulty allocating responsibility for decisions to the executive branch. At the same time this kind of deference leaves open the possibility that a persuasive submission from the government might warrant expertise-based dismissal in unusual cases.

Inconsistent Positions

The executive branch has taken inconsistent positions over time on the extraterritorial application and other general aspects of the ATS. As the government's brief in *Kiobel* noted,¹³³ its argument against the presumption in that case was a change of position from the Bush administration, which had explicitly argued that the presumption should apply.¹³⁴ The Carter and

¹²⁷ The effect might be less in ATS litigation because the cases are not brought against foreign sovereigns themselves. ATS cases brought against foreign corporations and individuals, however, have generated significant opposition from foreign governments. See, e.g., briefing in *Sosa v. Alvarez-Machain*, *supra* note 17; *Yousuf v. Samantar*, *supra* note 10, *petition for certiorari filed*; *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009). Cases against U.S. nationals based on conduct abroad might not generate similar pressure from foreign sovereigns. *But see In re S. African Apartheid Litig.*, *supra* note 18. In any event, most ATS cases are brought against foreign defendants.

¹²⁸ See John Bellinger, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Beyond*, 42 VAND. J. TRANSNAT'L L. 1, 11 (2009) (focusing specifically on the difficulties that case-by-case submissions create for the executive).

¹²⁹ Decisions of courts might also generate adverse reactions from foreign sovereigns, of course, see *Zschernig v. Miller*, 389 U.S. 429 (1968), but the immunity example suggests that they are not as damaging over the long-term as State Department decisions made on a case-by-case basis. Indeed, in *Zschernig*, the U.S. government disagreed with the Court: it did not believe that the state court statute and the court decisions applying it harmed U.S. foreign relations. *Id.* at 460–61 (Harlan, J., concurring in the result).

¹³⁰ See *Ku & Yoo*, *supra* note 120, at 192.

¹³¹ The Court has rejected the claim that the act of state doctrine should not apply to purported violations of international law unless the executive branch affirmatively states that the doctrine is applicable. The Court reasoned, in part, that “[o]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically.” *Banco Nacional de Cuba v. Sabbatino*, *supra* note 115, at 436. In the immunity context, Congress did not just shift authority from the executive to the courts; it also enacted a federal statute guiding the court's decision making. In that sense it is not analogous to the question of deference in the ATS context.

¹³² Cf. Kevin M. Stack, *The President's Statutory Power to Administer the Law*, 106 COLUM. L. REV. 263 (2006) (arguing that, at a minimum, *Skidmore* requires the reviewing court to consider the agency's position and the basis for its view).

¹³³ Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 21 & n.11, 22.

¹³⁴ Brief of United States as Respondent Supporting Petitioner at 46–50, *supra* note 28.

Clinton administrations had supported ATS litigation based on conduct abroad in cases like *Filartiga* and *Doe v. Unocal*, but without explicitly addressing the presumption against extraterritoriality.¹³⁵ The Reagan administration took a narrow view of ATS litigation, arguing that the statute was intended to apply only when the United States could be held accountable for the tortious conduct—a rationale that did not extend to conduct committed by aliens abroad.¹³⁶ At oral argument in *Kiobel*, Chief Justice Roberts and Justice Scalia grilled Solicitor General Verrilli on the flip-flop point, asking why the Court should defer to his view and not that of the “solicitors general who took the opposite position.”¹³⁷ The chief justice ended the exchange by stating that “whatever deference you are entitled to is compromised by the fact that your predecessors took a different position.”¹³⁸

The relevance of a prior inconsistent position depends on the reason for deferring to the executive in the first place. If the executive branch merits deference because it is a politically accountable actor,¹³⁹ then positions that change from one administration to the next serve the purposes of deferring.¹⁴⁰ But deference based on expertise—and lower levels of deference are difficult to justify on political accountability grounds—can be undermined by changes in agency interpretations from administration to administration.¹⁴¹ Inconsistent positions receive less expertise-based deference, which is appropriate here. The application of the statute to extraterritorial conduct as a general matter should be seen as a question of policy rather than expertise. Some argue that U.S. interests are best served by restricting the ATS to avoid entanglement with foreign governments and to encourage foreign investment, whereas others argue that U.S. interests are better served by enforcing international human rights law.¹⁴² Different administrations have adopted one or the other of these policies; picking between them is not an expertise-based decision. It is possible that some broader principles about the ATS might be expertise based. For example, the executive might want customary international law to develop in a particular direction with respect to aiding and abetting liability, universal jurisdiction, or corporate liability, and for that direction to remain constant over administrations;

¹³⁵ See Memorandum for the United States as Amicus Curiae at 1, *Filartiga v. Pena-Irala* (No. 79-6090), *supra* note 3; Statement of Interest of the United States, *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112).

¹³⁶ Brief for the United States of America as Amicus Curiae, *Trajano v. Marcos*, 878 F.2d 1438 (9th Cir. July 10, 1989) (Nos. 86-2448, 86-15039, 86-2449, 86-2496, 87-1706, 87-1707).

¹³⁷ Transcript of Oral Argument, *supra* note 44, at 43–44 (oral argument of General Donald B. Verrilli Jr. for the United States as amicus curiae, supporting the respondents).

¹³⁸ *Id.*; see also *Trajano v. Marcos*, 978 F.2d 493, 498–500 (9th Cir. 1992) (noting the Justice Department's change of position and concluding that the court was not bound by its submission). The Court did not mention the government's opposition to the presumption in the *Kiobel* opinion. It did refer to the flip-flop issue in a back-handed way. A sentence discussing the 1795 opinion of Attorney General Bradford noted that the solicitor general, “having once read the opinion” in one way, “now suggests” that the opinion could mean the opposite. In the next sentence the Court says that the “opinion defies a definitive reading and we need not adopt one here.” *Kiobel v. Royal Dutch Petroleum Co.*, *supra* note 1, at 1668. Although the specific reference is to the Bradford Opinion, it is hard not to see this as a veiled reference to the government's other (more substantial) changes of position.

¹³⁹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, *supra* note 106, at 865–66.

¹⁴⁰ *Bradley*, *supra* note 108, at 701.

¹⁴¹ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (discussing the tension between democratic accountability and protecting agency decision making from politics); cf. *Medellín v. Texas*, 552 U.S. 491, 528 n.14 (2008) (describing earlier statements from the solicitor general's office that contradicted its position in this case).

¹⁴² See *supra* note 159.

the executive's capacity to do so may have important consequences for U.S. treaty negotiations and for the application of customary international law in forums around the world.¹⁴³

In summary, the government should receive, at best, persuasiveness deference on general interpretive questions, consistent with the Court's approach in *Kiobel*. This conclusion is bolstered by the changes in government position from administration to administration, which undercut any expertise-based rationale for deferring. Some of the Court's language in *Sosa* and *Altmann*, however, points toward greater case-by-case deference to the government. These statements are in tension with the Court's approach in the act-of-state context, and they should also generate significant concerns about pressure on the State Department from foreign governments.

III. *KIOBEL* AND CUSTOMARY INTERNATIONAL LAW

ATS litigation has the potential to play an important role in the development and enforcement of customary international law. Decisions of national courts can constitute state practice and evidence of *opinio juris*, the two requirements of customary international law.¹⁴⁴ Thus, ATS cases are sometimes cited to show a customary international law norm of "civil universal jurisdiction"—which purportedly gives nations the power to apply their own law (known as "prescriptive jurisdiction") to extraterritorial conduct of "universal concern" such as piracy and the slave trade.¹⁴⁵ The *Kiobel* case serves as an example. Torture is widely viewed as a universal jurisdiction offense, so arguably the United States could apply its laws to criminalize torture occurring in Nigeria that involved neither a U.S. victim nor a U.S. perpetrator. Application of the ATS to conduct occurring within the territory of a foreign sovereign could be defended on these terms, and the *Kiobel* causes of action based on universal jurisdiction could go forward. Had the Court taken this approach, the decision would have had significant implications for customary international law.

Not a single justice, however, adopted universal civil jurisdiction in *Kiobel*. Even Justice Breyer, who had advanced this argument in a concurring opinion in *Sosa*,¹⁴⁶ did not explicitly rely on it here. Instead, Justice Breyer's *Kiobel* concurrence interpreted the statute as providing jurisdiction only "where distinct American interests are at issue"—a position based, in part, on the history of the statute and, in part, on an effort to "minimize international friction."¹⁴⁷ The *Kiobel* opinions themselves thus provided no state practice or *opinio juris* evidencing a customary international law norm of universal civil jurisdiction, but they also did not provide evidence

¹⁴³ See Ingrid B. Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931 (2010) (developing this argument); see also *Banco Nacional de Cuba v. Sabbatino*, *supra* note 115, at 432–33 ("When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.")

¹⁴⁴ See Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), para. 55 (Int'l Ct. Justice Feb. 3, 2012).

¹⁴⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1987); see also Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735 (2004). Universal jurisdiction is widely accepted for some criminal offenses—which may provide the basis for its application in civil cases. See *Sosa v. Alvarez-Machain*, *supra* note 17, at 761–62 (Breyer, J., concurring in part and concurring in the judgment); see also Carlos Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AJIL 531, 542–43 (2012).

¹⁴⁶ *Sosa v. Alvarez-Machain*, 542 U.S. at 761–62 (Breyer, J., concurring in part and concurring in the judgment).

¹⁴⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1674 (Breyer, J., concurring in the judgment).

against such jurisdiction. That is, none of the justices reasoned that international law does not permit universal civil jurisdiction. Instead, they did not reach this question, because they unanimously decided that *Congress* did not intend for this statute to extend that far. Indeed, although Justice Breyer declined to rely on universal civil jurisdiction in this case, he cited extensive authority in support of universal criminal jurisdiction and noted (as he had in *Sosa*) that in many countries criminal jurisdiction also supports civil remedies.¹⁴⁸

Justice Breyer did explicitly urge consideration of “international jurisdictional norms” to help construe the scope of the ATS. The relationship between his opinion and customary international law of prescriptive jurisdiction, however, is ultimately unclear. As described above, Justice Breyer did not argue for the application of universal jurisdiction in *Kiobel*. Instead, in his view, jurisdiction would lie when the tort occurs on “American soil” (corresponding to the territoriality basis for jurisdiction in customary international law) or at the hands of a U.S. national (corresponding to nationality), or when important American interests are at stake (arguably corresponding to some form of protective jurisdiction).¹⁴⁹ This last basis includes, in Justice Breyer’s analysis, an interest in not serving as a “safe harbor” for modern-day pirates, which extends to non-U.S. nationals who take up residence in the United States.¹⁵⁰ This application of the ATS goes beyond the traditional understanding of protective jurisdiction.¹⁵¹ It could be defended as an exercise of universal jurisdiction, but universal jurisdiction (unlike Justice Breyer’s approach) is not based on (or limited by) an important or distinct interest of the forum state.

In the end, Justice Breyer might be best understood as endorsing civil universal jurisdiction with a kind of subsidiarity requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendant’s residence there.¹⁵² The favorable reference to “comity, exhaustion, and *forum non-conveniens*” doctrines¹⁵³ could similarly accord preference to forums with a strong connection to the defendant or to the conduct at issue in the lawsuit, also consistent with universal jurisdiction tempered by subsidiarity.

In addition to arguing for universal jurisdiction, the *Kiobel* petitioners took the position that prescriptive jurisdiction limitations do not reach the ATS in the first place because the statute applies international law, not the law of the United States.¹⁵⁴ Under this view, extraterritoriality should pose no prescriptive jurisdiction concerns because the applicable law is customary international law, not domestic U.S. law. The problem with such an argument is that the ATS cause of action *is* U.S. law—federal common law—and the *Sosa* test for permissible causes of action is a uniquely American one.¹⁵⁵ Justice Breyer implicitly rejected the petitioners’

¹⁴⁸ *Id.* at 1675–76.

¹⁴⁹ *Id.* at 1673–74.

¹⁵⁰ *Id.* at 1674–75.

¹⁵¹ *Id.*; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 cmt. f (listing espionage, counterfeiting, and other examples).

¹⁵² See Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1, 40 (2011) (describing amended Spanish universal jurisdiction legislation as providing that “Spanish courts cannot assert universal jurisdiction unless the accused is on Spanish territory, or there is another relevant link between Spain and the case”); cf. Harmen van der Wilt, *Universal Jurisdiction Under Attack*, 9 J. INT’L CRIM. JUST. 1043, 1047–50 (2011) (discussing whether universal jurisdiction includes a preference for criminal prosecution by the state of nationality or the state on whose territory the conduct occurred).

¹⁵³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1677 (Breyer, J., concurring in the judgment).

¹⁵⁴ Petitioners’ Supplemental Opening Brief, *supra* note 53, at 38–40.

¹⁵⁵ See Wuerth, *supra* note 143. But see Anthony J. Colangelo, *Kiobel: Muddying the Distinction Between Prescriptive and Adjudicatory Jurisdiction*, MARY. J. INT’L L. (forthcoming 2013).

argument by discussing the prescriptive jurisdiction limitations on the application of federal common law in ATS cases.¹⁵⁶ Indeed, none of the opinions identified the applicable law in ATS cases as customary international law.¹⁵⁷ After *Kiobel*, it is clear that in ATS cases, courts are applying federal common law, some of which is derived, in part, from customary international law.¹⁵⁸

IV. CONCLUSION

The ATS, in general, and *Kiobel*, in particular, have engendered much handwringing, some of it shrill. Those who favor the decision lament the lower court opinions and law professors who ignored the presumption against extraterritoriality for so long, thereby permitting this unique and pernicious form of American exceptionalism. Those opposed to the decision lament the corporate and individual human rights abuses that may go entirely unaddressed. And then there is the seemingly unending lack of certainty about the statute, which now focuses on detailed parsing of the opinions in *Kiobel*.

In truth, however, the statute is difficult, and not just because it is a 200-year-old textual cipher. The real difficulty is the policy conflict behind the ATS. Both sides of the debate capture important and deeply held views: on one side, the need to redress horrific violations of the most fundamental human rights, and on the other, the view that many of these cases have little to do with the United States, may impose foreign policy costs, and may not enhance net social welfare for those most harmed.¹⁵⁹ At a high level of abstraction, there is a parallel to the now-pressing question of what the United States and other countries should or should not do in Syria to enforce international human rights and humanitarian law. From the perspective of international law, this division tracks in some respects the differences between “modern” customary international law with its normative impetus and “traditional” custom with its basis on the sovereign equality of states, predictability, and stability.¹⁶⁰ Many individuals identify strongly with one side of this debate or the other, which is part of what makes the debate difficult to resolve collectively.

The division of authority and the interplay among Congress, the Court, and the executive branch also make the ATS difficult to interpret. Domestic lawyers refer to this division as separation of powers, whereas international lawyers see it as fragmentation or, perhaps more charitably, pluralism. As with the ATS, the doctrinal areas of foreign state immunity and prescriptive jurisdiction are developed in large part through national legal systems and their courts.¹⁶¹ In both doctrinal areas, separation of powers has complicated the application and

¹⁵⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1673–74 (Breyer, J., concurring in the judgment).

¹⁵⁷ *Id.* at 1667 (majority opinion) (referring to the ATS as “applying U.S. law”).

¹⁵⁸ See Wuerth, *supra* note 143 (discussing choice of law in ATS cases and arguing that all of the applicable law is judge-made federal common law, the development of which is authorized by the statute).

¹⁵⁹ Compare Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Social Responsibility*, 56 RUTGERS L. REV. 971 (2004), and Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFF., Mar./Apr. 2013, at 16, with Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 279 (2009), and Robert H. Bork, Op-Ed, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16.

¹⁶⁰ See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

¹⁶¹ See H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 1929 BRIT. Y.B. INT’L L. 65, 69–70; CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 4 (2008).

development of customary international law in domestic systems around the world. The ability of courts, legislatures, and executive branches to act at least somewhat independently of each other has led to uncertainty,¹⁶² doctrinal innovation,¹⁶³ competition among the branches,¹⁶⁴ violations of international law,¹⁶⁵ “passing the buck” as one domestic actor pushes decision making and the implementation of international law to another domestic actor,¹⁶⁶ and a decidedly political slant to worldwide efforts to enforce human rights norms in domestic courts.¹⁶⁷ The ATS may be exceptional in various respects, but the underlying conflict in values that makes its application difficult are not. Nor are the power dynamics that shape the course of its development.¹⁶⁸

For all the downsides of fragmentation, the resulting tumult provides an opportunity for human rights activists to achieve in one forum what they could not in another. Universal civil jurisdiction and limitations on official immunity are unlikely to garner widespread support if undertaken as across-the-board treaty commitments, but domestic actors have created state practice that supports both. These initiatives succeed because the social conflict underlying the doctrinal uncertainty is resolved differently by different state organs acting at different times: hence the change in ATS policy from one administration to the next; the willingness of Congress to act—sometimes—to limit immunity and create human rights causes of action; and the Court’s decisions to limit, but not (yet) entirely foreclose, ATS litigation. Universal criminal jurisdiction has been similarly pulled in different directions through the domestic legal orders in Europe.¹⁶⁹ In the words of Nico Krisch, pluralism provides a “chance to contest, destabilize, delegitimize entrenched power positions,” but it also brings into the open that “[a]mongst the many laws in a pluralist order, law can no longer decide; recourse must be had to other, often political means.”¹⁷⁰ Viewed also from this perspective, the *Kiobel* decision and the arc of ATS litigation as a whole are entirely unexceptional.

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¹⁶² The resolution of particular issues within one branch may, for example, depend upon the context in which they arise—for example, litigation versus state-to-state negotiations. See Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MELB. J. INT’L L. 819, 833–34 (2012); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision-Making*, 38 YALE J. INT’L L. (forthcoming 2013).

¹⁶³ See, e.g., van der Wilt, *supra* note 152 (discussing the development of a subsidiarity requirement for universal jurisdiction based on state practice in Europe).

¹⁶⁴ See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

¹⁶⁵ See, e.g., *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 marzo 2004, n.5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 539 (2004), 128 ILR 658 (reported by Andrea Bianchi at 99 AJIL 242 (2005)).

¹⁶⁶ See, e.g., *Medellín v. Texas*, *supra* note 141; Giuseppe Cataldi, *The Implementation of the ICJ’s Decision in the Jurisdictional Immunities of the State case in the Italian Domestic Order: What Balance Should be Made Between Fundamental Human Rights and International Obligations?*, ESIL REFLECTIONS (Jan. 24, 2013), at <http://www.esil-sedi.eu/node/281>.

¹⁶⁷ See Langer, *supra* note 152.

¹⁶⁸ See NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 23 (2010).

¹⁶⁹ See Langer, *supra* note 152; van der Wilt, *supra* note 152; see also Steven R. Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AJIL 888, 889 (2003).

¹⁷⁰ KRISCH, *supra* note 168, at 306–07.

AGORA: REFLECTIONS ON *KIOBEL*

UNSHACKLING FOREIGN CORPORATIONS: *KIOBEL*'S UNEXPECTED LEGACY

By Anupam Chander*

The Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.*¹ disfavors American corporations. While largely unshackling foreign corporations from the risk of being haled before an American court to answer for human rights abuses abroad, the decision keeps American corporations constrained by human rights law. This inconsistency exists because application of the Alien Tort Statute (ATS),² as announced in *Kiobel*, turns on whether a corporation's actions "touch and concern" the United States.³ American corporations are simply far more likely to satisfy that standard than foreign corporations.

While *Kiobel* appears to favor corporate defendants over human rights plaintiffs,⁴ the reality is more complicated: *Kiobel* favors *foreign* corporations over both human rights plaintiffs and American corporations. *Kiobel* does not spell the death of human rights litigation in U.S. courts, but rather the death of U.S. human rights litigation against foreign corporations.

The argument proceeds as follows: First, this essay shows that American corporations are, for practical purposes, still bound by human rights law enforceable in U.S. courts. Second, it demonstrates that foreign corporations, however, are largely freed by *Kiobel* from similar obligations enforceable in U.S. courts. Third, it anticipates the rejoinder that this disparity between U.S. and foreign corporations does not matter: economic self-interest itself should lead corporations to human rights compliance so that any differential treatment in the law will have no consequence. Yet this view is altogether too sanguine; being unshackled from human rights obligations might well give a company a competitive advantage over another company that is subject to legal human rights obligations. After describing this differential treatment and its relevance, the essay concludes by delineating possible ways to resolve *Kiobel*'s asymmetrical effects. Perhaps most promisingly, Congress could level the playing field by declaring the ATS to have extraterritorial effect against foreign and domestic concerns alike.

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² 28 U.S.C. §1350.

³ *Kiobel*, 133 S.Ct. at 1669.

⁴ John Knox, *Death of a Statute: The Kiobel Ruling*, CPRBLOG (Apr. 19, 2013), at <http://www.progressivereform.org/CPRBlog.cfm?idBlog=225B214A-B7B5-401A-372F9EE967F2A21C>.

Why American Corporations Are Still Bound

In *Kiobel*, the Supreme Court held that the ATS did not apply extraterritorially against the Dutch, British, and Nigerian corporate defendants in a case where “all the relevant conduct took place outside the United States.”⁵ As many scholars have noted, Chief Justice John Roberts’s opinion for the Court did not bar the application of the ATS in cases involving events abroad entirely, but rather required a sufficient territorial nexus with the United States: “[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”⁶ Thus, *Kiobel* “leaves the courthouse door open a bit and will likely be used by workers’ rights advocates in subsequent litigation.”⁷ In an appraisal just a day after the decision was rendered, Oona Hathaway observed that the decision allowed for “foreign squared” cases—those “cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil”⁸—to be heard in U.S. courts. She concluded that “the end result of the Supreme Court’s decision yesterday may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations.”⁹

As Hathaway observed, the door is open, in particular, for cases involving American corporate defendants.¹⁰ Among the types of cases that might survive *Kiobel*’s strict standard are those involving execution, cross-border conduct, planning and authorization, design and testing, training, construction, contracting, financing and money transfers, electronic communications, and unlawful gains that “touch and concern” the United States “with sufficient force.”¹¹ In each of these cases, U.S. companies are far more likely to satisfy this standard than foreign companies, given that their headquarters and key personnel are more likely to be located in the United States. That the alleged human rights violator is a U.S. corporation will be front and center in a plaintiff’s argument that a case “touches and concerns” the United States. For example, in an ongoing ATS lawsuit, the plaintiff, seeking to demonstrate that the case meets *Kiobel*’s standards, would emphasize that a defendant corporation operating in Iraq is a U.S. corporation headquartered in the United States.¹²

⁵ *Kiobel*, 133 S.Ct. at 1669.

⁶ *Id.*

⁷ Susan Bisom-Rapp, *The Irony of the Supreme Court’s Decision in Kiobel v. Royal Dutch Petroleum*, WORKPLACE PROF BLOG (Apr. 18, 2013), at http://lawprofessors.typepad.com/laborprof_blog/2013/04/the-irony-of-the-supreme-courts-decision-in-kiobel-v-royal-dutch-petroleum.html.

⁸ Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013), at <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases>.

⁹ *Id.*

¹⁰ Cases involving U.S. defendants may remain “unresolved” by *Kiobel*. Marty Lederman, *Kiobel Insta-Symposium: What Remains of the ATS?*, OPINIO JURIS (Apr. 18, 2013), at <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/#more-28626>.

¹¹ I borrow here from Roger Alford’s excellent list of the array of cases that might satisfy the standard. Roger Alford, *Kiobel Insta-Symposium: Degrees of Territoriality*, OPINIO JURIS, (Apr. 22, 2013), at <http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality>.

¹² Kevin Jon Heller, *Is This the Model of a Viable Post-Kiobel ATS Lawsuit?*, OPINIO JURIS (May 10, 2013), at <http://opiniojuris.org/2013/05/10/is-this-the-model-of-a-viable-post-kiobel-ats-lawsuit> (citing synopsis by Center for Constitutional Rights of *Al Shimari v. CACI*, at <https://ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al>).

Perhaps future decisions in U.S. courts will reveal that these cases have little or no chance for success, foiled by a standard for “touch and concern” that is never satisfied, or by a bar against suits against corporations, or by a bar against veil piercing or theories of enterprise liability.¹³ But betting on that likelihood seems foolhardy for corporations whose executives are likely to wish to avoid the debilitating effects of responding to lawsuits. Unless further rulings render the possibility of successful litigation remote, U.S. corporations must continue to mind human rights law in their foreign operations for fear that they will be haled into court to answer for abuses abroad.¹⁴

Why Foreign Corporations Are Largely Unbound

Even while American corporations will remain subject to the possibility of ATS actions and comport themselves accordingly, *Kiobel* largely renders foreign corporations free from the threat of ATS suits in the United States. The actions of foreign corporations will be much less likely to “touch and concern” the United States with “sufficient force” to justify application of the ATS. Their decision making, key operations, and relevant technical support are far less likely to be rendered from the United States. Equally important, the logic of the *Kiobel* decision—that U.S. courts should avoid “diplomatic strife” that might result from ruling on cases involving foreign corporations acting overseas¹⁵—further strengthens the view that foreign corporations acting abroad are rendered largely outside the reach of the ATS. Critics of ATS use by human rights plaintiffs have observed the “strange form of litigation in which foreigners bring suits in U.S. courts against other foreigners, for human rights violations in foreign countries.”¹⁶ Indeed, foreign governments seem irritated by the assertion of jurisdiction by U.S. courts against their corporations and often file amicus briefs in ATS cases when their own corporations are the defendants.¹⁷ They have even gone so far as to state that they have no similar objection to U.S. courts applying the ATS to U.S. companies.¹⁸

Yet, won’t foreign corporations also be subject to the ATS because of their U.S. operations? After all, many multinational corporations have a continuous and systematic presence in the

¹³ Justice Stephen Breyer notes that the majority “leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1673 (2013) (Breyer, J., concurring).

¹⁴ For American companies, the stakes continue to be “too high for any corporate manager or director to deny or seek to evade” corporate social responsibility. David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 334 (2011).

¹⁵ *Kiobel*, 133 S.Ct. at 1669 (majority opinion).

¹⁶ Eric Posner, *The United States Can’t Be the World’s Courthouse: Why the Supreme Court Just Killed Off a Whole Category of Human Rights Suits*, SLATE (Apr. 24, 2013), at http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html.

¹⁷ Canada objected to an ATS suit brought against a Canadian corporation for conduct that occurred in Sudan. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399, at *6 (S.D.N.Y. Aug. 30, 2005). In *Kiobel*, Germany, the Netherlands, and the United Kingdom filed amicus briefs objecting to the assertion of jurisdiction in the case. Briefs filed in *Kiobel* are available online at <http://cja.org/section.php?id=509>.

¹⁸ Breyer quoted the European Commission as stating that it is “‘uncontroversial’ that the United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law.” *Kiobel*, 133 S.Ct. at 1676 (Breyer, J., concurring).

United States sufficient to justify general jurisdiction. Roberts answers this question, explaining that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”¹⁹ The Supreme Court will grapple with this issue this term in *DaimlerChrysler AG v. Bauman*.²⁰

Won’t foreign companies have to face similar statutes in their home countries? Justice Stephen Breyer notes in his concurrence that “[m]any countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad.”²¹ Yet, as Beth Stephens counters, even if criminal prosecutions occur abroad, “[c]ivil human rights litigation generally continues to be viewed as a peculiarly U.S. phenomenon.”²² Procedural rules in U.S. courts tend to be far more plaintiff friendly than those in foreign courts, given contingency fees, class actions, elaborate discovery, punitive damages, the absence of a loser-pays rule, etc.²³ Thus, even if foreign companies face the possibility of claims brought under universal jurisdiction at home, the local procedural and substantive rules are likely to be less worrisome for corporate defendants than U.S. courts empowered to hear claims brought by aliens for torts overseas. Stephens also observes cultural reluctance outside the United States to use civil litigation to make policy.²⁴

Foreign (and American) corporations might still face tort litigation in U.S. state courts, but this possibility is as yet unclear.²⁵ Barring substantial risk of state enforcement, the end result is that *Kiobel* leaves American corporations still in jeopardy of being sued for human rights abuses abroad, while rendering that possibility negligible for foreign corporations.

Why It Matters

Some will respond that corporations committing human rights abuses will suffer in the long run when abandoned by customers, financiers, and governments and thus will be motivated to abide by human rights in their own self-interest. In this view, the *Kiobel* ruling should not matter to corporations because they would be mindful of human rights interests even without legal obligation. Under this analysis, permitting a foreign corporation to violate human rights,

¹⁹ *Id.* at 1669 (majority opinion).

²⁰ *Bauman v. DaimlerChrysler Corp.* (Bauman III), 644 F.3d 909 (9th Cir. 2011), cert. granted, 133 S.Ct. 1995, (U.S. Apr. 22, 2013) (No. 11-965).

²¹ *Kiobel*, 133 S.Ct. at 1675–76 (Breyer, J., concurring) (“citing *inter alia* *Guererro v. Monterrico Metals PLC* [2009] EWHC (QB) 2475 (Eng.) (attacking conduct of U.K. companies in Peru); *Lubbe and Others v. Cape PLC*, [2000] UKHL 41 (attacking conduct of U.K. companies in South Africa); *Rb. Gravenhage* [Court of the Hague], 30 December 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.) (attacking conduct of Dutch respondent in Nigeria)”). For discussions of human rights litigation in foreign courts, see, in this *Agora*, Robert McCorquodale, *Waving Not Drowning, Kiobel Outside the United States*; Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*; see also Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127 (2013).

²² Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 3 (2002).

²³ *Id.* at 14–16; cf. John C. Coffee Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1, 5–8 (1999) (describing plaintiff preference for U.S. litigation in context of investor lawsuits).

²⁴ Stephens, *supra* note 22, at 24–27.

²⁵ Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsay, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013).

while forcing American corporations to abide by human rights, only confines American corporations to do what is in their own self-interest. This view sees the threat of suit in U.S. courts as surplusage, unnecessary to achieve the human rights goal.

Corporate social responsibility, including abiding by human rights standards, has gained traction among multinational corporations. As Peter Spiro observes, “Accountants, shareholders, NGOs, and other private standard-setters are increasingly vigilant to human rights compliance (think Apple and Foxconn to highlight only one recent example).”²⁶ Yet, even though media scrutiny (and ultimate end-user reaction) probably motivated Foxconn’s recent efforts to improve conditions for the production of electronic gadgets for global markets,²⁷ much of this compliance practice has legal underpinnings. Statutes from the Foreign Corrupt Practices Act of 1997 (FCPA)²⁸ to the California Transparency in Global Supply Chains Act of 2010²⁹ to the ATS provide legal mechanisms for deterring or disciplining human rights abuses. Before the judgment in *Kiobel* was handed down, scholars observed that multinational corporations had adopted corporate social responsibility as part of everyday compliance practice because “today a corporation, whatever its competitive drive, risks defaulting on legal standards and not solely moral imperatives.”³⁰ Bad press often follows an ATS lawsuit, even when public claims by victims not accompanied by legal process attract little attention. The imprimatur of a colorable legal claim, including the specter of real liability and damages claims often in the millions, compels newspapers to report on the claim and to follow it closely.³¹

The ability to engage in human rights abuses might well prove a competitive advantage to foreign corporations. Such abuses might enable them to access mineral resources in the lands of indigenous peoples who might seek to thwart the environmental pollution or desecration of their lands.³² Banks might be able to finance dictators or war. Communications and electronics companies may be able to offer equipment and software to autocrats to help them monitor and suppress dissidents.

Leveling the Playing Field

Leveling the playing field for international business competition is a fundamental ambition of international economic law. From trade law with its nondiscrimination obligations to finance with its international capital adequacy requirements to global rules against corporate

²⁶ Peter Spiro, *Human Rights Will Survive Kiobel*, OPINIO JURIS (Apr. 17, 2013), at <http://opiniojuris.org/2013/04/17/human-rights-will-survive-kiobel>.

²⁷ Charles Duhigg & David Barboza, *In China, the Human Costs That Are Built into an iPad*, N.Y. TIMES, Jan. 26, 2012, at A1; Nick Wingfield, *Fixing Apple’s Supply Lines*, N.Y. TIMES, Apr. 2, 2012, at B1.

²⁸ Foreign Corrupt Practices Act of 1997, 15 U.S.C. §78dd-1 [hereinafter FCPA].

²⁹ CAL. CIV. CODE §1714.43 (2012).

³⁰ Scheffer & Kaeb, *supra* note 14, at 335.

³¹ Laura Sydell, *Group Targets Yahoo Inc. over China Cases*, National Public Radio, All Things Considered (Apr. 18, 2007), at <http://www.npr.org/templates/story/story.php?storyId=9658200>; Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 19, 2007, at C4; Jad Mouawad, *Oil Industry Braces for Trial on Rights Abuses*, N.Y. TIMES, May 22, 2009, at B1; Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 9, 2009, at B1.

³² *Cf. Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

bribes of officials, international economic law seeks to encourage fair competition among corporations.³³ At times, the United States has accepted an uneven playing field where its corporations are bound to human rights obligations that many foreign corporations are not. In both the FCPA and the Anti-Apartheid Act of 1986,³⁴ Congress imposed human rights obligations that fell largely on American companies operating abroad. But in the FCPA, Congress sought to “extend the reach of the law as broadly as possible” and thus “piggybacked the FCPA on the federal securities laws, which govern all corporations, both domestic and foreign, that raise capital in U.S. public markets.”³⁵ Equally important, the United States successfully lobbied other nations to follow suit.³⁶ The Anti-Apartheid Act permitted any American corporation required to terminate or curtail business in South Africa to sue in a U.S. federal court any company “that takes commercial advantage [of] such termination or curtailment.”³⁷

Some might suggest that each state police the activities of its corporations abroad. Perhaps the United States might push for an international treaty to this effect. But that action might leave out some jurisdictions that exploit the opportunities created by more ethically minded competitors, permitting their corporations to enter the breach where the more constrained companies cannot go. Even where a foreign jurisdiction allows a lawsuit at home, those lawsuits are likely to be less onerous than those in U.S. courts. Others might suggest that the playing field be leveled by definitively removing human rights constraints on American companies acting abroad. That outcome would leave many human rights abuses unremedied.

A more promising strategy would be for Congress to make clear that the ATS has extraterritorial effect, thus no longer confining its application based on the closeness of the actions with the United States.³⁸ As Judge Pierre Leval of the Second Circuit writes, “[K]eeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would-be abusers.”³⁹ At the same time, with foreign corporations subject to international human rights law alongside American corporations, American corporations seeking business opportunities abroad would not find themselves disadvantaged by the Supreme Court’s decision in *Kiobel*.

³³ Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT’L L.J. 47 (1993); Katherine M. Morgan, *The Foreign Corrupt Practices Act: Toward a Definition of “Foreign Official,”* 38 BROOK. J. INT’L L. 415, 422 (arguing that one major goal of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was to level the playing field).

³⁴ Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, 100 Stat. 1086 (codified at 22 U.S.C. §§5001–5116 (1986) (repealed 1993)).

³⁵ Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 35 (2011).

³⁶ Congress directed the president to pursue an international anticorruption agreement. Omnibus Trade and Competitiveness Act of 1988, 22 U.S.C. §§5301–5306; FCPA, *supra* note 28.

³⁷ Comprehensive Anti-Apartheid Act, *supra* note 34, §403.

³⁸ Congress could not authorize extraterritorial application of the ATS without constraint. Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1967–71 (2010) (identifying international law limits on prescriptive jurisdiction).

³⁹ Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, 92 FOREIGN AFF., Mar.–Apr. 2013, at 16, available at <http://www.foreignaffairs.com/articles/138810/pierre-n-leval/the-long-arm-of-international-law>.

KIOBEL AND THE SURPRISING DEATH OF UNIVERSAL JURISDICTION
UNDER THE ALIEN TORT STATUTE

By Julian G. Ku*

The U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ has not ended future debate about the scope and impact of the Alien Tort Statute (ATS).² But the *Kiobel* Court did resolve at least one issue with surprising unanimity: both the opinion for the Court by Chief Justice John Roberts and the main concurring opinion by Justice Stephen Breyer refused to interpret the ATS as authorizing universal jurisdiction. All nine justices rejected decades of lower-court precedent and widespread scholarly opinion when they held that the ATS excluded cases involving purely extraterritorial conduct, even if the alleged conduct constituted acts that are universally proscribed under international law.

In this short essay, I argue that the surprising death of universal jurisdiction reflects the triumph of the "separation of powers" critique of the ATS, which casts a skeptical eye on giving federal courts an independent role in the administration of both ATS lawsuits and cases involving international law more generally. I argue that this separation of powers critique of the ATS, which has found relatively little academic support, is a crucial reason why the Court unanimously rejected universal jurisdiction in *Kiobel* and why the Court may further restrict the ATS in future cases.

Universal Jurisdiction and the ATS

When a state seeks to exercise jurisdiction outside of its territory, international law generally requires the state to show some connection to its territory, nationality, or national security interests. These limitations flow from fundamental international legal principles of sovereign equality and noninterference in the domestic affairs of sovereign states.³

But international law has long recognized an exception to this framework for a certain set of serious crimes: universal jurisdiction. Under this principle, any nation has the right to exercise prescriptive and adjudicative jurisdiction over certain crimes, irrespective of any connection between that crime and its territory. Historically, states invoked universal jurisdiction to apply their criminal laws to acts like piracy, but, in the modern era, universal jurisdiction is often justified by the severity and heinousness of the crimes. Hence, states have imposed criminal liability for acts such as torture and genocide, even if those acts had no territorial or other connection to a state.⁴

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² 28 U.S.C. §1350.

³ UN Charter Art. 2.

⁴ See, e.g., 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1987) [hereinafter RESTATEMENT]; M. CHERIF BASSIOUNI, 2 INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 169–80 (3d ed. 2008) (discussing the basis for universal jurisdiction over these crimes).

From its revival in 1980, the ATS has frequently been invoked for cases involving purely extraterritorial conduct by foreign nationals and involving allegations that those acts violate “universal” international law standards. In the seminal ATS case, *Filártiga v. Peña-Irala*,⁵ the U.S. Court of Appeals for the Second Circuit allowed two Paraguayan nationals to bring an ATS lawsuit against a former Paraguayan government official for committing torture in Paraguay. Although the *Filártiga* court did not invoke universal jurisdiction directly, it relied on the “well-established, universal[]” prohibition of torture under customary international law to support its decision to apply the ATS to the Paraguayan defendant.⁶

Because the *Filártiga* court justified its extraterritorial reach under the “transitory torts” doctrine (an approach eventually rejected by the *Kiobel* Court), the first U.S. courts to apply the ATS only indirectly considered the scope or significance of universal jurisdiction.⁷ In *Kadic v. Karadžić*, the Second Circuit held that international law permitted the imposition of civil liability on natural persons for certain universally proscribed acts under international law.⁸ The *Kadic* court also cited with approval the *Restatement (Third) of the Foreign Relations Law of the United States*, which noted that, while universal jurisdiction was typically applied in the criminal context, “international law also permits states to establish appropriate civil remedies” for universally proscribed acts.⁹ This ruling was one of the first times that a U.S. court recognized that at least some ATS cases involve the exercise of universal jurisdiction.

This connection between the ATS and universal jurisdiction became more explicit in 2004 when the Supreme Court decided *Sosa v. Alvarez-Machain*.¹⁰ Although the *Sosa* case arguably did not require the invocation of universal jurisdiction since it involved U.S. government action, the Court made clear that any ATS cause of action must satisfy a rigorous “specific, universal, and obligatory” standard.¹¹ The Court highlighted the importance of this standard not only as a way to conform to historical understandings of the ATS’s substantive scope but also as a way to satisfy concerns about judicial abuse of ATS powers that could negatively affect U.S. foreign relations.

Additionally, Breyer’s concurring opinion in *Sosa* directly embraced universal jurisdiction as a way to assuage concerns about judicial overreaching based on the ATS, suggesting that limiting ATS claims to universal jurisdiction crimes for which there was widespread international recognition would safeguard international comity.¹² Citing an amicus brief filed by the European Commission, he noted that nations have, in a narrow set of crimes, reached a “procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior.”¹³ When

⁵ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁶ *Id.* at 888.

⁷ *See, e.g.*, *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) (claim related to atrocities committed in Bosnia by leader of Bosnian Serb forces); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (claim related to torture and wrongful death committed in the Philippines by former Philippine president); *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 371 (E.D. La. 1997).

⁸ *Kadic*, 70 F.3d at 239.

⁹ *Id.* at 240 (citing RESTATEMENT, *supra* note 4, §404 cmt. b).

¹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹¹ *Id.* at 732.

¹² *Id.* at 760 (Breyer, J., concurring) (quoting *Marcos*, 25 F.3d at 1475).

¹³ *Id.* at 762 (citing Brief of Amicus Curiae the European Commission in Support of Neither Party at 24 n.54, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), available at <http://documents.law.yale.edu/sites/default/files/Brief%20of%20European%20Commission%20to%20Sosa.pdf>).

such an agreement is reached, concerns about interference in a foreign sovereign's affairs are lessened, if not eliminated. Breyer's concurrence was an important judicial recognition of the connection between the ATS and universal jurisdiction. Scholars also hailed his opinion as evidence of an emerging norm of universal jurisdiction in the civil as well as criminal sphere.¹⁴

The significance of universal jurisdiction in the ATS became even more apparent in the *Kiobel* case. In defending the extraterritorial application of the ATS, the petitioner (and numerous amici) pointed out that almost all ATS claims (including those alleged in *Kiobel*) satisfied international law standards for universal jurisdiction.¹⁵ Universal jurisdiction thus became a key element in the defense of the ATS against charges of American judicial overreach.

Kiobel and Universal Jurisdiction

Despite its prominence in *Sosa* and subsequent academic support, both the Roberts majority opinion and the Breyer concurring opinion rejected a universal jurisdiction reading of the ATS. Because the Roberts opinion noted that the "presumption against extraterritoriality" applies to the ATS,¹⁶ he had to consider the argument that the presumption was unnecessary since the statute seemed limited to universal jurisdiction causes of action. Citing the Torture Victim Protection Act,¹⁷ he observed that identifying a universal norm is "only the beginning of defining a cause of action" and that providing detailed definitions, specifying who may be liable, establishing a statute of limitations, and creating a rule of exhaustion "carr[y] . . . significant foreign policy implications."¹⁸ Later on in the opinion, Roberts noted that there is no historical or legislative history to support making the United States the "custos morum of the whole world."¹⁹ In other words, he saw no basis for reading the ATS to authorize U.S. courts to exercise universal jurisdiction.

Given Roberts's reliance on the presumption against extraterritoriality, it is not surprising that he gave universal jurisdiction little consideration. But given Breyer's endorsement of universal jurisdiction in his concurring opinion in *Sosa*, it is striking that Breyer's concurring opinion in *Kiobel* carefully avoided basing its claim on universal jurisdiction. Indeed, his reluctance to embrace universal jurisdiction under the ATS is even more surprising because Breyer held that the proper source for defining the extraterritorial scope of the ATS is "international jurisdictional norms."²⁰ As he then explained, the traditional bases for prescriptive jurisdiction

¹⁴ See, e.g., Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AJIL 142, 163 (2006); Pierre N. Leval, *Distant Genocides*, 38 YALE J. INT'L L. 231 (2013).

¹⁵ See, e.g., Petitioners' Supplemental Opening Brief, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491); Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491); Supplemental Brief of Amici Curiae International Law Scholars in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491). Briefs related to *Kiobel* are available online at <http://cja.org/section.php?id=509>.

¹⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1665 (2013).

¹⁷ Pub. L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 note).

¹⁸ *Kiobel*, 133 S.Ct. at 1665.

¹⁹ *Id.* at 1668 (quoting *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)).

²⁰ *Id.* at 1673 (Breyer, J., concurring) ("And just as we have looked to established international substantive norms to help determine the statute's substantive reach, so we should look to international jurisdictional norms to help determine the statute's jurisdictional scope" (citation omitted)).

under international law are (1) territory; (2) nationality; (3) conduct that has an effect on territory; (4) foreign conduct that is directed against the security of the state or against a limited class of other state interests; and (5) certain crimes of universal concern.²¹

Curiously, he then proceeded to rely only on the first four bases of jurisdiction. In his view, the ATS allows jurisdiction where conduct occurs on U.S. territory, where the defendant is a U.S. national, or where the defendant's conduct "substantially and adversely affects an important American national interest."²² Without any explanation, he excluded ATS jurisdiction based on universally proscribed conduct from his discussion. Instead, he would "interpret the statute as providing jurisdiction *only where distinct American interests are at issue.*"²³

Breyer concentrated the rest of his opinion on why preventing torturers from gaining safe harbor in the United States is a distinct American interest. Citing numerous authorities that support the punishment of pirates found within a nation's jurisdiction, he argued that there is no extraterritorial bar to using the ATS to compensate victims of "piracy and its modern-day equivalents" who come within U.S. territorial jurisdiction. But Breyer refused to read the ATS to reach as far as the international law of universal jurisdiction would permit, despite the urgings of both petitioners and their amici. Thus, Breyer abandoned his earlier embrace of a universal jurisdiction reading of the ATS in *Sosa*. While the European Commission brief in *Kiobel* argued that universal civil jurisdiction was now accepted under international law,²⁴ Breyer refused to read the ATS to embrace this purported international trend. Though he claimed that international law principles should define the ATS, he then excluded (without any explanation) universal jurisdiction from the international law principles incorporated into the ATS.

Neither Roberts nor Breyer offers any historical evidence to support their rejection of a universal jurisdiction reading of the ATS. Since the text of the ATS is famously elusive, it is not surprising that the text also fails to explain the more limited reading that both justices embrace. In the next and final section, I will argue that this aspect of both opinions is best explained as motivated by the separation of powers concerns raised by universal jurisdiction.

The Separation of Powers Critique of the ATS

Since the ATS was revived in 1980, it has been hailed in the academic community as an important milestone in the development of international law and the vindication of victims'

²¹ *Id.* (citing RESTATEMENT, *supra* note 4, §§402, 404).

²² *Id.* at 1674.

²³ *Id.* (emphasis added).

²⁴ Supplemental Brief of the European Commission on Behalf of the European Union in Support of Neither Party at 13–26, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491) (arguing that universal civil jurisdiction under the ATS conforms to international law principles of jurisdiction). Reasons exist to doubt this claim, however, since most of the examples cited by the European Commission involve civil recovery pursuant to criminal prosecutions ("*actions civiles*"). Indeed, almost no cases outside of the ATS context involve a private cause of action to enforce universal jurisdiction norms. The only such case cited, involving a Palestinian doctor recovering damages in a Dutch court for injuries suffered in Libya, still needed to be "sufficiently connected" to the Dutch court. *See id.* at 25 n.70.

rights. Harold Koh, for instance, cited ATS litigation as a leading example of how international legal norms can be developed and strengthened through domestic and nonstate actors.²⁵

But the ATS was not without critics. The first substantial dissenting note was registered by Judge Robert Bork, whose concurring opinion in *Tel-Oren v. Libyan Arab Republic*²⁶ set in motion what I will call the separation of powers critique of the ATS. In *Tel-Oren*, Bork held that the ATS was merely a jurisdictional statute and that it did not authorize courts to create a private cause of action.²⁷ Hence, no claims could be brought under the ATS itself unless or until Congress created specific causes of action. To find otherwise, Bork opined, would raise “grave separation of powers problems.”²⁸

Bork did not challenge the significance of international law in the domestic legal system. Indeed, he conducted a lengthy investigation of international law sources to determine its applicability to the case. Rather, his criticism is based on the principle that “the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments.”²⁹ Under Bork’s approach, the decision to recognize a cause of action under international law would be reserved for Congress.

Bork’s separation of powers critique did not win much support either in other courts or among scholars.³⁰ In the late 1990s, academics became more interested in a similar but distinct objection to ATS lawsuits that questioned the federal status of customary international law.³¹ Still, it was Bork’s separation of powers critique that remained the main vehicle for challenging the ATS in court. For instance, in the Supreme Court’s first extended analysis of the ATS in *Sosa*, both the defendants and the U.S. government as amicus curiae adopted Bork’s argument that the ATS did not create a cause of action and that to hold otherwise would threaten separation of powers.

Although the *Sosa* Court recognized the force of this separation of powers critique, it decided to leave the “door . . . ajar” for limited federal court activity in the administration of the ATS.³² Indeed, the justices were sufficiently sensitive to Bork’s critique that they instructed lower courts to adopt prudential considerations to limit separation-of-powers conflicts. Such prudential considerations included giving weight to executive branch views on ATS cases as well as limiting the types of causes of action that federal courts could recognize. Breyer’s invocation of universal jurisdiction in *Sosa* was also likely intended as a response to separation of powers concerns since foreign nations would be less likely to object to U.S. enforcement of legal norms of universal concern.

²⁵ See, e.g., Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1999) (describing how *Filártiga* and subsequent ATS cases helped build support for ban on torture); see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461, 489–93 (1989) (defending the use of ATS litigation to vindicate broader abstract norms).

²⁶ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

²⁷ *Id.* at 799 (Bork, J., concurring).

²⁸ *Id.* at 805.

²⁹ *Id.* at 801 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

³⁰ See, e.g., Burley, *supra* note 25, at 469 (criticizing Bork’s approach); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1539 (N.D. Cal. 1987) (rejecting Bork’s approach in *Tel-Oren* and citing contrary authority).

³¹ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 38–44 (1995); see also Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT’L L. 555 (2002).

³² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

It is therefore not surprising that, when the Supreme Court returned to the ATS in *Kiobel*, separation of powers concerns were again front and center. Both of the Court's main opinions recognized the endemic separation of powers concerns raised by ATS cases. For instance, as Roberts explained in his opinion for the Court, "[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what *Congress* has done but instead what courts may do."³³ Breyer recognized the need to "minimize international friction" caused by ATS lawsuits.³⁴ The main difference with Roberts was Breyer's confidence that existing prudential doctrines and international law notions of jurisdiction could accomplish this goal. It is noteworthy that Breyer limited ATS cases to those involving "distinct American interests," even though international law imposes no such requirement and the sources that he cites seem to support a universal jurisdiction approach.

In my view, Breyer's surprising retreat from universal jurisdiction reflects his view that federal courts applying a broad notion of universal jurisdiction would raise too many "international friction[s]" to be consistent with the basic separation of powers concerns first raised by Bork and later recognized by the *Sosa* Court. Because Breyer does not offer a textual, a historical, or even a policy explanation for his shift, the concern over separation of powers embedded in the avoidance of "international friction[s]" seems the most plausible rationale.

Conclusion

As John Yoo and I have argued elsewhere, this concern about separation of powers has a functional as well as formalist basis.³⁵ While federal courts have superior institutional competence in some areas, this competence is unlikely to include when to invoke U.S. power over foreign government actions and policies overseas. As *Kiobel* itself illustrates, federal courts vindicating purported international norms still sparked opposition from foreign governments like the United Kingdom and the Netherlands as well as the U.S. government itself.³⁶ Should the "international friction" with these nations (as well as Nigeria) be overcome by universal norms, or should it be deferred to political or diplomatic measures? *Kiobel* leaves the resolution of this question to Congress, which is likely to have superior informational and technical expertise on how to make this determination.

While the *Kiobel* Court did not explicitly embrace our functional framework, its conclusions conform to our recommendations. Both the Roberts and Breyer opinions in *Kiobel* seem to assume that Congress has the primary, or even exclusive, responsibility to determine how and whether the United States will invoke universal jurisdiction under international law.

³³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664 (2013) (emphasis added).

³⁴ *Id.* at 1674 (Breyer, J., concurring).

³⁵ Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153. We extend and develop this argument further in *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* 178–97 (2012), where we argue that privileging functional competence is a practical way to manage the collision of international and domestic law norms.

³⁶ See Supplemental 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, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491) (arguing against the applicability of the ATS overseas); Brief of the United States as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491).

This conclusion does not mean that debates over the ATS are completely resolved. But one big debate *is* over. The suggestions by scholars and courts that the ATS should be interpreted to reach the limits of universal jurisdiction under international law have been unanimously rejected. And the basis for their rejection indicates that the separation of powers critique of the ATS will likely dominate future debates about the ATS.

KIOBEL AND THE WEAKENING OF PRECEDENT:
A LONG WALK FOR A SHORT DRINK

By *Ralph G. Steinhardt**

*Kiobel v. Royal Dutch Petroleum Co.*¹ marks the second time in nine years that the Supreme Court has ruled unanimously that the Alien Tort Statute (ATS)² does not provide jurisdiction in a high-profile human rights case, a sequence that might suggest an end to the gilded age of human rights litigation that began with *Filártiga v. Peña-Irala*.³ On closer analysis, however, *Kiobel*, like *Sosa v. Alvarez-Machain* before it,⁴ adopts a rhetoric of caution without foreclosing litigation that fits the *Filártiga* model. To the contrary, *Sosa* and *Kiobel* invite considerably more ATS litigation than they resolve or bar and therefore confirm Justice Antonin Scalia's memorable encapsulation of the Court's "Never Say Never Jurisprudence."⁵ All four of the opinions in *Kiobel* confirm that multiple significant issues remain for future resolution, but it is unrealistic to expect answers on the basis of the Court's decision because what is law in *Kiobel* isn't clear and what is clear in *Kiobel* isn't law.

What law there is—and specifically the holding that the presumption against extraterritoriality requires the dismissal of *Kiobel*'s action against Royal Dutch Petroleum—actually creates an unprecedented and ill-defined presumption that has nothing but idiom in common with the traditional presumption as articulated by the Court in *Foley Bros. Inc. v. Filardo*⁶ and *Morrison v. National Australia Bank Ltd.*⁷ Although these "presumption precedents" drive the majority opinion, *Kiobel* is the first time that the presumption against extraterritoriality has been applied to a purely jurisdictional statute,⁸ as distinct from substantive statutes

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² 28 U.S.C. §1350 [hereinafter ATS].

³ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filártiga* established that the ATS could be used to advance certain human rights claims in U.S. courts, even if the abuse occurred abroad and involved exclusively non-American citizens, so long as the defendant was within the personal jurisdiction of the court.

⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁵ *Id.* at 750 (Scalia, J., concurring) ("In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again.").

⁶ *Foley Bros. Inc. v. Filardo*, 336 U.S. 281 (1949).

⁷ *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869 (2010).

⁸ *Sosa*, 542 U.S. at 724; *see also id.* at 729 ("All Members of the Court agree that §1350 is only jurisdictional.").

like antidiscrimination law, antitrust, securities regulation, and labor law.⁹ The contrast with the previous understanding of the ATS could not be starker: the essence of *Sosa* is that the ATS does not authorize the making of substantive U.S. law, let alone its application, abroad.¹⁰ To the contrary, after *Sosa*, the applicable substantive standard in ATS cases *must* be international law norms comparable to the “18th-century paradigms that [the Supreme Court has] recognized”¹¹ and not some domestic regime enacted by Congress and projected into foreign territory. In consequence, the remedial exercise at the heart of ATS litigation distinctly did not—indeed, after *Sosa* could not—involve the application of substantive U.S. law abroad. This distinction between remedial and prescriptive jurisdiction is fundamental and accounts in part for the fact that every lower court presented with the argument that the ATS cannot apply to wrongs committed in foreign territory had rejected it, both before¹² and after¹³ *Sosa*.

Equally unprecedented is that the *Kiobel* presumption against extraterritoriality—whatever else it means—can apparently be overcome case by case if the plaintiff’s claims “touch and concern the territory of the United States . . . with sufficient force to displace the presumption.”¹⁴ This creates a new presumption that turns on the factual allegations in each case and not on the text of the statute itself as in *Foley Bros.* and its progeny. The new claim-by-claim assessment cannot be squared with the traditional statute-by-statute analysis in determining whether the presumption against extraterritoriality has been overcome,¹⁵ and it seems a needlessly blunt instrument for handling the foreign relations concerns at the heart of the Court’s analysis.

But the problem is not merely that *Kiobel* breaks *with* precedent: the problem is that it fails *as* precedent because it gives precious little guidance to the lower courts as they struggle to determine which allegations will overcome the new presumption and which will not. The “touch and concern” test echoes the common law of property—specifically whether a covenant “runs with the land”—but there is no indication that the *Kiobel* Court intended to import that notoriously cryptic test literally into ATS litigation. Instead, in an apparent application of the “touch and concern” test, the majority declares that “[o]n these facts, all the relevant conduct took place outside the United States” and that “it would reach too far to say that mere corporate

⁹ See, e.g., *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991) (antidiscrimination law); *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (antitrust); *Morrison*, 130 S.Ct. 2869 (securities regulation); *Foley Bros.*, 336 U.S. 281 (labor law). Each of these cases rejected the projection of substantive U.S. regulation into foreign territories and held that U.S. standards could not govern foreign conduct by foreigners in the absence of a clear congressional directive to the contrary.

¹⁰ *Sosa*, 542 U.S. at 729.

¹¹ *Id.* at 725. Under *Sosa*, that part of U.S. law that consists of federal common law comes into ATS litigation not as a substantive regulation applied abroad but in recognition of a cause of action that is defined by the law of nations.

¹² See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980); *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) (“We are constrained by what §1350 shows on its face: no limitations as to the citizenship of the defendant or the locus of the injury.”).

¹³ See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745–47 (9th Cir. 2011) (en banc); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20–28 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.2d 1013, 1025 (7th Cir. 2011). From this perspective, far from violating international law restricting the application of domestic law, ATS cases in the *Filártiga* mold should be viewed as enforcement of the modest body of international norms that *Sosa* acknowledges.

¹⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013).

¹⁵ The procedural consequence is that ATS claims in the future must be tested on a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as distinct from a challenge to subject matter jurisdiction under Rule 12(b)(1), as has traditionally been the case.

presence [of the defendant] suffices.”¹⁶ That the Court would transform and invoke the presumption against extraterritoriality to address these concerns, instead of more naturally tailored case-specific doctrines like *forum non conveniens* or personal jurisdiction¹⁷ or comity, is evidence of the Court’s more robust stance against extraterritoriality (or even the appearance of extraterritoriality) over recent terms.¹⁸

The Supreme Court seemingly viewed *Kiobel* as an easy case under the ATS: foreign plaintiffs suing foreign corporate defendants, with no substantial connection to the United States, for conduct that occurred entirely abroad, with the United States government supporting dismissal. But the majority of ATS corporate cases, especially those that were stayed pending the disposition of *Kiobel*, are readily distinguishable. They are complaints against U.S. corporations, sometimes under contract with the United States government, generally involving a mix of tortious conduct in the United States and abroad, with no statement of interest from the executive branch. As these cases percolate through the district courts and the courts of appeals, the international law standards of prescriptive jurisdiction will provide at least analogical authority¹⁹ for determining which claims “touch and concern” the United States and which do not. Thus, cases that involve nationals of, or conduct in, the United States should not be dismissed on the basis of the *Kiobel* holding alone. In other cases, the courts may feel themselves obliged to develop a multifactor, all-the-circumstances test turning not on the territoriality of the wrong or the citizenship of the defendant but on, inter alia, the nature of the alleged breach; statements of interest by the executive branch; the exhaustion of local remedies (subject to the usual limitations); the applicability *vel non* of the act of state doctrine and the political question doctrine; whether a federal court is a forum of necessity or *forum non conveniens*; and the links of the plaintiff to the United States.

The *Kiobel* majority also fails as precedent because it said nothing about whether foreign-cubed actions against human beings, as in *Filártiga* and *In re Estate of Marcos*,²⁰ are included in the new presumption against extraterritoriality.²¹ To some extent, the separate opinion of Justices Samuel Alito and Clarence Thomas clarifies the point because it requires that the “domestic [i.e., U.S.] conduct [be] sufficient to violate an international norm that satisfies

¹⁶ *Kiobel*, 133 S.Ct. at 1669.

¹⁷ See, e.g., *Elemery v. Holzmann*, 533 F.Supp.2d 116, 123 (D.D.C. 2008) (“A federal court’s jurisdiction over a person, may be either general—adjudicatory authority to entertain a suit against a defendant without regard to the claim’s relationship *vel non* to the defendant’s forum-linked activity—or specific—authority to entertain controversies based on acts of a defendant that *touch and concern* the forum” (internal quotation marks and citation omitted). (emphasis added).)

¹⁸ In addition to *Morrison*, *Aramco*, and *F. Hoffmann–La Roche Ltd.*, see *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). But see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

¹⁹ International standards governing the jurisdiction to prescribe apply by analogy to the post-*Kiobel* “touch and concern” analysis because technically the ATS is not an exercise in jurisdiction to prescribe. The securities laws in *Morrison* were such an exercise, but *Sosa* established that the ATS recognizes only claims arising out of a violation of international law. Other international law doctrines may also shed light by analogy on the kinds of claims that touch and concern the United States, including state responsibility, jurisdiction to adjudicate, and diplomatic protection.

²⁰ *In re Estate of Marcos*, Human Rights Litig., 978 F.2d 493 (9th Cir. 1992).

²¹ In the decision below, the Second Circuit held that the managers or directors or employees of the corporation do bear obligations under international law. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 122 (2d Cir. 2010) (“[N]othing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law.”).

Sosa's requirements of definiteness and acceptance among civilized nations."²² The claims at issue in *Filártiga* and *Marcos*, cited with approval in *Sosa*,²³ would have failed the Alito-Thomas test. In those cases, the *Sosa*-qualified norms were violated by the defendants exclusively in foreign territory. But the other seven justices in *Kiobel* did not endorse the Alito-Thomas approach, suggesting, in turn, that ATS claims against individuals and involving foreign conduct may nonetheless have sufficient connections to the United States to satisfy the "touch and concern" test. From that perspective, the so-called safe haven cases—brought by victims of abuse abroad when they find their abusers living in the United States—survived *Kiobel*, just as they survived *Sosa*. Notably, the brief of the United States on the question of extraterritoriality explicitly preserved *Filártiga* and its progeny, even as it suggested that the U.S. connections in *Kiobel* were simply too attenuated.²⁴

Perhaps most surprising, the *Kiobel* Court never addressed the essential question at the heart of the court of appeals' decision and much of the public interest in the case, namely whether corporations may in principle bear international obligations to respect human rights norms. That conflict among the circuit courts, which first triggered the grant of certiorari, remains as trenchant as ever, with the Second Circuit as the sole outlier among the circuit courts in an overall consensus that corporations are not immune from international law for purposes of the ATS.²⁵ The briefing on this issue by the parties and by dozens of amici on both sides was extensive and pointed, with the government of the United States supporting the petitioners, and so the remarkable silence of the Court means that *Kiobel* offers no authority for any broad rethinking of ATS litigation against corporate defendants in general. Indeed, the majority's specification that "mere corporate presence is not enough" would be superfluous if corporations were, in principle, immune from ATS liability. International law, in a variety of forms, allows the imposition of civil liability on juridical persons, and no country in the world immunizes corporations from liability for their torts (or "delicts" in civil law jurisdictions), suggesting, in turn, that corporate liability qualifies as a "general principle[] of law recognized by civilized nations" under Article 38(1)(c) of the ICJ Statute.²⁶

²² *Kiobel*, 133 S.Ct. at 1670 (Alito & Thomas, JJ., concurring).

²³ When precisely the same "extraterritoriality" argument was made in *Sosa*, see, for example, Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), available at <http://www.justice.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf>, the Supreme Court cited with approval a variety of foreign-cubed cases against individuals, alleging conduct that occurred abroad, applying the ATS to causes of action that arose abroad, every one of them a foreign-cubed case. *Sosa*, 542 U.S. at 732–33.

²⁴ Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 19–20, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Kiobel-US-supp-brief-6-13-12.pdf>.

²⁵ Every other circuit court to address the issue of whether corporations could in principle face liability under the ATS had disagreed with the Second Circuit's conclusion in *Kiobel*. See *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated and remanded on other grounds*, 133 S.Ct. 1995 (mem. op.), *remanded to* 722 F.3d 1109 (9th Cir. 2013) (en banc) (affirming the district court's dismissal of the complaint, which had been based on defects in the case, having nothing in principle to do with corporate immunity under the ATS).

²⁶ ICJ Statute, Art. 38(1)(c); see also 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(1)(c) (1987) ("A rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.").

Even if the post-*Kiobel* trajectory of ATS corporate cases in federal courts is downward, the historic contribution of such cases since *Doe v. Unocal Corp.*²⁷ should not be underestimated. In the years since *Unocal* was filed, the prospect of ATS liability has led to the proliferation of corporate social responsibility standards, from the voluntary codes of conduct adopted by firms or industries, to social accountability and certification programs, to the Ruggie Principles and the work of intergovernmental organizations, like the International Committee of the Red Cross, the Organisation for Economic Co-operation and Development, and the international financial organizations. In short, *Unocal* and its progeny—whatever their future may be after *Kiobel*—provided scaffolding for the creation of a robust and still evolving set of norms governing the human rights responsibilities and best practices of the corporation in the twenty-first century. The scaffolding serves an important function but is not an end in itself.

Finally, what is clear in *Kiobel* is actually not law at all but a continuing, seemingly visceral resistance to treating modern international law in both treaty and customary form as law of the United States. Both the Rehnquist and Roberts Courts have opted to minimize the authority of much of international law by deploying existing doctrine in an aggressive and unprecedented way, with results that are incompatible with the long-term interest of the United States in furthering the rule of law among states. Consequently, for example, the Court has adopted a formalistic approach to treaties that yields interpretations directly at odds with those of the other contracting parties²⁸ and a conception of the self-executing treaty doctrine that excuses the United States from meeting its acknowledged international obligations.²⁹ And when the *Kiobel* majority does purport to take international law seriously, as in *Kiobel*'s invocation of the presumption against extraterritoriality, it even fails to apply international standards of jurisdiction correctly.³⁰ It is, moreover, international law in its ancient "negative" form of jurisdictional line drawing and abstention, instead of its contemporary "affirmative" forms of substantive law for resolving communal problems, like environmental degradation and egregious human rights violations.³¹ For this reason, the Court's international law touchstone—avoiding international disputes—may not always cut in favor of dismissing ATS claims with no territorial link to the United States. Perhaps, when the Supreme Court is again asked to clarify its understanding of the ATS, as it inevitably will, the substantive *and* the jurisdictional standards of international law in all its current breadth will be reflected in the Court's disposition.

²⁷ *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

²⁸ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

²⁹ *Medellín v. Texas*, 552 U.S. 491 (2008).

³⁰ See, in this Agora, Zachary D. Clopton, *Kiobel and the Law of Nations*, available at www.asil.org/AJILUnbound/KiobelAgora.

³¹ On the essential transformation of modern international law from a negative code of abstentions into a code of affirmative and mutual obligations, see WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 62 (1964).

WAVING NOT DROWNING: *KIOBEL* OUTSIDE THE UNITED STATES

By Robert McCorquodale*

Access to an effective remedy is part of the third pillar of the United Nations Guiding Principles on Business and Human Rights (Guiding Principles).¹ It should require states to provide access to judicial remedies for human rights violations, even those that have occurred outside the territory of the state by a corporation domiciled in that state, especially where claimants “cannot access [their] home State courts regardless of the merits of the claim.”² While the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*³ may seem to overwhelm or even drown⁴ some of the expectations of such remedies within the United States, the case law in the rest of the world is unlikely to be greatly affected by the ruling due to the jurisdictional and legal system foundations of other states. This article will examine the main case law and judicial remedies sought across the world, with a special emphasis on Europe, where the majority of large non-U.S. transnational corporations have their headquarters.⁵

European Judicial Remedies

Across the European Union, a range of approaches have been adopted to enable claims to be brought before national courts against corporations for their actions that violate human rights, including for actions outside the territory of the state. These approaches are affected by two European Union regulations that are binding on all EU member states. First, the Brussels I Regulation (Brussels I) provides that the national courts within the European Union have jurisdiction over all who are domiciled in their jurisdiction.⁶ For corporations, Brussels I defines *domicile* as the location of a corporation’s “statutory seat,” “central administration,” or “principal place of business.”⁷ This definition applies to all EU-domiciled corpora-

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¹ Office of the High Commissioner on Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. HR/PUB/11/04, princ. 26 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter Guiding Principles].

² *Id.*, princ. 26 cmt.; see also *id.*, princ. 7 cmt.

³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). This ruling was based on the Alien Tort Statute, 28 U.S.C. §1350 [hereinafter ATS].

⁴ See Stevie Smith, *Not Waving but Drowning*, in THE COLLECTED POEMS OF STEVIE SMITH 303 (1975).

⁵ See UN Conference on Trade & Development, World Investment Report 2013, Annex Table 28: The World’s Top 100 Non-Financial TNCs, Ranked by Foreign Assets, 2012 (June 26, 2013), available at <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx>.

⁶ Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 2(1), 2001 O.J. (L 12) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF> [hereinafter Brussels I]. In *El-Hojouj v. Unnamed Libyan Officials*, Arrondissementsrechtbank Den Haag [District Court of The Hague], Mar. 21, 2012, Case No. 400882/HA ZA 11-2252 (ECLI:NL:RBSGR:2012:BV9748), the court accepted jurisdiction where the only known domicile was that of the claimant on the basis of *forum necessitatis*. See, in this Agora, Nicola Jägers, Katinka Jesse & Jonathan Verschuuren, *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, available at www.asil.org/AJILUnbound/KiobelAgora.

⁷ Brussels I, *supra* note 6, Art. 60.

tions.⁸ Thus, in the European Union, the previous barrier of *forum non conveniens*—being the argument that the particular court was not the most appropriate forum for the case to be heard—is no longer relevant other than for limited circumstances,⁹ in contrast to the situation in the United States.

Second, the Rome II Regulation provides a uniform rule that the applicable law of a claim shall be the law of the state where the damage occurred, irrespective of the state where the claim is brought.¹⁰ This rule, however, has limited exceptions. For example, the applicable law may be that of the forum state where the law of the state in which the harm occurred does not effectively protect human rights,¹¹ where the event is manifestly more closely connected with another state,¹² or where the application of that law would conflict with the public policy of the state in which the claim is brought.¹³ Therefore, despite these exceptions, the courts in the European Union must generally apply the law of the state where the damage occurred, which seems advantageous over the position in *Kiobel* in that the European court hearing the case does not impose its own laws (or international law) directly on claims that have arisen in the territory of another state.

UK Common Law Approach

The legal system of the United Kingdom has had considerable experience with claims being brought against corporations for violations of human rights occurring elsewhere. These cases include claims based on the effects of chemicals on employees¹⁴ and based on damage to land.¹⁵ While some claims have been settled out of court or dismissed, others have resulted in decisions in favor of the claimants,¹⁶ resulting in judicial pronouncements on legal principles that affect all claims.

⁸ Some very limited exceptions to this rule exist. *Id.*, Arts. 23, 27. See, in this Agora, Andrew Sanger, *Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts*, available at www.asil.org/AJILUnbound/KiobelAgora.

⁹ The Grand Chamber of the Court of Justice of the European Union has held that Brussels I, *supra* note 6, prohibited the UK courts from declining jurisdiction on the grounds of *forum non conveniens* for corporations domiciled in the European Union. Case C-128/01, *Owusu v. Jackson*, 2005 ECR I-553. The UK courts had already decided that this ground was not a substantial hindrance to jurisdiction. See *Connelly v. RTZ Corp. PLC*, [1998] A.C. 854 (H.L.); *Lubbe v. Cape PLC*, [2000] 4 All E.R. 268 (H.L.).

¹⁰ Council Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), Art. 4(1), 2007 O.J. (L 199) 40. This provision can give rise to evidential issues in terms of proving the substance of the law in the foreign state.

¹¹ *Id.*, Art. 16.

¹² *Id.*, Art. 4(3). A manifestly closer connection might exist where the parties already have some type of relationship, such as a contractual relationship under a supply chain. Article 17 provides that the forum state's rules about health and safety of workers may also apply.

¹³ *Id.*, Art. 26. This public order exception might be applied where the laws of the foreign state are considered to be contrary to human rights. See *Kuwait Airways Corp. v. Iraq Airways Co.*, [2002] UKHL 19, para. 18, [2002] 2 A.C. 883.

¹⁴ *E.g.*, *Connelly*, *supra* note 9; *Lubbe*, *supra* note 9; *Ngcobo v. Thor Chem. Holdings Ltd.*, [1995] TIMES L. REP. 579 (Eng.); *Sithole v. Thor Chem. Holdings Ltd.*, [1999] EWCA (Civ) 706 (Eng.).

¹⁵ *E.g.*, *Motto v. Trafigura Ltd.*, [2012] W.L.R. 657 (Eng.); *Bodo Cmty. v. Shell Petroleum Dev. Co. (Nigeria) Ltd.*, No. HQ11X01280 (Eng.) (unresolved litigation); see also Carley Petesch, *Nigeria Community Rejects Shell Compensation Offer*, YAHOO! NEWS, Sept. 13, 2013, at <http://news.yahoo.com/nigeria-community-rejects-shell-compensation-offer-163345774.html>.

¹⁶ Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts—A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127 (2013).

The cause of action in each of these cases has normally been in tort, usually negligence,¹⁷ as there is no UK legislation that enables claims to be brought against a corporation for human rights violations occurring extraterritorially.¹⁸ A central issue has been the circumstances in which a parent corporation domiciled in the United Kingdom owes a duty of care to victims in another state. The most recent decision on this duty of care issue is *Chandler v. Cape*, which was based on a claim against a UK parent corporation for injury (asbestosis caused by asbestos dust exposure) suffered by employees of a subsidiary corporation.¹⁹ While the issue was largely about UK corporations, the Court of Appeal held that, in appropriate circumstances, the law may impose on a parent corporation a duty of care in relation to the health and safety of its subsidiary's employees. The Court noted that the following factors could give rise to such a duty:

- (1) the business of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.²⁰

In that case, the Court determined that the parent corporation had a duty of care.²¹

This ruling indicates an increasing likelihood that UK courts will consider, in contrast to the *Kiobel* decision, that a parent corporation domiciled in that state has assumed a duty of care towards third parties affected by the operations of subsidiaries located elsewhere, at least where the parent corporation has developed and implemented group-wide policies and practices. While a parent corporation might choose not to develop high global standards and policies to avoid such a duty of care, to do so would be to act contrary to the requirement of due diligence under the Guiding Principles.²²

Thus the UK litigation has built up a strong basis for bringing and deciding claims brought by victims of human rights violations caused by corporations operating elsewhere, even if through a subsidiary. This development has been based on common law principles, as has been the position in other common law jurisdictions,²³ and is due to a few determined lawyers

¹⁷ *Arroyo v. BP Petroleum Co. (Colom.) Ltd.*, Particulars of Claim, No. HQ08X00328 (High Court of Justice 2008) (Eng.) (unreported) (claim based on breach of contract).

¹⁸ Some possible avenues for action exist under the Bribery Act, 2010, c.23 §§6, 12 (UK), and the Serious Crime Act, 2007, §§44–46, 52 (UK). UK legislative information is available online at www.legislation.gov.uk.

¹⁹ *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525 (Eng.).

²⁰ *Id.*, para. 80.

²¹ *Id.*, paras. 72–79.

²² See Guiding Principles, *supra* note 1, princs. 15, 17.

²³ See, e.g., *Dagi v. BHP (No. 2)*, [1997] 1 V.R. 428 (Austl.); *Recherches Internationales Québec v. Cambior Inc.*, [1998] Q.J. No. 2554 (S.C.J.) (Can.); *Anvil Mining Ltd. v. Association Canadienne contre l'Impunité*, [2012] C.A. 117 (Can. Que.); see also Upendra Baxi, *Writing About Impunity and Environment: The 'Silver Jubilee' of the Bhopal Catastrophe*, 1 J. HUM. RTS. & ENV'T 23 (2010) (India); *Lee v. Minister Corr. Serv.*, [2012] ZACC 30, para. 95 (S. Afr.).

prepared to take litigation and costs risks. This outcome has occurred despite attempts by the UK government to limit the ability of lawyers to bring these cases,²⁴ its support of Shell's arguments in *Kiobel*,²⁵ and its limited domestic implementation of the Guiding Principles.²⁶ However, in the UK cases, claimants have not generally relied on cases under the Alien Tort Statute (ATS). In this context, the decision by the U.S. Supreme Court in *Kiobel* is effectively irrelevant and largely unimportant for cases brought in the United Kingdom.

European Civil Law Approach

In the European civil law states, not many cases have been brought that relate to human rights violations by corporations operating in other states. This absence is largely because such civil actions are unusual and because the benefits of the legal cost structure available in the United States do not exist in European civil law states.²⁷ Those claims that have been brought have been attempted within the criminal justice system,²⁸ not least due to the system facilitating access to a corporation's documents and enabling broad criminal law extraterritorial reach.²⁹ Most European civil law systems also allow civil claims to be attached to the criminal proceedings (*partie civile*).³⁰ However, public prosecutors have been reluctant to bring these cases, although there have been a few cases brought solely as civil (tort) claims.³¹

²⁴ For example, the changes created by the United Kingdom's Legal Aid, Sentencing and Punishment of Offenders Act 2012, c.10, seem to be contrary to the Guiding Principles, *supra* note 1. Letter from John Ruggie, UN Special Representative for Business and Human Rights, to Jonathan Djanogly, UK Justice Minister (May 16, 2011), *available at* <http://www.guardian.co.uk/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura>.

²⁵ See Brief for the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae Supporting Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), *available at* [http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum,%20et%20al.%20\(Amicus%20Brief%20-%20United%20Kingdom%20and%20Netherlands\).PDF](http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum,%20et%20al.%20(Amicus%20Brief%20-%20United%20Kingdom%20and%20Netherlands).PDF).

²⁶ SECRETARY OF STATE FOR FOREIGN & COMMONWEALTH AFFAIRS, GOOD BUSINESS: IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (Sept. 2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf (Sept. 4, 2013); see Robert McCorquodale, *Expecting Business to Respect Human Rights Without Incentives or Sanctions*, UK HUMAN RIGHTS BLOG (Sept. 4, 2013), *at* <http://ukhumanrightsblog.com/2013/09/04/expecting-business-to-respect-human-rights-without-incentives-or-sanctions-robert-mccorquodale>.

²⁷ See, in this Agora, Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*.

²⁸ See, in this Agora, Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation After Kiobel*.

²⁹ See, e.g., *Trafigura Beheer BV, Gerechtshof Amsterdam* [Court of Appeals of Amsterdam], Dec. 23, 2011, Case No. 23-003334-10 (ECLI:NL:GHAMS:2011:BU9239) (litigation involving oil waste), *available at* <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2011:BU9237>; GWYNNE SKINNER, ROBERT MCCORQUODALE, OLIVIER DE SCHUTTER & ANDIE LAMBE, *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* (2013), *available at* <http://www.corporate-responsibility.org/publications/research-reports/access-to-judicial-remedy>.

³⁰ See Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), *available at* <http://harvardhumanrights.files.wordpress.com/2012/10/european-commission-on-behalf-of-the-european-union-revised.pdf>; see also Kaeb & Scheffer, *supra* note 27. Many of these states now provide for corporate criminal liability.

³¹ See FIDH—WORLDWIDE HUMAN RIGHTS MOVEMENT, *AMESYS CASE: THE INVESTIGATION CHAMBER GREEN LIGHTS THE INVESTIGATIVE PROCEEDINGS ON THE SALE OF SURVEILLANCE EQUIPMENT BY AMESYS TO THE KHADAFI REGIME* (2013), *available at* http://www.fidh.org/spip.php?page=article_pdf&id_article=12752. Note that class actions or other collective redress is not widely available in Europe. See EXTRATERRITORIALITY AND COLLECTIVE REDRESS 15–41 (Duncan Fairgrieve & Éva Lein eds., 2012).

There are two cases of particular note in this latter regard: the *Alstom* case in France³² and the *Akpan* case in the Netherlands.³³ In *Alstom*, the claim alleged that Alstom and Veolia, French construction corporations, were breaching international humanitarian law in constructing a light rail system in Jerusalem, a part of which travels through the occupied Palestinian territory. The court of appeal in Versailles dismissed the claim as inadmissible because the corporations were not parties to the treaties and had no direct obligations under them. In *Akpan*, the claim was for negligence by the Shell parent corporation and its Nigerian subsidiary for oil pollution in Nigeria. The District Court of The Hague decided that the Nigerian subsidiary of Shell had been negligent in at least two of the claims and had breached its duty of care to the victims. While considering that the parent corporation may have had a duty of care, though in a more limited sense than in *Chandler*,³⁴ the court held that in this instance Nigerian law did not allow for the parent corporation to be liable. Nevertheless, the rulings indicate that such claims could be brought in civil law legal systems.³⁵

Each of these cases had no real engagement with ATS cases. However, in another French case, while claimants did not rely on the ATS cases, the claimants' lawyers threatened to bring the case in the United States under the ATS unless the case was heard in France.³⁶ This threat may diminish post-*Kiobel*.

Human Rights Claims

While it appears that the ATS cases are largely irrelevant to the case law elsewhere in the world, one aspect is submerged in them: human rights. In all of the litigation that has been undertaken outside the United States, none of the violations has been cast directly in human rights terms. Instead, a violation of a privacy right, a health right, or a labor right is presented as, for example, a claim in tort for negligence or a breach of contract.³⁷ Even a case involving the alleged torture and mistreatment of indigenous people was brought as a claim in tort for negligent management and as instigating trespass to the persons.³⁸

³² Association France-Palestine Solidarité v. Société Alstom Transport SA, Judgment, Cour d'appel de Versailles de 22 mars 2013, available at <http://www.dreuz.info/2013/04/la-cour-dappel-de-versailles-olp-c-alstom-et-veolia-declare-que-loccupation-par-israel-nest-pas-illegale> (English translation available online at <http://www.intjewishlawyers.org/main/files/Versailles%20Court%20of%20Appeals%20ruling%20doc%20English%20.pdf>).

³³ *Akpan v. Royal Dutch Shell PLC*, Arrondissementsrechtbank Den Haag, Jan. 30, 2013, Case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854). For a fuller discussion, see, in this *Agora*, Jägers, Jesse & Verschuuren, *supra* note 6.

³⁴ *Akpan*, *supra* note 33, para. 4.29 (citing *Chandler*, *supra* note 19).

³⁵ Other civil law states, like Brazil, allow such litigation. See Peter P. Houtzager, *The Movement of the Landless (MST), Juridical Field, and Legal Change in Brazil*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 218 (Boaventura de Sousa Santos & Cesar Rodríguez-Garavito eds., 2005).

³⁶ *Lipietz v. Préfet de la Haute-Garonne*, No. 305966, Conseil d'État (CE) de Bordeaux [High Administrative Court of Bordeaux] (Dec. 21, 2007) (Fr.), available at http://www.haguejusticeportal.net/Docs/NLP/France/Lipietz_Appel_27-3-2007.pdf; see, e.g., Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 391–92 (2008) (noting that the *Lipietz* case was the first time that a French court accepted such a civil claim, rather than relying on a case to be brought by the French authorities through the criminal process).

³⁷ Human rights have been mentioned in arguments in European cases, but this occasional reference has not been decisive. See *Lubbe*, *supra* note 9, at 277; *Akpan*, *supra* note 33, para. 4.56. However, there could be the possibility of reliance on Article 6 (fair trial) and Article 13 (remedy) of the European Convention on Human Rights. See *Markovic v. Italy*, 44 Eur. H.R. Rep. 1045 (2007).

³⁸ *Guerrero v. Monterrico Metals PLC*, [2009] EWHC 2475 (QB) (Eng.).

This approach forces claimants to fit their cases within certain restrictive legal parameters, and it privileges only those violations that can be expressed in tort or criminal claim terminology. Claims based on, for example, a corporation's denial of access to education, the prevention of joining a trade union, and the infringement of cultural rights may be ignored and dismissed. While the effects of the litigation may seem the same in some instances, this lack of legal expression diminishes the potential significance of the clear statement in the Guiding Principles that corporations (and not just states) may be liable for violating human rights.³⁹

What may be lost if U.S. courts retreat from the ATS is a national court example that claims against corporations can be based on violations of international human rights law.⁴⁰ The expressive value of such an example—which had previously sent a message that best accords with the views of victims and their communities⁴¹ and probably causes corporate officials to reflect most on the gravity of their acts—may disappear.

Conclusion

The decision in *Kiobel* is unlikely to have any significant effect on the development of litigation outside the United States against corporations for their extraterritorial actions that violate human rights.⁴² The effect of EU regulations and the use of imaginative common law tort claims and civil law criminal procedures, combined with innovative legal techniques, have enabled the development of effective litigation outside the United States that avoids many of the difficulties seen in ATS claims. This progression has occurred despite the limitations of the systems of these European states in terms of the restrictions on bringing class actions, the reliance on the law of the state where the damage occurred, and the inability to bring a claim in human rights terms.

The strength and breadth of these cases is such that it may lead to claims against corporations being initiated outside the United States (including against U.S. corporations) and might reignite claims in the United States on non-ATS bases.⁴³ It may also reinforce the application of the rule of law applying to all corporate activities worldwide.⁴⁴ Overall, the effect is that non-U.S. litigation on these issues will survive beyond the waves emanating from the *Kiobel* decision.

³⁹ Guiding Principles, *supra* note 1, princs. 12, 14.

⁴⁰ However, there are risks in relying on national courts to understand and apply international law.

⁴¹ Human rights language tends to add to the local group's own language for the claim, rather than to displace it. SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

⁴² It is hoped that the victims of human rights violations can bring claims within their own jurisdictions in due course, especially if legislation to give effect to the Guiding Principles, *supra* note 1, is put in place.

⁴³ See, e.g., Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 19 (2013).

⁴⁴ See Robert McCorquodale, *Business, the International Rule of Law and Human Rights*, in *THE RULE OF LAW IN INTERNATIONAL AND COMPARATIVE CONTEXT* 27 (Robert McCorquodale ed., 2010).

THE PARADOX OF *KIOBEL* IN EUROPE

By Caroline Kaeb and David Scheffer*

One of the most striking features of Chief Justice John Roberts's majority opinion in the U.S. Supreme Court's judgment in *Kiobel v. Royal Dutch Petroleum Co.*¹ is how it pays homage to foreign governments' opposition to the extraterritorial application of the Alien Tort Statute (ATS),² as voiced most prominently from European foreign ministries. "[F]oreign policy concerns" and the overarching goal to avoid diplomatic tensions with foreign sovereigns are themes heavily informing the Roberts opinion.³ The majority found the presumption against extraterritoriality applicable to the ATS in large part due to fear of "unwarranted judicial interference in the conduct of [U.S.] foreign policy" if the Court allowed the ATS to "reach conduct occurring in the territory of a foreign sovereign."⁴ In that light, the *Kiobel* judgment can be understood primarily as a decision prohibiting the overreach of U.S. law and protecting jurisdictional prerogatives of *lex loci delicti* and state of incorporation alike.

Some may be left with the impression that European governments are aligned in their law, practice, and theory with the majority opinion in *Kiobel*. The amici briefs filed by the United Kingdom, the Netherlands, Germany, and the European Union have been understood to signal this alignment with the Supreme Court's position to constrain corporate liability for extraterritorial violations of the law of nations. While there is some truth to this assessment for a few European governments, in fact an opposing paradoxical trend is unfolding in Europe.

The United Kingdom and the Netherlands, home to corporate defendant Royal Dutch Petroleum, were perceived as the prominent voices of Europe during reargument in *Kiobel* on the extraterritoriality question.⁵ They argued in their amici brief for a presumption against extraterritorial application of the ATS.⁶ However, this view was not necessarily representative of Europe as a whole. Such discord becomes abundantly clear in the amicus brief submitted by the European Commission on behalf of the European Union. While the European Commission stressed the need to ensure "an effective remedy for repugnant crimes in violation of fundamental human rights,"⁷ which helps to defeat impunity, the Dutch and British suggested

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² The ATS confers on district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350.

³ *Kiobel*, 133 S.Ct. at 1664.

⁴ *Id.*

⁵ Germany, discussed below, only filed an amicus brief for the initial argument in the case.

⁶ Supplemental 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 6, 33–34, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf [hereinafter Netherlands/UK Brief].

⁷ Supplemental Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 18, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at <http://harvardhumanrights.files.wordpress.com/2012/10/european-commission-on-behalf-of-the-european-union-revised.pdf> [hereinafter EU Brief].

an insular perspective that protects their sovereign rights as a function of commercial interests and foreign investments abroad.⁸ Their position, grounded in reciprocity, has mainly been shaped by the perceived threat of “U.S. litigators and judges to bypass the legal systems of other sovereigns.”⁹ This view seems to be dated, in light of the realities of modern globalization and transnational character of corporate activity today.

Instead of focusing merely on statutory principles, the European Commission looked to international law to determine the jurisdictional limits of the ATS.¹⁰ The European Commission concluded that “the United States’ exercise of universal [civil] jurisdiction [with no U.S. nexus of the parties or conduct] under the ATS is consistent with international law in accordance with these well-established constraints”¹¹ that stand apart from any presumption against extraterritoriality. The brief points to the application of an exhaustion requirement of local and international remedies and of *forum necessitatis* grounds to draw the jurisdictional limits.¹²

National practice of many EU member states is aligned with the European Commission’s position. At least ten EU member states allow for universal civil jurisdiction on a “necessity basis.”¹³ Unlike the United States, the European Union takes a progressive approach that looks to international custom to reinforce legislative will, rather than juxtaposing custom and legislative mandates. Where no impediments under customary law exist, extraterritorial jurisdiction will then be found when sought in the European context. In contrast, the majority opinion in *Kiobel* essentially creates an affirmative requirement of only legislated opportunities to trigger the extraterritorial reach of American law. Overlooked is the fact that the ATS was enacted in 1789, long before the Court discovered the presumption against extraterritoriality.

While admittedly the Dutch and British governments endorse the presumption against extraterritoriality, the Dutch national courts take a different approach and did so prominently in a civil case involving an entirely Libyan-situated matter pertaining to a nonnational decided in March 2012.¹⁴ Abandoning transatlantic judicial courtesies, Justice Antonin Scalia remarked during oral argument in *Kiobel* that “[he] would rather listen to the Dutch Government than . . . one Dutch judge, frankly.”¹⁵ However, in times when national legislatures are often deadlocked and thus impaired to adopt new legislation (witness Washington, D.C.), the credibility of national judges applying the law as they interpret it applies in European jurisdictions as much as it does on the banks of the Potomac.

⁸ Netherlands/UK Brief, *supra* note 6, at 24–26, 31. Arguing that the ATS poses a threat to international comity, the Dutch and British governments endorsed the concerns voiced by the U.S. Supreme Court and the South African government regarding the perceived risk to a foreign nation’s prerogative to “regulate its own commercial affairs,” *id.* at 31 (citation omitted), and the potential negative impact on “much needed direct foreign investment” in host countries, *id.* at 26 (citation omitted).

⁹ *Id.* at 24.

¹⁰ EU Brief, *supra* note 7, at 5.

¹¹ *Id.* at 4–5.

¹² *Id.* at 30–31. Alternatively, as noted in the EU Brief, “exhaustion of ‘local’ remedies requires a demonstration by the claimant that those states with a traditional jurisdictional nexus to the conduct are unwilling or unable to proceed.” *Id.* at 30 n.77.

¹³ *Id.* at 24 n.66.

¹⁴ *El-Hojouj v. Unnamed Libyan Officials*, Arrondissementsrechtbank Den Haag [District Court of The Hague], Mar. 21, 2012, Case No. 400882/HA ZA 11-2252 (ECLI:NL:RBSGR:2012:BV9748) (Neth.) (awarding damages to a Palestinian doctor tortured by Libyan state agents).

¹⁵ Oral Argument at 56:10–11, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf.

The Supreme Court may have almost shut the gates on ATS extraterritorial corporate liability, particularly in “foreign-cubed” situations, but many European nations and the European Union are moving in the opposite direction by loosening constraints on corporate liability as a matter of law and increasingly as a matter of practice.¹⁶ Within the broader perspective of the European experience, its governments, parliaments, and courts are discovering ways to impose greater degrees of liability on corporations that are engaging in or are complicit in egregious violations of international law outside of their home jurisdiction. While the discrepancy between the United States and Europe on the issue of extraterritorial corporate liability is growing in a post-*Kiobel* America, developments on the other side of the Atlantic conform with European legal culture and socioeconomic values that rest on a stakeholder-centric corporate model,¹⁷ rather than the American premise of shareholder primacy.¹⁸ For example, the 2006 UK Companies Act explicitly extends the fiduciary duty of directors to include stakeholder interests—which so often focus on the foreign operations of multinational corporations—alongside shareholder interests.¹⁹

Europe does not have an ATS-equivalent per se, but extraterritorial corporate liability exists in Europe. Although the formula in Europe is more complex than the one-sentence simplicity of the ATS promulgated in 1789, the challenge of unlocking the de facto ATS box in Europe remains.

While the *Kiobel* Court reversed gears on the growing trend of extraterritorial application of federal law in other areas,²⁰ European practice has broadened extraterritorial application of EU law and national laws on torts and criminal cases during the last two decades. At the EU level, the Brussels I Regulation (Brussels I)²¹ opens member state courts to civil claims in tort, even when the damage occurred outside of the European Union and the victim is a nonnational, as long as the “event giving rise to the harmful event” (for example, a tort committed through a decision by the board of directors) occurred within a European forum jurisdiction.²² All twenty-eight EU member states (and three non-EU countries: Switzerland, Iceland, and Norway)²³ are bound by Brussels I, which has often been described as the ATS-equivalent in

¹⁶ For a list of nations that provide for legal codification of criminal and often also joint civil liability for extraterritorial corporate conduct pertaining to international crimes, see Supplemental Brief of Ambassador David J. Scheffer as Amicus Curiae in Support of the Petitioners at 15–20, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at <http://harvardhumanrights.files.wordpress.com/2012/06/ambassador-scheffer.pdf>.

¹⁷ See MICHAEL KERR, RICHARD JANDA & CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 113 (2009).

¹⁸ ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 220–32 (1933).

¹⁹ Companies Act 2006, c.46, pt. 10, c.2, §172 (UK), available at <http://www.legislation.gov.uk/ukpga/2006/46/section/172>. Stakeholder interests include the interests of employees, suppliers, customers, and (local) communities. *Id.*, §172, para. 1(b)–(d).

²⁰ Other such areas include drug trafficking, terrorism, securities laws, and certain atrocity crimes.

²¹ Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 2(1), 2001 O.J. (L 12) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>.

²² The European Court of Justice interprets the jurisdictional link of the “place where the harmful event occurred,” *id.*, Art. 5(3), to encompass either “the place where the damage occurred or the place of the event giving rise to it.” Case 21/76, *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d’Alsace S.A.*, 1975 ECR 1735, para. 19.

²³ Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Dec. 21, 2007, 2007 O.J. (L 339) 3.

Europe since it provides a vehicle for tort claims against companies that are “domiciled” within the European Union based on their extraterritorial conduct (outside of the boundaries of the European Union).²⁴

However, the extraterritorial scope of Brussels I not only reaches European corporations headquartered in the European Union but also potentially covers European subsidiaries of United States or other non-European corporations as well. Since modern-day multinational corporations operate through a network of independent subsidiaries worldwide, EU law may have a significant extraterritorial reach in holding corporations liable for overseas torts. The European Parliament has urged the application of Brussels I to ATS-like cases.²⁵

Despite the availability of Brussels I as a litigation vehicle for extraterritorial corporate liability cases in torts, it has not yet been used to that end *in practice*. Aside from procedural rules that create a less favorable environment for private litigation in Europe (such as fee shifting and the lack of contingency fees, punitive damages, and class actions),²⁶ this restraint is primarily a reflection of the underlying cultural values (both legal and otherwise) in Europe in the sense that “tort remedies [are not considered to] fit the crime.”²⁷ While private party litigation plays an important role in American society as a vehicle for social change,²⁸ civil litigation in most European legal systems is perceived as merely settling a private dispute in an individual case.²⁹ But the European discomfort and reluctance to mimic the ATS in its structure are not indicative of a sentiment that corporations should be free from liability for their overseas involvement in violations of international law, which often amount to international crimes. Quite the opposite is true.

The important transatlantic difference is that European jurisdictions rely primarily on criminal proceedings to right the wrongs at hand. This practice is in line with European legal culture where punishment and the expression of moral condemnation are in the public interest and, as such, are effectuated merely by the criminal process.³⁰ At the domestic level, a majority of European jurisdictions provide for so-called *partie civile* procedures under which civil claims may be attached to criminal proceedings of any kind (including violations of international law)

²⁴ See, e.g., Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 227 (Philip Alston ed., 2005).

²⁵ European Parliament Resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (COM (2001) 366–C5-0161/2002–2002/2069(COS)), 2003 O.J. (C 187 E) 180, para. 50 (May 30, 2002), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2002-0278+0+DOC+XML+V0//EN>.

²⁶ See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT'L L.* 1, 27–31 (2002).

²⁷ Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 *ALB. L. REV.* 579, 603 (1997) (“The label ‘tort’ is a pale understatement when applied to the horrors inflicted upon victims and survivors of human rights abuses.”).

²⁸ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1284 (1976).

²⁹ See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 *HASTINGS INT'L & COMP. L. REV.* 401, 412–13 (2001).

³⁰ See Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 *AM. J. COMP. L.* 363, 364–66 (2008).

and thus benefit from the broad extraterritorial criminal jurisdiction prescriptions.³¹ Extending the reach of their law, an increasing number of European legal systems have opened their criminal courts to legal residents and recognized refugees as well.³²

The *partie civile* procedure is very different from the ATS since the primary proceeding is criminal. Yet this mechanism can be considered as a comparable vehicle for ATS-like claims.³³ It is uniquely suited to mitigate some procedural pitfalls for litigants in civil proceedings in continental legal systems—namely the high standard of proof³⁴ and a less liberal discovery process³⁵—by enabling the private party to benefit from the prosecutor’s investigatory powers and resources.³⁶

The European approach to adjudicating extraterritorial corporate violations of international law results from two parallel developments of the last two decades, namely (1) incorporation of international crimes and extraterritorial jurisdictional prescriptions in domestic criminal codes as part of implementation measures for the Rome Statute of the International Criminal Court³⁷ and (2) increasing codification of criminal liability for corporations. This development is emblematic of the multidimensional character of the European understanding of such liability.

Traditionally, European legal systems have been reluctant to endorse criminal liability of legal persons for conceptual and practical reasons.³⁸ In 1992, France set the example by adopting corporate criminal liability and by becoming a leading advocate for such liability during the 1998 negotiations to establish the International Criminal Court. France failed in that effort, but since then a convergence has emerged on the issue among most European jurisdictions.³⁹

Germany remains the most prominent outlier in continental Europe by holding firm on the principle *societas delinquere non potest* (a legal entity cannot be blameworthy).⁴⁰ The German government’s amicus brief on the issue of corporate liability presaged Justice Stephen Breyer’s concurring opinion⁴¹ when it argued, on comity grounds, that litigants suing corporations should use forums with a greater nexus to the dispute and should refrain from using U.S. courts

³¹ EU Brief, *supra* note 7, at 18.

³² See REDRESS & FIDH, EXTRATERRITORIAL JURISDICTION IN THE EU: A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EU (Dec. 2010), available at http://www.fidh.org/IMG/pdf/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union_FINAL.pdf; see also Prosecutor v. TotalFinaElf, Cour de Cassation/Hof van Cassatie [Court of Cassation], Mar. 28, 2007, No. P.07.0031.F (Belg.).

³³ See Stephens, *supra* note 26, at 19.

³⁴ Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 245–47 (2002).

³⁵ See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 293–94 (2002).

³⁶ See Jean Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965).

³⁷ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

³⁸ See John C. Coffee Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386–87 (1981).

³⁹ “Many of the European Union’s Member States can exercise universal criminal jurisdiction through *actions civiles* when brought within criminal proceedings.” EU Brief, *supra* note 7, at 24; see also Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETH. INT’L L. REV. 333, 340–42 (2009).

⁴⁰ See Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 142 (2008).

⁴¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1670 (2013) (Breyer, J., concurring).

until local remedies have been exhausted.⁴² Only as an afterthought did the German brief acknowledge an American presumption against extraterritoriality.⁴³ However, another brief filed for the reargument by two German members of the Bundestag (parliament) slammed the government's views and strongly backed the ATS's extraterritorial reach for human rights abuses.⁴⁴

Yet, even in Germany, the lack of corporate criminal liability is not a sign of a general rejection of the concept of "corporate blameworthiness" for overseas violations of international law, but rather the result of practical obstacles in formulating sanctions. Thus, the Bundesgerichtshof (Federal Court of Justice) has emphasized that, while corporations in theory can be found criminally liable, (criminal) penalties against corporations are contrary to the history of German criminal law.⁴⁵

In sum, Europe is part of a global regulatory trend stretching to Australia, Canada, and, paradoxically, even the United Kingdom, resulting in a growing "web of liability for businesses implicated in international crimes,"⁴⁶ while the United States marches in the opposite direction under the *Kiobel* judgment. Despite opposition by the British and Dutch governments to the extraterritorial reach of the ATS, the European view on the issue is far from settled and shows a trend towards extraterritoriality—however tame it may appear—spearheaded by the European Commission.

The amicus brief filed by the European Commission signals that, in important respects, the winds are changing in Europe. Even if a long history of ATS-like lawsuits is lacking in Europe, the law is on the books, and it is entirely plausible that it will gain momentum there in a post-*Kiobel* world in which the ATS, once a main vehicle for international corporate accountability, is severely constrained. At a time when "corporations find a friend in the [U.S.] Supreme Court,"⁴⁷ the corporate accountability movement has found an ally in the European Union and its member states. Multinational corporations situated at least in part in Europe would be wise to understand that growing reality.

⁴² Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents at 2, 14, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamcufederalrepublicofgermany.authcheckdam.pdf.

⁴³ *Id.* at 15.

⁴⁴ Supplemental Brief of Volker Beck and Christoph Strässer, Members of Parliament of the Federal Republic of Germany, as Amici Curiae in Support of Petitioners at 2, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioneramcuvolkerbecketal.authcheckdam.pdf.

⁴⁵ Bundesgerichtshof [Federal Court of Justice] Oct. 27, 1953, No. 5 StR 723/52, at 32 (Ger.) (discussing the issue of Strafbarkeit juristischer Personen (criminal liability of legal persons)).

⁴⁶ Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 893 (2009).

⁴⁷ Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 4, 2013 at http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&_r=0 (capitalization adjusted).

REVIVING HUMAN RIGHTS LITIGATION AFTER *KIOBEL*

By Vivian Grosswald Curran and David Sloss*

In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court held that “the presumption against extraterritoriality applies to claims under the [Alien Tort Statute (ATS)], and that nothing in the statute rebuts that presumption.”¹ The Court preserved the possibility that claims arising from conduct outside the United States might be actionable under the ATS “where the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”² However, the Court’s decision apparently sounds the death knell for “foreign-cubed” human rights claims under the ATS—that is, cases in which foreign defendants committed human rights abuses against foreign plaintiffs in foreign countries.

The Court’s decision overrules, *sub silentio*, a line of cases that originated with *Filártiga v. Peña-Irala*.³ *Filártiga* and its progeny embraced three core principles. First, an individual who commits exceptionally heinous crimes is “*hostis humani generis*, an enemy of all mankind.”⁴ Second, an enemy of humankind who is present in the United States is subject to the jurisdiction of U.S. courts, even in foreign-cubed cases. Third, victims of exceptionally heinous crimes may bring civil suits against the perpetrators in U.S. courts, even in foreign-cubed cases, if the defendant is subject to personal jurisdiction in the United States.⁵

The *Filártiga* line of cases supported U.S. human rights policy by sending a clear message that the United States will hold human rights violators accountable and will not allow its territory to be a safe haven for international criminals. However, some ATS cases raised foreign policy difficulties by exposing government officials from important U.S. allies to the threat of civil liability in U.S. courts.⁶ Justice Stephen Breyer’s concurring opinion in *Kiobel* would have given the courts and the executive branch discretion to balance the risks against the benefits on a case-by-case basis.⁷ The *Kiobel* majority, by contrast, preferred to “remand” the issues to Congress to obtain legislative guidance about how to balance the risks and benefits of civil litigation based on human rights violations committed abroad.⁸

This essay proposes a legislative response to *Kiobel* that would preserve some of the benefits of ATS human rights litigation, while minimizing the costs. Although the proposed legislation does not address the corporate liability questions that were at issue when the Supreme Court

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013).

² *Id.*

³ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁴ *Id.* at 890.

⁵ The second and third points are implicit in the court’s rationale in *Filártiga* and its progeny, although the court did not state these points explicitly.

⁶ See, e.g., *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (decision on ATS claim against former Israeli government official based on bombing of building in Gaza), *aff’d* 500 F.Supp.2d 284, 292 (S.D.N.Y. 2007).

⁷ See *Kiobel*, 133 S.Ct. at 1673–77 (Breyer, J., concurring).

⁸ *Id.* at 1669 (majority opinion) (explaining that the Court’s decision “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions . . . to the political branches”).

initially granted certiorari in *Kiobel*, the legislation would allow human rights victims to bring civil claims against perpetrators in some foreign-cubed cases. However, plaintiffs could not file such claims until after a federal prosecutor filed criminal charges against the perpetrator. This approach would allow federal executive officials to block claims that raised serious foreign policy concerns by choosing not to prosecute.⁹ It would also promote a more robust dialogue between federal executive officials and groups representing prospective human rights plaintiffs.

The proposed legislation is modeled partly on pending French legislation, as well as existing Belgian and German legislation. Statutes in all three countries share two critical features (assuming the French bill becomes law).¹⁰ First, victims of genocide, war crimes, and crimes against humanity have the right to initiate judicial proceedings against perpetrators who committed crimes extraterritorially, including in foreign-cubed cases. Second, public prosecutors in all three countries can block such judicial proceedings if they determine that a victim-initiated case would impair the state's foreign policy interests or would otherwise be contrary to public policy. The next section gives a brief overview of the foreign legislation. The concluding section explains and defends our proposal.

Legislation in Belgium, Germany, and France

Continental European legal systems derived from Roman law have a long, deeply engrained tradition of allowing victims to trigger criminal actions by constituting themselves as civil parties ("*parties civiles*") to the criminal trial, including in cases where the prosecutor decides not to proceed on behalf of the state. The function of criminal trials in civil law countries is similar to tort litigation in the United States, inasmuch as the *partie civile* mechanism enables victims to obtain compensation from perpetrators.¹¹ Under the traditional approach, continental European countries applied their criminal law extraterritorially, but their law did not reach foreign-cubed cases because various requirements of nationality and nexus restricted extraterritorial jurisdiction.

Belgium amended its criminal law in 1993 by adding a war crimes statute with a jurisdictional provision broad enough to reach foreign-cubed cases. A subsequent 1999 amendment added genocide and crimes against humanity to the class of foreign-cubed cases subject to prosecution in Belgian courts. Both amendments left untouched the traditional *partie civile* mechanism that allowed victim-triggered criminal proceedings, even in cases where the state initially chose not to prosecute.¹²

⁹ By granting federal prosecutors the power to block civil tort claims, the proposed legislation would probably act as a bar to corporate liability, but we would not add explicit statutory language to preclude corporate liability.

¹⁰ After the French Senate approved the bill, it was referred to the Committee on Constitutional Laws, Legislation, and General Administration of the Republic. *Justice: compétence territoriale du juge français pour les infractions visées par le statut de la Cour pénale internationale* [Law: territorial jurisdiction of French courts for offenses under the Statute of the International Criminal Court], DOSSIER DE L'ASSEMBLÉE NATIONALE [RECORD OF THE NATIONAL ASSEMBLY] (Feb. 26, 2013), at http://www.assemblee-nationale.fr/14/dossiers/article_689-11_code_procedure_penale.asp [hereinafter *Justice*]. From there, it will return to the National Assembly to be voted on by that chamber.

¹¹ See Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363 (2008).

¹² See Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Act of 16 June

Victim-initiated criminal proceedings in foreign-cubed cases created foreign policy problems for Belgium. By 2002, Belgium had been condemned by the International Court of Justice for having issued an international arrest warrant for the Congolese foreign affairs minister.¹³ In addition, foreign states protested, and the United States threatened to move NATO's headquarters from Brussels unless Belgium changed the legislation.¹⁴ In response, Belgium changed its law in 2003, preserving extraterritorial jurisdiction in some foreign-cubed cases.¹⁵ However, the 2003 amendment limited the traditional *partie civile* mechanism by adding a requirement of prosecutorial approval. Currently, due to a 2005 Constitutional Court decision,¹⁶ victims have a right to appeal a prosecutorial decision to block a *partie civile* action.¹⁷

In 2002, Germany enacted the *Völkerstrafgesetzbuch* (Code of Crimes Against International Law) to add provisions for genocide, war crimes, and crimes against humanity.¹⁸ The statute broadened the extraterritorial scope of its courts' jurisdiction to reach foreign-cubed cases.¹⁹ Like Belgium's revised law, the German law added an element of prosecutorial control over the traditional *partie civile* mechanism.²⁰ The German federal prosecution has adopted a broad interpretation of its statutory discretion to reject victim complaints,²¹ but its decisions have been subject to victim appeal.²² Thus, in both Belgium and Germany, victim-initiated foreign-cubed cases proceed, subject to an appealable prosecutorial decision to reject victim complaints.

In 2010, France amended its *Code de procédure pénale* (Code of Criminal Procedure)²³ by adding Article 689-11 to incorporate the Rome Statute of the International Criminal Court.²⁴

1993 on the repression of serious violations of the international Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 additional to these Conventions], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1993; Loi relative à la répression des violations graves du droit international humanitaire [Law on the repression of serious violations of international humanitarian law], M.B., May 7, 2003.

¹³ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 121 (Feb. 14).

¹⁴ See Ambrose Evans-Pritchard, *US Threatens to Move NATO HQ out of Belgium*, TELEGRAPH, June 13, 2003, at <http://www.telegraph.co.uk/news/worldnews/europe/belgium/1432913/US-threatens-to-pull-Nato-HQ-out-of-Belgium.html>.

¹⁵ CODE JUDICIAIRE/GERECHTELIJK WETBOEK [JUDICIAL CODE], Art. 144 quater (Belg.); CODE PÉNAL/STRAFWETBOEK [CRIMINAL CODE], Art. 12 bis, para. 2, titre préliminaire (Belg.). For an analysis immediately after the 2003 changes, see Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888 (2003).

¹⁶ Cour Constitutionnelle/Grondwettelijk Hof [Constitutional Court], Décision No. 62/2005, Mar. 23, 2005, at http://www.const-court.be/cgi/arrets_popup.php?lang=en&ArrestID=1931 (Belg.).

¹⁷ Loi du 22 mai 2006 modifiant certaines dispositions de la loi du 17 avril 1878 [Act of 22 May 2006 amending certain provisions of the Law of 17 Apr. 1878], M.B., July 7, 2006, 35,135.

¹⁸ VÖLKERSTRAFGESETZBUCH [CODE OF CRIMES AGAINST INTERNATIONAL LAW], §§1, 7 (Ger.).

¹⁹ See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 144–45 (2003).

²⁰ Gesetz zur Einführung des Völkerstrafgesetzbuches [Law on the Introduction of the International Criminal Code], June 26, 2002, BUNDESGESETZBLATT, TEIL I, at 2254 (Ger.).

²¹ STRAFPROZESSORDNUNG [CODE OF CRIMINAL PROCEDURE], §153f (1)–(3) (Ger.) (relating to Code of Crimes Against International Law).

²² In 2009, the Stuttgart Appeals Court upheld a decision rejecting a victim complaint against Donald Rumsfeld and others on behalf of Guantánamo Bay detainees. A further appeal was held inadmissible. See Center for Constitutional Rights, *German War Crimes Complaint Against Donald Rumsfeld, et al.* (filed Nov. 14, 2006), at <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al>.

²³ Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale [Law 2010-930 of 9 Aug. 2010 on the adoption of the Rome Statute of the International Criminal Court], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Aug. 10, 2010, p. 14,678.

²⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

Article 689-11 encompasses genocide, crimes against humanity, and war crimes.²⁵ Like Belgium and Germany, France added an element of prosecutorial discretion to limit victims' ability to initiate *partie civile* actions. Unlike Belgium and Germany, France retained a "habitual residency" requirement for defendants that precluded application of French criminal law to foreign-cubed cases.

On February 26, 2013, the French Senate voted to approve amendments to Article 689-11²⁶ aimed at facilitating the prosecution in France of international human rights crimes committed abroad.²⁷ One of the amendments removes the current "habitual residency" requirement for defendants, thereby permitting prosecution in foreign-cubed cases. Under the amended language, which was formulated to prevent trials in absentia,²⁸ the defendant would only need to "be located" in France at the time of the state's decision to prosecute.²⁹

Another proposed amendment that did not pass would have eliminated prosecutorial control, restoring to Article 689-11 the traditional victim-triggered *partie civile* mechanism.³⁰ The "restoration" of the *partie civile* mechanism would have meant a return to the pre-2010 standard. The French minister of justice argued against the proposed amendment out of concern for difficulties that might arise in France's relation with other states, particularly if many victim-triggered actions were filed in France.³¹ The final version approved by the Senate gives the prosecutor ultimate control, but it defers to the tradition of victim control by preserving some victims' rights. If the state decides not to prosecute, the prosecution must grant the victim a hearing if the victim requests one. If the prosecution does not change its decision after the hearing, it must issue a written statement of its reasons.³²

In sum, France, like Belgium and Germany, would depart from civilian criminal law tradition by restricting victims' ability to bring *partie civile* actions and by expanding extraterritorial jurisdiction to encompass foreign-cubed situations. Experience has shown that this combination can combine deference to national foreign relations concerns with an ongoing commitment to effective international human rights prosecution in cases of grave international crimes.

Our Legislative Proposal

Why have France, Belgium, and Germany chosen to apply their criminal laws to foreign-cubed cases? The *Filártiga* model provides a plausible explanation. Like the Second Circuit in

²⁵ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE], Art. 689-11 (Fr.).

²⁶ Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale [Bill to amend Article 689-11 of the Code of Criminal Procedure], Sess. Ord. 2012-13, FR. SÉNAT DOC. No. 354 (Feb. 13, 2013), *available at* <http://www.senat.fr/leg/pp12-354.html>. The National Assembly must also vote to approve this legislation before it can become law. *See Justice, supra* note 10.

²⁷ *See* Séance du 26 février 2013 [du Sénat] [Meeting of 26 Feb. 2013 of the Senate] (Fr.), TRAVAUX PARLEMENTAIRES (Fr.), *available at* <http://www.senat.fr/seances/s201302/s20130226/s20130226002.html> [hereinafter *Séance*].

²⁸ TRAVAUX PARLEMENTAIRES (Feb. 13, 2013) (citing Cass. crim. 10 janvier 2007) (Fr.) (holding by French supreme court of criminal law that defendants accused of grave crimes against humanity could not be tried in absentia).

²⁹ Proposition de loi, *supra* note 26 (noting that "*peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne soupçonnée de . . .*" ("may be prosecuted and tried by French courts, if he or she is located in France, anyone suspected of . . .").

³⁰ *See* C. PR. PÉN., Arts. 1, 2.

³¹ *See id.*

³² *See* Séance, *supra* note 27.

Filártiga, these states recognize that a person who commits serious international crimes is an enemy of humankind. Moreover, the victims of such heinous crimes deserve effective remedies.³³ Finally, under the principle of universal jurisdiction, a state is authorized to prosecute international criminals whenever such criminals are present on the state's territory,³⁴ regardless of where the crime was committed and regardless of the nationalities of the perpetrators and victims.³⁵

Yet the preceding survey of foreign legislation suggests that states perceive a trade-off between extraterritoriality and prosecutorial control. If victims have unlimited access to courts to bring claims for crimes committed anywhere in the world, foreign policy problems ensue. One way to mitigate those problems is to allow broad extraterritorial jurisdiction over foreign-cubed cases but to require victims to obtain prosecutorial approval before they can initiate legal proceedings against perpetrators. Germany, Belgium, and France (if the pending legislation is enacted) have all adopted some variant of this approach.

Obviously, the U.S. legal system is very different from the European civil law systems. Nevertheless, U.S. tort law is functionally similar to the traditional *partie civile* mechanism in civil law countries: both are designed to deter wrongdoers and compensate victims.³⁶ Given these similarities, the United States could remain faithful to the principles endorsed in *Filártiga*—and mitigate the associated foreign policy problems—by adopting a statutory supplement to the ATS modeled on European legislation. Specifically, Congress should create a statutory private right of action for genocide, war crimes, and crimes against humanity that is sufficiently broad to address foreign-cubed cases, but Congress should limit that right of action to cases in which federal prosecutors have filed criminal charges against the defendant.³⁷

The United States already provides criminal jurisdiction over genocide committed anywhere in the world whenever the defendant is present in the United States.³⁸ Moreover, under current law and practice, genocide victims can lobby federal prosecutors to file criminal charges against alleged perpetrators. We propose a statutory private right of action to enable genocide victims to file civil tort actions against any perpetrators whom prosecutors have charged with genocide or related offenses.³⁹ This plan would give genocide victims in the United States civil remedies comparable to the remedies available to genocide victims in Belgium, Germany, and France.

³³ See, e.g., Universal Declaration of Human Rights, Art. 8, GA Res. 217A (III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948) (“Everyone has the right to an effective remedy . . . for acts violating [his] fundamental rights . . .”); International Covenant on Civil and Political Rights, Art. 2(3), Dec. 16, 1966, 999 UNTS 171 (obligating states “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”).

³⁴ Some states and commentators understand “universal jurisdiction” to include the possibility of trial in absentia. However, trial in absentia arguably violates a defendant’s due process rights.

³⁵ See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §404 cmt. a (1987) (“Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them These offenses are subject to universal jurisdiction as a matter of customary law.”).

³⁶ See Curran, *supra* note 11.

³⁷ Our proposal would not affect litigation under the Torture Victim Protection Act, 28 U.S.C. §1350 note, which already provides a private right of action for torture victims that is not subject to prosecutorial control.

³⁸ See 18 U.S.C. §1091(e)(2)(D).

³⁹ The genocide statute covers incitement, attempt, and conspiracy, as well as genocide. See 18 U.S.C. §1091(c), (d).

The situation with respect to war crimes is slightly more complicated. The current federal war crimes statute provides federal criminal jurisdiction over extraterritorial war crimes whenever “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.”⁴⁰ We propose amending the criminal statute to authorize federal criminal jurisdiction whenever the defendant is present in the United States. This scheme would enable prosecutors to reach some foreign-cubed cases, thereby harmonizing the jurisdictional reach of the war crimes statute with the genocide statute. As above, we propose a statutory private right of action to enable war crimes victims to file civil tort actions against any perpetrators whom prosecutors have charged with war crimes.

Expanding this proposal to address crimes against humanity would entail more far-reaching legislative changes. At present, no U.S. federal criminal statute targets crimes against humanity as such. Several antiterrorism statutes criminalize actions encompassing conduct that might be classified as crimes against humanity under international law.⁴¹ However, current federal criminal statutes are not sufficiently broad to encompass the full range of conduct constituting crimes against humanity. Given that individuals who commit such crimes are generally viewed as “enemies of humankind,” the United States has a moral duty (if not a legal duty)⁴² to revise its criminal statutes to address the full range of crimes against humanity. Congress could accomplish this goal by adding a new statute to criminalize commission of a crime against humanity, as defined by the Rome Statute.⁴³ Like the genocide statute, the proposed statute should cover crimes against humanity committed anywhere in the world, provided that the perpetrator is present in the United States. For the reasons explained above, we would add a statutory private right of action to enable victims to file civil tort actions against any perpetrators whom prosecutors have charged with crimes against humanity.

Ultimately, our proposal is quite modest. Compared to *Filártiga* and its progeny, it would grant victims a rather limited right of access to federal courts, and only with respect to human rights violations that constitute grave international crimes. However, some limit on victims’ rights is necessary to address the primary policy objection raised by *Filártiga*’s critics: that human rights litigation under the ATS interfered with the president’s conduct of U.S. foreign policy. If adopted, our proposal would effectively eliminate that objection, preserve meaningful remedies for some human rights victims, and enable the United States to fulfill its time-honored commitment to human rights principles, thereby contributing to a more effective international human rights regime.

⁴⁰ 18 U.S.C. §2441(b).

⁴¹ See, e.g., 18 U.S.C. §1203 (implementing U.S. obligations under the International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205); 18 U.S.C. §2332f (implementing U.S. obligations under the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 UNTS 284).

⁴² The preamble to the Rome Statute notes that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Rome Statute, *supra* note 24, pmbl. It is unclear whether the drafters believed that every state has a legal duty to criminalize crimes against humanity. If so, they did not specify the source of that duty.

⁴³ It is not unusual for Congress to define a federal crime by reference to international law. Perhaps the earliest example was a federal piracy statute enacted in 1819. See Act of Mar. 3, 1819, ch. 77, Pub. L. No. 15-77, 3 Stat. 510 (1819) (act protecting the commerce of the United States and punishing the crime of piracy).

KIOBEL AND THE LAW OF NATIONS

By Zachary D. Clopton*

Since 1789, the Alien Tort Statute (ATS) has provided federal court jurisdiction for tort suits by aliens for violations of the law of nations.¹ Though debate certainly exists about the method by which ATS-appropriate torts are identified,² the Supreme Court has acknowledged that the substantive content of ATS causes of action is derived from the law of nations.³ In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court justices addressed not the substance of ATS cases but the reach of that statute.⁴

At least at the time of the Judiciary Act of 1789, the law of nations included not only substantive international law but also international jurisdictional law.⁵ Like the substantive law of nations that provides ATS causes of action, international jurisdictional law is an important part of the international legal order. And yet, in a decision about the reach of law-of-nations tort law—and in the search for post-*Kiobel* alternatives—too little attention has been paid to the jurisdictional branch of the law of nations. This essay briefly summarizes an approach to law-of-nations torts that tracks international jurisdictional law, which is broader than current ATS doctrine in some respects and narrower in others.

Prescriptive Jurisdiction

One aspect of international jurisdictional law potentially relevant to law-of-nations cases is the international law of prescriptive jurisdiction. Prescriptive jurisdiction describes the international-law limits of the reach of a state's laws.⁶ As others have argued, the limits of prescriptive jurisdiction are not technically the right framework for the ATS. The ATS is a

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¹ 28 U.S.C. §1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

² The Supreme Court has required that “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1663 (2013); *Sosa*, 542 U.S. at 732. In *Kiobel*, for example, the plaintiffs brought international law claims for crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention. 133 S.Ct. at 1663.

⁴ *Kiobel*, 133 S.Ct. 1659.

⁵ See, e.g., Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989). For a summary of U.S. interpretation of international jurisdictional law, see 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§401–88 (1987) [hereinafter RESTATEMENT].

⁶ Prescriptive (or legislative) jurisdiction is defined as the authority of a state “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.” RESTATEMENT, *supra* note 5, §401(a).

jurisdictional statute, not a conduct-regulating one, and ATS causes of action are derived from international law, not domestic law.⁷ Yet it is not wholly unreasonable to think about prescriptive jurisdictional limits on law-of-nations causes of action,⁸ and the Court treated *Kiobel* as a prescriptive jurisdictional case.

International jurisdictional law provides an internationally accepted set of bases for prescriptive jurisdiction. The *Restatement (Third) of the Foreign Relations Law of the United States* identifies five: (1) territoriality, (2) nationality, (3) objective territoriality, (4) passive personality, and (5) universal jurisdiction.⁹ The opinions in *Kiobel*, however, called for narrower limits on the prescriptive reach of law-of-nations torts than international jurisdictional law allows. Chief Justice John Roberts drew his limits from a territorial principle, that is, the presumption against extraterritoriality.¹⁰ While Justice Stephen Breyer referred to “international jurisdictional norms,”¹¹ his opinion concurring in the judgment defined limits in light of “American interests” rather than international law.¹² In concert with the international division of labor delineated in international jurisdictional law, future courts and legislatures addressing law-of-nations torts should broaden the prescriptive reach of these causes of action to the limits of international prescriptive jurisdiction.

Adjudicatory Jurisdiction

According to the Supreme Court in *Sosa v. Alvarez-Machain*, ATS cases must involve international-law causes of action that are specific and universal.¹³ Concern that ATS cases reach too far, therefore, arises not from the content of the rules but from the forum for adjudicating them—when should a U.S. court hear a law-of-nations tort case? International juris-

⁷ E.g., William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 37–44 (2010), at <http://www.harvardilj.org/articles/dodge.pdf> (arguing that the courts are not subject to prescriptive jurisdictional rules because they are applying (not prescribing) substantive law); Anthony Colangelo, *Kiobel Insta-Symposium: Kiobel Contradicts Morrison*, OPINIO JURIS, May 10, 2013, at <http://opiniojuris.org/2013/05/10/kiobel-insta-symposium-kiobel-contradicts-morrison> (arguing that the presumption against extraterritoriality, a prescriptive jurisdictional rule, should not apply to ATS cases because no U.S. conduct-regulating rule exists).

⁸ E.g., Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271 (2009). One could treat the ATS as impliedly creating causes of action within the limits established by international jurisdictional law or as authorizing federal courts to define common-law causes of action within the limits established by international law. See *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (implied causes of action); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (implied federal common law-making power). Those international law limits could be read into the term *law of nations* in the ATS or applied via the *Charming Betsy* canon. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

⁹ RESTATEMENT, *supra* note 5, §402.

¹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664–69 (2013) (applying the presumption against extraterritoriality).

¹¹ *Id.* at 1673 (Breyer, J., concurring).

¹² *Id.* at 1674 (“I would interpret the statute as providing jurisdiction only where distinct American interests are at issue.”); see also Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES.COM, Apr. 21, 2013, at <http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction> (observing that every justice in *Kiobel* rejected universal jurisdiction).

¹³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

dictional law addresses this question under the heading “adjudicatory jurisdiction.”¹⁴ As such, adjudicatory jurisdiction is the natural locus for limits on the reach of a domestic court applying internationally accepted substantive rules.

Applying the international law of adjudicatory jurisdiction to law-of-nations tort cases would narrow current ATS doctrine because international adjudicatory jurisdiction is narrower than personal jurisdiction in U.S. constitutional law. International adjudicatory jurisdiction does not countenance tag jurisdiction¹⁵ and seems less amenable to general jurisdiction than U.S. law, even after *Goodyear Dunlop Tires Operations v. Brown*.¹⁶ The international law of adjudicatory jurisdiction, therefore, could provide meaningful limits on ATS cases, yet the *Kiobel* Court ignored this body of law in its search for limits on the federal courts as fora for law-of-nations torts.¹⁷ Human rights advocates filing amicus briefs in *Kiobel* suggested that the ATS was sufficiently cabined by existing rules from personal jurisdiction to *forum non conveniens* to international comity, but they, too, did not look to the international law of adjudicatory jurisdiction.¹⁸ Should the Court reconsider the reach of the ATS, or should future courts or legislatures (in the United States or abroad) address law-of-nations cases, the law of adjudicatory jurisdiction may help set appropriate boundaries for the domestic-court enforcement of universally accepted norms of international law.¹⁹

Conclusion

In deciding *Kiobel*, the Supreme Court expressed caution with respect to the international discord that could result from ATS cases that reach beyond the scope of the United States’ authority.²⁰ The justices had access to—but declined to adopt—internationally agreed guidelines on exactly that issue. The international law of adjudicatory and prescriptive jurisdiction is a part of the law of nations that the ATS incorporated into U.S. law, and it should be part of law-of-nations tort law as well. If the Court had applied such limits in *Kiobel*, it would have

¹⁴ Adjudicatory (or judicial) jurisdiction is defined as the authority of a state “to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings.” RESTATEMENT, *supra* note 5, §401(b); *see id.* §§421–23.

¹⁵ Compare *id.* §421, cmt. e (noting that “[t]ag’ jurisdiction, *i.e.*, jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law”), with *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990) (finding personal jurisdiction on this basis).

¹⁶ Compare RESTATEMENT, *supra* note 5, §421 (describing international law of prescriptive jurisdiction), with *Goodyear Dunlop Tires Operations, SA v. Brown*, 131 S.Ct. 2846 (2011) (limiting, but not eliminating, general jurisdiction in U.S. law).

¹⁷ Perhaps the Supreme Court could have limited ATS cases by infusing law-of-nations causes of action with law-of-nations limits on adjudicatory jurisdiction, *see supra* note 8, or by applying some notion of “international due process” to law-of-nations claims, *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 479–81 (7th Cir. 2000) (discussing “international due process” in a judgment recognition case).

¹⁸ *E.g.*, Supplemental Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae on Reargument in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491); Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491). The *Kiobel* briefs are available online at <http://cja.org/section.php?id=509>. Perhaps this decision will prove wise—if the Court also adds adjudicatory-jurisdiction requirements to the class of ATS cases that survived *Kiobel*—because the remaining ATS regime would be narrower in both prescriptive and adjudicatory reach.

¹⁹ For a case in which the Supreme Court could entertain limits on adjudicatory jurisdiction, *see Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 133 S.Ct. 1995 (U.S. Apr. 22, 2013) (No. 11-965).

²⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664–65 (2013).

placed meaningful limits on ATS cases (which it seemed wont to do) and avoided causing international discord (its stated goal), all the while staying true to the words of the ATS and contributing to the rational ordering of the international legal system. In the same way, whether it is through common law, domestic statutes, or international agreements, future regimes of domestic civil enforcement of public international law should not ignore the international jurisdictional rules that have been an important part of the law of nations. In the words of Rosalyn Higgins, former president of the International Court of Justice, “There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances.”²¹

“OR A TREATY OF THE UNITED STATES”:
TREATIES AND THE ALIEN TORT STATUTE AFTER *KIOBEL*

*By Geoffrey R. Watson**

The decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ left open a number of questions about the scope of the Alien Tort Statute (ATS). One such question is the extent to which *Kiobel*'s holding on extraterritoriality applies to the oft-neglected final words of the ATS: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations *or a treaty of the United States*.”² What if one such treaty obliged the United States to provide a civil forum for litigation of human rights violations that occurred abroad and did not involve piracy?

Imagine, for example, a hypothetical treaty that obliged states parties not only to exercise universal criminal jurisdiction over accused torturers but also to provide a civil forum for torture victims who wish to sue their torturers in tort, regardless of where the tort occurred and regardless of the nationality of the parties. If the United States signed and ratified such a treaty, would the ATS apply to it? What if the treaty text went so far as to cite the ATS as an appropriate vehicle for implementation of the treaty obligation? Or what if the Senate, in giving advice and consent, expressed its view that the ATS was the appropriate vehicle for implementation of the treaty obligation? Even if the Senate declared that the treaty was otherwise non-self-executing, could its simultaneous declaration that the treaty was already implemented by the ATS have some bearing on the extraterritorial reach of the ATS?

The Supreme Court's opinion in *Kiobel*, like much other writing on the ATS, focuses on the ATS's reference to the “law of nations,” which is understood to mean customary international law, or at least something other than treaty law. It is not surprising that the Supreme Court prefers to apply the framers' original understanding of the “law of nations” to ATS litigation; there are reasons to be skittish about incorporating modern norms of customary law into a statute adopted in 1789. As Curtis Bradley and others have observed, customary law is in tension with democratic norms: our Congress has almost no say in its development, and even the president has only a limited power to create or shape customary law given that the United States

²¹ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 56 (1994).

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² 28 U.S.C. §1350 (emphasis added).

is but one of almost two hundred contributors to the formation of such law.³ Moreover, customary law is difficult to ascertain and may not be a significant source of new international legal norms anyway.⁴

But the Court's opinion says little about the treaty clause of the ATS, and the functional arguments against extraterritorial application of the treaty clause are weaker. Treaties have less of a democracy problem than customary law has. Treaties are negotiated and signed under the authority of the president, a democratically elected official. The popularly elected Senate must give advice and consent to ratification.

The historical arguments for extraterritorial application of the treaty clause are also stronger than those pertaining to the "law of nations" clause. Consider Attorney General William Bradford's 1795 opinion on the ATS, in which he said that the ATS might cover tortious actions by Americans overseas that violated a treaty between the United States and Great Britain.⁵ The respondents in *Kiobel* distinguished the opinion on the grounds that it involved a treaty with extraterritorial effect.⁶ For their part, the petitioners and the solicitor general argued that the opinion meant the ATS had extraterritorial effect, even in cases not involving a treaty.⁷ Thus the *Kiobel* parties agreed on the proposition that the ATS might be an appropriate vehicle for a case involving a treaty with extraterritorial effect.⁸

The *Kiobel* Court did not take a clear position on these historical arguments. Its reaction to the Bradford opinion, for example, was somewhat cryptic:

Attorney General Bradford's opinion defies a definitive reading and we need not adopt one here. Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.⁹

This passage did not unequivocally endorse the respondents' theory that the ATS covers a treaty with explicit extraterritorial reach, but it did not need to do so since *Kiobel* itself did not involve such a treaty. But does the last sentence quoted above mean that the Court would reject application of the ATS to a modern-day version of Bradford's case, even if that case involved a treaty of extraterritorial reach? Perhaps that situation is an example of what Justice Anthony

³ See, e.g., Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 464–70 (2001).

⁴ Cf. Sean D. Murphy, Book Review, 104 AJIL 697, 697 (2010) (noting that "it is actually rather difficult to identify a new norm of international law that has emerged purely as a matter of widespread state practice, at least in the form of what states actually *do* on the ground").

⁵ 1 Op. Att'y Gen. 57, 58 (1795).

⁶ See Supplemental Brief for Respondents at 28–30, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), cited in *Kiobel*, 133 S.Ct. at 1667–68. Briefs filed in *Kiobel* are available online at http://cja.org/section.php?id_509.

⁷ Petitioners' Supplemental Opening Brief at 13–15, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491); Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 10, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491).

⁸ That said, the framers of the ATS probably did not intend the statute to cover executive agreements. Executive agreements did develop in early American practice, but the term *treaty* was usually reserved for Article II treaties. See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–84 (2007).

⁹ *Kiobel*, 133 S.Ct. at 1668.

Kennedy, the fifth vote on extraterritoriality, had in mind when he mentioned cases not covered “by the reasoning and holding of today’s case.”¹⁰

None of the main participants in *Kiobel*—petitioners, respondents, the solicitor general, or the Court itself—took the position that the phrase “treaty of the United States” excludes treaties ratified after 1789. Scholarly commentators generally seem to assume that the ATS covers both pre-enactment and post-enactment treaties. For example, some debate exists about which treaty was at issue in the Bradford opinion: the 1783 Treaty of Paris, or the 1794 Jay Treaty? Thomas Lee argues that Bradford meant the Jay Treaty, which has the more “on-point” anti-neutrality rule.¹¹ Bradley and Ishai Mooreville argue that Bradford probably meant the Treaty of Paris because the Jay Treaty had been signed but not yet ratified in 1795.¹² Whatever the merits of this historical argument,¹³ no one has suggested that the extraterritorial reach of the ATS’s treaty clause depends on *when* the treaty entered into force.¹⁴ In other areas of U.S. statutory law, a reference to a “treaty” ordinarily means treaties that predate the statute as well as treaties that postdate the statute, unless otherwise indicated.¹⁵ Likewise, a plurality in the Supreme Court’s ruling in *Reid v. Covert* held that the Supremacy Clause covers all treaties, regardless of whether they predate or postdate the Constitution.¹⁶

Thus, whatever policy and historical considerations justify limiting the “law of nations” to the categories that the Court has sketched in *Sosa* and *Kiobel*, those considerations do not justify

¹⁰ *Id.* at 1669 (Kennedy, J., concurring).

¹¹ Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 891–92 & n.312 (2006) (citing Definitive Treaty of Peace, U.S.-Gr. Brit., Art. VII, Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Paris]; Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Art. XXI, Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty]).

¹² Curtis A. Bradley, *Attorney General Bradford’s Opinion and the Alien Tort Statute*, 106 AJIL 509, 521 n.82 (2012); Ishai Mooreville, *A Question of Sovereignty: The History Behind Attorney General Bradford’s 1795 Opinion on the Alien Tort Statute*, 40 SYRACUSE J. INT’L L. & COM. 217 (2013).

¹³ Bradford issued his opinion on July 6, 1795, before the Jay Treaty entered into force, but just two weeks after the Senate gave conditional advice and consent to the treaty. The safer conclusion is that Bradford was thinking of the 1783 Treaty of Paris, not the Jay Treaty, especially as ratification of the Jay Treaty was controversial. At that time, of course, there was no Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 33, whose Article 18 obliges states to “refrain from acts which would defeat the object and purpose” of signed but unratified treaties. Moreover, Bradford was undoubtedly conscious of the constitutional requirement of ratification. *Cf.* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 314 (2007) (noting that “[t]he United States repeatedly had to remind other countries during the nineteenth century that its signature did not constitute a promise of ratification” (citing J. MERVYN JONES, FULL POWERS AND RATIFICATION 76–77 (1946))). Bradford presumably understood the difference between Senate advice and consent and actual ratification by the president—a distinction sometimes lost on modern Americans. Still, the timing of Bradford’s opinion creates some uncertainty. Moreover, the neutrality provision in the Treaty of Paris is less detailed than its counterpart in the Jay Treaty, which might have seemed more like the applicable *lex specialis* to Bradford. Article XXI of the Jay Treaty, for example, states that “the laws against all such offences and aggressions shall be punctually executed”; the Treaty of Paris contains no such provision.

¹⁴ *Cf.*, e.g., Bradley, *supra* note 12, at 521 n.82 (“In any event, the issue [of which treaty Bradford had in mind] is not material to this essay.”).

¹⁵ *See*, e.g., 18 U.S.C. §3184 (conditioning international extradition on the existence of a “treaty or convention for extradition”); *cf.* *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 761–66 (3d Cir. 2010) (holding that the International Organizations Immunities Act of 1945 (IOIA), 28 U.S.C. §288, incorporates later-enacted provisions of the Foreign Sovereign Immunities Act); *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) (rejecting this view). The IOIA cases involve a later statute, not a later treaty, and, in any case, the *Nokalva* court has the better argument. *See* 2B SUTHERLAND STATUTORY CONSTRUCTION §51.08, at 192 (Norman J. Singer ed., 5th ed. 1992) (“A statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.”), quoted in *Nokalva*, 617 F.3d at 763.

¹⁶ *See Reid v. Covert*, 354 U.S. 1, 17–18 (1957) (plurality opinion).

limiting “treaties” either to those treaties that existed in 1789 or to the *types* of treaties that existed in 1789. The framers of the ATS, like the framers of the Constitution, understood that the United States would enter into new and different treaties as the Republic evolved. They understood that the United States has far more control over “treaties of the United States” than over the brooding omnipresence that is the “law of nations.”¹⁷ They understood that the United States can pick and choose its treaties, whereas it cannot pick and choose its own customary law.

So if functional and historical concerns do not preclude extraterritorial application of the treaty clause of the ATS, does the self-executing treaty doctrine stand in the way? The Court’s opinion in *Sosa* says it does. The *Sosa* Court dismissed the plaintiff’s reliance on the International Covenant on Civil and Political Rights in one sentence: “And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”¹⁸

The Court’s invocation of the self-executing treaty doctrine in *Sosa* was mistaken. The doctrine does not mean that a non-self-executing treaty can *never* help create legal obligations in domestic courts—only that the treaty does not create such obligations by its own force. The obvious case is a non-self-executing treaty that is followed by congressional implementing legislation. In such a case, the treaty itself does not have direct force of law, but the statute implementing it does.¹⁹

Moreover, a non-self-executing treaty may be implemented by *preexisting* legislation. Oona Hathaway, Sabria McElroy, and Sara Aronchick Solow cite two prominent examples, section 1983 and the federal habeas corpus statute, both of which have been used to enforce treaty rights.²⁰ Consider also extradition law—a body of law that, like the ATS and the Torture Victim Protection Act (TVPA), helps ensure that the United States does not become a “safe haven” for wrongdoers.²¹ Extradition treaties work in tandem with the preexisting federal extradition statute, which serves as preexisting implementing legislation.²² U.S. domestic courts have routinely enforced extradition treaties even though, until recently, Senate resolutions of advice and consent did not usually include a statement that an extradition treaty was self-executing.²³

¹⁷ *Cf.* *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . .”).

¹⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); *cf.* Bradley, *supra* note 3, at 464 (asserting that ATS plaintiffs avoid the treaty clause “[b]ecause of the limited way in which the President and Senate have consented to human rights treaties”).

¹⁹ See Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT’L L.* 51, 77–78 (2012) (citing congressional legislation implementing non-self-executing treaties such as the Torture Victim Protection Act, the Hague Child Abduction Convention, and the Chemical Weapons Convention).

²⁰ *Id.* at 78–83.

²¹ *Cf.* S. REP. NO. 102-249, at 3–4 (1991) (asserting that the Torture Victim Protection Act would help ensure that “torturers and death squads will no longer have a safe haven in the United States”), *quoted in* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1677 (2013) (Breyer, J., concurring).

²² See 18 U.S.C. §3184 (requiring a “treaty” for extradition).

²³ Until 2008, such resolutions typically contained no references to the self-executing treaty doctrine, though they always included a Bricker Amendment. See, e.g., 148 CONG. REC. S11,057 (daily ed. Nov. 14, 2002) (extradition treaty with Peru); 146 CONG. REC. S23,086 (daily ed. Oct. 18, 2000) (South Africa & Sri Lanka); *id.* at

After *Medellín v. Texas*²⁴ raised doubts about the self-executing character of such treaties, the Senate changed its practice and began to include explicit statements that such treaties are self-executing in the resolution of advice and consent as part of a broader undertaking “to address uncertainty regarding the self-executing character of some U.S. treaties.”²⁵

Through all of these developments, U.S. federal courts have continued to enforce extradition treaties, regardless of whether they are self-executing, because they are implemented by U.S. law. Courts should adopt the same approach to human rights treaties and the ATS. Hathaway and her coauthors are absolutely right when they suggest that “[t]he Alien Tort Claims Act . . . might be thought to be an additional mechanism for indirect enforcement of a treaty,” along with other mechanisms, such as the federal habeas statute, section 1983, and the TVPA.²⁶

In a perfect world, Congress would step in and clarify the scope of the ATS. Failing that, perhaps the Senate might consider extending its new (and commendable) practice of stating explicitly when a treaty is self-executing. The best practice—long sought by human rights activists—would be for the Senate to declare that future human rights treaties are self-executing, at least insofar as their self-executing status would not violate constitutional norms. That declaration would get around the specious objection posed by *Sosa*, but it may be too much to ask.

Perhaps, instead, the Senate might consider a more modest variation on its new declaration practice. Rather than declare a human rights treaty to be self-executing, the Senate might say that “[t]he Senate declares that this treaty is a ‘treaty of the United States’ for the purposes of the Alien Tort Statute. Furthermore, the Senate declares that the Alien Tort Statute would be an appropriate vehicle for civil enforcement of the legal obligations in this treaty.” (For that matter, the president could do so in the treaty text or when transmitting the treaty text to Congress.) If the treaty text is unclear about its extraterritorial reach, the Senate could express itself on that question as well. If the Senate determines that it would be inadvisable for the ATS to apply to a particular treaty, then the Senate should say so.

The Senate’s declarations on self-executing status already have domestic legal consequences.²⁷ So should its declarations on other ways in which a treaty interacts with existing U.S. law. Like a declaration on self-executing status, such a declaration should not be dispositive, but it should be entitled to a certain amount of weight.

The ATS is, if you will, pre-implementing legislation—just like the extradition statute, section 1983, and the federal habeas statute. The ATS establishes jurisdiction over a civil claim for a tort in violation of a “treaty of the United States,” not just a “*self-executing* treaty of the United States.” It should be interpreted so that it means what it says.

S23,085 (Belize, Paraguay); 145 CONG. REC. S28110 (daily ed. Nov. 3, 1999) (Korea). The Senate Foreign Relations Committee did sometimes express the general view that such treaties were self-executing, *see, e.g.*, SEN. EXEC. RPT. 106-26, at III (2000) (noting that “the legal procedures for extradition are governed by both federal statutes and self-executing treaties”), but such statements were not included in the resolution voted on by the full Senate.

²⁴ *Medellín v. Texas*, 552 U.S. 491 (2008).

²⁵ John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 104 AJIL 100, 100 (2010) (Senate Foreign Relations Committee documenting self-executing character of new extradition treaties).

²⁶ Hathaway, McElroy & Aronchick Solow, *supra* note 19, at 77 n.157.

²⁷ *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 745 (2004); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(3)–(4) (1987).

KIOBEL AND THE NEW BATTLE OVER CONGRESSIONAL INTENT

By *David H. Moore**

Transnational human rights litigation under the Alien Tort Statute (ATS)¹ has been plagued by the overarching question of the domestic legal status of customary international law (CIL).² *Kiobel v. Royal Dutch Petroleum Co.*³ is the Supreme Court's second installment on the ATS. Like *Sosa v. Alvarez-Machain*⁴ before it, *Kiobel* does not expressly address the domestic legal status of CIL, but it does provide clues. Those clues suggest two insights: the Court views CIL as external to U.S. law, rather than as part of federal common law, and the role of CIL in future cases may be affected less by arguments about CIL's status as federal common law than by arguments about congressional intent.

The Domestic Legal Status of Customary International Law

As is well known, the debate over the domestic status of CIL has produced two principal camps. Adherents of the modern position, with support from the *Restatement (Third) of the Foreign Relations Law of the United States*, maintain that CIL is a type of federal common law. As a result, it may be applied by federal courts on their own initiative. By contrast, adherents of the revisionist position maintain that federal courts may apply CIL as federal law only when authorized to do so by federal statute or the federal Constitution. In their view, CIL is not domestic law until positively incorporated.

Both sides claimed at least partial victory after *Sosa*.⁵ On the one hand, some modernists found support in the view that the Court "characterized customary international law as 'federal

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¹ 28 U.S.C. §1350.

² I say "plagued" because this question has often obscured the injustice alleged in the litigation. ATS cases have involved troubling allegations of human rights abuses, such as genocide, torture, slavery, murder, and rape. In addition, the question has received extensive attention from scholars, including myself. Although the attention may have at times been inordinate, the question remains important, not least because of its significance for the vertical and horizontal distribution of governmental power.

³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁵ For claims that *Sosa* supports the revisionist position, 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, 873, 902–10 (2007) ("[T]he decision in *Sosa* cannot reasonably be read as embracing the modern position and, indeed, is best read as rejecting it."); and David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 8, 48–49 (2006) ("Far from endorsing the [modern] view of CIL, the Court nodded support for the [revisionist] position by demonstrating that the application of CIL in federal courts turns on congressional intent."). For claims that *Sosa* supports the modern position, see Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 285 (2006) ("Justice Souter[']s opinion in *Sosa* resolves the debate. Customary international law is federal common law."); Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 342 (2005) (claiming that "a six-member majority of the Supreme Court rejected [the revisionist] view in *Sosa v. Alvarez-Machain*"); Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS., Fall 2004, at 169, 173 (arguing that *Sosa* "confirm[s] that international custom was part of judicially enforceable federal law even in the absence of a statute"); Harold Hongju Koh, *The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004) (asserting that *Sosa* rejected the revisionist position); and Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2255 (2004) (asserting that "the Supreme Court [in *Sosa*] explicitly reaffirmed the orthodox legitimacy of international law as law of the United

common law' for purposes of the Alien Tort Statute."⁶ Revisionists, on the other hand, noted the Court's reliance on congressional intent and the Court's emphasis on both the judiciary's limited role and the narrowness of federal common law after *Erie Railroad Co. v. Tompkins*.⁷

The Court's more recent opinion in *Kiobel* tends to undermine the modern position and support the revisionist position. To the extent that *Sosa* provided support for the modern position by finding a common law role for CIL under the ATS, *Kiobel* clearly erodes that support. *Sosa* itself authorized the creation of common law claims only as to CIL norms that are as specifically defined and well accepted as the norms that Congress had in mind in enacting the ATS. *Kiobel* went much further in reducing the CIL-based claims that remain plausible. After *Kiobel*, an ATS suit may not assert "violations of the law of nations occurring outside the United States" unless those violations "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" of common law causes of action based on CIL.⁸ It will take time to flesh out what it means to "touch and concern the territory of the United States . . . with sufficient force," but there is no question that a range of CIL-based common-law claims that were viable post-*Sosa* are not post-*Kiobel*.

Moreover, in defining the scope of viable claims, the *Kiobel* Court followed *Sosa*'s lead in turning to congressional intent. Under *Sosa*, the judiciary's lingering authority to create causes of action based on CIL was both grounded in and restricted by the intent of the First Congress in enacting the ATS. In *Kiobel*, the territorial reach of ATS causes of action is likewise discerned by reference to congressional intent, albeit after application of the presumption against extraterritoriality.⁹ One might expect that if CIL were federal common law and the judiciary were empowered under the ATS to create U.S. causes of action based on substantive CIL norms, then the judiciary would correspondingly invoke the CIL and federal common law of prescriptive jurisdiction as at least one source in deciding extraterritorial reach (as Justice Stephen Breyer did).¹⁰ Yet the *Kiobel* Court cut a path to congressional intent without any clear reference to CIL principles of prescriptive jurisdiction.¹¹

Even as it emphasized congressional primacy, *Kiobel*, like *Sosa*, stressed the limited role of the judiciary in foreign affairs.¹² In *Kiobel*, this emphasis is both express and implicit in at least two features of the Court's opinion: (1) the Court's assessment of the purpose of the ATS, and (2) the Court's chosen justification for the presumption against extraterritoriality. On the first

States . . . [and] repudiate[d] the revisionist view according to which ATS human rights actions were intrinsically illegitimate").

⁶ William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L. L. 87, 88 (2004) (footnote omitted); see also *id.* at 95–96; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 104 n.27 (2004) (briefly asserting that *Sosa* "settled part of [the] debate, recognizing that some CIL is federal common law").

⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see, e.g., Bradley, Goldsmith & Moore, *supra* note 5, at 902–06.

⁸ *Kiobel*, 133 S.Ct. at 1669.

⁹ See *id.* at 1665–69 (finding no compelling evidence in the text or history of the ATS that Congress intended ATS "causes of action to reach conduct in the territory of a foreign sovereign").

¹⁰ See *id.* at 1670–74 (Breyer, J., concurring) (interpreting the ATS by reference to CIL prescriptive jurisdiction principles, not the presumption against extraterritoriality).

¹¹ See, e.g., *id.* at 1665–69 (majority opinion). Even though the Court did not rely on the CIL of prescriptive jurisdiction in limiting the reach of causes of action under the ATS, the Court might be motivated by the Constitution's federalist principles to impose CIL-inspired—or more aggressive—limits on state causes of action addressing extraterritorial CIL violations.

¹² See *id.* at 1664–65.

score, the Court found that the First Congress turned to CIL not out of a general desire to improve CIL's enforcement but for instrumental reasons: to avoid foreign relations problems caused by CIL violations on U.S. soil that the federal government was helpless to remedy.¹³ If the First Congress's approach reflects the founding intent or understanding more generally, then CIL's relation to the federal judiciary might wax and wane depending on whether Congress determines that domestic incorporation serves U.S. interests.

As to the justification for the presumption against extraterritoriality, the Court had many options. Years ago, William Dodge summarized six possible justifications for the presumption, including securing compliance with CIL limits on extraterritoriality, effectuating the assumption that "Congress generally legislates with domestic concerns in mind," and avoiding foreign affairs problems resulting from unintended conflicts with other sovereigns' laws.¹⁴ In 2010, in *Morrison v. National Australia Bank*, the Court grounded the presumption "on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters," and explained that the presumption applies "regardless of whether there is a risk of conflict between the American statute and a foreign law."¹⁵ In *Kiobel*, the Court emphasized that the purpose behind the presumption is to avoid judicial triggering of conflicts with other states' laws that would generate foreign affairs problems that the political branches did not elect to incur.¹⁶ This justification comports with revisionist limitations on judicial power. It departs from the modern position's focus on international law enforcement in U.S. courts, a focus more consistent with a view that the presumption against extraterritoriality is meant to respect CIL limits on prescriptive jurisdiction.

Ultimately, the Court seemed to perceive CIL as existing in two spheres—one international and one domestic—with the scope of the domestic departing from the international according to congressional intent. Consistent with this view (albeit not exclusively so), the Court indicated that, when federal courts consider ATS claims, "[t]he question is . . . whether the court has authority to recognize a cause of action *under U.S. law* to enforce a norm of *international law*."¹⁷

Of course, this quotation and other aspects of the opinion might be explained by arguing that *Kiobel* is relevant only to the scope of U.S. causes of action based on CIL and not to the domestic status of CIL more generally. The same could be said of *Sosa*. As to *Sosa*, Jack Goldsmith, Curtis Bradley and I have observed that much of *Sosa*'s discussion of *Erie* "would have been largely unnecessary if the Court had been simply speaking to the circumstances under

¹³ See, e.g., *id.* at 1666–68.

¹⁴ William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 90 (1998).

¹⁵ See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869, 2877–78 (2010). *But cf. id.* at 2885–86 (refusing to apply the Securities Exchange Act to certain domestic conduct causing foreign effects, given the risk of conflict with other states' laws that Congress "would have addressed" had it "intended such foreign application" (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991))).

¹⁶ *Kiobel*, 133 S.Ct. at 1664–65, 1669. The Court also briefly alluded to a related justification for the presumption—"separation-of-powers concerns" that the judiciary lacks the authority and competence to calibrate the extraterritorial reach of federal statutes. Dodge, *supra* note 14, at 90; see *Kiobel*, 133 S.Ct. at 1664 (noting that Congress "alone has the facilities necessary to make fairly . . . [the] important policy decision [of extraterritorial reach] where the possibilities of international discord are so evident and retaliative action so certain" (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957))).

¹⁷ *Kiobel*, 133 S.Ct. at 1666 (emphases added); see also *id.* at 1664 (The ATS "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.").

which courts may imply a cause of action from existing domestic law, an issue generally governed by different precedent,” that “the Court referred to limits on implied rights of action as only one of many reasons for judicial caution in allowing claims under the ATS,” and that “the Court’s view of post-*Erie* federal common law is inconsistent with the proposition that CIL automatically and in a wholesale fashion has the status of federal law, even outside the context of causes of action.”¹⁸ Similarly, there is some reason to believe that *Kiobel* bears not just on the scope of CIL-based causes of action but on the broader domestic status of CIL. On this score, perhaps the most relevant feature of the *Kiobel* opinion is the Court’s application of the presumption against extraterritoriality to the CIL-based cause of action and not to the CIL prohibition on primary behavior.¹⁹ In *Morrison*, the immediate antecedent to *Kiobel* in terms of the presumption against extraterritoriality, the Court applied the presumption to both the cause of action and the federal statute from which it was implied.²⁰ The *Kiobel* Court may have applied the presumption only to the cause of action because it was not created by, or was more limited than, the substantive norm of CIL. Yet the Court may have understood that only the cause of action, not the CIL prohibition, was U.S. law.

The Battle for Congressional Intent

Though far from definitive, these insights suggest that *Kiobel* tends toward the revisionist position on the domestic status of CIL. I have previously argued that, in light of *Sosa*’s support for the revisionist view, the battle over the domestic role of CIL should shift from the courts to Congress.²¹ *Kiobel* strengthens that argument. At the same time, *Sosa* and *Kiobel* together suggest an intermediate battleground: the battle for congressional intent in the judiciary. How a court perceives congressional intent will have a significant impact on whether its holding resembles the modern or revisionist position. *Sosa* and *Kiobel* indicate that the goals of the modern position may be accomplished within the revisionist framework. The path to that end lies through congressional intent. Both opinions demonstrate that congressional intent can be understood in ways that are more or less receptive to CIL and that provide more or less room for the judiciary to incorporate CIL.

To illustrate, compare the treatment of congressional intent in *Sosa* and *Kiobel*. In *Sosa*, the Court spent considerable time seeking to understand the intent of the First Congress in enacting the ATS. The Court concluded that, through the ATS, the First Congress granted federal courts jurisdiction “on the understanding that the [general] common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”²² General common law did not support federal jurisdiction or preempt state law.²³ Under the banner of congressional intent, the Court then translated the First Congress’s understanding into a post-*Erie* world in which federal common law can support

¹⁸ See Bradley, Goldsmith & Moore, *supra* note 5, at 909.

¹⁹ See *Kiobel*, 133 S.Ct. at 1664 (noting that “[w]e typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad”).

²⁰ See *Morrison*, 130 S.Ct. at 2875, 2881 n.5, 2883.

²¹ See, e.g., Moore, *supra* note 5, at 52.

²² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

²³ See Bradley, Goldsmith & Moore, *supra* note 5, at 874–75.

federal subject matter jurisdiction and preempt state law.²⁴ The result was that a pre-*Erie* intent to engage a general common law that could not support federal jurisdiction or preempt state law produced a post-*Erie* common law that could. Through the medium of congressional intent, the judiciary exercised significant leeway to create a much more robust law based on CIL than the First Congress would have anticipated.

By contrast, *Kiobel* discerned congressional intent in a way that severely restricts judicial resort to CIL under the ATS. *Kiobel* applied the presumption against extraterritoriality to common law causes of action based on CIL, although the presumption's normal target is statutory proscriptions.²⁵ The Court then found the presumption controlling, notwithstanding the ATS's attempt to reach piracy and its references to aliens, the law of nations, and treaties.²⁶ As in *Sosa*, the Court's reasoning is not indefensible, but it illustrates a more restrictive approach to congressional intent and hence to judicial resort to CIL.

To be sure, the battle over congressional intent is not entirely new. Modernists and revisionists, for example, have long debated the significance of congressional enactment of the Torture Victim Protection Act²⁷ for the future of ATS litigation.²⁸ Yet, given *Sosa*'s and *Kiobel*'s focus on congressional intent and consistency with the revisionist position, the battle over congressional intent has gained a new prominence. Going forward, advocates should focus much less on how much congressional intent matters and much more on what that intent means.

THE LONG VIEW ON *KIOBEL*: A MUTED VICTORY FOR INTERNATIONAL LEGAL NORMS IN THE UNITED STATES?

By Marco Basile*

*Kiobel v. Royal Dutch Petroleum Co.*¹ may be a Trojan horse. Observers who are sympathetic to the adjudication in U.S. courts of international legal norms—such as those against torture—have criticized the decision for limiting federal jurisdiction over human rights abuses abroad.² Yet, despite this price, *Kiobel* might ultimately strengthen the foundation of international legal norms in U.S. courts. Chief Justice John Roberts's majority opinion, limiting the Alien Tort Statute (ATS)³ from reaching overseas, rested on the principle that one sovereign state should not usually apply its laws within the borders of another sovereign state, and that idea is a bedrock principle of international law. The majority avoided the connection to international law by dressing up the presumption against extraterritoriality in a foreign-policy rationale, but its argument does not square with the historical record, especially when it comes to piracy. In the

²⁴ See *id.* at 873, 878.

²⁵ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664 (2013).

²⁶ See *id.* at 1672 (Breyer, J., concurring).

²⁷ Torture Victim Protection Act, 28 U.S.C. §1350 note [hereinafter TVPA].

²⁸ See, e.g., Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 462–64 & n.26 (2001) (noting that some of the TVPA's legislative history supports open-ended ATS litigation while asserting that the statute's text does not).

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² See, e.g., Adam Liptak, *Justices Bar Nigerian Human Rights Case from U.S. Courts*, N.Y. TIMES, Apr. 18, 2013, at A22 (describing human rights groups' disappointment with *Kiobel*).

³ 28 U.S.C. §1350.

long run, the presumption's application is best understood in terms of certain premises about the international legal order. *Kiobel* might therefore contribute to a return to earlier ways in which the role of international legal norms in the United States was long taken for granted. Thus, although *Kiobel* is a setback for human rights litigation, it may one day prove to be a step forward out of a murky seventy-five-year-old debate over international law in U.S. courts.

The ATS and Customary International Law

Since the 1930s, the doctrinal status of customary international law in U.S. courts has been unsettled. In 1900, the Supreme Court declared in *The Paquete Habana* that “[i]nternational law,” referring to customary international law, “is part of our law.”⁴ But this statement was a last gasp from a previous era, rather than a guidepost for the new century. It was still the epoch of *Swift v. Tyson*,⁵ when federal courts promulgated federal general common law and applied international legal norms by incorporating them into that common law.

During the eighteenth and early nineteenth centuries, the United States developed a maritime commerce as a neutral carrier while the world was at war on the seas. Belligerents relied on privateers in addition to navies. The federal courts' dockets filled with neutrality and prize cases, and customary international law resolved those cases.⁶ Then, with new technology and more centralized nation-states capable of industrial warfare, the privatization of maritime warfare ended: “pirates, prizes, and privateers . . . faded or disappeared altogether.”⁷ At the same time, Americans increasingly came to view federal general common law as something judges illegitimately made, rather than as an authoritative source of law that judges discovered. As Justice Oliver Wendell Holmes famously stated in 1917, “The common law is not a brooding omnipresence in the sky”⁸ Two decades later in *Erie Railroad Co. v. Tompkins*, the Supreme Court adopted Holmes's position and overruled *Swift*.⁹ The basis for customary international law in American law went out with the bathwater.

What followed was the beginning of a “normless normalcy” in American history.¹⁰ Americans became increasingly skeptical of international law's authority. It was the postwar period, and, although it witnessed the creation of the United Nations and the adoption of the Universal Declaration of Human Rights, such international institutions and instruments emerged largely stillborn, neutered by a lack of enforcement mechanisms and restrictions, such as the domestic jurisdiction clause in the UN Charter.¹¹ The new field of international relations

⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁵ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

⁶ See David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 147 (2008).

⁷ David L. Sloss, Michael D. Ramsey & William S. Dodge, *Continuity and Change over Two Centuries*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 589, 597 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011); see also Nicholas Parrillo, *The De-privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1 (2007).

⁸ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938).

¹⁰ DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 120 (1990).

¹¹ See Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 HIST. J. 379, 393 (2004).

and its commitment to realism soared and crowded out less skeptical theories of international law.¹²

When human rights advocates rediscovered the ATS in the late 1970s as a vehicle for suing violators of international law,¹³ they revived the debate over the doctrinal status of international legal norms in the United States from its slumber. Although the ATS provided a statutory basis for federal jurisdiction over torts committed against aliens in violation of international law, it also required a constitutional basis, and the only plausible candidate was the clause granting federal jurisdiction over cases “arising under . . . the Laws of the United States.”¹⁴ Was international law part of “the Laws of the United States”?

No one had a good answer. Critics of the ATS argued that *Erie* had wiped away customary international law’s legal force.¹⁵ But this view seemed inconsistent with the role of customary international law for over 150 years of American history. On the other side, Louis Henkin, the dean of international law in the United States, argued that customary international law’s status as part of federal law survived *Erie* because it was “like federal common law,” yet distinguishable from it.¹⁶ On Henkin’s view, “In a real sense federal courts *find* international law rather than make it, as was not true when courts were applying the ‘common law’”¹⁷ But this position seemed unpalatable, and in *Sosa v. Alvarez-Machain* the Supreme Court rejected it outright.¹⁸ However, *Sosa* did not clarify the doctrinal uncertainty regarding customary international law’s status in the United States. Although the Court rejected Henkin’s position, it also chose not to adopt the alternative view that customary international law was not part of U.S. law. Instead, it merely grandfathered in the “violation of safe conducts, infringement of the rights of ambassadors, and piracy” as legitimate bases for federal jurisdiction under the ATS without explaining the constitutional grounds.¹⁹

Kiobel, too, did not resolve the nearly century-long uncertainty over the status of customary international law in the United States. Unlike *Sosa*, *Kiobel* did not even address the issue. But the Court may have ultimately commented on the status of customary international law in the United States more than it had intended—or even realized.

Kiobel and International Legal Order

Kiobel held that the ATS does not generally apply to violations of international law committed outside the United States.²⁰ Roberts’s majority opinion reasoned that, absent a clear statement from the Congress to the contrary, federal courts should not apply U.S. laws to conduct that does not forcefully “touch and concern the territory of the United States.”²¹ But from where does the aversion to extraterritoriality originate?

¹² See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 413–509 (2001).

¹³ See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁴ U.S. CONST. Art. III, §2, cl. 1.

¹⁵ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

¹⁶ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

¹⁷ *Id.* at 1561–62.

¹⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–26 (2004).

¹⁹ *Id.* at 724.

²⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013).

²¹ *Id.*

Consistent with his previous skepticism of international law's authority,²² Roberts was careful to describe the presumption against extraterritoriality as a separation-of-powers principle, in contrast to how lawyers supporting the defendant corporations had relied on international law arguments.²³ Adjudication of extraterritorial matters affects foreign affairs, he explained, and foreign policy is the prerogative of the political branches.²⁴ Thus, to complete the syllogism, federal courts should not apply laws extraterritorially absent a clear statement from the Congress to the contrary.²⁵

However, the majority opinion mischaracterized the presumption against extraterritoriality as purely a domestic separation-of-powers issue while overlooking its bases in international law.²⁶ The very idea that states are sovereign within their territorial borders and should not normally interfere with conduct that occurs inside other states' territories is premised on at least a general, if not outdated, view of international legal order. That view suggests that we live in a world of states organized around the principle of exclusive state sovereignty and a default norm of noninterference among states. These ideas are principles of international law that began to take hold in the eighteenth and nineteenth centuries.²⁷ They have never been absolute principles, and their force is waning in a twenty-first-century world that requires regulation of increasingly complicated transnational commerce and interaction. They are, nevertheless, principles that reflect a particular set of aspirations about how the international realm should be ordered. Their influence might be taken for granted today, even by those who disagree with them, but, if so, that development is extraordinary. For most of human history, the international order was structured hierarchically among empires, not states, and more powerful empires maintained prerogatives to interfere in the affairs of weaker groups.²⁸

²² See, e.g., *Medellín v. Texas*, 552 U.S. 491, 506 (2008) (holding, in an opinion by Roberts, that decisions of the International Court of Justice do not have legal force in the United States absent legislation rendering them domestic law, despite the United States being a party to that Court's founding treaties).

²³ See, e.g., Supplemental Brief of Chevron Corp. et al. as Amici Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at <http://www.losangelesemploymentlawyer.com/International-Human-Rights/Chevron-Corp-Dole-Food-Co-Dow-Chem-Ford-Glaxosmithkline-and-P-G.pdf> (arguing that the extraterritorial application of the ATS violates international law).

²⁴ *Kiobel*, 133 S.Ct. at 1664–65.

²⁵ *Id.* at 1665.

²⁶ See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 10–19 (1992) (discussing the presumption's origins in international law).

²⁷ See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19 (1834); EMER DE Vattel, THE LAW OF NATIONS 75 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008) (1758). Some commentators argue that international law does not recognize a presumption against extraterritoriality. See David L. Sloss, *Kiobel and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241, 241–44 (2013). The argument relies on *S.S. Lotus* (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18–19, which adopted a permissive, rather than prohibitive, approach to default international norms and reasoned accordingly that states are generally free to exercise jurisdiction extraterritorially absent a specific prohibition. However, the 1927 case has been rightly criticized as “represent[ing] the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies.” Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, 78, para. 51 (Feb. 14) (Higgins, Kooijmans & Buergenthal, JJ., joint sep. op.); see also *id.* at 43, para. 15 (Guillaume, J. & Pres., sep. op.) (noting that “the adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle”). Moreover, even if *S.S. Lotus* applies, the case does not mark a clean break from the territorial principle in favor of extraterritoriality, given that it relied on the “effects” on Turkish territory of an alleged offense committed on the high seas in order to uphold Turkey's jurisdiction over the offender. See *S.S. Lotus*, *supra*, at 23. See generally CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 30–31 (2008).

²⁸ See DAVID ARMITAGE, FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT 21 (2013).

Roberts avoided the international law argument in *Kiobel*, but it is uncertain that, in the long run, the *Kiobel* holding will withstand scrutiny without recourse to international legal norms to explain it. The problem with the majority's proffered separation-of-powers rationale is that it merely assumes that it is possible for the courts to take a neutral position toward foreign policy when a case arises that concerns foreign affairs. But declining to adjudicate a case involving an international issue can affect foreign relations as much as hearing the case.²⁹ No matter how the Court ruled, it would have altered the calculus of international human rights enforcement. Not only did the Court disregard this inevitability by claiming that it had issued a decision that neutrally deferred to the political branches regarding foreign policy, but, even more brazenly, it did so in a decision that directly contravened the wishes of the political branches, which had advocated a more flexible approach toward allowing human rights cases against foreign defendants in federal courts.³⁰

The incongruity between the holding and stated rationale in *Kiobel* appears most clearly where Roberts tried to explain how the ATS does not apply extraterritorially even though, under *Sosa*, it still applies to piracy on the high seas.³¹ He attempted to distinguish piracy from other violations of international law outside U.S. borders by claiming that “[a]pplying U.S. law to pirates . . . carries less direct foreign policy consequences.”³² But the Court got its history of pirates wrong. Judicial involvement in piracy cases often stoked major foreign policy debates.³³ For example, the Monroe administration took advantage of piracy cases during the Latin American wars of independence to punt to the federal courts any decision to recognize the revolutionary governments. In cases involving the capture of Iberian vessels by Americans aboard privateers commissioned by the revolutionary governments, the courts were left on their own to determine whether the commissions were valid or whether the Americans holding those commissions were pirates.³⁴ Similarly, the judicial debate between Chief Justice John Marshall and Justice Joseph Story over whether slavers were pirate ships under international law, and thus subject to lawful search and condemnation, involved the courts in one of the most significant controversies ever in Anglo-American relations.³⁵ It took Britain forty years to persuade the United States to treat slave trading as piracy under international law.³⁶ In short, as strange as it might seem today, piracy cases were controversial in American history precisely because *they were fraught with foreign policy implications*.

A stronger way to reconcile the *Sosa* holding that the ATS applies to piracy and the *Kiobel* holding that the ATS does not generally apply extraterritorially is to recognize that, under international law, the principle against extraterritoriality historically limits sovereigns from acting within the boundaries of other sovereign states, including on pirate ships subject to flag jurisdiction, but does not limit sovereigns from acting against actors on the high seas who have

²⁹ See Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAG., Sept. 28, 2008, at MM50.

³⁰ Sloss, *supra* note 27, at 247–50.

³¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

³² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1667 (2013).

³³ See *id.* at 1672 (Breyer, J., concurring).

³⁴ See Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 LAW & HIST. REV. 245, 261, 273 (2012).

³⁵ See *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825); *United States v. La Jeune Eugenie*, 26 F.Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

³⁶ See HUGH G. SOULSBY, *THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS, 1814–1862* (1933).

forfeited any state allegiance.³⁷ Both actions affect foreign policy, but modern international law has traditionally limited only the former. Thus, in the long run, *Kiobel* might come to be read not as a separation-of-powers decision but rather as a decision about a particular view of international legal order. The holding in *Kiobel* might outlive its stated rationale.

Kiobel therefore might ultimately contribute to a return to a stronger foundation of customary international law in U.S. courts. The decision underscores that the United States exists within an international system and sometimes must consider that system's norms in order to organize its own rule of law. Even though the particular international legal principles on which *Kiobel* relied are contentious and have struck observers as archaic in their emphasis on territorial line drawing and exclusive sovereignty,³⁸ *Kiobel* nevertheless demonstrates the appropriateness, if not occasional necessity, of reasoning from principles of international legal order to resolve disputes in U.S. courts. This observation is no more controversial than the Declaration of Independence, which was premised on the existence of an international order of independent states with rights "to levy War, conclude Peace, contract Alliances, establish Commerce" and the claim that a sovereign people had the right to form an independent state and acquire these rights.³⁹ The Declaration's second paragraph about individuals' "unalienable Rights" has come to dominate our memory of the document, but it was originally a document of international law directed toward the international community and aimed at achieving for the United States a recognized position, in its first paragraph's words, "among the powers of the earth."⁴⁰ The perceived authority of "the People" to enact a constitutional regime and to enjoy sovereign equality rests on international legal principles. In *Kiobel*, the Court still does not provide an explicit theory for how such principles have force in the United States, but their common-sense application by nine justices suggests that they do.

Conclusion

Even if litigation in U.S. courts over human rights abuses abroad were to come to a halt after *Kiobel*, the decision need not be seen as hostile to international law or even human rights. After all, human rights litigation under the ATS has been largely symbolic and has rarely led to liability. If *Kiobel* becomes understood as an instance of reasoning from international legal principles, then it might ultimately contribute to a more robust notion of the role of customary international law in U.S. courts. Those who believe international legal norms can play a constructive role may have to abandon ambitious aspirations regarding human rights litigation in exchange for broader recognition of the validity of reasoning from international legal norms.

³⁷ See *R. v. Dawson*, 13 How. St. Tr. 451, 455 (High Ct. Adm. 1696) (universal jurisdiction over piracy). Historically, the Supreme Court has hesitated to apply U.S. laws to pirates subject to the jurisdiction of a country whose flag their ship flew, but it was less hesitant where pirates flew no flag, save the Jolly Roger. Compare *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818) (declining to apply piracy statute to piratical acts "on board of a ship or vessel belonging exclusively to subjects of any foreign state"), with *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820) (applying same piracy statute to piratical acts committed "on board of a vessel not at the time belonging to the subjects of any foreign power").

³⁸ See, in this *Agora*, Zachary D. Clopton, *Kiobel and the Law of Nations*; Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*.

³⁹ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁴⁰ *Id.*; see DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 25–62 (2007).

This outcome, ultimately, would be a muted victory for international legal norms in U.S. courts.

KIOBEL'S BROADER SIGNIFICANCE: IMPLICATIONS FOR INTERNATIONAL LEGAL THEORY

By Austen L. Parrish*

The U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ has ushered in a new era for human rights enforcement. Unanimously, the Court ended so-called foreign-cubed human rights cases, that is, litigation where foreign plaintiffs sue foreign defendants for activity occurring abroad. The broadest form of universal civil jurisdiction that the Second Circuit's decision in *Filártiga v. Peña-Irala*² once appeared to promise is over. Alien Tort Statute³ (ATS) litigation, while not foreclosed, has become more limited.

So far, the analysis of *Kiobel* has been doctrinal, focusing, for example, on whether the Supreme Court correctly applied the presumption against extraterritoriality.⁴ Alternatively, the commentary has been forward-looking, discussing the types of cases that will be seen after *Kiobel*⁵ or predicting the next battleground for human rights advocacy.⁶ For its part, the popular press has caricatured the decision either as representing the end to plaintiff's litigation run amok⁷ or as signaling the United States' deference to corporate interests over human rights interests.⁸

Kiobel, however, has broader significance. The decision reflects a rejection of attempts to reconceive global governance, from both left-leaning and right-leaning academics. In *Kiobel*,

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

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

³ 28 U.S.C. §1350.

⁴ See, e.g., Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65 (2013) (arguing that the Court misapplied the presumption); David L. Sloss, *Kiobel and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241 (2013) (discussing the presumption); see also Sarah Cleveland, *Response: Plain Text, Stare Decisis, and Déjà Vu All over Again*, SCOTUSBLOG (July 24, 2012), at <http://www.scotusblog.com/2012/07/response-plain-text-stare-decisis-and-deja-vu-all-over-again> (detailing the intent behind the ATS in a *Kiobel* symposium held prior to the Supreme Court decision).

⁵ See generally Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AJIL 601 (2013) (describing what remains of the ATS after *Kiobel*); see also Oona Hathaway, *Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013), at <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases> (concluding that "'foreign cubed' cases . . . are off the table" but predicting that other claims should remain viable); Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, ASIL INSIGHTS (Apr. 18, 2013), at <http://www.asil.org.insights130418.cfm> (noting the likely "significant reduction in international human rights litigation in U.S. courts").

⁶ Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 4–6 (2013); cf. Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 25–26, 39–42 (2013) (describing the difficulties of state court human rights litigation).

⁷ See Beth Stephens, *Kiobel Insta-Symposium: Closing Avenues for Relief*, OPINIO JURIS (Apr. 24, 2013), at <http://opiniojuris.org/2013/04/23/kiobel-insta-symposium-closing-avenues-for-relief> (describing how some "are crowing about the resounding defeat of rapacious trial lawyers who used these cases to shake down virtuous multinational corporations" and noting that little supports this characterization).

⁸ See, e.g., Editorial, *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 18, 2013, at A26; Press Release, Human Rights First, *Kiobel Ruling Undermines U.S. Leadership on Human Rights* (Apr. 17, 2013), available at <http://www.humanrightsfirst.org/2013/04/17/kiobel-ruling-undermines-u-s-leadership-on-human-rights> (noting that "the Supreme Court gutted the Alien Tort Statute").

the Court unanimously refused to adopt the unilateral approach encouraged by pluralists and other modern internationalists that would displace international multilateral approaches to global governance. The Court also did not fully embrace the perspective championed by international law skeptics, who would prefer that international norms have no role in U.S. jurisprudence. Justice Stephen Breyer's concurrence particularly reinforces the view that U.S. courts should heed international jurisdictional norms, while reaffirming that exorbitant assertions of extraterritoriality are disfavored—a position that is consistent with long-standing international law principles.⁹

The *Kiobel* decision, then, is friendlier to international law than some have suggested. While *Kiobel* deprives advocates of one enforcement tool, the decision vindicates, rather than undermines, the interests of the human rights community. *Kiobel* suggests that efforts to build respect for human rights will need to occur multilaterally, instead of through unilateral extraterritorial regulation. If it spurs a reexamination of how to rebuild and legitimize international institutions, the decision's rejection of two popular theories in legal scholarship will be a welcome development.

Rejecting Global Legal Pluralism

The approach that the Court most roundly rejected is one that has been in ascendance among legal scholars recently: global legal pluralism. Legal pluralists have sought to take descriptive accounts from other disciplines, particularly sociology and anthropology, and turn them into normative theories for global governance.¹⁰ By staking a normative vision, they distinguish themselves from earlier pluralists who sought to better understand the world but not create an alternative jurisprudence.¹¹ Unlike traditional international law scholars, pluralists contend that international norms in the age of globalization are best created and enforced at the substate level.¹²

Pluralists have sought, among other objectives, to change and redefine jurisdictional rules.¹³ They have sought to exploit, not resolve or manage, normative conflict and have attempted to expand jurisdictional bases to enable local courts to develop international law. Harold Koh's transnational legal process, while not defined as "pluralist," in many ways seeks to develop international law through substate actors in this way.¹⁴

⁹ *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2011) (describing how the "exceptionalism of extraterritoriality reflects the foundational ideals of the international state system").

¹⁰ See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1156 (2007) ("In sum, pluralism offers not only a more comprehensive descriptive account of the world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices.").

¹¹ For an overview, see Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009).

¹² See e.g., NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010); PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012).

¹³ Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 403 (2005) (explaining how the United States "took an early lead in applying its own law to situations with little connection to itself other than a widely defined 'effect,' and it has succeeded in reshaping (or at least destabilizing) jurisdictional rules in this area"); see also Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 355, 360–62 (2002) (describing a "juridical paradigm shift" and how humanitarian law has extended the scope of jurisdiction beyond national borders).

¹⁴ Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); see Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225, 231–32 (2009) (describing Koh's work and its relationship to global legal pluralism).

Yet global legal pluralism, as prescription, is no friend to international human rights. It rejects the universal norms upon which human rights depend and instead relies on domestic courts as experimentation sites where norms will develop and later migrate to the international system. This approach to global governance requires a unique faith that courts in other countries will interpret and develop human rights in a specific (and similar) way. But little suggests that this sort of consensus exists.¹⁵ The concern, then, is less that other nations will hale U.S. citizens into their courts for alleged violations¹⁶ but that other courts will develop norms of civil liability that are in tension, or are even inconsistent, with human rights.¹⁷ For these reasons, the pluralist recipe for promoting human rights everywhere will likely be (despite best intentions) counterproductive.¹⁸

Extraterritorial regulation of foreigners is problematic for other reasons too. Many view this kind of regulation as inherently illegitimate.¹⁹ Even if a substantive right could be universally agreed upon, procedural mechanisms for justice vary. Other nations view American adjudication skeptically and—rightly or wrongly—perceive American courts as biased,²⁰ just as Americans often view foreign courts skeptically.²¹ Extraterritorial regulation of nonnationals is also seen as undemocratic²² and reflective of American exceptionalism and legal imperialism in its worst form.²³

That Chief Justice John Roberts's majority opinion was unsympathetic to court-encouraged pluralistic approaches was unsurprising.²⁴ But Breyer's concurrence also rejected them by failing to find that Congress had authorized universal civil jurisdiction.²⁵ While Breyer would look to "international jurisdictional norms" to determine the ATS's reach,²⁶ he was unwilling to

¹⁵ See Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 131 (2009) (noting that "it is quite naïve to think that general international law will always prevail over fragmentationist impulses"). For an account of how human rights developed from hard-fought political struggles and strategic alliances, see Yves Dezalay & Bryant G. Garth, *Constructing Law out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 354, 360 (Austin Sarat & Stuart Scheingold eds., 2001).

¹⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013).

¹⁷ Cf. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1 (2011) (describing the political aspects behind universal criminal jurisdiction).

¹⁸ See Bryant G. Garth, *Rebuilding International Law After the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists*, 4 LOY. U. CHI. INT'L L. REV. 3, 8–9 (2006) (describing the potential of undermining the legitimacy of international norms).

¹⁹ That the ATS has been employed generally against foreigners, but not against U.S. actors, increases the appearance of exceptionalism. James C. Hathaway, *America, Defenders of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 132 (2000) (noting how the "United States simultaneously asserts the right to lead, but also to be exempted from the rules it promotes").

²⁰ Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121–22 (1996); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1503 (2003).

²¹ See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 228 (2009) (suggesting that Americans only support decisions made by "American courts, which are staffed by Americans who share American values and interests").

²² Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 859–64 (2009).

²³ Chandra Lekha Sriram, *Human Rights Claims vs. the State: Is Sovereignty Really Eroding?*, 1 INTERDISC. J. HUM. RTS. 107, 117 (2006) ("To the degree that proceedings take place only in the courts of powerful Western states, and often in those of former colonizers, the argument that cases are selective, and even driven by imperialistic agendas, can be and has been raised.")

²⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664–65, 1668–69 (2013) (describing foreign policy concerns of imposing sovereign will onto conduct occurring within another sovereign's territorial jurisdiction).

²⁵ *Id.* at 1673–75 (Breyer, J., concurring); see also Wuerth, *supra* note 5, at 611–12.

²⁶ *Kiobel*, 133 S.Ct. at 1673 (Breyer, J., concurring).

find that those norms permitted a free-for-all, where each nation's courts could claim authority to hear any case in the world. Both opinions relied on a more traditional territorial understanding "where distinct American interests [would need be] at issue" for jurisdiction to attach.²⁷ Citing Justice Joseph Story, both the majority and Breyer's concurrence noted that Congress adopted the ATS when it was clear that "[n]o nation ha[d] ever yet pretended to be the *custos morum* of the whole world."²⁸

Rejecting Sovereignism

Yet *Kiobel* was not a victory for right-leaning theorists either. Over the last fifteen to twenty years, a group of legal scholars (often referred to as international law skeptics or Sovereignists) have attacked international law and its institutions,²⁹ arguing that international law must be narrowly cabined to avoid undermining American interests.³⁰ For Sovereignists, international law usually undermines democratic sovereignty. They generally recoil when courts cite to foreign law³¹ and oppose the creation of international institutions. From this perspective, ATS litigation constitutes an attempt by left-leaning groups to infuse internationalist values where they do not belong.

In many ways, the Sovereignist position is an attempt to redefine and constrain the role of courts. Sovereignists appear more animated by separation of powers and federalism concerns than by concerns over developing effective global governance.³²

The Court, however, did not fully adopt or endorse the Sovereignist approach. The majority came closest, with its invocation of legislative primacy.³³ But the majority's application of the presumption against extraterritoriality was similar to how the Court has long approached jurisdictional rules. The Court was reluctant to assume that Congress had authorized the broadest reach of possible jurisdiction.³⁴ The Court's majority opinion was consistent with

²⁷ *Id.* at 1674.

²⁸ *Id.* at 1668 (majority opinion); *id.* at 1674 (Breyer, J., concurring).

²⁹ See Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 9; see also Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1791 (2003) (describing the differences between realists and liberal internationalists).

³⁰ See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 167–84, 225–26 (2005) (arguing that international law is often rhetorical and that "international law scholars exaggerate its power and significance"); POSNER, *supra* note 21, at ix–xvi, 28–39 (criticism of the expansion of global legalism and warning on the overreliance on international law and its institutions); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1804 (2009) ("The force of international law is thus largely an illusion . . . [merely] a rhetorical, political trope . . .").

³¹ See Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 639–40, nn.8–10 (describing opposition to citation of foreign law).

³² For a more in-depth discussion, see Parrish, *supra* note 22, at 822–27, 841–56.

³³ Cf. Lea Brilmayer, *New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 S.W. L. REV. 655 (2011) (discussing the Court's focus on legislative supremacy and how the presumption permits judicial creativity).

³⁴ The Court often refuses to assume that Congress has utilized all jurisdictional power granted to it, even in the face of broad statutory language. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908) (interpreting the statutory grant of federal question jurisdiction to be narrower than what is constitutionally permitted); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (Marshall, C.J.) (interpreting the statutory grant of diversity jurisdiction to be narrower than constitutional limits).

international law's respect for sovereignty and self-determination.³⁵ Breyer's concurrence also was not sympathetic to the skeptics' view, as it sought to interpret the statute "consistent with international law and foreign practice."³⁶ In addition, the entire Court foreclosed only foreign-cubed cases. *Kiobel* says little about how to decide ATS claims when significant ties to the United States exist. The least controversial claims from an international law perspective—those seeking to hold U.S. actors liable for human rights violations, especially in places under U.S. control—should remain viable.³⁷ For international law skeptics, *Kiobel* does little to insulate American jurisprudence from transnational norms.³⁸

Conclusion

The doctrinal issues in *Kiobel* are important. The decision reflects culture-war-type debates over tort reform, the role of courts, separation of powers, and federalism.³⁹ The case, however, also says something important about approaches to global governance. The decision may mark the beginning of a welcome retreat from a failed strategy of aggressive American unilateralism that has been promoted by both right-leaning and left-leaning academics.

Much work remains in the human rights area. Tremendous barriers to justice exist. International law and institutions remain underdeveloped, often to the benefit of multinational corporations and other actors. Our courts can and should play an important role in enforcing and developing international law, particularly to hold our own citizens accountable for human rights abuses (whether occurring in the United States or abroad). The hope after *Kiobel* is that the human rights community will turn away from unilateral enforcement and focus its attention on rebuilding international law and its institutions. In this way, *Kiobel* underscores the failings of two extremes in legal scholarship—one that has sought to isolate internationalism, and another that has sought to privilege unilateralism.

CORPORATIONS AND TRANSNATIONAL LITIGATION: COMPARING *KIOBEL* WITH THE JURISPRUDENCE OF ENGLISH COURTS

By Andrew Sanger*

As a result of the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, claims brought under the Alien Tort Statute (ATS)¹ must "touch and concern the territory of the United States . . . with sufficient force" for federal courts to recognize a federal common

³⁵ See, in this Agora, Marco Basile, *The Long View on Kiobel: A Muted Victory for International Legal Norms in the United States?*

³⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1675 (2013).

³⁷ See Wuerth, *supra* note 5, at 603, 608–13, 621 (describing cases that may remain viable).

³⁸ Even as ATS litigation is curtailed, human rights law will continue to constrain corporate action. Peter J. Spiro, *Sovereignism's Twilight*, 31 BERKELEY J. INT'L L. 307, 318 (2013).

³⁹ For a more detailed exploration, see Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208 (2013).

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¹ 28 U.S.C. §1350.

law cause of action for violations of international law.² While the contours of this test are established on a case-by-case basis, ATS jurisprudence will continue to be unsettled and will likely result in far fewer cases being pursued in U.S. federal courts. The lower courts have already relied on the *Kiobel* decision to quickly dismiss pending cases,³ suggesting that, even if the Supreme Court did not close the door to transnational tort litigation, the decision may well prove to be the end of transnational ATS litigation. In light of *Kiobel* and its emerging progeny, now seems to be an opportune time to examine approaches to transnational tort litigation in the courts of other states.

The present contribution compares common law tort claims in U.S. federal courts with common law tort claims in English courts and suggests that, in a post-*Kiobel* world, the latter may offer significant advantages over the former. First, English courts apply the harmonized European Union Regulation on Jurisdiction (Brussels I),⁴ under which corporations domiciled in an EU member state are to be sued in that state, with courts precluded from declining jurisdiction on the ground that the court of a non-EU state would be a more appropriate forum. Second, in most cases, the applicable law is the law of the state in which the harm is alleged to have occurred, which avoids the potentially controversial extraterritorial application of the law of the forum state. Third, English courts have shown a willingness to find that a parent company may, in certain circumstances, owe a duty of care to employees of its subsidiaries. Finally, this short essay briefly addresses why, despite these potential advantages, comparatively few transnational tort claims against transnational corporations have been brought in English courts.

The Exercise of Jurisdiction over a Foreign Corporation

A jurisdictional challenge may arise when a claimant wishes to use the legal system where one part of a transnational corporation is domiciled to sue a constituent part incorporated in another state. The facts of *Kiobel* provide an example: Nigerian plaintiffs sued an English-Dutch parent company in the United States on the basis that the parent company operated an office in New York.⁵

U.S. federal courts may exercise two types of personal jurisdiction over a defendant corporation. First, a federal court has *specific* jurisdiction over a corporation if the claim arises out of the corporation's contact with the state in which the court is located (the forum state)—for example, if the tort is committed within the state. Second, a court has *general* jurisdiction over

² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013).

³ See, e.g., *Al Shimari v. CACI Int'l, Inc.*, No. 1:08-cv-827, 2013 U.S. Dist. LEXIS 92937, at *50–51 (E.D. Va. June 25, 2013), available at http://ccrjustice.org/files/Shimari_Opinion%20Dismissing%20ATS%20Claims%206.26.13.pdf.

⁴ Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 60, 2001 O.J. (L 12) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF> [hereinafter Brussels I]; Case C-281/02, *Owusu v. Jackson*, 2005 ECR I-1383, paras. 37–46, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0281:EN:HTML> (a decision on the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1978 O.J. (L 304) 36, but directly applicable to Brussels I). As of January 10, 2015, Brussels I will be recast as Regulation (EU) 1215/2012, 2012 O.J. (L 351) 1 (hereinafter EU Regulation). Article 63 of the EU Regulation is the corresponding provision to Article 60 of Brussels I.

⁵ See *Kiobel*, 133 S.Ct. at 1662–63; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93 (2d Cir. 2000).

any claim brought against a corporation⁶ if “the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”⁷ The Supreme Court stated in *Goodyear Dunlop Tire Operations v. Brown* that general jurisdiction exists over foreign corporations “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”⁸ The Court further explained that “continuous activity of some sort within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.”⁹

The decision in *Goodyear* is difficult to square with *Wiwa v. Royal Dutch Petroleum Co.*, where the Second Circuit ruled that the New York office of Royal Dutch Petroleum was sufficient to establish general jurisdiction, notwithstanding that the sole purpose of the office was to manage the corporation’s listing on the New York Stock Exchange.¹⁰ In *Kiobel*, Royal Dutch Petroleum challenged the assertion of personal jurisdiction, but the company did not raise the issue again after the district court proceedings, perhaps because of the ruling in *Wiwa*.¹¹ The Supreme Court will soon review *Bauman v. DaimlerChrysler Corp.*,¹² where the U.S. Court of Appeals for the Ninth Circuit ruled that it could exercise jurisdiction over a German company because one of its subsidiaries operates in California.¹³

By contrast, Brussels I requires that corporations domiciled in an EU member state be sued in that state, with EU member state courts precluded from declining jurisdiction on the ground that the court of a non-EU state would be a more appropriate forum.¹⁴ A corporation is domiciled where it has its “statutory seat” (identified in the following order: registered office, place of incorporation, or place under the law of which formation took place), “central administration,” or “principal place of business.”¹⁵ If a corporation is domiciled in more than one EU state, the claimant may choose where to bring the claim. A court will decline to hear a case only where (1) proceedings have already commenced between the same parties on the same subject matter in a non-EU jurisdiction;¹⁶ (2) the parties have contractually agreed that the courts of

⁶ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414–15 (1984).

⁷ *Goodyear Dunlop Tires Operations, SA v. Brown*, 131 S.Ct. 2846, 2849 (2011) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

⁸ *Id.* at 2851 (quoting *Int’l Shoe*, 326 U.S. at 317).

⁹ *Id.* at 2856 (quoting *Int’l Shoe*, 326 U.S. at 318).

¹⁰ *Wiwa*, 226 F.3d 88.

¹¹ See John Bellinger, *Reflections on Kiobel*, LAWFARE, Apr. 22, 2013, at <http://www.lawfareblog.com/2013/04/reflections-on-kiobel>.

¹² *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 133 S.Ct. 1995 (U.S. Apr. 22, 2013) (No. 11-965).

¹³ See, e.g., John Bellinger, *Recent Decisions May Make Ninth Circuit a Magnet for Foreign Plaintiffs*, LAWFARE, Sept. 3, 2012, at <http://www.lawfareblog.com/2012/09/recent-decisions-may-make-ninth-circuit-a-magnet-for-foreign-plaintiffs>; Kenneth Anderson, *Supreme Court to Review Bauman v. DaimlerChrysler*, OPINIO JURIS, July 17, 2013, at <http://opiniojuris.org/2013/07/17/supreme-court-to-review-bauman-v-daimlerchrysler>; see also Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *DaimlerChrysler AG v. Bauman*, No. 11-965 (U.S. July 2013), available at <http://www.justice.gov/osg/briefs/2012/3mer/1ami/2011-0965.mer.ami.pdf> (arguing that the Supreme Court should reverse the Ninth Circuit’s “seriously flawed” decision in *Bauman*).

¹⁴ Brussels I, *supra* note 4, Art. 60 (EU Regulation, *supra* note 4, Art. 63); *Owusu*, *supra* note 4, paras. 37–46.

¹⁵ Brussels I, *supra* note 4, Art. 60 (EU Regulation, *supra* note 4, Art. 63).

¹⁶ *Id.*, Art. 27 (EU Regulation, *supra* note 4, Art. 29).

a non-EU state should have jurisdiction over the dispute;¹⁷ or (3) a particularly close connection exists between the dispute and another jurisdiction that ousts the exclusive jurisdiction of EU member states under Article 22 of Brussels I (e.g., claims involving rights in land and specific provisions of company law).¹⁸

In the recent English case of *Vava v. Anglo American South Africa Ltd.*, claimants argued that, for the purposes of Brussels I, the “central administration” of the South African company Anglo American South Africa (AASA) included the place where the “entrepreneurial decisions” of the company were taken, notwithstanding that these decisions were taken in England by the company’s parent corporation.¹⁹ AASA objected to the assertion of jurisdiction by the English courts, and the claimants sought specific disclosure of appropriate documents to support their case against the objection. The High Court of Justice of England and Wales (Silber, J.) ruled that specific disclosure could be granted because the claimants had “at least an arguable case that the ‘central administration’ of a company is where management decisions are taken and where entrepreneurial decisions take place irrespective of where its economic activities occur.”²⁰ However, in the final hearing on jurisdiction, the High Court (Smith, J.) disagreed, finding that this argument went too far: it could result in the untenable conclusion that if a company’s “entrepreneurial decisions are determined predominantly by the wishes of a bank or other [financial] institution,” the location of the bank could be construed as the central administration of the company.²¹ Justice Smith explained that the question of the central administration of a company “depends upon where the company itself carries out its functions, and, unless the company can properly be said to act through another person or entity because of agency or delegation or on some other legally recognised basis, the actions of others do not determine the question.”²² The factual evidence did not support the argument that AASA carried out its functions in England; that its English parent company influenced decisions, policies, and strategies adopted by the AASA did not mean that its central administration was in England.²³

If the defendant corporation is not domiciled in an EU member state, English courts fall back on the common law, which provides that jurisdiction may be exercised where effective service of the claim form can be made.²⁴ An English court may exercise jurisdiction over foreign corporations not domiciled in the European Union as long as they have a place of business (a

¹⁷ *Id.*, Art. 23 (EU Regulation, *supra* note 4, Art. 25). Article 25 of the EU Regulation contains changes to the rules for assessing both the validity of the agreement conferring jurisdiction and the effect of the *lis alibi pendens*.

¹⁸ *Id.*, Art. 22 (EU Regulation, *supra* note 4, Art. 24). In addition, Articles 33 and 34 of the EU Regulation allow, but do not require, a court to stay proceedings on the basis that proceedings before a nonmember state involving the same parties and concerning the same subject matter were pending at the time that proceedings were instituted in the member state court.

¹⁹ *Vava v. Anglo American South Africa Ltd.*, [2012] EWHC 1969, paras. 17, 19 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2012/1969.html>.

²⁰ *Id.*, para. 43.

²¹ *Vava v. Anglo American South Africa Ltd.*, [2013] EWHC 2131, para. 71 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2013/2131.html>.

²² *Id.*

²³ *Id.*, paras. 71–72, 76.

²⁴ Civil Procedure Rules 1998, S.I. 1998/3132, pt. 6 (UK), available at <http://www.legislation.gov.uk/uksi/1998/3132/made> [hereinafter CPR].

presence less than domicile) in England.²⁵ It is not necessary for the claim to have any connection with the defendant's activities in England, but, unlike the Brussels I regime, a court may stay proceedings on the basis that another available forum is more appropriate than England and that it would not be unjust to require the claimant to sue in this alternative forum.²⁶ However, in two important cases involving corporations, English courts refused to order a stay of proceedings on the basis that to require the plaintiffs to pursue their claim in a foreign jurisdiction would deny them access to adequate funding for lawyers and experts, thereby resulting in the denial of practical access to justice.²⁷

Application of the Law of the Place Where Damage Occurred

In ATS cases, U.S. federal courts may recognize a federal common law cause of action for violations of international law if the rule alleged to have been violated has “a specificity comparable to the features of the 18th-century paradigms” of assaults against ambassadors, safe conducts, and piracy.²⁸ After *Kiobel*, claims will also have to “touch and concern the territory of the United States . . . with sufficient force.” This controversial—and now limited—exercise of extraterritorial prescriptive jurisdiction by U.S. federal courts does not occur in transnational tort cases governed by rules of private international law.

For cases brought in English courts, the Rome II Regulation (Rome II) determines the law to be applied (the *lex causae*). Rome II provides that, as a general rule, courts should apply the “law of the country in which the damage occurs”²⁹ for all matters of substance in the case. Thus, if the acts of a defendant occur in one state, but the claimant is injured in another, the law of the latter state will apply. The general rule is subject to an exception and an escape clause.³⁰ Rome II preserves the public policy interests of the forum state, which allows an English court to refuse to apply a rule of foreign law if its application would be “manifestly incompatible with the public policy . . . of the forum” state.³¹ In *Kuwait Airways Corp. v. Iraqi Airways Co.*, the House of Lords refused to give effect to Iraqi laws purporting to give the title of six aircraft, confiscated from Kuwait Airways during the Gulf War of 1990, to the defendants because the laws were in flagrant breach of international law and were therefore contrary to English public policy.³² A UN Security Council resolution had called upon states not to recognize the annexation of Iraq and to “refrain from any action or dealing that might be interpreted as an indirect

²⁵ *Id.* §§6.2, 6.5; Companies Act 2006, c.46 (UK), available at <http://www.legislation.gov.uk/ukpga/2006/46>. Stakeholder interests include the interests of employees, suppliers, customers, and (local) communities.

²⁶ See *Spiliada Maritime Corp v. Cansulex Ltd.*, [1987] A.C. 460 [H.L.]; *Connelly v. RTZ Corp.*, [1998] 1 A.C. 854 (H.L.); *Lubbe v. Cape PLC*, [2000] 4 All E.R. 268 (H.L.) (appeal taken from Eng.).

²⁷ *Connelly*, *supra* note 26; *Lubbe*, *supra* note 26, para. 24.

²⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

²⁹ Council Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations, Art. 4(1), 2007 O.J. (L 199) 40 (general rule applying to torts after January 11, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF> [hereinafter Rome II]; Case C-142/10, *Homawoo v. GMF Assurances SA*, 2011 ECR I-11603, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0412:EN:HTML>.

³⁰ Rome II, *supra*, note 29, Art. 4(2) (exception applying to torts committed after January 11, 2009); *id.*, Art. 4(3) (escape clause); see also *id.*, Art. 14(1)(a) (post-event agreement); *id.*, Art. 14(1)(b) (pre-event agreement).

³¹ *Id.*, Art. 26.

³² *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] UKHL 19, paras. 14–17, [2002] 2 A.C. 883, available at <http://www.bailii.org/uk/cases/UKHL/2002/19.html>.

recognition of the annexation.”³³ If the law of the state in which the harm occurs does not impose civil liability on those whose conduct international law requires states to prohibit and punish—for example, torture—English courts may apply English law on the basis that the *lex causae* is manifestly contrary to English public policy.

English common law tort claims are based on well-accepted types of torts, such as negligence, trespass to the person, and product liability. The torts may be committed in violation of international law and/or involve violations of human rights, but, unlike ATS claims in U.S. federal courts, the tortious conduct need not be contrary to a rule of international law. Nevertheless, liability in tort can protect the same values that are protected in ATS cases. A claim for torture is a claim for trespass to the person; a claim for avoidable environmental damage is a claim for negligence. Although these labels do not carry the same censure as a “tort in violation of international law” or a “human rights tort,” suing for traditional torts can still ensure responsibility and compensation for harmful conduct.³⁴

Application of the *lex causae* in English transnational tort cases also has some advantages over the recognition of a U.S. federal common law cause of action for violations of international rules in ATS cases. First, as noted, for nearly all transnational tort cases, English courts apply the law of the state in which the tort occurred; the concern that a state may exercise its prescriptive jurisdiction on an exorbitant basis does not arise. In complex or penumbral cases, rules of private international law assist the courts in determining which domestic law to apply, avoiding the challenges experienced by U.S. federal courts in deciding whether to apply rules of international law or federal common law in ATS cases. Second, English courts are not required to examine international law or engage with the constitutional rules that determine its place within the domestic legal system. Both of these tasks have frequently divided U.S. judges and academics in ATS cases and have led to a divergent body of jurisprudence. Third, applying the domestic law of the state in which the tort occurred avoids many of the corporate responsibility questions that have occupied federal courts in ATS cases. Unlike international law, domestic legal systems have well-developed notions of civil liability that deal with questions of corporate responsibility and the appropriate standard for secondary liability. Furthermore, for claimants, establishing negligence and other traditional torts is often easier than establishing a corporate violation of a rule or norm of customary international law.

Parent Company Responsibility

Where English law has been applied in cases involving corporate groups, English courts have shown a willingness to find a parent company directly responsible for the harm caused by its subsidiary. In *Chandler v. Cape*, an English parent company was found to owe a duty of care to the employees of its subsidiary on the basis of a clear proximity between the operations of

³³ SC Res. 662 (Aug. 9, 1990); see also SC Res. 661 (Aug. 6, 1990).

³⁴ See UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31, princ. 26 & cmt. (Mar. 21, 2011), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

the two companies.³⁵ For claimants, parent company responsibility means that they only need to establish that the parent company failed to exercise appropriate control over a subsidiary, rather than proving an abuse of the corporate form. The same approach could also be applied to corporations exercising control through long-term supply contracts. Several corporations have recently been criticized for creating—and/or failing to intervene in—situations where the supplier’s employees have been subjected to poor working conditions.³⁶ Although English law will rarely be applied in transnational tort cases brought in English courts, *Chandler* provides a precedent on which foreign courts could rely.

A Comparable Degree of Success?

Hundreds of claims against corporations have been filed under the ATS, but fewer than half a dozen have been filed in English courts; by contrast, most claims in English courts have been successful, but very few ATS cases have resulted in a judgment or settlement.³⁷ If claims in English courts generate less controversy and have a comparatively better chance of success than ATS cases, why have there been so few English cases? A number of factors could explain the reluctance to bring cases in English courts,³⁸ but the two strongest explanations are the difference in both the procedural rules and the types of claim brought by plaintiffs. The United States offers more advantageous procedural rules for plaintiffs, including extensive discovery options, class action suits, and punitive damages.³⁹ In English courts, the losing party typically pays the other side’s costs, a significant deterrent to potential claimants. In addition, English common law claims are not brought as human rights cases or violations of international law,⁴⁰ whereas ATS claims require that federal courts adjudge whether a corporation is liable for a violation of international law. Decisions on whether corporations have violated rules of international law have been instrumental in creating a normative expectation that corporations should comply with international standards, and the potential for ATS litigation has helped to reinforce other corporate responsibility initiatives.⁴¹ Nevertheless, traditional tort claims do have a significant role to play in setting standards for transnational corporate responsibility.⁴²

Conclusion

The future of transnational tort litigation is likely to involve the application of *lex causae* in traditional tort cases, rather than federal common law causes of action for violations of international law in ATS cases. As this brief comment has illustrated, transnational tort claims in

³⁵ *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525, para. 80 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html>. An argument based on parent company responsibility was also made in *Lubbe*, *supra* note 26, and *Gurrero v. Monterico Metals PLC*, [2009] EWHC 2475 (QB).

³⁶ Andrew Sanger, *Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of Its Subsidiary*, 71 CAMBRIDGE L.J. 478 (2012); see also, in this Agora, Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*.

³⁷ Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 128 (2013).

³⁸ See, in this Agora, Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*.

³⁹ See, in this Agora, Anupam Chander, *Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy*.

⁴⁰ See McCorquodale, *supra* note 36.

⁴¹ See, in this Agora, Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*.

⁴² See, in this Agora, Mahdev Mohan, *The Road to Song Mao: Transnational Litigation from Southeast Asia to the United Kingdom*.

English courts provide a significant—and a comparatively uncontroversial—alternative to ATS cases in U.S. federal courts.

THE ROAD TO *SONG MAO*: TRANSNATIONAL LITIGATION FROM SOUTHEAST ASIA TO THE UNITED KINGDOM

*By Mahdev Mohan**

Anxieties about the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ should not eclipse the fact that redress can, and at times should, be secured elsewhere. A major effect of *Kiobel* is to adjust the aperture of transnational corporate accountability away from the United States—which generally has been the default venue—and toward regional and foreign jurisdictions where violations occur or where responsible beneficiaries of the wrongdoings reside or conduct their businesses.

This article examines one example of such transnational human rights litigation outside the United States, a case regarding land evictions in Cambodia that has been accepted for adjudication by the United Kingdom High Court.² That case, *Song Mao v. Tate & Lyle Industries Ltd.*, I argue, reinforces and refines three crucial precepts for the post-*Kiobel* environment. First, plausible domestic and regional processes should be the initial juridical focus when seeking redress for business-related human rights abuses. Second, once such processes are exhausted or prove ineffective, recourse can be sought through transnational human rights litigation against transnational corporations and before foreign courts that have a nexus to the claim. Third, transnational human rights litigation should be premised on a cause of action appropriate to the court and legal system seized, however pedestrian that cause of action may seem. Garden-variety tort claims may be more effective at a liminal stage than torts rooted in *jus cogens* norms as foreign courts may find the latter to be nonactionable in the forum or incompatible with comity, especially without statutes akin to the Alien Tort Statute (ATS).³

Song Mao's Procedural History

In August 2006, the Cambodian government granted economic land concessions in the province of Koh Kong to two Cambodian sugar companies, Koh Kong Sugar Industry Co. Ltd. (KKS) and Koh Kong Plantation Co. Ltd. (KKP)—the two plots of land amounting to about

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² Statement of Claim, *Song Mao v. Tate & Lyle Indus. Ltd.*, Claim No. 2013, Folio 451 (EWHC (Comm), Mar. 28, 2013) (QB), available at <http://www.business-humanrights.org/media/documents/tate-lyle-particular-of-claim-28-mar-2013.pdf> [hereinafter *Song Mao SoC*].

³ 28 U.S.C. §1350.

thirty thousand acres (collectively “Land”).⁴ Both companies are now jointly owned by a Thai company, KSL Group (KSL) (70 percent); and a Taiwanese company, Ve Wong Corporation (30 percent).⁵ Previously, the companies were also partially owned by an influential Cambodian senator, Ly Yong Phat.⁶ Villagers claim that they were not consulted prior to the grant and were violently evicted from their lands by armed military police who were acting on behalf of the Koh Kong companies and/or the Cambodian government to make room for sugarcane plantations.⁷ In 2009, KKS and KKP entered into a five-year contract with a UK-headquartered company, Tate & Lyle Industries and its subsidiaries (T&L), to sell raw sugar derived from the plantations. It is estimated that the annual yield from the raw sugar capable of being produced from the Land exceeds US\$2 million.⁸

In March 2013, lawyers for two hundred Cambodian villagers commenced the *Song Mao* case before the UK High Court against T&L. They allege that T&L purchased sugar from sugarcane grown upon the villagers’ land. The plaintiffs maintain that they remain the legal owners of the land (and thus crops grown upon it) and claim that T&L is liable to pay damages for selling the raw sugar.⁹ The defendants argue that they do not have knowledge of the facts asserted and seek to be declared the rightful owners of the sugar purchased from KKS and KKP.¹⁰

The claimants have succeeded in persuading the UK High Court to assert its jurisdiction and hear the claim in October 2014.¹¹ This outcome is not because the UK courts are any more inclined than the *Kiobel* Court to set human rights standards for corporate conduct in other states.¹² In the absence of a UK equivalent of the ATS, UK courts are wary about circumstances in which they will adjudge corporate human rights abuses beyond UK borders. In a recent ruling, the UK High Court stated that it had no jurisdiction over claims that had been filed against Anglo American South Africa Ltd. by South African miners who contracted the deadly lung disease silicosis due to excessive dust in these mines.¹³ The High Court held that the miners could pursue their claim in South Africa as “the English court is not obliged to assume jurisdiction over claims that have little if anything to do with this country.”¹⁴

⁴ *Song Mao* SoC, *supra* note 2, para. 11.

⁵ Kuch Naren, *Thai Representative Meets with Koh Kong ‘Blood Sugar’ Families*, CAMBODIA DAILY, Feb. 28, 2013, at <http://www.cambodiadaily.com/archive/thai-representative-meets-with-koh-kong-blood-sugar-families-11884>.

⁶ *Song Mao* SoC, *supra* note 2, para. 6.

⁷ *Id.*, para. 8; see also David Pred, *Bridges Across Borders Cambodia, Bittersweet: A Briefing Paper on Industrial Sugar Production, Trade and Human Rights in Cambodia 2* (Briefing Paper, Sept. 2010), available at <http://bab.cambodia.org/developmentwatch/cleansugarcampaign/bittersweet.pdf>.

⁸ *Song Mao* SoC, *supra* note 2, para. 30.

⁹ *Id.*, paras. 1, 23–27, 32–33.

¹⁰ Defence & Counterclaim of the First and Second Defendants, *Song Mao v. Tate & Lyle Indus. Ltd.*, Claim No. 2013, Folio 451 (EWHC (Comm), May 2, 2013) (QB), available at <http://www.business-humanrights.org/media/documents/tate-lyle-defence-counterclaim-2-may-2013.pdf>.

¹¹ Joel Brinkley, *Private Property, Public Greed in Cambodia*, POLITICO, May 6, 2013, at <http://www.politico.com/story/2013/05/lawyer-works-to-put-end-to-cambodia-land-grabbing-90985.html>.

¹² “No nation has ever yet pretended to be the *custos morum* of the whole world.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1668, 1674 (2013) (quoting *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)).

¹³ *Vava v. Anglo American South Africa Ltd.*, [2013] EWHC 2131 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2013/2131.html>.

¹⁴ *Id.*, para. 76 (concluding statement in decision by Justice Andrew Smith).

In considering the success of the *Song Mao* claimants in having their case heard in the United Kingdom, it is obviously important that the defendant and the sugar are in the United Kingdom. Also notable, however, was the strategy of the claimants in drawing on and utilizing normative frameworks and judicial processes in Cambodia and the region before embarking on transnational human rights litigation elsewhere.¹⁵ Whether or not the UK High Court realized it, its actions were consistent with emerging human rights standards in the Southeast Asian region.

Backdrop: ASEAN's Regional Human Rights Standard Setting

The Association of Southeast Asian Nations (ASEAN), whose members include Cambodia and Thailand, has often been criticized for failing to adequately protect human rights due to its long-standing policy of noninterference in member states' internal affairs. However, in 2009, ASEAN's ten member states designed a "roadmap," which envisions the creation of "a rules-based Community of shared values and norms."¹⁶ Human rights discourse has become an established part of ASEAN's plans for integration by the year 2015. After all, the setting of regional human rights standards responds to indigenous conditions and challenges and opens up "new possibilities for a more inclusive human rights corpus."¹⁷ Furthermore, the UN high commissioner for human rights has observed that ASEAN's 2011 Human Rights Declaration (AHRD) "may set the tone for the emerging ASEAN human rights system."¹⁸

Of particular pertinence for these claimants was Article 5 of the AHRD, which provides that under domestic law "[e]very person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law."¹⁹ This provision accords with international standards codified in several significant international and regional human rights conventions.²⁰ Importantly, it sets the stage for corporate legal accountability as the rule of effective remedy has its origins in the doctrine of state responsibility and corporations that are not exempt by the AHRD or any treaty or customary rule from the duty to provide effective remedies.²¹

¹⁵ Several leading Cambodian civil society organizations (CSOs), including Equitable Cambodia, Cambodian Human Rights and Development Association (ADHOC), Cambodian League of the Promotion and Defense of Human Rights (LICADHO), Citizens Commission on Human Rights (CCHR), and Community Legal Education Center (CLEC), have worked in concert with villagers to document human rights abuses related to the Land, and these organizations advocate for corporate accountability.

¹⁶ ASEAN Secretariat, ASEAN Political-Security Community Blueprint (Mar. 1, 2009), available at <http://www.asean.org/communities/asean-political-security-community>.

¹⁷ Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q. 547, 587 (2007).

¹⁸ Press Release, Office of the High Commissioner for Human Rights, Next Two Years Key to Human Rights Development in ASEAN Region—UN Human Rights Chief (Nov. 28, 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11649&LangID=E>.

¹⁹ ASEAN Human Rights Declaration, princ. 5 (Nov. 18, 2012), available at <http://aichr.org/documents>.

²⁰ See Universal Declaration of Human Rights, Art. 8, GA Res. 217A(III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948), available at <http://www.un.org/en/documents/udhr>; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13, Nov. 4, 1950, ETS No. 5, 213 UNTS 221 (as amended by Protocol No. 11, Nov. 1, 1998, ETS No. 155); American Convention on Human Rights, Arts. 25, 63, Nov. 22, 1969, 1144 UNTS 123; Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women in Africa, Art. 25, July 11, 2003, OAU Doc. CAB/LEG/66.6.

²¹ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, Annex, UN Doc. A/RES/ 60/147 (Dec. 16, 2005), available at <http://www.ohchr.org/EN/Professional>

Cambodia, Thailand, and the United Kingdom—Crossing the Jurisdictional Threshold

The filing of the *Song Mao* claim in the United Kingdom in 2013 was a culmination of concerted civil-society responses to alleged corporate misconduct related to the sugar concessions. Tracing the road to *Song Mao* is thus instructive for the evolution of transnational human rights litigation and should be seen in connection with lessons offered by *Kiobel* and in conjunction with the above-mentioned ASEAN developments.

First, civil society organizations (CSOs)—representing the villagers affected by the economic land concessions—exhausted domestic remedies before national courts and commissions, reflecting the same sensibility as Justice Stephen Breyer’s concurrence in *Kiobel* that exhaustion of such remedies is a requirement for ATS litigation.²² Consistent with Article 5 of the AHRD, the CSOs identified the villagers’ right to an effective remedy for breaches of Cambodian land law as a right reflecting emerging ASEAN standards and settled international law measures. According to the CSOs, the transfer and use of the Land was illegal as it contravened the following obligations:

- (1) provisions against the arbitrary expropriation of private property;²³
- (2) the right to fair and just compensation for land acquisition of registered state-private land;²⁴
- (3) the prohibition against concessions of state-private land of more than ten thousand hectares to the same person or company;²⁵ and
- (4) the requirement that environmental and social impact assessments must be carried out, that public consultations be held with potentially affected communities, and that solutions for voluntary resettlement be reached before economic land concessions are granted.²⁶

First, in February 2007, the CSOs filed a complaint against KKS and KKP in Koh Kong Provincial Court, seeking cancellation of the concession agreement on the above-mentioned grounds.²⁷ In September 2012, that court ruled that it did not have the power to hear the dispute and transferred the case to the Cadastral Survey Commission, a Cambodian alternative dispute resolution body, to take action. To date, no action has been taken by this commission or relevant authorities.²⁸

Second, the CSOs sought recourse beyond Cambodia but within ASEAN. On January 6, 2010, they filed a complaint before the accredited National Human Rights Commission of Thailand (Thai Commission) alleging that KSL, a Thai company, through its subsidiaries KKP

Interest/Pages/RemedyAndReparation.aspx; see also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 63–69 (2006).

²² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1671 (2013) (Breyer, J., concurring).

²³ CONST. OF CAMBODIA, Art. 44 (2004), available at <http://www.opendevdevelopmentcambodia.net/pdf-viewer/?pdf=/law/en/Constitution-Of-The-Kingdom-Of-Cambodia-E.pdf>.

²⁴ Kingdom of Cambodia, Land Law, Art. 5 (2001), available at <http://www.opendevdevelopmentcambodia.net/pdf-viewer/?pdf=/law/en/Law-on-Land-2001-E.pdf> [hereinafter Land Law].

²⁵ *Id.*, Arts. 58, 59.

²⁶ Kingdom of Cambodia, Economic Land Concessions, Sub-Decree No.146 ANK/BK (Dec. 27, 2005), available at http://www.cambodiainvestment.gov.kh/sub-decree-146-on-economic-land-concessions_051227.html.

²⁷ *Song Mao* SoC, *supra* note 2, para. 14.2.

²⁸ *Id.*

and KKS, had obtained the land concession illegally. The CSOs based their claim for jurisdiction of the Thai Commission on KSL's substantial ownership of KKP and KKS, its control over operations in Cambodia, and its duty to respect human rights wherever it operates.²⁹ The Thai Commission accepted jurisdiction and investigated the claim. It found evidence that "human rights principles and instruments were breached in this case, and that [KSL] is involved in the operations of its subsidiaries in Koh Kong, where these breaches took place."³⁰ The UN special rapporteur for Cambodia has observed that the Thai Commission's decision represented, within limits, "success in transboundary human rights promotion and protection" and ASEAN standard-setting, and was "a landmark case for international advocacy in Cambodia."³¹

Third, having traced the sugar trail from sugarcane harvested and processed in Cambodia by KKS and KKP and further processed in Thailand by KSL, the villagers commenced *Song Mao*, through UK lawyers, against T&L in the United Kingdom, where the sugar had been imported.³² Instead of selecting the court of a state that had no nexus to the defendants' nationality, as the plaintiffs in *Kiobel* had done, the claimants in *Song Mao* selected the UK High Court as the forum because T&L is domiciled in the United Kingdom. Further, according to the claimants, T&L's liability arises from its acts or omissions as, inter alia, it knew or ought to have known that the villagers were the owners of the Land and the sugarcane grown upon it.³³ The claimants further asserted that T&L deprived the villagers of the "fruits resulting from cultivation of land," contrary to Cambodian law.³⁴ The claim thus crossed the jurisdictional threshold.

Fourth, while the *Song Mao* claim alleges multiple instances of human rights abuses attributable to T&L, the claim is not premised on a *jus cogens* human rights cause of action. Unlike ATS cases that limit U.S. federal courts to recognize causes of action only for alleged violations of international law norms that are "specific, universal, and obligatory,"³⁵ other civil actions are not similarly limited. The claimants apparently recognized this actuality and, consistent with comity concerns arising from the adjudication of torts committed abroad, chose the run-of-the-mill tort of "conversion."³⁶ Their claim alleges that T&L acquired raw sugar through

²⁹ KSL owns 70% of the Cambodian subsidiary companies and has effective control over operations in Cambodia and receives 100% of the processed sugar from the two Cambodian land concessions. See CLEC Press Statement, International Sugar Companies Implicated in Cambodian Land Grabbing (July 24, 2012), available at <http://terra0nullius.wordpress.com/resources/2012-resources/2012-07-cambodia-ngo-statement-on-koh-kong-trial>.

³⁰ National Human Rights Commission of Thailand, Findings of the Subcommittee on Civil and Political Rights of the National Human Rights Commission of Thailand on the Koh Kong Sugar Cane Plantation Case in Cambodia, at 3 (July 25, 2012), available at <http://www.business-humanrights.org/Links/Repository/1013888>.

³¹ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi, A Human Rights Analysis of Economic and Other Land Concessions in Cambodia, para. 195, UN Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012).

³² The claimants are represented by Stephen Brown of Jones Day and barristers at Fountain Court. All are acting pro bono. See <http://www.fountaincourt.co.uk/news/detail/song-mao-and-others-v-1-tate-lyle-sugar-industries-and-2-t-l-sugars-limited>.

³³ See *Song Mao* SoC, *supra* note 2, para. 17 (stating that T&L has been put on notice of the claimants' allegations since July 2010).

³⁴ Land Law, *supra* note 24, Art. 95; see also *Song Mao* SoC, *supra* note 2, paras. 7, 23–33.

³⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1665 (2013) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

³⁶ *Song Mao* SoC, *supra* note 2, paras. 26–27, 33.

illegal contracts that wrongfully deprived the plaintiffs of the ownership, use, and possession of the sugar and that T&L had converted the same to its own use.³⁷

Finally, the CSOs have pursued nonjudicial and quasi-judicial transnational avenues in parallel with transnational human rights litigation. They have approached institutional and industrial stakeholders in the realm of trade regulation. In particular, they lodged a complaint³⁸ with European Union Trade Commissioner Karel De Gucht regarding the human rights implications of its “Everything but Arms” (EBA) initiative, a European preferential trade scheme that allows companies to export sugar and other goods to the European Union without import duties or quotas and with a guaranteed minimum price.³⁹ The complaint involved an appeal to the European Commission to take action pursuant to its obligation under the EBA scheme, requesting consultations and a thorough investigation of the alleged human rights abuses associated with the industry and, if appropriate, suspension of EBA benefits.⁴⁰

Similarly, the CSOs filed a complaint with the U.S. national contact point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises⁴¹ in relation to the alleged role that American Sugar Refiners Inc. (ASR) has played in the purchase of sugar produced from the Land.⁴² In June 2013, the U.S. national contact point concluded that the issues raised by the CSOs “pertain to matters addressed in the human rights chapter of the Guidelines and in the UN Guiding Principles on Business and Human Rights.”⁴³ Among other conclusions, the national contact point recommended that “ASR evaluate the issues raised by the NGOs and consider how to address them . . . [and that] ASR conduct a corporate human rights policy review process”⁴⁴ The CSOs also filed a complaint in June 2013 with the London-based trade association Better Sugar Cane Initiative Ltd. (Bonsucro), which holds its members to a set of principles including maintaining human rights standards. On July 8, 2013, Bonsucro reportedly suspended T&L’s membership, thus evincing the efficacy of the CSOs’ strategic advocacy.⁴⁵

³⁷ *Id.*, paras. 28–33.

³⁸ A copy of the letter of complaint submitted by a group of ten Cambodian and international CSOs is available online at <http://www.equitablecambodia.org/newsarchives/open-letter.php> [hereinafter Complaint Letter].

³⁹ See European Union Generalized System of Preferences, Council Regulation (EC) No. 732/2008, 2008 O.J. (L 211) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF>.

⁴⁰ *Id.*, Art. 17; see also Complaint Letter, *supra* note 38; Report of the Special Rapporteur, *supra* note 31, para. 194. The EU trade commissioner and the EU high representative for foreign affairs and security policy have reportedly replied to the complaint, inter alia, as follows: “If the legal conditions for the activation of withdrawal procedures set out in the GSP regulation are met, the Commission will be ready to take action if this appears to be the case.” Zsombor Peter, *EU Won’t Investigate Land Concessions*, CAMBODIA DAILY, May 20, 2013, at <http://www.cambodiadaily.com/archive/eu-wont-investigate-land-concessions-for-now-25194> (quoting joint response of the trade commissioner and high representative).

⁴¹ See Organisation for Economic Co-Operation and Development, Guidelines for Multinational Enterprises (2011), available at <http://mneguidelines.oecd.org/text>.

⁴² See U.S. Dep’t of State, Bureau of Econ. & Bus. Affairs, Press Release, Community Legal Education Center of Cambodia (CLEC)/EarthRights International (ERI) and American Sugar Refining Inc. (ASR) (June 20, 2013), available at <http://www.state.gov/e/eb/oced/usncp/links/rls/210970.htm>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Sean Teehan, *Sugar Industry Monitor Drops UK’s Tate & Lyle amid Koh Kong Charges*, PHNOM PENH POST, July 18, 2013, at 5, available at <http://www.phnompenhpost.com/national/sugar-industry-monitor-drops-uk-tate-lyle-amid-koh-kong-charges>.

Conclusion

The *Song Mao* case demonstrates that transnational human rights litigation, if carefully calibrated, vigorously pursued, and made to comport with regional human rights standards and commitments—even if unconnected with the ATS—can remain a powerful tool for legal advocacy. More specifically, in response to advocacy campaigns by the CSOs, Ve Wong Corporation said in July 2012 that KKS and KKP “have promised that if there is any evidence proving that [KKS and KKP] illegally acquired the land from residents, the companies are willing to return [the Land] and compensate all relocation costs of all affected families.”⁴⁶ In April 2013, a KSL manager met with the villagers and announced that the company will consider returning some of the disputed Land to villagers to resolve the villagers’ grievances.⁴⁷

Such litigation need not be rooted in jurisdictional statutes, such as the ATS, which are confined to narrow grounds. Claims should be commenced in the courts of a state with a connection to the corporation and should be used for torts routinely actionable in that jurisdiction. Transnational human rights litigation should be reinforced by regional and UN human rights institutions and procedures. As appealing as an ATS-based fundamental human rights cause of action may seem, in domestic courts a more pedestrian cause of action may be more attractive to courts concerned with respecting international comity, avoid act of state complications, and provide injured parties with an effective remedy.

THE FUTURE OF CORPORATE LIABILITY FOR EXTRATERRITORIAL HUMAN RIGHTS ABUSES: THE DUTCH CASE AGAINST SHELL

*By Nicola Jägers, Katinka Jesse, and Jonathan Verschuuren**

The U.S. Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ limits the potential of the Alien Tort Statute (ATS)² as a means of legal redress for victims of human rights abuses caused by transnational companies. Interestingly enough, almost simultaneously with the *Kiobel* decision by the U.S. Supreme Court, a Dutch court issued its rulings in five cases concerning Nigerian individuals, supported by a Dutch environmental nongovernmental organization (NGO), in their claims against Royal Dutch Shell (RDS), headquartered in the Netherlands, and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC). These cases relate to oil spills for which the plaintiffs believed Shell should be held liable.³ Although these decisions cannot be hailed as a complete victory for the Nigerian

⁴⁶ Statement by Ve Wong Corporation in Response to the Business & Human Rights Resource Centre’s Inquiry Regarding Alleged Human Rights Abuses and Land Seizure by Sugar Companies in Cambodia (July 18, 2012), available at <http://www.business-humanrights.org/Documents/CambodiaCleanSugar2012>.

⁴⁷ Roundtable Discussion: Investment Projects and Land Concessions (Koh Kong City Hotel, Apr. 12, 2013) (on file with author).

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² 28 U.S.C. §1350.

³ On January 30, 2013, the District Court of The Hague rendered separate judgments in five cases brought by four Nigerian farmers and fishermen, supported by the Dutch branch of Friends of the Earth (*Milieudefensie*), against the Nigerian subsidiary of Shell and its former and current parent companies in the United Kingdom and

citizens, the Dutch court rendered a remarkable judgment that shows the way forward in attempts to hold multinational corporations accountable for environmental harms and human rights abuses committed abroad. In this article, after briefly addressing the importance of the ATS post-*Kiobel*, we explore possible options offered by the Dutch courts for victims of corporate harms abroad.

The Kiobel Ruling: The Beginning of the End or the End of a Beginning?

Since the mid-1990s, over 150 cases have been brought under the ATS before U.S. federal courts against multinationals for alleged harms suffered by non-U.S. nationals outside the United States. The ATS has frequently been hailed as the most promising avenue offering legal redress for victims of corporate human rights violations. The decision of the U.S. Supreme Court in *Kiobel*, however, severely limits the extraterritorial reach of this statute, and the decision has consequently been met with great disappointment by human rights advocates. However, we argue that *Kiobel* does not put an end to all transnational human rights litigation against corporations; rather, it turns the spotlight to other potential promising avenues for victims to seek legal redress elsewhere. Moreover, when discussing the implications of *Kiobel*, some caveats are in order.

It should be noted that the ascribed potential of the ATS as a mechanism for providing effective legal remedies to victims of corporate conduct has always been somewhat inflated. Plaintiffs in such cases have faced significant procedural obstacles, and most cases have been dismissed at their preliminary stages. In the handful of cases where plaintiffs overcame these obstacles, the corporate defendants frequently decided to settle. While a settlement might be deemed a positive outcome from the perspective of victims, the dearth of merits decisions has left the actual role of the ATS in corporate human rights litigation unclear.⁴ Even after *Kiobel*, it remains to be seen whether the Supreme Court has actually left the door slightly ajar for transnational human rights litigation before U.S. courts and, if so, to what extent. For instance, in concluding that the reach of the ATS is limited due to the presumption against extraterritorial application, the Supreme Court stated that, even where claims touch and concern the territory of the United States, they must do so with “sufficient force” to displace this presumption.⁵ What “sufficient force” means is left open and will depend on the interpretation given by district courts and appellate courts in subsequent litigation.⁶

Notwithstanding the fact that the ruling of the Supreme Court may have left prospective plaintiffs some room to maneuver, it seems clear that after *Kiobel* it will no longer be possible,

the Netherlands. In this article, we focus on the most important one: *Akpan v. Royal Dutch Shell PLC*, Arrondissementsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854). An (unofficial) English translation of this and the other four judgments is available from *Milieudefensie*'s website, <http://www.milieudefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case>. Information about this and other Dutch cases is available online at <http://www.rechtspraak.nl>.

⁴ See Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 *AJIL* 601, 601–03 (2013).

⁵ *Kiobel*, 133 S.Ct. at 1669. Anupam Chander points out that *Kiobel* does not put an end to U.S. transnational human rights litigation, but rather an end to transnational human rights litigation against foreign corporations; hence American corporations are disadvantaged over foreign corporations. See, in this Agora, Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*.

⁶ For more on the outstanding issues concerning the ATS post-*Kiobel*, see Wuerth, *supra* note 4.

under the ATS, to bring “foreign-cubed cases,” that is, cases in which foreign plaintiffs sue foreign companies over conduct outside the United States. This result turns our attention to other possibilities to hold corporations liable for human rights abuses committed abroad.⁷ While the spotlight has been on the ATS litigation, courts in, inter alia, Australia, Canada, the Netherlands, and the United Kingdom have increasingly been confronted with civil claims brought under ordinary tort law against corporations for alleged harms committed abroad to the environment or to people.⁸

The Netherlands: Fertile Ground for Transnational Human Rights Litigation?

Before turning to the recent Dutch court ruling in a case brought by Nigerians against RDS and SPDC, we briefly introduce the current state of affairs regarding transnational human rights cases in the Netherlands. It is conceivable that cases similar to *Kiobel* would be recognized by Dutch courts.⁹

The ATS is a unique statute, and there is no foreign equivalent. Nevertheless, several recent rulings in the Netherlands suggest that Dutch courts may accept jurisdiction with extraterritorial scope,¹⁰ including even foreign-cubed cases. Under Dutch law, it is possible to hold corporations liable for human rights violations under domestic tort law.¹¹ The focus of the regime governing jurisdiction for Dutch courts is first and foremost on the domicile of the defendants. However, in the recent *Palestinian Doctor* case,¹² the only connection to the Netherlands was the plaintiff’s presence there. That case was brought before the District Court of The Hague

⁷ The United States provides subject matter jurisdiction for some human rights claims that now fall outside the ATS. For instance, U.S. courts have jurisdiction over so-called transitory torts: torts committed in other countries that are unlawful under the law of that country. The most famous transitory tort claim is the litigation concerning the Union Carbide Corp. gas plant disaster in Bhopal, India, in 1984.

⁸ For some of these cases, see, in this *Agora*, Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*; Mahdev Mohan, *The Road to Song Mao: Transnational Litigation from Southeast Asia to the United Kingdom*; Andrew Sanger, *Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts* (focusing on English cases). However, as noted in this *Agora*, Anne Herzberg appears to see an opposite trend based on, most notably, jurisprudence regarding consequences of the Israeli/Palestinian conflict on the (alleged) occupied territories. Anne Herzberg, *Kiobel and Corporate Complicity—Running with the Pack*.

⁹ This point was brought forward in an amicus curiae brief dated June 13, 2012, submitted by five Dutch professors of law (including Nicola Jägers) to the U.S. Supreme Court in the *Kiobel* case in support of the plaintiffs. Supplemental Brief of Professor Alex-Geert Castermans (Leiden University) et al. as Amici Curiae in Support of Petitioners, *Kiobel v. Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioneramcu5_professorspdf.authcheckdam.pdf.

¹⁰ In two recent cases, the Dutch courts have asserted jurisdiction over cases in which the conduct took place outside the Netherlands. In these cases, the government of the Netherlands was held liable for the damages that occurred elsewhere. In one case, the Dutch Supreme Court held the Netherlands liable for damages caused to Bosnian families after their family members were expelled from the Dutch UN compound in Srebrenica and later executed by Serbian troops. *Nuhanovic v. The Netherlands*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], Sept. 6, 2013, Case No. 12/03324 (ECLI:NL:HR:2013:BZ9225). In the other case, the Dutch government was held liable to the family of those killed by summary executions in a village in Indonesia by the Dutch army in 1947. *Ass’n Dutch Debt of Honor v. The Netherlands*, Arrondissementsrechtbank Den Haag, Sept. 14, 2011, Case No. 354119/HA ZA 09-4171 (ECLI:NL:RBSGR:2011:BS8793).

¹¹ Burgerlijk Wetboek [Dutch Civil Code], Art. 6:162; see also Nicola M. C. P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 *BROOK. J. INT’L L.* 833 (2008). Under Article 51 of the Dutch Criminal Code [Wetboek van Strafrecht], corporations may also be held criminally liable. This topic will not be explored further here.

¹² *El-Hojouj v. Unnamed Libyan Officials*, Arrondissementsrechtbank Den Haag, Mar. 21, 2012, Case No. 400882/HA ZA 11-2252 (ECLI:NL:RBSGR:2012:BV9748).

by a Palestinian doctor who claimed to have suffered damages following unlawful imprisonment for eight years in Libya for allegedly infecting children with HIV/AIDS. The defendants' place of residence was unknown: the defendants were unidentified Libyan government officials working at prisons in Libya. In that case, the court relied on the *forum necessitatis* rule that allows Dutch courts to exercise jurisdiction over civil claims that would not normally fall under the ordinary bases for jurisdiction but where bringing those claims outside the Netherlands is simply impossible, either legally or practically (e.g., due to natural disasters or war). While the *forum necessitatis* rule is very rarely applied, it has the potential to bring foreign-cubed cases before the Dutch courts. In sum, in the Netherlands, cases can be brought against a defendant for alleged human rights violations or environmental harms, regardless of the location of the harms or the domicile or nationality of the victims, as long as the defendant has a domicile or its headquarters in the Netherlands. Yet, as noted in the *Palestinian Doctor* case where the defendants' place of residence was unknown, a defendant's connection to the Netherlands may have little relevance.

Transnational Litigation Against Shell in the Netherlands

Whether the *Palestinian Doctor* case ruling offers a fruitful ground for foreign direct liability cases against corporations was put to the test for the first time in another Dutch case, *Akpan v. Royal Dutch Shell PLC*, which was brought against RDS and SPDC. In *Akpan*, the plaintiff was a Nigerian farmer whose livelihood depended on the land and fishponds near the Nigerian village Ikot Ada Udo. He alleged that, following two oil spills that occurred from SPDC's oil well near his village, he suffered damages to his means of subsistence. SPDC's legal predecessor drilled the well in 1959, but subsequently abandoned it. The well was capped above ground by a so-called Christmas tree cap (an assembly of valves, spools, gauges, and chokes that control the well's flow) that can be opened or closed with a large wrench. In 2006, a single barrel of oil was spilled from the well, followed by a larger oil spill in 2007. After reporting the 2007 oil spill to SPDC, members of the local community initially refused to grant a joint investigation team access to the well for about two months. Shortly after consent was finally obtained, SPDC stopped the oil spill by closing the Christmas tree cap with a few turns of a wrench. By then, 629 barrels of oil had been spilled. After the remediation work required as a result of the oil spill from 2007, SPDC further secured the well, but only after the lawsuit was already pending.

The Dutch court's assessment started with a review of its jurisdiction. It upheld its 2010 interlocutory judgment that, by virtue of section 7 of the *Wetboek van Burgerlijke Rechtsvordering* (Civil Procedure Code), it had jurisdiction, not only over the claims initiated against RDS but also over the claims against SPDC. First, the court found that, as the claims initiated against both companies were intertwined, efficiency justified a joint hearing under Dutch law. Second, it found that these claims had (in part) the same legal basis, namely the tort of negligence under Nigerian law.¹³ According to the court, it was therefore "foreseeable" for SPDC to be summoned, together with RDS, to the Dutch court in connection with the alleged liability for the oil spills. The court supported this conclusion by referring to the international trend of holding a parent company of a multinational corporation liable in its own country for harmful practices by its foreign (sub-)subsidiaries. Third, the court dismissed the defense's

¹³ In this case, the Dutch court had to apply Nigerian law because European and Dutch law required application of the law of the jurisdiction where the damages occur.

argument that the claims against RDS would clearly fail, a defense that implied that the plaintiffs had abused procedural law by initiating the proceedings. According to the court, it could be argued under Nigerian law that the parent company of a (sub-)subsidiary may be held liable for the tort of negligence against people who suffered damages as a consequence of the activities of that (sub-)subsidiary. The court also explained that the jurisdiction of the Dutch court in the case against SPDC does not cease if the claims against RDS are subsequently dismissed, even in the absence of a *de facto* connection with the Netherlands.

The wording of the judgment indicates that the district court's decision has great relevance beyond this specific case. The judgment provides the opportunity for victims of corporate transnational environmental harms or human rights violations to sue a foreign subsidiary of a Dutch multinational corporation where a parent company *might* be held liable under the applicable foreign law (in this case, Nigerian law). The court found it irrelevant whether liability of the parent company is eventually established, the only restriction being that the claims against the parent company and its subsidiary need to be connected and be based at least in part on the same legal claim.

The district court also upheld its interlocutory judgment regarding the admissibility of the claims of NGO Friends of the Earth Netherlands (*Milieudefensie*), which supported Akpan. According to the court, some of those claims clearly went beyond Akpan's individual interests because remediating the soil, cleaning up the fishponds, purifying the water sources, and preparing an adequate contingency plan for future responses to oil spills—if ordered—would benefit not only Akpan but also the rest of the community and the environment in the vicinity of the village. Moreover, as many people may be involved, the court found that litigating in the name of the interested parties was problematic, hence the opportunity for the NGO to start a public-interest case. Furthermore, *Milieudefensie* met the formal requirements under Dutch law for starting such a case: for example, it is involved in campaigns to stop environmental pollution related to oil production in Nigeria, and the case fit within the NGO's statutory objective of global environmental protection.

Whereas the procedural considerations acknowledge the basis for extraterritorial human rights and environmental liability against corporations, the court's substantive assessment shows that further hurdles need to be overcome. The court dismissed all claims against RDS. Pursuant to Nigerian law, a parent company, in principle, is not obliged to prevent its (sub-)subsidiaries from harming third parties abroad. The court found that no special grounds existed to deviate from this general rule. Pursuant to Nigerian law, it dismissed the claims of *Milieudefensie* because the Nigerian oil spills did not infringe on its rights: the rights of this Dutch NGO were in no way affected by the oil spills in Nigeria (as Nigeria does not allow NGOs to sue on behalf of general interests).

Yet, the judgment is a victory for Akpan. The court determined that, pursuant to Nigerian law, SPDC violated a duty of care and was liable for negligence. It found that SPDC could have—and should have—prevented the sabotage of the Christmas tree cap by installing a concrete plug before legal proceedings were initiated. The court ordered SPDC to pay damages to Akpan, the amount to be determined in a separate “damages assessment” proceeding.

This modest victory for the plaintiffs indicates the potential for transnational litigation in the Netherlands. At the same time, other hurdles in the Dutch legal system may explain why this case is the first of its kind in that country. Due to the absence of a contingency fee system, “no win, no fee” arrangements are not allowed. As a consequence of the Dutch “loser pays”

principle and substantial attorney fees, restraint prevails. Furthermore, only compensatory damages can be awarded; the Netherlands does not have a system of punitive damages. Moreover, although Dutch law provides standing for NGOs litigating on behalf of public interests, it generally does not facilitate class actions, not even for transnational human rights and environmental claims that may involve many victims.

Conclusion

The U.S. Supreme Court's ruling in the *Kiobel* case limits the ATS as an instrument for victims of human rights abuses and environmental pollution caused by multinational corporations abroad, and the case necessitates the exploration of other legal pathways. One such pathway has been offered by the Dutch court ruling in *Akpan* against the same companies that were sued in *Kiobel*.¹⁴ The Dutch court held a Nigerian company liable for damages suffered by Nigerian farmers, following an oil spill from a sabotaged well, because of violations of Nigerian environmental law. The sole reason for this extraterritorial reach by the court is the fact that the parent company has its headquarters in the Netherlands. Despite the eventual dismissal of all claims against the parent company, the decision shows the *possibility* that, in other circumstances, the parent company could be held liable.

The Dutch approach offers advantages for victims of human rights abuses in developing countries. First of all, victims may bring claims against both the local subsidiary and the parent company at the same time, and the court must then assess their liability. Second, the legal infrastructure of developed countries usually offers access to justice in a faster and more reliable manner than that of most developing countries. Third, in many developed countries, class action suits may be initiated, and NGOs may be available for assistance.

One of the weaknesses of the approach taken by the Netherlands, however, is that its courts must rely on the local law where the tort occurred, in this case Nigerian law. This mandate proved to be a stumbling block for holding the parent company liable. Nevertheless, the *Akpan* case demonstrates that, depending on applicable (foreign) law, (sub-)subsidiaries of Dutch multinationals can be held liable in Dutch courts. It is also conceivable that, in the future, Dutch courts might also hold a parent company responsible for harms that occur abroad.

KIOBEL AND CORPORATE COMPLICITY— RUNNING WITH THE PACK

*By Anne Herzberg**

Many human rights activists have lamented the outcome of *Kiobel v. Royal Dutch Petroleum Co.*¹ Reacting to the opinion, Human Rights Watch expressed concern that *Kiobel* “significantly reduce[s] the possibility that corporations can be held accountable in US courts for

¹⁴ This Dutch pathway may be considered an illustration of a wider European trend. See, in this Agora, Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*.

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

human rights abuses committed abroad.”² The Center for Constitutional Rights issued a statement that it was “deeply troubled by the Supreme Court’s decision to undercut 30 years of jurisprudence.”³ Similarly, Amnesty International characterized the opinion as a “radical departure from its own precedent and a decision that . . . flies in the face of the trend toward enhancing accountability for serious human rights violations.”⁴

Rather than opposing a well-settled international legal norm, however, the Supreme Court’s decision actually appears to align with domestic jurisprudence elsewhere in North America and Europe. The courts in these diverse cases have expressed, in various ways, a reluctance to find an international rule of liability: although a few cases are still pending, almost all these cases have been dismissed based on application of justiciability doctrines and other non-merits grounds.⁵

This article briefly examines three civil cases filed in Canada and France. It also looks at two prosecutorial decisions on criminal complaints filed by activists in the Netherlands and Switzerland. In each of these examples, claims of corporate complicity in human rights abuses have not been allowed to proceed.

Canada

In January 2012, in *Anvil Mining Ltd. v. Canadian Ass’n Against Impunity*, the Court of Appeal of Québec dismissed a suit filed by the Canadian Association Against Impunity (CAAI) seeking damages against Anvil Mining for being an accomplice in war crimes and crimes against humanity.⁶ Anvil had registered as a corporation in 2004 in Canada’s Northwest Territories and, at the time of the lawsuit’s filing, was headquartered in Australia and had a small office in Quebec.⁷ Its sole activity was the operation of a copper mine in the Democratic Republic of Congo (DRC). CAAI alleged that Anvil contributed logistical support to the DRC military during a 2004 massacre of civilians in a town located 55km from Anvil’s mine.⁸ In

² Human Rights Watch, US: Supreme Court Limits Suits Against Rights Abusers Abroad (Apr. 29, 2013), at <http://www.hrw.org/news/2013/04/29/us-supreme-court-limits-suits-against-rights-abusers-abroad>.

³ Center for Constitutional Rights, *Kiobel* Decision: Supreme Court Limits US Courts’ Ability to Use Human Rights Law to Address Human Rights Abuses Committed Abroad (Apr. 17, 2013), at <http://www.ccrjustice.org/newsroom/press-releases/kiobel-decision%3A-supreme-court-limits-us-courts%E2%80%99-ability-use-human-rights-law-address-human-rights-a>.

⁴ Amnesty International, US: Supreme Court Ruling on Shell in the Niger Delta Severely Limits Access to Justice in Human Rights Cases (Apr. 17, 2013), at <https://www.amnesty.org/en/for-media/press-releases/us-supreme-court-ruling-shell-niger-delta-severely-limits-access-justice-hu>; see also ARVNID GANESAN, HUMAN RIGHTS WATCH, CORPORATE CRIME AND PUNISHMENT (2012), available at <http://www.hrw.org/news/2012/02/28/corporate-crime-and-punishment>; Brief of Amici Curiae International Human Rights Organizations and International Legal Experts in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_international.authcheckdam.pdf; Amnesty International, Business and Human Rights (undated), at <http://amnesty.org/en/business-and-human-rights>; International Commission of Jurists, Business and Human Rights (undated), at <http://www.icj.org/themes/business-and-human-rights>.

⁵ Approximately a dozen civil lawsuits and criminal complaints have been filed in Europe and Canada seeking liability against a corporation for aiding and abetting violations of international humanitarian law, international human rights, and criminal law committed by a foreign state abroad. Almost all have been dismissed; a few cases are still pending. This article summarizes the most recent decisions.

⁶ *Anvil Mining Ltd. v. Canadian Ass’n Against Impunity*, [2012] C.A. 117, para. 81 (Can. Que.), available at <http://www.canlii.org/fr/qc/qcca/doc/2012/2012qcca117/2012qcca117.html> (in French) [hereinafter CAAI].

⁷ See *id.*, paras. 16–17. According to the company’s website, Anvil was acquired by Minmetals Resources Ltd. in March 2012. See <http://www.anvilmining.com/index2.html>.

⁸ See CAAI, *supra* note 6, paras. 21–26.

particular, CAAI claimed Anvil provided rides to the military to the site of the massacre, supplying trucks, drivers, food, and fuel.⁹

The court of appeal rejected CAAI's complaint, finding that the courts in Quebec did not have jurisdiction. The ruling overturned the lower court decision allowing the case to proceed. Specifically, in looking at section 3148 of the Civil Code of Quebec, the court of appeal determined that, to exercise jurisdiction, there must be a "real and substantial connection" to Quebec—requiring presence in the jurisdiction and activity there—out of which the claim arises.¹⁰ The court decided that jurisdiction did not exist because "Anvil's activity in Quebec has no connection, directly or indirectly, to the 'complicity' in committing 'war crimes' or 'crimes against humanity' during the operation of a mine."¹¹ Moreover, the court did not accept CAAI's claims that it could not obtain justice in either the DRC or Australia. It appeared that the only reason that suit was not brought in Australia was due to the difficulty in convincing a lawyer there to take the case. In the court's opinion, this difficulty was not sufficiently compelling for CAAI to bring suit in Quebec under the principle of *forum necessitatis*.¹²

The *Anvil* decision was very similar to another case filed in Quebec, *Bil'in (Village Council) v. Green Park International Inc.*¹³ The lawsuit, filed in 2008 in the Superior Court of Québec, Montreal Division, was brought by the village of Bil'in, located in the West Bank, and the non-governmental organization (NGO) Al Haq.¹⁴ The plaintiffs alleged that the defendant companies acted as "agents of the State of Israel" by "aiding, abetting, assisting and conspiring with the State of Israel in carrying out an illegal purpose" by constructing apartments for Israeli civilians near the Green Line, the 1949 armistice line that separates the West Bank from Israel.¹⁵ The lawsuit was filed after the village had litigated more than six related cases in Israeli courts, in some of which it had prevailed.¹⁶ Based on statements made by one of the village's attorneys in an Al Jazeera documentary, the case was apparently brought in Canada to expand the controversy internationally and to generate publicity.¹⁷ According to an Al Haq researcher, the NGO originally envisioned filing a criminal suit in Canada but did not get approval to do so

⁹ *Id.*, para. 26.

¹⁰ *See id.*, paras. 57–58, 67–68. The court's analysis regarding a "real and substantial" connection to Quebec mirrors that of *Kiobel* which stated that claims must "touch and concern the territory of the United States" to rebut the presumption against extraterritorial application of the Alien Tort Statute. *See Kiobel v. Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013). CAAI also harkens to Breyer's concurrence in *Kiobel* requiring that "the defendant's conduct substantially and adversely affect[] an important American national interest." *See id.* at 1671 (Breyer, J., concurring.). The "touch and concern" principle also factored in the *Bil'in* case, discussed *infra*.

¹¹ *See CAAI, supra* note 6, para. 85.

¹² *See id.*, paras. 96–103. Under the *forum necessitatis* principle, the Quebec court could exercise jurisdiction only in exceptional circumstances, such as where there is an "absolute impossibility at law or practical impossibility" in bringing suit in the other forum. *Id.*, para. 98.

¹³ *Bil'in (Village Council) v. Green Park Int'l Inc.*, No. 500-17-044030-0 (Can. Montreal Sup. Ct. July 7, 2008).

¹⁴ *See* Al Haq, Press Release: *Bil'in Village Council v. Green Park* (2009), available at <http://www.alhaq.org/advocacy/targets/accountability/70-bilin-v-green-park/471-bilin-village-council-v-green-park> (case overview).

¹⁵ Further Amended and Particularized Motion Introducing a Suit, para. 9, *Bil'in (Village Council) v. Green Park Int'l Inc.*, No. 500-17-044030-0 (Can. Montreal Sup. Ct. Jan. 23, 2009), available at http://www.alhaq.org/images/stories/PDF/accountability-files/the_claim.pdf.

¹⁶ *See id.* at 34–35; *see also* Defendants' Exception to Dismiss Action, para. 10, *Bil'in (Village Council) v. Green Park Int'l Inc.*, No. 500-17-044030-0 (Can. Montreal Sup. Ct. June 22, 2009) (on file with author).

¹⁷ *Courtroom Intifada: How Palestinian Villagers Quest to Regain Lost Land Has Ended in Court* (Al Jazeera broadcast June 3, 2009), at <http://www.aljazeera.com/programmes/peopleandpower/2009/06/2009621104411512.html>.

from the authorities.¹⁸ Interestingly, several of the plaintiffs did not contend that they had an ownership interest in the lands at issue but asserted, instead, that they were “illegally assigned . . . to another local council,” thereby placing them outside the village’s “municipal jurisdiction.”¹⁹ They claimed that the reassignment was a violation of Article 49(6) of the Fourth Geneva Convention, Article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court, the Canadian Crimes Against Humanity and War Crimes Act, and local Quebec statutes.²⁰

On September 18, 2009, the court issued a decision dismissing the lawsuit and awarding partial costs to the defendants.²¹ The court found that the “mere existence of municipal jurisdiction over the Lands does not confer any right to their use nor does it otherwise confer . . . a sufficient interest” for standing.²² The court also remarked that the plaintiffs “offered no evidence whatsoever to this Court of their alleged ownership of the Lands” or that such land was “confiscated.”²³

In addition, the court engaged in a *forum non conveniens* analysis, determining that Israel was the appropriate forum.²⁴ The court further highlighted that “as it is presently framed, [plaintiffs’ case] can hardly lead to a just result.”²⁵ Plaintiffs were seeking the demolition of many homes, yet had failed to include the “numerous owners or occupants . . . thereby depriving those persons of the right to be heard, a fundamental tenet on natural justice.”²⁶ Importantly, the court believed that the plaintiffs were attempting to bypass sovereign immunity laws by omitting Israel as a party, even though they were indirectly seeking an “essential finding that [Israel] is committing a war crime.”²⁷ Finally, the court noted that the plaintiffs had failed to implead the Canadian attorney general or seek his authorization, as required by Canadian law. The court concluded that the plaintiffs were engaging in “inappropriate forum” shopping and had simply chosen a Quebec forum to “avoid[] the necessity . . . of proving [their case in Israel] . . . thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Québec.”²⁸

On August 11, 2010, the court of appeal issued a decision affirming the lower court’s dismissal. The court of appeal reiterated the finding that plaintiffs’ assertions of an ownership interest in the lands were contradictory and that the plaintiffs were apparently just seeking a

¹⁸ John Reynolds, Remarks at the Accountability for IHL Violations Forum, Al Quds University, Jerusalem (Mar. 2009).

¹⁹ Further Amended and Particularized Motion, *supra* note 15, para. 13.

²⁰ *See id.*, paras. 15–22.

²¹ *Bil’in (Village Council) v. Green Park Int’l Inc.*, No. 500-17-044030-0, Judgment (Can. Montreal Sup. Ct. Sept. 18, 2009) (Cullen, J.), available at <http://www.jugements.qc.ca/php/decision.php?liste=39887605&doc=0FB6ADF4D6C912C6AF300DBAD4E2C354A4831D66A546FCD5167EA497485443FF> [hereinafter *Bil’in* Trial Judgment].

²² *Id.*, para. 139.

²³ *Id.*, paras. 299–300.

²⁴ *Id.*, para. 335; *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1674 (Breyer, J., concurring) (suggesting reliance on the principles of exhaustion, *forum non conveniens*, and comity to “minimize international friction”).

²⁵ *Bil’in* Trial Judgment, *supra* note 21, para. 317.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, paras. 326, 327.

judicial “declaration on the policy of the ‘occupying state.’”²⁹ The court agreed with the *forum non conveniens* analysis, noting that “[i]t requires a great deal of imagination to claim that the action has a serious connection with Quebec.”³⁰ In March 2011, the Canadian Supreme Court affirmed the lower court decisions by dismissing the suit with costs.³¹ Undeterred, attorneys for the village filed a complaint in February 2013 with the UN Human Rights Committee, claiming that Canada had violated provisions of the International Covenant on Civil and Political Rights by not allowing the case to proceed.³²

France

In March 2013, a French appellate court dismissed a lawsuit brought by the Palestine Liberation Organization (PLO) and the Palestinian activist group Association France-Palestine Solidarité (AFPS) against three French companies: Alstom, Alstom Transport, and Veolia Transport.³³ The PLO and AFPS accused the companies of violating international law by participating in contracts to build the Jerusalem light rail, a portion of which travels through North Jerusalem, deemed by these organizations to be occupied territory.³⁴ Specifically, the Palestinians claimed that these contracts violated Israel’s obligations under the Geneva and Hague Conventions, as well as the UN Global Compact³⁵ signed by the companies. Among other demands, the claimants sought an order annulling the contracts, thereby prohibiting continuing performance, and barring the companies from entering into any subsequent agreements.³⁶

The court rejected these demands, finding both a lack of standing and a failure to allege a cause of action. At the outset of the decision, the court ruled that the AFPS did not have standing to bring suit because it was not “defending a collective interest specific to its membership as distinct from the public interest of Palestinians in general.”³⁷ Next, the court considered whether an unlawful act had even been alleged. In particular, the court noted that building the

²⁹ Bil’in (Village Council) v. Green Park Int’l Inc., [2010] C.A. 1455, para. 51 (Can. Que.), available at <http://www.jugements.qc.ca/php/decision.php?liste=69437636&doc=227F3616B495ADDF20D4DEA0A5D509505A8C1759ED918A3F747A3C483979FAE2&page=1>.

³⁰ *Id.*, para. 86.

³¹ Bil’in (Village Council) v. Green Park Int’l Inc., [2011] 1 S.C.R. vi (Can.) (dismissing application with costs), available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-l-csc-a/en/item/10463/index.do>.

³² See Individual Complaint to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights, Bil’in (Village Council) v. Canada (Feb. 28, 2013), available at <http://globalinitiative-escr.org/wp-content/uploads/2013/03/130228-NRC-Individual-Complaint-ICCPR-Canada-ETOs-FINAL.pdf>; see also Tom Blackwell, *West Bank Village Accuses Canada of Breaking Human-Rights Laws*, NAT’L POST (Can.), June 7, 2013, at <http://news.nationalpost.com/2013/06/04/west-bank-village-accuses-canada-of-breaking-human-rights-laws>.

³³ Association France-Palestine Solidarité v. Société Alstom Transport SA, Judgment, Cour d’appel de Versailles de 22 mars 2013, available at <http://www.dreuz.info/2013/04/la-cour-dappel-de-versailles-olp-c-alstom-et-veolia-declare-que-loccupation-par-israel-nest-pas-illegale> (English translation available online at <http://www.intjewishlawyers.org/main/files/Versailles%20Court%20of%20Appeals%20ruling%20doc%20English%20.pdf>).

³⁴ The three companies were not signatories to the contract but had formed an Israeli company that subsequently won the government tender to build the light rail. The companies were also involved in its construction and maintenance.

³⁵ At <http://www.unglobalcompact.org>.

³⁶ *Association France-Palestine Solidarité*, *supra* note 33, at 5–6.

³⁷ *Id.* at 17.

Jerusalem light rail was not illegal because occupation law allows for the governance of occupied territory and includes the building of transportation infrastructure.³⁸ Moreover, it emphasized that the determination of the legality of a contract cannot hinge on “the individual assessment of a social or political situation by a third party.”³⁹ Next, like in *Bil’in*, the court highlighted the failure to name Israel as a party to the lawsuit even though the allegations concerned Israeli actions. The court also looked to whether the legal norms relied upon by the PLO provided nonstate entities with a private right of action and decided that the obligations of the Geneva and Hague Conventions only apply between state parties, foreclosing the PLO from bringing suit.⁴⁰

Although the court found a lack of standing, the court addressed claims by the PLO regarding the existence of an international norm of corporate complicity. The court stated that corporations were not bound by humanitarian and human rights conventions, with the possible exception of those addressing environmental and labor standards.⁴¹ After finding no cause of action under international treaties, the court rejected claims that customary law provided a basis for liability.⁴² Similarly, the alleged violations did not rise to the level of a *jus cogens* norm.⁴³ The court further noted that reliance on the UN Global Compact was misplaced as it was not a binding legal instrument and that the companies could not be held liable for alleged violations of voluntarily adopted ethical codes.⁴⁴

Netherlands

In March 2010, Al Haq filed a criminal complaint in the Netherlands against the Dutch company Riwal for alleged complicity “in the commission of war crimes and crimes against humanity . . . through its supply of mobile cranes and aerial platforms for the construction of settlements and the Wall in several locations in the Occupied West Bank.”⁴⁵ Al Haq alleged that such activity violated the Geneva Conventions and, consequently, the Dutch International Crimes Act (*Wet Internationale Misdrijven*).⁴⁶

In May 2013, however, the prosecutor decided that it would not take legal action against the crane lessor or its directors on account of mootness: the company had stated that it was no longer working in Israel and the West Bank. The prosecutor also explained that a significant factor weighing against further investigation was the company’s limited contribution to the building of the security barrier and settlements; its cranes and platforms were only used on

³⁸ See *id.* at 20; see also Raphael Ahern, *French Court’s Light Rail Ruling Breaks No Legal Ground, Scholars Say*, TIMES OF ISRAEL, Apr. 29, 2013, at <http://www.timesofisrael.com/french-ruling-on-jeruselems-light-rail-adds-nothing-new-scholars-say>.

³⁹ *Association France-Palestine Solidarité*, *supra* note 33, at 21.

⁴⁰ *Id.* at 21–22.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.* at 26–27.

⁴⁴ See *id.* at 27–28.

⁴⁵ Al Haq, *Criminal Complaint Lodged Against Dutch Company for Construction of Settlements and ‘The Wall’* (Oct. 14, 2010), at <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/472-criminal-complaint-lodged-against-dutch-company-for-construction-of-settlements-and-the-wall>.

⁴⁶ See *id.*

occasion for a few days and sometimes only through third-party leasing.⁴⁷ Concern also arose related to the complex nature of the case and to the substantial state resources needed should the case proceed.⁴⁸

Switzerland

Swiss prosecutors from the canton of Vaud announced on May 1, 2013, that it was declining to prosecute Nestlé S.A. and senior managers for alleged complicity in the murder of a trade unionist by paramilitaries in Colombia. In March 2012, the European Center for Constitutional Human Rights (ECCHR) and Colombian NGOs filed a criminal complaint with Swiss authorities claiming that Nestlé negligently contributed to the 2005 murder of Luciano Romero, a trade unionist who worked at a local subsidiary of Nestlé until 2002.⁴⁹ The NGOs alleged that the subsidiary's representatives had "falsely branded" Romero as a guerilla fighter, which in the environment of Colombia's armed conflict amounted to a "death sentence."⁵⁰ They also claimed that Nestlé's local agents were "closely intertwined" with paramilitaries.⁵¹ The NGOs argued that Nestlé knew of "resulting dangers" to trade unionists and, as a result, had a duty to prevent the crime.⁵² Nestlé responded that no evidence supported the NGO claims and that similar allegations had failed not only in courts in Colombia and the United States but also at the International Labour Organization.⁵³

Human rights activists considered the action to be "a European test case" seeking "to demonstrate the extent to which multinational enterprises are to be liable."⁵⁴ On May 1, 2013,

⁴⁷ Openbaar Ministerie, Geen verder onderzoek naar kraanverhuurder (No further testing for crane hire) (May 14, 2013), at http://www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@160903/verder-onderzoek/. In *Kiobel*, the British and Dutch governments filed an amicus brief on behalf of Royal Dutch Petroleum. They argued against the exercise of universal jurisdiction and declared that no rule of international law imposed direct liability on corporations. 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, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/02/4587212_1_UK-Netherlands-amicus-brief-ISO-respondents-filed-2-3-12-2.pdf.

⁴⁸ See Openbaar Ministerie, *supra* note 47. In response to a parliamentary question regarding involvement of Dutch companies in Israeli settlements, the Dutch government responded that while it considers settlements illegal and discourages Dutch involvement, "Dutch companies are not prohibited to engage in these types of economic relationships. The responsibility lies with the companies themselves." Press Release of the Dutch Government, Questions and Answers, Aanhangel van de Handelingen, Tweede Kamer der Staten-Generaal (Appendix of Acts, second chamber of the states-general) (Sept. 16, 2013), at <https://zoek.officielebekendmakingen.nl/ah-tk-20122013-3223.html?zoekcriteria=%3fzkt%3dEenvoudig%26pst%3d%26vrt%3dnegatief%2bbouw%2badvies%2bisrael%26zkd%3dInDeGeheleText%26dpr%3dAfgelopenDag%26sdt%3dDatumBrief%26ap%3d%26pnr%3d1%26rpp%3d10&resultIndex=7&sorttype=1&sortorder=4>.

⁴⁹ European Center for Constitutional and Human Rights (ECCHR), *Nestlé Has Nothing to Fear from Swiss Legal System*, ECCHR SPECIAL NEWSLETTER, May 10, 2013, at 2, available at <http://www.ecchr.de/index.php/nestle-518.html>.

⁵⁰ Information Platform Human Rights.ch, No Test Case After All—No Charges Filed Against Nestlé in Switzerland (May 29, 2013), available at http://www.humanrights.ch/en/Switzerland/Foreign-Affairs/Foreign-Trade/Transnational/idart_9188-content.html.

⁵¹ *Id.*

⁵² ECCHR, *supra* note 49, at 2.

⁵³ Business & Human Rights Resource Centre, Nestlé Response Re Suit Alleging Its Complicity in Murder of Colombian Trade Unionist (Mar. 7, 2012), available at <http://business-humanrights.org/Links/Repository/1011578>.

⁵⁴ Information Platform Human Rights.ch, *supra* note 50.

however, the Swiss prosecutor issued a “no-proceedings order” announcing that an investigation would not be opened because the case was barred by the statute of limitations.⁵⁵ Since the decision, the NGOs and Romero’s wife have appealed the order to the cantonal criminal court, claiming that the prosecutors engaged in improper delay in reviewing the case and that the incorrect statute of limitations was applied.⁵⁶

Conclusion

Emerging jurisprudence in North America and Europe indicates reluctance by courts and prosecutors to proceed with litigation in cases where a corporation is alleged to have aided and abetted human rights abuses by a foreign state abroad. Far from outside the mainstream then, *Kiobel* seems to be firmly situated within this line of cases. These courts and prosecutors appear uncertain whether corporations are bound by international human rights and humanitarian norms, particularly when only an indirect connection exists to the alleged violations. Furthermore, these courts and prosecutors seem wary to sit in judgment on the activities and policies of other countries or to become embroiled in messy political disputes or international conflicts. As emphasized in *Kiobel*, “No nation has ever yet pretended to be the *custos morum* of the whole world.”⁵⁷ There also appears to be a significant fear of opening the courts to a stream of litigation related to conduct with, at best, a tenuous connection to the jurisdiction. These courts do not want to encourage forum shopping or the circumvention of sovereign immunity laws. For the time being, it is likely that North American and European courts and prosecutors will continue to favor reliance upon justiciability doctrines and other non-merits grounds in cases alleging corporate complicity in foreign state abuses, rather than becoming embroiled in complex disputes that could have far-reaching political and policy consequences.

BEYOND *KIOBEL*: ALTERNATIVE REMEDIES FOR SUSTAINED HUMAN RIGHTS PROTECTION

*By Justine Nolan, Michael Posner, and Sarah Labowitz**

Corporate accountability actions brought under the Alien Tort Statute (ATS)¹ tend to be grounded more in hope than in expectation. While an effective publicity tool for highlighting allegations of corporate irresponsibility and a successful approach for gaining favorable settlements in a few high-profile cases, U.S. courts have generally been reluctant to use the ATS to hold global corporations accountable for their actions outside the United States. The decision

⁵⁵ European Coalition for Corporate Justice, Update in the Nestlé Case: Prosecutor Under Court Review (June 14, 2013), at <http://www.corporatejustice.org/UPDATE-in-the-Nestle-Case.html>.

⁵⁶ ECCHR, *Update in the Nestlé Case: Prosecutor Under Court Review*, ECCHR SPECIAL NEWSLETTER, May 17, 2013, at <http://www.ecchr.de/index.php/nestle-518.html>.

⁵⁷ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1668 (2013) (quoting *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)); see also *id.* at 1674 (Breyer, J., concurring) (same).

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¹ 28 U.S.C. §1350 (also known as the Alien Tort Claims Act (ACTA)).

of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*² reflects this judicial reticence. In *Kiobel*, the Court further restricted—though did not close the door—to future ATS litigation involving the actions taken by global companies outside the United States, especially actions against non-U.S.-based companies.

Rather than being a silver bullet, however, the ATS is, as one experienced litigator for plaintiffs in ATS cases explained, “an extremely limited, highly conditional, litigable instrument of last resort.”³ After *Kiobel*, the multiple barriers to both initiating such cases and prevailing in U.S. courts have become even more formidable. Absent affirmative support by the U.S. government, or a clearer expression of legislative intent by the U.S. Congress, most U.S. courts are likely to be reluctant to provide a judicial remedy in foreign-cubed cases.⁴

Despite these limitations, it is important to recognize that, since the 2000 *Doe v. Unocal Corp.* case⁵ involving the use of forced labor to build an oil pipeline in Burma, ATS litigation involving global corporations has had a significant educative impact and has helped shape the larger public debate on these issues. Judge Pierre Laval of the Second Circuit Court of Appeals noted in a 2013 article:

At the very least, keeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would be abusers. And they give substance to a body of law that is crucial to a civilized world yet so underenforced that it amounts to little more than a pious sham. The Supreme Court should continue to interpret the ATS as opening the doors of U.S. federal courts to victims of foreign atrocities who cannot get justice elsewhere, and other countries should adopt laws that open the doors of their courts as well.⁶

A Changing Corporate Culture

The growing public demand for large companies to adopt meaningful measures to protect human rights in their global operations, as well as the associated changes in culture of some globally focused corporations, is a phenomenon that has taken shape in the last twenty-five years. An early catalyst was the 1984 disaster at Bhopal in India, in which more than three thousand people were killed and tens of thousands injured in an industrial gas leak accident at a Union Carbide pesticide plant. Litigation in response to the accident was pursued in both U.S.

² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

³ DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY 193 (2009) (citing Harold Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 269 (2004) (noting Koh’s assessment of the ATS)).

⁴ This term refers to cases in which a foreign plaintiff sues a foreign defendant for acts committed on foreign soil.

⁵ *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003) (en banc), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

⁶ Pierre N. Laval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, 92 FOREIGN AFF., Mar.–Apr. 2013, at 16–17, available at <http://www.foreignaffairs.com/articles/138810/pierre-n-laval/the-long-arm-of-international-law>. The earlier split decision (2-1) of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), reveals contrasting views of the educative value and impact of the ATS. While Chief Judge Dennis Jacobs, writing for the majority, appeared dismissive of the potential longer-term effect of the ATS in reducing corporate rights violations, he subsequently summarized the views of Judge Pierre Laval as believing that the dismissal of corporate liability would likely open the door to “slavers and pirates . . . [to] rush into corporate transactions.” *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (denying petition for panel rehearing).

and Indian courts, but with limited results.⁷ The reaction of the principal companies involved was generally denial, and they refused to take much or any responsibility for their roles in this massive industrial accident. By contrast, reaction in the United States and Europe to the tragic April 2013 collapse of a building in Bangladesh containing five garment factories, which killed more than one thousand people, has differed. Much greater attention is now being paid to the responsibilities of multinational firms outsourcing their products in these factories—even though these firms neither own nor operate such factories.⁸

While the UN Guiding Principles on Business and Human Rights⁹ both affirm that companies have a responsibility to respect rights and call on governments and companies to develop meaningful remedies when rights are violated, a lack of clarity or consensus still exists about what these concepts mean in practice. Important work needs to be undertaken to provide practical guidance clarifying what “responsibility to respect” means in practice and what remedies are available to those who have been harmed. In the absence of a “hard” legal regime that compels global companies to act or not act in a particular way, the burden is falling on others to develop a series of practical remedies that will hold corporations accountable to human rights standards and that go beyond what is required by local laws.

ATS in Context: Courts Are Only One of an Expanding Range of Remedies

Looking forward, U.S. courts can and should continue to provide remedies to victims of gross human rights abuse abroad involving corporations in select cases. These decisions are likely to turn on factors such as whether the violations are particularly egregious, whether a clear and direct link exists between the corporate defendant and the egregious conduct, and whether the corporate defendant has a substantial presence in the United States. But the role of U.S. and other courts is only part of an expanding set of remedies and accountability measures that are helping to shape rules of the road for global companies with respect to human rights.

Logically, recourse to local law and a system of enforcement and judicial relief in the host countries where global corporations operate should be the first option for ensuring greater respect for human rights. In the case of Bangladesh, if the government had enacted robust labor and workplace health and safety laws and had built strong enforcement systems, some of the loss of life in the April 2013 factory collapse would likely have been averted. But in many countries, such laws are weak, enforcement is weaker still, and corruption is endemic, reflecting chronic failures in developing a governmental order based on the rule of law. Reliance on local

⁷ For an overview of the Bhopal disaster, see AMNESTY INTERNATIONAL, CLOUDS OF INJUSTICE: BHOPAL DISASTER 20 YEARS ON (2004), available at <http://www.amnesty.org/en/library/asset/ASA20/015/2004/en/fa14a821-d584-11dd-bb24-1fb85fe8fa05/asa200152004en.pdf>.

⁸ See Julfikar Ali Manik, Steven Greenhouse & Jim Yardley, *Outrage Builds After Collapse in Bangladesh*, N.Y. TIMES, Apr. 26, 2013, at A1; Dan Viederman, *Supply Chains and Forced Labour After Rana Plaza: Lessons Learned*, GUARDIAN (London), May 30, 2013, at <http://www.guardian.co.uk/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains>.

⁹ UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31 (Mar. 21, 2011), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

remedies is vitally important, but it remains a long-term proposition.¹⁰ As we consider the post-*Kiobel* order, it is important to recognize and further develop these other—in many cases non-judicial—mechanisms. Available remedies include the following five avenues for pursuing corporate accountability for human rights abuse committed abroad.

1. *Standard setting by intergovernmental organizations*

International standards, such as those developed by the International Labour Organization (ILO), are helpful in principle but only have meaning if effective international remedies and enforcement mechanisms are put in place or taken up by local governments. The ILO with its tripartite structure (business, labor, and government) is often constrained in its efforts to implement the standards that it has created. One notable positive development is the ILO's Better Work program,¹¹ a collaboration between the ILO and the International Finance Corporation, focused on the application of labor standards in private sector development. The Better Factories Cambodia project,¹² launched in 2001, provides a concrete example of how international standards can usefully be combined with strong monitoring and trade incentives to form a sustainable basis for improving working conditions.

2. *Provision of resources by the World Bank and other international financial institutions*

Effective remedies to major systemic problems, like workplace safety issues in Bangladesh, require considerable resources. Governments in poor countries do not have the needed resources, and private companies cannot be expected to finance comprehensive solutions on their own. To fill the gap, international financial institutions such as the World Bank and international development agencies such as the United Nations Development Programme (UNDP) should be enlisted to contribute to developing and underwriting comprehensive remedial strategies. Similar challenges exist in the agricultural sector, where poor economic conditions contribute to a reliance on child and forced labor. While some international financial agencies have begun to link their performance standards with human rights,¹³ what is lacking is an integrated effort to combine the resources of governments, the private sector, and the various international financial institutions. In addressing major structural problems like unsafe

¹⁰ Recognition of the limited governmental capacity to provide a remedy to prevent further disasters is evident by the focus on encouraging companies to sign on to the privately developed accord on fire and building safety in Bangladesh, which in essence privatizes the establishment of a fire and building safety program in Bangladeshi factories. See Accord on Fire and Building Safety in Bangladesh (May 13, 2013), available at http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf; see also IndustriALL Global Union, Bangladesh Safety Accord Implementation—Moving Forward (July 7, 2013), at <http://www.industrial-all-union.org/bangladesh-safety-accord-implementation-moving-forward>.

¹¹ At <http://betterwork.org/global>.

¹² At <http://betterfactories.org>.

¹³ The International Finance Corporation (IFC) updated its Environmental and Social Sustainability Performance Standards in August 2011 and began implementing them in 2012. The IFC Performance Standards are a set of standards with which IFC borrowers, primarily corporations and states, must comply to qualify for project funding; their objective is to reduce the environmental and social risk to IFC's investments. The update included an attempted alignment with the UN Guiding Principles; however, the human rights references in the IFC Performance Standards continue to be fairly sparse. See INTERNATIONAL FINANCE CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (Jan. 2012), available at http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

working conditions in Bangladesh, a combination of global resources needs to be brought to bear.

3. *Home-country reporting requirements*

Home countries—like the United States or Western European nations where major multinationals are based—can also provide added remedies. At a minimum, these countries can require companies to report on their global activities and on the steps taken to ensure the protection of human rights. For example, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires all listed companies to report on the sources of minerals used in their products when raw materials are acquired in the areas around the Democratic Republic of the Congo (DRC).¹⁴ The purpose of this provision is to provide greater transparency in the trade in minerals fueling and funding the armed struggle in the DRC. In addition, as part of the decision to lift certain economic sanctions applicable to Burma/Myanmar, the Obama administration has established new reporting requirements for U.S. companies investing more than \$500,000 in businesses in Burma. The reporting requirements also include a provision that compels companies to outline the steps that they are taking to ensure that their commercial engagements do not contribute to human rights abuses.¹⁵ At a local level, the state of California requires companies to report on their efforts to eradicate slavery and human trafficking in their global operations.¹⁶

4. *Home-country sanctions*

Home countries can also impose sanctions related to human rights, as the Obama administration did in 2012 in Executive Order 13606, which prohibits companies from transferring surveillance technology to Iran or Syria.¹⁷ The Treasury Department explained the order as a means to advance the protection of human rights, noting that

¹⁴ The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §5301 note), addresses financial transparency. Section 1504 requires all listed oil and mining companies to disclose the revenues that they pay to governments worldwide. The European Union has also recently adopted new laws aimed at increasing the transparency of government income from the oil and gas and logging industries. The 2013 EU Accounting and Transparency Directives will require European companies to report payments of more than €100,000 made to the government of the country in which they operate, including taxes levied on their income, production or profits, royalties, and license fees. Council Directive 2013/34/EU, 2013 O.J. (L 182) 19, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF> (accounting directive); Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Commission Directive 2007/14/EC, COM (2011) 683 final (Oct. 25, 2011), *available at* http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf (transparency directive).

¹⁵ *See* Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (2012); *see also* Bureau of Democracy, Hum. Rts. & Labor, U.S. Dep’t of State, Responsible Investment Reporting Requirements (2013), *available at* <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

¹⁶ On January 1, 2012, the 2010 California Transparency in Supply Chains Act took effect. The act compels companies that meet certain threshold requirements to disclose their efforts to eradicate slavery and human trafficking from their supply chains. California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE §1714.43.

¹⁷ *See* Exec. Order No. 13606, 77 Fed. Reg. 24,571 (Apr. 24, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-04-24/pdf/2012-10034.pdf>.

the President recognized that the commission of serious human rights abuses against the people of Iran and Syria by their governments, facilitated by computer and network disruption, monitoring, and tracking by those governments, threatens the national security and foreign policy of the United States. The [executive order] targets this activity in order to deter and disrupt such abuses.¹⁸

Sanctions also can be imposed by legislation. One important legislative model in a related but distinct area is the Foreign Corrupt Practices Act.¹⁹ Adopted in 1977, it has had an important impact in the way in which U.S. businesses operate abroad and has changed the global business environment more generally with respect to corruption, especially as multilateral organizations took up efforts to the same end.²⁰ Companies have responded to global anticorruption laws by developing due diligence programs to identify proactively potential risks. The global implementation of laws to combat corruption is a useful model in assessing how more rigor could be brought to bear in applying international human rights standards to business.

5. *Voluntary multistakeholder initiatives*

Since the mid-1990s, another remedy has been the development of multistakeholder initiatives (MSIs), which are voluntary efforts by a group of companies working with other stakeholders, such as governments, nongovernmental organizations, social investors, and academics. These MSIs work to identify human rights issues in a particular industry, determine the standards by which company performance should be evaluated, and then work collectively to adopt operational strategies for sustained compliance with the standard. In so doing, they are going beyond an individual risk mitigation model to taking solutions-oriented action to address human rights problems.

MSIs have been formed in the apparel, athletic shoe, and electronics manufacturing sectors; the oil and mining industries; the private security industry; and the information technology sector. These efforts share several common characteristics. First, they represent efforts by commercial enterprises to collaborate, rather than compete, in developing industry human rights standards to which they will be bound. Second, they reflect a willingness by these companies to discuss implementation of common standards, not only with other firms but also with outside stakeholders, such as nongovernmental advocacy organizations, governments, universities, and other experts. Third, these MSIs start from the proposition that the underlying human rights challenges facing many of these industries are impossible for the private sector to solve on its own. Most importantly, these efforts acknowledge that global companies need to do more than simply monitor human rights problems to reduce the risks to their own brands (what has been termed “know and show” within the Guiding Principles framework).²¹ Rather,

¹⁸ See U.S. Dep’t of the Treasury, Resource Center: Frequently Asked Questions and Answers, para. 183 (Oct. 15, 2013), at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#183>.

¹⁹ 15 U.S.C. §78dd-1 et seq.

²⁰ See also UN Convention Against Corruption, GA Res. 58/4, UN Doc. A/Res/58/4 (Oct. 31, 2003), available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, S. TREATY DOC. No. 105-43, 37 ILM 1 (1998), available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

²¹ See Mazars-Shift Project, Developing Global Standards for the Reporting and Assurance of Company Alignment with the UN Guiding Principles on Business and Human Rights: A Discussion Paper 4 (May 1, 2013),

they need to make a collective commitment to be part of the solution to vexing human rights challenges.

Conclusion

The *Kiobel* decision makes imperative an increased exploration of alternative nonjudicial remedies. These five options are not “either/or” alternatives, but rather are a range of strategies that should be pursued on a continuum by both governments and companies. As multinational businesses expand their global reach and grapple with issues of human rights in their core business operations, a growing need arises for those involved to pursue several objectives:

- a better definition of the practical common standards that companies in each industry should apply in addressing human rights issues in their core business operations and solid metrics for evaluating their performance;
- a reasonable assessment process to determine whether a company’s actions comply with these standards, both to help inform the company and to engage it in improving its performance; and
- practical and effective remedies in situations where companies are in serious noncompliance with these standards and, as a result, grave human rights violations are occurring.

Judicial solutions, such as those pursued against corporations under the ATS, are an important piece of the corporate accountability puzzle but are not—and have never been—the sole solution. Looking forward, it is the combination of all these potential judicial and nonjudicial remedies that will eventually lead to a system of sustained human rights protection.

available at <http://business-humanrights.org/media/documents/developing-global-standards-discussion-paper.pdf> (“Under the second pillar—the corporate responsibility to respect—the Guiding Principles require companies to know and show that they are respecting human rights by developing policies and processes for managing human rights . . .”).