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# Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open

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SUING AMERICANS FOR HUMAN RIGHTS TORTS  
OVERSEAS: THE SUPREME COURT LEAVES  
THE DOOR OPEN

*Doug Cassel\**

INTRODUCTION

If American citizens or corporations commit gross violations of human rights against foreign victims on foreign shores, can the victims sue the Americans for damages in United States federal courts?

Until recently the answer was clearly yes. However, following the diverse opinions in the Supreme Court's 2013 ruling in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>1</sup> the question has divided lower courts to date.<sup>2</sup> This Article argues that, as a matter of both domestic and international law, and under both the majority and minority rationales in *Kiobel*, federal courts can and should hear tort suits against American nationals for human rights violations they commit against foreign victims in foreign countries.

The statutory basis of both jurisdiction and the cause of action is the Alien Tort Statute (ATS). Originally passed in 1789, the ATS grants district

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1 133 S. Ct. 1659 (2013).

2 Some courts have dismissed suits against American corporations on the ground that *Kiobel* bars suits for human rights violations committed in foreign countries, even by American companies. See *Balintulo v. Daimler AG*, 727 F.3d 174, 194 (2d Cir. 2013); *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 U.S. Dist. LEXIS 103981, at \*32–33 (N.D. Ala. July 25, 2013); *Al Shimari v. CACI Int'l, Inc.*, No. 1:08-cv-827 (GBL/JFA), 2013 U.S. Dist. LEXIS 92937, at \*50 (E.D. Va. June 25, 2013). Others take the view that suits against American nationals sufficiently “touch and concern” the United States to be actionable, even where the principal or exclusive violations were committed in foreign countries. See *Ahmed v. Magan*, No. 2:10-cv-00342, 2013 U.S. Dist. LEXIS 117963, at \*4 (S.D. Ohio Aug. 20, 2013) (report and recommendation of magistrate judge), *adopted by* 2013 U.S. Dist. LEXIS 142538 (S.D. Ohio Oct. 2, 2013); *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 U.S. Dist. LEXIS 114754, at \*36–44 (D. Mass. Aug. 14, 2013). For discussion, see *infra* Section II.D.

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.”<sup>3</sup>

The ATS essentially lay dormant for two centuries until resurrected in 1980 in *Filartiga v. Pena-Irala*,<sup>4</sup> when the Second Circuit ruled that a Paraguayan dissident could bring an ATS suit in U.S. courts against a Paraguayan police chief for official torture committed in Paraguay. Both plaintiff and defendant resided in the United States at the time the suit was filed.<sup>5</sup> Lower courts thereafter entertained numerous ATS suits for overseas human rights violations.<sup>6</sup>

Not until 2004 did the Supreme Court first pronounce on the ATS. In *Sosa v. Alvarez-Machain*,<sup>7</sup> the Court read the ATS as double-barreled—not only conferring jurisdiction, but also authorizing judicial recognition of common law causes of action for torts in violation of international law. The ATS is thus not a mere jurisdictional grant, useless absent further legislation creating a cause of action. Rather it also authorizes federal courts to recognize causes of action for violations of international law norms, so long as the norms are widely accepted and specifically defined.<sup>8</sup> The *Sosa* Court cited *Filartiga* in support of both the ATS authorization to recognize causes of action,<sup>9</sup> and the limits thereon.<sup>10</sup>

*Sosa* involved an alleged tort committed in Mexico by Mexicans against a Mexican citizen (albeit at the behest of the U.S. Drug Enforcement Agency).<sup>11</sup> Still, the Court did not then address whether ATS jurisdiction to recognize common law tort claims extends to torts committed outside the United States. Not until 2013 in *Kiobel*, a suit brought by Nigerian plaintiffs against British, Dutch, and Nigerian corporations for alleged torts in Nigeria,<sup>12</sup> did the Court pass on the extraterritorial reach of the ATS. Invoking a presumption against applying statutes extraterritorially, the five-member *Kiobel* majority ruled that the ATS does not generally allow federal courts to

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3 28 U.S.C. § 1350 (2006).

4 630 F.2d 876 (2d Cir. 1980).

5 *Id.* at 878–79.

6 *E.g.*, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003). The case was reportedly settled. *Final Settlement Reached in Doe v. Unocal*, EARTHRIGHTS INT'L (March 21, 2005), <http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal>. EarthRights International was co-counsel for plaintiffs in the case. Although the terms of the settlement were confidential, it reportedly reached \$30 million. Paul Magnusson, *A Milestone for Human Rights*, BUSINESSWEEK, Jan. 24, 2005, at 63. For an overall history and analysis of ATS cases, see Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014).

7 542 U.S. 692 (2004).

8 *Id.* at 724–25, 731–32.

9 *Id.* at 731 (“The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* . . .”).

10 *Id.* at 732 (“This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.” (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980))).

11 *Id.* at 698.

12 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

recognize causes of actions for torts committed in foreign countries.<sup>13</sup> However, the majority relied extensively on *Sosa*<sup>14</sup> (adjudicating an alleged tort in a foreign state) and was silent on *Filartiga* (also adjudicating a tort in a foreign state), without suggesting that either landmark case was wrongly decided.

Moreover, the *Kiobel* majority did not specifically address whether the ATS allows causes of action for torts committed overseas by *American* citizens or corporations. In contrast, four Justices, while concurring in the result in *Kiobel* (a suit against *foreign* corporations), expressly opined that the ATS confers jurisdiction, within limits, to recognize causes of action for torts committed abroad by American nationals,<sup>15</sup> possibly including corporations.<sup>16</sup>

In this author's view, the concurring Justices are correct in allowing ATS suits against Americans for foreign torts.<sup>17</sup> And contrary to narrow readings by some lower courts,<sup>18</sup> even the majority's rationale allows space for ATS causes of action for torts committed by Americans overseas. *Kiobel* was a suit by foreign plaintiffs, against foreign defendants, for foreign conduct.<sup>19</sup> In that "foreign-cubed" case,<sup>20</sup> the limited American jurisdictional interests at stake—mainly to afford redress for heinous international torts<sup>21</sup>—were not enough to persuade the majority to overcome its presumption against extra-territorial application. Nor were they enough to convince the four Justices concurring in the result that there were sufficient "distinct American interests" to justify ATS jurisdiction in that case.<sup>22</sup>

But the calculus is different when the alleged overseas tortfeasors are Americans. When Americans violate human rights in other countries, the

13 *Id.* at 1669.

14 *Id.* at 1662–69.

15 *Id.* at 1671 (Breyer, J., concurring).

16 *See infra* note 85.

17 Indeed, as explained by the amicus brief of the European Union, there are strong arguments for allowing ATS suits for overseas torts in even broader circumstances than those recognized by Justice Breyer's concurring opinion. Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party at 13–26, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter EU Amicus Brief].

18 *See supra* note 2; *infra* Section II.D.

19 *Kiobel*, 133 S. Ct. at 1662.

20 The phrase "foreign-cubed" refers to the three foreign aspects of a case: foreign plaintiffs, foreign defendants, and foreign location of the tort. *See Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008) ("This is the first so-called 'foreign-cubed' securities class action to reach this Circuit." (citing Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, in CORPORATE LAW AND PRACTICE HANDBOOK SERIES (Number B-1442) 91, 96 (Practicing Law Institute ed., 2004) (coining the term "foreign-cubed"))), *aff'd*, 130 S. Ct. 2869 (2010).

21 *See Kiobel*, 133 S. Ct. at 1676–77 (Breyer, J., concurring); EU Amicus Brief, *supra* note 17, at 17–26; *infra* subsection IV.C.1.

22 Justice Breyer would allow ATS suits for foreign conduct only where there are sufficient "distinct American interests" in the case. *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

jurisdiction of U.S. courts is supported, not only by the U.S. foreign policy commitment to human rights,<sup>23</sup> but also by other factors. They include the internationally recognized right of victims of gross violations of human rights to effective remedies,<sup>24</sup> the international law principle of a state's jurisdiction over its own nationals acting abroad,<sup>25</sup> and the nation's internationally recognized interest<sup>26</sup>—and indeed international best practice<sup>27</sup>—to police its own wrongdoers. Collectively, these interests generally combine in cases against Americans to outweigh any presumption against applying statutes extraterritorially. In the terms used by the concurring Justices, suits against Americans possess the requisite “distinct American interests” to support ATS jurisdiction.<sup>28</sup>

But not in every case. In some cases a foreign state may have a stronger claim to jurisdiction. In other cases, judicial efficiency or foreign policy concerns may counsel in favor of foreign rather than U.S. jurisdiction. The four concurring Justices were thus correct to signal that ATS jurisdiction may be subject on a case-by-case basis to doctrines of exhaustion of foreign remedies, *forum non conveniens*, comity toward other sovereign nations, and due deference to the foreign policy views of the executive branch.<sup>29</sup>

But there are limits to the limits: they must not in effect defeat the very jurisdiction whose importance the four concurring Justices rightly recognize. For example, exhaustion of foreign remedies should not necessarily be required when American defendants are sued exclusively or as principals, and should in any event be subject to the exceptions established by international law.<sup>30</sup>

Part I of this Article shows that both international and domestic law recognize the right of states to exercise extraterritorial jurisdiction over cases against their nationals for serious misconduct abroad. Parts II through V then consider whether the ATS should be interpreted to exercise this juris-

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23 See generally Brief of Former United States Diplomats Diego Asencio et al. as *Amici Curiae* in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter *Diplomats Amicus Brief*]. This author was counsel for the twenty-three former American diplomats who argued on the basis of their experience that ATS suits for violations of human rights committed in other countries are sometimes in the interest of U.S. foreign policy, and sometimes not. Therefore the determination must be made on a case-by-case basis, taking into account the views of the executive branch, and potentially making use of such judicial management techniques as narrowing of claims and discovery in order to minimize any adverse foreign policy impacts.

24 See *infra* subsection IV.C.3.

25 See *Kiobel*, 133 S. Ct. at 1675–76; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987). See generally EU Amicus Brief, *supra* note 17, at 11–13.

26 See *infra* subsection IV.C.2.

27 See *infra* subsection IV.C.2.

28 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

29 *Id.*

30 As explained in *infra* Section V.A, foreign remedies must be exhausted in appropriate cases only if they are adequate, effective, accessible, not unduly delayed, and consistent with due process of law.

dictional authority. Part II summarizes the contrasting opinions in *Kiobel* and their implications for ATS claims against Americans for torts committed abroad. Part III shows that, regardless of whether one takes an “international law” or “domestic law” approach to interpreting the reach of the statute, the ATS authorizes claims against Americans for torts committed on foreign shores. Part IV outlines the differing foreign policy interests underlying the Justices’ divergent views on the territorial reach of the ATS. It concludes that the interests in favor of extraterritorial jurisdiction over ATS suits against Americans generally prevail. Part V addresses case-by-case limits on such suits.

This Article does not revisit the issue on which review was originally granted in *Kiobel*—whether corporations may *ever* be sued under the ATS.<sup>31</sup> All nine Justices decided the case instead on the issue of extraterritoriality; none expressly opined on whether corporations may be sued. This author has argued elsewhere that corporations are proper defendants in ATS suits.<sup>32</sup> The majority of federal courts of appeals addressing the issue agree that corporations may be sued.<sup>33</sup> Rather than reargue the point here, this Article simply assumes that corporations may be sued. But even if the Supreme Court were some day to rule that corporations may not be sued, the arguments in favor of ATS jurisdiction over suits against American nationals for overseas human rights torts would still apply to suits against individual Americans, such as corporate executives.<sup>34</sup>

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31 *Kiobel*, 133 S. Ct. at 1663.

32 Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT’L HUM. RTS. 304 (2008). For a brief, but thoughtful summary, see William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT’L L. 1045 (2012).

33 See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747–48 (9th Cir. 2011) (en banc) (dictum), *vacated on other grounds*, 133 S. Ct. 1995 (2013) (mem.); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017–21 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39–57 (D.C. Cir. 2011), *vacated and remanded on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013) (mem.) (per curiam). *But see* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010), *aff’d on other grounds*, 133 S. Ct. 1659. Recently a Ninth Circuit panel read *Kiobel* as “suggesting in dicta that corporations may be liable under ATS.” *Doe v. Nestle USA, Inc.*, No. 10-56739, 2013 U.S. App. LEXIS 25204, at \*4 (9th Cir. Dec. 19, 2013) (citing *Kiobel*, 133 S. Ct. at 1669).

34 I do not suggest that suits against corporate executives are an adequate substitute for suits against corporations. For example, it may be more difficult for plaintiffs to find evidence showing the culpable knowledge or actions of a particular executive than of the corporation as an entity. See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 473–75 (2001).

I. BOTH INTERNATIONAL AND DOMESTIC LAW RECOGNIZE THAT STATES MAY EXERCISE JURISDICTION OVER THE SERIOUS MISCONDUCT OF THEIR NATIONALS ABROAD

Both international and domestic law recognize the right of states, including the United States, to exercise jurisdiction, and to recognize causes of action, in cases against their nationals for serious misconduct abroad.

So long as the exercise is reasonable,<sup>35</sup> there is no dispute that states may choose to exercise such jurisdiction and to recognize such causes of action.<sup>36</sup> The *Restatement (Third) of the Foreign Relations Law* of the United States recognizes that a nation may “prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside . . . its territory.”<sup>37</sup> A leading international law text agrees that “States have an undisputed right” to apply their laws to their own citizens, “wherever they may be.”<sup>38</sup>

In *Kiobel*, the British and Dutch governments—which as amici curiae opposed the exercise of extraterritorial ATS jurisdiction over British and Dutch companies<sup>39</sup>—nonetheless agreed that “active personality jurisdiction,” by which the United States could apply the ATS extraterritorially to Americans, “is very clearly asserted (and accepted) in State practice, and is

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35 See *infra* note 220; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(2), 403 (1987). Because the ATS both grants jurisdiction and authorizes courts to recognize causes of action (with both substantive and remedial components), 28 U.S.C. § 1350 (2006), one may debate whether the applicable international law rules are those governing a state’s jurisdiction to *prescribe*, to *adjudicate*, or to *enforce* by judicial means (or some combination thereof). Compare RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (jurisdiction to prescribe), and *id.* § 421 (jurisdiction to adjudicate), with *id.* § 431(1) (jurisdiction to enforce judicially). For purposes of ATS claims against U.S. nationals for torts committed abroad, however, the debate is academic. All three categories authorize states to exercise jurisdiction over acts abroad by their own nationals, *id.* §§ 402(2), 421(2)(d)–(e), 431(1), subject to the limit that the exercise be reasonable. *Id.* §§ 403, 421(1)–(2), 431(1)–(2). The reasonableness tests for jurisdiction to prescribe and to adjudicate (prerequisites for enforcement) are sufficiently broad and vague that nothing about ATS suits against U.S. nationals turns on which test is used. See *id.* §§ 403, 421(1)–(2), 431. This Article follows Justice Breyer, who used the *Restatement* provisions on jurisdiction to prescribe, namely sections 402, 403, and 404. *Kiobel*, 133 S. Ct. at 1673–74 (Breyer, J., concurring); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–04 (1987).

36 See *supra* note 35 and accompanying text.

37 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

38 Vaughan Lowe, *Jurisdiction*, in INTERNATIONAL LAW 335, 345 (Malcolm D. Evans ed., 2d ed. 2006).

39 See 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 5–6, 18–23, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter UK Dutch Amicus Brief].

well established in international law.”<sup>40</sup> Calling the same principle by a different name, the European Commission termed the “nationality principle” an “uncontroversial basis for jurisdiction under international law.”<sup>41</sup>

The Supreme Court of the United States long ago reached a consistent conclusion. In *Blackmer v. United States*,<sup>42</sup> involving a witness subpoena issued by the Supreme Court of the District of Columbia to an American citizen in France,<sup>43</sup> the Court in 1932 recognized that there was “no question of international law.”<sup>44</sup> Quoting leading international law authorities,<sup>45</sup> the Court explained, “The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy.”<sup>46</sup> “[S]o far as citizens of the United States in foreign countries are concerned,” the question about applying the relevant U.S. statute extraterritorially “is one of construction, not of legislative power.”<sup>47</sup>

The only question of ATS jurisdiction and causes of action for serious torts committed by Americans abroad, then, is the proper construction of the ATS. International law recognizes the right of states to exercise such jurisdiction and to recognize such causes of action.

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40 *Id.* at 14. For example, Canadian courts have presumptive jurisdiction over foreign torts where the defendant is “domiciled or resident” in Canada. *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, paras. 81–82, 85–86, 90(a) (Can.).

41 EU Amicus Brief, *supra* note 17, at 11. EU law, governing the twenty-eight EU member states, *Countries*, EUROPA, [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm) (last visited Feb. 12, 2014), and other European states who join the regulations voluntarily, makes jurisdiction turn mainly on domicile. The EU default rule is that “persons domiciled” in an EU state “shall, whatever their nationality, be sued in the courts of” the domiciliary state. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 2.1, 3.1, 2001 O.J. (L 12) 1, 3–4 (EC) [hereinafter Brussels I Regulation]; Council Decision 2007/712/EC of 15 October 2007 on the Signing, on Behalf of the Community, of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 2, 3.1, 2007 O.J. (L 339) 3 [hereinafter Lugano II Convention]. In tort cases they may also be sued in the state where the “harmful event” takes place. Brussels I Regulation, *supra*, art. 5.3; Lugano II Convention, *supra*, art. 5.3.

42 284 U.S. 421 (1932).

43 *Id.* at 433, 436.

44 *Id.* at 437.

45 *Id.* at 437 n.2.

46 *Id.* (citing EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 13, at 21–22 (Kraus Reprint Co. 1970) (1915); 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW* § 240, at 424 (1922); 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* § 202, at 255–56 (1906); OPPENHEIM, *INTERNATIONAL LAW* § 145, at 281 (Arnold D. McNair ed., 4th ed. 1926); JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 540, at 755 (Melville M. Bigelow ed., 8th ed. 1883)) (internal quotation marks omitted).

47 *Blackmer*, 284 U.S. at 437 (citing *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); *United States v. Bowman*, 260 U.S. 94, 102 (1922); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).



## II. THE FOUR OPINIONS IN *KIOBEL*

In recent decades, lower federal courts have exercised ATS jurisdiction over tort suits brought by foreign plaintiffs, against foreign defendants, for foreign conduct allegedly violating human rights.<sup>48</sup> In *Kiobel*, however, the Supreme Court held unanimously (but on differing rationales) that the ATS did not reach that “foreign-cubed” suit.<sup>49</sup>

### A. *The Majority Opinion*

The majority opinion, joined by five members of the Court,<sup>50</sup> interpreted the ATS in light of the presumption that a statute does not apply extraterritorially unless Congress clearly indicates that it does.<sup>51</sup> Because in the majority’s view Congress gave no such indication in the ATS,<sup>52</sup> the majority found that the ATS did not authorize the causes of action in the *Kiobel* suit,<sup>53</sup> which was brought by Nigerian plaintiffs, against British, Dutch, and Nigerian corporations, for alleged human rights torts in Nigeria.<sup>54</sup>

However, the majority did not necessarily rule out suits against *American* defendants for human rights torts overseas. It ventured that “even 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” of the ATS.<sup>55</sup> It was silent on whether claims against American citizens—subject to American jurisdiction under international law—would sufficiently “touch and concern”<sup>56</sup> the United States to warrant jurisdiction under the ATS. The majority opinion thus left unanswered the question of whether the ATS affords jurisdiction over suits against American citizens or corporations for human rights violations committed overseas. The opinion was equally silent on whether corporations can be sued *at all* under the ATS<sup>57</sup> (the question on which certiorari had originally been granted).<sup>58</sup>

### B. *Justices Concurring in the Result and the Reasoning*

Justice Kennedy joined the majority opinion<sup>59</sup> but concurred separately.<sup>60</sup> He, too, was silent on whether ATS suits can be brought against

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48 *E.g.*, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 742, 744, 747–48 (9th Cir. 2011) (en banc) (dictum), *vacated on other grounds*, 133 S. Ct. 1995 (2013) (mem.).

49 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *see supra* note 20 and accompanying text.

50 *Kiobel*, 133 S. Ct. at 1662.

51 *Id.* at 1664, 1669.

52 *Id.* at 1665–69.

53 *Id.* at 1663, 1669.

54 *Id.* at 1662–63.

55 *Id.* at 1669.

56 *Id.*

57 *Id.* at 1663, 1669.

58 *Id.* at 1663.

59 *Id.* at 1662.

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

Americans for human rights torts committed in other countries.<sup>61</sup> However, he did allow that there may be cases of foreign torts not covered “by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”<sup>62</sup>

Because ATS jurisdiction over American nationals for torts committed abroad was explicitly asserted by Justice Breyer,<sup>63</sup> Justice Kennedy was certainly aware of the issue. The fact that he did not explicitly address it, and referred only to future “elaboration and explanation” of the presumption against extraterritoriality,<sup>64</sup> suggests that he left the door open to resolve the issue in a future case.

The same cannot be said of two other Justices who also joined in the majority opinion.<sup>65</sup> In their separate concurring opinion, Justices Alito and Thomas would have barred ATS suits over human rights violations “unless the domestic conduct is sufficient to violate an international law norm.”<sup>66</sup>

### C. *Justices Concurring in the Result but Not the Reasoning*

In the final opinion in *Kiobel*, four other Justices concurred in the result but not the reasoning.<sup>67</sup> Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, agreed with the majority that the ATS did not authorize the claims in *Kiobel*, because it was a suit by foreign plaintiffs, against foreign defendants, for foreign torts, without a sufficient “distinct American interest[ ]” in the case.<sup>68</sup>

However, these four Justices rejected the applicability to the ATS of the presumption against applying statutes extraterritorially.<sup>69</sup> Noting the observation in a prior case that the presumption “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters,”<sup>70</sup> Justice Breyer pointed out that, in enacting the ATS, Congress clearly had “‘foreign matters’ in mind”<sup>71</sup>: the ATS expressly refers to suits by “alien[s],” based on violations of “treat[ies]” and “the law of nations,”<sup>72</sup> and indisputably allows claims against pirates for torts committed on ships under

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61 *Id.*

62 *Id.*

63 *See infra* Section II.C.

64 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); *see supra* notes 59–62 and accompanying text.

65 *Kiobel*, 133 S. Ct. at 1662 (majority opinion).

66 *Id.* at 1670 (Alito & Thomas, JJ., concurring).

67 *Id.* (Breyer, Ginsburg, Sotomayor, & Kagan, JJ., concurring).

68 *Id.* at 1674–78.

69 *Id.* at 1671.

70 *Id.* at 1672 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)) (internal quotation marks omitted).

71 *Id.* (quoting *Morrison*, 130 S. Ct. at 2877).

72 *Id.* (alteration in original) (quoting 28 U.S.C. § 1350 (2006)) (internal quotation marks omitted).

foreign jurisdiction.<sup>73</sup> In his view, these add up to sufficient signals that Congress contemplated potential extraterritorial application of the ATS.<sup>74</sup>

In lieu of relying on the majority's presumption and "guided in part by principles and practices of foreign relations law,"<sup>75</sup> Justice Breyer would look to "international jurisdictional norms" to interpret the ATS.<sup>76</sup> He would thus interpret the ATS to allow jurisdiction to recognize causes of action for foreign violations of international law, but "only where distinct American interests are at issue."<sup>77</sup> Specifically, he would allow ATS causes of action for overseas torts in at least two circumstances authorized by international law. One is where "important American national interest[s]" are "substantially and adversely affect[ed]" by foreign torts, including the "interest in not becoming a safe harbor" for foreign nationals who come here after committing human rights violations overseas.<sup>78</sup> That circumstance is beyond the scope of this Article.

The other circumstance is the focus of this Article: where "the defendant is an American national."<sup>79</sup> International law and practice authorize states to exercise jurisdiction and recognize claims, within limits, over torts committed by their nationals outside their territories.<sup>80</sup> Justice Breyer noted the European Commission's amicus brief, which stated that "[i]t 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.'"<sup>81</sup> He cited cases from Britain and the Netherlands<sup>82</sup> (the home countries of two of the corporate defendants in *Kiobel*)<sup>83</sup> to show that "[m]any countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad."<sup>84</sup>

73 *Id.*

74 *Id.* at 1672–73.

75 *Id.* at 1671.

76 *Id.* at 1673.

77 *Id.* at 1673–74.

78 *Id.* at 1674.

79 *Id.*

80 *See supra* notes 35–41 and accompanying text.

81 *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring) (quoting EU Amicus Brief, *supra* note 17, at 11).

82 *Id.* at 1675–76.

83 *Id.* at 1662 (majority opinion).

84 *Id.* at 1675–76 (Breyer, J., concurring) (citing UK Dutch Amicus Brief, *supra* note 39, at 19–23 (citing *inter alia* Rb. Gravenhage [Court of the Hague] 30 December 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.) (involving conduct of Dutch respondent in Nigeria); Guerrero v. Monterrico Metals PLC, [2009] EWHC 2475 (QB) (involving conduct of U.K. companies in Peru); Lubbe v. Cape PLC, [2000] UKHL 41 (H.L.) (involving conduct of U.K. companies in South Africa))).

Justice Breyer also arguably implied, but stopped short of making clear, that ATS claims for foreign torts could be brought, not only against individual Americans, but also against American corporations.<sup>85</sup>

Responding to the majority's concerns that allowing ATS suits for overseas torts could lead to conflicts with foreign nations,<sup>86</sup> and could open the door to Americans being sued in other countries for human rights violations in the United States,<sup>87</sup> Justice Breyer imposed at least four "limiting principles" on such ATS suits: they would be subject in appropriate cases to the doctrines of "exhaustion" of foreign remedies, "*forum non conveniens*," "comity" toward foreign nations, and due judicial deference "to the views of the Executive Branch."<sup>88</sup>

#### D. Implications for ATS Suits Against Americans for Torts Overseas

The four separate opinions in *Kiobel* thus fall along a spectrum with respect to the extent of extraterritorial jurisdiction allowed under the ATS. At one extreme, Justices Alito and Thomas would allow ATS claims only where *domestic conduct in the United States* violates international law with sufficient clarity and international acceptance to be cognizable under the ATS.<sup>89</sup> While this does not necessarily mean that conduct outside the United States could *never* be the subject of an ATS claim, conduct abroad could never be the *sole basis* for an ATS claim. At minimum, the foreign conduct would apparently have to be coupled with conduct inside the United States that is sufficient, by itself, to constitute an ATS claim.<sup>90</sup>

In contrast, the majority opinion leaves the door ajar to allow a foreign tort by an American to constitute, by itself, a sufficient basis for an ATS cause of action. The majority opinion would generally ban extraterritorial ATS claims, except where the foreign violations "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application."<sup>91</sup> But beyond clarifying that the "mere corporate presence"

85 *See id.* at 1677–78. Justice Breyer opined that a "minimal and indirect American presence" by a foreign corporation, through trading of its shares on the New York Stock Exchange and having an office in New York run by an affiliate, did not suffice to justify ATS jurisdiction. *See id.* By implication, if the foreign company instead had a major and direct American presence, ATS jurisdiction would arguably exist. But one cannot be certain, since neither Justice Breyer nor any other member of the Court answered the question on which certiorari was originally granted—whether corporations can be sued at all under the ATS. *See id.* at 1663 (majority opinion); *supra* notes 50–84 and accompanying text.

86 *See Kiobel*, 133 S. Ct. at 1664–65.

87 *Id.* at 1669.

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

89 *Id.* at 1669–70 (Alito, J., concurring) (citing the standards for ATS conduct set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723–24, 732 (2004)).

90 *See, e.g., Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 U.S. Dist. LEXIS 114754, at \*36–44 (D. Mass. Aug. 14, 2013) (noting that tortious conduct by U.S. citizen "in large part" committed in the United States was sufficient for ATS claim).

91 *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883–88 (2010)).

in the United States of a foreign corporation<sup>92</sup> (such as Royal Dutch in *Kiobel*)<sup>93</sup> does not meet that threshold,<sup>94</sup> the majority did not say what form or degree of connection to the United States is needed to sufficiently “touch and concern”<sup>95</sup> the United States. In particular, it did not say whether the fact that the alleged tortfeasor is an American citizen or corporation would satisfy its test.<sup>96</sup>

A possible reading of the “touch and concern” language is that it would allow ATS jurisdiction in both *Sosa* and *Filartiga*. Neither of these ATS landmark cases was disavowed by the majority, which in fact relied extensively on *Sosa*.<sup>97</sup> Although both cases were “foreign-cubed”—with foreign plaintiffs, foreign defendants, and foreign tortious conduct<sup>98</sup>—they had aspects which arguably “touched and concerned” the United States. In *Sosa*, the tort was apparently planned and directed by U.S. government agents.<sup>99</sup> In *Filartiga*, both plaintiff and defendant resided in the United States at the time the ATS suit was filed.<sup>100</sup>

Had the majority expressly applied its presumption against extraterritoriality to these precedents, however, *Filartiga*, at least, should not have won the votes of Justices Alito and Thomas, whose concurring opinion required that domestic conduct in the United States suffice to violate an international law norm.<sup>101</sup> On the other hand, if the majority opinion had disavowed *Filartiga*, let alone *Sosa*, one wonders whether Justice Kennedy would still have joined the opinion.<sup>102</sup> It may well be that the undefined content of the “touch and concern” phrase was a deliberate ambiguity, designed precisely to attract five votes.

In attempting to parse the *Kiobel* majority opinion, some lower courts all but disregard the “touch and concern” exception, reading *Kiobel* simply to bar ATS suits based on conduct outside the United States.<sup>103</sup> Others

92 *Id.*

93 *Id.* at 1662.

94 *Id.* at 1669.

95 *Id.*

96 *See supra* notes 55–58 and accompanying text.

97 *Kiobel*, 133 S. Ct. at 1662–69.

98 *See supra* note 20 and accompanying text.

99 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

100 *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

101 *See supra* notes 89–90 and accompanying text.

102 *See Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

103 *Balintulo v. Daimler AG*, 727 F.3d 174, 194 (2d Cir. 2013); *Chen v. Honghui Shi*, No. 09 Civ. 8920 (RJS), 2013 U.S. Dist. LEXIS 110409, at \*18 (S.D.N.Y. Aug. 1, 2013); *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 U.S. Dist. LEXIS 103981, at \*32–33 (N.D. Ala. July 25, 2013); *Al Shimari v. CACI Int’l, Inc.*, No. 1:08-cv-827 (GBL/JFA), 2013 U.S. Dist. LEXIS 92937, at \*2, \*50 (E.D. Va. June 25, 2013). Some courts, confronted with extremely weak or frivolous, often pro se, claims, adopted similar views without serious analysis. *E.g.*, *Ben-Haim v. Neeman*, No. 13-1522, 2013 U.S. App. LEXIS 22339, at \*6–7 (3d Cir. Nov. 4, 2013) (holding subject matter jurisdiction “lacking” because the “conduct” occurred in Israel and *Kiobel* held “that the ATS does not apply when all of the relevant conduct took place outside the United States” (citing *Kiobel*, 133 S. Ct. at 1669)); *Muntslag*

acknowledge that the “touch and concern” language, especially read together with Justice Kennedy’s concurring opinion, appears to leave the door open to ATS jurisdiction over some extraterritorial torts.<sup>104</sup> Indeed, two courts to date have read *Kiobel* to allow ATS suits against U.S. citizens or

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v. Beerens, No. 12-cv-07168 (TPG), 2013 U.S. Dist. LEXIS 121035, at \*6–7 (S.D.N.Y. Aug. 26, 2013) (stating that plaintiff fails under *Kiobel* where the “conduct . . . occurred” outside the United States (citing *Kiobel*, 133 S. Ct. at 1669)); Ahmed-Al-Khalifa v. Obama, No. 1:13-cv-49-MW-GRJ, 2013 U.S. Dist. LEXIS 101281, at \*3–4 (N.D. Fla. July 1, 2013) (holding that plaintiff fails under *Kiobel* because the conduct “occurred outside the United States” and did not sufficiently “touch” or “concern” the United States (citing *Kiobel*, 133 S. Ct. at 1662, 1669)); Mwangi v. Bush, No. 5: 12-373-KKC, 2013 U.S. Dist. LEXIS 85842, at \*9 (E.D. Ky. June 18, 2013) (holding that the plaintiff fails under *Kiobel* because the “conduct . . . occurred” outside the United States (citing *Kiobel*, 133 S. Ct. at 1669)); Ahmed-Al-Khalifa v. Elizabeth, No. 5:13cv103/RS/CJK, 2013 U.S. Dist. LEXIS 71682, at \*4–6 (N.D. Fla. Apr. 19, 2013) (stating that plaintiff fails under *Kiobel* because the conduct “occurred outside of the United States” and did not sufficiently “touch” or “concern” the United States” (citing *Kiobel*, 133 S. Ct. 1659)); Murillo v. Bain, No. H-11-2373, 2013 U.S. Dist. LEXIS 56981, at \*9 (S.D. Tex. Apr. 19, 2013) (citing *Kiobel* for the statement that “American laws like the Alien Tort Statute and Torture Victim Protection Act are presumed not apply [sic] beyond the borders of the United States” (citing *Kiobel*, 133 S. Ct. 1659)).

104 *E.g.*, Aldana v. Fresh Del Monte Produce, N.A. Inc., No. 12-16143, 2014 U.S. App. LEXIS 2231, at \*4 n.1 (11th Cir. Feb. 6, 2014) (dismissing case on other grounds, and observing in dicta only that *Kiobel* “may well bar” a suit against a U.S. company for alleged human rights violations in Guatemala); Du Daobin v. CISCO Sys., Inc., No. PJM 11-1538, 2014 U.S. Dist. LEXIS 22632, at \*24–26 (D. Md. Feb. 24, 2014) (dismissing case on other grounds and observing, without deciding, that the presumption against extraterritoriality did not bar an ATS suit against an “American company” for alleged human rights violations committed “predominantly, if not entirely” in the United States). In *Du Daobin*, the court observed, “It is not yet clear when and under what circumstances ATS claims will ‘touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.’” *Id.* at \*24–25 (quoting *Kiobel*, 133 S. Ct. at 1669); NTSebeza v. Daimler AG, No. 03 Civ. 4524 (SAS), 2013 U.S. Dist. LEXIS 181647, at \*5–7 (S.D.N.Y. Dec. 26, 2013) (dismissing ATS claims against “foreign defendants” because their activities could not plausibly “touch and concern” the United States, while ordering further briefs on the question, *inter alia*, of whether the activities of U.S. defendants sufficiently touched and concerned the United States); Chen Gang v. Zhao Zhizhen, No. 3:04CV1146 (RNC), 2013 U.S. Dist. LEXIS 134510, at \*12 (D. Conn. Sept. 20, 2013) (“Because the alleged abuses occurred in China and do not sufficiently ‘touch and concern’ the United States, the Court does not have subject matter jurisdiction . . . .”); Tymoshenko v. Firtash, No. 11-CV-2794 (KMW), 2013 U.S. Dist. LEXIS 123240, at \*11–12 (S.D.N.Y. Aug. 28, 2013) (“Although the Supreme Court did note that there may be situations in which a tort committed outside the [United States] is nonetheless actionable—namely, ‘where the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption . . .’—the Court failed to provide guidance regarding what is necessary to satisfy the ‘touch and concern’ standard.” (quoting *Kiobel*, 133 S. Ct. at 1669)); Kaplan v. Cent. Bank of the Islamic Republic of Iran, No. 10-483 (RCL), 2013 U.S. Dist. LEXIS 117528, at \*52 (D.D.C. Aug. 20, 2013) (“[T]he Court appeared to leave room for future cases in which the conduct took place outside the United States . . . .”); Mohammadi v. Islamic Republic of Iran, 947 F. Supp. 2d 48, 69, 71 (D.D.C. 2013) (stating that “[t]he Supreme Court in *Kiobel* . . . ‘le[ft] open a number of significant questions’ and that ‘the Supreme Court appears to have set a very high bar for

residents for torts committed overseas (albeit in one case the tortious acts were committed “in large part” in the United States).<sup>105</sup> Another court read *Kiobel* to allow a suit for torts committed during an attack on the U.S. Embassy in Kenya, an attack plotted in part within the United States.<sup>106</sup>

The only extended appellate analysis of *Kiobel* to date is a Second Circuit panel opinion written by the same judge who authored the original appellate opinion in *Kiobel* (ruling that corporations cannot be sued under the ATS).<sup>107</sup> In *Balintulo*, a suit brought by South Africans against one foreign company (Daimler AG) and two U.S. companies (Ford and IBM) for alleged complicity in apartheid, the Second Circuit panel dismissed the “touch and concern” language in *Kiobel* as mere dicta.<sup>108</sup> It opined that *Kiobel* “plainly bars common-law suits” under the ATS which are based solely on conduct occurring abroad.<sup>109</sup> In its view, this

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plaintiffs’” (quoting *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (alteration in original))).

105 Ahmed v. Magan, No. 2:10-cv-00342, 2013 U.S. Dist. LEXIS 117963, at \*4 (S.D. Ohio Aug. 20, 2013) (report and recommendation of magistrate judge) (“I also find that as [the defendant is] a permanent resident of the United States, the presumption against extraterritoriality has been overcome in this case.”), *adopted by* 2013 U.S. Dist. LEXIS 142538 (S.D. Ohio Oct. 2, 2013); Sexual Minorities Uganda v. Lively, No. 12-cv-30051-MAP, 2013 U.S. Dist. LEXIS 114754, at \*36–44 (D. Mass. Aug. 14, 2013) (stating that an ATS suit “against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described in *Kiobel*”).

106 Mwani v. Bin Laden, 947 F. Supp. 2d 1, 3–6 (D.D.C. 2013) (allowing suit but ordering plaintiffs to apply for interlocutory appeal, and staying proceedings pending a ruling by the court of appeals).

107 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *rehearing en banc denied*, 642 F.3d 379 (2d Cir. 2011), *aff’d on other grounds*, 133 S. Ct. 1659 (2013).

108 *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013) (denying petition for writ of mandamus). The panel seemed to interpret the “touch and concern” language as addressing only the situation where some conduct occurs abroad and some in the United States. *Id.* The author of the *Balintulo* opinion later authored another opinion which similarly dismissed an ATS suit on the ground that the alleged conduct took place abroad. *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, No. 09-4483-cv, 2014 U.S. App. LEXIS 2507, at \*16–17 (2d Cir. Feb. 10, 2014). A concurring judge clarified her agreement that the case did not “touch and concern” the United States because the alleged conduct “took place entirely in Bangladesh.” *Id.* at \*44 (Pooler, J., concurring). Nothing in the opinions suggests that any defendants were U.S. citizens or U.S. corporations. *See id.* at \*4.

109 *Balintulo*, 727 F.3d at 181–82, 192–93. Repeatedly referring only to “common-law” suits under the ATS, *id.* at 181–82, 185, 188, 191–92, 194, the panel noted that “Justice Breyer seems to have understood the Court’s opinion as leaving open whether the ATS can provide jurisdiction over ‘a statutory claim’ . . . where Congress evinces sufficient intent to overcome the presumption against extraterritoriality.” *Id.* at 192 n.27 (quoting *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring)). Some language in the *Kiobel* majority opinion would indeed support such an interpretation. For example, the majority states, “Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.” *Kiobel*, 133 S. Ct. at 1668–69.

*Kiobel* holding was “unambiguous” and “obvious,” evincing “bright-line clarity.”<sup>110</sup>

This writer respectfully disagrees. The *Kiobel* majority’s “touch and concern” language<sup>111</sup> was dicta precisely because the majority was not necessarily addressing all the questions that might arise with respect to the territorial reach of the ATS. As noted by Justice Kennedy, whose concurring opinion—and crucial fifth vote<sup>112</sup>—was all but ignored by the *Balintulo* panel<sup>113</sup>: “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.”<sup>114</sup> If the majority had aimed for “bright-line clarity,”<sup>115</sup> for example, it might have expressly rejected Justice Breyer’s suggestions that the ATS allows suits based on conduct committed abroad by American nationals and by foreign human rights violators who seek safe haven in the United States.<sup>116</sup> In the face of these vigorously argued suggestions, the majority’s silence seems hardly “unambiguous.”<sup>117</sup>

A more ambiguous reading of the majority opinion is consistent with the concurring opinion of its fifth vote. Justice Kennedy opted for an open-ended, unspecified reservation of future “elaboration and explanation” of the “proper implementation of the presumption against extraterritorial application.”<sup>118</sup> If and when a case involving a tort allegedly committed by an American overseas comes before the Court, Justice Kennedy’s past opinions on extraterritoriality suggest that, even then, he may well refrain from a categorical answer.<sup>119</sup> He would be likely to undertake a pragmatic, fact-specific, case-by-case analysis of whether a *particular suit* against an American is sufficiently connected to the United States to justify extraterritorial application of the ATS.

If Justice Kennedy allowed such a suit, his opinion would likely define a new majority. As noted above, Justice Breyer, writing for himself and three other Justices, expressly deemed the fact that an “American national” is the

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110 *Balintulo*, 727 F.3d at 182, 189. The panel went so far as to count the majority opinion’s framing of the question (three times), *id.* at 189 (citing *Kiobel*, 133 S. Ct. at 1662, 1664–65), and its references to the “location of the . . . ‘conduct’” in *Kiobel* (at least eight times). *Id.* (citing *Kiobel*, 133 S. Ct. at 1665–69).

111 *Kiobel*, 133 S. Ct. at 1669.

112 *See id.* at 1662.

113 The panel’s only reference to Justice Kennedy’s concurrence was a footnote stating, “*see also id.* (Kennedy, J., concurring).” *Balintulo*, 727 F.3d at 191 n.26.

114 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

115 *See Balintulo*, 727 F.3d at 189.

116 *See supra* notes 55–58, 75–85 and accompanying text.

117 *See Balintulo*, 727 F.3d at 182.

118 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

119 *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 730, 755–66 (2008) (Kennedy, J.); *Hamdan v. Rumsfeld*, 548 U.S. 557, 636–655 (2006) (Kennedy, J., concurring); *Rasul v. Bush*, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring); *United States v. Verdugo-Quirquez*, 494 U.S. 259, 275–78 (1990) (Kennedy, J., concurring).



alleged tortfeasor to be sufficient to justify ATS jurisdiction<sup>120</sup>—subject in appropriate cases to the limits of exhaustion, *forum non conveniens*, comity, and deference.<sup>121</sup>

In this writer's view, Justice Breyer not only reached the right result on this point, but also correctly articulated why the ATS grants jurisdiction over suits against American nationals for serious human rights violations committed overseas, subject to limits on a case-by-case basis.<sup>122</sup> However, even under the majority's rationale, one may conclude with good reason that suits against American nationals sufficiently "touch and concern" the United States to "displace the presumption against extraterritorial application."<sup>123</sup>

### III. BOTH INTERNATIONAL AND DOMESTIC LAW SUPPORT ATS JURISDICTION AND CLAIMS AGAINST AMERICANS FOR HUMAN RIGHTS TORTS COMMITTED ABROAD

Justice Breyer "would assume that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp."<sup>124</sup> In other words, "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."<sup>125</sup>

If that "international law" approach to interpreting the ATS is taken, then ATS jurisdiction over human rights torts committed by American nationals overseas is a slam dunk. As discussed in Part I above, it is "undisputed" and "uncontroversial" that international law permits states to exercise jurisdiction over the activities of their nationals abroad, subject to the limits of reasonableness.<sup>126</sup>

Conforming both the substantive content and the jurisdictional reach of the ATS to the law of nations seems likely to be what the Congress of a fledgling United States, anxious to earn a place of respect in the world, might have intended in 1789.<sup>127</sup> Justice Breyer's international law interpretation, then, makes good sense.<sup>128</sup>

But suppose a "domestic law" approach is taken to interpret the ATS. In that case, early interpretations of the statute, contemporaneous with its enactment, may shed important light. As it happens, U.S. Attorney General William Bradford in 1795 issued a relevant opinion letter.<sup>129</sup> In the words of

120 *Kiobel*, 133 S. Ct. at 1670–71, 1674 (Breyer, J., concurring).

121 *Id.* at 1674; *see infra* Part V.

122 *See supra* Section II.C.

123 *Kiobel*, 133 S. Ct. at 1669.

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

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

126 *See supra* Part I.

127 *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 701–11 (2002).

128 *See supra* Section II.C.

129 *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795).

the majority opinion in *Kiobel*, the Bradford opinion concerned a 1794 case in which “several U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone.”<sup>130</sup> In regard to criminal prosecution of the U.S. citizens, Bradford wrote that, insofar “as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts.”<sup>131</sup> In contrast, in regard to civil suits under the ATS, Bradford took the opposite view:

But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .<sup>132</sup>

In *Kiobel* the majority distinguished the Bradford opinion—but on grounds that actually *support* ATS jurisdiction over acts of U.S. citizens committed on “foreign shores”:

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* . . . .<sup>133</sup>

Thus, both Bradford and the *Kiobel* majority grounded ATS jurisdiction in the 1795 case on the fact that U.S. citizens were the alleged perpetrators. Bradford saw “no doubt”<sup>134</sup> that the ATS granted jurisdiction and a remedy for an attack by U.S. citizens that took place “both on the high seas and on a foreign shore.”<sup>135</sup> For purposes of *Kiobel*, a suit against *foreign* nationals,<sup>136</sup> the majority found Bradford’s opinion concerning a case against “U.S. citizens” “hardly suffic[ient] to counter the weighty concerns underlying the presumption against extraterritoriality.”<sup>137</sup> But for purposes of ATS suits

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130 *Kiobel*, 133 S. Ct. at 1667.

131 *Id.* (quoting *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58 (1795)).

132 *Id.* at 1668 (quoting *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795)).

133 *Id.* (emphasis added).

134 *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795).

135 *Kiobel*, 133 S. Ct. at 1668.

136 *Id.* at 1662.

137 *Id.* at 1668. Scholar Curtis Bradley likewise reads the Bradford opinion to support suits only against Americans. Concluding that the “weight of the evidence” suggests that Congress “implicitly intended to limit the Alien Tort Statute to suits involving a U.S. citizen defendant (at least in non-admiralty cases),” he contends that the Bradford opinion “obviously envisions a suit brought by alien plaintiffs against American citizens,” and “[t]here is no suggestion in the opinion that the Alien Tort Statute could be used to address similar acts of hostility committed by foreign citizens, such as the French citizens involved in the attack.” Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 635, 637 (2002). Most recently, Professors Bellia and Clark conclude that the ATS “originally encompassed claims by aliens against U.S. citizens (but only U.S. citizens) for any tort of violence against person or personal property, wherever committed.” Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1612 (2014).

against U.S. citizens for torts committed on foreign shores—the focus both of Bradford’s opinion and of this Article—Bradford concluded that there is “no doubt” of ATS jurisdiction.<sup>138</sup>

Would the majority find the Bradford opinion equally unpersuasive in an ATS suit against U.S. citizens for torts committed on foreign shores? The majority did not specifically address suits against U.S. citizens.<sup>139</sup> If it had done so, only with difficulty could the majority have evaded the plain meaning of the Bradford opinion on this issue.<sup>140</sup>

The majority did, however, rely on the “weighty concerns” underlying its approach to interpreting the statute.<sup>141</sup> Part IV of this Article turns not only to those interests, but to the full spectrum of foreign policy and international law interests at issue in ATS suits against Americans for human rights torts committed on foreign shores. It concludes that, subject to the limits discussed in Part V on a case-by-case basis, the balance of interests generally supports the exercise of ATS jurisdiction over cases against U.S. nationals, just as Bradford opined in the case of the U.S. nationals who plundered Sierra Leone.

#### IV. COMPETING FOREIGN POLICY INTERESTS IN EXTRATERRITORIAL ATS JURISDICTION

##### A. *The Role of Foreign Policy Interests in Interpreting the Jurisdictional Reach of the ATS*

At least six foreign policy and international law interests are potentially at stake in the question of whether the ATS reaches human rights torts committed by Americans overseas.<sup>142</sup> Three tend to weigh against extraterritorial jurisdiction; three tend to weigh in favor. They are as follows:

##### Interests Weighing Against Extraterritorial Jurisdiction:

- The territorial interests of foreign sovereign states to govern their own territories;
- The risk of inter-state conflict resulting from exercises of extraterritorial jurisdiction; and

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138 See *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795).

139 See *supra* Section II.A.

140 One might argue that the “high seas” component of Bradford’s opinion was essential to his view that there was ATS jurisdiction over the torts committed in the “foreign country.” But Bradford said nothing to make ATS jurisdiction over terrestrial torts turn on whether torts were also committed on the high seas. One might also argue that the tort he addressed involved a statutory rather than a common law violation. Again, Bradford said nothing to suggest that such a distinction would matter. See *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58–59 (1795).

141 *Kiobel*, 133 S. Ct. at 1668; see *supra* notes 86–88 and accompanying text.

142 See *infra* Sections IV.B–C.

- The reciprocity risk: the risk that suits might be brought in foreign courts against Americans for human rights violations in the United States or in third countries.<sup>143</sup>

Interests Weighing in Favor of Extraterritorial Jurisdiction:

- The U.S. foreign policy interest in human rights accountability worldwide;
- The right and interest of each state, including the United States, to police the conduct of its nationals abroad; and
- The internationally recognized right of victims of gross violations of human rights to effective access to justice, effective remedies, and reparation.<sup>144</sup>

In addition, where the ATS plaintiffs are lawful residents of the United States, a seventh interest—their interest as residents of a U.S. forum—weighs in favor of the exercise of extraterritorial jurisdiction by U.S. courts.<sup>145</sup>

The divergent views of the Justices on the principal legal issues in *Kiobel*—whether to invoke the presumption against extraterritorial application of the ATS and whether the ATS reaches extraterritorial torts at all<sup>146</sup>—likely reflected the differing weights they assigned to these interests. The language of the majority opinion prioritized the first three interests, namely those weighing against extraterritorial application.<sup>147</sup> In contrast, while taking respectful account of those interests, Justice Breyer’s opinion treated them in some cases as outweighed, within limits, by U.S. interests in promoting human rights and policing the conduct of U.S. nationals abroad.<sup>148</sup>

Unfortunately, the text of the opinions gave no clear indication that *any* Justice treats the rights of victims to effective remedies, or the interests of lawful resident aliens in a U.S. forum, as relevant to the extraterritorial reach of the ATS.<sup>149</sup> Despite their relevance, these interests thus appear to have no value in explaining the divergent views of the Justices in *Kiobel*.<sup>150</sup> If and when the issue of ATS jurisdiction over torts committed by American nationals abroad is squarely presented in a future case, the Justices should clarify these seeming omissions.

The rights of victims to effective remedies are at stake in all ATS cases. In contrast, the interests of lawful resident alien plaintiffs are at stake only where, as in *Kiobel* and *Filartiga*, the alien plaintiffs happen to reside in the United States.<sup>151</sup> The *Kiobel* Court implicitly deemed those plaintiffs’ inter-

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143 See *infra* Section IV.B.

144 See *infra* Section IV.C.

145 See *infra* subsection IV.C.4.

146 See *Kiobel*, 133 S. Ct. at 1662–65, 1669.

147 See *infra* Section IV.B.

148 See *infra* Sections IV.C and Part V.

149 See *infra* subsections IV.C.3–4.

150 See *infra* subsections IV.C.3–4.

151 *Kiobel*, 133 S. Ct. at 1662–63; *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

ests as residents not sufficient to justify ATS jurisdiction over a case that otherwise had no connection to the United States.<sup>152</sup> But in ATS cases against U.S. nationals, if the plaintiffs reside in the United States, that fact (as explained below) should count as an additional interest supporting the exercise of jurisdiction.<sup>153</sup>

The following text considers each of these seven interests in turn.

### B. *Interests Tending to Weigh Against Extraterritorial Application*

#### 1. Sovereign Territory

The interest of foreign sovereigns in governing their own territories is obvious, but should not be overstated. It was most strenuously asserted before the *Kiobel* Court in the amicus brief of four former State Department legal advisers.<sup>154</sup> They observed that the presumption against extraterritorial application of statutes reflects, “[a]t the international law level, the principle of territory.”<sup>155</sup> The territorial principle, they argued, “has been described as ‘perhaps the fundamental concept of international law,’ because it gives meaning to the crucial concepts of sovereignty and jurisdiction.”<sup>156</sup> Reaching back to Chief Justice John Jay’s explanation in 1793 “that ‘every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions to the entire exclusion of all foreign power, interference and jurisdiction,’”<sup>157</sup> the former legal advisers also cited an 1812 Supreme Court decision, which described “[t]he jurisdiction of the nation within its own territory” as “necessarily exclusive and absolute.”<sup>158</sup>

But even if exclusive and absolute territorial sovereignty had been the law two centuries ago,<sup>159</sup> it is no longer the law and has not been for decades. For example, like most nations, the United States is now party to treaties that prohibit—including on our own territory—genocide,<sup>160</sup> torture,<sup>161</sup> and sys-

152 See *Kiobel*, 133 S. Ct. at 1669; *infra* subsection IV.C.4.

153 See *infra* subsection IV.C.4.

154 Brief of Former State Dep’t Legal Advisers as Amici Curiae in Support of Respondents at app. 1, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter Legal Advisers Amicus Brief].

155 *Id.* at 6–7.

156 *Id.* at 7 (quoting 1 D.P. O’CONNELL, INTERNATIONAL LAW 403 (2d ed. 1970)).

157 *Id.* (quoting *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (charge given to grand jury on circuit)).

158 *Id.* (alteration in original) (quoting *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

159 It was not. If it had been, Attorney General Bradford could not have written his opinion in the *Sierra Leone* case; Britain, as the territorial sovereign of its colony, would have had exclusive jurisdiction over the torts committed in *Sierra Leone*. See *Schooner Exchange*, 11 U.S. (7 Cranch) at 136 (“[A]ll sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.”).

160 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

tematic racial discrimination.<sup>162</sup> Even on the territory of states that choose not to join those treaties, such heinous acts are prohibited by customary international law.<sup>163</sup> States in the twenty-first century no longer enjoy (if they ever did) “exclusive and absolute” territorial sovereignty—especially in cases of gross violations of human rights.

Perhaps the legal advisers meant only to characterize the state of the law at the time the ATS was enacted in 1789. But their brief implied otherwise. The principle of absolute sovereignty, they wrote, “long has been ingrained in our [nation’s] jurisprudence.”<sup>164</sup> They did not mention that the principle had also long been abandoned. Otherwise the human rights treaties cited above<sup>165</sup> could not have been adopted.

Not surprisingly, no Justice in *Kiobel* expressly relied on the anachronistic doctrine of (nearly) absolute territorial sovereignty.<sup>166</sup> True, the majority counseled against imposing “the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign.”<sup>167</sup> However, its repeatedly stated concern was not so much the intrusion on sovereignty per se, as the resulting “foreign policy consequences”<sup>168</sup>—namely the “‘possibilities of international discord . . . and retaliative action.’”<sup>169</sup>

The *Kiobel* majority also quoted *Microsoft Corp. v. AT&T Corp.* for “the ‘presumption that United States law governs domestically but does not rule the world.’”<sup>170</sup> While that phrase fit the U.S. securities laws at issue in *Morrison v. National Australia Bank Ltd.*,<sup>171</sup> it does not fit the ATS. The ATS is a jurisdictional statute which authorizes federal courts to recognize causes of action for certain violations of treaties or the law of nations.<sup>172</sup> When ATS judges rule on torts committed in another nation, the substantive norms they

161 International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

162 International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195.

163 See, e.g., *Barcelona Traction, Light & Power Co., (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (explaining that “obligations of a State towards the international community as a whole”—or “obligations *erga omnes*” may “derive . . . from the principles and rules concerning the basic rights of the human person,” among other sources, and “all States can be held to have a legal interest in their protection”).

164 Legal Advisers Amicus Brief, *supra* note 154, at 7.

165 See *supra* notes 160–62 and accompanying text.

166 See *supra* Sections II.A–C.

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

168 *Id.* at 1664, 1667, 1669.

169 *Id.* at 1664 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

170 *Id.* (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

171 130 S. Ct. 2869, 2875–76, 2883 (2010) (“Even if that were not true, when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.” (citing *Microsoft*, 550 U.S. at 455–56)).

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

apply are not American laws, as in *Morrison*, but international law, equally binding on the foreign nation.<sup>173</sup>

That is not to suggest that foreign nations have *no* sovereign interest in adjudicating what goes on in their territories. They plainly do, and sometimes that interest is greater than that of the United States. But in cases where U.S. interests in adjudication prevail—as in suits against U.S. nationals<sup>174</sup>—the legitimate interests of foreign sovereigns can be adequately addressed on a case-by-case basis by the limiting principles discussed in Part V below without shutting down ATS extraterritorial jurisdiction altogether,<sup>175</sup> especially in situations where victims would otherwise have no effective access to justice or remedy.<sup>176</sup> Both human rights and sovereignty interests can often be reasonably accommodated, but only on a case-by-case basis, not by blanket assertions or denials of jurisdiction.

The point was well made by the United States as amicus in *Kiobel*. Urging the Court not to “articulate a categorical rule” against extraterritorial ATS causes of action, the Justice Department stated the government’s position: there are indeed “circumstances in which” ATS causes of action for overseas torts “would be appropriate,” and the question “calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion.”<sup>177</sup>

## 2. International Discord

The risk that extraterritorial adjudication may lead to serious international discord is real in some cases. For example, if U.S. courts were to hear an ATS case against a Chinese official for violating the right of Tibetans to self-determination, tensions between the world’s two leading powers could rise significantly.<sup>178</sup>

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173 The *Kiobel* majority clarified that

[t]he question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.

*Kiobel*, 133 S. Ct. at 1666. Be that as it may, the substantive norm being enforced in an ATS human rights case is not one that was defined by the United States and then imposed on a foreign sovereign. The norm is rather one defined by the international community, of which both the United States and the foreign sovereign are equally members, and which governs conduct equally in the foreign state as in the United States.

174 See *supra* Part I; *infra* Section IV.C.

175 See *infra* Part V.

176 See *infra* subsection IV.C.3.

177 Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 4, 6, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter Supplemental U.S. Amicus Brief].

178 Cf. *Doe v. Qi*, 349 F. Supp. 2d 1258, 1266–67, 1271 (N.D. Cal. 2004) (noting that the State Department advised the court that “potentially serious adverse foreign policy consequences” could result from adjudicating ATS suit brought by Falun Gong practitioners against Chinese officials (quoting Letter from William H. Taft, IV, Legal Adviser, Dep’t of

But there can be and have been cases where adjudicating an extraterritorial ATS suit poses no meaningful threat to U.S. foreign policy interests, including our interest in avoiding international discord. For example, the State Department voiced no objection to, and even went so far as to support, ATS suits for human rights torts committed in Paraguay in the *Filartiga* case in 1980,<sup>179</sup> in Bosnia in the *Kadic* case in 1995,<sup>180</sup> in Burma in the *Unocal* case in 1997,<sup>181</sup> and in Somalia in the *Samantar* case in 2010.<sup>182</sup> In none of these cases did the ensuing ATS litigation lead to significant diplomatic or international discord.

The State Department reaffirmed its support of the case-by-case principle in 2012. In *Kiobel*, the United States informed the Supreme Court that the State Department adheres to the view that “after weighing the various considerations, allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights.”<sup>183</sup>

Again, the answer is case-by-case resolution. In some cases the international discord feared by the majority may well materialize; in others it may not. For example, other nations are less likely to object to suits against U.S. nationals, especially where the U.S. nationals are sued exclusively or as principals. There is no need to throw the baby out with the bath water.

### 3. Retaliation

The majority also feared that allowing suits like *Kiobel* “would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”<sup>184</sup>

Whatever the merits of this point in *Kiobel*—a suit against *foreign* corporations—it has no application to ATS jurisdiction over torts committed abroad *by Americans*. We could hardly object if foreign states were to follow our example and exercise jurisdiction over human rights violations committed outside their territories by their *own citizens*.

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State, to Robert D. McCallum, Assistant Att’y Gen., Civil Div., U.S. Dep’t of Justice 7–8 (Sept. 25, 2002)).

179 Memorandum for the United States as Amicus Curiae at 22–23, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

180 *Kadic v. Karadžić*, 70 F.3d 232, 250 & n.10 (2d Cir. 1995).

181 *Nat’l Coal. Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 335, 362 (C.D. Cal. 1997).

182 Brief for the United States as Amicus Curiae Supporting Affirmance at 1, *Samantar v. Yousef*, 560 U.S. 305 (2010) (No. 08-1555).

183 Supplemental U.S. Amicus Brief, *supra* note 177, at 4–5, 13.

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



C. *Interests Tending to Weigh in Favor of Extraterritorial Application*

Of the interests that concerned the majority, only sovereignty and potential international discord—and not the fear of retaliation—may thus be relevant in cases against American nationals for torts committed abroad. Yet concerns for sovereignty and discord must be balanced against other interests that support extraterritorial jurisdiction. In ATS suits against Americans for serious human rights violations overseas, the interests supporting the exercise of jurisdiction generally prevail, subject to the limits set forth in Part V below on a case-by-case basis.

1. American Foreign Policy on Human Rights

Perhaps the weightiest interest favoring extraterritorial ATS claims against American nationals is the U.S. foreign policy commitment to worldwide respect for human rights and accountability for violations.

As observed by the former U.S. diplomats whom this writer had the honor to represent before the Supreme Court in *Kiobel*,<sup>185</sup>

America's foreign policy commitment to respect for [sic] human rights worldwide is longstanding and bipartisan. United States law declares that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."<sup>186</sup>

The diplomats continued, "In 1992 President Bush reiterated 'our commitment to ensuring that human rights are respected everywhere.'"<sup>187</sup> This specifically includes a commitment to accountability:

In 2009 Secretary of State Clinton reaffirmed that our "commitment to human rights starts with universal standards and with holding everyone accountable to those standards." Similar statements have been made by Administrations of both parties over the last four decades.<sup>188</sup>

The foreign policy risks of ATS adjudication must therefore be balanced against the foreign policy benefits. This was recognized by the State Department three decades ago in *Filartiga*.<sup>189</sup> Where there is international consensus on a protected human right, and on the scope of protection, the Department advised,

there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in

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185 Diplomats Amicus Brief, *supra* note 23.

186 *Id.* at 10 (quoting 22 U.S.C. § 2304(a)(1) (2006)).

187 *Id.* (quoting Statement on Signing the Torture Victim Protection Act of 1991, 1 PUB. PAPERS 437, 438 (Mar. 12, 1992)).

188 *Id.* (quoting Hilary Rodham Clinton, Secretary of State, Remarks on the Human Rights Agenda for the 21st Century, Georgetown University (Dec. 14, 2009), available at <http://www.state.gov/secretary/20092013clinton/rm/2009a/12/133544.htm>).

189 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.<sup>190</sup>

In 2012 the State Department reaffirmed this view. As noted above, the United States informed the Supreme Court in *Kiobel* of the Department's view that ATS suits based on "conduct occurring in a foreign country," in the circumstances of *Filartiga*, are "consistent with the foreign relations interests of the United States, including the promotion of respect for human rights."<sup>191</sup>

Of course, the balance does not come out in favor of allowing suits in every case. Sometimes other foreign policy risks outweigh the potential human rights gains. As the United States rightly argued in *Kiobel*, the assessment must be made on a case-by-case basis.<sup>192</sup> Courts should take into account the views of the State Department in deciding whether to allow particular ATS cases to proceed. In contrast, adopting a blanket rule against extraterritorial ATS cases—as Justices Alito and Thomas would do explicitly, and as the majority opinion has already been misread to require<sup>193</sup>—would deprive the United States of the foreign policy benefits, in appropriate cases against U.S. tortfeasors, of affording foreign victims what may be their only opportunity to be heard before independent courts.

## 2. Policing Nationals Abroad

As noted in Part I above, international law has long recognized the right of each nation, within limits of reasonability, to adjudicate and recognize claims against its nationals for serious misconduct abroad.

This is not merely a right, but also an interest of each nation. For example, as Germany's amicus brief before the Supreme Court in *Kiobel* rightly contended, "Germany has an inherent interest in applying its laws and using its courts in cases in which German defendants are accused of the violation of international customary laws."<sup>194</sup>

With respect to corporate defendants, this right and interest also reflect contemporary international best practice. The United Nations *Guiding Principles on Business and Human Rights*, endorsed by consensus of the UN Human Rights Council in 2011, provides in Principle 2 that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."<sup>195</sup>

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190 Memorandum for the United States as Amicus Curiae, *supra* note 179, at 22–23.

191 Supplemental U.S. Amicus Brief, *supra* note 177, at 13.

192 *Id.* at 4, 6.

193 See the cases discussed in *supra* Section II.D.

194 Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 10, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter German Amicus Brief].

195 Human Rights Council Res. 17/4, Human rights and transnational corporations and other business enterprises, 17th Sess., July 6, 2011, U.N. Doc. A/HRC/RES/17/4, at 1 (July 6, 2011); Special Representative of the U.N. Secretary General, *Guiding Principles on*

The Commentary to the *Guiding Principles* elaborates:

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.<sup>196</sup>

Why should states police their businesses operating abroad? The Commentary explains:

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad. . . . *The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.*<sup>197</sup>

How should states hold their companies accountable for conduct overseas? The Commentary informs:

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. . . . Other approaches amount to direct extraterritorial legislation and enforcement.<sup>198</sup>

In cases of American companies, then, ATS jurisdiction over their alleged involvement in human rights violations abroad is supported not only by the U.S. foreign policy interest in human rights accountability, but also by the interest of every state and international best practice in policing the serious misconduct of its citizens and companies abroad.

These elements were missing in the *Kiobel* suit against foreign corporations. Had *Kiobel* instead been a suit against *American* companies, the balance of foreign policy interests, and their reflection in the Court's statutory interpretation of the ATS, should have tipped the other way.<sup>199</sup> Put in the majority's terms, a suit against an American company (or business executive) for serious human rights violations in another country sufficiently "touches and

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*Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles on Business and Human Rights*].

196 *Guiding Principles on Business and Human Rights*, *supra* note 195, at 7.

197 *Id.* (emphasis added).

198 *Id.*

199 *Cf. Daimler AG v. Bauman*, No. 11-965, slip op. at 18–19 (U.S. Jan. 13, 2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradigm[m] . . . bases for general jurisdiction.' Those affiliations have the virtue of being unique . . . as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." (citations omitted)). The United States as *amicus* in *Kiobel* rightly stated that, in the circumstances of that suit against foreign defendants, the Court need not decide whether a common law cause of action should be recognized under the ATS "where the defendant is a U.S. national or corporation." Supplemental U.S. Amicus Brief, *supra* note 177, at 21.

concerns” the United States to justify federal courts recognition of a cause of action under the jurisdictional grant of the ATS. However, the limits discussed in Part V below should also be considered on a case-by-case basis.

### 3. Victims’ Rights to Effective Remedies

None of the *Kiobel* opinions gave explicit weight to the rights of victims of gross violations of human rights to effective access to justice, effective remedies, and reparations. These remedial rights are recognized internationally by such instruments as the Universal Declaration of Human Rights<sup>200</sup> and the International Covenant on Civil and Political Rights,<sup>201</sup> a treaty to which the United States is a party.<sup>202</sup> The most recent broad articulation, adopted without dissent by the United Nations General Assembly in 2005, recognizes victims’ rights to “effective access to justice” and to “adequate, effective, prompt and appropriate remedies, including reparation.”<sup>203</sup>

The Court’s neglect of these rights and interests was unfortunate. Although the *Kiobel* plaintiffs were Nigerian citizens, allegedly victimized by foreign corporations in Nigeria, they had taken refuge in the United States, where they were lawful residents, having been granted political asylum.<sup>204</sup> If no remedy was available to them in U.S. courts, where were they supposed to secure an effective remedy? In Nigeria—the country from which they had fled persecution, and whose courts were effectively closed to human rights claims during and after the violations at issue?<sup>205</sup> Or in London or The Hague—home capitals of the (wealthy) defendant corporations, but inconve-

200 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Article 8 of the Declaration provides: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” *Id.* at 73.

201 International Covenant on Civil and Political Rights, *supra* note 161. Article 2.3 of the Covenant provides:

Each State Party . . . undertakes: (a) To ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy . . . ; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

*Id.* at 174.

202 The United States ratified the Covenant on June 8, 1992. *See International Covenant on Civil and Political Rights*, UNITED NATIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last updated Feb. 7, 2014).

203 G.A. Res. 60/147, at 4, 6, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (adopting Basic Principles and Guidelines 2(c), 11(a), and 11(b)).

204 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662–63 (2013).

205 The African Commission on Human and Peoples’ Rights noted:

[A]t the time of submitting this communication [in 1996], the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights.

niently located an ocean away from where the (presumably not wealthy) plaintiffs now reside in the United States?

One might argue that the victims' interest—by itself—is insufficient to outweigh the sovereignty and discord interests against extraterritorial ATS jurisdiction. But the victims' internationally recognized interest in effective remedies should at least be given explicit weight, not ignored.

Perhaps the omission of a reference to victims' rights in the *Kiobel* opinions reflected the fact that ATS plaintiffs, as required by the text of the statute, are necessarily "aliens." The Justices may have felt no obligation to weigh the interests of aliens in effective access to justice. If so, the rationale was flawed. Aside from the U.S. foreign policy commitment to worldwide human rights accountability (as described above in subsection IV.C.1), the United States is party to several treaties that commit it "to promote universal respect for, and observance of, human rights and freedoms."<sup>206</sup> Under Article VI of the Constitution, those treaties are part of the "supreme Law of the Land."<sup>207</sup> Even if not self-executing, they justify taking account of the interests of victims of human rights violations committed abroad in access to justice.<sup>208</sup>

#### 4. Interests of Lawful Resident Aliens in a U.S. Forum

The right of victims to effective remedies weighs in favor of extraterritorial jurisdiction under the ATS, even where the alien plaintiffs reside abroad, but are denied effective access to justice in their home countries. However, when the alien plaintiffs happen to reside lawfully in the United States, as in *Filartiga* and *Kiobel*, the weight of their interest in a U.S. forum is enhanced. While their U.S. residency in *Kiobel*, by itself, was not enough to outweigh the interests weighing against jurisdiction in that foreign-cubed case, it should have been considered (along with their right to effective remedies) as a factor weighing in favor of U.S. jurisdiction.

Unfortunately, although the majority noted that "[f]ollowing the alleged atrocities, [the *Kiobel* plaintiffs] moved to the United States where they have been granted political asylum and now reside as legal residents,"<sup>209</sup> its reasoning took no account of these facts. Nor did Justice Breyer mention them.

These omissions deserve reconsideration in an appropriate future case. Granted, lawful residency does not confer the same "passive personality"

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African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*, at ¶ 41, 155/96 (Oct. 27, 2001) (citing The Constitution (Suspension and Modification) Decree 1993).

<sup>206</sup> International Covenant on Civil and Political Rights, *supra* note 161, at 173 ("Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms."). The same obligation is embodied in Article 55(c) of the United Nations Charter. U.N. Charter art. 55.

<sup>207</sup> U.S. CONST. art. VI.

<sup>208</sup> See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 719–20 (1995).

<sup>209</sup> *Kiobel*, 133 S. Ct. at 1663.

jurisdiction exercisable by states when their citizens are victimized by serious wrongs committed outside their territories.<sup>210</sup> Yet lawful residency is nonetheless relevant to the exercise of extraterritorial jurisdiction in both domestic and international law and practice.

In domestic law, a plaintiff's U.S. residency weighs against dismissal based on *forum non conveniens*. "[L]awful U.S. residence can be a meaningful factor supporting the plaintiff's choice of a U.S. forum," because the greater her ties to the United States, "the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction."<sup>211</sup> This is especially true in human rights suits under the ATS against an American defendant for aiding and abetting foreign human rights violations. Because such suits may "assert outrageous conduct on the part of another nation," they may be ill-received by that nation's courts.<sup>212</sup>

International law on jurisdiction treats residency as relevant not so much because of the plaintiff's convenience, but because of state interests in adjudicating the rights and obligations of their residents. Thus the *Restatement (Third) of Foreign Relations Law*, in addressing jurisdiction to adjudicate, states, "In general, a state's exercise of jurisdiction to adjudicate with respect to a person . . . is reasonable if, at the time jurisdiction is asserted: . . . the person, if a natural person, is resident in the state."<sup>213</sup>

A similar view was implicit in the joint separate opinion in *Congo v. Belgium* of the British, Dutch and American judges on the International Court of Justice. They opined that an exercise of universal jurisdiction *in absentia* should be predicated on "some special circumstance[ ]," such as that "persons related to the victims of the case will have requested the commencement of legal proceedings."<sup>214</sup> They no doubt had in mind the case before them, in which seven of the twelve complainants in the Belgian criminal proceedings were residents, but not citizens, of Belgium.<sup>215</sup>

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210 *E.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 63 (Feb. 14); (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("Passive personality jurisdiction, for so long regarded as controversial, is now reflected . . . in the legislation of various countries . . . , and today meets with relatively little opposition, at least so far as a particular category of offences is concerned."). The United States asserts passive personality jurisdiction in various legislation. *E.g.*, 18 U.S.C. § 2333(a) (2006) ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . may sue therefor in any appropriate district court of the United States . . .").

211 *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000); *see also* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 n.23 (1981) ("Citizens *or residents* deserve somewhat more deference than foreign plaintiffs [in choice of forum]." (emphasis added)).

212 *Wiwa*, 226 F.3d at 106.

213 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(c) (1987).

214 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 63, 81 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

215 *Id.* at 9 (judgment).

The interests of lawful residents are also relevant to extraterritorial jurisdiction in the laws of several European states. In cases where extreme circumstances render a foreign forum unavailable, the “forum of necessity” doctrine allows Dutch courts to exercise extraterritorial jurisdiction so long as there is a “sufficient connection” with the Netherlands, “for example, if the plaintiff has his or her habitual residence in the Netherlands.”<sup>216</sup> In one such case, Dutch courts took jurisdiction over a suit by a Bulgarian against Libyans for acts that took place in Libya because the Bulgarian “resided in the Netherlands.”<sup>217</sup> At least ten European states have such “forum of necessity” jurisdictional rules.<sup>218</sup>

The point may be illustrated by the reverse situation. Suppose the plaintiffs in *Kiobel* had remained in Nigeria and had never come to the United States. Would that circumstance not strengthen the argument against U.S. courts exercising jurisdiction?

The interests of lawful residents do not, by themselves, suffice to justify extraterritorial ATS jurisdiction. But where other interests support extraterritorial jurisdiction—as in human rights suits against American nationals—the interest of lawful resident plaintiffs in a U.S. forum adds to their collective weight.<sup>219</sup>

#### D. Conclusion on the Balance of Competing Interests

The balance of interests generally favors extraterritorial jurisdiction over ATS claims against Americans. However, in view of the limits discussed in Part V below, the weight of competing interests may sometimes tilt against jurisdiction in a particular case. Those limits can most accurately be assessed on a case-by-case basis.

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216 UK Dutch Amicus Brief, *supra* note 39, at 22.

217 *Id.* at 22–23.

218 See EU Amicus Brief, *supra* note 17, at 24 n.66 (noting the “forum necessitatis” doctrine). Canadian courts refer to the doctrine in English as “forum of necessity.” *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, para. 59 (Can.) (noting that “forum of necessity” doctrine is an “exceptional basis” for jurisdiction in Canada).

219 Cf. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 32 (2001). Principle 8, a “Resolution of Competing National Jurisdictions” states:

Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria: . . . (d) the nationality connection of the victim to the requesting state; (e) *any other connection between the requesting state and the alleged . . . victim . . .*

*Id.* (emphasis added). The Princeton Principles are an unofficial set of recommendations made by a group of experts assembled by the Program on Law and Public Affairs of Princeton University. See generally *id.*

V. LIMITS ON ATS SUITS AGAINST AMERICANS FOR  
TORTS COMMITTED ABROAD

Not every ATS suit against an American national for an overseas human rights tort should be heard by U.S. courts. In a given case, interests of respect for foreign sovereignty, U.S. foreign policy interests, fairness to defendants, or judicial efficiency may counsel against exercising ATS jurisdiction.<sup>220</sup>

The determination is best made by courts on a case-by-case basis by applying, in appropriate cases, the doctrines suggested by Justice Breyer, namely exhaustion of foreign remedies, *forum non conveniens*, comity toward foreign sovereigns, and due deference to the foreign policy views of the executive branch.<sup>221</sup>

These limiting principles were already suggested in *Sosa*.<sup>222</sup> The Court there noted that it would “certainly consider” an exhaustion requirement in an appropriate case, and that in some cases there is a “strong argument” for courts to give “serious weight” to the foreign policy views of the executive.<sup>223</sup> Concurring in *Sosa*, Justice Breyer added that he would ask whether a particular exercise of ATS jurisdiction “is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.”<sup>224</sup>

Neither *Sosa* nor Justice Breyer’s concurrences in *Sosa* and *Kiobel* reached the issues of the definition of these limits on the exercise of jurisdiction, or of the exceptions to these limits, either generally or in the specific context of ATS suits against American nationals. Confusion on the definition of the limits and the exceptions was evident in various amicus briefs submitted to the Court in *Kiobel*. Yet where extraterritorial ATS jurisdiction is justified *prima facie*—as in suits against American nationals for torts committed abroad—both the limits and the exceptions to the limits must be carefully

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<sup>220</sup> The *Restatement* provides generally that, even when a jurisdictional basis such as nationality exists, a state should not exercise jurisdiction with respect to a person or activity “having connections with another state when the exercise of such jurisdiction is unreasonable.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987). The *Restatement* lists a host of factors relevant to reasonableness, including, among others, links of territory and nationality, the nature of the regulated activity and its importance to the forum state and to the international legal system, and the interests of other states and the likelihood of conflict with their interests. *Id.* § 403(2). Where two states both have jurisdictional interests in a matter, they should each evaluate their respective interests “in light of all the relevant factors,” and defer to the state with the greater interest. *Id.* § 403(3). Justice Breyer’s approach, by applying the doctrines of exhaustion, *forum non conveniens*, comity, and deference, is a way of meeting these general requirements of reasonableness in the context of ATS suits against U.S. nationals for torts committed on the territory of another state.

<sup>221</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671, 1674 (2013) (Breyer, J., concurring).

<sup>222</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>223</sup> *Id.* at 733 n.21.

<sup>224</sup> *Id.* at 761 (Breyer, J., concurring).



considered. Otherwise the limits may be applied in an overbroad manner, defeating the very jurisdiction and causes of action whose importance is rightly recognized by Justice Breyer. The following discussion focuses on their application to ATS suits against American nationals for torts committed on foreign shores.

### A. Exhaustion of Foreign Remedies

#### 1. Whether To Require Exhaustion

In *Sosa* the Court stated that it would consider an exhaustion requirement in an “appropriate” case.<sup>225</sup> Justice Breyer opined separately that exhaustion “might” be required,<sup>226</sup> a view he reiterated in *Kiobel*.<sup>227</sup> The Ninth Circuit en banc read the references in *Sosa* to support a prudential exhaustion requirement, most likely to be imposed where the nexus to the United States is weak and the norm allegedly violated is not universal.<sup>228</sup>

In cases against Americans, the nexus to the United States, by definition, is strong. Under the Ninth Circuit’s rationale, on that ground alone, exhaustion might be excused, all the more so when the alleged violation is—as it must be for ATS claims—universal. Yet in suggesting a possible exhaustion requirement in *Kiobel*, Justice Breyer had in mind *only* cases “where distinct American interests are at issue”<sup>229</sup>—including cases against American defendants.<sup>230</sup> Under his rationale, then, exhaustion might be required even where the nexus to the United States is strong.

On the other hand, his statement that exhaustion “might” be required need not require its presence in every case. Whether to require exhaustion might depend on the balance of adjudicative interests between the foreign state and the United States. For example, a foreign state would have a greater adjudicative interest where an American is sued for aiding and abetting an agency or officer of that state than where the American is sued exclusively or as a principal. Exhaustion might appropriately be required only where Americans are sued as accomplices, but not where they are sued as principals, and still less when they are sued as the sole perpetrators.<sup>231</sup>

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225 *Id.* at 733 n.21 (majority opinion).

226 *Id.* at 760 (Breyer, J., concurring).

227 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (Breyer, J., concurring).

228 *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 754–55 (9th Cir. 2011) (en banc) (citing *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc)), *vacated on other grounds*, 133 S. Ct. 1995 (2013).

229 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

230 *Id.* at 1674–76.

231 *Cf. id.* at 1678 (rejecting ATS jurisdiction in *Kiobel* in part because plaintiffs alleged, “not that the [foreign] defendants directly engaged [in human rights violations], but that they helped others (who are not American nationals) to do so”).

## 2. Exceptions to Exhaustion

Even where an exhaustion requirement is imposed, both domestic and international law recognize that it is subject to exceptions.<sup>232</sup> Several amici in *Kiobel*, in arguing for an exhaustion requirement, recognized exceptions. But their formulations were neither consistent nor complete. They would variously excuse exhaustion where foreign remedies are “futile,”<sup>233</sup> “unavailable,”<sup>234</sup> “clearly sham or inadequate, or their application is unreasonably prolonged,”<sup>235</sup> or not “adequate and available,”<sup>236</sup> or where the local forum is “unwilling or unable to provide relief,”<sup>237</sup> or where that forum is in a country with a “proven record of human rights violations and no due process.”<sup>238</sup>

With so many candidate criteria, there is a risk that the exceptions might be applied in an inconsistent or incomplete manner. For the sake of uniformity and fairness, courts would do well to follow Justice Breyer’s lead and look to established “norms of international law” in determining the jurisdictional reach of the ATS.<sup>239</sup>

A good international law set of standards is set forth in the widely cited and globally influential judgment of the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras*.<sup>240</sup> The Inter-American Court interpreted the provisions of the American Convention on Human Rights<sup>241</sup> governing exhaustion of domestic remedies before cases may be taken to the Inter-American Commission. The Convention requires, first, that domestic remedies have been exhausted “in accordance with generally recognized principles of international law.”<sup>242</sup> It then specifies three exceptions to the requirement of exhaustion:

- a. the domestic legislation of the state concerned does not afford *due process* of law for the protection of the right . . . ;

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232 In domestic law, see, for example, *Sarei*, 550 F.3d at 830 (noting exceptions to exhaustion where foreign remedies were “ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile” (quoting *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996))).

233 Supplemental U.S. Amicus Brief, *supra* note 177, at 24 n.12.

234 EU Amicus Brief, *supra* note 17, at 30.

235 *Id.* at 31 n.78 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1987)).

236 *Id.* at 35 n.89 (quoting Torture Victims Protection Act § 2(b), Pub. L. No. 102-256, 106 Stat. 73 (1992)).

237 *Id.* at 26.

238 *Id.* at 32 n.82 (quoting German Amicus Brief, *supra* note 194, at 13).

239 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1672 (2013) (Breyer, J., concurring).

240 *Velásquez-Rodríguez v. Honduras*, Merits Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf).

241 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

242 *Id.* art. 46.1.a.

- b. the party alleging violation of his rights has been *denied access* to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been *unwarranted delay* in rendering a final judgment under the aforementioned remedies.<sup>243</sup>

In addition to these three exceptions—lack of due process, denial of access, and unwarranted delay—the Inter-American Court interpreted the “generally recognized principles of international law” on exhaustion to require that domestic remedies be both “adequate” and “effective.”<sup>244</sup>

“Adequate” remedies are “those which are suitable to address an infringement of a legal right.”<sup>245</sup> Thus, a civil proceeding to obtain “a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate . . . or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.”<sup>246</sup> Similarly, a foreign criminal proceeding that does not include a remedy of monetary compensation, or that can be initiated only by the state, would not be an adequate remedy for victims seeking reparations for human rights violations in an ATS civil suit.

In contrast, an “effective” remedy is one that is “capable of producing the result for which it was designed.”<sup>247</sup> For example, the foreign jurisdiction may, in theory, allow tort suits against government officials, but if the officials control or intimidate the courts, or defy court orders, the foreign remedy is not effective.

In order to require exhaustion, then, all five tests must be met: domestic remedies must be adequate, effective, consistent with due process of law, accessible, and not unduly delayed.

These tests have the virtue of objectivity. They are thus preferable to the subjective standards—for example, that domestic authorities are “unwilling” to bring genuine prosecutions—incorporated in the statute of the International Criminal Court (ICC).<sup>248</sup> Not only are subjective assessments difficult,

243 *Id.* art. 46.2.a–c (emphasis added).

244 *Velásquez-Rodríguez*, Inter-Am. Ct. H.R., (Ser. C) No. 4 at ¶¶ 63–64, 66.

245 *Id.* ¶ 64.

246 *Id.*

247 *Id.* ¶ 66.

248 Cases are inadmissible before the ICC except where national authorities are “unwilling or unable” to conduct genuine investigations or prosecutions. Rome Statute of the International Criminal Court art. 17.1(a), July 17, 1998, 2187 U.N.T.S. 90. “Unwilling” is defined with subjective elements. One or more of the following must exist:

- (a) The proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person concerned* from criminal responsibility . . . ;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is *inconsistent with an intent to bring the person concerned to justice*;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is *inconsistent with an intent to bring the person concerned to justice*.

*Id.* art. 17.2(a)–(c) (emphasis added).

especially from afar, they also raise serious issues of comity among nations. For an American court to rule (and to have to rule) on whether foreign authorities have acted in bad faith would be far less respectful to a foreign sovereign than ruling, for example, on whether a foreign proceeding has been unduly delayed.

In addition, like ATS tort suits, the *Velásquez* standards for exhaustion are designed precisely for *civil* suits seeking reparations. In contrast, *criminal* prosecutions before the ICC are more deferential to the interests of states in prosecuting their own citizens.<sup>249</sup>

### B. *Forum Non Conveniens*

The doctrine of *forum non conveniens* merits only a limited role in ATS human rights suits against American defendants. The doctrine should be applied only where the foreign forum meets all the *Velásquez* standards for exhaustion, and where the balance of judicial efficiency, convenience of the parties, and public policy clearly favors the foreign forum. Only then can a *forum non conveniens* dismissal be consistent with the right of victims to effective access to justice and with U.S. foreign policy favoring human rights accountability.

Unfortunately, the usual formulation of the doctrine (for tort cases generally) is too permissive in regard to the adequacy of the foreign forum to meet these criteria (for ATS human rights cases against Americans). The general U.S. test for adequacy of the foreign forum is ordinarily satisfied simply “when the defendant is ‘amenable to process’ in the other jurisdiction.”<sup>250</sup> Only in “rare circumstances” would a foreign remedy be so “clearly unsatisfactory” as to be deemed inadequate.<sup>251</sup>

In human rights cases against Americans, relegating victims to a foreign forum, so long as it is not “clearly unsatisfactory,” accords too little weight to the victims’ right to *effective*, and not merely formal or theoretical, access to justice.<sup>252</sup> Yet the United States’ amicus in *Kiobel*, far from raising the standard of adequacy, would lower it: “For reasons of comity among nations, in

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249 Because of the harsher nature of criminal jurisdiction, its exhaustion requirements are stricter than those for civil jurisdiction. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 reporters’ note 8 (1987) (“It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification.”). Similarly, ICC standards require not only that national remedies fail to comport with due process, as in the *Velásquez* test, but also that they are inconsistent with an intent to do justice, i.e., they are administered in bad faith.

250 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)).

251 *Id.*

252 Cf. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (noting that the Torture Victims Protection Act expresses a policy of favoring exercise of ATS jurisdiction in foreign torture cases, unless the *forum non conveniens* factors otherwise “tilt strongly” in favor of foreign trial (citation omitted)).

suits based on the ATS, assertions that a foreign judicial system is inadequate should not be accepted absent a very clear and persuasive showing.”<sup>253</sup> (The United States’ amicus, however, was not specifically addressing ATS suits *against Americans*.)

In contrast, under the Canadian approach to *forum non conveniens*, even in cases not involving human rights, the defendant has the burden to show that a foreign forum is “clearly more appropriate.”<sup>254</sup> Whatever standard U.S. courts may apply outside the human rights context, the Canadian approach is preferable in ATS suits against Americans for human rights violations.

Moreover, the adequacy of the foreign forum should be assessed in light of the five factors of the *Velásquez* test for exhaustion of national remedies (remedies must be adequate, effective, consistent with due process of law, accessible, and not unduly delayed). Although utilized in *Velásquez* to assess the adequacy of national vs. international fora, these five factors are equally valid to assess the adequacy of a foreign vs. a domestic (U.S.) forum.

### C. Comity Among Nations

Comity is a doctrine of mutual respect among nations, by which one nation may refrain from applying its laws or adjudicating where another nation has sovereign interests. The goal is to make sure that the potentially conflicting laws of different nations will work together in harmony.<sup>255</sup>

Comity thus potentially comes into play in extraterritorial ATS litigation. However, it plays a far lesser role in ATS suits against American nationals. As Justice Breyer explained in *Sosa*, “These comity concerns normally do not arise (or at least are mitigated) if the conduct in question . . . involves [the forum] country’s own national.”<sup>256</sup> In such cases, the forum country (the United States in ATS cases) has both a right and an interest in policing its own nationals, and it may generally do so without passing judgment on the conduct of foreign authorities.

While this is generally true where Americans are the sole tortfeasors, the picture is more complicated when they are alleged to have acted in association with foreign nationals (and even with the foreign sovereign itself), whether as participants in a joint criminal enterprise, aiders and abettors, or

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253 Supplemental U.S. Amicus Brief, *supra* note 177, at 25. The United States in *Filar-tiga* likewise proposed that a “very clear and persuasive showing” be required to hear the case in the United States. Memorandum for the United States as Amicus Curiae, *supra* note 179, at 25 n.48. But in *Filar-tiga*, the United States noted, the defendant was a foreign national who had fled U.S. jurisdiction, leaving “little contact” between the United States and the parties and alleged conduct. *Id.* If the defendant had instead been a U.S. national, a less stringent showing of the inadequacy of the foreign forum would have been warranted.

254 *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, paras. 108–09 (Can.).

255 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723–24 (2004); *id.* at 761 (Breyer, J., concurring).

256 *Id.* at 761 (Breyer, J. concurring).

otherwise. In such cases, it may be difficult for an American court to adjudicate the alleged wrongdoing of the American national without also rendering judgment on the conduct of the foreign sovereign or its nationals. Comity comes into play.

In some such cases, the answer will be to allow the ATS suit to proceed anyway. For example, in the ATS suit against Unocal for allegedly aiding and abetting torture and slavery by the Burmese military, no U.S. foreign policy interest counseled against the implied criticism of Burma—a dictatorship on which the U.S. had imposed sanctions—that would result from a judgment against Unocal. The State Department advised the court that adjudicating the claims against Unocal “would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma.”<sup>257</sup>

In other cases the potential embarrassment of a foreign sovereign, and attendant foreign policy consequences, can be avoided by judicial management tools. An example is provided by an ATS suit against several oil companies, including one partially owned by the Indonesian government, for gross violations of human rights allegedly committed in Indonesia by their security force contractor—namely the Indonesian military.<sup>258</sup> The court noted the State Department’s warning that adjudication of the suit would “risk a potentially serious adverse impact on significant interests of the United States.”<sup>259</sup>

However, as summarized by the court, the State Department qualified its assessment as “necessarily predictive and contingent” on how the case proceeded, including the intrusiveness of discovery and the extent to which the case required “judicial pronouncements on the official actions of the [government of Indonesia] with respect to its military activities.”<sup>260</sup>

The court responded by narrowing the claims, parties, and scope of discovery.<sup>261</sup> To avoid embarrassment to the Indonesian government, the court dismissed the claims of genocide and crimes against humanity, leaving only the common law tort claims; it dismissed the one partially state-owned company; and it ordered that discovery “avoid intrusion” into Indonesian sovereignty and be subject to “firm control” by the court.<sup>262</sup>

In some ATS cases where American nationals are not the sole defendants, then, both comity and U.S. foreign policy interests may be accommodated by the tools of judicial management. In other cases, the role of American defendants and foreign sovereigns may be so intertwined that they cannot feasibly be separated. If the comity interest is sufficiently compelling, then dismissal, as a last resort, may have to be considered in such cases.

257 *Nat’l Coal. Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 335, 362 (C.D. Cal. 1997).

258 *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005) (subsequent history omitted).

259 *Id.* at 22.

260 *Id.* (quoting the U.S. State Department Statement of Interest).

261 The amicus brief filed by this author on behalf of former U.S. diplomats in *Kiobel* made the same point verbatim. *Diplomats Amicus Brief*, *supra* note 23, at 16.

262 *Doe*, 393 F. Supp. 2d at 29.

In any event, regardless of whether an ATS suit implicating foreign sovereigns is to proceed in full, in part, or not at all, courts should assess comity on a case-by-case basis, taking account of any views expressed by the executive on the foreign policy impacts. The next Section discusses this claim.

#### D. *Due Deference to the Executive*

The executive branch is both better informed than the judiciary on matters of foreign policy and constitutionally mandated to carry out foreign policy.<sup>263</sup> While this does not oust courts of jurisdiction in all cases affecting foreign policy<sup>264</sup>—and in some cases of statutory interpretation involving foreign affairs the courts decline to extend any “special deference” to the views of the executive<sup>265</sup>—the foreign policy views of the executive should be given “serious weight” on a case-by-case basis in ATS cases.<sup>266</sup>

In their amicus brief before the Court in *Kiobel*, four former State Department legal advisers argued against case-by-case assessments of extraterritorial ATS suits. Instead, they advocated a “categorical” denial of extraterritorial ATS suits.<sup>267</sup> A purely case-by-case approach, they objected, “would make it difficult or impossible for foreign nations to know whether U.S. law will apply to conduct within their respective territories.”<sup>268</sup> A categorical rule would help the United States “to maintain stable and predictable relations with other countries.”<sup>269</sup>

They also contended that consulting the State Department for its views on ATS litigation “involving the acts of foreign sovereigns. . . . has not proved consistently workable.”<sup>270</sup> Among other reasons, they argued, “the Department has not always responded to the requests, and in some instances where it has, courts have declined to follow the Department’s recommendation . . . . And in other cases, the litigation has dragged on so long that the views of the governments in question later changed.”<sup>271</sup>

If the only U.S. foreign policy interest were to maintain stable and predictable relations with other governments, the concerns of the former legal advisers would be more persuasive. But the United States is rightly con-

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263 *E.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government . . . .”).

264 *Baker v. Carr*, 369 U.S. 186, 211 (1962).

265 *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004). In *Kiobel*, the majority, noting a change in interpretation of the ATS by the Solicitor General, declined to follow his views. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

266 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). Such deference is apparently not a distinct doctrine, but results from an application of comity or of the political question doctrine. Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 *BROOK. J. INT’L L.* 773, 783 & n.58 (2008).

267 Legal Advisers Amicus Brief, *supra* note 154, at 26.

268 *Id.* at 28.

269 *Id.* at 29.

270 *Id.* at 32.

271 *Id.* at 32–33.

cerned not only about its relations with other governments, but also about its relations with human beings at home and abroad, and how those relations are perceived, both by other governments and by the public worldwide.<sup>272</sup> Admittedly, as discussed above, the interests of the United States in supporting human rights accountability worldwide do not *always* carry the day in the face of conflicting interests. But they *sometimes* do, and that determination is best made on a case-by-case basis.<sup>273</sup> The problem with the categorical approach of the former legal advisers is that it would *never* allow human rights interests to justify a role for the ATS in accountability for gross violations of human rights abroad—even when committed by Americans.

The better approach, then, is the one advocated both by the United States and by the former U.S. diplomats represented by this author in their respective amicus briefs before the Court in *Kiobel*: a case-by-case approach to allowing suits against Americans for human rights violations committed overseas.<sup>274</sup>

And in a case-by-case approach, it makes no sense for courts to close their eyes to the expressed views (if any) of the State Department. Judicial independence, as confirmed by judicial rulings to date, counsels against slavishly following whatever the State Department might say.<sup>275</sup> But judicial prudence and respect for the constitutional allocation of powers undergird the Supreme Court's admonition in *Sosa* that courts give "serious weight" to the views of the executive on the foreign policy consequences of adjudicating particular ATS suits.<sup>276</sup>

#### CONCLUSION

The opinion of the five-member *Kiobel* majority—particularly read in light of the concurring opinion of one of its members, Justice Kennedy—does not expressly or by necessary implication foreclose ATS claims against American nationals for human rights torts committed on foreign shores. Justice Breyer's concurring opinion, joined by three other Justices, correctly identifies claims against American nationals as one of the classes of extraterritorial claims which are consistent with the text and purposes of the ATS and with international law and practice. The ATS should be read to permit juris-

272 For the classic exposition of "soft power," see JOSEPH S. NYE, JR., *BOUND TO LEAD* (1990).

273 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (approving a "policy of case-specific deference to the political branches").

274 Diplomats Amicus Brief, *supra* note 23, at 8, 9, 14, 18; Supplemental U.S. Amicus Brief, *supra* note 177, at 4, 6.

275 Courts have shown independence in assessing the views of the executive in ATS cases against corporate defendants. See generally Stephens, *supra* note 266, at 774 (noting that in eight cases to date in which courts assessed Bush Administration foreign policy objections to ATS suits against corporations, the courts accepted the objections in only two cases, while allowing five cases to proceed, and dismissing one case on other grounds, after explicitly rejecting the objections).

276 *Sosa*, 542 U.S. at 733 n.21.



diction and recognition of common law causes of action against Americans for torts committed abroad, subject to case-by-case consideration of the limits proposed by Justice Breyer.

ATS jurisdiction generally should be exercised over such claims only when reasonable. The exercise of jurisdiction is reasonable where:

- plaintiffs exhaust their foreign remedies, or need not do so because of a greater U.S. adjudicative interest, or because they meet an internationally recognized exception;
- the foreign forum is not clearly more appropriate to provide effective access to justice and effective remedies for human rights torts; and
- comity toward a foreign sovereign and avoidance of serious international discord, judicially assessed after giving serious weight to the expressed views (if any) of the executive branch, do not outweigh the factors supporting ATS jurisdiction. These include U.S. interests in human rights accountability and in policing serious misconduct by Americans abroad, as well as the internationally recognized rights of victims to effective access to justice and effective remedies, and, where applicable, the interest of lawful resident aliens in a U.S. forum.

In other words, the relevant balance must take into account not only the interests of the United States and foreign states, but also the interests of the victims whose human rights our nation espouses. These three sets of interests do not always weigh in the same direction. How best to accommodate them can be assessed only on a case-by-case basis. Categorical approaches—either barring or allowing all claims against our nationals for human rights torts abroad—are bound to shortchange one or the other set of important interests. Allowing *no* such claims would betray our profound national commitment to human rights accountability worldwide, whereas allowing *all* of them would in some cases offend legitimate sovereignty interests of other nations. The best way forward, consistent with international law and U.S. foreign policy interests, is to allow ATS claims against Americans for human rights violations committed abroad, subject to a case-by-case assessment of the relevant limits on such cases. Judicial decisions on whether to allow such claims must strive to be respectful of both human rights and the legitimate interests of foreign rule-of-law states.