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Ralph G. Steinhardt

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Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations

RALPH G. STEINHARDT[†]

I want to congratulate the *Maryland Journal of International Law* for convening this timely symposium on the *Kiobel*[1] litigation in the U.S. Supreme Court. That litigation raises in particularly pointed form the recurring questions of when international law provides a rule of decision for domestic litigation, how the Alien Tort Statute (ATS)[2] should be interpreted, and whether multinational corporations can—even in principle—bear legally-enforceable obligations to respect international human rights standards. Let me begin by offering a brief orientation to the *Kiobel* litigation, situating it in the history of ATS litigation, and closing with some thoughts about the oral arguments and the potential impact of this case on corporate responsibility and extraterritoriality.

In its modern form, the ATS provides, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[3] In an audience this large and diverse, some may be unfamiliar with some terms of art in this statute, enacted by the First Congress of the United States in 1789. The "district courts" is simply a reference to our federal trial level courts.[4] Every state has its courts,

[†] Professor of Law and International Affairs, Arthur Selwyn Miller Research Professor of Law, The George Washington University Law School. This Keynote Address was prepared and delivered in November 2012. A Postscript has been added to address the decision of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). I would like to express my deep gratitude to the staff of the *Maryland Journal of International Law*.

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

2. 28 U.S.C. § 1350 (2006).

3. *Id.*

4. *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 478 (1989) (discussing the decision of the First Congress to vest the federal judiciary, rather than state courts, with jurisdiction over ATS cases).

and one of the interesting, recurring issues is the extent to which this kind of case could be brought in the courts of each individual state and under what body of law, but this statute deals only with the federal courts. A "tort" is a civil, non-contract-based wrong. It is redressable through money damages. Civil law lawyers would call this a "delict." Finally, the "law of nations," as referred to in the statute, is the eighteenth-century equivalent of what we would today call "customary international law."[5] This is international law that arises out of the consistent and coherent practice of states acting out of a sense of legal obligation. It is distinct from treaties and other sources of international law.

Since 1980, when the Second Circuit Court of Appeals decided *Filártiga v. Peña-Irala*,[6] the ATS has been used to assure a certain measure of civil redress for the victims of egregious human rights violations when the abuser can be found in the United States.[7] In *Filártiga*, a Paraguayan national named Joelito Filártiga was tortured to death in Asunción, Paraguay, by Americo Peña-Irala, who was the Inspector General of Police.[8] Peña-Irala came to the United States, and Dolly Filártiga, the victim's sister, and Joel Filártiga, the victim's father, sued Peña-Irala under the ATS.[9] The Filártigas were plainly aliens, death by torture is plainly a tort, so the interesting jurisdictional question at that early stage was whether a government's torture of its own citizens constitutes a violation of the law of nations or not.[10] The precedent on that particular issue was not favorable to the plaintiffs because of the orthodoxy that a state's treatment of its own citizens was not within the reach of international law, and the district court dismissed the case on precisely those grounds.[11] Drawing on a variety of declarations, treaties, constitutions, a

5. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003) ("In the context of [ATS jurisprudence], we have consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'").

6. 630 F.2d 876 (2d Cir. 1980).

7. The Supreme Court has called *Filártiga* "the birth of the modern line of [ATS] cases." Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

8. *Filártiga*, 630 F.2d at 878.

9. *Id.* at 878–79.

10. *Id.* at 880.

11. *See id.* (explaining that the dicta in *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.1976) and *IIT v. Vencap Ltd.*, 519 F.2d 1001 (2d Cir. 1975) had led the district court judge "to construe narrowly 'the law of nations' as employed in § 1350, as excluding that law which governs a state's treatment of its own citizens").

submission from the executive branch, and academic commentary, the Second Circuit reversed, ruling that deliberate torture perpetrated under color of state authority violates universally accepted principles of international law.[12] The consequence was that the ATS could be used to recover civil damages for particularly serious violations of human rights, even if they occurred in a foreign country.

Filártiga has sometimes been called the international human rights movement's *Brown v. Board of Education*.[13] John Ruggie recently wrote, for example, that "*Filártiga v. Peña-Irala* has been to global human rights litigants what *Brown v. Board of Education* was for advocates of racial integration domestically."[14] That may be slightly hyperbolic, but it does convey a truth in the way that a caricature conveys a truth. That is, if you see a caricature of Barack Obama, George Bush, or Karl Rove, it will convey a truth, but no one would confuse the caricature with a portrait or a photograph. So too it seems that there is something being said with a certain "truthiness" quotient in comparing *Filártiga* to *Brown*, but I would not want to press the analogy too much.

It sometimes comes as a surprise when people first encounter this ancient statute and this revolutionary case, but the fact is that, in the decades since the *Filártiga* decision, a great number and variety of abuse victims have obtained a measure of civil redress against their abusers. For example, in more recent ATS cases, a Florida jury found Augusto Pinochet henchman Armando Fernández Larios responsible for the torture and murder of Chilean economist Winston Cabello.[15] In November 2005, a Memphis jury held Colonel Nicolas Carranza, the former Vice Minister of Defense for El Salvador, liable for crimes against humanity, torture, and extrajudicial killing.[16] In 2006, a New York judge found Death Squad leader Emmanuel "Toto" Constant liable for abuses in Haiti and ordered him to pay nineteen million dollars to three survivors of state-sponsored rape.[17]

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12. *Id.* at 880–85.

13. 347 U.S. 483 (1954).

14. JOHN G. RUGGIE, KIOBEL AND CORPORATE SOCIAL RESPONSIBILITY 1 (Harvard Kennedy School, Issues Brief, Sept. 4, 2012), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf.

15. Cabello Barrueto v. Fernández Larios, 205 F. Supp. 2d 1325, 1326–27 (S.D. Fla. 2002), *aff'd per curiam*, 402 F.3d 1148 (11th Cir. 2005).

16. Chavez v. Carranza, No. 03-2932 M1/P, 2006 WL 2434934, at *1–2 (W.D. Tenn. Aug. 15, 2006), *aff'd*, 559 F.3d 486 (6th Cir. 2009).

17. Doe v. Constant, No. 04 Civ. 10108, slip op. at 13 (S.D.N.Y. Oct. 24, 2006), *aff'd*, 354 F. App'x. 543 (2d Cir. 2009).

On August 28, 2012, U.S. District Court Judge Leonie Brinkema awarded twenty-one million dollars in compensatory and punitive damages against a former Somali general, Mohamed Samantar, for acts of torture, extrajudicial killings, war crimes, and other human rights violations that had occurred during the regime of Siad Barre.[18] Recently, the Fourth Circuit Court of Appeals ruled that Samantar was not entitled to any kind of official immunity for acts of this sort.[19]

Now we might ask, what is the value of such huge awards when there is a decent possibility that no money will actually change hands? To this, I can only reply with an anecdote from *In re Estate of Ferdinand Marcos, Human Rights Litigation*[20]—the first full-blown human rights trial under the ATS. With Paul Hoffman, I was honored to represent a number of survivors of human rights abuses in the Philippines, and a multi-million dollar judgment was awarded. When told that there was a good chance of never seeing a dime of this award, this survivor of almost inconceivable abuse said something that I have not forgotten in twenty years, and that is, "That's okay, it's enough to be believed." *It is enough to be believed*. The compensation would be nice if anything came of it, of course, although the fight continues on how exactly this will be paid. The point was that this survivor was able to use the courts of the United States to have her story heard and to have compensation awarded.

Since that time and certainly after *Filártiga*, a small, cottage industry has developed in international human rights litigation against violators from a variety of countries,[21] and those cases have been

18. Yousuf v. Samantar, No. 1:04cv1360(LMB/JFA), 2012 WL 3730617, at *16 (E.D. Va. Aug. 28, 2012).

19. Yousuf v. Samantar, 699 F.3d 763, 778 (4th Cir. 2012) (holding that Samantar was neither entitled to head-of-state nor foreign official immunity). The Fourth Circuit previously addressed the question of whether Samantar had immunity from suit. Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010). The Fourth Circuit held that Samantar was not entitled to immunity under the Foreign Sovereign Immunities Act but left unanswered the question of whether Samantar could "successfully invoke an immunity doctrine arising under pre-FSIA common law." *Id.* at 383–84.

20. 25 F.3d 1467 (9th Cir. 1994).

21. Since *Filártiga*, there have been approximately 173 judicial opinions related to the ATS. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 712–13 (2012); *see also* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508–09 (2008) (explaining that a

moderately successful to the extent that they conformed to the *Filártiga* paradigm: an individual plaintiff suing an international human rights violator, who is present in the United States, for a clear violation of customary international law.[22]

A key turning point in litigation against multinational corporations for their role in human rights violations was *Kadic v. Karadžić*,[23] in which the Second Circuit said, "we do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[24] We could discuss when international law imposes obligations on non-state actors and when it does not. After all, typically defendants under the ATS have been police officers, military commanders, concentration camp guards, and even former heads of state, as in *Marcos*.[25] However, at an increasing rate over the last decade, ATS cases have been filed against multinational corporations for their alleged participation in or their direct responsibility for human rights violations.[26]

It is in that vein that the Supreme Court heard *Kiobel v. Royal Dutch Petroleum Co.*, first argued on February 28, 2012, on the issue of corporate liability, and then reargued October 1, 2012, on the issue of extraterritoriality. The case arises because, in September 2010, the Second Circuit held that corporations cannot properly be sued under the ATS for violations of customary international law.[27] The Second

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cottage industry of international human rights litigation has emerged even though there has only been a small percentage of successful claims).

22. *See generally* Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 173–86 (2005) (assessing the success of ATS cases and discussing the impact of these cases on the development of human rights law).

23. 70 F.3d 232 (2d Cir. 1995).

24. *Id.* at 239.

25. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1469. Defendant Ferdinand Marcos served as President of the Philippines, and during his presidency "up to 10,000 people were allegedly tortured, summarily executed, or disappeared at the hands of military intelligence personnel acting pursuant to martial law declared by Marcos in 1971." *Id.*

26. *See* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011) (explaining that of the 155 ATS cases that plaintiffs have filed against corporations, 125 of those cases have arisen in the last fifteen years).

27. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

Circuit found that executives, individual managers, and individuals within the corporation might be sued, but not the corporation itself.[28]

The Second Circuit's holding was odd because a number of cases in the Second Circuit had simply assumed that corporations could be liable under the ATS and proceeded on that very assumption. For example, the Second Circuit had specifically allowed an ATS claim to go forward against the pharmaceutical company Pfizer for allegedly testing an anti-meningitis drug on Nigerian children without informed consent, a case that ultimately settled.[29] The Seventh, Ninth, Eleventh, and D.C. Circuits have explicitly rejected the blanket rule that corporations can in no circumstances bear liability under international law and are therefore exempt from subject matter jurisdiction under the ATS.[30] They have all decided that the corporations can bear a measure of responsibility under international law and that the ATS would be a proper way to enforce it. Doubtless, the split among the circuit courts is what led the Supreme Court to review the *Kiobel* case, and, in an effort to resolve that split, the Justice Department, joined by the State Department and the Commerce Department, filed an amicus brief supporting the Petitioners on the issue of whether corporations could in principle bear obligations under international law.[31]

Just a week after the first oral argument in *Kiobel*, the Court issued an order restoring the case to the calendar for reargument. The last time the Supreme Court did that was *Citizens United v. FEC*[32] and that turned out just fine, so the assumption was that this would be just another example of something small like that! Specifically, the parties were directed to file supplemental briefs addressing the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a

28. *Kiobel*, 621 F.3d at 149.

29. Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

30. *See, e.g.*, Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1018 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747–48 (9th Cir. 2011) (en banc), *cert. granted, vacated and remanded*, 133 S. Ct. 1995 (2013), *dismissed on other grounds*, Nos. 02–56256, 02–56390, 09–56381, 2013 WL 3357740 (9th Cir. June 28, 2013); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

31. Brief for the United States as Amicus Curiae Supporting Petitioners at 6–8, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

32. 130 S. Ct. 876 (2010).

cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[33] So, instead of being a decision strictly about corporate liability under the ATS, the issue became whether the ATS will recognize a cause of action for violations arising extraterritorially. Judging from the tenor of its questions in February, the Court seemed especially concerned about the so-called "foreign-cubed" cases, in which non-U.S. nationals sue other non-U.S. nationals for conduct that occurred abroad.[34]

One of the interesting ways to approach that question is to ask whether that means that *Filártiga* and other famous foreign-cubed cases, like *Marcos* or *Karadžić*, were correctly decided in the first place. The stakes definitely went up with the Court's new order, but one could be forgiven for thinking that the risk of loss to the plaintiffs actually went down. The stakes went up because it could mean that *Filártiga*—the very fountainhead of this inventive and human-centered form of litigation—is gone, but exactly because of that risk the Supreme Court would need to tread carefully. A new Justice Department brief was filed, this time without the State Department or Commerce Department. Its position is somewhat difficult to decipher because it said that this particular case should be dismissed, but that *Filártiga* and its progeny were still good law.[35] Thus, the Justice Department threaded a needle that many would say does not exist: both *Kiobel* and *Filártiga* were "foreign-cubed" cases, both involved egregious behavior by private actors in positions of local authority, and both could be seen as furthering the interests of the United States in a meaningful regime of human rights protection. The factual distinctions between the cases—like the difference between a natural

33. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.) (restoring the case for reargument).

34. For instance, Justice Alito asked what business this case—involving twelve Nigerian plaintiffs, alleging Respondents aided and abetted in human rights violations, and occurring in Nigeria—had in U.S. courts. Transcript of Oral Reargument at 11, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). Justice Alito also raised the question of whether it was the Framers' intent in passing the ATS to permit victims of the French Revolution to sue French defendants in United States courts. *Id.* at 12.

35. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 4, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). The United States argued that it was not necessary to question *Filártiga*, as the circumstances in *Filártiga* are "consistent with the foreign relations interests of the United States" and "Congress has created a statutory cause of action for the conduct at issue in *Filártiga*." *Id.* at 4–5. The United States argued that the circumstances in *Kiobel* were different, primarily because "the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country." *Id.* at 5.

and juridical person—did not connect in any obvious way with the issue of extraterritoriality.

In addition, if foreign-cubed cases were not allowed under the ATS, the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*[36] would be inexplicable. In *Sosa*, a case in which I appeared with Paul Hoffman as co-counsel to Dr. Alvarez-Machain, the Supreme Court had to decide whether a Mexican doctor who was abducted from Mexico and brought to trial in the United States for a crime that occurred in Mexico could sue one of the kidnappers under the ATS.[37] The ultimate decision from the Supreme Court is a cautionary tale, because it suggests that courts must determine in future ATS cases whether a human rights claim satisfies a very demanding standard of evidence. Specifically, the case must "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized."[38] I am not sure that most lawyers would know what an eighteenth-century paradigm is if it bit them in the retainer; however, the fact that the Supreme Court cited *Filártiga*, *Karadžić*, and *Marcos* with approval in *Sosa*[39] suggests that certain norms do satisfy this demanding but entirely traditional standard. It is a strict standard, but it can be traced to the Supreme Court's decisions in *Paquete Habana*[40] and its antecedents about how lawyers go about proving the content of international law.

Demanding as the standard is, of the hundreds of ATS cases that had been decided at the time of the *Sosa* decision, the only one that the Supreme Court disapproved was *Sosa* itself. That is, the lower courts had ruled in favor of Alvarez-Machain, and that is the only decision that the Supreme Court decided was wrongly resolved. Certainly, since the *Sosa* decision, claims for torture, genocide, violations of the laws of war, crimes against humanity, and slavery, among others, have been held to satisfy *Sosa*'s rule of evidence, much as they did before *Sosa*. From that perspective, Justice Scalia

36. 542 U.S. 692 (2004).

37. *Id.* at 697.

38. *Id.* at 725.

39. *Id.* at 732.

40. 175 U.S. 677, 700 (1900) ("[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .").

has it exactly right in his separate opinion in *Sosa*,[41] which is to say that the Court had offered an extensive analysis but did not actually change the standard or the result in any case other than *Sosa* itself. In effect, the Court had set the table for a feast but served a nut.

With this idea post-*Sosa* that the ATS door is slightly "ajar" for the recognition of additional causes of action, it is certainly true that rhetorically *Sosa* looks like a slap down to plaintiffs' lawyers. Yet, it turns out to be a radical restriction on ATS litigation only to those people—generally defense counsel and the academic self-styled revisionists—who had overstated the threat of ATS jurisdiction in the first place. That is, if you exaggerate the reach of the ATS instead of looking at the decisions that actually separate the wheat from the chaff, then you could conclude that *Sosa*'s rhetoric of moderation is a significant restriction. I think that misses the mark because the courts have never thought that they could make something up and call it customary international law. And nothing in the analysis or result of *Sosa* turned on the fact that it was a classic foreign-cubed case: an alien sued an alien for wrongs committed in a foreign territory.

Before exploring the oral argument in *Kiobel*, let me just take a moment to observe that litigation under the ATS, though relatively obscure and somewhat specialized, raises characteristic and recurring questions about the relationship between domestic and international law in domestic courts, whether under the ATS or not. In other words, to really appreciate the sharpness and longevity of the post-*Filártiga* controversy is to understand principles of more general concern to lawyers, even those who are not human rights advocates. Ultimately, the process by which international law and domestic law have converged in our time would have been unthinkable to a prior generation of lawyers. So *Filártiga* litigation arises in a specialized setting, but the kinds of issues that it raises seem to me deeply characteristic of how law will be practiced in the twenty-first century.

Let me finally say a few words about the oral argument itself. Winston Churchill allegedly said there is nothing more exhilarating than to be shot at without result,[42] and that is a bit what it felt like at the reargument in the Supreme Court. It is in marked contrast to the way it felt last February, when Paul Hoffman barely got his argument out on corporate liability, because some of the more vocal members

41. *Sosa*, 542 U.S. at 750 (Scalia, J., concurring in part and concurring in the judgment).

42. WILLIAM MANCHESTER, THE LAST LION: WINSTON SPENCER CHURCHILL, VISION OF GLORY, 1874-1932 228 (1983).

of the Court could not get past the question of why this case was in the United States in the first place.

I want to suggest that, from the perspective of international law, the "extraterritoriality" question has a pretty straightforward answer, and that the Supreme Court's decision in *Kiobel* throws that clarity out the window.

First, as noted, the courts of the United States have long recognized a cause of action under the ATS for violations of the law of nations occurring within the territory of another state. That is subject of course to having personal jurisdiction over the defendants; they actually have to be in the United States at the time of service.[43] Additionally, the notion that the courts will be open in this way is subject to forum non conveniens considerations, comity, and other limitations on the exercise of jurisdiction that apply in *any* transnational case;[44] however, so long as the underlying cause of action in an ATS case rests on a specific, universal, and obligatory norm of international law, nothing in international law prevents a remedy in these extraterritorial or foreign-cubed cases; indeed, in *Sosa*, the Supreme Court cited with approval a line of cases that took precisely that approach.[45]

In contrast to the imposition of substantive U.S. law abroad, which is sometimes a *violation* of international jurisdictional norms, this line of cases has been recognized and respected as an *enforcement* of international law. It is a domestic remedy for a violation of a modest number of substantive international standards, but distinctly not like the U.S. substantive law of securities regulation, as in *Morrison v. National Australia Bank Ltd.*,[46] or

43. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Due process requires . . . that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it . . . ."); *see also* Supplemental Brief of Amici Curiae International Law Scholars in Support of Petitioners at 27–28, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter Steinhardt/Brenner Brief] (explaining that neither ATS or international law overrides this personal jurisdiction requirement).

44. Steinhardt/Brenner Brief, *supra* note 43, at 28–36.

45. *Sosa*, 542 U.S. at 732 (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

46. 130 S. Ct. 2869 (2010).

substantive labor law as in *Boureslan v. Arabian American Oil Co.*[47] Prior to the Supreme Court's *Kiobel* decision, the argument to the contrary had been rejected by every court to which it has been presented.

The reason for that remarkable unanimity over three decades is neither obscure nor subtle. Unlike other jurisdictional statutes, the ATS by its terms does not specify the citizenship of the defendant or the locus of the injury. Second, *Sosa*-qualified norms, those that meet the eighteenth-century paradigm test, cannot qualify as the kind of domestic law to which international law limits on prescriptive jurisdiction apply. It is not U.S. law that is being applied: *Sosa* says explicitly that the applicable norm has to be derived from international standards.[48] It is true that federal common law—a branch of domestic law—provides a cause of action, that is, the mechanism for applying a substantive standard that is international in its origin. But Congress did not pass the law governing such *Sosa*-qualified norms as crimes against humanity or slavery.

We also know that the transitory tort doctrine, on which *Filártiga* and its progeny partially rest,[49] is fully consistent with the international norm that every state retains the sovereign authority to resolve disputes that are brought within its territory by the presence of the defendant, again going back to the essential requirement that these defendants be within the personal jurisdiction of the courts.

The ATS as interpreted and applied is also consistent with the international obligations of the United States to provide a meaningful remedy for egregious violations of human rights law and to prevent its territory from routinely becoming a safe haven for abusers. Finally, even if the ATS *is* an exercise in jurisdiction to prescribe, which I deny, the restrictive international standards governing such jurisdiction do not apply when norms within each state's universal jurisdiction are involved. [50]

If you have read the transcript of the oral argument in *Kiobel*, you will see some of these very themes and a few others as well. First, consider the following exchange between Justice Scalia and Kathleen Sullivan, who represented Royal Dutch Petroleum, on the issue of extraterritoriality:

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47. 499 U.S. 244 (1991).
48. *See Sosa*, 542 U.S. at 725.
49. *Filártiga*, 630 F.2d at 885.
50. *See generally* Steinhardt/Brenner Brief, *supra* note 43, at 24–26.

> JUSTICE SCALIA: Ms. Sullivan, can I ask you about your position on extraterritorial application. I believe strongly in the presumption against extraterritorial application, but do you know of any other area where extraterritorial application only means application on the territory of a foreign country and not application on the high seas?
>
> MS. SULLIVAN: Well --
>
> JUSTICE SCALIA: I find that -- you know, extraterritorial means extraterritorial, but -- but you contend that this -- as I think you must -- that this statute applies on the high seas.
>
> MS. SULLIVAN: We -- we don't concede that the statute applies on the high seas.
>
> JUSTICE SCALIA: Oh, oh you don't? Okay. I thought that was common ground.[51]

There is good reason for Justice Scalia to have thought that this is "common ground," because *Sosa*, citing authorities going back to Blackstone, recognizes that the ATS applies to pirates on the high seas.[52] It was therefore somewhat quixotic for Royal Dutch Petroleum to argue that the ATS does not apply to the high seas. That is important because if it *does* apply to the high seas, then the rebuttable presumption against extraterritoriality, the so-called "*Foley Brothers* presumption,"[53] is overcome. Nothing in that presumption as traditionally understood distinguishes between the high seas and foreign territories.

Consider also this snippet, on the same topic of pirates, in an exchange between Justice Breyer and Ms. Sullivan, when Justice Breyer said:

51.Transcript of Oral Reargument, *supra* note 34, at 24–25.

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

53. Foley Brothers Inc. v. Filardo, 336 U.S. 281, 285 (1949) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions.").

> JUSTICE BREYER: If, when the statute was passed, it applied to pirates, the question to me is who are today's pirates. And if Hitler is not a pirate, who is? And if, in fact, an equivalent torturer or dictator who wants to destroy an entire race in his own country is not the equivalent of today's pirate, who is?[54]

Now you could say that Hitler *is* the modern equivalent of a pirate and *still* deny that the proper remedy is an action for damages in a U.S. court, although foreclosing that possibility as a matter of law does seem inconsistent with the foundational *Lotus*[55] decision of the Permanent Court of International Justice. The essential lesson from *Lotus* is methodological: a sovereign, like the United States, need not look to international law for permission to act.[56] It does not need to find a green light. Those who wish to stop the United States from doing something in particular have to find a red light. It seems that there is no red light in international law for actions of this sort. Certainly, in complete accord with *Lotus*, the absence of similar arrangements in other countries does not create a prohibitory rule: other states' abstention from a practice is evidence of its rarity, but not its illegality. There is no persuasive argument that the ATS as interpreted in *Filártiga* is a violation of some international law prohibition.

The next most significant issue in the oral argument dealt with ATS precedents. As an example, I offer the following exchange involving Justices Sotomayor and Kagan and Ms. Sullivan:

> JUSTICE SOTOMAYOR: But you're asking us to overturn our precedents.[57]
>
> MS. SULLIVAN: We --
>
> JUSTICE SOTOMAYOR: You're – you're basically saying *Filártiga* and *Marcos*, *Sosa*, they were all wrong.
>
> MS. SULLIVAN: We are not, Your Honor. *Sosa* did not address the question we have before the Court today.

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54. Transcript of Oral Rergument, *supra* note 34, at 26.

55. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

56. *See id.* at 19.

57. Justice Sotomayor is referring here to *Sosa* and its incorporation of *Filártiga*, *Karadžić*, and *Marcos*.

> JUSTICE SOTOMAYOR: Counsel, how can you say that? Maybe the facts didn't, but certainly the reasoning of the case addressed that issue very directly -- and basically said it does. And then it talked about how you limit it. That's what *Sosa* did.
>
> MS. SULLIVAN: . . . . And you don't need to overrule *Sosa*, with respect, Justice Sotomayor, because *Sosa* did not address, for better or for worse, the extraterritoriality argument we make today. It went off at the first step. No international norms, specifically universal and specific -- sufficiently specific and universal. So it didn't get to the concerns about friction with foreign countries.
>
> JUSTICE KAGAN: But, Ms. Sullivan, I'm going to read you something from *Sosa*, which -- it talks all about the rule that it adopts and then it says: "This is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. *See Filártiga*." And then it quotes *Filártiga*: "For purposes of civil liability, the torturer has become like the pirate and slave trader before him, an enemy of all mankind." So we gave a stamp of approval to *Filártiga* and *Filártiga*'s understanding that there were certain categories of offenders who were today's pirates.[58]

When Solicitor General Donald Verrilli began his argument, he laid out the essential U.S. position in a single sentence: "The Alien Tort Statute should not afford a cause of action to address the extraterritorial conduct of a foreign corporation when the allegation is that the defendant aided and abetted a foreign sovereign. In this category of cases, there just isn't any meaningful connection to the United States."[59] Now there are a lot of qualifiers in that essential position of the United States: the extraterritorial conduct of (1) a foreign corporation when the allegation is that the defendant, (2) aided and abetted, (3) a foreign sovereign.

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58. Transcript of Oral Reargument, *supra* note 34, at 38–40.
59. *Id.* at 41.

> JUSTICE SCALIA: General Verrilli, the -- that's -- that is a new position for the -- for the State Department, isn't it?
>
> GENERAL VERRILLI: It's a new --
>
> JUSTICE SCALIA: And for -- and for the United States Government? Why should -- why should we listen to you rather than the solicitors general who took the opposite position and the position taken by Respondents here in other cases, not only in several courts of appeals, but even up here?[60]

This qualifies as a short but profound pushback on the U.S. position. An honorable response to Justice Scalia's observation would have been to say that the Bush Administration had taken significantly different positions from prior administrations as well. One of the reasons *Filártiga* and *Karadžić* went forward is that presidential administrations in those times filed briefs and statements of interest supporting the exercise of jurisdiction under the ATS.[61] It is true that the Reagan Administration came in against the *Marcos* case. Although it filed something quite helpful on the Act of State Doctrine, it argued that the ATS should be narrowly construed. To which the Ninth Circuit Court of Appeals said something like, "We will defer to you on matters within your expertise like the foreign affairs implications of the case, but it is the province of the courts to determine what the law is, and there is a very important difference between the meaning of a jurisdictional statute, as distinct from an organic statute (such as might get *Chevron* or *Skidmore* deference)."[62] It would have been important to say that the Government's positions on the jurisdictional reach of the ATS have not been consistent across the years or across administrations. It would have been right to correct Justice Scalia and say, "Well actually, the original position filed by the U.S. government was quite favorable to ATS litigation. And now we are simply reverting back to that original position." I think the overall idea, that this is something of a will-o'-the-wisp when it comes to submissions from the Executive Branch, is exactly the point that Justice Scalia was trying

60. *Id.* at 43.

61. *See, e.g.*, Memorandum for the United States as Amicus Curiae, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090); Statement of Interest of the United States, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (No. 94-9035).

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

to make. From that perspective, it would have been *worse* to correct the record.

Finally on the implications of the oral argument, a word about the rebuttal and a particular hypothetical that Kiobel's counsel worked on for a week in the run-up to the oral argument. The plan was to develop a hypothetical that could be used at a key moment in the argument that would do three things. First, strategically, it had to speak to Justice Kennedy, and it needed to demonstrate to him that there are certain kinds of cases that certainly *should* be heard under the ATS in the courts of the United States. Second, the hypothetical needed to demonstrate that the U.S. position was inadequate. From plaintiffs' perspective, anything that gave the Supreme Court's imprimatur to argument that "we in the State Department get to determine whether jurisdiction is appropriate" had to be derailed. In addition, the special conditions that the United States had suggested, especially the aiding and abetting qualification, were not persuasive. The third desideratum was that the hypothetical had to be simple and quick. So this is what counsel came up with:

> Suppose there is an Iranian corporation that secretly supplies poison gas to the current Syrian regime in order to kill tens of thousands of Kurdish citizens. And suppose after the Assad regime is overthrown, the documents revealing the poison gas transfer to the Syrian regime were made public and that Iranian corporation does business in the United States. Asylum seekers, who were driven out by the poison gas attacks, are in the United States, maybe living in the same communities as the plaintiffs in our case, having gotten asylum. Would it be the case that the Alien Tort Statute should not apply to a claim of aiding and abetting the Assad regime and murdering tens of thousands of its people? It is the modern-day example of I.G. Farben. Is it the case that a modern-day I.G. Farben would be exempt from the Alien Tort Statute?[63]

63. *See* Transcript of Oral Reargument, *supra* note 34, at 52–53. This hypothetical also addresses the personal jurisdiction issue—perhaps implausibly—by having the Iranian corporation "do business" in the United States.

Coming at a key moment in the rebuttal, this was the longest uninterrupted submission that any of the advocates got in the hour-long argument.

I will close with a brief look at what a win might look like, what a loss might look like, and what either of them might mean for the long-term health of alien tort litigation.

First, what would a win look like for the plaintiffs? A win might have been that the Supreme Court embraced the rough consensus that has emerged among the lower courts since the *Sosa* decision in 2004. There are three essential elements to that consensus among the lower courts. The first part of the consensus is that the cause of action in ATS cases comes from international law, not from U.S. substantive law. *Sosa* could not have been clearer that U.S. law does not provide the substantive standard to be applied.[64] Again, U.S. federal common law is the vehicle for inferring a cause of action, but *Sosa* only allows the enforcement of norms that meet that eighteenth-century paradigm test: the wrong is only actionable under the ATS if it violates a specific, universal, and obligatory norm of *international law*,[65] which again distinguishes this case from those precedents that disapprove the extraterritorial application of substantive U.S. law.[66] In short, under *Sosa*, U.S. law provides the remedy but not the substantive norm. What that might suggest is that this case is actually not about the extraterritorial application of substantive U.S. law. It involves a remedial jurisdiction, the power to offer a local remedy for a violation of international standards, but it is not, in fact, the kind of prescriptive jurisdiction that involves the application of a state's substantive internal law to some foreign person or some foreign transaction.

The second part of the consensus is that extraterritorial cases, even the so-called "foreign-cubed" cases, are subject, like every other exercise of jurisdiction in transnational cases, to a variety of discretionary doctrines available to the courts: the due process requirements of personal jurisdiction; forum non conveniens; possibly an exhaustion of local remedies requirement; possibly the political question doctrine; possibly the Act of State Doctrine.

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64. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 722–25, 729 (2004).

65. *See id.* at 732.

66. *See* Steinhardt/Brenner Brief, *supra* note 43, at 7–8 (citing *Boureslan v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (anti-discrimination laws); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (securities regulation); and *Foley Brothers Inc. v. Filardo*, 336 U.S. 281 (1949) (labor law) as examples of such precedents).

However, the idea would still be that extraterritorial cases are not in principle forbidden. To the contrary, these discretionary doctrines exist to derail cases to which the U.S. link is simply inadequate.[67]

The third part of the emerging consensus is that corporations are not in principle immune from international standards. At some point, the Supreme Court will address the original issue that came before it and the suggestion that the Second Circuit got it exactly wrong in suggesting that corporations were in principle immune from international standards.

That's what a win would look like for the plaintiffs. What would a loss look like?

I want to distinguish between what the plaintiffs might consider the good ways to lose and the bad ways to lose. The bad way to lose is pretty obvious: Justice Kennedy would repudiate *Filártiga* and its progeny, and he would be joined by at least four other Justices. Another way to lose that would be bad for the plaintiffs is for the Court to indicate that international law is not to be taken all that seriously; that as the Court did to treaties in *Medellín v. Texas*,[68] they now do to customary international law. The Court would perhaps view customary international law as a branch of politics, and therefore textually committed to the Executive Branch and therefore, a political question under *Baker v. Carr*.[69] That outcome is unlikely, but it is a position that has been put before the Supreme Court. Another possibility would be that despite *Sosa* and *Verlinden v. Central Bank of Nigeria*,[70] Article III is somehow violated by having lawsuits involving aliens against other aliens. That position is also unlikely to prevail, but it is the position of Harvard Law Professor Jack Goldsmith as submitted in an amicus brief in *Kiobel*.[71]

It seems to me that the solution to a loss along those lines would be to wait for a better Congress and to enact a Torture Victim

67. For a discussion of how these discretionary doctrines limit ATS litigation, see *id.* at 26–36.

68. 552 U.S. 491 (2008).

69. 369 U.S. 186 (1962).

70. 461 U.S. 480 (1983).

71. *See* Supplemental Brief of Chevron Corp. et al. as Amici Curiae Supporting Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of Chevron Corp. et al. as Amici Curiae Supporting Respondents, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

Protection Act[72] that is not limited to torture. Unfortunately, in today's political climate "a better Congress" may seem particularly elusive, but at least this gives you an idea of what the strategy would need to be. It is also fair to say that a loss like that would privilege alternative litigation strategies: state courts, other statutory causes of action, and potentially government contract remedies like debarment for those corporations that do business with the government of the United States on behalf of some foreign country in the course of which human rights are violated. So, there are alternative statutory causes of action and alternative forums.

The "good" way for the plaintiffs to lose in *Kiobel* would be that *Filártiga* and its progeny are preserved, but that this particular case loses. One way to do that would be for the Supreme Court to adopt a rigid exhaustion of local remedies requirement. So long as the imposed exhaustion requirement were consistent with international standards, the plaintiffs would likely be able to prevail in many cases. After all, the politics of human rights abuse are such that, when there are human rights violations, there tend not to be meaningful remedies. The law does not require a futile act, and so remedies that exist on paper but not in reality would not have to be exhausted. Still, you could imagine a somewhat formalistic disposition remanding to the lower courts for a finding on whether local remedies in Nigeria were exhausted or not. Another possible, decent way for plaintiffs to lose would be the U.S. position, whatever it is.

Of course, predicting the result in a case, especially on the basis of oral argument, is a fool's errand. And by the time this symposium appears in print, there's a very good chance that we will no longer have to speculate about the *Kiobel* decision and its impact. On the other hand, Supreme Court decisions often generate more litigation than they resolve, and the cause of corporate responsibility will persist in a variety of forums and under a variety of liability theories, no matter how the Court handles the ATS itself.

POSTSCRIPT

Readers of this symposium publication will understand that these remarks were drafted and delivered after the second oral argument in *Kiobel* but are being finalized mere weeks after the decision was announced. Rather than completely rewrite the history of the

72. 28 U.S.C. § 1350 note (2006).

symposium, it need only be noted that the Supreme Court—unanimous in deciding that the case had to be dismissed but split on the rationale—left a remarkable number of questions unanswered, as each of the four separate opinions explicitly recognizes.

In the end, the Supreme Court barred the Nigerian plaintiffs' case seeking relief against foreign corporations for violations of the law of nations outside the United States.[73] The majority explicitly based its decision on the fact that *Kiobel* was a "foreign-cubed" case, a term of art traceable to *Morrison v. National Australia Bank Ltd.*,[74] and referring to the fact that foreign plaintiffs were suing foreign defendants for conduct that occurred entirely in foreign territory. As in *Morrison*, the Court held that the presumption against extraterritoriality required the dismissal of Kiobel's action, because "all the relevant conduct took place outside the United States."[75] In the next sentence, the majority made it clear that the *Morrison* presumption as applied to ATS cases was not absolute and could be overcome "where the [ATS] claims *touch and concern* the territory of the United States . . . with sufficient force to displace" it.[76] Unlike the precedents applying the presumption against extraterritoriality, including *Morrison*, which turned on the language of a statute or the intent of Congress, this new *Kiobel* presumption can be overcome case-by-case or claim-by-claim, so long as the claims have "sufficient" connection to the United States. Apparently content to dispose of the case without further elaboration, the Court effectively required the lower courts to give content to this new presumption.

The first level of guidance for future litigation derives from the fact that nothing in *Kiobel* explicitly overrode *Sosa v. Alvarez-Machain*,[77] which preserved the possibility of ATS jurisdiction over extraterritorial conduct. *Sosa*, which was itself a foreign-cubed case, turned on whether the international norm at issue in an ATS case was

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

74. 130 S. Ct. 2869, 2894 n. 11 (2010); *see also* Foley Brothers Inc. v. Filardo, 336 U.S. 281, 285 (1949).

75. *Kiobel*, 133 S. Ct. at 1669. The *Kiobel* innovation also throws the relative clarity of the *Morrison* presumption into disarray by distinguishing between foreign territory and the high seas, which Justice Scalia rightly considered unprecedented. *See supra* text accompanying note 51.

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

77. 542 U.S. 692 (2004).

specific, universal, and obligatory.[78] The analysis in *Sosa* would have been inexplicable if all ATS cases involving foreign conduct were barred for that reason. To the contrary, as noted above, the *Sosa* court cited multiple foreign-cubed cases with approval, including *Filártiga v. Peña-Irala*, *Kadic v. Karadžić*, and *In re Estate of Ferdinand,. Marcos Human Rights Litigation*.[79] Without addressing, let alone distinguishing, these precedents, the *Kiobel* Court simply determined that "all the relevant conduct" in the singular case before it occurred abroad,[80] but nothing in the Court's analysis undermined the *Sosa* Court's approach to the "relevant conduct" in other cases, even if it occurred abroad. Notably, the brief of the United States in *Kiobel* on the question of extraterritoriality explicitly preserved *Filártiga* and its progeny even as it suggested that the U.S. connections in *Kiobel* were simply too attenuated.[81]

This means in the aftermath of *Sosa* and *Kiobel* that ATS plaintiffs must clear two hurdles: *first* they must show that the defendant has violated a *Sosa*-qualified norm, meaning a "a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms [the Court has] recognized."[82] *Kiobel* did nothing to restrict the actionable norms themselves, which will therefore continue to include torture, genocide, war crimes, crimes against humanity, human trafficking, slavery, and similar wrongs. Second, ATS plaintiffs must show that their factual claims "touch and concern the territory of the United States with sufficient force to displace" the presumption against extraterritoriality.[83]

So much is clear, but the *Kiobel* disposition leaves several essential problems in its wake, with no clear guidance from the Court

78. *See id.* at 748.

79. *Id.* at 732 & n.20.

80. *Kiobel*, 133 S. Ct. 1659.

81. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 19, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). It is significant that the U.S. amicus brief in *Sosa* explicitly invoked the *Morrison* presumption against extraterritoriality as a reason to dismiss Alvarez-Machain's case. *See* Brief for the United States as Respondent Supporting Petitioner at 46–50, *Sosa*, 542 U.S. 692 (Nos. 03-339, 03-485). It was all to no avail: the *Sosa* Court did not even make extraterritoriality a factor in the impressionistic determination of whether a cause of action would be inferred, 542 U.S. at 724–28, let alone whether jurisdiction was proper or whether a claim had been stated.

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

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

about how to approach them. Here are the four most significant issues remaining for future litigation:

(i) First, what kind of allegations are necessary to satisfy the *Kiobel* test? The majority stressed that "all the relevant conduct [in *Kiobel*] took place outside the United States"[84] and that "it would reach too far to say that mere corporate presence suffices,"[85] so it appears that the necessary allegations post-*Kiobel* will include the kind of pleadings that have traditionally fallen under the rubric of personal jurisdiction or venue or forum non conveniens. But the vehicle for testing the adequacy of each complaint—and specifically whether it sufficiently "touch[es] and concern[s]" U.S. territory[86]—is apparently a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, rather than a challenge to subject matter jurisdiction under Rule 12(b)(1).

(ii) Second, *Kiobel* leaves open the possibility that the kinds of allegations that suffice to displace the presumption vary depending on whether the defendant is a corporation or an individual human being. With respect to corporate defendants, given the level of public interest in the case and the extensive briefing, it was a shock that the *Kiobel* Court was utterly silent on whether corporations even in principle can have international obligations to respect human rights norms. As noted above, this was the very essence of the court of appeals' decision in *Kiobel*,[87] and was the only question on which certiorari had been granted initially. In its *Kiobel* opinion, the Supreme Court said only that "mere corporate presence" was not enough,[88] which would have been superfluous if the Second Circuit had been correct in its categorical exclusion of corporations from ATS cases. In effect, the Supreme Court's disposition leaves the Second Circuit as the outlier: every other court of appeals to address the issue has determined that corporations do not exist in an international law-free zone.[89]

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84. *Id.*

85. *Id.*

86. *Id.*

87. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

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

89. *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d

Foreign-cubed cases against corporations that fit the *Kiobel* mold are barred, but the Court's analysis and disposition also suggest that foreign-cubed actions against individual human beings—as in *Filártiga* and *Marcos*—survive. Those cases are not cited in the majority's opinion and are not "foreign cubed" in any event: they are after all safe haven cases, in which the defendant commits abuses abroad and then comes to the United States and remains. The defendant's living connection to the United States distinguishes those cases from the foreign corporations sued in *Kiobel*: they clearly "touch and concern the territory of the United States." That plaintiffs in such cases should not come within the *Kiobel* presumption is doubly clear from the fact that the separate opinion of Justices Alito and Thomas *did* require that the "domestic [*i.e.*, U.S.] content" of the claim must be "sufficient to violate an international norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[90] In other words, Justices Alito and Thomas would require violation of the *Sosa*-qualified norm *in the United States*. That would of course have blocked the *Filártiga* and *Marcos* cases, so it is highly significant that the other seven Justices rejected Justice Alito's restriction.

(iii) The third major problem post-*Kiobel* is what role international law will play (if any) in determining which claims touch and concern the United States. It is well-established that federal statutes must be interpreted in light of international law,[91] and a productive symmetry exists after *Sosa* and *Kiobel*: just as international law defines the positive substantive norms that are actionable under the ATS per *Sosa*, international law defines the positive jurisdictional reach of the ATS post-*Kiobel* and the kinds of claims it covers. In short, a strong argument exists that international law provides authoritative guidance on the question of what kind of connections should count in *Kiobel*'s "touch and concern" calculus.

Several doctrines of international law specify the kinds of claims that should displace the *Kiobel* presumption. For example, the *doctrine of state responsibility* determines the circumstances under which a State may bear responsibility under international law. In its

736 (9th Cir. 2011) (en banc), *cert. granted, vacated and remanded*, 133 S. Ct. 1995 (2013), *dismissed on other grounds*, Nos. 02–56256, 02–56390, 09–56381, 2013 WL 3357740 (9th Cir. June 28, 2013); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

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

91. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

authoritative treatment of this topic the International Law Commission ("ILC") concluded inter alia that

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[92]

In its commentary to article 8, the ILC clarifies that even unauthorized or illegal conduct by a private actor can trigger the State's responsibility as a matter of international law:

> where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.[93]

Recognizing the potential for its own state responsibility internationally, the United States requires that its contractors—regardless of citizenship and location of service—operate in a dense regulatory environment, profoundly controlled by the government itself, all of which qualifies as evidence of the kind of contractor conduct that "touches and concerns" the United States.[94]

Similarly, the international law doctrine of jurisdiction to prescribe catalogues various connections that justify the extension and application of a State's law, suggesting that ATS claims that fall within these categories displace the *Kiobel* presumption.[95] So for example, international law recognizes that every sovereign is sufficiently touched and concerned by certain categories of conduct that it can extend its jurisdiction to prescribe legal consequences for

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92. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, *Responsibility of States for Internationally Wrongful Acts*, art. 8, U.N. Doc A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001).

93. *Id.* art. 8, cmt. 8.

94 *See* USA PATRIOT Act of 2001 § 804, 18 U.S.C. § 7(9) (2006) (expanding the United States' special maritime and territorial jurisdiction to include U.S.-operated facilities overseas by amending 18 U.S.C. § 7 to include "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States"); Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261–3267 (2006) (subjecting contractors to federal criminal prosecution).

95. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

it: the conduct of its own nationals; conduct within its territory or which has substantial effects within its territory; conduct that implicates its national security or essential government functions; and conduct that implicates a State's concern with certain wrongs that threaten the international community as a whole.[96] From this perspective, *Kiobel* resolved the unique case before the Court, on the particular facts alleged in that complaint, without offering much guidance on the resolution of what international law might regard as "foreign-squared" cases, involving for example U.S. companies as defendants, corporate conduct within the jurisdiction of the United States or under contract with the U.S. government (even if performed abroad), or in violation of norms proscribing universally condemned behavior (including those subject to "extradite-or-prosecute" provisions of international treaties).[97]

(iv) The fourth major problem in the aftermath of *Kiobel* has nothing to do with doctrine and everything to do with the mind of Justice Anthony Kennedy. Concurring separately but also joining the majority, Justice Kennedy—reaching new heights of what looks like intentional obscurity—wrote:

> The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA) and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. *Other cases may arise with allegations of serious violations of*

96. *See generally* I.A. SHEARER, STARKE'S INTERNATIONAL LAW 183–212 (8th ed. 1994).

97. In the recent case of *Belgium v. Senegal*, the International Court of Justice examined the obligation of *aut dedere aut judicare* within the context of the Convention Against Torture, and clarified the nature and basis of the State obligation. *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (July 20, 2012), *available at* http://www.icj-cij.org/docket/files/144/17064.pdf. The Court held unanimously that Senegal was required to take action to hold an individual within its territory accountable for violations of customary international law norms. "State parties have a common interest to ensure, in view of their shared values" that acts in violation of international human rights norms "are prevented and that, if they occur, their authors do not enjoy impunity." *Id.* ¶ 68. Further, a nation's obligation is "triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred." *Id.*

> *international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.*[98]

Is this Justice Kennedy's veiled reference to *Filártiga* and its post-*Sosa* progeny? At a minimum, those cases do involve "allegations of serious violations of international law principles protecting persons," and they are not "covered . . . by the TVPA" because they involve allegations of war crimes, crimes against humanity, genocide or the like. Nor are those cases "covered . . . by the reasoning and holding" of *Kiobel* because they do not involve foreign corporations, or the foreign corporate defendants are not merely present in the United States or the claims have some other connection to the United States, say by falling within this country's jurisdiction to prescribe.

Clearly, *Kiobel* invites more litigation than it resolves, which is common in Supreme Court cases, but the Roberts opinion also invites a lazy hostility to *Filártiga*-like cases that is simply not justified. In the months immediately after *Kiobel*, a handful of lower courts dispensed with the "touch and concern" analysis altogether, holding that so long as the alleged conduct occurred abroad, *Kiobel* was fatal to the case, a position consistent with the opinion of Justices Alito and Thomas but inconsistent with the analyses of the other seven Justices.[99] These early decisions suggest a willful misunderstanding of the transitory tort doctrine and a visceral reluctance to consider and apply the law of nations in both treaty and customary form as the rule of decision in cases where it is relevant. Nothing in *Kiobel*

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98. 133 S. Ct. at 1669 (emphasis added) (citation omitted).

99. *See, e.g.*, Al Shimari v. CACI Int'l, Inc., No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720, at *1 (E.D. Va. June 25, 2013) ("In light of the United States Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, the Court holds that it lacks ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign." (citation omitted)). The corporate defendants in *Al Shimari* are U.S. nationals, making the case "foreign-squared" not "foreign-cubed." *Compare Mwani v. Bin Laden*, No. 99-125 (JMF), 2013 WL 2325166, at *4 (D.D.C. May 29, 2013) (sustaining jurisdiction over ATS claims arising out of an attack on a U.S. embassy in a foreign country: "Surely, if any circumstances were to fit the Court's framework of 'touching and concerning the United States with sufficient force,' it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees.").

requires or justifies so profound a departure from the traditional approach to international law as law of the United States.