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INTRODUCTION

The debate over the extraterritorial application of the Alien Tort Statute (ATS)[1] raised by *Kiobel v. Royal Dutch Petroleum Co.*[2] presumes an underlying tension between a state's exercise of civil universal jurisdiction and its national interest. Realist-based critiques of the ATS posit that harmful consequences result when the United States provides a civil remedy for human rights abuses that occur in foreign territory, even where the conduct transgresses universally recognized norms.[3] These critiques maintain that ATS litigation undermines U.S. investment in foreign countries; provokes a backlash against the United States in affected countries while also angering U.S. allies; and, more generally, reflects a naïve view of international relations.[4] Another common charge is that ATS

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1. 28 U.S.C. § 1350 (2006).

2. 133 S. Ct. 1659 (2013).

3. *See, e.g.*, Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004) (discussing the harms that flow from judicial involvement in foreign affairs through ATS litigation); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 473 (2001) (describing the costs of ATS litigation).

4. *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1119–21 (2011) (summarizing critiques).

litigation represents a form of "plaintiff's diplomacy" that interferes with the executive's prerogative to make foreign policy.[5]

In *Kiobel*, the Supreme Court appeared to vindicate these concerns in holding that the presumption against extraterritoriality applies to the ATS, thus limiting suits that may be brought under the statute for serious human rights violations that occur in foreign territory.[6] Although the decision to adopt the presumption against extraterritoriality was supported only by a five-Justice majority, the Court was unanimous in concluding that the ATS did not provide for universal jurisdiction and in recognizing that ATS suits could potentially undermine U.S. interests.

This Essay explains how concerns about the adverse consequences of human rights litigation underlie *Kiobel*'s adoption of the presumption against extraterritorial application. It also argues, however, that those concerns are overstated and ignore the way in which ATS litigation can advance U.S. strategic interests. The Essay concludes that even as *Kiobel* imposes a new territorial nexus requirement, it leaves open the possibility that some consideration may be given in future cases to how ATS suits advance U.S. interests in determining whether the presumption against extraterritoriality is displaced.

Part I describes how the various opinions in *Kiobel* are shaped by their respective views of the impact of ATS litigation on the United States. Part II describes the potential value of ATS litigation for the United States—a point expressly incorporated into Justice Breyer's concurring opinion, which proposes an alternative framework for determining when the ATS applies extraterritorially. This part thus posits that the supposed conflict between what might be termed human rights universalism and national interest realism is overstated and that ATS litigation can promote U.S. interests even in "foreign-cubed cases," where both parties are foreign nationals and the alleged wrongful conduct takes place abroad. Part III examines recent Supreme Court decisions addressing the Constitution's extraterritorial reach in war-on-terrorism cases. These decisions provide an additional perspective on *Kiobel*, highlighting the tension

5. *See* Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2243 (2004) (noting critiques that ATS litigation amounts to "plaintiff's diplomacy"). *See generally* Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102 (describing the "plaintiff's diplomacy" phenomenon).

6. *Kiobel*, 133 U.S. at 1665.

between the Court's desire to retain some flexibility to adjudicate claims of human rights violations that occur abroad and its continued attraction to territoriality as a way of limiting the potential adverse effect of those claims on U.S. interests. The Essay concludes that *Kiobel* still leaves room for plaintiffs to argue that ATS litigation involving human rights violations committed abroad advances U.S. interests, where such arguments are supported by evidence of some territorial nexus to the United States.

I. *KIOBEL* AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY UNDER THE ATS

After initially hearing argument in *Kiobel* on the issue of corporate liability, the Supreme Court ordered reargument on the broader question of "[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."[7] In its decision, the Court addressed this broader question, concluding that the presumption against extraterritoriality applies to suits under the ATS. The Court thus determined that ATS suits cannot be brought even for *Sosa*-specific torts[8] where those torts occur in foreign territory, unless the claims "touch and concern the territory of the United States" with "sufficient force to displace the presumption against extraterritorial application."[9] Applying this test in *Kiobel*, where the alleged human rights violations occurred in Nigeria, and where the plaintiffs and defendants were non-U.S. nationals, the Court found the defendants' mere corporate presence in the United States insufficient to displace the presumption against extraterritorial application.[10]

In opposing ATS jurisdiction in *Kiobel*, the defendants and various amici had underscored the adverse foreign policy consequences that can result when a U.S. court provides a civil remedy for human rights violations that occur in another country. Extraterritorial ATS actions, they maintained, expose U.S. officials and nationals to jurisdiction by foreign states for U.S.-based conduct and undermine U.S. commercial interests.[11] Further, they rejected the

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

8. Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004).

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

10. *Id.*

11. Supplemental Brief for Respondents at 51–52, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

suggestion that federal courts can effectively manage these adverse effects through case-specific doctrines such as international comity and forum non conveniens.[12] Only a prohibition against applying the ATS to torts committed abroad, they argued, could avoid the harmful foreign policy consequences associated with civil human rights litigation in U.S. courts.[13]

The United States took a more nuanced position. It argued that courts should exercise great restraint when confronting the foreign relations and foreign policy consequences of asserting civil jurisdiction over conduct that occurs in the territory of another sovereign.[14] In *Kiobel*, the potential for friction was heightened because the defendants were incorporated in the United Kingdom and the Netherlands, whose respective governments formally objected to the exercise of U.S. jurisdiction.[15] The U.S. government accordingly opposed recognizing ATS actions where the suit "challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct."[16] While the United States sought to leave the door ajar for the ATS' possible future extraterritorial application, it urged restraint and emphasized the need for a connection to the United States, as in *Filártiga*, where the defendant's presence in the United States meant that the United States might be perceived as harboring an alleged human rights violator.

Kiobel's adoption of the presumption against extraterritoriality was driven by these perceived adverse foreign policy consequences. The presumption, the *Kiobel* majority explained, "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[17] The presumption against extraterritoriality has traditionally applied to

12. *Id.* at 49; *see also* Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 981–82 (2004) (describing the "formidable procedural and prudential hurdles" ATS plaintiffs must overcome to prevail).

13. Supplemental Brief for Respondents at 36–37, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

14. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 16–17, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

15. *See id.* at 17–18.

16. *Id.* at 21.

17. *Kiobel*, 133 S. Ct. at 1664 (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (internal quotation marks omitted)).

statutes regulating conduct.[18] The ATS, by contrast, is a jurisdictional statute, allowing federal courts to recognize causes of action based on sufficiently well-defined norms of international law.[19] The *Kiobel* majority nevertheless held that the principles underlying the presumption against extraterritoriality constrain judicial enforcement of the ATS. The Court's conclusion was driven by its concern about the negative foreign policy consequences of judicial involvement. Writing for the majority, Chief Justice Roberts found that the risk of those consequences was magnified in the context of the ATS because "the question is not what Congress has done but instead what courts may do" through their exercise of ATS jurisdiction.[20] *Kiobel* thus reflects a deep skepticism not only about the value of human rights litigation to the United States, but also about judges' ability to enforce human rights norms without jeopardizing national interests.

The Court acknowledged that its prior decision in *Sosa v. Alvarez-Machain*[21] had placed constraints on the type of claims that could be brought under the ATS, requiring that the claims allege violations of international law norms that are "specific, universal, and obligatory."[22] It concluded, however, that *Sosa*'s limitation on the scope of possible ATS claims provided an insufficient check against unwarranted judicial interference in foreign policy.[23] Identifying a norm, the Court said, was "only the beginning of defining a cause of action," and judges would still need to address various other issues, from determining who could be held liable to assessing the statute of limitations—decisions that all carry "significant foreign policy implications."[24]

The Court also cited adverse foreign policy consequences in distinguishing piracy,[25] which provided the strongest historical precedent in favor of the ATS' extraterritorial application. Of the three law-of-nations violations familiar to the Congress that enacted the ATS—violation of safe conducts, infringement of the rights of ambassadors, and piracy—piracy alone typically occurred outside the

18. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (Securities Exchange Act); *Aramco*, 499 U.S. at 246 (Title VII of the Civil Rights Act).

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

20. *Id.* at 1664–65.

21. 542 U.S. 692 (2004).

22. *Kiobel*, 133 S. Ct. at 1665 (quoting *Sosa*, 542 U.S. at 732).

23. *Id.*

24. *Id.*

25. *Id.* at 1667.

United States.[26] Piracy, moreover, does not merely occur on the high seas.[27] The acts that constitute piracy ordinarily take place not on the water but on a ship, which, as Justice Breyer observed, is "like land, in that it falls within the jurisdiction of the nation whose flag it flies."[28] The *Kiobel* majority highlighted the differential impact of judicial enforcement of the norm against piracy. An ATS suit involving piracy, it said, does not pose the same foreign policy concerns as suits for other law-of-nations violations.[29] Unlike ATS suits addressing torture, extrajudicial killing, and other human rights abuses, piracy "does not typically impose the sovereign will of the United States onto conduct occurring within the territory of another sovereign," and "therefore carries less direct foreign policy consequences."[30]

The Court further noted instances in which ATS litigation has caused diplomatic strife. It cited, by way of example, objections by various countries, including Canada, Germany, South Africa, and the United Kingdom to the ATS' extraterritorial application.[31] The Court also observed that allowing for the ATS' extraterritorial application would suggest that other nations could hale U.S. citizens into court for their alleged violations of the law of nations occurring in the United States or anywhere else in the world—a result laden with damaging foreign policy consequences.[32]

The assumption that civil human rights litigation under the ATS undermines rather than advances U.S. foreign policy and other national interests thus pervades the majority opinion in *Kiobel* and provides the rationale for its application of the presumption against extraterritoriality. The other main rationale for the presumption against extraterritoriality—that Congress "ordinarily legislates with respect to domestic, not foreign matters"[33]—provided no support for the Court's decision since the ATS was enacted expressly with

26. *Sosa*, 542 U.S. at 723–24.

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

28. *Id.* at 1672 (Breyer, J., concurring in the judgment); *see also* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (observing that a crime committed "within the jurisdiction" of a foreign state and a crime committed "in the vessel of another nation" are "the same thing").

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

30. *Id.*

31. *Id.* at 1669.

32. *Id.*

33. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010); *see also* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 262 (1991).

foreign matters in mind. The Court's reasoning likely reflects the objections to the litigation in *Kiobel* registered by such close U.S. allies as the United Kingdom and Netherlands. It also suggests more generally a skeptical view of judicial enforcement of human rights norms through civil litigation and an assumption that such enforcement undermines U.S. interests rather than furthering them.

Although the decision to uphold the dismissal of the ATS suit in *Kiobel* was unanimous, the Court divided both on whether and how to apply the presumption against extraterritoriality. These opinions suggest divergent views about the potential value of ATS litigation to the United States.

In his concurring opinion, Justice Breyer offered a different conception of human rights litigation, one that led him to oppose applying the presumption of extraterritoriality to the ATS.[34] Guided in part by principles and practices of foreign relations law, Justice Breyer identified three circumstances that would provide a basis for ATS jurisdiction:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that *includes* a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other enemy of mankind.[35]

Breyer's first two categories invoke traditional international law bases for prescriptive jurisdiction: territoriality and nationality. Territoriality rests on a State's authority over conduct occurring within its borders.[36] Nationality presumes a State's interest in exercising authority over its own citizens, whether as perpetrators or victims, even for offenses committed outside the State's territory.[37]

Breyer's third category represents an amalgam of other jurisdictional rationales—the "effects" principle[38] and protective

34. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

35. *Id.* (emphasis added).

36. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987).

37. *Id.* § 402(2).

38. *Id.* § 402(1)(c).

jurisdiction[39] on the one hand, and universal jurisdiction[40] on the other. The effects principle allows for the exercise of prescriptive jurisdiction over conduct outside a State's borders based on its actual or intended effect within the State.[41] The protective principle, which the *Restatement*'s commentary describes as "a special application of the effects principle," similarly allows for the regulation of extraterritorial conduct by non-nationals because of the threat posed to a State's security or to a limited class of other State interests.[42] Universal jurisdiction, by contrast, rests on the nature of the offense itself—that the particular crime is so egregious that it warrants the exercise of jurisdiction by all States, independent of any connection to a State's territory, nationals, or interests.[43]

Breyer's opinion bridges the traditional divide between these jurisdictional rationales and challenges the assumption that a State is not advancing its own interests when it exercises universal jurisdiction. His third category suggests that providing a civil remedy under the ATS against those who commit crimes of universal concern furthers a distinct U.S. national interest (the protective principle) and that failing to provide such a remedy could have a deleterious impact on the United States (the effects principle). It thus posits that the assertion of jurisdiction over matters of universal concern can potentially further a State's interests and should be exercised where it does.

Breyer does not, however, embrace the traditional concept of universal jurisdiction, which would provide for the assertion of jurisdiction under the ATS solely based on the conduct itself (i.e., for all *Sosa*-specific torts). Congress adopted the ATS when, as Justice Story put it, "No nation ha[d] ever yet pretended to be the custos morum of the whole world."[44] Not all exercises of universal jurisdiction, Breyer suggests, further a nation's interests. Breyer instead sets forth a theory of qualified universal jurisdiction grounded

39. *Id.* § 402(3).

40. *Id.* § 404.

41. *Id.* § 402 cmt. d.

42. *Id.* § 402 cmt. f; *see also* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 151 (2010) (describing the effects and protective principles).

43. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987).

44. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring in the judgment) (alteration in original) (quoting United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.)).

on and ultimately constrained by a State's own interest in upholding widely accepted norms.[45] Limiting ATS jurisdiction to where "distinct American interests" support judicial enforcement of universally accepted norms, Breyer explains, would fulfill the statute's purpose while helping to minimize international friction.[46]

While Breyer's first two categories provide bright-line rules (i.e., necessarily providing for ATS jurisdiction for *Sosa*-sufficient torts that occur on U.S. soil or that are perpetrated by U.S. nationals), the national interest category is more open-ended. Breyer does not attempt to set forth a list of interests that would anchor jurisdiction over an extraterritorial human rights tort, but he makes clear that the list includes preventing the United States from becoming a "safe harbor" for torturers and others who violate the type of "specific, universal, and obligatory" international norms identified in *Sosa*.[47] Thus, even as Breyer rejects the application of the presumption against extraterritoriality, he draws upon notions of territoriality through the safe harbor paradigm. Such a territorial nexus—one Breyer found absent in *Kiobel* itself[48]—provides both a limitation on the scope of ATS jurisdiction and an example of how a State's own interests may be implicated by its exercise.

The two other concurring opinions in *Kiobel* offer additional perspectives on ATS litigation and its potential consequences. In his brief concurrence, Justice Kennedy noted the limited nature of the Court's ruling, observing that the decision "is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[49] Other cases, he said, may arise "with allegations of serious violations of international law principles protecting persons" that are not covered by *Kiobel*'s "reasoning and holding" and that might require "further elaboration and explanation" of the presumption against extraterritoriality.[50] Kennedy's decision to join the majority opinion indicates that he subscribes to the majority's position that ATS litigation can cause adverse foreign policy consequences and that he—unlike Breyer—believes a presumption against extraterritoriality provides the best way to minimize this risk. But Kennedy also suggests that the presumption might need to be

45. *See id.* at 1674–77.
46. *Id.* at 1674.
47. *Id.*
48. *Id.* at 1677–78.
49. *Id.* (Kennedy, J., concurring).
50. *Id.*

qualified in other cases,[51] including where there is a stronger nexus to the United States and, by implication, where the foreign policy effect of ATS jurisdiction is different than in *Kiobel*. Kennedy thus not only leaves open the possibility of future ATS litigation for human rights violations occurring abroad where the claims "touch and concern" U.S. territory with sufficient force to displace the presumption against extraterritoriality. He also allows for the possibility that courts might consider how future ATS litigation advances U.S. interests in determining whether to apply the presumption.

Justice Alito wrote separately in *Kiobel* to explain his view of how the presumption against extraterritoriality should operate.[52] Unlike Kennedy, who opted for ambiguity, Alito sought to outline a standard that could help answer the questions left open by what he described as the Court's "narrow approach" and limit future ATS cases for human rights abuses occurring abroad.[53] A putative ATS action, Alito said, would "fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[54] Alito thus not only isolates domestic conduct as the trigger for ATS jurisdiction, but also maintains that this conduct must clear *Sosa*'s high bar of definiteness and acceptance among civilized nations, even if the underlying offense itself meets that requirement. Alito would therefore require that ATS suits relying on theories of accomplice or participatory liability, such as *Kiobel*, show that the domestic conduct met a *Sosa*-specific international norm regardless of whether the underlying offense itself provided a basis for ATS jurisdiction. As a result, Alito's approach appears to exclude consideration of the type of national-interest calculation specifically contemplated by Breyer and left open by Kennedy.

II. THE POTENTIAL STRATEGIC VALUE OF HUMAN RIGHTS LITIGATION UNDER THE ATS

Much of the extraterritoriality debate in *Kiobel* presumes that applying the ATS to conduct in foreign countries carries negative

51. *See id.*
52. *Id.* at 1670 (Alito, J., concurring).
53. *Id.*
54. *Id.*

consequences for the United States. This presumption rests on a false dichotomy between human rights universalism and national interest realism—one in tension with the history surrounding the ATS and the increasing link between human rights, on the one hand, and economic development and security, on the other. As a number of scholars have described, ATS litigation can advance U.S. interests,[55] while the various harmful scenarios invoked by rogue courts in ATS cases have yet to materialize.[56]

From its inception, universal jurisdiction rested on pragmatic considerations. The First Congress enacted the ATS against a backdrop of concern about the inadequate vindication of international law.[57] It provided a civil remedy for a narrow set of international law offenses that could have serious consequences in international affairs, including war.[58] Although the United States could be held responsible for those consequences by failing to provide a remedy, the ATS was not so limited, reflecting concerns about the wider ramifications of the inadequate enforcement of international law.

Providing a civil remedy for universal jurisdiction offenses such as piracy—even in the absence of a nexus to the United States—was understood to promote the international legal order and thereby benefit the United States. In adopting this logic, *Sosa* explained that while wide acceptance of the particular norm justified the exercise of universal jurisdiction, such jurisdiction was also supported by assessments of the value of a federal forum to the United States.

The rise of modern ATS litigation in the aftermath of *Filártiga v. Peña-Irala*[59] reflects the growing power and influence of the

55. *See, e.g.*, Knowles, *supra* note 4, at 1163–73 (describing the strategic benefits of ATS litigation); Cleveland, *supra* note 12, at 971 (contesting the notion that the ATS damages U.S. foreign relations or its role in advancing human rights globally); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 196–204 (2004) (describing the utility of ATS litigation for advancing human rights); *see also* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 209–10 (2008) (maintaining that ATS litigation does not damage U.S. foreign relations or undermine democratic reform).

56. *See* Knowles, *supra* note 4, at 1157.

57. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004).

58. *See id.* at 715. Those offenses were violation of safe conducts, infringement of the rights of ambassadors, and piracy. *See id.* at 724; *see also* Knowles, *supra* note 4, at 1163 (noting that "[t]he ATS . . . owes its existence to geopolitical interests and realist ends," which at the time were to ensure America's neutrality and avoidance of European entanglements).

59. 630 F.2d 876 (2d Cir. 1980).

international human rights movement.[60] The movement rejects the classical Westphalian system of state sovereignty, under which states are the only actors of consequence on the international stage. It instead maintains that international law protects the freedom and dignity of individuals, and that the international system must hold states accountable for the treatment of their own citizens.[61] ATS litigation also reflects the related explosion in transitional justice, which centers on holding perpetrators accountable for past abuses.[62] While transitional justice mechanisms typically focus on criminal liability, there is an increasing interest outside the United States in establishing civil liability based on universal jurisdiction.[63]

Protecting human rights is increasingly tied to advancing security and economic development. The linkage between human rights and collective security has roots in the UN Charter.[64] Numerous other UN documents tether human rights to development, peace, and security, and the United Nations has demonstrated its intent during the past two decades to make human rights a priority in its work.[65] This notion that accountability for human rights violations can promote peace and security underlies the UN Security Council's establishment of ad hoc criminal tribunals under its Chapter VII

60. *See, e.g.*, Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 436–40 (2002) (describing the origins of modern ATS litigation).

61. *See* Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 212 (2005).

62. *See* Sandra Coliver et al., *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, 185–86 (2005) (explaining how the ATS can serve as a "catalyst for the process of transitional justice in the [victim's] home country").

63. *See, e.g.*, Vivian Grosswald Curran, *Remarks at the GJIL Symposium on Corporate Responsibility and Alien Tort Statute*, 43 GEO. J. INT'L L. 1019, 1020 (2012) (explaining that some European courts have allowed litigants to file tort suits for violations of human rights, with at least one court granting recovery).

64. U.N. Charter art. 1, para. 3 (establishing that one of the United Nations' purposes is to "achieve international co-operation in . . . promoting and encouraging respect for human rights").

65. *See* Noëlle Quénivet, *Binding the United Nations to Human Rights Norms by Way of the Law of Treaties*, 42 GEO. WASH. INT'L L. REV. 587, 596 (2010). U.N. Security Council Resolution 1546, for example, called on "all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law," and also required States to support the United Nations in its mission to "promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq." S.C. Res. 1546, pmbl., ¶ 7(b)(iii), U.N. Doc. S/RES/1546 (June 8, 2004).

powers.[66] The collective security interest in preventing atrocities by states against their own people has been used to justify humanitarian interventions under the emerging principle of a responsibility to protect.[67] Economic growth and stability has similarly been tied to the protection of basic individual rights,[68] particularly under rule-of-law-based approaches.[69] Human rights are important to all major European institutions: the Council of Europe, the European Union, and the Organization for Security and Cooperation in Europe, which has described human rights protection as an integral component of the new European security system in the twenty-first century.[70] The U.S. government frequently describes human rights as "an essential element of American global foreign policy."[71]

ATS litigation seeks to advance human rights by providing victims with a federal forum for the enforcement of a subset of sufficiently well-defined and established violations. The presumption that the statute's extraterritorial application will necessarily interfere with U.S. foreign policy is at odds with the growing linkage between human rights and security. It obscures the degree to which providing a federal forum—even in the absence of a U.S. nexus—can further U.S. strategic interests by promoting respect for human rights and advancing perceptions of its commitment to the enforcement of universally accepted norms.[72]

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66. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security . . . . ").

67. *See* Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 319, 326–30 (2012). *See generally* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

68. *See, e.g.*, U.N. MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 110–25 (2005) (discussing the importance of good governance, including promotion of human rights, to economic development).

69. *See* KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 14 (2006).

70. *See* Alla Fedorova & Olena Sviatun, *The Implementation of the Human Rights Universality Principle in Ukraine*, 16 IUS GENTIUM 405, 412 (2012).

71. Colum Lynch, *U.S. to Seek Seat on U.N. Human Rights Council, Reversing Bush Policy*, WASH. POST, Apr. 1, 2009, at A2 (quoting Secretary of State Hillary Rodham Clinton, announcing that the Obama administration would "seek a seat" on the UN Human Rights Council).

72. *See* Knowles, *supra* note 4, at 1168–69 (describing the potential reputational value of compliance with international human rights law).

Not all conflict, moreover, undermines U.S. interests. As Professor William Dodge has observed in the anti-trust context, the extraterritorial application of U.S. law has led in the long run to a series of agreements between the United States and other countries that promote cooperation, even though it has caused some short-term friction.[73] The possibility for transforming friction into cooperation is arguably greater for ATS litigation given that the underlying norm must be universal in nature, even if there is disagreement over the best means of enforcing it.

III. THE CONSTITUTION'S EXTRATERRITORIAL APPLICATION IN THE WAR ON TERROR: ANOTHER PERSPECTIVE ON THE POTENTIAL VALUE AND COSTS OF HUMAN RIGHTS LITIGATION

The Supreme Court's decisions in the Guantánamo detainee habeas corpus cases have grappled with similar questions concerning the strategic value of enforcing human rights norms in federal court. In 2008, the Court held in *Boumediene v. Bush*[74] that the habeas corpus right guaranteed by the Constitution's Suspension Clause applied to Guantánamo.[75] Unlike *Kiobel*, *Boumediene* involved the extraterritorial application of a constitutional provision, and not of a federal statute. Also unlike *Kiobel*, *Boumediene* challenged U.S. action rather than conduct by foreign officials. The resistance to federal jurisdiction in *Boumediene* thus centered more on concerns about judicial interference with executive decision-making and military operations than with foreign relations. Despite these differences, *Boumediene* and other detainee habeas cases provide a useful perspective on *Kiobel*'s treatment of extraterritoriality, the perceived consequences of enforcing human rights norms in federal court, and the degree to which territoriality is viewed as a constraint on the exercise of judicial power.

Until 2008, the central question in the Guantánamo detainee litigation concerned whether the courts could ever exercise habeas jurisdiction over detentions outside the United States. This question was often framed as a conflict between the individual's right to be free from unlawful executive imprisonment, on the one hand, and the impropriety and risks of judicial review of executive action during wartime, on the other. In arguing against a federal forum for review

73. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 122 (1998).

74. 553 U.S. 723 (2008).

75. *Id.* at 728.

of executive detentions, the government relied on a combination of two factors: alienage (the Guantánamo detainees were all non-citizens) and territoriality (Guantánamo was located outside sovereign U.S. territory). Territoriality was thus viewed as a limitation on the exercise of federal judicial power, which the government argued would be detrimental to the nation's interests.

In *Rasul v. Bush*,[76] the Court held that the general federal habeas statute applied to Guantánamo.[77] The Court concluded that the presumption against extraterritorial application did not apply because of the "complete jurisdiction and control" that the U.S. exercised over the Guantánamo naval base.[78] It also noted that the government conceded that the habeas statute would extend to U.S. citizens detained there, undermining its own argument for invoking the presumption.[79] The Court thus concluded that Guantánamo was not extraterritorial, at least not for purposes of applying the federal habeas statute. It did not, however, address whether any constitutional guarantees applied to Guantánamo detainees.

After Congress eliminated the statutory basis for habeas jurisdiction over Guantánamo detentions,[80] the Court had to confront the question of the Constitution's application. In holding that the Suspension Clause applied to Guantánamo,[81] *Boumediene* rejected the government's argument for a categorical rule based on territoriality and citizenship. Writing for a five-Justice majority, Justice Kennedy adopted a functional test, which drew upon Justice Harlan's flexible methodology in *Reid v. Covert*[82] and his own concurrence in *United States v. Verdugo-Urquidez*.[83] As Kennedy explained, "whether a constitutional provision has extraterritorial effect depends upon the particular circumstances, the practical necessities, and possible alternatives which Congress had before it and, in particular, whether judicial enforcement of provision would be impracticable and anomalous."[84] Kennedy then distilled these

76. 542 U.S. 466 (2004).

77. *Id.* at 481.

78. *Id.* at 480–81.

79. *Id.*

80. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

81. Boumediene v. Bush, 553 U.S. 723, 728 (2008).

82. 354 U.S. 1 (1954).

83. 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

84. *Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)) (internal quotation marks omitted).

general principles into a multi-factored test to determine the extraterritorial application of the Suspension Clause. Those factors include: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[85] Applying this test, the Court found that the Suspension Clause "has full effect" at Guantánamo.[86] While *Boumediene* did not address either the application of other constitutional provisions to Guantánamo or the application of the Suspension Clause to other U.S.-run detention facilities, such as Bagram Air Force Base in Afghanistan, it established that there was no categorical presumption against the Constitution's extraterritorial application.

Boumediene may be understood as a pragmatic, situation-specific approach to the problem of Guantánamo. But it also suggests a recognition that enforcement of fundamental individual rights in federal court can advance U.S. strategic interests. Kennedy acknowledged the risks that judicial review of wartime detentions could potentially pose and urged judges to exercise caution and appropriate deference to executive branch officials in considering detainee habeas petitions.[87] But he also noted, "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[88] *Boumediene* had been preceded by years of criticism over Guantánamo, where detainees had been brought deliberately to avoid judicial review and to facilitate the creation of what had been termed a "legal black hole."[89] Guantánamo had been attacked by America's allies, the United Nations, and non-government organizations, and was widely perceived as undermining U.S. interests and counter-terrorism efforts—a perception that led ultimately to President

85. *Id.* at 766.

86. *Id.* at 771.

87. *Id.* at 796–97.

88. *Id.* at 797.

89. Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1666 (2013) (quoting 2003 lecture by British Law Lord, Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004), *available at* http://journals.cambridge.org/action/displayAbstract? fromPage=online&aid=1523512).

Obama's decision to close the detention center.[90] Habeas jurisdiction provided a way to counter this perception and to legitimate the exercise of government detention power through judicial review. Although the right to habeas was grounded in domestic law, it mirrors protections under international human rights law, particularly the right to be free from arbitrary detention and from the torture and other mistreatment historically associated with such detention. *Boumediene* thus also reflects the Court's understanding that providing a federal forum for vindicating human rights guarantees can further the nation's interests, even where the conduct occurs beyond its borders.

At the same time, however, the Court continued to view territoriality as a constraint on federal judicial power. It emphasized that "[i]n every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States."[91] The Court distinguished Guantánamo from Landsberg Prison in post-World War II Germany, which was under the temporary authority of the combined allied forces,[92] thus weighing against the exercise of habeas jurisdiction in *Johnson v. Eisentrager*.[93] *Boumediene* thus not only underscored the importance of territorial control as a factor in determining whether courts should engage in review, but also emphasized the exclusivity and permanency of U.S. control over Guantánamo.

In addition, *Boumediene* suggested that the risk of friction with a foreign government could provide a possible limitation on the Suspension Clause's extraterritorial application.[94] It noted that no Cuban court has jurisdiction over U.S. military personnel at Guantánamo or those detained there, and that the United States is "answerable to no other sovereign for its acts on the base there."[95]

Since *Boumediene*, a federal district and appeals court have addressed the Suspension Clause's application to U.S. detentions at Bagram in Afghanistan. These cases reinforce the continued salience of territoriality notwithstanding *Boumediene*'s rejection of a

90. President Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

91. *Boumediene*, 553 U.S. at 768.

92. *Id.*

93. 339 U.S. 763 (1950).

94. *See Boumediene*, 553 U.S. at 770.

95. *Id.*

categorical bar to the Constitution's extraterritorial application and demonstrate a skeptical view of judicial enforcement of human rights violations occurring outside the nation's borders. In *Al Maqaleh v. Gates*,[96] the district court held that the Suspension Clause did not extend to Bagram detainees, with the exception of the small percentage of non-Afghan nationals who had been seized outside of Afghanistan and brought to Bagram.[97] The court acknowledged that the U.S. possessed a high degree of control over Bagram, although it said that control was less complete and more impermanent than at Guantánamo.[98] The court also noted that the process that the United States had afforded to Bagram detainees fell "well short" of the process provided to Guantánamo prisoners and deemed inadequate in *Boumediene*, thus suggesting that the risk of arbitrary and unlawful detention was greater at Bagram than at Guantánamo.[99] The district court, however, emphasized the practical obstacles in reviewing detentions in a war zone. Such review might not only impact the U.S. military mission but also cause friction with the host government, particularly since a significant percentage of Bagram detainees were expected to be transferred to the Afghan government.[100] As the court explained, "It is by no measure unlikely that a federal court—sitting in the United States and applying standards used in analogous habeas cases involving Guantánamo detainees—would arrive at a different result than an Afghan court applying an entirely different process and legal standards."[101]

On appeal, the D.C. Circuit held that the Suspension Clause did not extend to any detainees at Bagram.[102] Applying *Boumediene*'s functional test, the D.C. Circuit established a complete bar to the Constitution's extraterritorial application to U.S. detention operations in Afghanistan. Like the district court, the D.C. Circuit emphasized Bagram's location in a theater of war and the potential risk habeas review could pose to ongoing military operations.[103] It further noted the risk of generating friction with the Afghan government—a risk that extended not only to review of the detention of Afghan nationals (as the district court had concluded), but also to review of the

96. 604 F. Supp. 2d 205 (D.D.C. 2009).
97. *Id.* at 235.
98. *Id.* at 220–26.
99. *Id.* at 227.
100. *Id.* at 229–30.
101. *Id.* at 229.
102. Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).
103. *Id.* at 97–98.

detention non-Afghan nationals seized outside of Afghanistan, who were being held pursuant to a cooperative arrangement with the Afghan government.[104]

Another war-on-terrorism habeas decision expressed similar concerns with federal court adjudication of human rights abuses that occur in foreign territory. In *Munaf v. Geren*,[105] which was issued the same day as *Boumediene*, the Supreme Court addressed the detention of two U.S. citizens by the Multinational Force-Iraq (MNF-I), an international coalition operating in Iraq.[106] In their habeas actions, the petitioners challenged both their detention by the MNF-I, which they argued was arbitrary and unlawful, and their contemplated transfer to Iraq to face criminal proceedings, which they argued was illegal and would likely result in their torture.[107] The Court held that federal courts had habeas jurisdiction to consider the petitions.[108] Although an international force in a foreign country was holding the prisoners, it said, the United States retained ultimate control and authority over their detention, thus bringing them within scope of the federal habeas statute.[109] The Court also held, however, that federal courts could provide no relief and that the petitions should be dismissed.[110] It underscored not only Iraq's sovereign right to prosecute the detainees for offenses committed within its territory,[111] but also the adverse foreign-relations consequences inherent in federal-court adjudication of their claims, including of their transfer-to-torture claim.[112]

To varying degrees, these war-on-terrorism cases suggest the continued salience of what Kal Raustiala has termed "legal spatiality"—the principle that law and legal remedies are connected to, or limited by, territorial location.[113] *Boumediene*'s rejection of a categorical bar to the Constitution's extraterritorial application to non-citizens in favor of a functional, case-by-case assessment of the implications of extending a particular right to a particular location indicates a resistance to bright-line rules based on territoriality. *Boumediene* further suggests that enforcing human rights norms in

104. *Id.* at 99.
105. 553 U.S. 674 (2008).
106. *Id.* at 679.
107. *Id.* at 692.
108. *Id.* at 688.
109. *Id.* at 685–87.
110. *Id.* at 692.
111. *Id.* at 694–95.
112. *Id.* at 700–03.
113. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2503 (2005).

federal court can advance national interests, even where the violation occurs beyond the country's borders. But *Boumediene*'s emphasis on the nature of U.S. control over Guantánamo—both total and permanent—highlights how territoriality continues to constrain such enforcement. The Bagram habeas cases demonstrate a continued skepticism towards the Constitution's extraterritorial application and a fear about its impact both on U.S. military operations and U.S. relations with other states. *Munaf* registers similar concerns, with its emphasis on the potential harm to U.S. foreign relations if federal courts were to conduct habeas review of extraterritorial detention and transfer decisions, even in the limited category of cases involving U.S. citizens.

The response of lower courts to civil damages actions arising from U.S. detention and interrogation practices in the war on terrorism reflects similar concerns about the negative foreign affairs consequences of federal court litigation challenging human rights abuses committed overseas, even where the gravamen of those actions is against U.S. officials or U.S. defendants.[114] These cases, several of which have raised claims under the ATS, have typically been decided based on state secrets[115] or other justiciability doctrines, such as *Bivens* "special factors,"[116] rather than on extraterritoriality grounds. They nonetheless reflect similar fears among judges about the harm such litigation could cause to U.S. foreign policy and relations.[117]

These decisions help place *Kiobel* in a broader context and highlight parallels among cases aimed at remedying human rights violations that occur outside the United States. Like *Kiobel*, the decisions suggest that even where the Supreme Court has declined to foreclose judicial enforcement through the adoption of categorical

114. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1079 (9th Cir. 2010) (en banc) (dismissing suit against company for helping provide and operate flights used in the U.S. government's extraordinary rendition program, which involved the movement of terrorism suspects among secret overseas detention centers for torture and other harsh interrogation methods); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) (dismissing suit challenging plaintiff's rendition to the United States to Syria for torture and other mistreatment); El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007) (dismissing suit against U.S. officials and corporate defendants for their role in plaintiff's rendition to and torture at a secret prison in Afghanistan).

115. United States v. Reynolds, 345 U.S. 1 (1953).

116. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

117. *Jeppesen*, 614 F.3d at 1081–82; *Arar*, 585 F.3d at 575–76; *El-Masri*, 479 F.3d at 303–04, 312–13.

rules, it still relies on territoriality to avoid what it perceives as the potentially significant strategic costs of human rights litigation in federal courts.

CONCLUSION

The Supreme Court's decision ultimately to frame the issue in *Kiobel* as one of extraterritoriality rather than corporate liability suggests that its principal concern over ATS litigation centered on judicial enforcement of human rights norms that occur abroad and lack a significant nexus to the United States. This concern was magnified in *Kiobel*, which threatened foreign corporations with civil liability for a joint subsidiary's alleged complicity in human rights violations in a foreign country. The *Kiobel* majority based its adoption of the presumption against extraterritorial application on the perceived harmful foreign policy consequences resulting from litigation that lacked a sufficient nexus to the United States, even if that litigation was limited to a narrow category of universally recognized and well-defined torts.

Kiobel's scope, however, remains uncertain. Marty Lederman has identified three familiar types of ATS cases that *Kiobel* appears to suggest are unresolved: (1) cases alleging *Sosa*-sufficient torts committed overseas by U.S. defendants; (2) cases such as *Filártiga*, in which a foreign defendant uses the United States as a safe harbor, thus preventing other states from bringing him to justice; and (3) cases in which a defendant allegedly engaged in conduct in the United States that contributed materially to a violation of a *Sosa*-sufficient international norm, but where that U.S. conduct alone is insufficient to establish the violation (in contrast to *Kiobel*, which alleged only corporate presence in the United States).[118] In these cases, future courts may be called upon to determine whether particular ATS claims involving human rights violations committed abroad "touch and concern" U.S. territory with "sufficient force to displace the presumption against extraterritorial application."[119] As they conduct this "touch and concern" analysis, it remains to be seen whether, and to what extent, courts will consider the potential

118. Marty Lederman, *What Remains of the ATS?*, OPINIO JURIS (Apr. 18, 2013, 6:40 PM), http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/.

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

consequences—adverse or beneficial—that hearing those ATS claims will have on the United States.[120]

As described above, the *Kiobel* majority's rationale for adopting the presumption against extraterritoriality was the potential adverse foreign policy consequences of ATS litigation.[121] Justice Breyer's concurrence, by contrast, highlights the adverse consequences of *not* recognizing an ATS cause of action in certain circumstances—for example, where the United States might be seen as providing safe harbor to a war criminal or genocidaire.[122] Breyer thus acknowledges that ATS litigation can serve U.S. interests. His opinion, coupled with Justice Kennedy's concurrence, which notes that the decision leaves open "a number of significant questions,"[123] suggests a continued window for plaintiffs to argue and courts to consider the value of ATS litigation to the United States, even where the human rights violations occurred abroad. While a U.S. interest in human rights norm enforcement—without any territorial nexus—will unlikely provide a stand-alone basis for jurisdiction given the majority opinion in *Kiobel*, it could bolster arguments for jurisdiction where there is such a nexus. Future cases will have to grapple with unanswered questions surrounding the required territorial nexus and, relatedly, the degree to which concerns about providing—or denying—a federal forum for enforcing human rights violations that occur overseas may nevertheless be understood to "touch and concern" the United States.

120. In one early post-*Kiobel* decision, the district court dismissed plaintiffs' ATS claims against a U.S. military contractor for its role in their torture and mistreatment in Iraq during the period of U.S. occupation. *See* Al Shimari v. CACI Int'l, Inc., No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720 (E.D. Va. June 25, 2013), *appeal filed*, No. 13-1937 (4th Cir. July 26, 2013). In dismissing the claims, the district court narrowly interpreted the *Kiobel*'s "touch and concern" language and noted the potential harmful foreign policy consequences of ATS litigation. *Id.* at *8–*9. The court, moreover, ignored the possible benefits to the United States of exercising jurisdiction, particularly where the defendant is a U.S. corporation headquartered in the United States.

121. *Kiobel*, 133 S. Ct. at 1664–65.

122. *Id.* at 1674–77 (Breyer, J., concurring in the judgment).

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