Kiobel v. Royal Dutch Petroleum Co.: Extraterritorial Jurisdiction Under the Alien Tort Statute

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Summary

The Alien Tort Statute (ATS) was originally drafted as part of the Judiciary Act of 1789 in order to provide foreign plaintiffs with a forum to remedy violations of customary international law. Now codified at 28 U.S.C. § 1350, the ATS states that "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." After being raised in only a handful of early cases, the ATS lay dormant for almost 200 years until a 1980 case, *Filartiga v. Pena-Irala*, signaled a new use for the statute as a vehicle for redressing human rights violations. Post-*Filartiga*, the ATS was used frequently for "foreign cubed" cases, which involve alien plaintiffs and defendants for torts committed on foreign soil. These cases first prompted debate that most recently has centered on the controversial question of whether corporate defendants can be held liable for aiding and abetting human rights violations under the ATS.

This was the question originally presented to the Supreme Court in the 2012 case, *Kiobel v. Royal Dutch Petroleum Co*. A foreign cubed case, *Kiobel* involved Nigerian plaintiffs suing for human rights violations aided and abetted by Royal Dutch Petroleum Co. (Royal Dutch) and Shell Transport and Trading Co. (Shell), incorporated in the Netherlands and United Kingdom, respectively. After the first round of oral arguments, the Court ordered rebriefing and reargument on a new issue: whether federal courts even have jurisdiction over cases occurring on foreign soil.

Asking whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a foreign sovereign, the Court held that the presumption against extraterritorial application applied to the ATS. Under *Morrison v. National Australia Bank*, the presumption against extraterritoriality provides that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." The presumption calls for judicial caution in hearing extraterritorial cases over which Congress has not expressly given the courts jurisdiction. The *Kiobel* court held that nothing in the text, history, or purpose of the ATS overcame the presumption.

The Court left a narrow opening for cases arising under the ATS that "touch and concern the territory of the United States" with "sufficient force" to overcome the presumption. Justice Kennedy's concurrence suggests that there could be an exception for cases involving "serious violations of international law principles," but the only example provided by the Court was that "mere corporate presence" is insufficient to rebut the presumption. Because the question of extraterritoriality was sufficient to resolve the case, the Court declined to address the question of corporate liability.

The decision in *Kiobel* could reduce the number of human rights cases successfully brought under the ATS. The "touch and concern" test leaves a small crack in the door for extraterritorial application, but the test is vague, and its contours unknown. While it appears the courts will proceed with caution, Congress is free to either explicitly give the courts extraterritorial jurisdiction, or clarify the limits of that jurisdiction at least in respect to human rights violations, as it did with the Torture Victim Protection Act (TVPA).

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Introduction

The Alien Tort Statute (ATS) states that "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."[1] Codified at 28 U.S.C. § 1350, the ATS is "a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world."[2] Created as part of the Judiciary Act of 1789, the ATS is an opaque statute initially intended to provide foreign nationals redress for violations of the law of nations. The statute lay dormant until 1980, when it was used by Paraguayan plaintiffs in a case involving the wrongful death of their son in Paraguay, at the hands of a Paraguayan official. This was the first of the ATS "foreign cubed" cases, in which a foreign plaintiff brings a suit against a foreign defendant for torts committed on foreign soil. Soon victims of human rights violations used the ATS as a vehicle for claims against foreign corporations that aided and abetted local foreign governments in committing human rights abuses. The debate soon focused on whether those corporations could be held responsible for committing those torts under the ATS.

In April 2013, the Supreme Court decided a long-awaited case, *Kiobel v. Royal Dutch Petroleum Co*.[3] In this case, Nigerian nationals sued Royal Dutch Petroleum Co. (Royal Dutch), a Dutch company, and Shell Transport and Trading (Shell), a British company, for aiding and abetting the Nigerian government in committing human rights violations. The case began when residents of the Ogoni Region of Nigeria began protesting the environmental effect of the companies' oil drilling in Ogoni. In response to these protests, the plaintiffs claimed that the oil companies enlisted the aid of the Nigerian militia, who went on to rape, beat, and kill Ogoni residents, and loot and destroy their property. Royal Dutch and Shell argued that the ATS does not extend liability to corporations, and the controversial question of corporate liability was argued before the Supreme Court. After oral arguments, the Court then requested supplementary briefs and arguments on a new inquiry that called into question the past 30 years of ATS jurisprudence: "whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a foreign sovereign."[4]

Applying a judicially created doctrine called the presumption against extraterritoriality, the Court held that because it was not the intent of Congress that the ATS apply to cases occurring abroad, *Kiobel* and similar foreign cubed cases are not justiciable in federal courts. The presumption acts to prevent courts from making foreign affairs and policy decisions that might best be left to its coordinate political branches. The *Kiobel* court held that nothing in the text, history, or purpose of the ATS rebutted the presumption, and unless Congress speaks to the jurisdiction of the courts over foreign cubed cases, judicial caution would be best. The Court left a door open for cases that "touch and concern the territory of the United States," but only if those cases do so with enough force to rebut the presumption.[5] The Court provided only one guidepost, that "mere corporate presence" in the United States is insufficient. The majority declined to comment on the question of corporate liability, resolving the case on the issue of extraterritorial jurisdiction.

[1] 28 U.S.C. § 1350.

[2] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010).

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

[4] *Id.* at 1669.

[5] *Id*. at 1660.

This report will briefly survey the historical background of the Alien Tort Statute. It will then look at the past 30 years of ATS case law, starting with *Filartiga* and tracing the question of corporate liability. Next, it will examine the decision in *Kiobel* and the arguments made by the majority and concurrences about the extraterritorial application of the ATS; the history, text, and purposes of the act; and the "touch and concern" test. Finally, it will survey the possible implications of the *Kiobel* decision on pending and future cases, and possible congressional responses to the Court's invocation of the presumption.

Background

Creation of the Alien Tort Statute

As a fledgling nation, the United States faced a number of difficulties in meeting its foreign relations obligations. One problem in particular was the inability of the Continental Congress to provide redress to foreign citizens for violations of the law of nations. Fearing the consequences wrought by lack of sufficient federal control over foreign affairs, in 1781 Congress implored the powerful state legislatures to "provide expeditious, exemplary and adequate punishment" for treaty infractions and violations of other international norms.[6] Unfortunately, as James Madison wrote in a letter to James Monroe, "Nothing seems to be more difficult under our new Governments than to impress upon the attention of our Legislatures a due sense of those duties which spring from our relations to foreign nations."[7] Thus, despite the pleas of Congress, the states' response was underwhelming,[8] and their reluctance to create provisions for violations of the law of nations soon created friction between the United States and other nations.

In 1784, the United States faced international criticism when the Secretary of the French Legion, Consul General Marbois, was assaulted by a French adventurer on the streets of Philadelphia.[9] A formal protest was brought to the Continental Congress by the French Minister Plenipotentiary, who threatened to leave the United States unless provided with a remedy, pursuant to the law of nations. The federal government was apologetic, but unable to act. Three years later, a similar incident occurred when a police officer in New York City entered Dutch Ambassador Van Brecknel's residence to arrest a domestic servant, violating the ambassador's diplomatic immunity.[10] Leaving such incidents unaddressed could have led to a perversion of justice, which would have been considered a just cause of war under the law of nations.[11] Despite this danger, as John Jay, then governor of New York, reported to Congress, the federal government was not "vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."[12]

[6] Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004).

[7] Letter from James Madison to James Monroe (Nov. 27, 1784), *in* 2 THE WRITINGS OF JAMES MADISON, 1783-1787, at 93 (Gaillard Hunt, ed., 1901).

[8] Only one state, Connecticut, created the suggested law. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 228-29 (1996).

[9] *Kiobel*, 133 S.Ct. at 1666; *see also* Respublica v. De Longschamps, 1 Dall. 111 (O.T. Phila. 1784).

[10] *Kiobel* at 1667.

[11] THE FEDERALIST NO. 80 (Alexander Hamilton).

[12] 34 J. CONT. CONG. 109, 111 (1788).

The United States was "embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States,"[13] and these incidents contributed to the creation of the federal judiciary under the Judiciary Act of 1789. As Alexander Hamilton wrote:

> the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts ... is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.... So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.[14]

While the academic community has debated the legislative history and reasoning behind the creation of the ATS,[15] it can be concluded that the foreign affairs-related "anxieties of the preconstitutional period," including the infamous Marbois and Van Brecknel incidents, contributed to passage of the ATS as part of the act.[16]

Enacted in 1789, and later codified in 1878,[17] 28 U.S.C. § 1350 now reads, "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."[18] While it seems clear that providing redress for foreign diplomats was contemplated in the creation of the statute, there is little else in the legislative history to serve as a guidepost for interpreting the ATS. Adding to its mystery is the remarkably small number of cases asserting jurisdiction under the ATS during the next 200 years, with fewer still argued successfully.[19] Thus in 1980, when the long hibernation of the ATS came to an end, its rebirth as a vehicle for human rights cases raised myriad questions of first impression, leaving the courts and scholastic community struggling to define its contours.

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[13] *Kiobel*, 133 S. Ct. at 1668.

[14] THE FEDERALIST NO. 80 (Alexander Hamilton).

[15] *See Sosa*, 542 U.S. at 719 ("But despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive."); *see generally* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt and Anthony D'Amato, eds., 1999); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY, 175 (Ralph G. Steinhardt and Anthony D'Amato, eds. 1999); Anthony J. Bellia Jr. and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHICAGO L. REV. 445 (2011); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); 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).

[16] *Sosa*, 542 U.S. at 719.

[17] Rev. Stat. § 563 (1879).

[18] The language of the statute is substantially the same, bar the addition of one or two minor language changes and the addition of the comma after "only." For a more detailed look at the linguistic and grammatical changes, see CRS Report RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views*, by (name redacted).

[19] *Id.* at 12-13.

Filartiga v. Pena-Irala and the Rebirth of the ATS

In 1980, after nearly two centuries of dormancy, the ATS was given new life in the landmark human rights case, *Filartiga v. Pena-Irala*.[20] The case involved a suit against a Paraguayan police officer by two Paraguayan natives, who alleged that the officer tortured and killed Dr. Filartiga's son, Joelito, while the family was living in Paraguay.[21] Though it was dismissed by a federal district court for lack of subject matter jurisdiction, the U.S. Court of Appeals for the Second Circuit (Second Circuit), applying the transitory tort theory,[22] held that torture performed by a state authority was actionable under international law, and thus could be successfully argued under the ATS.[23] On its face, *Filartiga* does not inspire much controversy. The case involved alien plaintiffs suing for what was clearly a tort, and the determination that torture and wrongful death was a violation of the law of nations was, after Nuremberg, "uncreative."[24] But what the case did do was wake a sleeping giant of academic debate. By "opening the federal courts for adjudication of the rights already recognized by international law," *Filartiga* unceremoniously opened a door for what would become known as "foreign cubed" claims, where both the plaintiffs and defendants are foreign nationals, and the alleged violations took place on foreign soil.

The case that most "strikingly exemplifies" the controversy surrounding the modern day understanding of the ATS is *Tel-Oren v. Libyan Arab Republic*.[25] The case was brought by the survivors of a terrorist attack in Israel, which was allegedly committed by the Palestine Liberation Organization and assisted by Libya. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) agreed per curiam that the case should be dismissed for lack of subject matter jurisdiction, but issued three separate concurring opinions outlining three very different lines of reasoning. The disparity between the opinions reflects the "legal Lohengrin" that is the ATS; a lack of historical context combined with little-to-no precedent has required the courts to deal with a 200-year-old statute as a matter of first impression, leading to "sharp differences of viewpoint among the judges who have grappled with these cases over the meaning and application."[26]

Judge Robb found the case to be nonjusticiable under the political question doctrine. Not only is the status of an international terrorist attack beyond the responsibilities of the federal courts, Robb argued, but to make decisions about terrorism would be to interfere with foreign affairs and the national interest, a job better left to the political branches.

In an argument that would later find ground in *Sosa v. Alvarez-Machain*, Judge Bork came to a similar, but differently reasoned conclusion, finding that the ATS does not provide a cause of

[20] 630 F.2d 876 (1980).

[21] *Id*. at 878.

[22] *See* Petitioners' Supplemental Opening Brief at 6, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. June 6, 2012) ("The transitory tort doctrine, inherited from English common law upon this nation's founding, allows for suit against a tortfeasor regardless of where the cause of action arises, so long as personal jurisdiction is satisfied... The tortfeasor owed an obligation to the victim that could be enforced wherever the tortfeasor was found, regardless of where the tort occurred.").

[23] *Filartiga*, 620 F.2d at 878.

[24] Ralph G. Steinhardt, *The Internationalization of Domestic Law*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 4 (Ralph G. Steinhardt and Anthony D'Amato, eds. 1999).

[25] Randall, *supra* note 15, at 175.

[26] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (1984) (Edwards, J., concurring).

action. Relying on a formalist approach to separation of powers, Bork maintained that in recognizing a case where the legislature has not expressly granted a cause of action, the risk of crossing into the territory best left to the political branches is too great. With modern day terrorism being beyond the understanding of the drafters in 1789[27] and too little legislative history to suggest otherwise, Judge Bork concluded that there was no express intent to create a private cause of action under the ATS.[28]

Judge Edwards's conclusion varied significantly from his colleagues' views. Finding both that the understanding of international normative law evolved with the modern understanding, and that there is a cause of action under the ATS, Judge Edwards affirmed the lower court's decision based instead on factual considerations that distinguished the case at bar from *Filartiga*. Focusing on a question that would soon become the central controversy surrounding the ATS, Judge Edwards looked to the liability of non-state actors and determined that the ATS does permit some individual liability. Though extending the law to include individual liability would "require this court to venture out of the comfortable realm of established international law – within which *Filartiga* firmly sat – in which states are the actors,"[29] Judge Edwards examined the potential for individuals to violate the law of nations. Despite his unwillingness to conclude that the law of nations recognizes individual liability for all violations, Judge Edwards did find that there exist a "handful of crimes to which the law of nations attributes individual responsibility."[30] While torture and terrorism were not included on this list, Judge Edwards's concurrence opened the door to the possibility that some individuals could be liable under the ATS. To whom the statute could apply and for which crimes would come under much debate.

Though one of the oldest of *Filartiga's* progeny, *Tel-Oren's* greatly varied interpretations of the ATS foreshadowed the interpretive confusion in the decades to follow. Coming to an agreement on the appropriate reading of the ATS has been a challenge for judges, and its application has run the gamut in district and appeals courts. Additionally, debate turned toward those issues identified by the judges, including whether the ATS created a cause of action, and more prevalently, whether it permits liability of an individual or corporation for violating international law.

Corporate Liability

Judge Edwards's concurrence in *Tel-Oren* became a benchmark for the next two decades of ATS cases. The 1995 decision, *Kadic v. Karadzic*,[31] was a landmark case in determining whether *individuals* can be held liable under the ATS. The case involved Croat and Muslim citizens of Bosnia-Herzegovina, who alleged that the self-proclaimed president of the Bosnia-Serb Republic commanded his military forces to commit human rights violations. A federal district court held that because the Bosnia-Serb Republic was not a recognized state, and "acts committed by non-state actors do not violate the law of nations," the ATS could not provide a remedy.[32] The Second

[27] *Id.* at 813 (Bork, J., concurring) ("[I]n 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover.").

[28] *Id*. at 819 (Bork, J., concurring).

[29] *Id.* at 792 (Edwards, J., concurring).

[30] *Id*. at 795 (Edwards, J., concurring).

[31] Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995).

[32] Doe v. Karadzic, 866 F. Supp. 734, 739 (S.D.N.Y. 1994).

Circuit reversed, holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[33]

While this answered the question as to whether individuals could be held liable without acting under the color of the state, the Second Circuit did not address whether a corporation is considered an individual. However, eliminating the need for state action brought to the forefront a number of cases where aliens brought suit against individuals and, more predominantly, corporations under the ATS. Whether those corporations could be held liable sparked an ongoing debate that has spanned two decades, with appeals courts coming to varied conclusions.

Doe v. Unocal Corp.

The first case to deal specifically with corporate liability under the statute was *Doe v. Unocal Corp*. in 2002.[34] Villagers from Myanmar (also known as Burma) sued the United States energy corporation Unocal for human rights violations committed while the corporation was constructing a gas pipe. The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), relying on Judge Edwards's *Tel-Oren* concurrence and the decision in *Kadic*, held that violations of international law such as genocide, war crimes, and other human rights abuses committed by individuals could be actionable under the ATS, with no state action requirement. The panel held that the Unocal Corporation could be liable under the statute, but did not articulate its reasoning. The court appeared to have assumed that corporations fell within the scope of individual liability without further discussion. The case was ultimately settled, but *Unocal* became the first in a line of cases dealing with corporate liability to hold a corporation responsible for a tort in violation of the law of nations.

Sosa v. Alvarez-Machain

The question of corporate liability was addressed only by an ambiguous footnote in the 2004 Supreme Court decision, *Sosa v. Alvarez-Machain*.[35] The first ATS case to be heard by the Supreme Court, *Sosa* involved the torture and death of Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar in Mexico. The respondent, Humberto Alvarez-Machain, was a Mexican physician accused of prolonging Camarena-Salazar's life in order to extend the interrogation and torture. After Mexican authorities failed to aid the United States in carrying out its arrest order, the DEA employed a group of Mexicans, including petitioner Jose Francisco Sosa, to abduct Alvarez-Machain from his home and bring him to Texas, where he was arrested. After he was released, Alvarez-Machain sued Sosa, five other Mexican civilians, and several DEA agents. He argued, among other things, that the abduction was a violation of international law under the ATS.

After examining the limited legislative history of the statute, the Court determined that its place in Section 9 of the Judiciary Act and its "cognizance" of certain causes of action indicate that the ATS is a strictly jurisdictional statute, and does not create a cause of action. However, the Court found that despite not creating causes of action, the statute was intended to have immediate practical effect with no congressional action required. The Court left the door "ajar subject to

[33] *Id*. at 239.

[34] Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

[35] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

vigilant doorkeeping, and thus open to a narrow class of international norms today," but specified that any cause of action under the ATS would have to be cautiously determined by courts to have been "defined with a specificity comparable to the features of the 18th century paradigms" contemporaneous to the drafting of the statute.[36] The determination would also have to include an "element of judgment about the practical consequences" of making the cause available, taking into special consideration potential effects on foreign policy.[37] "Since many attempts by federal courts to craft remedies for violation of new norms of international law would raise risks of adverse foreign policy consequences," the Court warned, "they should be undertaken, if at all, with great caution."[38]

The Court's only reference to corporate liability was in a much-debated footnote. During its discussion about "whether a norm is sufficiently definite to support a cause of action," the Court noted that, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[39] The Court then referred to the passages about the liability of private actors in both *Tel-Oren* and *Kadic*. Though it says little, footnote 20 reverberated through ATS cases for the rest of the decade, and was relied on by plaintiffs and defendants alike to both support and contradict the proposition that corporations could be held liable for international torts under the ATS.

Recent ATS Cases

In the decade following *Unocal* at least four appeals courts dealt with the question of corporate liability under the ATS. The first case to hold a corporation explicitly liable was in 2008 from the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit), *Romero v. Drummond Co*. However, like the Ninth Circuit in *Unocal*, the *Drummond* court did not outline its rationale, noting only that the text of the ATS "provides no express exception for corporations."[40] In 2011 the D.C. Circuit also addressed corporate liability in *Doe v. Exxon Mobil Corp*.[41] Based on its finding that the law of nations does not create civil remedies or private rights of action, the court examined corporate liability under federal common law. Looking to the historical context of both the ATS and corporate liability theories, the court opined, "It appears that the law in 1789 on corporate liability was the same as it is today: The general rule of substantive law is that corporations, like individuals, are liable for their torts."[42] The court also criticized Exxon's reliance on *Sosa* footnote 20, finding that the footnote only referred to the debate in *Tel-Oren* and *Kadic* over whether "certain forms of conduct were violations of international law only when done by a state actor" rather than a private actor. Footnote 20 was not intended, according to the

[36] *Id.* at 725.

[37] The Court notes particularly that, "the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law ... It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agents has transgressed those limits." *Id*. at 727.

[38] *Id*. at 728.

[39] *Id*. at 732 n.20.

[40] Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

[41] Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

[42] *Id.* at 49 (quoting White v. Cent. Dispensary & Emergency Hosp., 99 F.2d 355, 358 (D.C. Cir. 1938) (quotation marks omitted)).

D.C. Circuit, to distinguish private actors from corporations, as Exxon argued. Ultimately, that same year both the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) and Ninth Circuit joined the D.C. Circuit in concluding that corporations can be held liable, though their reasoning varied.[43]

Not all appeals courts agreed that corporations could be held liable under the ATS, however. In its 2010 decision, *Kiobel v. Royal Dutch Petroleum Co*., the Second Circuit furthered the debate by finding that the ATS does not provide federal courts with jurisdiction over corporations.[44] The *Kiobel* decision was appealed to the Supreme Court, and many believed that the Court would finally solve the decades-long debate surrounding corporate liability. Instead, the Court turned to the threshold question of whether the ATS provides federal courts with jurisdiction over extraterritorial cases with foreign plaintiffs and defendants.

Kiobel v. Royal Dutch Petroleum Co.

Background

Kiobel v. Royal Dutch Petroleum Co. involved a suit brought by former residents of Ogoniland, Nigeria, now residing in the United States.[45] They alleged that the respondents, Royal Dutch Petroleum Company (Royal Dutch) and Shell Transport and Trading Company PLC's (Shell) subsidiary, Shell Petroleum Development Company of Nigeria (SPDC), aided and abetted the Nigerian company in committing human rights violations against the residents of Ogoni.[46] Royal Dutch and Shell are incorporated in the Netherlands and the United Kingdom, respectively. The SPDC is incorporated in Nigeria. Since 1958, the SPDC has been exploring for and producing oil in Ogoni. In response to the effect on the local environment, a group of concerned residents called the "Movement for Survival of Ogoni People" was organized in order to protest the exploration.[47] In 1993, the oil companies allegedly enlisted the help of the Nigerian government to suppress the Ogoni resistance. The Nigerian military and police forces allegedly attacked the Ogoni villages, raping, beating, arresting, and killing the Ogoni people, and destroying property.[48] The plaintiffs also alleged that the respondents aided and abetted these human rights violations by providing the military forces with food, transportation, and compensation.[49] The plaintiffs fled the area and came to the United States, where they are now legal residents after receiving political asylum.[50]

The petitioners filed suit in the Southern District of New York, alleging jurisdiction under the ATS for violations of the law of nations. The federal district court determined that three claims gave rise to a violation of the law of nations: (1) crimes against humanity; (2) torture and cruel treatment; and (3) arbitrary arrest and detention. The court granted an order for interlocutory

[43] *See* Flomo v. Firestone, 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, 671 F.3d 736 (9th Cir. 2011).

[44] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010).

[45] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

[46] *Id.*

[47] *Kiobel*, 621 F.3d at 123.

[48] *Id.*

[49] *Id.*

[50] *Kiobel*, 133 S. Ct. at 1663.

appeal under 28 U.S.C. § 1292(b)[51] to determine whether these alleged human rights abuses were actionable under the ATS.[52]

Second Circuit

The Second Circuit granted the appeal, but unlike contemporaneous cases from other circuits, held that (1) international law, not domestic law, governs under the ATS; and (2) international law has not recognized liability for corporations. Relying on *Sosa* and international law treatises, the court first found that international law, not the domestic law of individual states, determines the subjects and scope of liability of international law.[53] Relying specifically on footnote 20 from *Sosa*, the court emphasized that the language "requires that we look to *international law*" to determine both liable conduct and the scope of liability under the ATS.[54]

The court then turned to establishing whether international law imposes liability on corporations. Relying primarily on the tribunals at Nuremberg, the court focused on the war crimes and crimes against humanity perpetrated by Nazi Germany, and its partnership with I.G. Farben, the corporation that helped create Auschwitz and manufactured the chemical agent used in its gas chambers.[55] As the court noted, "[I]t is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany."[56] Despite its complicity, the tribunal made a conscious decision to refrain from holding I.G. Farben criminally liable. While the tribunal firmly established individual liability for human rights crimes,[57] they found that:

> [C]orporations act through individuals and, under the conception of personal individual guilt ... the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.[58]

The *Kiobel* court noted that when the Nuremberg tribunals concluded that "[c]rimes against international law are committed by men, not by abstract entities," that court made it clear that crimes cannot be divorced from individual moral responsibility.[59] Also looking to post-Nuremberg international tribunals, international treaties, and academics, the court concluded that corporate liability is not contemplated by international law because "moral and legal

[51] A civil judge may write into an order for which there is normally no opportunity to appeal, that he believes it involves a controlling question of law for which there can be substantial difference of opinion, and for which an immediate appeal may materially advance the ultimate termination of the litigation. The Court of Appeals can then decide to grant an immediate appeal. 28 U.S.C. § 1292(b).

[52] *Kiobel*, 621 F.3d at 124.

[53] *Id.* at 126 ("Whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

[54] *Id.* at 127-28 (emphasis in original).

[55] *Id.* at 135. Farben was also responsible for manufacturing and supplying oil, rubber, and other products to the Nazis.

[56] *Id.* at 134.

[57] *Id.* at 127 ("The defining legal achievement of the Nuremberg trials is that they explicitly recognized individual liability for the violation of specific, universal, and obligatory norms of the customary international law of human rights.").

[58] *Id.* at 135.

[59] *Id.*

responsibility for heinous crimes should rest on the individual whose conduct makes him or her '*hostis humani generis*,' an enemy of all mankind."[60] Thus, the court held that Royal Dutch and Shell could not be held responsible under the ATS.[61]

It was on this question of corporate liability that the Supreme Court granted certiorari in 2012.[62] During oral argument, the Justices turned from the potential for corporate liability to whether the ATS provided jurisdiction for extraterritorial torts. As Justice Alito asked counsel for the plaintiffs, "What business does a case like [*Kiobel*] have in the courts of the United States? ... There's no connection to the United States whatsoever."[63] Re-briefing and new oral arguments addressed the question of extraterritoriality: whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.[64]

The Presumption against Extraterritoriality

On April 17, 2013, the Court handed down the *Kiobel* ruling. While unanimous in the judgment that extraterritorial jurisdiction did not lie based on the specific facts of the case, the Court splintered as to the rule moving forward.

The *Kiobel* majority opinion, written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito, first looked to the question of whether the presumption against extraterritorial application applied to the ATS. The Court stated that the question was not whether a proper claim was brought under the ATS,[65] but instead whether a proper claim under the ATS can reach conduct that occurs in the territory of a foreign sovereign.[66] The Court concluded that the presumption is in force and applies to foreign cubed ATS cases.

The presumption against extraterritoriality "is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[67] Chief Justice Rehnquist's *Aramco* opinion, a landmark case concerning the presumption canon, observed that applying the presumption effectuates congressional intent. The courts "assume that Congress legislates against the backdrop of the presumption against extraterritoriality,"[68] so unless Congress has clearly indicated that the law applies to conduct in foreign territories, the law must then be "primarily concerned with

[60] *Id.* at 149 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (internal quotation marks omitted)).

[61] *Id.*

[62] Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011).

[63] Transcript of Oral Argument at 11, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2012) (No. 10-1491).

[64] *Kiobel*, 133 S. Ct. at 1660.

[65] Under *Sosa v. Alvarez-Machain*, a claim has to be a violation of the law of nations with "definite content and acceptance among civilized nations." 542 U.S. at 732.

[66] *Kiobel*, 133 S. Ct. at 1664.

[67] E.E.O.C. v. Arabian American Oil Co. 499 U.S. 244, 248 (1991) (quoting Foley Bros, Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

[68] *Id*.

domestic conditions."[69] As the Court in *Morrison v. National Australia Bank Ltd.* summarized, "when a statute gives no clear indication of an extraterritorial application, it has none."[70]

While traditionally a canon aimed at answering questions of merit, rather than questions of jurisdiction, the presumption against extraterritoriality was invoked because "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS."[71] Essentially, any time a court makes a decision that affects foreign policy it could have serious consequences, regardless of whether the question is jurisdictional or on the merits. In fact, the Chief Justice stressed that in the case of jurisdiction, the level of danger may actually be higher.[72] The principles underlying the presumption make constraining the courts' power to hear these cases "all the more pressing" under the ATS because they would be deciding which conduct occurring within the territory of another sovereign could be considered a cause of action under international law.[73] He wrote:

> [T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead *what courts may do*. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, 'the potential [foreign policy] implications ... of recognizing ... causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.[74]

The danger of "unwarranted judicial interference" in this context calls for a high level of caution to prevent the courts from making any decisions that affect foreign policy, especially because these matters are the province of the political branches.[75]

This foreign policy tension was reflected in several of the amici briefs filed by other countries in support of the respondent corporations. Concerned with the potential long arm of ATS jurisdiction, the Federal Republic of Germany wrote in its brief, "Such assertions of jurisdiction are likely to interfere with foreign sovereign interests in governing their own territories and subjects and in applying their own laws in cases which have a closer nexus to those countries."[76] In fact, construing the ATS to apply to extraterritorial torts would work antithetically to the

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[69] *Id*. at 248 (quoting *Foley Bros*., 336 U.S. at 285).

[70] Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

[71] *Kiobel*, 133 S. Ct. 1659, 1670. In his concurrence, Justice Breyer disagreed with the majority's use of the presumption because the ATS was "enacted with foreign matters in mind" (internal quotations omitted) and was clearly intended to include international matters. He points specifically to the explicit use of "alien[s]," "treat[ies]," and "the law of nations" in the text of the ATS. For further discussion of Justice Breyer's concurrence, *see infra* p.17.

[72] *See id*. at 1664.

[73] *Id.* at 1665. The Court specifically points to the number of decisions made by Congress in passing the Torture Victim Protection Act, which included not only identifying an international law norm, but also creating definitions and establishing a statute of limitations. "Each of these decisions carries with it significant foreign policy implications." *Id.* at 1664.

[74] *Id.* at 1664 (quoting *Sosa*, 542 U.S. at 727) (emphasis added).

[75] *See id.* at 1665.

[76] Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents at 2, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2012) (No. 10-1491); *see also* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amicus Curiae in Support of the Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2012) (No. 10-1491).

purpose of the statute's creation, the prevention of diplomatic discord. "Far from avoiding diplomatic strife," the Court noted, "providing such a cause of action could have generated it."[77]

One final repercussion of allowing for extraterritorial reach is its potential effect on American citizens and corporations. If the United States construes international law to allow its domestic courts to hear foreign cubed cases, there is nothing to prevent other countries from providing relief in their own courts for acts committed by Americans in other territories, including on American soil. As the Chief Justice warned, providing jurisdiction "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."[78] Such dangerous decision making, the Court concluded, appropriately remains in the hands of the political branches.

In his concurrence, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, disagreed with the majority's use of the presumption against extraterritoriality. Justice Breyer noted, "That presumption rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters."[79] However, he pointed out, the ATS was "enacted with foreign matters in mind," referring to "aliens," "treaties," and the "law of nations."[80] The First Congress was not legislating domestic matters here, Breyer concluded, and "the majority's effort to answer the question by referring to the presumption against extraterritoriality does not work well."[81]

Text, History, and Purpose

The Court then went on to respond to the petitioners' contention that even if the presumption is applied, the text, history, and purposes of the ATS rebut it for causes of action appropriately brought under the statute. The Court acknowledged that Congress can indicate when federal law applies to extraterritorial conduct, but in order to conclude that the First Congress intended it to do so here, "the ATS would need to evince a clear indication of extraterritoriality."[82] After examining the text, history, and purposes of the ATS, the Court concluded that, "It does not."[83]

Beginning with the text of the ATS, the Court identified no language to indicate that Congress intended extraterritorial application. The ATS covers torts brought by aliens, but does not specify where those actions should take place because "such violations affecting aliens can occur either within or outside the United States."[84] The Court read this as applying to domestic torts with no indication that extraterritorial torts were contemplated. The petitioners argued that by using the word "torts," the First Congress implied jurisdiction under a doctrine of transitory torts, which can be heard in both foreign and domestic territories outside the forum state. The Court disagreed, citing the only justification for allowing a party to recover in another jurisdiction as "a well-

[77] *Kiobel*, 133 S. Ct. at 1669.

[78] *Id.*

[79] *Id.* at 1672 (Breyer, J., concurring) (quoting *Morrison*, 130 S. Ct. at 2877-78)).

[80] *Id.* at 1672 (Breyer, J., concurring).

[81] *Id.* at 1672. For further discussion of Justice Breyer's concurrence, see *infra* p.16-17

[82] *Id.* at 1665 (citing Morrison, 130 S. Ct. at 2883) (internal quotation marks omitted).

[83] *Kiobel*, 133 S. Ct. at 1665.

[84] *Id.*

founded belief that it was a cause of action in that place."[85] The Court also noted that the question is not whether a federal court has jurisdiction over a cause of action provided by foreign or international law, but whether the court has authority "to recognize a cause of action under U.S. law to enforce a norm of international law."[86] Using the word "tort" did nothing to indicate that those causes of action were meant to reach conduct in another sovereign territory. The Court also noted that the umbrella language "any civil action" does not necessarily cover torts committed abroad. "It is well established," the Court cited, "that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality."[87]

Turning to the historical background of the ATS, the Court also found that the history of the ATS gave no clear indication that the First Congress intended the statute to reach extraterritorial conduct. In determining whether a cause of action applies extraterritorially, the *Morrison* court wrote that "assuredly context can be consulted."[88] Relying on this language, the Court looked to the understanding of international law violations contemporaneous to the creation of the ATS.

When Congress passed the ATS, three principle law of nations violations had been identified by Blackstone, a preeminent 18th century legal authority. These consisted of the violation of safe conducts, infringement of the rights of ambassadors, and piracy.[89] Violation of safe conducts and infringement of the rights of ambassadors, the Court points out, did not contemplate extraterritorial activity but in fact were described by Blackstone to cover domestic conduct.[90] The Court pointed to the Marbois and Van Brecknel incidents in the mid-1780s, both of which involved international common law violations toward ambassadors on American soil.[91] Two additional contemporaneous incidents after the drafting of the statute invoked the ATS. Both incidents, concerning the wrongful seizure of slaves from a vessel docked in a U.S. port, and wrongful seizure from a ship in U.S. territorial waters, involved conduct occurring in U.S. territory.[92] The majority concluded that "these prominent contemporary examples–immediately before and after passage of the ATS–provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring throughout."[93]

The third instance of international law violations, piracy, presented a different challenge. Petitioners contended that piracy was a clear example of Congress's intent to provide extraterritorial jurisdiction under the ATS because actions against pirates necessarily anticipated conduct occurring abroad. The Court conceded that they have "generally treated the high seas the same as foreign soil for the purposes of the presumption against extraterritoriality."[94] However,

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[85] *Id.* at 1666 (citing Cuba R. Co. v. Crosby, 222 U.S. 473, 479 (1912) (quotation marks omitted)).

[86] *Id.* at 1661.

[87] *Id.* at 1665.

[88] *Id.* at 1666 (citing Morrison, 130 S. Ct. at 2883).

[89] *Id.*

[90] Blackstone used such language as safe conduct for "those who are here" and to "receive ambassadors at home." *Id.* at 1666.

[91] The incidents occurred in Philadelphia and New York, respectively. *See supra* notes 9-11 and accompanying text.

[92] *See* Bolchos v. Darrell 3 F. Cas. 810 (1795); Moxon v. The Fanny, 17 F. Cas. 942 (1793).

[93] *Kiobel*, 133 S. Ct. at 1667.

[94] *Id*. The Court pointed to two instances in *Sale v. Haitian Centers Council, Inc*., 509 U.S. 155, 173-174 (1993) and *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 440 (1989), wherein the Court declined to apply provisions of the Immigration and Nationality Act, and the Foreign Sovereign Immunities Act, respectively, to the high (continued...)

the Court distinguished piracy from other actions performed on the high seas, concluding that the existence of a cause of action against pirates was not sufficient to suggest that the ATS applies extraterritorially.[95] First, the Court found that when it came to pirates, applying U.S. law to acts performed on a pirate ship was different from applying those same laws to acts occurring on ships flying under the flag of a sovereign nation. Far from acting in a sovereign jurisdiction, pirates did not operate within any jurisdiction at all.[96] "Pirates were fair game," Chief Justice Roberts wrote, and applying U.S. law to a pirate ship did not carry the same foreign policy consequences.[97] In terms of causes of action, the Court opined that "pirates may well have been a category unto themselves."[98]

The Court also looked to one of the few contemporaneous references to the ATS, a 1795 opinion written by Attorney General William Bradford, which both petitioners and respondents interpreted to support their arguments for and against extraterritoriality. During the Napoleonic wars, several U.S. citizens joined a French privateer fleet and attacked Sierra Leone, a British colony. The disputed language comes from Bradford's response to the protest of the British ambassador:

> So far ... as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas are within the jurisdiction of the ... courts of the United States; and, so far as the offense was committed thereon, I am inclined to think that it may be legally prosecuted in ... those courts ... But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. 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....[99]

Petitioners argued that the last sentence clearly indicated that 18th century understanding was that the ATS applied to law of nations violations committed on foreign sovereign territory. The respondents countered by suggesting that Attorney General Bradford was referring to acts of hostility only insofar as they took place on the high seas, and even if he meant a broader application, it was only in relation to the applicable treaty, which had an extraterritorial reach. In its amicus brief, the United States suggested that the opinion "could have been meant to encompass ... conduct [occurring within the foreign territory]."[100] The Court determined, however, that there was no definitive reading of the passage, and declined to adopt one.[101] It concluded that because Attorney General Bradford's statement dealt with actions performed by

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(...continued)

seas.

[95] *See Kiobel*, 133 S. Ct. at 1667.

[96] In his concurrence, Justice Breyer argues that it is not the pirate ship's jurisdiction but rather that of the victim ship which makes the vessel "like land": "Indeed, in the early 19th century Chief Justice Marshall described piracy as an 'offenc[e] against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." *Id.* at 1672 (Breyer, J., concurring).

[97] *Id.* at 1667.

[98] *Id.*

[99] *Id.* at 1667-68 (citing 1 Op. Atty. Gen. 57 (1795)) (emphasis in original).

[100] *Id.* at 1668.

[101] *Id.*

U.S. citizens in violation of a treaty between the United States and Great Britain, the passage "hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality."[102]

Finally, the Court looked to the purposes for which the ATS was drafted to determine if there was sufficient evidence to rebut the presumption. The Court dealt with this question simply by suggesting that it was highly unlikely the First Congress intended the fledgling United States to become the first "custos morum of the whole world."[103] Instead, embarrassed by its likely inability to provide redress to foreign diplomats injured in the United States, a just cause of international war, it is more likely that the drafters merely intended to create judicial relief for these incidents because "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."[104]

"Touch and Concern"

After concluding that the presumption against extraterritorial application applies to the ATS, and that nothing in the text, history, or purposes of the statute rebuts the presumption, the majority barred the petitioners' case seeking relief because the conduct in question took place outside the United States. However, foreign cubed cases are not definitively foreclosed from redress under the ATS. The Court, raising more questions than it answered, wrote 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."[105]

The Chief Justice then referred to the decision in *Morrison v. National Australia Bank*, which held that the presumption against extraterritorial application prevented Section 10(b) of the Securities Exchange Act from applying to securities not listed on a domestic exchange. Petitioners in that case argued that Section 10(b) applied in their case because the company and its executives engaged in the deceptive conduct and made misleading statements in Florida, though the effects were felt in Australia. The *Morrison* Court agreed that:

> ... [the] presumption [against extraterritorial application] 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.[106]

However, the Court found that the focus of the Exchange Act was not the place of origin but rather the location of the purchases of the sales and securities, which in this case did not happen in the United States.[107]

[102] *Id.*

[103] *Id.* (quoting United States v. The La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C. Mass. 1822)).

[104] *Id*. at 1668-69.

[105] *Id.* at 1669.

[106] Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2884 (2010).

[107] *Id.*

Apart from its reference to *Morrison*, the Court was silent on which foreign cubed cases would "touch and concern"[108] U.S. territory with sufficient force to rebut the presumption. The Court did note, however, that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to satisfy the "touch and concern" test.[109] The Chief Justice concluded by suggesting that, "If Congress were to determine otherwise, a statute more specific than the ATS would be required."[110]

The majority's "touch and concern" test does not lay out a clear set of guidelines; the concurrences of Justices Kennedy and Breyer do provide some suggestions as to the scope of the new standard, but Justice Alito felt the test should be narrowed to permit only those cases occurring in the United States. Justice Kennedy's brief concurrence remarks that, "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."[111] He observes:

> Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor 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.[112]

Leaving a door open for particular, though unidentified, human rights violations, the "touch and concern" test does not completely foreclose foreign cubed cases from redress under the ATS. Justice Kennedy's concurrence does little to explicate exactly which extraterritorial human rights violations are anticipated to fit through the opening left by the Court, but acknowledges that such cases could exist, though they may be a narrow class. This opinion contrasts with Justice Alito's concurrence, joined by Justice Thomas, which stressed that the ATS should not apply to any conduct occurring outside U.S. territory. Though noting that "perhaps there is wisdom in the Court's preference for this narrow approach," Justice Alito would apply a broader standard, concluding the case falls squarely in the scope of the presumption.[113] Relying on the test used in *Morrison*,[114] Justice Alito looked to the conduct that was the "focus of congressional concern" when the statute was drafted.[115] Opining that the focus was on the three Blackstone international law violations,[116] Alito concluded that only domestic conduct that both violates an international

[108] It is interesting to note that "touch and concern" is language traditionally associated with covenants in real property. Touch and concern is a requirement of covenants and must relate to the direct use and enjoyment of the land, making up one of the six elements that makes the burden on the land run. *See, eg.*, Lawrence Burger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. (1986).

[109] *Kiobel*, 133 S. Ct. at 1669.

[110] *Id*.

[111] *Id.* at 1669 (Kennedy, J., concurring).

[112] *Id*.

[113] *Id.* at 1669-70 (Alito, J., concurring).

[114] *See Morrison*, 130 S. Ct. at 2884 (looking to the focus of the Exchange Act, which was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States.").

[115] *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring) (quoting *Morrison*, 130 S. Ct. at 2884)).

[116] Violation of safe conducts, infringement of the rights of ambassadors, and piracy. *See* discussion *supra* Text, History and Purpose.

law norm and meets *Sosa's* requirements of definiteness and acceptance among civilized nations can be successfully redressed under the ATS.[117]

Justice Breyer's concurring opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, agrees with the majority's conclusion, but deviates completely from its reasoning. Finding that the presumption against extraterritoriality was not appropriate for the ATS,[118] Justice Breyer looked to the principles and practices of international law. Looking at the Blackstone offenses, Justice Breyer opined that the real question was: Who are today's pirates?[119] Men who commit human rights crimes, "*hostis humani generis*, [enemies] of all mankind,"[120] are the modern day equivalent of pirates, and they are equally "fair game."[121] Based on this interpretation and *Sosa's* cautionary note, Justice Breyer found three areas of jurisdiction under the ATS: where (1) the alleged tort occurs on American soil; (2) the defendant is an American national; or (3) the defendant's conduct substantially and adversely affects an important American national interest.[122] This specifically includes providing safe harbor for criminals who have committed grievous human rights violations or any other "common enemy of mankind." Justice Breyer's test casts a wider net than the majority's narrower "touch and concern" test, but he also concluded that the *Kiobel* plaintiffs' case was too far reaching to suggest sufficient American interest, "agree[ing] with the Court that here it would 'reach too far to say' that such 'mere corporate presence suffices.'"[123]

Implications of *Kiobel*

In his 1984 *Tel-Oren* concurrence, Judge Bork said, "Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed."[124] However, 30 years later the ATS still resides in murky waters. While the Supreme Court has decided two cases involving the ATS, in each instance the Court has been careful to address only the narrow questions before it. As a result, while the "touch and concern" test has likely narrowed the number of justiciable ATS cases, the actual scope of its jurisdiction is still unknown.

Early responses from the academic community in the wake of the *Kiobel* decision have varied. On the practical application of the ATS, some have opined that the narrow "touch and concern" test will compel human rights plaintiffs to seek redress under other federal laws, or from state courts. Some have argued that this was "an all but categorical 'no,'"[125] and that the door to the ATS is, for all intents and purposes, closed. One observer predicts that the *Kiobel* case "will help

[117] *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

[118] *See* discussion *supra* pp.11-12.

[119] *Id.* at 1671 (Breyer, J., concurring).

[120] *Id*. (quoting *Sosa*, 542 U.S. at 732).

[121] *Id*. at 1672 (quoting *Kiobel* majority at 1667).

[122] *Id*. at 1674.

[123] *Id.* at 1669.

[124] Tel-Oren 726 F.2d at 823 (Bork, J., concurring).

[125] Kristin Linsley Myles and James Ruten, *Kiobel commentary: Answers … and more questions*, SCOTUSblog (Apr. 18, 2013, 2:07 PM), http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions/.

to usher in a brave new world of transnational litigation where federal, state, and foreign courts compete to regulate international human rights claims."[126]

The majority of commentators, however, have focused on the question of how the *Kiobel* holding will affect claims of corporate liability, an issue the Court did not address. At least one commentator has read the Court's comment that "mere corporate presence" is insufficient to meet the touch and concern test as an implication that other potential ties to U.S. territory could be enough for corporate liability.[127] Another commentator has gone so far as to claim that, "It's clear that *all* the justices believe that some cases involving abuses by corporations, even those involving injuries in foreign countries, may still be brought."[128] Another has argued that the door left open by the Court and by Justice Kennedy's vague concurrence results in a purgatorial state[129] for corporate liability claims. While plaintiffs in human rights claims are certain to argue that corporations with headquarters in the United States are responsible even for injuries occurring abroad,[130] uncertainty about the application of the "touch and concern" test and the remaining unanswered questions leaves the fate of corporate liability cases in the air.

Commentators who have focused more heavily on the political atmosphere surrounding the life of the ATS as a human rights vehicle say that there is little surprise in the Court's decision. While the decision and its reliance on the presumption may "radically revise[] and undermine[] the way the statute has been applied for a generation,"[131] commentators have pointed out that it should not be too surprising that the *Filartiga* line of cases have met this end. The *Filartiga* decision, as one commentator noted, came at the end of a phase where judge-made law and implied rights of action ruled the day.[132] Since that time, power in the federal courts has shifted. *Filartiga* and its human rights progeny rested on "a mountain of judge-made law" because the text and history of the statute provide little guidance for causes of action and jurisdiction.[133] In fact, nearly every decision made about human rights cases brought under the ATS would involve judge-made law.[134] So when the Court's first look at the ATS came in the 2004 *Sosa* decision, this commentator believes, it should have been obvious that the Court was unwilling to say more than necessary to solve the case at hand. That silence was read by some to imply approval of *Filartiga*, and was

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[126] Donald Childress, *Kiobel commentary: An ATS answer with many questions (and the possibility of a brave new world of transnational litigation)*, SCOTUSblog (Apr. 18, 2013, 5:03 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/.

[127] *See* Oona Hathaway, *Kiobel Commentary: The door remains open to "foreign squared" cases*, SCOTUSblog (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/.

[128] Katie Redford, *Commentary: Door still open for human rights claims after Kiobel*, SCOTUSblog (Apr. 17, 2013, 6:48 PM), http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/.

[129] In his article, Michael D. Goldhaber called the ATS a "zombie doctrine – not quite alive and not quite dead." *See* Michael D. Goldhaber, *The Global Lawyer: The Zombification of the Corporate Alien Tort*, AM. LAW., (Apr. 21, 2013), http://www.americanlawyer.com/digestTAL.jsp?id=1202596949949&slreturn=20130625084603.

[130] Miles & Ruten, *supra* note 126.

[131] NY Times Editorial Board, *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 17, 2013.

[132] 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/.

[133] Andrew Pincus, *Is the Alien Tort a Zombie Doctrine? Andrew Pincus Responds*, AM. LAW, Apr. 29. 2013.

[134] *Id.*

also seen as only limiting ATS jurisdiction with *Sosa's* specificity test. That commentator believes seeing things in *Sosa* that were not there should be a cautionary tale for those looking to read too much into *Kiobel*, particularly those that believe the Court implied that corporate liability is possible by giving the example of mere corporate liability as insufficient to rebut the presumption.

This cautionary approach to interpreting the case seems to have taken hold in the lower courts in recent post-*Kiobel* decisions. *Sarei v. Rio Tinto*, a case on the Court's docket at the time of the *Kiobel* opinion, was remanded to the district court in light of that decision.[135] The district court held, and the Ninth Circuit affirmed, that based on *Kiobel*, the court had no jurisdiction over this foreign cubed case.[136] This has been the fate of several recent cases, with judges cautiously concluding that, "the Supreme Court appears to have set a very high bar for plaintiffs asserting jurisdiction under the ATS for claims arising out of conduct occurring entirely abroad."[137]

One case particularly stands out among the post-*Kiobel* decisions because it is the first opinion to decide if a case has passed the "touch and concern" test. *Mwani v. Bin Laden* is an ongoing litigation involving the Kenyan victims of an explosion caused by Al Qaeda outside the American Embassy in Nairobi. Magistrate Judge Facciola of the D.C. District Court felt that because the events that occurred were directed at the United States government with the intention of harming our country and its citizens, "[s]urely, if any circumstances were to fit the Court's framework of 'touching and concerning the United States with sufficient force,' it would be a terrorist attack that (1) was plotted in part within the United States, and (2) was directed at a United States Embassy and its employees."[138] However, Judge Facciola certified the issue for appeal under 28 U.S.C. § 1292(b) because as it is a matter of first impression "there may be a substantial difference of opinion among judges whether it is correct."[139] While the case is pending appeal, Judge Facciola's decision indicates that the "touch and concern" test may not close the door to extraterritorial application as drastically as some commentators believe. However, as this case involves a terrorist attack directed at the United States Embassy, it could be distinguished in future cases applying the "touch and concern" test in human rights litigation.

Since the Nuremberg trials at the close of the Second World War, the importance of redressing human rights cases has been acknowledged by countries around the world. However, plaintiffs in foreign cubed cases, especially those featuring corporate aiding and abetting, face a great challenge in overcoming the presumption against extraterritorial application. Justice Kennedy's concurrence suggests that some human rights cases may be the exception to the rule, but until a third ATS case reaches the Supreme Court, clarification on the fate of ATS cases may have to come from other sources.

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[135] Sarei v. Rio-Tinto, No. 02-56256, 2013 U.S. App. LEXIS 13312 (9th Cir. Jun. 28, 2013).

[136] The Rio Tinto case involved a suit by residents of Papua New Guinea against Rio Tinto, a British-Australian corporation mining copper in the area. Environmental damage caused by the company and blockades by the government allegedly led to the start of an extremely violent civil war in Papua New Guinea that lasted until the end of the twentieth century. *See* Sarei v. Rio-Tinto, 625 F.3d 561 (9th Cir. 2010).

[137] Mohammadi v. Islamic Republic of Iran, No. 09-1289, 2013 U.S. Dist. LEXIS 76477 (D.D.C. May 31, 2013). *See, e.g.*, Ahmed-Al-Khalifa v. Trayers, 2013 U.S. Dist. LEXIS 98339 *4 (D. Conn. July 1, 2013); Al Shimari v. CACI Int'l, Inc., 2013 U.S. Dist. LEXIS. 92937 *2 (E.D. Va. June 25, 2013).

[138] Mwani v. Usama Bin Laden, No. 99-125, 2013 U.S. Dist. LEXIS 74822 *13 (D.D.C., May 29, 2013).

[139] *Mwani* at *4.

In 1991 Congress enacted the Torture Victim Protection Act (TVPA) in order to provide redress for those victims of torture and extrajudicial killing committed by individuals acting in an official capacity in other countries.[140] Because of limitations on defendants, foreign cubed cases claiming corporate liability cannot seek redress under the TVPA. With the new test for jurisdiction under the ATS, the *Kiobel* case has created some uncertainty for foreign cubed human rights cases. If Congress wishes to provide redress for extraterritorial torts, or establish corporate liability, it is within its power to do so.

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[140] The Torture Victim Protection Act, P.L. 102-256, Mar. 12, 1992, 106 Stat. 73, codified at 28 U.S.C. § 1350 note. Recently, the Senate Proposed Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744 has increased the number of actionable offenses under the TVPA to include war crimes and genocide.