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# KIOBEL SURPRISE: UNEXPECTED BY SCHOLARS BUT CONSISTENT WITH INTERNATIONAL TRENDS

*Eugene Kontorovich\**

## INTRODUCTION

A primary function of legal scholarship is to incubate ideas to inform the bench and bar. Yet several Supreme Court Justices have recently spoken out publicly about what they consider the growing irrelevance of academic legal scholarship<sup>1</sup> (though empirical findings suggest the continued utility of law reviews to judges).<sup>2</sup> The legal academy sometimes entirely misses what turn out to be major and decisive legal issues in prominent areas, not recognizing them at an early stage and dismissing their importance later on. For example, the great majority of professors dismissed the notion that the Patient Protection and Affordable Care Act (Obamacare) could violate the Commerce Clause.<sup>3</sup>

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1 See Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, Wall St. J.L. Blog (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more>; *Scalia's Critique of Legal Education Echoes UNH Law's Practice-Ready Philosophy*, UNIV. N.H. SCH. L. (Mar. 25, 2013), <http://law.unh.edu/news/2013/03/scalias-critique-of-legal-education-echoes-unh-laws-practice-ready-philosophy>; see also Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES (Mar. 19, 2007), <http://www.nytimes.com/2007/03/19/us/19bar.html> (discussing comments made by Judge Dennis G. Jacobs of the Second Circuit Court of Appeals regarding legal scholarship and its lack of influence on his rulings).

2 See Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U.L. REV. 995, 995 (2011); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1352–70 (2011).

3 David Hyman has argued that constitutional scholars' contemptuous treatment of challenges to the Patient Protection and Affordable Care Act represents a "high profile failure[ ]" of the profession. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. (forthcoming) (manuscript at 3) available at <http://ssrn.com/abstract=2224364>.

The ruling in *Kiobel v. Royal Dutch Petroleum Co.*<sup>4</sup> similarly blind-sided the academy. The case involved one of the most important, contentious, and dynamic aspects of U.S. foreign relations law—the ability of foreigners to sue in U.S. courts for extraterritorial violations of customary international law (CIL) under the Alien Tort Statute (ATS).<sup>5</sup> Yet the Court surprised observers by deciding the case on grounds almost entirely ignored by the academy—the presumption against extraterritoriality.

Despite an extensive academic literature on the statute,<sup>6</sup> the Court's decision was not anticipated by commentators,<sup>7</sup> or for that matter, litigants and inferior judges, making it in some ways a bigger shock than the Obama-care ruling.<sup>8</sup> Indeed, the issue had not even been part of the litigation in *Kiobel* until the Court raised it *sua sponte* during oral argument<sup>9</sup> of an entirely different ATS issue.<sup>10</sup> Subsequently, the Court surprised observers by calling for further briefing in the next term.<sup>11</sup> This finally inspired a sudden academic interest in the extraterritoriality questions. Even then, the Court's unanimous acceptance of some extraterritoriality limitation came as yet

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4 133 S. Ct. 1659 (2013).

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

6 Between 1981 and the end of 2012, there were over 456 law review articles with the ATS or major ATS cases in their title alone, and many more that dealt substantially with it. (These are the results of a Westlaw search in the JLR database for [*ti(atca ats “alien tort” fillartiga sosa) & da(bef 2012)*]).

7 Cf. Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1082 (2011) (noting tension between ATS cases and the *Morrison* holding).

8 Cf. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (upholding Obamacare's constitutionality under Congress's taxation power).

9 See Transcript of Oral Argument at 24–35, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491\\_rearg.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491_rearg.pdf).

10 See John Bellinger, *Stop Press: Supreme Court Orders Kiobel Reargued to Address Extraterritoriality*, LAWFARE (Mar. 5, 2012, 7:03 PM), [http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/#.UtQ0X\\_SryxU](http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/#.UtQ0X_SryxU).

11 See *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.) (“Parties are directed to file supplemental briefs addressing the following question: ‘Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.’”).

another surprise to most observers,<sup>12</sup> who predicted a split along more ideological lines.<sup>13</sup>

This Article examines the intellectual history of extraterritoriality arguments in ATS litigation, while placing *Kiobel* in a broader context of global developments. The story of the winning argument in *Kiobel* is interesting not just for ATS purposes, but as a case study in the path dependence of legal doctrine and of agenda setting by the Supreme Court and the Justice Department. Amazingly, the issue that won in *Kiobel*, foreclosing most ATS litigation, had never been examined in a law review until a 2003 student note.<sup>14</sup> No court ruled on it for three decades.<sup>15</sup> Even in *Kiobel*, the issue had not been raised below or by the litigants. Thus, the Supreme Court *sua sponte* raised an issue in the absence of any division of the lower courts or substantial academic controversy.

Yet *Kiobel* can be understood as not involving the extraterritoriality presumption, but rather its more obscure cousin—the presumption against universality. ATS “foreign-cubed” cases have no U.S. nexus, unlike the typical case raising extraterritoriality concerns. This Article describes the implicit presumption against universality that, while not having a name, has guided courts since the early Republic. It also comprehensively canvasses all statutes under which universal jurisdiction (UJ) has been exercised and finds that, aside from the ATS, Congress always explicitly creates UJ. Moreover, the universal cognizability of a crime in international law is neither necessary nor sufficient for UJ status in U.S. law. This contradicts a major argument for UJ under the ATS—that its reference to international law demonstrates and implies a maximal application of UJ.

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12 See, e.g., Diane Marie Amman, *Alien Tort Statute Lives to Die Another Day*, DIANEMARIEAMANN (Apr. 18, 2013), <http://dianemarieamann.com/2013/04/18/alien-tort-statute-lives-to-die-another-day> (expressing “surprise” at unanimous vote); Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (And What That Can Tell Us About How to Read Kiobel)*, SCOTUSBLOG (Apr. 19, 2013, 11:30 AM), <http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/>; Eugene Kontorovich, *A Supreme Rebuke to Global Forum-Shopping*, WALL ST. J. (Apr. 23, 2013, 7:20 PM), <http://online.wsj.com/news/articles/SB10001424127887324493704578430592807923134>.

13 The *sua sponte* request for supplemental briefing in *Kiobel* can be seen as another example of Chief Justice Roberts’s preference for consensus. The original issue in the case was whether corporations could be liable for violations of international law. For many, this had echoes of *Citizens United*, a controversial and divisive case that held that corporations have free speech rights that entitle them to engage in political spending. *Citizens United v. FEC*, 558 U.S. 310 (2010). The issue-switch allowed *Kiobel* to be decided on grounds that are, for ATS purposes, both broader but less divisive.

14 See Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 699 (2003).

15 See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20 (D.C. Cir. 2011), *vacated*, 527 F. App’x 7 (D.C. Cir. 2013); *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 247 (S.D.N.Y. 2009).

While *Kiobel* was a surprise from a domestic law context, it fits perfectly into broader patterns in international law. Universal jurisdiction, which had seemed an ascendant law doctrine in the 1990s, has in the past decade encountered a significant backlash, leading ultimately to its destabilization and retrenchment. Universal jurisdiction today rarely results in the exercise of jurisdiction, and it is increasingly not universal, but sharply contested by African and Asian states. *Kiobel* is the next major step in a broad disengagement from UJ by leading Western nations.

Part I traces the discussion and application, or lack thereof, of the extraterritoriality presumption both in academic literature and in litigation and considers possible reasons for its extremely belated appearance after more than two decades of litigation. While normative approval of ATS litigation, no doubt, contributed to the neglect of the issue in the exciting early years of ATS litigation, its longstanding omission must also be attributed to broader intellectual factors. Part II places ATS “foreign-cubed” suits in the international context of trends in the exercise of universal jurisdiction. On this background, *Kiobel* is no surprise, but merely the latest step in a withdrawal from UJ by nations that had most aggressively exercised it. Finally, Part III argues that one reason the extraterritoriality presumption might have come to mind is that ATS suits involved universality, something more extreme than “mere extraterritoriality.” Thus *Kiobel* can be understood as involving a rather obscure—and yet unnamed—statutory presumption, the “presumption against universality.” This understanding of the case has significant implications for the disagreement on the Court about the application of the statute to conduct by Americans abroad.

#### I. TRACKING THE EXTRATERRITORIALITY PRESUMPTION IN ATS CASES

Modern ATS litigation began with a foreign-cubed case, *Filartiga v. Pena-Irala*.<sup>16</sup> The Second Circuit’s recognition of a cause of action for international law violations under the ATS lead, eventually, to an extensive debate in which most of the leading American foreign relations scholars participated.<sup>17</sup> The dispute focused on such fundamental issues as the relation between CIL and U.S. law, the extent of federal common law, and the role of courts in foreign relations.<sup>18</sup> Thus, the ATS was the focus of some of the most sustained debates in foreign relations law. It is in this context that the presumption against extraterritoriality fell through the cracks.

This Part chronicles the discussion of the presumption in academic literature, where it received a late and brief role in the ATS debates. It then examines the path of the presumption in ATS cases, both because such litiga-

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16 630 F.2d 876 (2d Cir. 1980).

17 See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 157–62 (sketching the “full-fledged controversy” surrounding the ATS).

18 See Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353, 357–60 (2011) (chronicling academic debates over the ATS).

tion often prominently featured briefs by professors, and to see how the scholarly debate intersects with the judicial discussion. Before proceeding, given that there is some implicit criticism of academic shortsightedness here, the author freely notes that he has engaged in the ATS debates himself for some time, and is guilty of the same omissions.

#### A. *Extraterritoriality in Commentary*

Early commentary simply observed, favorably, that courts had not applied the presumption against extraterritoriality in ATS cases, but did not examine the issue.<sup>19</sup> The first academic argument for applying the presumption in ATS cases came, perhaps not surprisingly, from Curt Bradley and Jack Goldsmith.<sup>20</sup> However, perhaps because they raised the issue in the midst of their broad and profound attack on the status of international law as federal common law,<sup>21</sup> this particular criticism of the ATS did not get immediate further attention.

The first in-depth discussion of the relevance of the presumption to ATS litigation came in a 2003 student note that argued for its applicability.<sup>22</sup> Already this hit on the major pieces of evidence on both sides of the issue—the Bradford memorandum on one hand and the specific issues giving rise to the ATS on the other hand.<sup>23</sup> The genre of student-edited law reviews, to say nothing of student scholarship, receives regular derision. The Jarvis note shows that sometimes student work—which is thought to stick ploddingly to doctrine—can be an effective incubator for novel ideas ignored by a hollow academic consensus.<sup>24</sup> Nonetheless, up until *Kiobel*, the general sense in the academy weighed heavily against the relevance of the extraterritoriality presumption to ATS cases.<sup>25</sup>

19 See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 62 (1985) (“While jurisdiction over extraterritorial torts under the Alien Tort Statute has been denied for various reasons, it has never been denied on the ground that the statute itself does not confer jurisdiction over extraterritorial tort actions.”). Randall suggests that the only relevant limit on extraterritoriality would be personal jurisdiction. See *id.* at 65.

20 See Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 361–63 (1997).

21 See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997); see also Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 370–71 (2003) (arguing that the ATS’s text shows no intention to applied abroad, and the motivating incidents behind the law all took place in the United States).

22 See Jarvis, *supra* note 14, at 699–709 (noting the lack of prior academic discussion on the issue).

23 See *id.* at 701.

24 The rewards for being first appear meager, at least for student notes: the Jarvis comment was not cited in any of the subsequent decisions about the presumption.

25 See K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 34–35 (2004) (arguing the presumption does not apply because of UJ status of the

To be sure, the lack of discussion of the presumption against extraterritorial application of statutes does not mean scholars ignored any potential concerns arising from the foreign subject matter of most ATS suits. The extraterritoriality issue permeated or informed a variety of objections to the ATS. But these concerns were usually explored in grander terms than the extraterritoriality presumption—they were framed in international or constitutional law terms, rather than modest federal courts interpretive canons. Thus some scholars expressed a general concern that such lawsuits raised separation of powers concerns by intruding into foreign relations matters.<sup>26</sup> Several commentators invoked variants of the *Charming Betsy* canon,<sup>27</sup> questioning whether the foreign-cubed suits truly enjoyed support in international law,<sup>28</sup> either because UJ itself is not well established, or civil UJ is not, or the particular offenses go beyond what international law universalizes. Another group of critics argued that foreign-cubed suits raised constitutional problems, either by violating Article III's exclusion of pure alien diversity suits,<sup>29</sup> or violating the Offenses Clause.<sup>30</sup>

### B. *ATS and Extraterritoriality in the Courts*

The courts came even later to the extraterritoriality concerns. The Second Circuit's seminal opinion in *Filartiga* only touched briefly on the extraterritorial nature of the case, noting it "is not extraordinary" for courts to hear such cases.<sup>31</sup> In the decades that followed, federal courts heard a large number of purely foreign ATS cases without the extraterritorial aspect being litigated or discussed at all. Indeed, observers assumed the ATS enjoyed a

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crimes); Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1968 n.199 (2010) (suggesting that "the subject matter of the statute itself would seem to defeat the presumption").

26 See John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 9 (2009); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460 (2001).

27 See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

28 See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 303–05 (2009).

29 See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002).

30 See Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1743–49 (2012).

31 *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). The Court invoked the "transitory torts" doctrine. The basic point is that U.S. law is not being applied extraterritorially, but rather CIL created the cause of action already when the plaintiff was abroad, and it is simply being brought in the United States. See *id.*

tacitly understood exemption to the extraterritoriality presumption, such that courts did not even need to mention it.<sup>32</sup>

While some judges suggested that extraterritorial application may be improper for international law reasons,<sup>33</sup> the first judicial discussion of the extraterritoriality presumption was in a single sentence, in a footnote, two decades after *Filartiga*.<sup>34</sup> The presumption against extraterritoriality was not mentioned at all in any decision again for another decade, when it was summarily dismissed by pointing to the “universal agreement” of federal courts to hear such cases,<sup>35</sup> though such agreement had not been supported by any analysis of the applicability of the presumption. Thus in the first thirty years of ATS litigation, courts established a practice of hearing foreign-cubed cases without any explanation and, when the question was finally raised, used the unexamined *sub silentio* practice as its own justification.

At the same time as the Jarvis comment broached the issue,<sup>36</sup> it was also raised for the first time in litigation—not by counsel for the parties or by scholars, but rather by the Justice Department. The Department submitted two amicus briefs, first in the Ninth Circuit’s en banc rehearing of *Doe v. Unocal* in 2003,<sup>37</sup> and then more extensively in a Supreme Court amicus brief in *Sosa v. Alvarez-Machain* the following year.<sup>38</sup> These briefs made a straightforward argument for the relevance of the presumption for ATS suits, noting the lack of express language in the statute and the Framers’ shyness about jurisdiction in foreign causes. However, this was not the Department of Justice’s first foray into explaining the ATS: it had filed at least six prior amicus briefs in ATS cases, starting with *Filartiga*, without having raised the extraterritoriality issue. Indeed, it had at times even supported jurisdiction in foreign-cubed cases.<sup>39</sup> This may have weakened the force of the Department of Justice’s new arguments. A prominent group of foreign relations scholars responded with an amicus brief countering the applicability of the presump-

32 See William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577, 1587 (2014) (noting that before the “revival” of the presumption in *Aramaco* in 1991, it seemed “highly unlikely” to scholars that the issue would be relevant to the ATS).

33 See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 & n.7, 788 (D.C. Cir. 1984) (Edwards, J., concurring).

34 See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 n.10 (2d Cir. 2000) (“Whatever the intent of the original legislators . . . , the text of the Act seems to reach claims for international human rights abuses occurring abroad.”). The court supported this conclusion only by citing its own prior decision in *Filartiga*, which itself offered no discussion of the issue. Still, the court argued that *Filartiga* has been “ratified” by Congress’s passage of the Torture Victims Protection Act. *Id.* at 104.

35 E.g., *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 247 (S.D.N.Y. 2009).

36 See Jarvis, *supra* note 14.

37 Brief for the United States of America, as Amicus Curiae at 2–4, *Doe I v. Unocal*, 395 F.3d 978 (9th Cir. 2003) (Nos. 00-56603, 00-56628).

38 Brief for the United States as Respondent Supporting Petitioner at 48–49, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), available at <http://www.justice.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf>.

39 See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT’L L. 681, 705 (2003).



tion by noting the lack of textual geographic limitations, the transitory tort doctrine, and the Bradford memo.<sup>40</sup>

The Department of Justice's briefs did little to raise the profile of the issue, either in the courts or in commentary. Both the Ninth Circuit in *Unocal* and the Supreme Court in *Sosa* avoided ruling on the extraterritoriality issue.<sup>41</sup> The extraterritoriality argument was only ruled on by a court of appeals after thirty years of ATS litigation.<sup>42</sup> In that period, there had been no considered appellate decision on the extraterritorial application of the statute—despite the vast scholarship on the ATS subject. The issue was so invisible that one court found, in a case against a former Salvadoran official now a resident in the United States, that the suit was not barred by a Salvadoran amnesty law because “the Salvadoran Amnesty Law cannot be interpreted to apply extraterritorially. A statute must not be interpreted as having extraterritorial effect without a clear indication that it was intended to apply outside the country enacting it.”<sup>43</sup> Yet the court did not pause to note that there is no particular indication that the ATS applies to activities in El Salvador.

Not surprisingly given this track record, the applicability of the presumption was rejected when it finally received a hearing in a court of appeals in 2011 in *Doe v. Exxon Mobil Corp.*<sup>44</sup> Exxon had explicitly raised the statutory presumption, albeit briefly, placing great reliance on the recently decided *Morrison v. National Australia Bank Ltd* case.<sup>45</sup> However, a divided panel of

40 See Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, *Sosa*, 542 U.S. 692 (No. 03-339), reprinted in 28 HASTINGS INT'L & COMP. L. REV. 99, 115–17 (2004) (presenting brief of Professors Vikram Amar, William R. Casto, Sarah H. Cleveland, Drew S. Days III, William S. Dodge, David M. Golove, Robert W. Gordon, Stewart Jay, John V. Orth, Judith Resnik, and Anne-Marie Slaughter). Another amicus brief on behalf of seventy-five international and foreign relations scholars from around the world made similar arguments. See Brief of Amici Curiae National and Foreign Legal Scholars in Support of Respondents, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 419427, at \*21–25.

41 Moreover, the Court in *Sosa* cited extraterritorial ATS cases favorably. Justice Breyer referred to the extraterritoriality issue, but only to note that universal jurisdiction should only be exercised when clearly established in international law. See *Sosa*, 542 U.S. at 761–62 (Breyer, J., concurring).

42 See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20 (D.C. Cir. 2011) (observing that “[t]he issue of extraterritoriality . . . has yet to be decided by a circuit court of appeals”), vacated, 527 F. App'x 7 (D.C. Cir. 2013). The issue had been discussed solely in a dissent the prior year. See *Sarei v. Rio Tinto, PLC*, 625 F.3d 561, 563–64 (9th Cir. 2010) (Kleinfeld, J., dissenting).

43 *Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009).

44 654 F.3d 11. *Exxon Mobil* itself happened not to be a foreign-cubed case, as the defendant was an American corporation, though the relevant conduct occurred abroad.

45 130 S. Ct. 2869 (2010); see Answering Brief of Defendants-Appellees/Cross-Appellants at 37–38, *Exxon Mobil*, 654 F.3d 11 (No. 09-7125). The issue was also discussed more extensively in an amicus brief. See Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Defendants-Appellees at 5–12, *Exxon Mobil* 654 F.3d 11 (Nos. 09-7125, 09-7127, 09-7134, 09-7135).

the District of Columbia Circuit held that the presumption, even as fortified in *Morrison*, did not apply to the ATS because of the “foreign” nature of the subject matter: alien plaintiffs and international law causes of action.<sup>46</sup> Moreover, the court reasoned that the ATS is a jurisdictional statute, and thus cannot apply extraterritorially. Finally, the court noted that federal courts had been entertaining foreign-cubed ATS suits with the acquiescence of the Supreme Court in *Sosa* and Congress in the Torture Victims Protection Act (TVPA).<sup>47</sup> The dissenting judge observed that “[s]omewhat surprisingly, no court of appeals has analyzed whether the ATS applies to conduct that took place in a foreign nation.”<sup>48</sup> While acknowledging the proliferation of extraterritorial ATS cases, the dissent rejected using them to establish the point as they “contain no judicial analysis of the extraterritoriality question and thus provide no persuasive arguments for accepting the extraterritorial application of the ATS.”<sup>49</sup>

Three days after *Doe*, the Seventh Circuit came out the same way. It devoted only a few sentences to the extraterritoriality issue, and instead of considering the statute itself, it relied entirely on earlier courts’ entertaining such suits, and *Sosa*’s failure to question the practice.<sup>50</sup> Later that year, an en banc Ninth Circuit agreed, again relying primarily on the numerous extraterritorial applications of the statute up to and including the D.C. Circuit’s *Doe* decision.<sup>51</sup> Like the D.C. Circuit, it noted the statute’s “foreign” subject matter, its jurisdictional nature,<sup>52</sup> and the piracy anomaly. A strong dissent joined by three judges emphasized *Morrison*.<sup>53</sup>

Just a few months after the *Doe* and *Rio Tinto* decisions, the Supreme Court raised the ATS issue itself during oral argument in *Kiobel*. The issue

46 *Exxon Mobil*, 654 F.3d at 20–22.

47 *Id.* at 26.

48 *Id.* at 74 n.3 (Kavanaugh, J., dissenting).

49 *Id.*

50 *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011) (Posner, J.). The court also argued that the ATS would be “superfluous” without extraterritorial effect, as there were ample alternative remedies for the relevant conduct under U.S. municipal law. *Id.* Of course, this does not mean the statute would have been irrelevant if applied territorially in 1790.

51 See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744–45 (9th Cir. 2011) (en banc) (“[T]he seminal and most widely respected applications of the statute relate to conduct that took place outside the United States.”), *vacated*, 133 S. Ct. 1995 (2013). The en banc court also suggested that it had already decided the “same issue” in *Trajano v. Marcos (In re Estate of Marcos)*, 978 F.2d 493, 499–501 (9th Cir. 1992). *Sarei*, 671 F.3d at 749. Yet while *Marcos* did discuss extraterritoriality and the lack of a U.S. nexus, it was in the context of the plaintiff’s argument that there was no Article III subject matter jurisdiction for such suits. The plaintiff essentially argued that this was a pure alienage suit; the Ninth Circuit, however, ruled that it “arose under” federal law because of the incorporation of customary international law into federal common law. *Marcos*, 978 F.2d at 501–03. The court never considered whether the statute could be construed to apply extraterritorially even if it would be constitutional to do so.

52 *Sarei*, 671 F.3d at 745–47.

53 See *id.* at 799 (Kleinfeld, J., dissenting).

was absent from the *Kiobel* litigation until oral argument at the Supreme Court,<sup>54</sup> despite a whopping thirty-six submissions from the Court's friends.<sup>55</sup> Thus, the Supreme Court greatly curtailed decades of litigation based on an issue on which there was no circuit split and no significant academic critique, and that had not even been raised by the parties. This is quite extraordinary for Supreme Court practice.

### C. *Why Scholars Missed the Presumption*

Obviously, one cannot know why scholars ignored the presumption. Any explanation for academic trends would have to delve somewhat into collective psychology; explaining the absence of a trend is even harder. Still the question calls for examination—even the courts have speculated about it.

One obvious reason is the academic enthusiasm for *Filartiga* and its progeny. A large sector of academia was evidently delighted by the opportunities for numerous judicial decisions expounding, and perhaps expanding, international law.<sup>56</sup> Thus, scholarship in the first seventeen years after *Filartiga* was celebratory in tone and not looking for implicit limitations on the branch of litigation that is seen as having significant normative value. Yet the phenomenon cannot be attributed purely to ideological blinders. Goldsmith and Bradley's 1997 article inspired a "backlash" against the ATS by a number of serious international law and foreign relations scholars.<sup>57</sup> These scholars could have been expected to latch on to such issues, but did not, suggesting it was part of a broader, value-neutral oversight.

The scholarly literature on both sides was characterized by complex and arcane historical arguments, or far-flung tours through international conventions and tribunals. This is not surprising for a discussion of a statute that slumbered for centuries. All of this may be somewhat "foreign" or uncomfortable terrain for many Justices. Yet the presumption is a standard judicial instrument, found in the judicial toolbox alongside numerous other conventions of statutory interpretation. To put it differently, the presumption was the least "fancy" answer to the ATS litigation suggested by conservative critics.

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54 See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 n.10 (2d Cir. 2010) ("We decline to address several other lurking questions, including whether the ATS applies 'extraterritorially . . . .'", *aff'd on other grounds*, 133 S. Ct. 1659 (2013).

55 Even the amicus brief by Prof. Jack Goldsmith on behalf of several corporations, which was cited by the Justices during oral argument, did not deal with the presumption against extraterritoriality. Rather, it argued that the extraterritorial application of civil liability in such cases was not countenanced by international law. See Brief of Chevron Corp. et al. as Amici Curiae in Support of Respondents at 2, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

56 See *Ku*, *supra* note 18, at 357 ("Indeed, a survey of legal literature at the time suggests that the decision was welcomed as identifying the long-missing entry point for international law and human-rights norms into the U.S. legal system."); see, e.g., Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

57 See, e.g., Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 377-80 (1997).

It did not require making any rulings about the nature of customary international law, post-*Erie* common law, or the Constitution.

Alternatively, one might speculate that it was the Supreme Court's decision in *Morrison* that reinvigorated or strengthened the presumption, or at least drew new attention to it.<sup>58</sup> *Morrison* could also suggest that the Court now took the presumption more seriously, and arguments based on the presumption would enjoy a more favorable hearing. The Securities and Exchange Act has also been on the books for quite a while, but only had its extraterritorial effect determined in *Morrison*.<sup>59</sup> Certainly the timing of *Kiobel*, shortly after *Morrison*, might suggest a new salience for the presumption that perhaps it did not previously obtain. The unanimous vote on the outcome in *Kiobel* lines up squarely with the unanimity of *Morrison*, with a few liberal Justices concurring but suggesting more expansive tests.<sup>60</sup>

Yet this explanation can also only go so far. For *Morrison* did not invent the presumption against extraterritoriality, it only reemphasized and aggressively applied<sup>61</sup> principles that had been articulated two decades earlier in *EEOC v. Arabian American Oil (Aramco)*.<sup>62</sup> Yet *Aramco* did not prompt any examination of the relevance of the presumption to the newly booming human rights litigation under the ATS.<sup>63</sup>

The Second Circuit in *Kiobel* seemed to acknowledge the oddity of the extraterritoriality issue not being addressed after three decades of litigation. It attributed the existence of such basic “unresolved [jurisprudential] issues lurking” in ATS cases to the paucity of appellate decisions, which it in turn attributed to settlements by defendants.<sup>64</sup> The empirical basis of that theory is shaky; of the 155 ATS cases filed against corporations in federal courts, seventeen have settled.<sup>65</sup> Even if true, this does not explain why scholars had

58 See Colangelo, *supra* note 7, at 1079–80 (observing that *Morrison* strengthens claims that the ATS should not apply extraterritorially).

59 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) (“[D]isregard of the presumption against extraterritoriality . . . has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act . . .”).

60 See *id.* at 2888.

61 See *id.* at 2883–85 (applying *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1990)).

62 499 U.S. at 246 (applying presumption of extraterritoriality to Title VII of the Civil Rights Act of 1964).

63 See Dodge, *supra* note 32, at 1587.

64 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013). Furthermore, numerous other cases are dismissed by district courts on various procedural grounds such as immunity.

65 Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 713 (2012). To be sure, some of these settlements were in high-profile cases. See, e.g., Bloomberg News, *Unocal Settles Rights Suits in Myanmar*, N.Y. TIMES (Dec. 14, 2004), <http://www.nytimes.com/2004/12/14/business/14unocal.html>. And there are likely more settlements arrived at early on, or that have otherwise not been publicized. However, it does not appear that there was a lack of cases for developing ATS principles.

not taken a greater interest, and the volume of writing on the ATS always far outpaced litigation.

The Second Circuit's claim can, however, be developed somewhat. In the first "wave" of ATS litigation, defendants were typically private individuals or sovereign actors with immunity.<sup>66</sup> The former often simply failed to defend and had default judgments entered against them. In neither case would arguments about the presumption arise. More sophisticated defenses were only mounted—and more cases filed—during the "second wave" of ATS suits in the mid-90s, aimed at large corporations.<sup>67</sup>

While scholarly bias, the lower salience of the presumption before *Morrison*, and the relatively low volume of filings all help explain the disconnect between what academia and what the Court thought dispositive, certainly path dependence and settled assumptions come in to play as well. The first ATS cases neglected to consider the applicability of the presumption, and the early celebratory academic work also said nothing about it. These early cases and writings created an aura of "settledness" around the question, though it had never actually been examined. Courts came to justify their non-application of the presumption by referring to their prior, *sub silentio* actions.<sup>68</sup> This may well account for scholarly approaches also, with the scholars accepting the assumptions of earlier cases. This is not meant as a strong criticism. Legal scholarship is awkwardly both positive and normative, with the line between the two blurry. Existing practice becomes its own justification through the elision of is and ought—in law such elision is not without legitimacy. It could only help that the results of the early decisions trajectory accorded with a desire among prominent international law scholars to have a mechanism for the "internalization" of international norms, but this factor may not have been necessary.<sup>69</sup>

## II. THE GLOBAL DECLINE OF UNIVERSAL JURISDICTION

While the Court's direction in *Kiobel* may have been difficult to predict on the background of lower courts' ATS practice, it fits well with a broader global phenomenon of retrenchment from UJ. *Kiobel* is part of a turning against UJ by nations that had enthusiastically embraced it in the 1990s.

The past decade has witnessed several kinds of retrenchment from UJ. Perhaps the first sign came in several opinions in the International Court of Justice's *Belgium v. Congo* case, which observed that despite the vast academic

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66 See Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 108 (2005).

67 *Id.* at 109.

68 See *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011) ("Courts have been applying the statute extraterritorially (and not just to violations at sea) since the beginning . . .").

69 Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1999) (describing how ATS cases create a forum for development and elaboration of incipient international law norms); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646–55, 665–66 (1998).

proselytizing for UJ, “there is no established practice” for “pure universal jurisdiction,” without any link to the forum.<sup>70</sup> Since then, the number of UJ cases has remained extremely low and is probably declining as a ratio of possible cases. Thus the overall use of UJ appears to be flagging. Second, some of the nations that had been at the forefront of UJ revised their statutes to substantially limit its exercise. Third, numerous countries began to clearly express *opinio juris* largely or totally denying the permissibility of UJ in international law. Finally, the few cases where UJ is exercised fit an increasingly defined pattern, involving defendants who had voluntarily taken up residence in the forum state. Several thorough scholarly studies have called attention to the decline of UJ.<sup>71</sup> *Kiobel* follows and adds (perhaps not self-consciously) to this global trend. Interestingly, it did so in spite of a scholars amicus brief that suggested a broader global acceptance of UJ than actually exists.<sup>72</sup>

Actual exercises of UJ have always been quite rare. While the ATS was always notable as the only civil use of UJ in the world,<sup>73</sup> criminal cases are also few and far between. A comprehensive study by Maximo Langer has found that only thirty-two such cases have gone to trial since World War II.<sup>74</sup> Three-quarters of these involved defendants from three particular conflicts

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70 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 76 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

71 See Noora Arajärvi, *Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?*, 16 TILBURG L. REV. 5, 9 (2011); Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 4 (2011); Luc Reydam, *The Rise and Fall of Universal Jurisdiction*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337, 337–54 (William A. Schabas & Nadia Bernaz eds., 2011).

72 See Supplemental Brief of Yale Law Sch. Ctr. for Global Legal Challenges as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491). The brief focused mostly on laws that would on their face permit UJ, without noting the overwhelming disuse of such laws, and their frequent amendment in the face of actual use. See *id.* at 28–35. The supplemental brief only identified two civil cases around the world implementing the principles, and only one of these cases was actually a foreign-cubed case. See *id.* at 36–38.

73 See Menno T. Kamminga, *Universal Civil Jurisdiction: Is It Legal? Is It Desirable?*, 99 AM. SOC'Y INT'L L. PROC. 123, 124 (2005). Ironically, shortly after reargument in *Kiobel*, a Dutch court awarded that country's first civil UJ judgment to a Palestinian doctor for torture in Libya. See *Dutch Court Compensates Palestinian for Libya Jail*, BBC NEWS (March 28, 2012, 8:09 PM), <http://www.bbc.co.uk/news/world-middle-east-17537597>. Thus after *Kiobel*, the number of nations engaged in the civil UJ enterprise remains one. Even more ironically, Holland filed an amicus brief in *Kiobel*, a case against a Dutch company, criticizing the propriety of UJ in such cases. This fits the broader pattern of nations approving of UJ when someone else's ox is gored. See Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 31, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 405480, at \*31 (“[T]he lower courts have both asserted jurisdiction with regard to a wider category of such [international law] violations [than is proper], and in relation to facts in which a ‘sufficiently close connection’ to the U.S. is entirely absent.”).

74 See Langer, *supra* note 71, at 7–9.

that had been made the subject of extraordinary international tribunals (Rwandans, Yugoslavs, and Nazis). Moreover, as a proportion of cases that qualify for UJ prosecution, the enforcement rate approaches zero.<sup>75</sup>

Of course, a major practical limitation for criminal UJ is obtaining custody over the world's war criminals and *genocidaires*, at least for nations that do not allow for trials *in absentia*. Even given this limitation, the exercise of UJ is extremely rare. For example, the British Home Office is aware of nearly 700 to 800 suspected war criminals residing in Britain—over 100 applied for asylum in 2012 alone.<sup>76</sup> Yet, rather than prosecuting these individuals, the government at most seeks to return those against whom there is already credible evidence to their home countries. Indeed, while Britain provided a massive publicity boost for UJ in the *Pinochet* case (which itself did not directly raise universality issues),<sup>77</sup> it has only universally prosecuted two defendants—an Afghan paramilitary officer and a Nepalese colonel, both for torture.<sup>78</sup> Both defendants resided in Britain and had committed their crimes under a defunct regime that did not object to their prosecution.

Several states that had been relatively active in pursuing high-profile UJ cases have severely curtailed the future scope of such action through legislative reforms and judicial decisions. In a series of statutory amendments culminating in 2003, Belgium effectively gutted the universal reach of its once ambitious law that had seen cases brought against Israeli Prime Minister Ariel Sharon, as well as President George W. Bush, General Tommy Franks, and others over alleged war crimes in Iraq.<sup>79</sup> Spain, perhaps Europe's leading forum for UJ investigations, substantially revised its laws in 2009 to abolish universality by requiring some nexus with Spain,<sup>80</sup> and in 2014 introduced legislation to restrict it further still.<sup>81</sup> France changed its UJ law to greatly restrict the potential causes of action, require the defendant to reside in

75 See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 436 (2010).

76 See Tom Bateman, *Nearly 100 War Crimes Suspects' in UK Last Year*, BBC NEWS (July 30, 2013, 5:17 AM), <http://www.bbc.co.uk/news/uk-23495314>.

77 *R. v. Bartle, ex parte Pinochet* (No. 3), [1999] UKHL 17, [2000] 1 A.C. (H.L.) 147 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld1998/99/ldjudgmt/jd990324/pino1.htm>. The Lords in the *Pinochet* case entertained an extensive discussion of the universality principle as it related to the grounds for extradition. However, the actual charges against Pinochet all involved extraterritorial crimes against Spanish nationals, making it an exercise of the passive personality principle.

78 See *UK Exercises Universal Jurisdiction to Prosecute Nepalese Colonel for Torture*, INT'L JUST. RES. CTR. (Jan. 9, 2013), <http://www.ijrcenter.org/2013/01/09/uk-exercises-universal-jurisdiction-to-prosecute-nepalese-colonel-for-torture>.

79 See Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888–89 (2003).

80 See Arajärvi, *supra* note 71, at 18.

81 Matt Moffett, *Spain's Lower House Approves Law to Limit Judges' Reach*, WALL ST. J. (Feb. 11, 2014, 4:20 PM), <http://online.wsj.com/news/articles/SB10001424052702304558804579376842263831908> (reporting on passage of bill by lower house that would require that extraterritorial torture plaintiffs be Spanish citizens at the time of the event, and that in other cases, foreign defendants must reside, rather than merely be present in Spain).

France, and eliminate privately initiated proceedings.<sup>82</sup> Most recently, Britain in 2011 tightened its laws by limiting the ability of private parties to initiate criminal complaints, which had been the primary vehicle for UJ cases.<sup>83</sup> In what appears to be a global trend, other prominent Western nations have also begun to discuss limiting their broad UJ statutes.<sup>84</sup>

Finally, some nations have begun to suggest that UJ may not even be a genuine established norm of international law. The U.N. General Assembly (GA) has over the past several years conducted an extensive inquiry into “[t]he scope and application of the principle of universal jurisdiction.”<sup>85</sup> In the process, several states, including China, rejected the existence of universality beyond piracy,<sup>86</sup> while others suggested it was still an “incipient” but not full-fledged norm.<sup>87</sup> On the whole, the international consensus about UJ seems to fall short of the well-settled norms described by many publicists. According to the United Nations:

With respect to the scope of universal jurisdiction, delegations expressed divergent opinions. Some delegations emphasized that there *was no clarity or consensus on the scope of crimes covered by the principle beyond piracy . . .* The view was also expressed that the material scope of universal jurisdiction was in fact under constant development and it was questioned, whether it was advisable to reach a consensus on a list of crimes. Some delegations cautioned against any unwarranted expansion of the crimes covered under universal jurisdiction.<sup>88</sup>

In a meeting the subsequent year, GA delegates expressed further wide-ranging concerns about UJ. African representatives criticized the doctrine broadly, while the Spanish delegate observed “there was no common understanding of the circumstances and conditions of its application.”<sup>89</sup>

The practice of other nations also reveals structural problems with the ATS’s “implied” universality. Universal jurisdiction can take many different forms, from “pure” universality to more limited versions that require some

82 See Langer, *supra* note 71, at 25.

83 See *Recent Legislation: International Law—Universal Jurisdiction—United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes.—Police Reform and Social Responsibility Act, 2011, c. 13 (U.K.)*, 125 HARV. L. REV. 1554, 1554 (2012) (noting the law is “the latest in a trend of states’ . . . tightening universal jurisdiction legislation”).

84 See Arajärvi, *supra* note 71, at 18.

85 U.N. GAOR, 66th Sess., 12th mtg. at 2, U.N. Doc. A/C.6/66/SR.12 (Oct. 12, 2011).

86 See *Statement by Ms. Zhou Lulu at the Sixth Committee of the 65th Session of the UN General Assembly on Scope and Application of the Principle of Universal Jurisdiction*, PERMANENT MISSION CHINA TO UN (Oct. 18, 2010), [www.china-un.org/eng/hyyfy/t762543.htm](http://www.china-un.org/eng/hyyfy/t762543.htm).

87 *Sixty-Fifth Session: The Scope and Application of the Principle of Universal Jurisdiction (Agenda Item 86)*, GEN. ASSEMBLY UNITED NATIONS, <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml> (last visited Mar. 11, 2014) [hereinafter *Agenda Item 86*]; see also U.N. GAOR, *supra* note 85, at 2–4 (documenting the response of Iran, Qatar, and Egypt).

88 *Agenda Item 86, supra* note 87 (emphasis added).

89 Press Release, Gen. Assembly, Principle of ‘Universal Jurisdiction’ Again Divides Assembly’s Legal Committee, Delegates; Further Guidance Sought from International Law Commission, U.N. Press Release GA/L/3415 (Oct. 12, 2011), available at <http://www.un.org/News/Press/docs/2011/gal3415.doc.htm>.



substantial nexus between the crime and the forum.<sup>90</sup> At a minimum, there may already be an international consensus that UJ requires that the defendant have become a resident in the forum.<sup>91</sup> Such cases dominate the few non-piracy UJ trials since World War II.

When the defendant resides in the forum, UJ becomes more of a substitute for extradition or deportation than a tool against impunity. Aside from pure reciprocity, one reason nations extradite suspected foreign criminals is to avoid becoming a haven for foreign law-breakers.<sup>92</sup> The gravity of UJ crimes may make nations particularly desirous of keeping their perpetrators out. However, because of the nature of the crimes, the *non-refoulement* doctrine may frustrate extradition, either because the defendant would be unlikely to get a remotely fair trial, or because conditions in the home country are otherwise bad enough. These considerations are not present in most ATS cases, which have almost always involved defendants abroad (though with some contacts to the United States). While *Filartiga* fit the global paradigm perfectly—the defendant had taken up U.S. residency—however, most subsequent ATS cases departed widely from the *Filartiga* model by allowing “pure” UJ.

The growing trend of hostility to and retrenchment from UJ has relevance to the presumption against extraterritoriality in *Kiobel*. (It is also relevant to the substantive question of whether UJ would exist for particular ATS causes of action, and whether applications of the statute violate the *Charming Betsy* canon.) The international trend creates a context where one cannot easily read a statute silent on the subject as broadly asserting UJ.<sup>93</sup> To put it differently, the *Kiobel* plaintiffs had argued that UJ can be assumed for ATS causes of action because they are sound in international law, and international law authorizes UJ. But recent experience shows that: i) the extent of this authorization is hotly debated among states, and moreover, ii) states are not interested in exercising UJ up to the international law maximum. Thus recent legislation either eliminated or greatly restricted UJ in states that had previously been at the forefront of transnational justice.

The presumption against extraterritoriality is a default rule about congressional intent. As applied to the ATS, however, it is in no way a reconstruction of the intent of the 1791 drafters, because of the numerous intervening developments that make their “intent” in this matter entirely notional—the abolition of federal common law in *Erie*, the rise of international human rights law, and the expansion of UJ to conduct in foreign countries. Thus, perhaps the actions of other Western legislatures can serve as a closer proxy for congressional intent.

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90 See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 42 (Feb. 14) (separate opinion of President Guillaume) (finding no support in international law for universal jurisdiction where the offender is not present in the jurisdiction).

91 See Arajärvi, *supra* note 71, at 15–20; Langer, *supra* note 71, at 25.

92 See IVAN ANTHONY SHEARER, EXTRADITION IN INTERNATIONAL LAW 12, 19–20 (1971).

93 Of course, current developments have no bearing on the original intent of the ATS’s enactors. But it becomes relevant given the lack of direct evidence of such intent.

### III. A PRESUMPTION AGAINST UNIVERSALITY, NOT MERE EXTRATERRITORIALITY

*Kiobel's* extraterritoriality ruling has been criticized as not fitting the typical parameters of the presumption, which many see as inapplicable to jurisdictional statutes.<sup>94</sup> In this view, the case was not about anti-extraterritoriality, but about something else. If so, it is no surprise the presumption had been absent from prior academic debates: *Kiobel* in this view just got things badly wrong, and the professors had it right. As this Part will show, there is a another way of understanding *Kiobel* that does not reject the Court's approach, but makes sense of some of its tensions with typical applications of extraterritoriality presumption.

This Part argues that the ATS foreign-cubed cases involve a rule of construction that could more productively be described as a cousin of the extraterritoriality presumption—a presumption against universality. This presumption, based on Congress's actual legislative practice, assumes that Congress does not intend to authorize UJ unless it explicitly says so, even for causes of action where international law would allow it.<sup>95</sup> Section A discusses and distinguishes between the extraterritoriality presumption and the rarer universality presumption. Section B comprehensively surveys the statutes under which UJ has been found to exist. It finds that: i) Congress has never authorized UJ without a clear statement; ii) authorizations come in a variety of shapes and sizes, but are generally narrower than “pure” UJ of the kind exercised in ATS cases; and iii) the existence of UJ under international law is neither necessary nor sufficient for its availability under a statute, even one that purports to reflect international law. Thus when a statute is silent on the matter, the availability of UJ in international law does not demonstrate its availability under the statute.

#### A. *Did Kiobel Really Apply the Extraterritoriality Presumption?*

Professor Anthony Colangelo has argued that the presumption has thus far only applied to substantive, not jurisdictional statutes.<sup>96</sup> But the ATS as explicated in *Sosa* is not a garden-variety jurisdictional statute; rather, it is at once both jurisdictional and substantive in that it authorizes the creation of

94 See William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35, 44–46 (2010).

95 Thus the “universality canon” is the opposite of the proposed “extrajurisdictionality canon” that would interpret such statutes as applying to the maximum level of universality permitted by international law. See Colangelo, *supra* note 7, at 1023 (“[W]hen Congress enacts a statute silent on geographic scope designed to implement international substantive law, courts should construe that statute in line with international jurisdictional law, including attendant principles of extraterritorial jurisdiction.”). See generally John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351 (2010) (proposing presumption against extrajurisdictionality to define geographic scope of U.S. law).

96 See Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329, 1331 & n.8 (2013).

federal common law.<sup>97</sup> Moreover, the applicability of the presumption to jurisdictional norms that “incorporate by reference” substantive law, like the ATS, remains the subject of a circuit split.<sup>98</sup> Relatedly, scholars have argued that the point of the presumption against extraterritoriality is to avoid subjecting extraterritorial actors to conflicting regulatory regimes.<sup>99</sup> Yet if the rule of decision comes from CIL, there can be no conflict. (Of course, as a practical matter, the application of CIL from one nation to another could vary as much as the general common law of the pre-*Erie* era.) But conflict and foreign relations implications are only one set of reasons for the presumption;<sup>100</sup> another is a more empirical and psychological assumption that extraterritoriality is simply not what Congress intends, without a clear statement, because it typically is not interested in regulating such conduct, and because many general words could sweep in such cases inadvertently.<sup>101</sup> Thus the Court has held the presumption applies to Antarctica, where there is no possible conflict with foreign law.<sup>102</sup>

More evidence of the misfit between *Kiobel* and the presumption comes in its treatment of piracy, which the Court assumes falls within the ATS despite, by definition, occurring on the high seas. The presumption typically excludes high seas cases (though there is no reason in principle that one cannot have a more reticulated or segmented presumption). The Court

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97 See generally Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004) (discussing piracy and the historical test of *Sosa*). Such quasi-substantive, quasi-jurisdictional statutes are uncommon. See, e.g., Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.); Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 456–57 (1957) (describing the substantive dimension of the Taft-Hartley Act).

98 Compare United States v. Gatlin, 216 F.3d 207, 212 & n.6 (2d Cir. 2000) (holding that presumption against extraterritoriality applied to statute defining “special maritime and territorial jurisdiction of the United States” because while that statute “is the immediate focus of our inquiry, the ultimate question here is whether a criminal statute—*i.e.*, 18 U.S.C. § 2243(a)—applies extraterritorially”) (internal quotation marks omitted), with United States v. Corey, 232 F.3d 1166, 1176 & n.5 (9th Cir. 2000) (holding presumption did not apply because there was no risk of conflict with foreign countries).

99 See generally Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT’L L. 65, 66 (2013) (“The presumption has traditionally applied only to exercises of U.S. jurisdiction to prescribe conduct-regulating rules over persons or things abroad.”); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 18 BERKLEY J. INT’L L. 85, 115–17 (1998) (identifying avoidance of conflicts with foreign law as a possible reason for the presumption against extraterritoriality).

100 To be sure, these were the policies stressed by the Court in *Kiobel*. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013).

101 See *id.* at 1665 (noting that the words “any civil action” rarely take on a literal meaning) (internal quotation marks omitted).

102 See *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (stating that the presumption is based not only in conflict-avoidance, but rather “is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind”).

seemed to acknowledge this awkward fit by saying piracy is *sui generis*.<sup>103</sup> Finally, this application of the presumption does not account for the famous nineteenth-century Attorney General opinion that suggested an extraterritorial application, though this does not seem like a fatal flaw.

All these objections about *Kiobel*'s use of the presumption fall away if the case is understood as involving a narrower version of the presumption. The presumption *Kiobel* used is a *presumption against universality*, a subspecies of extraterritoriality. To be sure, the Court called it by the same name, which is not surprising, as the extraterritoriality presumption is much more commonly used. Yet the anti-universality presumption serves related but distinct policy goals. If *Kiobel* is understood as involving an anti-universality presumption, it leaves room for the kind of ATS suits envisioned by the *Kiobel* concurrences that involve those actions of Americans abroad.<sup>104</sup>

Even the most controversial and aggressive uses of extraterritoriality typically involve the regulation of American-related conduct abroad.<sup>105</sup> The presumption against extraterritoriality screens out cases involving foreign conduct with a weak or incidental (but direct) relation to the United States, while admitting foreign conduct targeted at the United States.<sup>106</sup> There is always some conduct involving the United States in extraterritoriality cases—that is why the relevant statutes could be plausibly read as covering it. For example, *Morrison* involved a suit under the Securities and Exchange Act about the sale of securities abroad of a U.S. company engaged in fraudulent activity in the United States. The Court noted that the defendants committed their deceptions in the United States:

This is less an answer to the presumption against extraterritorial application than it is an assertion—a quite valid assertion—that that presumption here (as often) is not self-evidently dispositive, but its application requires further analysis. For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.<sup>107</sup>

Yet the line of ATS cases from *Filartiga* to *Kiobel* is unusual in that these cases involve conduct with no particular effects in the United States whatsoever. These are suits by foreigners against foreigners for conduct that took place entirely abroad and has no particular effect on the United States. Indeed, in the lower courts, the issue came to be known as “foreign-cubed”

103 See *Kiobel*, 133 S. Ct. at 1667 (“[P]irates may well be a category unto themselves.”).

104 See Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1780–83 (2014).

105 See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (applying the Sherman Antitrust Act to foreign conduct with expected domestic effects).

106 See, e.g., *United States v. Hijazi*, 845 F. Supp. 2d 874, 902 (C.D. Ill. 2011) (holding presumption against extraterritoriality lifted when “the conduct proscribed causes or is likely [the] cause [of] significant injury to the U.S.”).

107 *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

suits (foreign plaintiffs, defendants, and locus),<sup>108</sup> not merely extraterritorial ones. Even assuming the relevant exercise of UJ is consistent with international law, Congress does not typically extend its laws that far. The policies behind the presumption are related to the extraterritorial one. First, there is an empirical fact, discussed below, that Congress does not generally go to the international law maximum of UJ even in statutes that explicitly provide for some universality. Thus finding pure UJ by implication would be unwarranted. Second, a parochial prioritization of more direct U.S. interests would caution against sweeping into federal courts cases with no U.S. nexus.<sup>109</sup> The extreme rarity of legislation with a plausibly universal scope also provides a reason for the anti-universality presumption: Congress allows universality so infrequently that it makes more sense to require it to clearly say so on those occasions than for courts to repeatedly consider the possible universal application of numerous statutes through lawsuits.

### B. *Congress Does Not Extend Universality to the International Law Maximum*

#### 1. John Marshall and the Early Republic

The anti-universality presumption is not a modern creation. Indeed, it is at least as old as the presumption against extraterritoriality, if not older.<sup>110</sup> From the founding of the nation until after World War II, piracy was the only UJ offense in international law. In *United States v. Palmer*, Chief Justice Marshall read a statute passed by the First Congress criminalizing “piracy” by “any person” as requiring a U.S. nexus, even though it was clear that Congress *could* apply the statute universally.<sup>111</sup> Marshall saw this as involving principles of construction: “no general words of a statute ought to be construed to embrace [crimes] when committed by foreigners against a foreign govern-

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108 See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 794 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part), *vacated*, 133 S. Ct. 1995 (2013). Ironically, the foreign-cubed term comes from an extraterritoriality case. See *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008) (describing the first “‘foreign-cubed’” securities class action to reach the Second Circuit), *aff’d*, 130 S. Ct. 2884.

109 Thus the executive in 1823 chose to narrowly interpret authority under a piracy statute that specifically invoked the law of nations because

[a]dmitting the act might be extended this far, *it does not appear to have been the general object of the law*; and it is thought by the President most advisable, at present, not to give it a like indiscriminate practical construction as to all vessels.

The great object [of the statute], . . . was to protect the merchant vessels of the United States and their crews from piratical aggressions.

Smith Thompson, *Copy of General Instructions, for Officers Commanding Cruising Vessels*, in 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 211, 211 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860) (emphasis added).

110 See Dodge, *supra* note 99, at 85 n.2 (citing anti-universality cases as the first examples of “extraterritoriality” presumption).

111 See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630–33 (1818).

ment.”<sup>112</sup> Congress is generally understood as only legislating to protect concrete American interests, “not offences against the human race.”<sup>113</sup>

To be sure, Congress quickly overrode the *Palmer* construction, at least partially.<sup>114</sup> Chief Justice Marshall certainly knew that piracy could be punished universally. His insistence on reading the statute narrowly suggests that universality is both rare and extraordinary enough to require a clear statement. Congress’s reaction also underscores the ability of Congress to correct judicial errors in the application of an anti-universality presumption.

## 2. Contemporary Statutes Are Always Explicit About Universal Jurisdiction

The validity of an anti-universality presumption is strengthened by the fact that even for the very few activities where international law clearly authorizes UJ, Congress has either conspicuously excluded it or specifically and clearly authorized UJ. When Congress legislates about crimes that are universally cognizable in international law, it does not assume that the very subject matter rebuts the anti-universality presumption; rather, it requires an express statement. That legislative statement also specifies the precise contours and scope of UJ under the statute, whether it applies criminally and civilly, and includes other important narrowing details. Moreover, Congress has applied UJ even where not authorized by international law and has not applied it where it is authorized. Thus the law of nations appears to be no guide in interpreting the universal application of federal legislation.

Genocide is the paradigmatic modern UJ crime in CIL. Yet the 1988 Proxmire Act criminalizes it only when “the offense is committed within the United States” or where “the alleged offender is a national of the United States.”<sup>115</sup> Only after further consideration, and an explicit discussion of UJ, did Congress pass the Genocide Accountability Act,<sup>116</sup> which extended UJ to foreign conduct by non-Americans, provided that they would subsequently be present in the United States.<sup>117</sup> Similarly, though torture is by treaty a UJ crime, the criminal statute implementing the Torture Convention expressly applies “outside the United States” and “irrespective of the nationality of the victim or the alleged offender.”<sup>118</sup> On the other hand, the statute criminaliz-

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112 *Id.* at 632–33.

113 *Id.* at 631. See generally Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. REV. 149, 185 (2009) (discussing Chief Justice Marshall’s conclusion in *Palmer* that Congress could not have put “offences against the human race” under the Act) (internal quotation marks omitted).

114 See Kontorovich, *supra* note 113, at 189.

115 Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045, 3046 (1988) (codified as amended at 18 U.S.C. § 1091(d)(1)–(2) (2006)).

116 Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (codified as amended at 18 U.S.C. § 1091 (2006 & Supp. IV 2010)).

117 See 18 U.S.C. § 1091(e)(2)(B)–(D).

118 18 U.S.C. § 2340A(a), (b)(2) (2006); see also Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2006)) (providing universal civil remedy for torture). Here, as with the genocide statute, the legislative history explicitly embraced universality. See S. REP. NO. 102-249, at 3 (1991).

ing another universal offense, war crimes, explicitly excludes UJ,<sup>119</sup> but allows for extraterritoriality.<sup>120</sup> Other statutes implementing treaty-based UJ also clearly provide for such jurisdiction.<sup>121</sup>

These examples show that for the UJ crimes that Congress has legislated about in modern times, Congress has either: i) explicitly excluded UJ; ii) explicitly included it subject to particular limitations;<sup>122</sup> iii) excluded it and then specifically added it. Thus statutes dealing with international offenses cannot be assumed to have universal scope unless Congress has expressly provided for it. There is simply no precedent—outside the ATS—for implicit universality, and a great deal against it. Moreover, in the few cases where Congress does create UJ, it does so in a limited form. Implying blanket UJ into a silent statute goes against the evidence of congressional practice, even when such UJ would be authorized by international law. Finally, the parallel practice of other nations, discussed in Part II above, shows that the maximal exercise of UJ cannot be assumed from statutes that do not provide for it.

### 3. Universal Application Cannot Be Assumed from International Law

Congress's assertions of UJ have little to do with whether international law permits it. We have seen Congress has failed to extend UJ in cases where international law would authorize it (war crimes, genocide, and piracy for a while). But it has also done the opposite—authorizing UJ where international law does not. For example, the Maritime Drug Law Enforcement Act extends U.S. narcotics laws to foreign vessels on the high seas, without any U.S. nexus required.<sup>123</sup> Here Congress plainly stated its intention for univer-

119 See 18 U.S.C. § 2441(b) (2006) (limiting application of war crimes statute to situations where offender or victim is U.S. national or service member).

120 See *id.* § 2441(a) (applying statute “inside or outside the United States”).

121 See *id.* § 2280(b)(1)(C) (authorizing jurisdiction over violence against maritime navigation on the high seas when “the offender is later found in the United States after such activity is committed”); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), Mar. 10, 1988, 1678 U.N.T.S. 201; see also 18 U.S.C. § 32(b)(3) (criminalizing the placing of an object on an aircraft which may damage it); *id.* § 1203(b)(1)(B) (extending jurisdiction solely on the basis of subsequent U.S. presence of suspect, pursuant to the International Convention Against the Taking of Hostages); 49 U.S.C. § 46502(b) (implementing the Convention for the Suppression of Unlawful Seizure of Aircraft); *United States v. Rezaq*, 134 F.3d 1121, 1131–32 (D.C. Cir. 1998) (finding that Congress specifically intended to create universal jurisdiction over hijacking); Eugene Kontorovich, *International Decisions: United States v. Shi*, 103 AM. J. INT'L L. 734, 738–39 (2009) (discussing first and only universal jurisdiction application of the SUA statute).

122 In another example, the Trafficking in Persons Accountability Act of 2008, which passed the Senate but not the House, allows for “extra-territorial jurisdiction” over conduct committed by persons present in the United States, but also provides a carve-out for cases involving proceedings in other countries. See S. 1703, 110th Cong. § 2 (2008).

123 46 U.S.C. § 70502(c)(1) (2006). The statute makes clear it applies to foreign ships outside the United States, and also specifically reaffirms its “extension beyond territorial jurisdiction,” as well as the irrelevance of international law that might limit such universality. *Id.* §§ 70503(b), 70505.

sal application.<sup>124</sup> In recent years, a few new statutes have extended UJ to material support for terrorism<sup>125</sup> and recruiting child soldiers. Such statutes also make their universality quite explicit (and limited).<sup>126</sup> Moreover, some of these criminal statutes have civil analogs, with the same jurisdictional reach.<sup>127</sup> Yet neither drug trafficking, material support for terrorism, nor child soldiers are universally cognizable by the law of nations. These statutes, like the ones discussed in subsection B.2, above, demonstrate several things. First, UJ in statutes is expressed quite explicitly; Congress understands how extraordinary it is and thus spells it out. Second, UJ in statutes is not one-size-fits-all or “pure,” but rather some narrower, tailored form that at least requires the territorial presence of the defendant, consistent with the overwhelming weight of international practice. Third, civil UJ can be narrower than criminal, but there are no examples of the opposite being the case.

Finally, and most intriguingly, much statutory UJ applies to crimes that do not clearly have this status in international law. In these cases, the United States exercises UJ in violation of, or at least without license from, CIL. This weakens the argument that because the ATS mentions CIL, it should be read as authorizing UJ to the maximum extent permitted by CIL. For not only do statutes that explicitly address the matter refuse to go to the international law limit (e.g., genocide), they sometimes exercise UJ *despite* CIL. Either way, CIL does not appear to be a useful guide to the UJ intended by statutes.

#### CONCLUSION

The rejection of UJ suits under the ATS in *Kiobel* is a lesson in the agenda-shaping power of the Court and the Justice Department, and a humbling one for the numerous academics, including the present author, who had developed more elaborate accounts of the statute that were ultimately mooted. But aside from being a fascinating example of legal doctrine developing divorced from academia, it does show strong parallels with global trends in UJ. Many leading UJ countries have in recent years backed away

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124 See generally Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191 (2009) (discussing expanding jurisdiction over high seas and ultimately concluding that there is no clear Article I source in the absence of a U.S. nexus).

125 See, e.g., 18 U.S.C. § 2339B(a) (2006); see also Eugene Kontorovich, *The Offenses Clause & Universal Jurisdiction over Terrorists*, VOLOKH CONSPIRACY (Jan. 2, 2013), <http://www.volokh.com/2013/01/02/the-offenses-clause-universal-jurisdiction-over-terrorists> (discussing a prosecution under the statute).

126 See 18 U.S.C. § 2339B(d)(1)(C), (d)(2) (providing for extraterritorial jurisdiction and universal jurisdiction so long as “after the conduct . . . occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States”); see also *id.* § 2339B(b) (providing for civil penalty against financial institutions but not natural persons); *id.* § 2442(c)(3)–(4) (Supp. II 2008) (extending jurisdiction for criminalization of enlistment of child soldiers not within the United States when the “offender is present in the United States, irrespective of the nationality of the alleged offender”).

127 See 46 U.S.C. § 70506 (providing for civil penalty for maritime narcotics trafficking).



from the aggressive assertion of international law, and *Kiobel* represents another large step in that direction. Finally, *Kiobel* may best be understood as reading the statute to avoid universality, rather than mere extraterritoriality.