NOTE

A Test By Any Other Name: The Influence of Justice Breyer's Concurrence in *Kiobel v. Royal Dutch Petroleum Co.*

*Alex S. Moe**

In Kiobel v. Royal Dutch Petroleum Co., *the Supreme Court applied the presumption against extraterritorial application to the Alien Tort Statute ("ATS"). In doing so, the Court undermined the generally accepted view of the ATS: that it could apply to actions abroad. Applying this presumption severely limited the factual circumstances that could produce a viable ATS claim. The majority opinion carved an exception, permitting extraterritorial ATS claims that "touch and concern" the United States, but declined to set more specific guidelines. In the absence of such guidelines, lower courts have applied the presumption in an overbroad fashion, barring claims that the Court might have intended to fall within its exception.*

However, concurring in Kiobel, *Justice Breyer offered an alternative three-pronged test to determine jurisdiction. Though Justice Breyer reached the same conclusion as the Court—that jurisdiction did not lie—his test is more specific than the majority's and also provides lower courts with a proper means of assessing ATS extraterritoriality.*

This Note first extensively discusses the rich and colorful history of the ATS, tracking its outgrowth from the Articles of Confederation to its use in the eighteenth century to bring pirates to justice. It then discusses the modern line of ATS cases, including the various procedural elements that courts have read into the Statute. Turning to Kiobel, *it examines the impact of the Court's reversal of precedent by applying a presumption against extraterritorial application to the ATS, specifically focusing on the majority standard's lack of clarity. This*

* B.A., Northwestern University, 2012; J.D. Candidate, Loyola University Chicago School of Law, 2015.

Note concludes by proposing that the best way to reasonably limit the ATS' scope while still allowing meritorious claims to proceed is to use Justice Breyer's test.

INTRODUCTION

> The Alien Tort Statute "is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came." – Judge Henry Friendly[1]

The Alien Tort Statute[2] ("ATS") is 124 years old, but has a body of case law only a tenth its age. Passed by the first session of the First Congress, it was applied a handful of times in the eighteenth century before disappearing almost entirely from American jurisprudence, spending 185 years as little more than a footnote.[3] In 1980, the Second Circuit breathed new life into the statute by applying it in *Filartiga v. Pena-Irala*, extending and updating it to provide jurisdiction over acts of torture.[4]

Aggrieved aliens were quick to capitalize on the new grant of jurisdiction, and in the years after *Filartiga* the ATS saw regular use in

1. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (rejecting ATS claim for failure to allege a treaty violation). The substantive holding of *Vencap* was later abrogated, but Judge Friendly's characterization of the ATS is timeless.

2. Unlike most contemporary legislation, the ATS was not appended a short name; references to it in early cases are always to the language of the statute itself. *See, e.g.*, Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) (referring to "the words of the judiciary act of the United States"). The term "Alien Tort Statute" first appeared in 1980, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). It is also known both as the Alien Tort Claims Act, *e.g. Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), and the Alien Tort(s) Act, *e.g. Huyn Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978). All three terms are synonymous. This Note follows contemporary practice and refers to the statute as the Alien Tort Statute, or ATS.

3. *See infra* Part I.B (discussing applications of the ATS between 1795 and 1980).

4. *Filartiga*, 630 F.2d at 878 (holding that ATS provides jurisdiction over violations of the law of nations, which includes torture); *see also infra* Part I.C.1 (discussing *Filartiga*).

courts.[5] Without much legislative or jurisprudential precedent to draw upon, courts developed procedural and substantive standards to set boundaries on ATS jurisdiction.[6] The Supreme Court first entered the fray in *Sosa v. Alvarez-Machain* in 2004, outlining a test with which to evaluate the merits of ATS claims.[7] The *Sosa* test did much to establish common boundaries, but many significant issues remained unanswered.

The Court granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.* to consider one such issue: whether corporations could be held liable for torts committed abroad.[8] Oral arguments uncovered a further foundational question: whether the ATS could have any extraterritorial application at all.[9] The Court ultimately held the ATS subject to a presumption against extraterritorial application, a presumption that could be overcome only by claims that touched and concerned the United States' territory.[10] The Court's ruling was unanimous, but four Justices, led by Justice Breyer, concurred only in the judgment and used an entirely different approach. They argued that the presumption against extraterritoriality did not apply to the ATS and offered an alternate test to determine whether jurisdiction would be proper.[11]

This Note starts by discussing the relatively sparse background of the ATS, including events in the eighteenth century that likely sparked its drafting.[12] It reviews the few cases that occurred in the eighteenth century, the ATS' absence in the nineteenth and most of the twentieth centuries, and the Second Circuit's landmark ruling in *Filartiga*.[13] It

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5. The total number of cases brought under the ATS is not objectively large, but even a few cases can be highly significant, given the 185-year drought.

6. *See infra* Part I.D (discussing procedural limitations on the ATS that courts have developed since *Filartiga*).

7. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see also infra* Part I.C.2 (discussing *Sosa*). *See generally* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1671–72 (2013) (Breyer, J., concurring) (describing the mechanism by which *Sosa* limited ATS jurisprudence).

8. 133 S. Ct. at 1663 (granting certiorari to consider question of corporate liability); *see also infra* Part II.A.2; *infra* notes 244–248 and accompanying text (discussing procedural history of *Kiobel*).

9. *Kiobel*, 133 S. Ct. at 1663 (granting rehearing to consider extraterritorial application of ATS); *see infra* Part II.A.2; *infra* notes 244–248 and accompanying text (discussing procedural history of *Kiobel*).

10. *Kiobel*, 133 S. Ct. at 1669. *See generally infra* Part II.B (discussing the majority opinion).

11. *Kiobel*, 133 S. Ct. at 1670–71 (Breyer, J., concurring). *See generally infra* Part II.E (discussing concurring opinion of Justice Breyer).

12. *See infra* Part I.A (providing an overview of the historical and legislative background of the ATS between 1781 and 1789).

13. *See infra* Parts I.B–C (discussing applications of the ATS between its enactment in 1798 and *Filartiga* in 1980).

discusses the Supreme Court's guidance in *Sosa*,[14] the various procedural requirements that lower courts have held applicable, and extraterritoriality, the issue at the heart of *Kiobel*.[15]

Part II lays out *Kiobel*, presenting the opinion of the Court, the concurring opinions of Justices Kennedy and Alito, and the concurring opinion of Justice Breyer.[16] Part III reviews and analyzes the two primary lines of legal reasoning presented within the opinions: first, the "touch and concern" standard of the majority; and second, the three-point test articulated by Justice Breyer.[17]

The Note then examines the current state of ATS jurisprudence and the effects that the majority holding of *Kiobel* has already had. It suggests a way in which *Kiobel* could be applied to reduce confusion and improper application in a manner consistent with legislative and judicial precedent.[18] It first describes the increasing importance of ATS litigation,[19] and then discusses the need for a clear standard by examining the current and conflicting ways in which lower courts have applied the majority holding of *Kiobel*.[20] It proposes that the alternative test offered by Justice Breyer can be reconciled into the majority's standard as a test reaching the same conclusion, with potential discrepancies remaining acceptable in light of legal precedent.[21] This Note closes by examining cases that suggest such an approach, and concludes that a reconciled standard would be both possible and preferable to the current confusion that has arisen when courts have attempted to apply the *Kiobel* holding.[22]

I. BACKGROUND

The Alien Tort Statute provides, in full, that "[t]he district courts

14. *See infra* Part I.C.2 (discussing *Sosa*).

15. *Kiobel*, 133 S. Ct. at 1659. *See infra* Parts I.D–E (summarizing procedural requirements of the ATS, including prior holdings on extraterritorial application of the ATS).

16. *See infra* Parts II.B–E (discussing the four opinions of *Kiobel*: one majority and three concurring).

17. *See infra* Part III (discussing elements of and potential issues with the standard of the majority and the test proposed by Justice Breyer's concurrence).

18. *See infra* Part IV (presenting present and potential future impacts of *Kiobel*).

19. *See infra* Part IV.A (discussing increasing importance and relevance of ATS legislation).

20. *See infra* Part IV.B (concluding that *Kiobel* is currently being applied unevenly, and in some cases, in a manner that suggests that courts are committing errors of law).

21. *See infra* Part IV.C (reconciling Justice Breyer's test as a method of approaching the majority's standard).

22. *See infra* Part IV.D (discussing several subsequent cases that apply *Kiobel*, with a focus on interpretation of the majority's standard in light of Justice Breyer's concurring opinion).

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."[23] It was passed by the first session of the First Congress as a direct implementation of the Constitution's Offenses Clause,[24] explicitly giving federal courts jurisdiction over potentially sensitive diplomatic issues.[25] Used sporadically in the eighteenth century, it lay fallow for nearly two hundred years before being revived in 1980.[26] Since then, modern ATS developments have addressed and resolved several difficulties,[27] only once receiving guidance from the Supreme Court.[28] Because of the relative absence of appellate jurisprudence and the youth of the modern line of cases, a number of important issues remain unaddressed. This lack of guidance results in divergent interpretations of relatively basic elements, such as whether a statute of limitations applies and the nature of permissible parties to an ATS

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23. 28 U.S.C. § 1350 (2012). The cited language is from the current statute, which is substantively the same as the original 1789 text:

> That the district courts shall have, exclusively of the courts of the several States, cognizance . . . concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

Judiciary Act of 1789, 1 Stat. 73, § 9; s*ee infra* notes 47–50 and accompanying text (discussing passage of Judiciary Act). The ATS formed part of the first codification of United States law as part of the Revised Statutes of the United States in 1873: "The district courts shall have jurisdiction . . . . Of all suits brought by any alien for a tort only in violation of the law of nations, or of a treaty of the United States." 1 Rev. Stat. § 563, cl. 16 (1875). Its codification into U.S.C. broke the clauses from the Revised Statutes into freestanding statutes, used the term of art "original jurisdiction," and added the verb "committed." Judicial Code of 1911, § 24, cl. 17, 36 Stat. 1087, 1093 (codified at 28 U.S.C. § 41, cl. 17 (1911)). The current text dates to 1948, the only change in that codification being a substitution of the term "civil action" for the term "suits." Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934 (codified at 28 U.S.C. § 1350 (1948)). This modification was made pursuant to the then-recently adopted Federal Rules of Civil Procedure, which then as now provide that there is one form of action: the civil action. FED. R. CIV. P. 2.

24. U.S. CONST. art. I, § 8, cl. 10; *see infra* text accompanying note 43 (discussing the Offenses Clause).

25. Roughly speaking, the exact purpose of the ATS remains unclear; during the eighteenth century it was used primarily to provide jurisdiction over cases of seizure and piracy. *See infra* Part I.B.1 (discussing the uses of the ATS in the eighteenth century). The specific intentions of the ATS' drafters have consistently been at issue in modern jurisprudence.

26. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); *see infra* Part I.C.1 (discussing *Filartiga*).

27. *See infra* Parts I.D–E (discussing a variety of procedural elements to application of the ATS, including extraterritoriality, which was at issue in *Kiobel*).

28. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (providing guidelines on what underlying factual allegations constitute a violation of the law of nations sufficient to permit ATS jurisdiction); *see infra* Part I.C.2 (analyzing *Sosa* in detail).

action.[29]

A. Historical Context of the Alien Tort Statute

The Alien Tort Statute's history may be sparse,[30] but its origins extend to before the Constitution. The Articles of Confederation recognized the existence of State courts, but by themselves did not directly establish any courts under the central government of the Confederacy.[31] The Articles authorized Congress to create only two permanent types of courts: (1) trial courts for piracy and felonies on the high seas; and (2) an appellate court for the same.[32]

While the Articles of Confederation were in force, criminal matters were tried in State courts.[33] When the later drafters of the Constitution were framing Congress' jurisdiction, they were influenced by two high-profile offenses against foreign ambassadors that occurred around this

29. *See infra* Parts I.D–E (discussing procedural factors that may play into application of the ATS).

30. The ATS was successfully invoked only four times between its enactment and the Second Circuit's landmark decision in *Filartiga*—a period of 191 years. O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); M'Grath v. The Candalero, 16 F. Cas. 127 (D.S.C. 1794) (No. 8809); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *see also infra* note 57 and accompanying text (discussing the Court's erroneous assertion in *Kiobel* that the ATS was only invoked twice in the eighteenth century).

31. *E.g.* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2 (requiring Congressionally-appointed commissioners to take an oath administered by a judge of a state's superior court). The Articles themselves established only one central body: Congress. *Id.* art. IX (granting powers of the United States solely to Congress, and establishing no other political organs). Whereas Article III of the Constitution establishes only one Court, but grants to Congress the power to establish inferior federal courts, the Articles of Confederation themselves established neither permanent courts nor any mechanism for determining judicial primacy. *See infra* note 32 and accompanying text (discussing the judicial mechanisms provided for under the Articles of Confederation).

32. Congress "shall have the sole and exclusive right and power . . . [to] appoint[] courts for the trial of piracies and felonies committed on the high seas . . . ." ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1. Notably, this power was exclusive with the states. Congress was also established as the ultimate determiner of conflicts of "boundary, jurisdiction or any other cause whatever" between multiple States, but these conflicts were not to be resolved in a court. The conflict resolution procedure involved selecting three candidates from each State, then having the aggrieved States alternately strike candidates until seven to nine were left, and *then* having the remaining candidates form an adjudicative panel to hear the case. While sensible enough, this procedure would create different panels for every issue, resulting in *ad hoc* adjudication rather than a permanent judicial body, establishing a system not unlike that of modern arbitration proceedings.

33. Without a permanent Confederate judicial body of any sort, only state courts would have existed for criminal matters, the only exception being limited but exclusive jurisdiction for confederate trials and appeals in cases of piracies and felonies on the high seas. *See supra* note 32 and accompanying text (discussing judicial principles under the Articles of Confederation).

time: an assault in 1784, and a violation of territorial integrity in 1787.[34] In 1784, a French army veteran threatened and subsequently assaulted the Consul General of France to the United States.[35] The defendant was tried, convicted, and ultimately fined and jailed for two years,[36] with no apparent indication of any irregularities in the judicial process.[37] Regular or not, however, French officials were concerned that the process was governed entirely by State law and that the Confederate central government was powerless to intervene; the French ambassador lodged a formal complaint to that end with the Continental Congress.[38] Three years later, during the Constitutional Convention, a New York constable entered the house of a Dutch ambassador to arrest one of the ambassador's servants.[39] Then-Secretary of Foreign Affairs John Jay directed the Mayor of New York to arrest the constable in turn.[40] Reporting to Congress on the Dutch ambassador's subsequent complaint, he explained that the Confederate government was not vested with powers to hear such cases.[41]

In response to these incidents, the United States Constitution was drafted to grant Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[42] The Offenses Clause[43] adopted the "piracies and felonies

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34. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1666 (2013) (providing a brief synopsis of the eighteenth-century assaults in question).

35. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 111–12 (Pa. 1784); *see also Kiobel*, 133 S. Ct. at 1666 (discussing the underlying facts of *Respublica*).

36. *Respublica*, 1 U.S. at 118.

37. Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1692–93 (2012) (finding no evidence of irregularity or other untoward procedure in the subsequent state criminal proceedings); *see also* Alfred Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. HIST. & BIOGRAPHY 294, 298 (1939) (noting that, because of the ambassador's personal popularity, "There was never any question of negligence on the part of Pennsylvania.").

38. *Respublica*, 1 U.S. at 112; *see also* Rosenthal, *supra* note 37, at 298–300 (discussing debate, resolutions, and U.S.–France negotiations in the wake of the incident).

39. *Kiobel*, 133 S. Ct. at 1666 (discussing the facts of the incident); Sosa v. Alvarez-Machain, 542 U.S. 692, 717 (2004) (discussing the factual background).

40. *Kiobel*, 133 S. Ct at 1666.

41. *Sosa*, 542 U.S. at 717 (discussing Secretary Jay's explanations to Congress after speaking with the Dutch ambassador); *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of The Law of Nations*, 18 CONN. L. REV. 467, 494 n.152 (1986) (providing a more complete background of the event in question).

42. U.S. CONST. art. I, § 8, cl. 10. The exact definition of what offenses against the law of nations consist in is unclear. The *Filartiga* court included torture in this list. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980). The Supreme Court established a test to define the term in *Sosa*, 542 U.S. at 737.

43. For more on the other effect of this clause, see generally Kontorovich, *supra* note 37.

committed on the high seas" language from the Articles of Confederation,[44] but it expanded the crimes covered to include offenses against the law of nations.[45] Under this formulation, Congress could have regulated the two incidents in 1784 and 1787, as assault against ambassadors and violations of safe conduct were already a part of British common law.[46] The First Congress implemented this language from the Offenses Clause in its first session[47] in passing the Judiciary Act of 1789.[48] This Act, *inter alia*, both solved the ambassadorial question by giving the Supreme Court original jurisdiction over suits brought by diplomats[49] and created the Alien Tort Statute.[50]

Few historical references to the ATS exist, but those few stand out.[51] In 1794, several American citizens joined a French fleet in an attack against the British colony in Sierra Leone.[52] In response to a British complaint, Attorney General William Bradford issued a formal opinion stating that actions that took place in a foreign country were not punishable within the United States, but those that took place on the high seas were, and furthermore that those injured had access to a civil remedy.[53] This "civil remedy" is a clear reference to the ATS, both

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44. *Compare* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1, *with* U.S. CONST. art. I, § 8, cl. 10.

45. This further gave Congress the power to define all three types of crimes.

46. And would therefore be both incorporated into the fledgling American common law and more generally considered as the law of nations. Kontorovich, *supra* note 37, at 1693–94, 1693 n.82.

47. The Judiciary Act was passed on September 24, 1789, Judiciary Act of 1789, 1 Stat. 73, five days before the close of the First Congress' first session on September 29, 1789. *Dates of the Sessions of Congress, present–1789*, UNITED STATES SENATE, https://www.senate.gov/reference/Sessions/sessionDates.htm (last visited Sept. 26, 2014).

48. Judiciary Act of 1789, 1 Stat. 73. Formally, the Judiciary Act was passed as "[a]n Act to establish the Judicial Courts of the United States," as Chapter XX of the Public Acts of the First Congress. The term "Judiciary Act" stuck almost immediately, as at the time there was of course only one of them. *See, e.g.*, Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) (referring to "the words of the judiciary act of the United States").

49. Judiciary Act of 1789, § 13; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (noting the Judiciary Act's purpose to ensure jurisdiction over diplomatic suits).

50. Judiciary Act of 1789, § 9.

51. Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509, 509 (2012) (discussing the few contemporary references to the ATS).

52. *See* Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795) (document produced to explain the United States' actions as a result of the incident); *see also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1667–68 (2013) (discussing the opinion of Attorney General Bradford); Bradley, *supra* note 51, at 518–20 (providing an overview of the incident).

53. Breach of Neutrality, 1 Op. Att'y Gen. 57, 58–59 (1795).

> 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

describing it and echoing its language.[54] While previously the ATS was used to justify actions resulting from conduct on the high seas,[55] the ambiguity in his text implies that the ATS might justify a suit for tortious conduct that occurred abroad—the major modern-day use of the ATS.[56]

B. Historical Uses of the Alien Tort Statute

The Alien Tort Statute was referred to three times in the eighteenth century:[57] once denying jurisdiction, once providing jurisdiction, and once granting alternative jurisdiction.[58] It did not appear at any point in the nineteenth century. Between 1900 and 1980, it was only referred to twice, both in passing.[59] All references support interpreting the ATS as

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> prosecuted or punished for them by the United States . . . crimes committed on the high seas are within the jurisdiction of the . . . courts of the United States . . . . 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* . . . .

Id. (emphasis added).

54. *Id.* The language used by Attorney General Bradford is a clear reference to the ATS.

55. *See infra* Part I.B.1 (discussing uses of the ATS in cases involving action on the high seas).

56. This was, in fact, the argument of the plaintiffs in *Kiobel*. Attorney General Bradford states that actions in a foreign country are not within the cognizance of American courts. He continues, however, by saying that foreign actions cannot be criminally punished, and that ones on the high seas can, but "there can be no doubt" that there exists a civil remedy for those "injured by these acts of hostility." *See* Breach of Neutrality, 1 Op. Att'y Gen. 57, 58–59 (1795). This phrasing introduces ambiguity as to whether the "acts of hostility" include only actions on the high seas, or whether they encompass, as the *Kiobel* plaintiffs unsuccessfully argued, all foreign actions. The *Kiobel* court ultimately sidestepped the issue, holding that Attorney General Bradford's opinion "hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1668.

57. The Court in *Kiobel* asserts that the ATS was invoked only twice in the eighteenth century. *Kiobel*, 133 S. Ct. at 1663 (citing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895)). There exists a third case, *M'Grath v. Candalero*, 16 F. Cas. 127 (D.S.C. 1794) (No. 8809), which makes reference to the ATS. *M'Grath* uses the ATS to provide jurisdiction for an enforcement action, rather than to decide a case on merits, but the case is worth mentioning, given that references of any sort to the ATS are few and far between.

The Court's omission here is not unusual, given the general difficulty of conducting legal research around the founding of the nation; only eight years prior, the Court in *Sosa* noted only one pre-*Filartiga* case (*Bolchos*) where the ATS provided jurisdiction. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004). Perhaps the Court's next holding on the ATS will make mention of *M'Grath*.

58. Respectively, these cases are *Moxon*, 17 F. Cas. 942; *M'Grath*, 16 F. Cas. 127; and *Bolchos*, 3 F. Cas. 810.

59. In *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908), the ATS was cursorily dismissed;

a purely jurisdictional vehicle, with causes of action supplied by common law.[60]

1. First Applications in the Eighteenth Century

The first case to discuss the Alien Tort Statute was *Moxon v. The Fanny*, which was decided four years after the enactment of the ATS.[61] In *Moxon*, the owners of a British ship sued in the District Court of Pennsylvania for damages after a French privateer seized it in United States territorial waters.[62] As neither party was American, jurisdiction flowed solely from the ATS.[63] The plaintiff sued, requesting both return of the seized goods and damages arising from the seizure.[64] The court dismissed, holding that, when both property and damages were sought, the suit could not be properly called one for "tort only," as the ATS requires.[65] This restrictive holding is sensible in the light of the ATS' explicit limitation and implies that, without further legislation, a plaintiff bringing an ATS claim could only recover damages.[66]

The second and third cases provide a less restrictive interpretation of the ATS.[67] One case used it as basis to uphold a claim; the other refers

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in *Khedivial Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960), the parties do not appear to have argued the ATS, and it was discussed only briefly.

60. *See infra* notes 80–81 and accompanying text (discussing the Court's finding in *Sosa* that the ATS is purely jurisdictional).

61. *Moxon*, 17 F. Cas. at 942 (disallowing recovery for seizure at sea based on ATS).

62. *Id.* at 942–43; *see also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1667 (2013) (discussing *Moxon*); *Sosa*, 542 U.S. at 720 (discussing *Moxon*).

63. "[T]his court is particularly by law vested with authority where an alien sues for a tort only in violation of the laws of nations . . . and this is a case falling under that description." *Moxon*, 17 F. Cas. at 943.

64. *Id.* Personal jurisdiction was satisfied by personal presence: "[b]y bringing property into our ports captors submit to our jurisdiction." *Id.* at 944. A relevant Treaty of Alliance with France satisfied the ATS' treaty requirement. *Id.* at 947.

65. "It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.* at 947–48 (dismissing case for failure to satisfy ATS).

66. *See Sosa*, 542 U.S. at 720 ("[T]he judge [in *Moxon*] gave no intimation that further legislation would have been needed to give the District Court jurisdiction over a suit limited to damages.").

67. The same judge sitting in the same court heard both cases: Judge Thomas Bee (1739–1812). Judge Bee served, *inter alia*, as South Carolina's Lieutenant Governor (1780), one of its delegates to the Second Continental Congress (1780–81), and a state Senator (1788–90). George Washington appointed him to the federal bench in 1790, where he served until his death in 1812. *Biographical Directory of Federal Judges: Bee, Thomas*, FED. JUDICIAL CTR. (Oct. 2, 2012), http://www.fjc.gov/servlet/nGetInfo?jid=140. Judge Bee was also one of President Adams' (in)famous midnight judges: he was nominated and confirmed as Chief Judge of the Fifth Circuit, but declined the office. List of John Adams's Appointments, 23 February 1801, *in* 33 THE PAPERS OF THOMAS JEFFERSON, 17 FEBRUARY TO 30 APRIL 1801, at 52, 558 (Barbara Olberg ed., 2006) (appointing Judges Bee, Sitgreaves, and Clay to the Fifth Circuit, marking Thomas Bee

to the ATS to buttress admiralty jurisdiction.[68] In *M'Grath v. The Candalero*,[69] a privateer seized the titular *Candalero*; her owners sued, citing to the ATS and a treaty with France as the basis for jurisdiction.[70] An English court deemed the seizure illegal, while the American proceedings in the District of South Carolina were for enforcement, which was duly granted.[71]

One year later, in *Bolchos v. Darrel*,[72] a French privateer captured a British vessel and brought it to an American port.[73] When in port, the ship's Spanish mortgagee seized its cargo of slaves.[74] The French privateer sued the Spanish mortgagee in South Carolina, arguing that under the American treaty with France,[75] he had rightfully seized the slaves, which were therefore his property.[76] The seizure took place in

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as Chief).

68. Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (using ATS to support jurisdiction); M'Grath v. The Candalero, 16 F. Cas. 127 (D.S.C. 1794) (No. 8809) (using ATS to buttress, and noting that Bee declined jurisdiction in an enforcement action).

69. 16 F. Cas. 127. The first party's name is given in the original document as "M'Grath," but the case has been subsequently cited as "McGrath." *See, e.g.*, United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 540 (1841) (referring to "McGrath v. The Candelero"). This Note uses the original spelling of "M'Grath," as per the original form of publication in the Federal Cases.

70. *M'Grath*, 16 F. Cas. at 127. Incidentally, this was the same treaty as in *Moxon*. *See supra* note 64 and accompanying text (treaty in *Moxon*).

71. *M'Grath*, 16 F. Cas. at 127. The nature of the prior proceedings is unclear. The court said only that, "as the illegality of th[e] seizure was pronounced [in England], as the action is transitory, and the actor has chosen to seek for compensation in this court, I must say that his suit is properly brought." *Id.* at 128. Interestingly enough, though the parties jointly agreed to offer money as security, they forgot to actually *attach* the vessel to its titular suit. After the adverse judgment, the defendants sought to use the loophole and moved to review the proceedings, a motion summarily denied. *Id.*

72. 3 F. Cas. 810.

73. *Id.* The facts of the case do not clarify for *which* war the privateer was commissioned. Normally this would be self-evident, but in 1795 there were *two* ongoing wars between Britain and France: the War of the First Coalition (1792–97), where Britain joined Austria, the Hapsburgs, Prussia, and various Italian states in an attempt to contain Revolutionary France; and the War in the Vendée (1793–96), a French counterrevolution in which British forces armed French royalists in what was legally a separate conflict. In either case, both British and French governments would have issued letters of marque, as the practice of commissioning private agents to attack foreign vessels was a common one at the time. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress to issue letters of marque). The practice has become rare; though its power to do so remains intact, Congress has not issued a letter of marque since the War of 1812. *See generally* William Young, Note, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895, 907 (2009) (overview of letters of marque).

74. *Bolchos*, 3 F. Cas. at 810 (discussing facts of the case).

75. This was the same treaty as in *Moxon* and *M'Grath*. *See supra* text accompanying notes 64 and 70.

76. *Bolchos*, 3 F. Cas. at 810. The question of whether a slave could be property did not, of

port—and therefore on land—but the case was brought in admiralty, so there was some question as to the appropriateness of the district court's jurisdiction.[77] The court affirmed its jurisdiction on the grounds that the action arose at sea, thus making the action eligible for an admiralty ruling; furthermore, because state courts had already dismissed the case believing federal admiralty jurisdiction proper, dismissing the federal case at that point would have been a miscarriage of justice.[78] Lastly, the court mentioned that, because the ATS would provide concurrent jurisdiction, any doubt on the point was to be dismissed.[79]

In general, the ATS is best understood as having been created as a jurisdictional vehicle alone.[80] Common law would provide a specific cause of action for the few violations of international law that did carry personal liability: offenses against ambassadors, violations of safe conduct, and piracy.[81]

2. Mentions in the Early Twentieth Century

Though the Alien Tort Statute has been part of federal law since the Judiciary Act of 1789, it was not often applied in contemporary cases, despite seeming to provide a relatively broad mechanism for redress.[82] It does not appear in the nineteenth century[83] and was mentioned only twice in the first two-thirds of the twentieth century.

The ATS' first twentieth century appearance also marks its first application beyond the scope of the high seas. In *O'Reilly de Camara v.*

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course, arise.

77. *Id.*

78. *Id.*

79. *Id.*

80. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) (asserting that the ATS is purely jurisdictional); *see also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1664 (2013) (affirming *Sosa*'s determination of the pure jurisdictionality of the ATS).

81. *Sosa*, 542 U.S. at 714 (inferring from historical context that the ATS was intended to take effect at the moment it was passed by relying on such common law causes of action, rather than requiring additional legislation to provide causes of action).

82. *See supra* notes 80–81 and accompanying text (discussing jurisdictional scope of ATS). The ATS would provide immediate and original jurisdiction for any crime against any foreign official. *See supra* note 49 and accompanying text. Furthermore, it would provide civil redress against pirates and for other crimes on the high seas. *See supra* note 42 and accompanying text. Piracy was a clear and present danger at the time; the United States itself formally went to war twice because of the threat pirates posed, in the First and Second Barbary Wars of 1801–05 and 1815, respectively. Given a problem prevalent enough to justify not one but two wars, one might expect at least *some* litigation on point, but none exists.

83. At least, not in this Author's research, though thorough research is no guarantee of success. *Cf. supra* note 57 and accompanying text (Supreme Court's omission of *M'Grath* in recital of precedent).

Brooke,[84] the plaintiff was High Sheriff of Havana, Cuba, a position that brought with it certain payments and rights.[85] When the United States occupied Cuba during the Spanish-American War,[86] the military governor of Havana revoked the office and its rights.[87] The plaintiff sued alleging deprivation of property, basing jurisdiction on the ATS and the peace treaty with Spain, which had made the United States Constitution legally effective during the occupation.[88] The United States subsequently passed a law validating all actions taken during the occupation, including the plaintiff's dismissal from office.[89] The Supreme Court affirmed the dismissal with little thought;[90] because the validation authorized the act by law, it could hardly be a tort.[91] The plaintiff argued that her fundamental rights were violated, a contention that the Court dismissed after finding Congress and the President agreed on the appropriateness of the validating law.[92]

The second case, *Khedivial Line, S.A.E. v. Seafarers' International Union*,[93] briefly brings up the ATS, disclaiming it as a potential source of jurisdiction.[94] In *Khedivial*, union members picketed a ship in New York Harbor, the owners of which sued to enjoin the picketing.[95] The district court dismissed the owners' suit because a specific federal law

84. 209 U.S. 45 (1908).

85. Including, curiously, that of being allowed to slaughter cattle within the city. *Id.* at 48–49.

86. Cuba, previously a Spanish colony, had earlier rebelled against Spain during the Ten Years' War (1868–78) and Little War (1879–80). Its third rebellion in 1895 would become known as the Cuban War of Independence. A combination of American economic interests and critical events, such as the infamous sinking of the U.S.S. *Maine*, precipitated intervention and resulted in the Spanish-American War. *See generally* John L. Offner, *McKinley and the Spanish-American War*, 34 PRESIDENTIAL STUD. Q. 50–61 (2004).

87. *O'Reilly*, 209 U.S. at 49. Removing local political appointees would not have been, and is still not, an unusual action during a military occupation. The case does not give sufficient facts, but if the plaintiff was a Spanish sympathizer, removal might have been inevitable.

88. *Id.*; *see also* Treaty of Peace between the United States of America and the Kingdom of Spain, art. I, U.S.–Spain, Dec. 10, 1898, 30 Stat. 1754 (also known as the Treaty of Paris).

89. *O'Reilly*, 209 U.S. at 49–50.

90. *Id.* at 50 ("We are so clearly of opinion [sic] that the complaint must be dismissed that we shall not do more than mention some technical difficulties that would have to be discussed before the plaintiff could succeed.").

91. *Id.* at 51 (holding legalization of an act by definition barred a suit alleging the illegality of that act).

92. What exactly these more fundamental rights were is unclear; the Court nevertheless dismissed the argument. *Id.* (accepting joint Congressional and Presidential approval of the legalization act as sufficient).

93. 278 F.2d 49 (2d Cir. 1960).

94. *Id.* at 51–52.

95. *Id.* at 50.

barred injunctive relief.[96] The Second Circuit affirmed on different grounds: the specific law did not apply,[97] but federal jurisdiction was not otherwise available.[98] The court considered and dismissed diversity jurisdiction,[99] federal question jurisdiction,[100] and maritime tort jurisdiction[101] as potential bases for the action, before briefly considering and dismissing the ATS, as the plaintiff neither alleged that a treaty existed, nor that such picketing violated the law of nations.[102] The court's brief treatment, coupled with plaintiff's failure to present any evidence to support an ATS claim,[103] implies that the possibility of ATS jurisdiction was raised briefly, if at all, and was not given serious consideration.[104]

The ATS did not play a significant role in either of the early twentieth century cases: in *O'Reilly* there was no underlying tort, a threshold requirement for any cause of action;[105] in *Khedivial*, the parties did not substantively argue the issue.[106]

C. The Modern Line of Cases

Following nearly two hundred years of obscurity,[107] the Alien Tort

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96. *Id.* at 50. The law at hand was the Norris-La Guardia Act of 1932, 29 U.S.C. § 101 (2012), which prevents federal courts from granting injunctive relief against non-violent labor disputes.

97. The plaintiffs did not adequately establish the events in question as constituting a "labor dispute" within the meaning of the Norris-La Guardia Act. *Khedivial*, 278 F.2d at 51.

98. *Id.* at 51.

99. *Id.* (complaint did not allege diversity).

100. *Id.* (complaint did not allege a violation of federal antitrust regulations).

101. While the action was a maritime tort, the Supreme Court had recently affirmed the position that a maritime tort could not support a grant of injunction in admiralty. *Id.* at 52; *see also* Marine Cooks & Stewards, A.F.L. v. Panama Steamship Co., 362 U.S. 365, 368 n.5 (1960) (because the Norris-LaGuardia Act prevents federal courts from issuing injunctions in labor disputes, injunctions should not be permitted on alternate grounds, such as cases in admiralty).

102. *Khedivial*, 278 F.2d at 51–52.

103. The court only mentions that the plaintiff concedes that there is no treaty of free access, and that furthermore the plaintiff presented "no precedents *or arguments*" regarding any right of free access to harbors. *Id.* at 52 (emphasis added).

104. The failure of the plaintiff to even argue that free access was a fundamental right protected by the law of nations—much less present any evidence on point—implies that the ATS was not seriously considered as a claim. Either that, or counsel was fatally unprepared at oral argument; given plaintiff's representation by a reputable New York firm, such seems unlikely. Furthermore, the lack of "argument" on the issue indicates that it was not given serious consideration. The issue was in all likelihood raised *sua sponte* by the court.

105. O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908).

106. *See supra* note 102 and accompanying text (discussing extent of ATS argumentation in the case).

107. The earliest reference to any ATS-like language comes from the Articles of

Statute was suddenly brought into the modern age in the Second Circuit's holding in *Filartiga v. Pena-Irala*,[108] which brought the ATS up to date and gave it potential for relevance in the modern world. Though a flurry of ATS litigation followed,[109] the Supreme Court only addressed the ATS in 2004, in *Sosa v. Alvarez-Machain*,[110] establishing formal boundaries and guidelines in the wake of circuit confusion. Though several cases have since defined other procedural boundaries of the ATS,[111] all modern ATS jurisprudence is based on the *Sosa* framework.[112] Given the drastic implications of expanded ATS jurisdiction, the time had come for the Supreme Court to once again weigh in on the matter, thus setting the stage for *Kiobel*.

1. *Filartiga v. Pena-Irala*

In *Filartiga*,[113] two citizens of Paraguay sued a former Paraguayan police Inspector General, the alleged torturer of their son.[114] They asserted federal jurisdiction solely under the Alien Tort Statute.[115] The New York district court dismissed based on a strict interpretation of the ATS, holding that the law of nations did not extend to a torture claim.[116] This outcome was not surprising, given how rarely the ATS had been used, much less upheld as conferring jurisdiction.[117] The Second Circuit's reversal therefore paved the way for a new and modern conceptualization of the ATS,[118] which has since been firmly adopted in spirit, if not in detail.[119]

Confederation, establishing a potential earliest date of 1781. The *Filartiga* decision, handed down in 1980, came just one year shy of the ATS' bicentennial.

108. 630 F.2d 876 (2d Cir. 1980).

109. Relative to five cases in 191 years, *any* cases would constitute a flurry.

110. 542 U.S. 692 (2004).

111. *See infra* Part I.D (discussing procedural requirements applied to ATS).

112. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1665 (2013) (affirming *Sosa*'s specific ruling and "specific, universal, and obligatory" test).

113. *Filartiga*, 630 F.2d 876.

114. *Id.* at 878.

115. *Id.* at 880.

116. *Id.*

117. The last time jurisdiction under the ATS was upheld was in 1795 in *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Even *Bolchos* was a case of parallel, rather than sole, jurisdiction. *See generally supra* Part I.B.1 (discussing *Bolchos*).

118. Gary C. Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 610 (2004).

119. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (affirming modern applicability of ATS but setting out guidelines to determine when jurisdiction under ATS is proper); *see also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659 (2013) (limiting extraterritorial application of ATS doctrine).

The *Filartiga* court made two principal rulings regarding aspects of the ATS.[120] Substantively, it held that torture was a violation of the law of nations; procedurally, it reaffirmed that the ATS could grant jurisdiction over actions that took place entirely abroad.[121]

The Second Circuit's substantive determination that torture violated the law of nations was the first expansion of the "law of nations" language of the ATS.[122] The court made this determination from a comprehensive analysis of international jurisprudence on the issue.[123] It looked to the Charter of the United Nations,[124] observing that, though there existed disagreement as to what the Charter's basic guarantees include, no state questioned the right to be free from torture.[125] The court concluded there were few issues in contemporary law so universally agreed upon as the limitation on a state's power to torture those under its control.[126] The court bolstered its interpretation by looking to the Universal Declaration of Human Rights,[127] the American Convention on Human Rights,[128] and explicit bans of torture in national constitutions,[129] including those of the United States[130] and Paraguay.[131] It also referred to a State Department report articulating a

120. It also incidentally affirmed that the ATS was purely a jurisdictional statute, and did not grant any new rights. *Filartiga*, 630 F.2d at 887; *see also infra* note 138 and accompanying text.

121. *Filartiga*, 630 F.2d at 887, 890. The acts took place abroad, but both parties were present in the United States; the plaintiffs had applied for and received political asylum, while the defendant had entered on a visitor's visa. *Id.* at 878. The defendant's visa had expired, and he was actually served with the complaint while in custody waiting for deportation. *Id.* at 878–89.

122. The only prior case, *Khedivial*, gave a cursory analysis and suggested that the law of nations did not guarantee free access to harbors. *See supra* text accompanying note 102 (discussing *Khedivial*). It can be safely said that ATS jurisdiction had been materially unmodified since its introduction.

123. *See generally Filartiga*, 630 F.2d at 880–85 (looking to international sources for defining the law of nations).

124. *Id.* at 881; *see also* U.N. Charter art. 55.

125. *Filartiga*, 630 F.2d at 882.

126. *Id.* at 881 (finding public opinion is united on limitations on a state's power to torture).

127. *Id.* at 882; *see also* Universal Declaration of Human Rights art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/.

128. *Filartiga*, 630 F.2d at 883–84. The United States has not signed the American Convention on Human Rights, but it stands as an example of international consensus surrounding torture. *See* Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

129. *Filartiga*, 630 F.2d at 884. *See* 48 *Revue Internationale de Droit Penal* Nos. 3 & 4, at 208 (1977) (survey of national constitutions' torture provisions, concluding that more than fifty-five nations explicitly ban torture).

130. *Filartiga*, 630 F.2d at 884 n.13 (citing U.S. CONST. amend. VIII, which prohibits "cruel and unusual punishments.").

131. The actions that culminated in *Filartiga* took place in Paraguay. *Filartiga*, 630 F.2d at

general international recognition of the principle of freedom from torture, which reached a similar conclusion.[132] The prohibition against torture was "clear and unambiguous" and therefore sufficient to constitute a law of nations.[133]

The court then turned to jurisdiction, determining that the ATS can have extraterritorial application.[134] It started by noting it would not be unusual for a court to adjudicate claims arising out of its jurisdiction under the transitory torts doctrine.[135] It concluded that, because the ATS was properly authorized under Article III of the Constitution,[136] and the law of nations has always been part of the federal common law, federal jurisdiction over cases involving international law was clearly established.[137] The court was careful to note that this interpretation granted no *new* rights, but merely established the ATS as a jurisdictional vehicle for rights already recognized by international law, and thus the federal common law.[138]

Filartiga ended on a note of clarification, asserting that the reinterpretation of the ATS was intended to form it into a mechanism through which to protect human rights.[139] The court did so by expanding the law of nations to account for the fact that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind,"[140] thus drawing an explicit connection to the language of the Constitution that authorizes the

884. *See* CONSTITUCIÓN DE LA REPÚBLICA DE PARAGUAY Aug. 25, 1967, art. 65, cl. 3 (Para.) (outlawing torture and other cruel and inhuman behavior).

132. *Filartiga*, 630 F.2d at 884; *see also* J. L. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 4–5 (1944) (concluding that states' violations of norms of international law do not mean the norms do not exist, nor does it diminish their effect; states may violate international norms as individuals do national laws, but the violations have no bearing on the existence of the norms).

133. *Filartiga*, 630 F.2d at 884.

134. *Id.* at 885.

135. *Id.* To wit: a party may recover for torts "when the cause of action arose in another civilized jurisdiction [if there exists] a well-founded belief that it was a cause of action in that place." Cuba R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912).

136. *Filartiga*, 630 F.2d at 866; U.S. CONST. art. I, § 8, cl. 10; *see also supra* notes 42–50 and accompanying text (discussing origin of ATS in the Judiciary Act of 1789, which was authorized under the Offenses Clause).

137. *Filartiga*, 630 F.2d at 886–87.

138. *Id.* at 887.

139. *Id.* at 890.

140. *Id.* at 890. Both the emphasis and the punctuation are in the original; the *Filartiga* opinion as transcribed in various online databases is often improperly cited. This eminently quotable language is often found in subsequent ATS litigation. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1671 (2013) (Breyer, J, concurring); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

ATS.[141]

2. *Sosa v. Alvarez-Machain*

Filartiga fundamentally changed the Alien Tort Statute, rendering it suddenly relevant after nearly two hundred years of obscurity. In its aftermath, courts continued to expand the ATS, sometimes significantly. This rapid expansion was accompanied by correspondingly significant consequences.[142] It fueled fears that ATS litigation was developing into a plaintiff's market, threatening massive class actions against powerful corporate and sovereign defendants.[143] The Supreme Court first weighed in on the matter in 2004 in *Sosa*, affirming the ATS as a purely jurisdictional statute.[144] The Court sketched a test to define violations of the law of nations,[145] and above all urged judicial caution in the ATS' application.[146]

In *Sosa*, a Drug Enforcement Administration ("DEA") agent was captured in Mexico, tortured, and murdered.[147] The DEA had reason to believe the defendant, Alvarez-Machain, was involved with the crime.[148] When extradition procedures subsequent to an arrest warrant

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141. Congress would later sanction and formalize the *Filartiga* holding by passing the Torture Victim Protection Act (TVPA) of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 18 U.S.C. § 1350 (2012)), an ATS-like statute crafted specifically to give victims of foreign torture redress in American courts. While the TVPA was added to the ATS, it neither modified its wording nor changed the ATS' effect. The legislative context surrounding the TVPA's passage makes it quite clear that it was intended to supplement the ATS, rather than supplant it, by providing concurrent jurisdiction in cases of torture. *See* S. REP. NO. 102-249, at 4 (1991) (Senate Committee on the Judiciary stating that, relative to TVPA, ATS has other important uses and "should not be replaced"); H.R. REP. NO.102-367(I), at 4 (1991) (House Committee on the Judiciary noting that TVPA intended to "enhance the remedy already available under [the ATS]").

142. *See* Hufbauer, *supra* note 118, at 610–11 (describing how, after *Filartiga*, some courts held ATS to explicitly create causes of action under federal common law, and other courts were receptive to expanding definition of the law of nations).

143. *Id.* at 614–15 (in section entitled "Pandora's Box: Potential Damage to International Commerce," comparing potential trajectory of ATS litigation to that of asbestos, which "spawned the largest mass tort litigation in legal history.").

144. *Sosa*, 542 U.S. at 713–14 (holding that the ATS was intended as jurisdictional; to argue that the ATS *creates* causes of action is "simply frivolous").

145. *Id.* at 724–25. In order to be cognizable, violations of the law of nations must be "specific, universal, and obligatory." *Id.* at 732 (quoting *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

146. The term "caution" appears seven times in the Court's opinion. *See, e.g.*, *Sosa*, 542 U.S. at 725 ("A series of reasons argue for judicial caution [when considering early common law claims]"); *id.* at 727 ("[C]ollateral consequences . . . argue for judicial caution."); *id.* at 728 ("These reasons argue for great caution in adapting the law of nations . . . .").

147. *Id.* at 697–98.

148. *Id.*

were fruitless, the DEA hired a group of Mexican citizens, including Sosa, to capture him.[149] The defendant was held for one night before being flown to California, where he was arrested, charged, and eventually acquitted for insufficient evidence.[150] Alvarez-Machain then sued Sosa asserting claims under, among other statutes,[151] the ATS.[152]

The Court first discussed the ATS' jurisdictionality, concluding it was intended solely as a jurisdictional article.[153] The Court reached this conclusion by looking to the original text of the ATS, giving attention to its placement in the Judiciary Act of 1789[154]—a statute otherwise exclusively concerned with federal jurisdiction[155]—and two related journal articles.[156] If the ATS were purely jurisdictional, it could have been argued that additional legislation was necessary to provide causes of action.[157] The Court disagreed, reasoning that, at the time of the passage of the ATS, such causes of action would have been provided by federal common law adopted from the moment of independence,[158] and

149. *Id.* at 698.

150. *Id.* Alvarez-Machain successfully dismissed his criminal case on the grounds that his seizure was in violation of a U.S.–Mexico extradition treaty. United States v. Alvarez-Machain, 504 U.S. 655, 658 (1992). The dismissal was affirmed on appeal, but the Supreme Court reversed, reinstating the charges on the grounds that the mere fact of a forcible seizure did not affect a federal court's jurisdiction. *Id.* at 670. The case was tried on remand, and the district court granted a motion for a directed verdict. *Sosa*, 542 U.S. at 698.

151. Alvarez-Machain also sought a remedy under the Federal Tort Claims Act ("FTCA") for the DEA agents' alleged wrongful arrest. *Sosa*, 542 U.S. at 698; *see also* 28 U.S.C. § 2680(h) (2012) (permitting suits for wrongful arrest against government agents acting within the scope of their employment). The FTCA claim was dismissed by the district court, but reinstated on appeal by the Ninth Circuit. Alvarez-Machain v. United States, 266 F.3d 1045, 1064 (9th Cir. 2001). On appeal, the Supreme Court reversed again, dismissing the FTCA claim on the grounds that the FTCA's waiver of sovereign immunity pursuant to 28 U.S.C. § 2680(k) does not apply to "any claim arising in a foreign country." *Sosa*, 542 U.S. at 700–01.

152. *Sosa*, 542 U.S. at 698–99. It bears note that the events in question took place in 1985, a full nineteen years before the case reached the Supreme Court.

153. *Id.* at 713–14. Thus affirming the conclusion of *Filartiga*.

154. Judiciary Act of 1789, § 9, 1 Stat. 73 (1789).

155. *Sosa*, 542 U.S. at 713.

156. *Id.*; *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479–80 (1986) (contending that ATS "clearly" does not create a cause of action, and to argue otherwise would be "simply frivolous"); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002) (arguing that the ATS was intended as jurisdictional in nature).

157. Such was the defendant's argument. *Sosa*, 542 U.S. at 714.

158. *Id.* at 714–15. This is not a new notion, and dates back to the very first cases addressing the subject. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (opinion of Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

that furthermore those who drafted the ATS would have made that assumption as well.[159]

The remaining question was then what sort of torts the ATS was meant to encompass. The Court in *Sosa* inferred it was intended to provide jurisdiction for a "modest" set of violations: offenses against ambassadors, violations of safe conduct, and prize captures and piracy.[160] The law of nations concerned itself with whole nations,[161] while the ATS provided for individual relief, but the tension between the individual and international scopes did not mean that *no* claims were cognizable: the ATS provided jurisdiction for the few international law violations that carried personal liability.[162]

The Court then turned to how best to understand violations of the law of nations in a modern context. It concluded that, absent Congressional modification to the ATS,[163] any law of nations that could be enforced under the ATS would need to be established through reliance on a norm of international character accepted by the civilized world and defined with specificity comparable to the accepted eighteenth century violations.[164] The Court required a modern law of nations to be: (1) specific, (2) universal, and (3) obligatory.[165] Courts applying these requirements would then have to moderate them by examining the possible resulting practical effects of allowing such actions.[166]

Turning at last to Alvarez-Machain's claim, the Court concluded that

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159. *Sosa*, 542 U.S. at 715–16 (finding the legislative intent behind the ATS was to have federal common law provide causes of action); *see also supra* Part I.A (discussing historical context of ATS).

160. *Sosa*, 542 U.S. at 720 (ATS intended to provide vehicle for three causes of action); *see also supra* note 46 and accompanying text (discussing how causes of action under the ATS were already incorporated into British common law, and thus adopted by American federal common law).

161. *Sosa*, 542 U.S. at 720 (set of potential ATS claims limited by the national scope of the law of nations); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (1769) ("offences again[s]t [the law of nations] are principally incident to whole [s]tates or nations").

162. *Sosa*, 542 U.S. at 724.

163. Such as the TVPA. *See supra* note 141 and accompanying text (discussing TVPA's passage and effect).

164. *Sosa*, 542 U.S. at 725.

165. *Id.* at 732–33 (quoting *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). *Sosa* actually uses two phrasings of the test, the other being "violat[ion]s [of] definable, universal and obligatory norms." *Sosa*, 542 U.S. at 732 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)). The "specific, universal, and obligatory" language has, however, prevailed.

166. *Sosa*, 542 U.S. at 732–33. Courts often keep practical considerations in mind, but the Supreme Court here made a pragmatic analysis an explicit element.

"arbitrary arrest" did not meet these standards.[167] It did not find appeals to the Universal Declaration of Human Rights[168] or the International Covenant on Civil and Political Rights[169] compelling. Neither document was binding according to United States jurisprudence,[170] and what propositions the documents did present were too abstract to support a broad rule.[171] Lastly, the Court commented that admitting such litigation would create an incredibly and inappropriately broad cause of action.[172]

The Court in *Sosa* set the bar fairly high; though the Supreme Court has since readdressed the ATS, it only did so in *Kiobel* on more fundamental grounds.[173] Given the more prominent issues in other areas of ATS jurisprudence,[174] it might be some time until *Sosa*'s test to interpret the law of nations is reviewed.

D. Procedural Requirements Read Into the ATS

Sosa addressed only the Alien Tort Statute insofar as it defined what a cognizable law of nations violation was. Courts have since developed a much broader package of ATS jurisprudence to address other

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167. *Id.* at 735, 738.

168. *Id.* at 734; *see also* Universal Declaration of Human Rights, *supra* note 127, art. 5.

169. *Sosa*, 542 U.S. at 734–35; *see also* International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171, 175–76.

170. *Sosa*, 542 U.S. at 734–35. The Universal Declaration of Human Rights is a declaration, rather than a binding instrument; the International Covenant on Civil and Political Rights is non-self-executing, and was never intended to create a private cause of action. *See* S. EXEC. REP. NO. 102-23 (1992) (understanding of Senate); David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 96 (2013) (despite status as treaty, ICCPR not incorporated into domestic law, and unavailable to courts).

171. *Sosa*, 542 U.S. at 736 n.27 "[M]any nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality.").

172. *Id.* at 736 ("[The] implications would be breathtaking. [Admitting arbitrary detention as a violation of the law of nations] would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place . . . ."). The Court's declaration is sweeping, but perhaps it overlooks other procedural checks such as exhaustion. *See* Part I.D *supra* (discussing procedural requirements imposed on ATS claims).

173. *Sosa* looked to what constituted a violation of the law of nations, but *Kiobel* was originally accepted to determine whether a corporation could be liable in the first place, and was decided on the even more fundamental question of whether the ATS could even have extraterritorial application. *See infra* note 225 and accompanying text (discussing grounds for which cert. was granted in *Kiobel*).

174. One such issue is whether corporations may be liable—the question originally at issue in *Kiobel* before the issue of extraterritoriality arose. Both corporate liability and extraterritoriality are *a priori* to the *Sosa* factors, and it is unlikely that a case testing *Sosa* alone would reach the Court in the near future.

procedural issues.[175] Because appellate review of the ATS is so uncommon, many of these issues remain unresolved; they nevertheless bear some mention to establish the bounds of ATS litigation.[176]

Though the text of the ATS enumerates no procedural requirements,[177] several have been inferred, including both a requirement of exhaustion of domestic remedies and application of a statute of limitations.[178] The Supreme Court briefly touched on exhaustion in *Sosa*,[179] noting that requiring the exhaustion of domestic remedies as a prerequisite for seeking international ones could be considered a principle of international law[180] and suggesting that exhaustion could be considered as a requirement.[181] Courts have been generally receptive to an exhaustion requirement, and the Ninth Circuit has established a framework within which to evaluate exhaustion as an affirmative defense.[182] While *Sosa* does not discuss a statute of limitations applicable to ATS jurisprudence, courts have applied a ten-year statute to the ATS by analogy to the explicit statute provided for within the Torture Victim Protection Act ("TVPA").[183] As with all

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175. As discussed in this section, these requirements can include exhaustion, statutes of limitations, effects of state action, the nature of the parties, and the underlying tort. Extraterritoriality, the issue at the heart of *Kiobel*, is dealt with in Part I.E *infra*.

176. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. —, 133 S. Ct. 1659 (2013) ("Because appellate review of ATS suits has been so uncommon, there remain a number of unresolved issues lurking in our ATS jurisprudence—issues that we have simply had no occasion to address.").

177. At thirty-three words, the text of the ATS does not go into great detail on much of anything. *See* 28 U.S.C. § 1350 (2012) (full text of ATS).

178. Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2004) (recognizing that causes of action barred in a foreign jurisdiction by a statute of limitations will generally be barred domestically). This does not explicitly establish a domestic statute for ATS claims, but implies recognition of foreign statutes as a possibility.

179. *Id.* at 722 n.21 (discussion of exhaustion in a footnote).

180. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472–81 (6th ed. 2003). TVPA § 2(b), 28 U.S.C. § 1350 (2012) requires claimants to exhaust "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."

181. *Sosa*, 542 U.S. at 733 n.21 (Court "would certainly consider" the appropriateness of an exhaustion requirement in a future case).

182. Sarei v. Rio Tinto P.L.C., 550 F.3d 822, 831–33 (9th Cir. 2008). The Ninth Circuit here explicitly follows guidelines set out in the Restatement of Foreign Relations Law. *Id.* at 832; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 cmt. d. (1987) (allowing a state to pursue formal remedies only after a claimant of a human rights violation "has exhausted available remedies under the domestic law of the accused state"). Worth noting is that the Restatement itself was specifically modeled on the doctrinal holdings of *Filartiga*. Ernest A. Young, Universal Jurisdiction, the Alien Tort Statute, and Transnational Public Law Litigation after *Kiobel* 14 (Mar. 14, 2014) (unpublished manuscript), available at http://ssrn.com/abstract=2409838.

183. TVPA § 2(c); *see, e.g.*, Jean v. Dorelien, 431 F.3d 776, 778 (11th Cir. 2005) (asserting

statutes of limitations, equitable tolling is applicable.[184]

The ATS is fairly clear about which parties have standing to sue for relief, but it is less clear on the nature of the defendant. A party seeking relief under the ATS must be, as a threshold matter, an alien.[185] Alien status is determined solely through citizenship—neither residency[186] nor custodial status[187] is relevant. The nature of the defendant is less clear-cut, posing two main issues: (1) what effect, if any, does a claim of state action have on a defendant;[188] and (2) whether a corporate defendant can be liable.[189] Circuit confusion and disagreement on a requirement of state action likely stem from the TVPA, where state action is explicitly required—that is, that individuals must be acting under the color of state law.[190]

As the ATS contains no explicit state action requirement, federal courts have taken different approaches to the subject. The Eleventh Circuit has held that state action is generally required under the ATS, but that war crimes are exceptional and do not require such a

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(incorrectly) that ATS and TVPA are *both* subject to a ten-year statute of limitations provided for in TVPA).

184. Van Tu v. Koster, 364 F.3d 1196, 1199–1200 (10th Cir. 2004) (finding insufficient showing by plaintiff to justify equitably tolling the statute of limitations for an ATS claim that was delayed by twenty-two years).

185. "The district courts shall have original jurisdiction of any civil action by an *alien* for a tort only . . . ." 28 U.S.C. § 1350 (2012) (emphasis added). Quite plainly, "[a] district court lacks subject-matter jurisdiction under the ATS if the plaintiff is not an alien." Weisskopf v. United Jewish Appeal–Fed'n of Jewish Philanthropies of N.Y., Inc., 889 F. Supp. 2d 912, 921–22 (S.D. Tex. 2012); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 255 (2d Cir. 2009) (alien nature of plaintiff meets one of three requirements to state an ATS claim).

186. *See* Sarei v. Rio Tinto P.L.C., 550 F.3d 822, 831 (9th Cir. 2008) (finding that permanent resident alien qualifies as alien); Filartiga v. Pena-Irala, 630 F.2d 876, 878–89 (2d Cir. 1980) (allowing ATS suit by resident alien).

187. Rasul v. Bush, 542 U.S. 466, 473–74 (2004) (reversing precedent to hold that aliens detained abroad have standing to sue for habeas relief).

188. Specifically, whether a defendant *must* be acting under color of state action, whether it must *not* be acting under such state action, or whether a state action analysis is irrelevant to individual liability.

189. As *Kiobel* was decided on the procedural issue of extraterritoriality, the issue of corporate liability is still largely unresolved. *See, e.g.*, Tymoshenko v. Firtash, No. 11-CV-2794, 2013 WL 4564646, at *3 (S.D.N.Y. Aug. 20, 2013) (concluding that, because the Supreme Court affirmed *Kiobel*, until the Supreme Court or Second Circuit en banc repudiates it, the Second Circuit's *Kiobel* holding still bars corporate liability within the Second Circuit).

190. To be liable under the TVPA, an individual must act "under actual or apparent authority, or color of law, of any foreign nation . . . ." TVPA § 2(a), 28 U.S.C. § 1350 (2012); *see also* Romero v. Drummond Co., Inc., 552 F.3d 1303, 1316 (11th Cir. 2008) (affirming district court's grant of summary judgment on TVPA claims but not ATS claims, because a lack of state action did not affect ATS requirements).

showing.[191] The Ninth Circuit does not recognize such an exception, requiring state action to entertain claims of crimes against humanity.[192] The District of Columbia Circuit also requires state action; while it does not categorically bar ATS suits against nonstate actors,[193] if state action is not alleged, the plaintiff must demonstrate that an international consensus on individual liability for the action exists.[194] By contrast, the Second Circuit held that the law of nations does not apply solely to state action;[195] while torture and summary execution are only violations if carried out under the color of state law,[196] genocide[197] and war crimes[198] carry individual liability. The Fifth Circuit has declined to consider the issue.[199]

Corporate liability is also an area of significant ambiguity,[200] and the

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191. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1266–67 (11th Cir. 2009), *abrogated on different grounds*, Mohamad v. Palestinian Auth., 566 U.S. —, 132 S. Ct. 1702 (2012) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual."). Under this interpretation, plaintiffs must either argue state action or fit their claims under the "war crimes exception." *Id.* at 1267.

192. Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 735 (9th Cir. 2008). At least one judge, however, disagrees, asserting that "genocide and war crimes do not require state action," without indication that the point is contentious. Sarei v. Rio Tinto P.L.C., 671 F.3d 736, 786 n.4 (9th Cir. 2011) (McKeown, J., concurring), *vacated in light of Kiobel*, Rio Tinto P.L.C. v. Sarei, 133 S. Ct. 1995 (2013) (mem.), *dismissed on other grounds*, Sarei v. Rio Tinto P.L.C., 722 F.3d 1109 (9th Cir. 2013) (affirming dismissal in light of *Kiobel*).

193. Ali Shafi v. Palestinian Auth., 642 F.3d 1088, 1096 (D.C. Cir. 2011) ("A categorical bar of ATS suits against nonstate actors would be at odds with *Sosa* . . . .").

194. *Id.*

195. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

196. *Id.* at 243 ("[T]orture and summary execution . . . are proscribed by international law only when committed by state officials or under color of law."). If such acts are perpetrated in the course of genocide or war crimes, however, state action is no longer required. *Id.* The purpose of the "state action" inquiry is to find whether the defendant exceeded standards of civilized conduct, rather than draw a connection with a sovereign. As a result, meeting the "state action" threshold only requires showing a semblance of official authority. *Id.* at 232.

197. "[T]he proscription of genocide has applied equally to state and non-state actors." *Id.* at 241–42.

198. "The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . ." *Id.* at 239.

199. In its most recent pronouncement on the issue, the Fifth Circuit held that "we need not address whether state-action is required to sustain an action for individual human rights violation under the ATS." Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 166 (5th Cir. 1999).

200. And unusually so, as corporate liability is generally widely-accepted in other areas of the law. "A legal culture long accustomed to imposing liability on corporations may, at first blush, assume that corporations must be subject to tort liability under the ATS . . . ." Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. —, 133 S. Ct. 1659 (2013).

Supreme Court granted certiorari in *Kiobel* to consider that issue.[201] Most circuits had either held or assumed corporations were subject to liability under the ATS;[202] only the Second Circuit disagreed, rejecting corporate liability as having no grounding in the law of nations.[203] As the Supreme Court did not reach the issue in *Kiobel*, the split remains unresolved.

Setting aside questions of who may be liable under the ATS, there remains uncertainty as to what valid defendants may be liable *for*. The *Sosa* formulation provided guidance on which torts were covered under the law of nations, allowing for "[a] modest number of international law violations,"[204] but not defining any new ones. Modern courts have recognized several potential violations. The paradigmatic tort is that of torture, confirmed in *Filartiga*.[205] Courts have further upheld jurisdiction in cases of extrajudicial killings,[206] modern piracy,[207]

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201. *Kiobel*, 133 S. Ct. at 1663; *see also* Kiobel v. Royal Dutch Petroleum Co., 565 U.S. —, 132 S. Ct. 472 (2011) (mem.) (grant of certiorari).

202. The Fifth, Seventh, Ninth, Eleventh, and District of Columbia Circuits currently recognize corporate liability. *See* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 725 F.3d 940 (9th Cir. 2013) (holding that "[y]ou don't need a peg leg or an eye patch" to be a pirate, ruling for plaintiff without comment as to corporate nature of defendant); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1020–21 (7th Cir. 2011) (ruling that corporations are liable where the violations are directed, encouraged, or condoned by corporate decisionmakers); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008) (holding that ATS provides no exception for corporate defendants); Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004) (ruling without comment as to corporate nature of defendant in a suit between corporations); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999) (ruling on ATS claim, without comment as to corporate nature of defendant).

203. *Kiobel*, 621 F.3d at 120 (holding that international law rejects corporate liability, so ATS jurisdiction does not encompass corporate defendants). Interestingly enough, the Second Circuit had previously upheld an ATS claim against a corporate defendant—the *same* corporate defendant as in *Kiobel*. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 91–92 (2d Cir. 2000), *repudiated by Kiobel*, 621 F.3d 111 (reinstating ATS claim against corporation on grounds that corporate office in New York was sufficient for personal jurisdiction).

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

205. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). Congress recognized torture as a violation of the law of nations by granting torture a sort of permanent pass by passing the TVPA, which independently provides protections and remedies to torture victims.

206. The TVPA provides a concurrent remedy for victims of extrajudicial killings. TVPA § 2(a)(2), 28 U.S.C. § 1350 (2012). If the ATS' requirements are met, then it provides concurrent jurisdiction. *See, e.g.*, *Romero*, 552 F.3d at 1316 (noting that ATS provides concurrent remedy to TVPA for extrajudicial killings, if "committed in violation of the law of nations").

207. *Inst. of Cetacean Research*, 725 F.3d at 942.

> You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your

human trafficking and forced labor,[208] and aiding and abetting liability.[209] Courts have found that acts of terrorism alone[210] do not constitute a violation of the law of nations.[211] A district court in the Northern District of California has even entertained disclosure of electronic information as a potentially actionable ATS claim.[212]

Due to the scarcity of modern appellate review of the ATS, some discrepancies have been resolved,[213] but many have not, leaving much room for rulings of first impression to accumulate.

E. The Requirement of Extraterritoriality

Though the Supreme Court granted certiorari for *Kiobel* to consider corporate liability, the case was ultimately decided on the threshold question of whether the Alien Tort Statute could have extraterritorial effect, an application that most jurisdictions had previously accepted.

As with corporate liability,[214] several courts have either explicitly found or implicitly assumed extraterritorial application of the ATS to be permissible.[215] While some courts have explicitly upheld the ATS'

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purpose to be.

Id.

208. Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009) (finding that trafficking and forced labor qualify as international norms under *Sosa*, and are therefore actionable under ATS).

209. Aziz v. Alcolac, Inc., 658 F.3d 388, 395–96 (4th Cir. 2011) (citing Doe v. Exxon Mobil Corp., 654 F.3d 11, 19 (D.C. Cir. 2011), *vacated in light of* Kiobel, Doe v. Exxon Mobil Corp., 527 Fed. App'x 7 (D.C. Cir. 2013) (mem.)) (concluding that "virtually every court" after *Sosa* has recognized accessorial liability for violations of international law).

210. As with the Second Circuit's holding on torture relative to genocide. *See* Kadic v. Karadzic, 70 F.3d 232, 243–44 (2d Cir. 1995) (holding torture without state action not actionable under ATS, but may be actionable if part of a larger act of genocide).

211. *See, e.g.*, *In re* Chiquita Brands Litig., 792 F. Supp. 2d 1301, 1321–22 (S.D. Fla. 2011) (terrorism is not based on a sufficiently accepted, established, or defined international norm so as to constitute a violation of the law of nations).

212. Zheng v. Yahoo!, Inc., No. C-08-1068 MMC, 2009 WL 4430297, at *1 n.3 (N.D. Cal. Dec. 2, 2009) (concluding that, where plaintiff filed suit for unlawful disclosure of private electronic communication, the claim "as pleaded" could be interpreted as alleging an ATS violation).

213. For example, *Kiobel*'s test may have helped to clarify when and under what conditions terrorism may be actionable under the ATS. *Compare* Kaplan v. Cent. Bank of the Islamic Republic of Iran, No. 10-483 RCL, 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013) (holding that Hezbollah rocket attacks injuring American civilians in Israel did not sufficiently touch and concern the United States), *with* Mwani v. Bin Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (finding that a terrorist attack on an American embassy in Afghanistan touched and concerned the United States to be actionable under ATS).

214. *See supra* text accompanying note 202 (listing numerous precedents in support of corporate liability).

215. Note that extraterritorial application of *state* tort law, as opposed to the law of nations, is

extraterritorial application,[216] others have done so implicitly, applying the ATS in extraterritorial contexts.[217] Judge Posner of the Seventh Circuit Court of Appeals addressed the question directly, holding the ATS capable of extraterritorial application.[218] He noted not only that all precedent was in favor of extraterritorial application, but also that courts had used the ATS extraterritorially since its creation.[219] Furthermore, denying extraterritorial application would render the statute "superfluous," given the extensive domestic remedies already in place for the torts it would otherwise cover.[220]

Issuing extraterritorial injunctions under ATS jurisdiction is a more difficult matter, with outcomes determined more by the practicality of enforcing injunctive relief abroad than any specific doctrine. The Second Circuit has held that applying injunctive relief within a foreign country is improper, largely because of the difficulty of enforcement: such an order would take effect both well outside of the court's jurisdiction and infringe the sovereignty of a foreign state.[221] Conversely, the Ninth Circuit has upheld extraterritorial injunctive relief in international waters, where no foreign state was present to complicate matters.[222]

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generally and uncontroversially barred. *See, e.g.*, Al Shimari v. CACI Int'l, Inc., 679 F.3d 205, 230–31 (4th Cir. 2012) (presumption of extraterritoriality applies to Virginia tort law).

216. *See, e.g.*, Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, 807 F. Supp. 2d 689, 694 (N.D. Ill. 2011) (holding that, since Congress generally has authority to apply its laws extraterritorially, consistent with principles of international law, ATS may be applied to extraterritorial actions); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1088 (N.D. Cal. 2008) (holding ATS can be applied extraterritorially as long as it fulfills the *Sosa* requirements of meeting a definite and universal international law norm); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1157 n.12 (C.D. Cal. 2005) (finding claims under the ATS to be explicitly extraterritorial in nature).

217. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (finding ATS jurisdiction proper where torture took place in Paraguay). For an extension of this principle, see Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (accepting acts under color of law that would expand extraterritorial reach of ATS, implicitly accepting that ATS has extraterritorial reach); *see also* John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1003–04 (S.D. Ind. 2007) (holding that, because acts were extraterritorial, normal federal law does not apply, and plaintiffs must proceed under the ATS, implicitly accepting that the ATS has extraterritorial application).

218. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011).

219. *Id.*

220. *Id.* (reasoning that, if ATS was not extraterritorially applicable, it would serve no purpose, given extensive domestic remedies for eligible torts).

221. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 124 (2d Cir. 2008) (determining that an extraterritorial injunction to be enforced in Vietnam would be "wholly impracticable," given the court's lack of jurisdiction and Vietnam's sovereignty).

222. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 725 F.3d 940, 946–47

The core modern interpretation of the ATS—that aliens may sue in American courts to recover for violations of the law of nations—has remained largely unchanged since *Filartiga*. The Court previously addressed the limits of ATS jurisprudence by setting out the limits of the law of nations in *Sosa*, setting out a fairly definite standard.[223] It is against this background that the Supreme Court took up the case of *Kiobel* to address finer-grained procedural details: corporate liability and, on rehearing, extraterritorial application.

II. DISCUSSION

Kiobel v. Royal Dutch Petroleum[224] came before the Court on two different rounds of oral arguments: the first on corporate liability, and the second on the threshold issue of extraterritorial application.[225] The Court's decision was unanimous, but between the majority and three separate concurrences, the various Justices' rationales differed greatly.[226]

A. Kiobel v. Royal Dutch Petroleum

The *Kiobel* plaintiffs filed suit against the Royal Dutch Petroleum Company, alleging it aided and abetted the Nigerian government in violating the law of nations. The debate in lower courts centered on corporate liability, though the Supreme Court ultimately ruled on the threshold issue of extraterritoriality.

1. Factual Background

The plaintiffs were Nigerian residents of Ogoniland, an area in the Niger Delta.[227] Defendant Royal Dutch Petroleum[228] had been active in

(9th Cir. 2013) (citing *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 45 (E.D.N.Y. 2005)) (issuing an injunction against piracy, enforceable in international waters, where comity did not apply, and U.S. did not recognize foreign claims of sovereignty over waters).

223. *See supra* Part I.C.2 (discussing *Sosa*).

224. 569 U.S. —, 133 S. Ct. 1659 (2013).

225. *Id.* at 1663.

226. *Compare infra* Part II.B (discussing opinion of the majority), *with infra* Part III.C (discussing concurring opinion of Justice Kennedy), III.D (discussing concurring opinion of Justice Alito), *and* III.E (discussing concurring opinion of Justice Breyer).

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

228. Commonly known as Shell. The suit was first filed on September 20, 2002 against Royal Dutch Petroleum and Shell Transport and Trading; the actions alleged were attributed to Shell Petroleum Development Company of Nigeria, Ltd., a jointly owned subsidiary of the two named defendants. *Id.*; Joint Appendix at 1, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 WL 6425353, at *1. In 2005, Royal Dutch and Shell Transport merged into Royal Dutch Shell. *1980s to the new millennium*, SHELL GLOBAL,

Nigeria since 1937, and had exported oil therefrom since 1958.[229] The plaintiffs alleged that, after Ogoniland residents started protesting the environmental effects of Royal Dutch Petroleum's activities in the early 1990s, Royal Dutch Petroleum requested and received aid from the Nigerian government in suppressing the protests.[230] The suppression was violent, and the plaintiffs alleged that Nigerian military and police forces attacked villages; engaged in beatings, rapes, and killings; illegally arrested village residents; and looted and destroyed property.[231] The plaintiffs also alleged that Royal Dutch Petroleum aided and abetted Nigerian governmental forces by providing food, transportation, payment, some material support, and by letting Nigerian forces use Royal Dutch Petroleum's property as a staging ground for attacks.[232] The plaintiffs subsequently moved to the United States and received political asylum.[233]

2. Procedural Developments

Kiobel was first filed in the Southern District of New York in September 2002, putatively as a class action.[234] Seven counts were brought under ATS jurisdiction: extrajudicial killings, crimes against humanity, torture, arbitrary arrest, violation of the right to life, forced exile, and destruction of property.[235] The district court, relying on the recently-issued *Sosa* opinion, granted summary judgment for the defendants on the claims of extrajudicial killings, right to life, forced exile, and property destruction.[236] Judge Kimba Wood did, however, certify the denial of summary judgment on the remaining claims for interlocutory appeal,[237] noting in particular her concern of whether

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http://www.shell.com/global/aboutshell/who-we-are/our-history/1980s-to-new-century.html (last visited Sept. 26, 2014).

229. *See Shell at a glance*, SHELL NIGERIA (Nov. 12, 2009), http://www.shell.com.ng/aboutshell/at-a-glance.html (discussing Shell's operations in Nigeria); *see also* Joint Appendix, *supra* note 228, at *59, *98 (discussing length and nature of Shell's operations in Nigeria).

230. *Kiobel*, 133 S. Ct. at 1662; *see also* Joint Appendix, *supra* note 228, at *43.

231. *Kiobel*, 133 S. Ct. at 1662; *see also* Joint Appendix, *supra* note 228, at *44–54.

232. *Kiobel*, 133 S. Ct. at 1663. "Material support" of an unspecified nature was alleged in the amended complaint, Joint Appendix, *supra* note 228, at *43, but did not appear in the Supreme Court's listing of grievances.

233. *Kiobel*, 133 S. Ct. at 1663. As resident aliens, they were eligible to file under the ATS. *See supra* note 186 (resident aliens normally qualify as aliens for purposes of ATS jurisdiction).

234. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 459 (S.D.N.Y. 2006).

235. Joint Appendix, *supra* note 228, at *80–87.

236. *Kiobel*, 456 F. Supp. 2d. at 464–67 (dismissing counts under *Sosa* test).

237. *Id.* at 467–68.

aiding and abetting liability was permissible post-*Sosa*.[238]

On appeal, the Second Circuit sidestepped the individual claims and turned to the threshold issue of whether ATS claims could be properly brought against a corporate defendant.[239] The court found that, though corporate liability for torts might be common in a domestic context,[240] a fresh review was necessary to determine whether corporations could be liable for torts under customary international law.[241] In that context, the court did not find any such norm of corporate liability, and so it held that ATS jurisdiction could not extend to sustaining actions against corporations.[242] The Second Circuit therefore affirmed in part and reversed in part to dismiss all claims.[243]

The Supreme Court granted certiorari to consider whether the law of nations recognized corporate liability.[244] At the first oral argument, counsel for petitioner barely finished two sentences before Justice Kennedy raised the issue of extraterritorial application, an issue that permeated the rest of the oral discussion.[245] One week later, the Court examined another ATS case, *Rio Tinto P.L.C. v. Sarei*, wherein the Ninth Circuit held that the ATS did have extraterritorial application.[246]

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238. *Id.* at 468 n.14 (noting that it is "particularly unclear" whether aiding and abetting liability can survive the tests outlined in *Sosa*); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 n.20 (2004) (questioning whether private actors can be liable under the ATS, and urging courts to consider the practical effect of allowing claims).

239. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 117 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. —, 133 S. Ct. 1659 (2013); *see also supra* notes 200–203 and accompanying text (discussing corporate liability and reviewing other circuit precedent).

240. *Kiobel*, 621 F.3d at 117–18 (substantive law in the court's jurisdiction may lead one way, but such is not applicable to issues of customary international law).

241. *Id.* at 118.

242. *Id.* at 118–20. The issue is not, strictly speaking, "immunity" from ATS suits; rather, corporations are simply not liable for such violations in the first place. *Id.* at 120.

243. *Id.* at 149. It bears note that one judge concurred solely in the judgment and filed a separate concurrence on different grounds, presaging the Supreme Court's opinion. *Kiobel*, 621 F.3d at 149–96 (Leval, J., concurring in the judgment). Judge Leval found denial of corporate liability without precedent, *id.* at 151, but agreed that dismissal was proper on the basis that the pleadings could not support aiding and abetting liability, as the plaintiffs did not allege that Royal Dutch Petroleum acted with the purpose of aiding human rights abuses, *id.* at 153–54.

244. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1663 (2013); *see also* Kiobel v. Royal Dutch Petroleum Co., 565 U.S. —, 132 S. Ct. 472 (2011) (mem.) (grant of certiorari).

245. Oral Argument at 00:40, Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013) (No. 10-1491), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_10_1491/argument; s*ee* Lyle Denniston, *Argument recap: Downhill, from the start*, SCOTUSBLOG (Feb. 28, 2012, 3:05 PM), http://www.scotusblog.com/2012/02/argument-recap-downhill-from-the-start (analyzing the oral arguments in *Kiobel*).

246. Rio Tinto P.L.C. v. Sarei, — U.S. —, 133 S. Ct. 1995 (2013); *see* Sarei v. Rio Tinto

Rather than issue a *Kiobel* ruling on corporate liability and immediately readdress the ATS in *Sarei*, the Court expanded the scope of *Kiobel*,[247] directing parties to file supplemental briefs on the extraterritoriality issue and setting the case for reargument.[248]

Addressing the ATS directly for the first time since *Sosa*, the Court sidestepped the question of corporate liability and turned to the threshold issue as to whether ATS claims could be properly brought for actions taking place within the territory of a foreign sovereign.[249] Though the Court unanimously affirmed the Second Circuit, the rationales of the individual Justices varied: three separate concurring opinions accompanied the five-member majority.

B. The Majority Opinion

Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined.[250] The majority held that the presumption against extraterritoriality applied to the ATS, and that the present claims did not displace that presumption.[251]

After a brief summary of the factual and procedural history of the case, the Court reviewed the lengthy history of the ATS.[252] The Court then reframed the question presented as not whether the ATS claim was properly stated pursuant to the *Sosa* test, but whether such a claim could cover events that happened on the soil of a foreign sovereign state.[253]

The Court then provided a recital of the presumption against extraterritorial application of statutes, holding that the presumption applied to the ATS.[254] Relying on its holding in *Morrison v. National*

P.L.C., 671 F.3d 736, 744–47 (9th Cir. 2011) (extraterritoriality is no bar to applying the ATS). *Kiobel* functionally reversed the Ninth Circuit's holding, which was dismissed on remand. Sarei v. Rio Tinto P.L.C., 722 F.3d 1109 (9th Cir. 2013).

247. Lyle Denniston, Kiobel *to be expanded and reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), http://www.scotusblog.com/2012/03/kiobel-to-be-reargued (analyzing the close proximity of the arrival of *Rio Tinto* with the oral argument and order for rehearing in *Kiobel*).

248. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.).

249. The question as properly presented: "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1663 (2013).

250. *Id.* at 1662 (majority opinion authored by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito).

251. *Id.* at 1669.

252. *Id.* at 1662–63; *see also supra* Parts I.A–B (outlining history of the ATS); *supra* Part I.C (discussing *Filartiga* and *Sosa*).

253. *Kiobel*, 133 S. Ct. at 1664.

254. *Id.* at 1665.

Australia Bank,[255] the Court reaffirmed that, where there is no indication in a statute that it has extraterritorial application, it has none.[256] The presumption against extraterritoriality was intended to prevent unintentional clashes between the laws of the United States and those of other nations.[257] The Court took special note that international relations lie within the domain of the political branches, and so any extraterritorial effect would need to be clearly expressed by Congress in the statute in question.[258] The Court noted that, though the presumption was usually applied to acts that regulate conduct abroad,[259] and the ATS is a purely jurisdictional statute,[260] the ATS' underlying principles of international effect were similar enough to justify cross-application.[261] Such an application was particularly appropriate given *Sosa*'s exhortations to judicial caution.[262]

Moving to the ATS itself, the Court concluded that nothing in its text or history rebutted the presumption against extraterritorial application.[263] The language of the statute did not evince a clear indication of extraterritorial application.[264] Furthermore, the Court determined that plaintiff's reliance on the transitory torts doctrine[265] was misplaced: the ATS did not permit a cause of action under foreign law directly, but instead permitted a cause of action under U.S. law to enforce an international norm.[266] As the cause of action was therefore

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255. 561 U.S. 247 (2010).

256. The *Kiobel* Court noted that "'[W]hen a statute gives no clear indication of an extraterritorial application, it has none . . . .'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 561 U.S. at 255).

257. The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 133 S. Ct. at 1664 (quoting E.E.O.C. v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)).

258. *Kiobel*, 133 S. Ct. at 1664; *see also* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 146–47 (1957) (asserting that the judiciary should not "run interference" in the field of international relations without a clearly expressed affirmative intention of Congress to that end).

259. *See, e.g.*, *Aramco*, 499 U.S. at 258–59 (stating Title VII has no extraterritorial effect, despite potential non-domestic application).

260. As held in Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004).

261. *Kiobel*, 133 S. Ct. at 1664.

262. *Id.* at 1664–65; *see also supra* note 146 (discussing *Sosa*'s emphasis on the need for judicial caution in applying the ATS).

263. *Kiobel*, 133 S. Ct. at 1665.

264. *Id.* at 1666. The term "*any* civil action" was not sufficient; the Court noted that such generic terms were not sufficient to rebut the presumption against extraterritoriality. *Id.* at 1665. *See, e.g.*, *Aramco*, 499 U.S. at 248–49 (boilerplate terms like "commerce" or "employer" do not suffice to displace presumption against extraterritoriality).

265. *See supra* note 135 and accompanying text (formal definition of doctrine).

266. *Kiobel*, 133 S. Ct. at 1666.

wholly domestic, the transitory torts doctrine could not apply.[267]

The Court then discussed the historical background of the ATS in some depth.[268] It concluded that, if anything, the ATS was enacted to provide jurisdiction for such actions as assaults on ambassadors[269] and wrongful seizures of property from ships in United States territorial waters,[270] and therefore did not apply to claims arising from actions in foreign territory.[271] While piracy on the high seas was also within the explicit contemplation of the ATS,[272] and conduct on the high seas has generally been treated the same as foreign soil for the purposes of extraterritorial application,[273] pirates were a category *sui generis*, as they traditionally did not operate within any jurisdiction.[274] Because applying the ATS to conduct on the high seas would not generally infringe another nation's sovereignty, such application would run fewer foreign policy risks that would otherwise justify applying a presumption against extraterritoriality.[275]

Finally, in looking to the purpose of the ATS, the Court did not find that it was explicitly passed to provide a forum for the enforcement of international norms so as to override the presumption against

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

Id.

267. *Id.* at 1665–66.

268. *Id.* at 1666–69; *see also supra* Parts I.A–B (discussing historical context of the ATS).

269. *Kiobel*, 133 S. Ct. at 1666–68; *see supra* Part I.A and notes 34–41 and accompanying text (providing an overview of the 1784 and 1787 assaults in question).

270. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *see also Kiobel*, 133 S. Ct. at 1667 (discussing the two cases as examples of seizures occurring within US territorial waters); *supra* Part I.B.1 (discussing the *Moxon* and *Bolchos* cases). The Court does not mention *M'Grath v. Candalero*, 16 F. Cas. 128 (D.S.C. 1794) (No. 8809), a parallel case where the ATS was used to provide jurisdiction for enforcement of an action that took place in foreign territorial waters. *See supra* note 57 and accompany text (discussing the Court's omission of *M'Grath*); *see also supra* Part I.B.1 (discussing *M'Grath*).

271. *Kiobel*, 133 S. Ct. at 1667 (finding no historical support for foreign application of ATS).

272. *Id.*; *see also supra* note 82 and accompanying text (concluding that ATS would provide jurisdiction for piracy).

273. *Kiobel*, 133 S. Ct. at 1667; *see, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173–74 (applying presumption of extraterritoriality a treaty for conduct on high seas).

274. *Kiobel*, 133 S. Ct. at 1667. *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES *71 (1769) (allowing pirate prosecution by any nation).

275. *Kiobel*, 133 S. Ct. at 1667 (applying ATS to piracy doesn't impose the United States' sovereign will on acts occurring within jurisdiction of another sovereign).

extraterritoriality.[276] The ATS was a means of relief for foreign officials wronged within the United States, rather than an extension of jurisdiction to cover conduct in foreign countries.[277] A contrary interpretation would, if anything, create more problems than it solved; the Court referred to a number of nations that had objected to recent extraterritorial applications of the ATS.[278]

The Court concluded that none of the conduct in the case took place within the United States' jurisdiction.[279] It held that to displace the presumption against extraterritorial application, ATS "claims [must] touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[280] Mere corporate presence of the defendant within the United States was not sufficient to displace the presumption.[281] More pointedly, if Congress wanted to extend the ATS to extraterritorial applications, it would be required to enact a specific statute.[282]

C. Concurring Opinion: Justice Kennedy

Justice Kennedy joined the opinion of the Court and additionally filed a concurring opinion.[283] He noted that the majority opinion left several significant questions still open.[284] In his view, this was "a proper disposition,"[285] as the Torture Victim Protection Act already provided a mechanism for redress in several alleged violations of international customary law.[286] He accepted that ATS jurisprudence was far from complete, concluding that future cases arising outside the scope of the

276. *Id.* at 1668 ("implausible to suppose" that First Congress, concerned with *any* recognition of the United States, intended to provide a forum for enforcing international norms).

277. *Id.* at 1668–69.

278. *Id.* at 1669 (citing Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)) (listing objections to ATS by, *inter alia*, Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

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

280. *Id.*

281. *Id.* In this case, the presence consisted of an office in New York City. *See* Joint Appendix, *supra* note 228, at *55.

282. *Kiobel*, 133 S. Ct. at 1669. This is likely a reference to the TVPA, which supplemented the ATS by providing jurisdiction for claims of torture. *See supra* text accompanying note 141 (discussing TVPA).

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

284. *Id.*

285. *Id.*

286. *Id.*; *see also* TVPA §§ 2(a)–(c), 28 U.S.C. § 1350 (2012) (providing jurisdiction for claims of torture).

majority's ruling or the TVPA will require further explanation.[287]

D. Concurring Opinion: Justice Alito

Justice Alito also joined the Court's opinion and filed a concurrence, which Justice Thomas joined.[288] Like Justice Kennedy, Justice Alito recognized that the majority's "touch and concern" formulation "leaves much unanswered,"[289] and set out a broader approach that nevertheless set forth a similar standard.[290]

Relying on *Morrison*, Justice Alito argued that the presumption against extraterritoriality should bar claims unless the event that was the "focus of Congressional concern" in the statute took place within the United States.[291] The Court's holding in *Sosa* made it clear that, when the ATS was passed, Congressional concern was focused on violations of safe conduct, infringement of ambassadors' rights, and piracy.[292] Causes of action under the ATS should therefore be barred by the presumption against extraterritoriality, unless that domestic conduct violated an international law norm sufficient to meet the *Sosa* requirements of definiteness and acceptance among civilized nations.[293] As none of the acts in *Kiobel* took place domestically, under this formulation the presumption against extraterritoriality would apply to bar the claim.[294]

E. Concurring Opinion: Justice Breyer

Justice Breyer filed a concurrence, which Justices Ginsburg, Sotomayor, and Kagan joined.[295] Justice Breyer's reasoning differed

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287. *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Justice Kennedy's opinion is deliberately vague, leaving open the door for further analysis and judicial developments without expressing an opinion as to which direction those developments should take. *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/ (characterizing Justice Kennedy's concurrence as "deliberately (maddeningly) vague").

288. *Kiobel*, 133 S. Ct. at 1669–70 (Alito, J., concurring).

289. "[The majority's] formulation obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach." *Id.*

290. *Id.* at 1670.

291. *Id.* (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010)).

292. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (no reason to suspect First Congress had any torts in mind other than Blackstone's three primary offenses regarding safe conducts, ambassador's rights, and piracy).

293. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

294. *Id.*

295. *Id.* at 1670–78 (Breyer, J., concurring).

fundamentally from that of the majority and Justice Alito in that he did not invoke the presumption against extraterritoriality at all, finding that the presumption does not apply to the ATS.[296] He instead set out a three-part test for finding jurisdiction under the ATS.[297]

Justice Breyer began by framing the *Kiobel* case as a successor to *Sosa*.[298] *Sosa* functionally reaffirmed the ATS' modern relevance, "essentially lead[ing] today's judges to ask: Who are today's pirates?"[299] *Sosa* provided a framework limiting claims to those similar in specificity and character to piracy;[300] *Kiobel* addressed the subset of claims arising from activities abroad.[301]

Addressing the majority's stance, Justice Breyer discussed how the presumption against extraterritoriality did not apply well to the ATS.[302] The specific presumption rested on a general fundamental presumption that Congress normally legislates on domestic, as opposed to foreign, matters.[303] The ATS, however, was enacted with "foreign matters" in mind[304]: it explicitly referred to "alien[s]," "treat[ies]," and the "law of nations,"[305] and its purpose was to address actions that had potential consequences in the international arena.[306]

One of the three torts that does fall within the ATS' scope—piracy—normally takes place abroad.[307] The majority dismissed this by

296. *Id.* at 1672 (noting ATS explicitly passed with foreign affairs in mind, so presumption does not apply).

297. *Id.* at 1671.

298. *Id.* at 1671–72.

299. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004) (allowing courts to recognize claims based on modern violations of the law of nations).

300. *Sosa*, 542 U.S. at 725 (allowing ATS claims based on modern norms of international character that are universal and sufficiently specific to the originally cognized ATS claims such as piracy).

301. *Kiobel*, 133 S. Ct. at 1671–72 (Breyer, J., concurring).

302. *Id.* at 1672.

303. *Id.* (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).

304. *Id.*

305. *Id.*; *see also* 28 U.S.C. § 1350 (2012) (providing district courts with "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).

306. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring) (stating that the purpose of ATS was to address law of nations violations by offering a remedy for activities "threatening serious consequences in international affairs" (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004)).

307. *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *72 (1769) (defining piracy as taking place abroad).

emphasizing that piracy takes place on the high seas,[308] but Justice Breyer noted that piracy takes place on a ship, an environment that falls within the jurisdiction of the nation of its registry.[309] The majority stated that applying United States law to pirates does not apply the United States' sovereign will to the territorial jurisdiction of another country,[310] but because a ship *is* within the territorial sovereignty of another nation, the distinction is one without a difference.[311] If pirates were indeed "fair game" wherever caught, then the purpose of the ATS would be to target modern pirates as outlined by *Sosa*.[312]

Addressing the ATS directly, Justice Breyer assumed that Congress intended the ATS' jurisdictional grant to extend as far as its substantive reach,[313] and looked to the Third Restatement of Foreign Relations Law to determine the scope of that reach.[314] Under the Restatement, any extension of jurisdiction must be reasonable.[315] Subject to this general requirement, a state may apply its law to conduct within its territory,[316] activities and interests of its citizens outside its territory,[317] conduct outside its territory intended to have a substantial effect within its territory,[318] and conduct outside its territory directed against state security regardless of the actor.[319] Under the Restatement, states also have explicit jurisdiction to define and punish offenses recognized by nations as being of universal concern, such as piracy, slave trading, and war crimes.[320]

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308. *Kiobel*, 133 S. Ct. at 1667 (finding that piracy occurs on the high seas, beyond the jurisdiction of any country).

309. *Id.* at 1672 (Breyer, J., concurring) (reasoning that ships are the jurisdiction of the country whose flag they fly); *see also* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 632 (1818) (holding that ships sailing under the flag of a foreign government fall under that government's jurisdiction).

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

311. *Id.* at 1672 (Breyer, J., concurring).

312. *Id.* at 1673 (enemies of mankind should be punished wherever found, so nations do not harbor them; *Sosa* outlines a test for determining what and who modern enemies of mankind are).

313. *Id.*

314. *Id. See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987).

315. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (stating that a state may not exercise jurisdiction where it is unreasonable to do so).

316. *Id.* § 402(1)(a–b).

317. *Id.* § 402(2).

318. *Id.* § 402(1)(c).

319. *Id.* § 402(3).

320. *Id.* § 404. These offenses of "universal concern" include piracy, slave trade, hijacking aircraft, genocide, war crimes, and some types of terrorism, even if there is no jurisdiction based on a specific provision of § 402.

Viewing these bases in light of the basic purposes of *Sosa*[321] and the ATS,[322] Justice Breyer proposed that ATS jurisdiction should exist where the tort occurred on American soil, the defendant is an American citizen, or the alleged conduct substantially and adversely affects an American national interest, with a note that this last jurisdiction-conferring situation includes a distinct national interest in the United States not becoming a safe harbor for torturers or other common enemies of mankind.[323] To minimize international friction, Justice Breyer would only interpret the statute to provide jurisdiction where distinctly American interests were at issue.[324] Jurisdiction would be further restricted by other principles such as exhaustion, *forum non conveniens*, and comity.[325]

Justice Breyer noted that the United States has a strong interest in not becoming a safe harbor for pirates or their modern equivalent, and proposed that the interest can justify extension of ATS jurisdiction.[326] The ATS' purpose was as a "weapon" against modern pirates. The duty to not provide safe harbor to pirates was not only a well-established one in international law,[327] but one through which some modern courts have conferred ATS jurisdiction itself.[328] Interpreting this interest as one of not providing safe harbor to violators would be consistent with international law and practice.[329] Permitting a suit by an alien against a

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321. Specifically, *Sosa* urged caution to avoid international friction. *See supra* note 146 and accompanying text (discussing *Sosa*'s exhortations to judicial caution).

322. As interpreted by *Sosa*, the purpose of the ATS is to compensate those injured by modern pirates. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1673 (2013) (Breyer, J., concurring).

323. *Id.* at 1674.

324. *Id.*

325. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring); *see also supra* Part I.D (outlining potential procedural limitations on ATS, such as exhaustion and statutes of limitations).

326. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring). To do otherwise would be to "turn a blind eye to the plight of victims [who have suffered] heinous actions." *Id.* (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

327. *See Kiobel*, 133 S. Ct. at 1674–75 (Breyer, J., concurring) (reciting list of international and historical precedent). The duty to not provide safe harbor to pirates is a firmly-established one, even within the United States. In Colonial times, harboring piracy was a serious charge, despite the economic benefits and booty they brought to American ports; governors who harbored pirates could expect to be the targets of royal inquiry. NORMAN K. RISJORD, REPRESENTATIVE AMERICANS: THE COLONISTS 159–61 (2d ed. 2001).

328. *Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring); *see In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (successful suit by alien plaintiff against alien defendant for torts committed abroad); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (another successful suit by alien plaintiff against alien defendant for torts committed abroad); *see also* Part I.C.1 *supra* (discussing *Filartiga*).

329. *Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring).

citizen would also not be controversial in practice, as other countries grant jurisdiction for claims brought by aliens against their own citizens for conduct abroad.[330]

Some countries also permit suits by aliens against aliens for torts committed abroad, based on jurisdictional grants similar to those outlined in the Restatement of Foreign Relations Law.[331] Furthermore, several countries that do not permit such suits themselves would not object to other nations doing so.[332] Domestically, Congress has ratified several treaties that obligate the United States to punish perpetrators of serious crimes committed abroad.[333] Congress also passed the Torture

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330. *Id.* at 1675–76. The international importance of *Kiobel* drew a number of *amicus* briefs on behalf of foreign nations and intergovernmental organizations. Perhaps the strongest support for this proposition comes from the *amicus* brief of the European Commission, the executive body of the European Union, which calls the exercise of American jurisdiction over conduct committed by its nationals abroad "uncontroversial." Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 11–12, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659 (2013) (No. 10-1491) (asserting that jurisdiction based on nationality is consistent with international law).

331. *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (in limited circumstances, countries may exercise jurisdiction for alien claims against aliens for actions abroad). There is furthermore a large amount of scholarship favorably describing the international extension of civil liability for major criminal acts. *See, e.g.*, Kathryn Metcalf, *Reparations for Displaced Torture Victims*, 19 CARDOZO J. INT'L & COMP. L. 451, 468–71 (2011) (describing the emergence of universal civil jurisdiction as a tool to combat major violations of international law); Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 885–86 (2009) (claiming "many countries" have some sort of restitution mechanism, with explicit mechanisms in place in Argentina, Belgium, France, Japan, the Netherlands, and Spain).

332. The United Kingdom and the Netherlands, two countries that have *not* implemented ATS-like jurisdictional grants, have nevertheless indicated that they would not object to American exercise of such jurisdiction in cases similar to *Filartiga*. Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 15–16, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659 (2013) (No. 10-1491) (holding that where a defendant is an alien, presence of a "genuine connection" between defendant and United States is sufficient to support jurisdiction).

333. *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring). Because of the broad nature of the term "law of nations," there is a large body of potentially applicable treaties to any given ATS claim. Nations have general obligations. *See, e.g.*, U.N. Charter art. 55 (obligating signatories to promote, *inter alia*, social progress, international cooperation, and respect for human rights). However, there are a number of highly specific treaties that criminalize certain conduct. *See, e.g.*, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (codification of international principles regarding the protection of diplomats); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1870, 22 U.S.T. 1641, T.I.A.S. No. 7192 (commonly known as the Hague Hijacking Convention, providing for international criminalization of hijacking).

Victim Protection Act, intended to supplement and enhance remedies under the ATS.[334]

Justice Breyer's test would find jurisdiction where the tort occurred on American soil, the defendant is a citizen, or the conduct substantially and adversely affects a national interest. Applying this test to the facts of *Kiobel*, Justice Breyer determined that jurisdiction would not be proper.[335] The conduct took place abroad, both parties were foreign, and there was no distinctly American interest present in the case.[336] The outcome—the dismissal of the case—might have been the same, but Justice Breyer's rationale was radically different.

III. ANALYSIS

This Part evaluates the standard articulated by the majority, concluding that though it is spartan, it can be expanded to a workable threshold test without too much extrapolation.[337] Even so, it is difficult to square the majority's extraterritoriality analysis with the bulk of prior Alien Tort Statute precedent. The alternative test proposed by Justice Breyer[338] has similar effects to the majority's standard, but is presented in a more formalistic manner, offering two bright line tests and a flexible "American interests" component.[339] The first two components

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Some treaties go beyond criminalization, explicitly obligating signatories to punish offenders. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5(2), 7(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (requiring signatories to establish jurisdiction over offenders when present in their territory, or extradite such offender for prosecution); Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 (requiring contracting parties to take any action necessary to provide effective sanctions for violating the Convention, and obligating them to search for alleged violators thereof).

334. *Kiobel*, 133 S. Ct. at 1676–77 (Breyer, J., concurring); *see* TVPA §§ 2(a)–(c), 28 U.S.C. § 1350 (2012).

335. *Kiobel*, 133 S. Ct. at 1677–78 (Breyer, J., concurring).

336. "[I]t would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, which this legal action helps to vindicate a distinct American interest." *Id.* at 1678. The fact that the defendant was corporate did not play into the analysis.

337. *See infra* Part III.A (discussing majority's standard). Determining the *limits* of the standard, on the other hand, is a different issue entirely. *See infra* Part IV.D.2 (noting that current courts face difficulties in interpreting "touch and concern" language of the standard consistently).

338. The concurrences of Justices Kennedy and Alito will not be discussed, as neither offers a full-fledged proposal in the alternative. Both Justices joined the opinion of the Court, and their rationale does not significantly differ from that of the majority. *See generally infra* Parts II.C–D (presenting the concurring opinions of Justices Kennedy and Alito). In case law since *Kiobel*, the substantial majority of the analysis of *Kiobel* focuses on either the majority's holding or Justice Breyer's concurrence. *See infra* Part IV.D (discussing implementation of *Kiobel*).

339. *See infra* Part III.B (discussing elements of Justice Breyer's proposed test).

extend jurisdiction where it is not likely to be controversial, and the third component functions as an explicit limiting principle to address the foreign policy concerns that undergird the majority's appeal to the presumption against extraterritoriality.

A. The Majority's Standard: Touch and Concern

The majority's standard is fairly straightforward, requiring that ATS claims "touch and concern the territory of the United States."[340] It does not, however, offer much by way of guidance on its own application. This problem is magnified because the Court's holding runs counter to the prior holdings of most courts that have previously addressed the ATS' extraterritoriality;[341] courts attempting to apply the *Kiobel* standard must do so without the benefit of precedent or experience.

1. Elements of the Standard

Under the majority's standard, claims brought under the ATS must establish jurisdiction by passing the threshold issue of extraterritorial application.[342] The standard as such is a fairly simple one: for conduct taking place outside the United States to be actionable under the ATS, it must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[343]

This standard is refreshingly brief; of the majority's thirty-one paragraphs, the standard appears in exactly one of them.[344] The standard is a simple binary test: conduct either takes place outside of the United States' territory or it does not.[345] If the conduct is foreign, then it must touch and concern the United States with sufficient force to displace the presumption;[346] if it is domestic, then the claim is permissible.[347]

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

341. Namely, that courts have generally assumed it *does* have extraterritorial application. *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (reciting unanimous circuit precedent holding the ATS to apply to extraterritorial actions).

342. *Kiobel*, 133 S. Ct. at 1664.

343. *Id.* at 1669.

344. *Id.* at 1662–69.

345. The majority is careful to note that, on the *Kiobel* facts, *all* conduct took place outside the United States. *Id.* at 1669 (finding that all relevant conduct took place outside the United States); *see infra* Part III.A.2 (discussing potential issues with mixed-conduct cases which could arise if some action took place domestically and some took place abroad).

346. *Id.* at 1669.

347. Passing the extraterritoriality bar by no means guarantees that the claim will ultimately

The ultimate purpose motivating the standard is a cautionary one: the presumption against extraterritoriality prevents domestic courts from taking actions with significant foreign policy ramifications of the sort best left to the other two branches of government.[348] Not restricting actions based on conduct on United States soil preserves the ATS' original jurisdictional purpose in providing a method of redress for foreign nationals[349] and its historical use in punishing piracy.[350]

2. Difficulties in the Standard's Application

The extreme brevity of the standard[351] makes interpreting it more difficult, due to the absence of context. The Court's only guidance on interpretation of its standard is that the mere corporate presence of a defendant within the United States does not satisfy the standard.[352]

As Justice Kennedy notes,[353] the standard's brevity leaves several significant questions unanswered. The majority may have intended Congress to fill gaps in the ATS through legislation similar to the Torture Victim Protection Act.[354] In the meantime, and unlike most Supreme Court issues involving statutory interpretation, there is little

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be *successful*; it is simply a procedural threshold to be passed before addressing the merits of the case, as with other requirements such as exhaustion. *See supra* Part I.D (detailing various procedural requirements that apply to ATS claims).

348. *Kiobel*, 133 S. Ct. at 1669; *see also supra* note 278 and accompanying text (reciting recent objections to extraterritorial applications of ATS). In this respect the Court follows its own exhortations to judicial caution in *Sosa*. *See supra* note 146 and accompanying text (*Sosa* court's emphasis on judicial caution).

349. *See supra* Part I.A, notes 33–41 and accompanying text (discussing domestic assaults on foreign ambassadors).

350. *See supra* Part I.B.1 (discussing uses of ATS to provide jurisdiction for enforcement of seizures occurring within US territorial waters).

351. The crucial sentence that sets out the standard is twenty-eight words long, shorter than even the ATS itself. *Kiobel*, 133 S. Ct. at 1669 ("And 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.").

352. *Id.* The Court also refers to some choice language from the previous prominent ruling on the subject of extraterritoriality. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010) (discussing that in the context of securities transactions, "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"). Unfortunately, "*some*" activity is about as vague as stating that corporate presence alone is not enough. Something more is required; indeed, "*some*" thing more—but what that thing *is* remains unclear.

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

354. Though the majority does not mention the TVPA, Justice Kennedy does, noting that torture cases are now dealt with through the TVPA's statutory scheme. *Id.*; *see also* TVPA § 2(a), 28 U.S.C. § 1350 (2012) (establishing a mechanism for liability). The ATS is still available for torture claims, but the torture-tailored provisions of the TVPA make it a more attractive statute upon which to found jurisdiction.

case law on extraterritoriality in the ATS to guide courts, as no courts had previously found extraterritorial application of the ATS problematic.[355]

Though the extraterritorial application of the ATS may have been objected to in some instances,[356] there are other instances in which other nations have *not* objected to such applications.[357] Perhaps most tellingly, the Restatement of Foreign Relations Law explicitly allows a state to extend jurisdiction beyond its territory.[358] While these precedents do not speak directly to the ATS,[359] they seem to indicate that exercising extraterritorial jurisdiction for recovery on violations of the law of nations is permissible. Within American law, no other statutes fit that description, save for the ATS.[360] Seeking a "clear indication" of statutory intent to rebut the presumption in the ATS[361] might make sense for interpreting a modern statute, but the ATS dates to 1789,[362] far earlier than the modern presumption against extraterritoriality.[363] It makes no sense to seek a modern notion of statutory indication in a statute enacted before that notion even

355. *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011) (surveying ATS jurisprudence and concluding that ATS had always been extraterritorially applied). *See generally supra* Part I.E (discussing circuit precedent regarding extraterritoriality).

356. *See supra* note 278 and accompanying text (reciting recent objections to extraterritorial applications of the ATS).

357. *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring) (pointing out that United Kingdom and the Netherlands would not object to exercising extraterritorial jurisdiction in cases like *Filartiga* and *Marcos*); *see also supra* text accompanying notes 331 (nations that allow ATS-like jurisdiction to prosecute conduct that occurred abroad), 332 (nations that would not object to ATS jurisdiction), and 333 (discussing treaties that obligate nations to prosecute certain types of conduct, regardless of the location of the action).

358. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

359. And, conversely, the ATS does not speak to *them*. The majority reasons that there is nothing in the ATS that explicitly rebuts the presumption against extraterritoriality. *Kiobel*, 133 S. Ct. at 1665.

360. And, of course, the TVPA, which was explicitly passed to supplement the ATS, rather than replace it. *See supra* note 141 and accompanying text (discussing the intent behind supplementing the ATS).

361. As the majority does. *Kiobel*, 133 S. Ct. at 1665 (seeking a "clear indication of extraterritoriality").

362. In its formal enactment in the Judiciary Act. Its roots date slightly father back. *See supra* Part I.A (discussing origin of ATS in Articles of Confederation).

363. The specific term "presumption against extraterritoriality" is first found in *E.E.O.C. v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991). Though the notion is far older, there is no evidence to indicate that the precedent was in force in 1789. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (recognizing that all legislation is prima facie territorial); The Antelope, 23 U.S. (10 Wheat.) 66, 74 (1825) (claiming the Spanish law asserting extraterritorial jurisdiction is "inconsistent with the law of nature").

existed.[364]

Lastly, there are several smaller procedural issues stemming from the unclear limits of extraterritoriality. How much of the conduct must occur on United States soil[365] for it to be territorial? Within the United States, actions[366] taking place across multiple states may give multiple states jurisdiction; the question would be one of venue for a suit, rather than whether one may be properly brought at all, as would be the case for any ATS claims.[367] It remains an open question as to how such "mixed-conduct" cases would be resolved if conduct only partially occurred abroad.[368]

B. Justice Breyer's Test: Three Paths to Jurisdiction

The test proposed by Justice Breyer is subdivided into three components,[369] each of which tends to be better-defined and better-supported by international and domestic precedent than the majority's standard. While Justice Breyer's proposed test is not perfect,[370] it provides a better framework with which to evaluate specific cases.[371]

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364. It would have been impossible for Congress to know what the Supreme Court would have been looking for, because the ATS was passed almost two years before the very first Supreme Court case. *See* Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791) (first case docketed at the Supreme Court; the Court issued a procedural order on August 1, 1791, but the parties eventually settled before the Court could issue a merits ruling).

365. That is, within the bounds of United States territorial jurisdiction; this of course includes territorial waters. *See supra* note 62 and accompanying text (noting that in *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), ATS jurisdiction was upheld for actions in territorial waters).

366. Here, actions giving rise to civil suits. Criminal jurisdiction is broad, but as the ATS is purely a civil statute, an analogy to criminal procedure would be of little value, though much of the same problems can arise in criminal law. *See generally* David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases after* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71 (2013) (discussing the effect of *Kiobel*'s extraterritoriality jurisprudence on criminal law).

367. In the context of the ATS, there might not be another forum, or it might be unavailable as a matter of practicality for the plaintiff. Requiring exhaustion of domestic remedies would limit ATS cases such that, if a case *did* appear in the United States, it would be as a last resort, without any alternative foreign forum. *See supra* Part I.D (discussing exhaustion within the context of the ATS).

368. *See, e.g.*, Roger L. Phillips, *Piracy—Not just* Kiobel*'s Analogy*, COMMUNIS HOSTIS OMNIUM (Apr. 23, 2003), http://piracy-law.com/2013/04/23/piracy-not-just-kiobels-analogy/ (suggesting case-by-case analysis to determine where majority of conduct took place, and noting that a direct answer to the mixed-conduct question would elucidate the "touch and concern" test).

369. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring); *see infra* Part III.B.1 (discussing components of the test).

370. *See infra* Part III.B.2 (discussing difficulties with Justice Breyer's test).

371. *See infra* Part IV.D (discussing current implementation of *Kiobel* standards).

1. Three Components of the Proposed Test

Rejecting the presumption against extraterritoriality as validly applying to the ATS,[372] Justice Breyer offers a parallel test; a test that is, if nothing else, more clearly articulated than the standard set up by the majority.[373] Justice Breyer would find ATS jurisdiction where at least one of three elements is present: the tort occurred on United States soil, the defendant is an American citizen, or the action substantially and adversely affects an important national interest.[374] Finding jurisdiction where the tort occurred on United States territory is not controversial, and in this respect Justice Breyer's test parallels both the test of the majority[375] and precedent.[376]

The test diverges from the majority's standard by categorically upholding jurisdiction where the defendant is a United States national. While it is possible that having a United States citizen as a defendant will always touch and concern the United States sufficiently to displace the presumption, the majority's standard does not foreclose on the possibility that it will not.[377] When the Court dismissed the *Kiobel* claims, however, it noted that corporate presence alone did not support ATS jurisdiction,[378] implying that some form of corporate presence could support a claim for conduct occurring abroad.[379]

This extension of liability would track other areas of United States law, in which legal action against United States citizens for actions that took place abroad is unquestionably permissible.[380] The United States

372. *Kiobel*, 133 S. Ct. at 1672–73 (Breyer, J., concurring); *see also supra* text accompanying notes 302–320 (discussing Justice Breyer's rejection of the presumption against extraterritoriality).

373. *Compare supra* text accompanying notes 345–347 (expanding majority opinion's standard into a threshold test), *with Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (setting out a proposed alternate test for jurisdiction under the ATS).

374. *Id.*

375. The presumption against extraterritoriality can only apply to actions taking place extraterritorially; that domestic activity passes the majority's extraterritoriality standard is trivial.

376. *See supra* Part I.B.1 (discussing original use of ATS to provide jurisdiction for seizures in United States territorial waters).

377. *See Kiobel*, 133 S. Ct. at 1669 (holding that claims must touch and concern United States, without reference to nationality of defendant).

378. *Id.*

379. For more on corporate presence, see *infra* Part IV.B.2 (discussing interpretations of corporate presence in the aftermath of *Kiobel*).

380. To assert otherwise would imply that all United States citizens have diplomatic immunity. *See* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 333, art. 1 (defining "internationally protected person" as a limited class consisting of a head of state, official representative of a state, or a family member thereof).

already exercises foreign jurisdiction regarding its nationals, such as jury duty[381] and taxation.[382] Imposing legal requirements on a state's own nationals abroad is a recognized and accepted state action.[383] To additionally extend liability to American citizens for egregious violations of international law would not be unprecedented; it could be treated as a civil variation of criminal extradition.[384] Such extension of liability would, if nothing else, ease international tensions by allowing aliens to recover against American nationals.[385]

The third circumstance Justice Breyer offered under which ATS jurisdiction would be permitted is where foreign conduct substantially and adversely affects an important American national interest.[386] Crucially, Justice Breyer recognizes that this would permit recovery against aliens, so long as the conduct complained of adversely affects an important national interest. Such an interpretation would be in line with legislation in place in other countries,[387] as well as the Restatement of Foreign Relations Law.[388]

Justice Breyer also explicitly notes that preventing the United States from becoming a safe harbor for common enemies of humankind is one

381. Federal juror eligibility includes a one-year residency requirement. 28 U.S.C. § 1865(b)(1) (2012). State requirements vary, and do not always require strict residency. *See, e.g.*, People v. Williams, 827 P.2d 612 (Colo. Ct. App. 1992) (retaining juror as qualified where juror spent voted and paid taxes in another district, but spent more than 50% of his time in the relevant district). In either case, so long as the individual's residence remains within a domestic district, he or she may be obligated to jury service, regardless of the person's physical location.

382. *See generally* 26 U.S.C. § 901 (2012) (providing statutory basis for foreign income taxation exclusion to prevent situations where double taxation might occur); Jill Meyer, Comment, *2006 Amendments to the Foreign Earned Income Exclusion: Effects, Reactions, and Suggestions for Change*, 60 SMU L. REV. 1667 (2007) (overview of the United States' foreign income taxation regime).

383. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987) (permitting a state to proscribe law with respect to its nationals inside and outside of its territory).

384. Such extension of jurisdiction over nationals' actions abroad is already practiced by other nations. *See supra* note 331 and accompanying text (discussing other nations which permit civil jurisdiction over their citizens for actions committed abroad).

385. On this point, the effects of Justice Breyer's test run exactly counter to the majority's concern that allowing recovery against *aliens* is a violation of a foreign state's sovereignty. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1667 (2013) (majority finds punishing piracy acceptable as it does not impose one state's sovereign will on other states).

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

387. *Id.* at 1676 (noting that some countries that have adopted universal criminal jurisdiction for crimes such as genocide also permit civil actions by aliens against aliens for conduct abroad).

388. *Id.*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (permitting states to exercise universal criminal jurisdiction for certain offenses recognized as such by the community of nations).

such distinct and important interest.[389] Formally sanctioning such an interest would clearly enact the provisions of the Restatement,[390] and would follow in a line of precedent that indicates that not harboring pirates, or their modern equivalent, is an important state and international interest.[391]

Lastly, requiring distinctly American interests to be at issue in otherwise purely foreign cases serves as an ultimate limiting principle, curtailing ATS jurisdiction only to those situations where it is reasonable for the United States to exercise jurisdiction.[392] Under these limiting principles, the ATS would furthermore be limited by other principles such as exhaustion, comity, and *forum non conveniens*, ensuring that claims are only adjudicated in American courts when there is no other suitable forum, and limiting claims where another state can adequately redress the harm.[393]

2. Difficulties in Applying the Test

Justice Breyer's proposed test is not without its difficulties. Perhaps most notably, because—like the majority's standard—Justice Breyer's is also a new test, it suffers from much the same issues of definition.[394] Though both the majority opinion and Justice Breyer offer relatively ambiguous tests—"touch and concern"[395] and, *inter alia*, "important American national interest"[396] respectively—Justice Breyer's test would require less definition in subsequent cases. This is both because there already exists a large body of case law that supports limited

389. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (preventing United States from being a safe harbor to enemies of mankind is an important national interest).

390. *See supra* note 388 and accompanying text (recognizing limited permissibility of universal criminal jurisdiction).

391. *Kiobel*, 133 S. Ct. at 1674–75 (Breyer, J., concurring) (reciting precedent on the issue of harboring pirates); *see, e.g.*, RISJORD, *supra* note 327 (not harboring pirates was an important interest in the Colonies).

392. *Kiobel*, 133 S. Ct., at 1674 (Breyer, J., concurring). This mirrors the "reasonability" provision of the Restatement. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (stating that, generally, states may not exercise international jurisdiction where such would be unreasonable).

393. *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (noting that other factors may restrict the ATS' scope); *see also supra* Part I.D (discussing procedural elements that may limit the application of the ATS).

394. In this respect, *any* new test will necessarily require further definition. The benefit of Justice Breyer's test over the majority's standard lies in how much further definition is required, and the magnitude of harm in possible misinterpretation of the standard.

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

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

extraterritorial application of the ATS,[397] and because explicitly granting ATS jurisdiction over acts that take place within the United States, or with American nationals as defendants,[398] limits the scope of jurisdictional review.

Crucially, although the majority's standard looks to the location of the conduct, leading to difficulties in determining jurisdiction with cases occurring in more than one location,[399] Justice Breyer's proposed test looks to the effects of the action. This permits courts to be more flexible in their analyses and provides a better framework with which to analyze human rights violations.

IV. CURRENT AND FUTURE IMPACT

As Alien Tort Statute litigation has become more frequent and significant, the need for clear standards has only become more pressing.[400] Current applications of *Kiobel* differ significantly on matters of identification and interpretation of the majority's standard.[401] Justice Breyer's test can be reconciled within the standard of the majority, diverging only where Justice Breyer's interpretation is borne out by legislative and judicial precedent.[402] Applying his proposed test as a way to meet the majority's standard provides crucial guidance and gives courts a framework with which to approach ATS cases.[403]

A. The Increasing Importance of ATS Litigation

Since *Filartiga*, ATS litigation has become much more frequent.[404]

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397. *See supra* Parts I.C–E (outlining modern developments of ATS case law, generally accepting of extraterritorial application); *see also* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011) (review of extraterritoriality precedent).

398. That is, the first two prongs of Justice Breyer's test, which are fairly straightforward bright line tests. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

399. *See supra* note 368 and accompanying text (discussing difficulties with determining mixed-conduct cases where the conduct alleged occurs both abroad and on U.S. soil).

400. Young, *supra* note 182, at 74–81 (analyzing ATS as the "centerpiece" for transnational public law litigation and as one component of a broader structural debate over private enforcement of international law).

401. *See infra* Part IV.B (discussing various interpretations of *Kiobel*).

402. *See infra* Part IV.C.3 (reconciling the test proposed by Justice Breyer as a method of meeting the majority's broader standard).

403. *See infra* Part IV.D (discussing current courts' implementation of *Kiobel* and manners in which courts have attempted to meet the majority's standard by reference to the specific requirements of Justice Breyer's test).

404. *See, e.g.*, Hufbauer, *supra* note 118, at 610 (*Filartiga* paved the way for expansions of ATS' scope); Young, *supra* note 182, at 74–81 (ATS as "centerpiece" of transnational public law litigation).

Human rights considerations have played a pivotal role in increasing litigation,[405] but pecuniary interests cannot be discounted, as successful ATS claims can be both highly lucrative and highly damaging.[406]

Though the ATS as originally enacted[407] refers only to violations of treaties or the law of nations,[408] the Second Circuit in *Filartiga* interpreted it to support violations of international human rights law.[409] The new interpretation of the ATS provided victims of human rights violations with a rare tool with which to seek redress.[410] In 1992, Congress advanced these developments by enacting the Torture Victim Protection Act, which provided explicit relief for victims of foreign torture, a relief mechanism that is both concurrent with and broader than the ATS.[411] The ATS has developed into the center of gravity for contemporary foreign human rights litigation,[412] sanctioned by Congress,[413] and generally approved of by most executive administrations since *Filartiga*.[414]

Victims of human rights abuses generally have little recourse against

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405. *See generally* Mirela V. Hristova, *The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility*, 47 U.S.F. L. REV. 89 (2012) (viewing imposition of liability on non-state actors as method induce conformity to human rights principles).

406. A successful award is its own reward, but human rights organizations might desire a wider chilling effect on a certain class of activity in general. Given the potential magnitude of ATS litigation, such a broader result is entirely feasible. *See, e.g.*, Hufbauer & Mitrokostas, *supra* note 118, at 617–18 (discussing chilling effect of potential billion-dollar ATS awards on international trade).

407. Subject to subsequent non-substantive changes in wording. *See supra* note 23 and accompanying text (discussing the minor textual changes to the ATS between its passage and its current wording).

408. 28 U.S.C. § 1350 (2012).

409. Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

410. Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFF., Mar.–Apr. 2013, at 16.

411. TVPA §§ 2(a)–(c), 28 U.S.C. § 1350 (2012); *see, e.g.*, Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005) (barring ATS claims but allowing suit to proceed under TVPA); *id.* at 876–77 (discussing how TVPA was intended to expand, not contract, ATS remedies).

412. *See* Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) (concluding ATS has provided a focal point for modern human rights litigation).

413. This was accomplished by passing the TVPA.

414. David J. Bederman, *International Law Advocacy and its Discontents*, 2 CHI J. INT'L L. 475, 477 (2001) (every executive administration since *Filartiga* has approved of the ATS as a remedy for human rights abuses). The administration of President Bush, Jr. expressed support for the ATS' goals, but moved to block ATS litigation largely in circumstances surrounding corporate liability, a move some commentators have decried as political intervention to protect private interests. Beth Stephens, *Upsetting Checks and Balances: the Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 169–79 (2004).

their abusers: suits brought in foreign countries may be fruitless, as foreign judiciaries may be subject to the control of those perpetrating the abuses[415]—if such suits are even permissible at all, due to sovereign immunity.[416] Successfully-brought human rights cases can serve as vehicles to draw attention to atrocities and deter future abusers.[417] They can also provide some measure of solace to the victims[418] and can potentially provide considerable recovery through damages.[419]

Adverse financial awards are undesirable to potential defendants, and unchecked ATS litigation creates a further risk of causing an extensive depressive effect on international trade.[420] If a low enough barrier to ATS ligation opens multinational enterprises to liability for conducting business in certain countries, then they are much less likely to do so, curtailing trade and cutting financial ties.[421] Though the proliferation of

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415. If a foreign state is sanctioning gross human rights abuses of the sort that rise to the level of ATS violations, it would unfortunately not be surprising for that same state to suppress or otherwise manipulate the rule of law within its borders to serve its ends. *See, e.g.*, Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1097 (N.D. Cal. 2008) (finding Nigerian judiciary subject to pressure from executive and legislative branches as well as corruption and inefficiency, justifying waiver of any exhaustion requirement).

416. *See* Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§1602–11 (2012) (establishing grounds on which a foreign sovereign may or may not be liable for suit). In appropriate circumstances, the FSIA has barred claims brought under the ATS. *See, e.g.*, *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (FSIA bars claims against a foreign state unless an exception applies). *But see* Douglas M. Evans, Comment, *Sovereign Immunity—Foreign Sovereign Immunities Act—Jurisdiction Granted Under Alien Tort Statute;* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), 12 SUFFOLK TRANSNAT'L L. J. 687 (1989) (analyzing properly-stated claims under ATS as a categorical exception to FSIA).

417. *See* Leval, *supra* note 410 (successful ATS litigation calls attention to human rights violations and deters abuses).

418. *See id.* (successful ATS litigation provides some comfort to plaintiffs).

419. *See, e.g.*, Filartiga v. Pena-Irala, 577 F. Supp. 860, 866–67 (E.D.N.Y. 1984) (on remand from Second Circuit, analyzing previous awards of punitive damages and awarding a total judgment of $10,385,364 in costs and punitive damages to deter practice of torture); Hufbauer & Mitrokostas, *supra* note 118, at 607 (envisioning an ATS complaint in the total amount of $26 billion being settled for $10 billion). Whether such awards could be collected or not is a different issue; some foreign parties might well be judgment-proof. *See, e.g.*, Mwani v. Bin Laden, 947 F. Supp. 2d 1 (D.D.C. 2013) (civil suit against Osama Bin Laden and al-Quaeda).

420. *See generally* Hufbauer, *supra* note 118 (examining risk of expansion of ATS litigation in the wake of *Sosa*, including dampening effects on trade, investment, and extensions of credit); Stephens, *supra* note 414, at 178–89 (summarizing "corporate opposition" to ATS).

421. Gary C. Hufbauer & Barbara Oegg, *Economic Sanctions: Public Goals and Private Compensation*, 4 CHI. J. INT'L L. 305, 326–27 (2003) (discussing chilling effect of ATS litigation on foreign investment); *see, e.g.*, Brief for the National Foreign Trade Council, USA*Engage, The National Association of Manufacturers, The Chamber of Commerce of the United States of America, and the United States Council for International Business as Amici Curiae in Support of Petitioner at 1, Sosa v. Alvarez-Machain, 540 U.S. 1045 (2003) (No. 03-339), 2003 WL

such suits has not spiraled out of control—as some have feared[422]—the magnitude of the potential risks involved reaffirms the *Sosa* Court's exhortations to judicial caution in this arena.[423]

B. A Pressing Need for Clear Standards

While all newly-articulated judicial tests require some amount of interpretation to be consistently applied, the need for clear standards in ATS jurisprudence is especially strong. Several lower courts applying the *Kiobel* rule have fatally misinterpreted it, and while the rule has proven useful in some instances to bar some frivolous claims,[424] misinterpretation is not ideal. Even if correctly interpreted, however, the exact nature of the majority's standard is unclear: it refers to two terms of art, neither of which is given sufficient explanation or contextual meaning to allow for consistent application.

1. Proper Application of the Court's Current Standard is Unclear

Though all new rules and interpretations will, by virtue of their novelty, require some amount of judicial interpretation, the brevity of the majority's standard provides little guidance.[425] The Court simply notes that corporate presence alone is not sufficient to displace the presumption.[426] With no body of case law upon which to draw,[427] lower courts are forced to address ATS issues as matters of first impression. Without so much as a hint at what the Court intended by its standard, lower courts have come out in different ways on the matter.

In the six months following *Kiobel*, the case was applied by district

22429204 (alleging that suits against corporate defendants seek to punish companies for investing in rights-abusive governments).

422. *See, e.g.*, Brief for the National Foreign Trade Council et al., *supra* note 421, at 4–5 (describing ATS suits as "serious impediments" to foreign investment); Hufbauer, *supra* note 118, at 614–15 (predicting risks of ATS litigation expanding into a plaintiff's market).

423. *See supra* note 146 and accompanying text (*Sosa* court's repeated urges to judicial caution in ATS claims).

424. *See infra* note 432 and accompanying text (discussing frivolous claims barred by applying the *Kiobel* standard).

425. That is, one relatively short paragraph. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1669 (2013); *see supra* note 351 and accompanying text (discussing length of actual standard).

426. *Id.*; *see also infra* Part IV.B.2 (discussing interpretations of the majority standard).

427. As the majority's standard effectively reverses a thirty-two-year-old assumption that extraterritoriality is permissible, there is very little case law to flesh out the majority's standard. *See supra* Part I.E (discussing history of extraterritoriality in ATS jurisprudence, noting that most courts until *Kiobel* found extraterritorial application of the ATS permissible).

courts from Oregon[428] to Florida,[429] and twice on appeal.[430] Crucially, some district courts' applications of the *Kiobel* holding appear to be improper: several district courts have denied ATS claims, citing *Kiobel* for the proposition that extraterritorial application of the ATS is flatly impermissible, without reference to the crucial "touch and concern" language that was the primary rule of the holding.[431] While dismissing the "touch and concern" standard may provide a simpler tool with which to rule on potentially frivolous cases,[432] the motivation for the Court's order for rehearing and eventually ruling on extraterritoriality was to specify which extraterritorial claims *could* be permitted.[433]

2. There is Little to Guide the Standard's Application

In *Sosa*, the Court asserted that not all violations of the law of nations would be actionable, and set up a standard to determine which

428. Fotso v. Republic of Cameroon, No. 6:12 CV 1415-TC, 2013 WL 3006338, at *7 (D. Or. June 11, 2013) (under *Kiobel*, presumption of extraterritoriality bars claims based on foreign action).

429. Ahmed-Al-Khalifa v. Al-Assad, No. 1:13-cv-48-RV-GRJ, 2013 WL 4401831, at *2 (N.D. Fla. Aug. 13, 2013) (concluding the 2011 Syrian civil war does not touch or concern United States).

430. Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013) (dismissing ATS claims); Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011), *cert. granted sub nom.* DaimlerChrysler AG v. Bauman, — U.S. —, 133 S. Ct. 1995 (2013) (remanding ATS claims in light of *Kiobel*).

431. *See, e.g.*, United States v. Viertel, Nos. 08 Civ. 7512(JGK), 01 Cr. 0571(JGK), 2013 WL 5526242, at *5 (S.D.N.Y. Oct. 7, 2013) (in analogy to *Kiobel*, asserting that *Kiobel* simply held that extraterritorial conduct is not grounds for ATS liability); Giraldo v. Drummond Co., Inc., No. 2:09-CV-1041-RDP, 2013 WL 3873965, at *3 (N.D. Ala. July 25, 2013) (finding that claims based on extraterritorial conduct simply "fail" as directed under *Kiobel*, without mention of "touch and concern"); Mwangi v. Bush, No. 5: 12-373-KKC, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013) (holding that, under *Kiobel*, ATS does not authorize jurisdiction over claims with foreign conduct); *Fotso*, 2013 WL 3006338 at *7 (barring claims as presumption against extraterritoriality applies to ATS, without mention of "touch and concern").

432. It is solely a court's prerogative to rule on the merits of claims. *But see* Ahmed-Al-Khalifa v. Salvation Army, No. 3:13cv289-WS, 2013 WL 2432947 (N.D. Fla. June 3, 2013) (plaintiff requested and was denied humanitarian aid by the Salvation Army in Nigeria; dismissed for failure to touch and concern United States); Ahmed-Al-Khalifa v. Queen Elizabeth II, No. 5:13-cv-103-RS-CJK, 2013 WL 2242459 (N.D. Fla. May 21, 2013) (asserting plaintiff is a descendent of the Prophet Muhammad, whose descendants fled Mecca to South Africa, claiming damages for their suffering during Apartheid; dismissed for failure to touch and concern United States, with judge noting that plaintiff seems to be forum-shopping for his frivolous complaints to go forward).

433. The Court did not even explicitly state that extraterritorial claims would be presumptively barred; that conclusion arises by implication. The Court's language is solely in the positive, describing the very exception itself: "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1669 (2013).

violations permitted legal action.[434] In *Kiobel*, the Court extended this approach, holding that extraterritorial applications were presumptively inapplicable and setting up a standard to determine what would overcome that presumption. Unfortunately, the standard was presented with little guidance to assist in determining just what constitutes action that "touch[es] and concern[s] the territory of the United States."[435]

Within the context of the Court's opinion, all nine Justices agreed that "corporate presence" does not suffice,[436] but the analysis ended there, as the Court's use of "corporate presence" was otherwise unqualified.[437] In conventional American jurisprudence, the term arises most frequently in personal jurisdiction, where a corporation's presence in a state subjects it to liability for suit.[438] By analogy to the conventional use of the term, a corporation headquartered or incorporated within the United States would have sufficient corporate presence to satisfy the majority's test.[439] This appears to run contrary to the Court's intent in introducing a new limitation: if a corporation is sufficiently present to satisfy the "touch and concern" requirement, the corporation would remain a valid target for ATS litigation, even on the basis of action that occurred purely abroad.[440]

The nature of "touch and concern" is even vaguer. While the term is somewhat familiar in American jurisprudence, it comes from the realm of property law. Since the sixteenth century, real covenants and equitable servitude must "touch and concern" real property to run with the land.[441] Precedent here, however, is fruitless; in *Kiobel*, "touch and

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434. Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004).

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

436. *Id.* The corporate presence of the defendants in *Kiobel* comprised an office in New York City, operated by a separate but affiliated company, along with shares bought and sold on the New York Stock Exchange. *Id.* at 1677–78 (Breyer, J., concurring) (claiming corporate presence is insufficient to satisfy the majority's standard); *see also id.* at 1678 (Breyer, J., concurring) (finding corporate presence is insufficient under Justice Breyer's alternative test).

437. *See id.* at 1669 (discussing insufficiency of defendant's corporate presence, without further qualification as to the nature of such presence).

438. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

439. Though the extent of activity within a state necessary to satisfy "corporate presence" has been subject to debate in the half-century since *International Shoe*, the Court's latest interpretation has adopted a "nerve center" test. Hertz Corp. v. Friend, 559 U.S. 77, 78 (2010).

440. *See* Kristin Linsley Myles, 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/ (discussing various concerns with corporate defendants in light of the *Kiobel* ruling on extraterritoriality).

441. "Touch and concern" in this context predates the United States by several centuries. Spencer's Case, 77 Eng. Rep. 72, 72 (K.B. 1582) (in order to run with land, covenants must touch and concern real property). *See generally* A. Dan Tarlock, *Touch and Concern Is Dead, Long*

concern" is functionally a new term of art, one which is likely to be interpreted only through future litigation.[442]

C. Reconciliation of Majority Standard with Justice Breyer's Test

In *Filartiga*, the Second Circuit opened the doors to ATS litigation, but in *Sosa*, the Supreme Court closed them slightly, explicitly establishing a set of standards with which to assess ATS claims.[443] While the Court in *Kiobel* unanimously intended to further restrict the scope of permissible litigation,[444] there was a significant split as to how to do so. By interpreting the standard of the majority with Justice Breyer's three-part test, it is possible to provide additional guidance on the Court's meaning while remaining within the suggested practical limitations on ATS jurisdiction.

The majority applies extraterritoriality jurisprudence to the ATS, concluding that it is subject to the normal presumption against extraterritorial application of statutes.[445] The presumption, however, is just that: an inference that can be overcome with other evidence.[446] Though Justice Breyer's alternative test is explicitly constructed without reference to the presumption of extraterritoriality,[447] the three-part test he presents can be conceptualized as a way in which a claim might be understood to touch and concern the territory of the United States, as required by the majority.[448]

Live the Doctrine, 77 NEB. L. REV. 804 (1998) (discussing modern developments in the touch and concern doctrine within the context of real property).

442. "[T]oday, the Supreme Court has provided fodder for another decade or more of litigation . . . [as] advocates will battle over when claims touch and concern the U.S. with sufficient force." 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/ (discussing *Kiobel*'s effect on ATS litigation). The value of scholarly analysis of these issues is as of yet unclear. Certainly judicial authority, especially of the binding type, tends to be more persuasive.

443. Sosa v. Alvarez-Machain, 542 U.S. 692, 731–32 (2004) ("We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises . . . .").

444. The ruling was unanimous *against* allowing an ATS claim to proceed. Justices Breyer, Ginsburg, Sotomayor, and Kagan concurred in the Court's judgment, but not its opinion. *See* Young, *supra* note 182, at 25–26 (stating that, contrary to expectations, *Kiobel* was unanimous against permitting second-wave ATS litigation).

445. "[T]he presumption against extraterritoriality applies to claims under the ATS, and . . . nothing in the statute rebuts that presumption." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1669 (2013).

446. *See Presumption*, BLACK'S LAW DICTIONARY (9th ed. 2009).

447. *See Kiobel*, 133 S. Ct. at 1671, 1672–73 (Breyer, J., concurring).

448. *Id.* at 1669.

Cases satisfying the first two points can be categorically determined to meet the majority's touch and concern standard. While Justice Breyer's third point would extend jurisdiction farther than the majority's standard would, such extension is in line with legal and legislative precedent as well as the United States' stated foreign policy. In this manner, Justice Breyer's test largely shadows the majority's standard, providing jurisdiction wherever the majority would, and extending jurisdiction over a relatively limited set of cases in a manner consistent with policy and precedent.

1. Torts Occurring on American Soil

The first of Justice Breyer's elements would support jurisdiction where the alleged tort occurs on American soil.[449] That a tort taking place on American soil touches and concerns the territory of the United States is not controversial,[450] as such an action would touch the United States' territory in a very literal sense of the term. Furthermore, any action that takes place in United States territory would also concern the United States; what more proper object of legal concern is there for a state than torts taking place within its sovereign territory?

This understanding is in line with the original intent and application of the ATS.[451] The statute was created after a pair of high-profile assaults against ambassadors provided a source of embarrassment for the newly formed nation: torts committed by aliens against aliens within United States territory.[452] The ATS was created immediately after the adoption of the Constitution, in order to enact a constitutional clause that specifically authorized such jurisdiction.[453]

The first—and, for more than a hundred years, only—applications of the ATS occurred under such a theory of jurisdiction, addressing acts that occurred within the territorial waters of the United States.[454] In this respect, finding that torts occurring within American territory

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

450. *See supra* text accompanying notes 375–376 (discussing relatively uncontroversial nature of allowing recovery for actions occurring within a court's jurisdiction).

451. *See generally supra* Parts I.A–B (providing and discussing historical context surrounding both the passage of the ATS and applications of the ATS in the eighteenth century).

452. *See supra* text accompanying notes 34–41(discussing two eighteenth-century attacks on foreign officials).

453. *See supra* text accompanying notes 42–50 (enactment of ATS pursuant to Offenses Clause). *See generally* Kontorovich, *supra* note 37 (discussing the Offenses Clause).

454. Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895). Strictly speaking, *M'Grath* was an enforcement action, and did not directly apply the ATS. *See generally supra* Part I.B.1 (discussing *Moxon* and *Bolchos*).

sufficiently touch and concern the United States to displace the presumption against extraterritoriality is little more than a reaffirmation of the oldest use and original purpose of the ATS.

2. Claims Brought Against American Nationals

The second prong of Justice Breyer's test would support jurisdiction where the defendant is an American citizen.[455] Reconciling this element with the majority's standard is possible under the assertion that all claims against American citizens necessarily touch and concern the United States' territory.[456] This is a point of divergence with the majority's standard: while a claim against an American citizen for conduct occurring abroad will likely touch and concern the United States, the majority's standard does not foreclose on the possibility that it will not.

In affirming the dismissal of plaintiff's claims in *Kiobel*, however, the Court noted that the defendants' corporate presence did not support jurisdiction under a touch and concern theory.[457] That determination seems to imply that some other form of corporate presence *would* sufficiently touch and concern the United States, even though the conduct occurred abroad.[458] In the few cases on point decided since *Kiobel*, district courts have ruled both ways on the matter.[459]

Permitting ATS suits against United States nationals because of their citizenship would be in line with other areas of the law. The Restatement of Foreign Relations Law explicitly permits a state to exercise such jurisdiction.[460] Indeed, the United States already extends jurisdiction over its citizens for certain activities abroad.[461] American

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455. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring).

456. As provided for by the majority's standard, which requires claims to touch and concern American territory with enough strength to displace the presumption. *See id.* at 1669 (majority standard); *supra* Part II.B (discussing majority standard).

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

458. *See supra* text accompanying notes 380–385 (noting that *Kiobel* leaves open the possibility that corporate presence may touch and concern the United States).

459. *See infra* note 480 and accompanying text (discussing cases that address corporate presence since *Kiobel*). *Compare* Adhikari v. Daoud & Partners, No. 09-cv-1237, 2013 WL 4511354, at *7 (S.D. Tex. Aug. 23, 2013) (finding American citizenship does not provide sufficient grounds to support an ATS claim), *with* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 310–11 (D. Mass. 2013) (finding that presumption of extraterritoriality does not apply to ATS where defendant is American national).

460. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987).

461. Obligations of citizenship, regardless of the citizen's physical location or domicile, include paying taxes, *see supra* note 382 and accompanying text, and can include jury duty

citizens are already held criminally liable for actions abroad.[462] Extending civil liability for conduct that is not only criminal but also sufficient to violate the law of nations is not only a logical extension of current jurisprudence, but, in holding United States citizens to such international standards,[463] would also reaffirm American support of those standards.[464]

3. Claims that Substantially and Adversely Affect a Distinct National Interest

The third prong of Justice Breyer's test is the broadest, and would sustain liability where conduct abroad substantially and adversely affects an important American national interest.[465] Both this standard and the majority's standard are vague, lacking case law, legal or policy precedent, or much of any other context to assist in definition.[466] Whereas the first two elements of conduct performed either on United States soil or by a United States national could be categorically defined as adversely affecting an important American national interest, this third element cannot.

There exist three possible permutations of the majority's standard and Justice Breyer's third element.[467] If both standards would grant or deny

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service, *see supra* note 381 and accompanying text.

462. Criminal conduct abroad may be grounds for extradition: even if the conduct is not prosecuted within the United States, there still exists jurisdiction to ensure that the accused party is brought before a tribunal to answer for the allegations against him or her. Criminal extradition is required in some circumstances. *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 (when contracting state finds an alleged violator of the Geneva Convention, it must either try the defendant or extradite him or her for trial elsewhere).

463. Standards that, while not exhaustively defined, historically included offenses against ambassadors, violations of guarantees of safe conduct, and piracy. *See supra* note 81 and accompanying text. They also include torture, Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980), extrajudicial killings, sundry war crimes, and slavery. *See supra* text accompanying notes 204–212 (defining offenses that some courts have found to be violations of the law of nations).

464. Unquestionably, this interpretation would explicitly place liability on American citizens, wherever they might be found. The additional burden, however, simply requires Americans to not commit crimes abroad that are so egregious as to rise to the level of violations of international law under *Sosa*. All of the potential grounds for ATS liability are already criminalized domestically, otherwise they would not be internationally recognized. Requiring Americans to not commit genocide is not a particularly onerous obligation, and would not be a new one.

465. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring).

466. *Compare supra* Part III.A.2 (discussing difficulties with standard of the majority), *with supra* Part III.B.2 (discussing those same issues in the context of Justice Breyer's standard).

467. This requires the assumptions that both the standard and test are binary propositions. This seems to be borne out by the language used, as both the majority and Justice Breyer refer to

jurisdiction, then the standards are interchangeable.[468] If the tests disagree on whether to grant jurisdiction,[469] one of two cases has occurred: either an action that touches and concerns the territory of the United States does not adversely affect an important American national interest, or an action affecting an important national interest does not touch and concern American territory.[470]

The first of these two cases is easily disposed of: it is highly unlikely that an action that touches United States territory does not adversely affect an important national interest. It is therefore reasonable to assert that the United States would have an important national interest in any action that touched or concerned American territory.[471]

The second of the two permutations is more difficult. Justice Breyer's test would extend jurisdiction to, among others, any case that involves an important American national interest, but does not necessarily touch and concern the United States. In this respect, this test is more permissive, extending jurisdiction farther afield, but it is not an unreasonable extension. The majority's standard, applied on its face,

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meeting a standard. *Kiobel*, 133 S. Ct. at 1669 (majority standard); *see also id.* at 1677–78 (Breyer, J., concurring). Furthermore, jurisdiction by nature is a Boolean proposition: either a court has it, or it does not. Given two binary propositions, there can only exist four possible conjunctions of their state. *See generally* WARREN GOLDFARB, DEDUCTIVE LOGIC 19–21 (2003) (discussing the truth function of conjunction). Because it is unlikely that an action that meets the majority's touch and concern standard does not meet Justice Breyer's test, there are functionally three scenarios. *See infra* note 471 and accompanying text (discussing the rarity of such a potential case).

468. Though of course the rhetoric used to argue both tests would likely differ, if one were treated as a logically equivalent interpretation of the other, satisfying one would satisfy the other. Such a determination could only be made ex post facto; parties would need to know beforehand what the relevant standard is, a determination this Note seeks to make.

469. As was the case in *Kiobel*, where both the majority and Justice Breyer found jurisdiction improper. *Kiobel*, 133 S. Ct. at 1677–78 (Breyer, J., concurring).

470. It should be noted that because Justice Breyer's three-point test is disjunctive, rather than conjunctive, only one of the three elements must be satisfied in order for ATS jurisdiction to hold. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring). Claims arising "under" the third test for the purposes of this analysis are therefore ones that cannot be sustained under the first two tests of either involving American soil or an American defendant; these are therefore so-called "foreign squared" cases involving an alien suing an alien for actions on alien soil. *See, e.g.*, 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/ (discussing the nature of "foreign squared" cases).

471. Any action brought under the ATS would allege a violation of the law of nations. Such violations are typified by being extremely serious: after all, they are violations so unanimously decried as to be accepted by the world at large—genocide, war crimes, and so forth. It is difficult to imagine *any* such act that would touch American territory yet *not* be one in which the United States had an important interest.

would have rejected the claims in *Filartiga*;[472] an alien torturing another alien abroad does not palpably touch or concern the United States, and so jurisdiction would not have been found. Under Justice Breyer's test, however, the distinct and well-established interest in not providing a safe harbor to common enemies of mankind—here, a torturer—would sustain jurisdiction over a torturer.[473]

While the majority's test appeals to the presumption against extraterritoriality to prevent courts from making foreign policy decisions,[474] this foreign policy decision has already been made: Congress explicitly authorized recovery on facts such as *Filartiga*'s by passing the TVPA.[475] The government has already indicated that extending jurisdiction in similar cases is not only permissible but encouraged; allowing such actions fits into foreign relations interests of the United States—interests such as the promotion of human rights, which the TVPA was enacted to promote.[476]

Using Justice Breyer's "distinct national interest" element as satisfactory of the majority's "touch and concern" standard would extend jurisdiction farther than the touch and concern standard alone would extend it, but such an extension would be both well within the bounds of case law and the stated foreign policy interests of the United States. Courts could approach any novel fact pattern arising under this test through application of the "distinct American interests" test, much like they would now have to apply the "touch and concern" test. There may be unanswered questions lurking in a "distinct American interests" test, but those questions would still be unanswered under the majority's "touch and concern" test.

D. Courts' Current Implementation of Kiobel

With little guidance on the proper interpretation of the Court's

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

473. *See id.* at 1671 (Breyer, J., concurring) (noting that important American national interests include that of not providing safe harbor to pirates or common enemies of mankind).

474. *See id.* at 1664–65 (finding the danger of unwarranted judicial interference that underlies presumption against extraterritoriality magnified in context of ATS; courts should recognize foreign implications and act cautiously).

475. TVPA § 2(b), 28 U.S.C. § 1350 (2012).

476. "[A]llowing suits based on conduct occurring in a foreign country in the circumstances presented in Filartiga is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 4–5, Kiobel v. Royal Dutch Petroleum, 569 U.S. —, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290 (in brief for the United States government, discussing official governmental stance on ATS suits).

standard, lower courts have been interpreting *Kiobel* in essentially an ad hoc manner, a process that has led to interpretations so divergent that they likely constitute errors of law.[477] Though few courts have addressed the case's concurrences, at least one[478] has used the test offered by Justice Breyer as a mechanism for understanding and evaluating claims under the majority's standard.[479]

1. Courts Improperly Applying *Kiobel* to Categorically Bar ATS Claims

Most lower courts relying on *Kiobel* have dismissed the claims before them for lack of subject-matter jurisdiction.[480] While some have properly applied the majority's standard, determining that the claims do not sufficiently touch and concern the United States,[481] other courts have read the ATS as barring all claims based on extraterritorial actions.[482] Although correcting such relatively simple errors of law is a task suited for the circuit courts, the fact that such clear errors arise at all is troubling.[483]

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477. *See, e.g.*, *infra* text accompanying notes 482, 491 (courts holding all extraterritorial claims to be categorically barred, despite the *Kiobel* exception for claims that sufficiently touch and concern the United States).

478. Mwani v. Bin Laden, 947 F. Supp. 2d 1, 4 (D.D.C. 2013) (relying on Justice Breyer's rhetoric in discussion of the majority's standard).

479. *See infra* Part IV.D.3 (discussing applications of Justice Breyer's standard).

480. As of September 2014, *Kiobel* had been cited by 114 cases, including 86 district court orders, 25 circuit court holdings, and a single remand by the Court for further consideration in light of *Kiobel* itself. Conversely, there are nearly three times as many academic citations in that same time span; the ATS is a bountiful topic indeed.

481. *See, e.g.*, Tymoshenko v. Firtash, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) (dismissing claims brought in a similar fact pattern to *Kiobel*, but with even less corporate presence); Kaplan v. Cent. Bank of the Islamic Republic of Iran, No. 10-483 RCL, 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013) (finding that Hezbollah rocket attacks injuring American civilians did not sufficiently touch and concern the United States to be actionable under ATS); Ahmed-Al-Khalifa v. Queen Elizabeth II, No. 5:13-cv-103-RS-CJK, 2013 WL 2242459 (N.D. Fla. May 21, 2013) (dismissing claims for damages during Apartheid for failure to touch and concern United States).

482. *See, e.g.*, Fotso v. Republic of Cameroon, No. 6:12 CV 1415-TC, 2013 WL 3006338, at *7 (D. Or. June 11, 2013) (barring claims on the grounds that presumption against extraterritoriality applies to ATS, without mention of "touch and concern" standard); *see also supra* Part IV.B.1; *supra* note 431 and accompanying text (listing and discussing further cases of lower courts' application of *Kiobel*).

483. Correcting such errors is of course the proper task of the appellate courts, but it would be preferable that they not occur in the first place. A cursory reading of *Kiobel* would reveal that the presumption could be overcome; the Court says as much in the last paragraph of the holding. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1669 (2013) (claims may overcome presumption if they touch and concern the territory of the United States). Furthermore, the very notion of a presumption means it can be rebutted.

2. Varying Interpretations of "Touch and Concern"

Without a body of case law to provide common starting ground, courts are approaching the majority's "touch and concern" requirement on a case-by-case basis. While some determinations are relatively simple,[484] others draw finer distinctions. For example, a terroristic attack that injured Americans but targeted another nation does not touch and concern the United States,[485] whereas the bombing of an American embassy does.[486] Remarkably, one court has interpreted the Court's "touch and concern" language as referring to a necessary and external prerequisite for further authorizing legislation, such as the TVPA.[487] Under such an interpretation, no extraterritorial application of the ATS is possible, save for that explicitly authorized by Congress along the lines of the TVPA. The defendant's citizenship has been found dispositive as both sufficient and insufficient grounds for an ATS claim.[488]

Perhaps the most rigorous[489] interpretation of the issue has come out of *Giraldo v. Drummond*,[490] where a court in the Northern District of Alabama held that an action was extraterritorial, and therefore categorically barred by the presumption against the same unless the action complained of occurred abroad.[491]

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484. *See, e.g.*, Ahmed-Al-Khalifa v. Obama, No. 1:13-cv-49-MW/GRJ, 2013 WL 3797287, at *2 (N.D. Fla. July 19, 2013) (holding suit for recovery by unrelated alien for torture of North Korean by North Korean government does not touch and concern the United States); *supra* note 432 and accompanying text (discussing frivolous ATS complaints).

485. Kaplan, 2013 WL 4427943, at *16 (finding that Hezbollah rocket attacks injuring American civilians in Israel did not sufficiently touch and concern the United States to be actionable under ATS).

486. Mwani v. Bin Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (terrorist attack on American embassy in Afghanistan sufficiently touched and concerned the United States to be actionable under ATS). Jurisdiction might also be upheld on the alternate grounds that such an attack would physically touch American territory. In either case, the court preemptively certified the case for review as presenting a substantive and controlling issue of first impression.

487. Al Shimari v. CACI Int'l, Inc., No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720, at *7–10 (E.D. Va. June 25, 2013) (noting that *Kiobel* rejected extraterritorial application of ATS, with "touch and concern" applying only to specific authorizing statutes such as the TVPA), *vacated in light of* Kiobel *sub nom.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014).

488. *See supra* note 459 and accompanying text (noting that citizenship has been found to be both sufficient and insufficient grounds for ATS jurisdiction post-*Kiobel* by different courts).

489. With only a handful of cases actually addressing the extent of the "touch and concern" standard, this unfortunately means very little.

490. No. 2:09-CV-1041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013).

491. *Id.* at *8. The *Giraldo* court reaches this conclusion through a web of alternatives and double negatives as pure dicta, already having granted motions to dismiss on other grounds. It looks to *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247 (2010), holding that *Morrison*

Under Justice Breyer's test, these cases would likely come out the same way. While there is an American interest in keeping its citizens safe, an attack injuring, but not targeted at, Americans might not have a sufficiently substantial effect to support jurisdiction; an attack on an embassy, however, probably would be sufficiently substantial.[492] Cases involving an American defendant would receive ATS jurisdiction,[493] and cases holding that the ATS categorically does *not* include extraterritorial applications would be remanded for further consideration.[494]

3. Courts Discussing Justice Breyer's Test

Of the few cases that address *Kiobel*, only a handful discuss Justice Breyer's concurrence.[495] Several have cited it, but three are particularly

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directed courts to find extraterritoriality not based on the activity's location but the statute's focus; if a claim alleges both domestic and foreign action, the presumption only applies if the event under focus does not occur abroad. Because the ATS, however, does focus on specific torts, the presumption *will* apply to an ATS claim if the focused event *does* occur abroad. *Giraldo*, 2013 WL 3873960, at *8.

This interpretation would effectively bar all ATS claims not arising from domestic conduct, unless the focus of the claims was domestic conduct, in which case the presumption would apply to foreign portions of the claims only, thus barring the claims for different reasons. The ultimate effect would be the same as simply barring all ATS claims based on extraterritorial action, as if there was no exception. As the "touch and concern" exception was the entire point of the *Kiobel* ruling, *supra* note 433 and accompanying text, the *Giraldo* interpretation seems unlikely to be sound. Lastly, the *Giraldo* court notes that the Eleventh Circuit might be compelled to take up the matter. *Giraldo*, 2013 WL 3873960, at *9. Given *Giraldo*'s convoluted analysis, that might not be a bad idea.

492. *Compare* Kaplan v. Cent. Bank of the Islamic Republic of Iran, No. 10-483 RCL, 2013 WL 4427943 (D.D.C. Aug. 20, 2013) (Hezbollah rocket attack against Israel injuring American citizens as bystanders), *with* Mwani v. Bin Laden, 947 F. Supp. 2d 1 (D.D.C. 2013) (Al-Qaeda attack on American embassy).

493. *See supra* Part IV.C.2 (discussing potential of citizenship to categorically fulfill the "touch and concern" standard).

494. As perhaps they should under the *Kiobel* standard, given that it makes no such categorical statement. *See supra* text accompanying notes 489–491 (discussing *Giraldo*'s rationale to determine that the ATS cannot apply extraterritorially). *See generally supra* Parts IV.B.1, IV.D.1 (discussing court holdings that categorically deny the ATS extraterritorial application).

Under Justice Breyer's test, even though ATS claims would not be categorically barred from extraterritorial application, they would still need to meet one of the three elements of his test in order to obtain subject-matter jurisdiction. Furthermore, even if jurisdiction were found, claims would still be subject to standard procedural controls such as comity, *forum non conveniens*, and principles of exhaustion. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring); *supra* Part I.D (discussing procedural requirements that apply to ATS).

495. Of those, several dispose of their claims on TVPA grounds. *See generally supra* note 480 and accompanying text (discussing cases that address *Kiobel*).

illustrative.

In *Balintulo v. Daimler AG*,[496] the plaintiffs attempted to salvage their extraterritorial claims in the wake of *Kiobel* by interpreting the majority's "touch and concern" standard as one part of a multi-factor test and arguing that the ATS still covers foreign conduct when the defendant is a United States citizen.[497] The Second Circuit identified this argument as being "precisely the conclusion reached by Justice Breyer."[498] The court then proceeded to vigorously refute the argument, holding that the majority clearly barred extraterritorial applications of the ATS, and, more draconically, that "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."[499] The court then curiously described the "touch and concern" language as dicta, noting that, because all of the conduct in *Kiobel* occurred abroad, a fact that was otherwise dispositive of the issue, "the Court had no reason to explore, much less explain," anything further.[500] This analysis of the touch and concern standard as dicta appears otherwise unprecedented.[501]

Despite the Second Circuit's holding in *Balintulo*, the Southern District of New York has cited Justice Breyer's concurrence much more favorably. In *Tymoshenko v. Firtash*,[502] the court referred to Justice Breyer's concurrence to briefly summarize the facts of *Kiobel*.[503] In footnote four of its opinion,[504] however, the *Tymoshenko* court noted that the *Kiobel* majority did not outline a test with which to determine

496. Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013).

497. *Id.* at 189.

498. *Id.*

499. *Id.* at 190.

500. *Id.* at 190–91.

501. Certainly it is one way of reaching the conclusion that ATS claims based on extraterritorial action are always barred; nevertheless, until the Supreme Court's rehearing of *Kiobel*, the Second Circuit implicitly accepted such extraterritorial application. Its sudden reversal, especially with such sharp language, is not clear. *See id.* at 191–92 ("In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign. . . . [T]he ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should.") (emphasis in original).

502. Tymoshenko v. Firtash, No. 11-CV-2794, 2013 WL 4564646 (S.D.N.Y. Aug. 28, 2013). Continuing the trend of single judges hearing multiple ATS claims in succession, *see supra* note 67 (Judge Bee heard *M'Grath* in 1794 and *Bolchos* in 1795), *Tymoshenko* was heard by Judge Wood, who coincidentally was the district judge in *Kiobel*.

503. *Tymoshenko*, 2013 WL 4564646, at *4.

504. Not to be confused with the much better known Footnote Four. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

the bounds of its touch and concern standard.[505] The court continued by citing to the concurrences of Justices Alito and Breyer, concluding that the plaintiff's claims in *Tymoshenko*—political persecution, centered on Ukrainian governmental corruption, with American claims anchored by RICO allegations[506]—would fail under either proposed test.[507]

Addressing the issue more obliquely, the District Court for the District of Columbia in *Mwani v. Bin Laden*[508] briefly discussed Justice Breyer's concurrence, and found jurisdiction based on a "touch and concern" analysis.[509] The rationale underlying the determination, however, was one of national interest: the court concluded that an attack on an embassy is much more tied to American national interests than a claim of foreign action where the defendant's only tie is corporate presence.[510] In this manner, the *Mwani* court issued its ruling under the overarching standard articulated by the majority, but used the categories and terminology outlined by Justice Breyer to reach that determination. The majority's standard remained the controlling principle, and Justice Breyer's test provided the mechanics needed to clarify and interpret the standard from a broader concept to something courts can apply to facts.

4. *Kiobel* Affirmed: *DaimlerChrysler AG v. Bauman*

Five days after issuing *Kiobel*, the Court granted certiorari in a case with the potential to provide some much-needed guidance for ATS jurisprudence: *Daimler AG v. Bauman*.[511] At issue in *Daimler* was a pair of ATS and TVPA claims levied by an alien plaintiff against an alien defendant for claims taking place abroad.[512] The critical difference from *Kiobel* was that in *Daimler*, the defendant *was* alleged to have substantial corporate presence within the United States.[513] Ruling in January 2014, the Supreme Court dismissed the case, not on the subject-matter jurisdiction grounds of *Kiobel*, but instead for a lack

505. *Tymoshenko*, 2013 WL 4564646, at *4 n.5.
506. *Id.* at *1.
507. *Id.* at *4 n.4.
508. Mwani v. Bin Laden, 947 F. Supp. 2d 1 (D.D.C. 2013).
509. *Id.* at *3–4.
510. *Id.* at *4.
511. Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011), *cert. granted sub nom.* DaimlerChrysler AG v. Bauman, — U.S. —, 133 S. Ct. 1995 (2013), *rev'd sub nom.* Daimler AG v. Bauman, — U.S. —, 134 S. Ct. 746 (2014).
512. *Id.* at 751–52.
513. *Id.* at 751.

of personal jurisdiction.[514]

Nevertheless, because of the paucity of ATS litigation, especially at the appellate level, *Daimler* bears mention.[515] The actions at issue were attributed to an indirect subsidiary of the only named defendant, Daimler.[516] The trial court dismissed for lack of personal jurisdiction, holding that jurisdiction over the subsidiary on these facts did not impute the parent corporation, and that jurisdiction directly over the parent would be improper.[517]

The Ninth Circuit reversed, holding personal jurisdiction proper as an exercise of general jurisdiction[518]: it held that Daimler had the requisite contacts with the forum state,[519] and such jurisdiction was reasonable.[520] Crucially, as part of its reasonableness analysis, it noted that the ATS and TVPA gave American federal courts "a strong interest in adjudicating and redressing international human rights abuses."[521] It also briefly addressed the ATS claims independently, affirming its prior position regarding exhaustion, treating it as an affirmative defense rather than a requirement for jurisdiction.[522]

The Supreme Court took up the case framed on personal jurisdiction grounds. Most commentators anticipated a reversal on those grounds,[523] and indeed oral arguments confirmed that expectation.[524]

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514. *Id.* at 761–62.

515. *See supra* note 176 and accompanying text (describing that appellate review of the ATS is uncommon). *Sosa* addressed the substance of the ATS; *Kiobel* was granted to hear a more fundamental issue of corporate jurisdiction and finally ruled upon for an even more fundamental jurisdictional issue. In this effective "race to the bottom," *Daimler* has thus managed to address the only remaining—indeed, only *possible*—issue *a priori* to *Kiobel*: personal jurisdiction.

516. *Daimler AG*, 134 S. Ct. at 752.

517. *Id.*; *see* Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW, 2007 WL 486389, at *1 (N.D. Cal. Feb. 12, 2007) (granting motion to dismiss for lack of personal jurisdiction, but preemptively certifying the issue for review).

518. Bauman v. DaimlerChrysler Co., 644 F.3d 909, 931 (9th Cir. 2011).

519. *Id.* at 920–24 (analyzing requisite contacts, concluding that sufficient contacts existed).

520. *Id.* at 924–30 (analyzing reasonableness, finding that jurisdiction comported with traditional notions of fair play and substantial justice).

521. *Id.* at 927.

522. *Id.* at 918 n.10. Here, defendant raised—and lost on—exhaustion only in regards to the TVPA claims. Because of the Ninth Circuit's interpretation of exhaustion as an affirmative defense, rather than a procedural requirement, *see* Sarei v. Rio Tinto PLC, 550 F.3d 822, 831–32 (9th Cir. 2008), Daimler's failure to raise exhaustion was waiver. *Bauman*, 644 F.3d at 918 n.10.

523. *See* Amanda Frost, *Academic highlight: Vanderbilt Law Review roundtable on* DaimlerChrysler AG v. Bauman, SCOTUSBLOG (Oct. 11, 2013, 12:29 PM), http://www.scotusblog.com/2013/10/academic-highlight-vanderbilt-law-review-roundtable-on-daimlerchrysler-ag-v-bauman/ (summarizing five legal commentators' opinions on what action the Court might take in *DaimlerChrysler*; all focus on personal jurisdiction).

524. Supreme Court commentators noted the reaction:

Despite being the underlying causes of action, and certainly being contentious enough on their own merits, neither the ATS nor the TVPA made much of a showing at oral argument.[525] In its ruling, the Court focused heavily on personal jurisdiction, as might have been expected.[526] It ultimately held that, even if the subsidiary were to be subject to jurisdiction, jurisdiction over the parent was not proper.[527]

Jurisdiction aside, the Court still took a moment to discuss the ATS and *Kiobel*.[528] The Ninth Circuit partially justified its grant of jurisdiction by appealing to a strong interest in redressing human rights abuses derived from the ATS and TVPA.[529] The Supreme Court offered a brusque dismissal of the rhetoric: "[r]ecent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm."[530] The Court offered no other explanation, save a citation to *Kiobel*[531] and an admonishment that the Ninth Circuit "paid little heed" to the risks that its extension of jurisdiction posed.[532]

The inference is clear enough: without the defendant's corporate presence within the United States, the case essentially collapses into the facts of *Kiobel*, upon which it is undisputed that jurisdiction would not

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> [I]t was obvious that most of the members of the Court—and perhaps all—had reacted negatively to the sweep of the Ninth Circuit's ruling. Whatever rule of law they might choose to overturn the Ninth Circuit, it appeared that they would find one that basically would say this reach was just far too ambitious.

Lyle Denniston, *Argument recap: Trying to salvage a lost cause*, SCOTUSBLOG (Oct. 15, 2013, 3:12 PM), http://www.scotusblog.com/2013/10/argument-recap-trying-to-salvage-a-lost-cause/.

525. Transcript of Oral Argument at 44–45, DaimlerChrysler v. Bauman, — U.S. —, 133 S. Ct. 746 (2014) (reaffirmation by counsel for respondent of belief that they had a valid claim under *Kiobel*, but noting they were not asking Court to resolve the issue at that time).

526. Justice Ginsburg wrote for an eight-member majority reversing the Ninth Circuit; Justice Sotomayor concurred in the judgment. Daimler AG v. Bauman, — U.S. —, 134 S. Ct. 746 (2014). The Court's lengthy opinion focused on and clarified its own precedents on specific and general jurisdiction. *Id.* at 753–59; William Baude, *Opinion recap: A stricter view of general jurisdiction*, SCOTUSBLOG (Jan. 15, 2014, 11:30 AM), http://www.scotusblog.com/2014/01/opinion-recap-a-stricter-view-of-general-jurisdiction/ (framing *Daimler* as a personal jurisdiction decision, starting with a "remarkably long recharacterization" of Court precedent on the issue).

527. *Daimler*, 134 S. Ct. at 760.

528. *Id.* at 762–63.

529. *Id.*

530. *Id.*

531. *Id.* The Court also noted that corporate liability was not recognized under the TVPA, though as the TVPA's bar to liability derives from an explicit statutory provision, it has no bearing on the ATS claim. *Id.* (citing Mohamad v. Palestinian Auth., — U.S. —, 132 S. Ct. 1702, 1708 (2012)).

532. *Daimler*, 134 S. Ct. at 763. Though not directly on point, the Supreme Court's language echoes the exhortation to judicial caution in *Sosa*. *Supra* note 146 and accompanying text.

lie.[533] It is unfortunate that the Court did not offer even a hint of elaboration on the *Kiobel* standard, though such inaction is perfectly understandable given the complexity of the jurisdictional issue that *was* involved. With luck, the Court will have reason to address and clarify *Kiobel* in the near future, providing the guidance its standard needs.

CONCLUSION

Despite being authorized directly by the Constitution, the Alien Tort Statute lacks much by way of legal, legislative, or historical context, and the Supreme Court has urged—and taken—a cautious approach to its interpretation and application. In taking up *Kiobel*, all nine Justices agreed that the ATS required limitation; they differed, however, as to why, with the majority relying on the general presumption against extraterritoriality and Justice Breyer offering an alternative three-part test. Because of the lack of context or guidance by the majority, lower courts have already encountered difficulties, sometimes directly misstating and improperly applying the Court's holding. Until the Court addresses this matter again, it seems unlikely this confusion will abate. In the meantime, and until the Court clarifies its language, it is possible and preferable to interpret the majority's standard through the test laid out by Justice Breyer in order to provide the crucial guidance necessary to ensure this venerable law remains cautiously, uniformly, and appropriately applied.

533. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. —, 133 S. Ct. 1659, 1669 (2013).