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# The Contradiction Between Alien Tort Statute Jurisprudence and the Continued Immunity of U.S. Officials for Acts of Torture Committed Abroad

JULES LOBEL<sup>†</sup>

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*Kiobel v. Royal Dutch Petroleum Co.*<sup>1</sup> raised the critical question of the extraterritorial application of fundamental human rights norms when aliens sue those responsible for their torture or other abuses under the Alien Tort Statute (ATS).<sup>2</sup> For three decades, starting with *Filártiga v. Peña-Irala*<sup>3</sup> in 1980, U.S. courts have relied on the jurisdiction afforded by that statute to hold individuals or corporations liable for human rights abuses committed against aliens abroad. Indeed, in 2004, the Supreme Court affirmed the cautious use of the ATS to provide a remedy for aliens who were subjected to torture abroad.<sup>4</sup> While the Supreme Court in *Kiobel* significantly narrowed the scope of ATS extraterritorial jurisdiction, as will be discussed in the Postscript to this Essay, U.S. courts still will assert jurisdiction against foreign state officials who commit torture or summary execution against aliens or citizens abroad under the

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1. 133 S. Ct. 1659 (2013).

2. 28 U.S.C. § 1350 (2006). After hearing argument on questions of whether corporations could be held sued under the ATS on February 28, 2012, the Supreme Court ordered briefing and reargument on March 5, 2012 on the question: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

3. 630 F.2d 876 (2d Cir. 1980).

4. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (“The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filártiga v. Peña-Irala* . . .”).

Torture Victims Protection Act (TVPA),<sup>5</sup> and potentially still have ATS jurisdiction to adjudicate claims that U.S. corporations or some foreign officials committed human rights abuses against aliens in another country.

Yet, in sharp contrast to the ATS line of cases, U.S. courts have refused to adjudicate claims by citizens or aliens that U.S. officials have been responsible for their torture or other abuses committed abroad. Often, these courts have held that the U.S. Constitution's prohibition on torture does not apply extraterritorially.<sup>6</sup> Even after the Supreme Court's landmark decision in *Boumediene v. Bush*,<sup>7</sup> holding that aliens detained by the U.S. military at Guantánamo Bay had a right to seek a writ of habeas corpus in federal courts,<sup>8</sup> the D.C. Circuit has still opined that other fundamental provisions of the Constitution, such as the Due Process Clause or the Eighth Amendment's prohibition against torture, still do not apply extraterritorially.<sup>9</sup> Moreover, the D.C. Circuit has held that even an alien's right to challenge his allegedly unlawful prolonged detention by seeking a writ of habeas corpus does not apply to aliens held extraterritorially in Afghanistan.<sup>10</sup> In addition, numerous courts have relied on various jurisdictional and technical doctrines such as the Westfall Act, the special factors exception to *Bivens* claims, and qualified immunity to refuse to adjudicate aliens' claims that they have been tortured or otherwise abused by U.S. officials in the context of the "war against terror."<sup>11</sup> Furthermore, there has been dispute within the courts as to whether the international laws of war should be applied by the courts against Executive conduct in the armed conflict against al-Qaeda and the Taliban.<sup>12</sup>

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5. 28 U.S.C. § 1350 note (2006).

6. *Rasul v. Myers*, 512 F.3d 644, 663–65 (D.C. Cir. 2008), *vacated and remanded*, 555 U.S. 1083 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009); *Harbury v. Deutch*, 233 F.3d 596, 602–04 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

7. 553 U.S. 723 (2008).

8. *Id.* at 795.

9. *Rasul*, 563 F.3d at 529.

10. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

11. *See, e.g., Ali v. Rumsfeld*, 649 F.3d 769, 771, 774–75 (D.C. Cir. 2011); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 279, 286 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009).

12. *See, e.g., Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

This Essay will argue that human rights *jus cogens* norms, such as the prohibition against torture, extrajudicial killing, war crimes, and prolonged arbitrary detention, must be applied by U.S. courts to hold U.S. officials accountable for abuses they commit. These norms generally give rise to universal jurisdiction and are universally recognized by international society.<sup>13</sup> While not every provision of the U.S. Constitution may be applicable to U.S. conduct abroad, certainly those that reflect the fundamental, universal values of international society ought to be binding on U.S. officials wherever and whenever they act, and actionable in U.S. courts.

#### I. *FILÁRTIGA*, *KIOBEL*, AND LAWSUITS AGAINST U.S. OFFICIALS FOR TORTURE COMMITTED AGAINST ALIENS

In 1980, the U.S. Court of Appeals for the Second Circuit spawned a new era of human rights litigation in accepting the Center for Constitutional Rights' argument that a two-hundred-year-old statute, the ATS, could provide federal court jurisdiction and a cause of action for suits against foreign government officials who commit torture against aliens abroad.<sup>14</sup> In allowing *Filártiga* to litigate his claims in federal court, the Second Circuit held that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."<sup>15</sup> The court believed that "giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."<sup>16</sup> By providing that a foreign governmental official who tortured someone in another country could be held accountable in U.S. courts, the court was aiding the enforcement of human rights principles that all governments, including our own, had agreed to abide by.

While a few judges, such as Robert Bork in *Tel-Oren v. Libyan Arab Republic*,<sup>17</sup> questioned *Filártiga*'s holding, the courts of appeals were virtually unanimous in following *Filártiga* and allowing aliens to sue foreign government officials who committed torture or other

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13. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . .").

14. *Filártiga v. Peña-Irala*, 630 F.2d. 876, 887 (2d Cir. 1980).

15. *Id.* at 890.

16. *Id.*

17. 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring).

violations of fundamental human rights norms abroad.<sup>18</sup> Even former Prime Ministers were not accorded immunity from suit, with the Supreme Court rejecting the argument made by the former Prime Minister of Somalia that the Foreign Sovereign Immunities Act accorded him immunity from an ATS claim for his official acts committed on behalf of the Somalian government in *Samantar v. Yousuf*.<sup>19</sup> On remand, the Fourth Circuit rejected the former official's claim that common law immunity protected him from liability for his official government conduct. The Fourth Circuit held that because the allegations of the complaint alleged violations of fundamental human rights norms, known as *jus cogens* norms, including torture, extrajudicial killing, and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, official immunity was not available.<sup>20</sup> In so holding, the Fourth Circuit recognized that both international and U.S. courts have increasingly concluded that "*jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity."<sup>21</sup> Moreover, in 1991, Congress explicitly affirmed *Filártiga* by enacting the TVPA, which authorizes a civil cause of action brought by either U.S. citizens or aliens against any individual who "under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or extrajudicial killing."<sup>22</sup>

Nonetheless, U.S. government officials who have committed torture or other *jus cogens* violations against aliens abroad have been shielded from accountability in U.S. courts despite the *Filártiga* line of cases. The second ATS case, *Sanchez-Espinoza v. Reagan*,<sup>23</sup> brought by the Center for Constitutional Rights after *Filártiga* began

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18. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (holding that a claim involving government-sponsored "torture and cruel, inhuman, and degrading treatment" could be brought under the ATS); *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) (holding that acts of foreign officials involving "genocide, war crimes, and crimes against humanity" fall under the ATS).

19. 130 S. Ct. 2278, 2282 (2010).

20. *Yousuf v. Samantar*, 699 F.3d 763, 778 (4th Cir. 2012). The Fourth Circuit did recognize that head of state immunity, as opposed to official immunity, was absolute, at least with respect to current heads of state. *Id.* at 776. Other courts have also accorded immunity to heads of state or even former heads of state. See, e.g., *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004); *Ye v. Zemin*, 383 F.3d 620, 630 (7th Cir. 2004).

21. *Yousuf*, 699 F.3d at 776.

22. 28 U.S.C. § 1350 note (2006); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (describing the TVPA as supplementing the *Filártiga* decision).

23. 770 F.2d. 202 (D.C. Cir. 1985).

the trend. In *Sanchez-Espinoza*, Nicaraguan citizens brought a suit against current and former Reagan Administration officials as well as Nicaraguan contra organizations and individuals under the ATS and the Constitution alleging that these officials had aided the contras in summarily executing and torturing civilians in Nicaragua.<sup>24</sup> The D.C. Circuit, in an opinion written by then Judge Scalia, and joined in by then Judge Ginsburg, held that the ATS claim had to be dismissed on the basis of immunity because it “would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States.”<sup>25</sup>

Thus, under this decision, U.S. officials cannot be sued under the ATS for official acts they committed which violate fundamental *jus cogens* human rights norms such as torture or summary execution, despite the fact that foreign officials have no such immunity from suit for the same acts.<sup>26</sup> The following hypothetical provides a stark example of the contradiction. Assume that a foreign government official and a high U.S. official enter into a conspiracy to torture an alien in a foreign country, and that in both countries the official actions, although secret, are taken on behalf of the government as official policy. The alien at some point gets released and his torture ends. If the foreign government official was to come to the United States, the alien could sue him under either the ATS or the TVPA in U.S. courts. However, the U.S. official would be accorded immunity. That result seems to make no sense—why should U.S. courts have jurisdiction over official acts of a foreign government official, but not over the same acts committed by a U.S. official? Unfortunately, as I discuss below, this scenario is not hypothetical, but illustrates the claims of a real plaintiff who alleged this was exactly what happened to him.

## II. ACCOUNTABILITY FOR TORTURE IN U.S. COURTS IN THE FIGHT AGAINST TERRORISM

Since 2001, various alien plaintiffs have brought lawsuits seeking damages in U.S. courts alleging that U.S. officials subjected

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24. *Id.* at 205.

25. *Id.* at 207.

26. Professor David Cole wrote about this contradiction in a prescient law review article right after the *Sanchez-Espinoza* case was decided. See David Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT’L L. J. 155 (1985).

them to torture abroad. None have succeeded. While the courts have utilized a variety of doctrines to dismiss these claims, the one stark and consistent holding has been that U.S. officials will not be held accountable in U.S. courts for claims of torture. These rulings contrast sharply with *Filártiga*.

A. *The Arar Case and Extraordinary Rendition*

Perhaps the case that raises the most vivid example of the federal courts' refusal to address claims that U.S. officials sanctioned torture is *Arar v. Ashcroft*.<sup>27</sup> Arar, a Canadian citizen of Syrian descent, was transferring planes at Kennedy Airport in New York when he was detained by INS agents based on a tip from the Canadian police that he was a member of al-Qaeda.<sup>28</sup> Questioned repeatedly by the FBI, Arar denied the allegations.<sup>29</sup> After two weeks of solitary confinement in Brooklyn, INS officials, with the approval of then U.S. Attorney General John Ashcroft, secretly rendered Arar to Syria, where he was tortured and locked in a damp, cold, underground cell that Arar termed a "grave" cell measuring three feet wide, six feet long and seven feet high.<sup>30</sup> After a year in detention, Syria released him, concluding that Arar had no connection to terrorism, and he returned home to Canada.<sup>31</sup> To this day, Arar suffers severely from his ordeal.

In 2004, Canada convened a commission to conduct an official inquiry into the Arar affair.<sup>32</sup> In September 2006, the commission issued a voluminous report fully exonerating Arar of any connection to al-Qaeda or any terrorist group.<sup>33</sup> The Canadian government accepted the commission's recommendation and officially apologized to Arar and paid him \$11.5 million Canadian dollars as compensation for the Canada's role in his ordeal.<sup>34</sup>

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27. 585 F.3d 559 (2d Cir. 2009).

28. *Id.* at 563.

29. *Id.* at 565.

30. *See id.* at 565–66.

31. *See id.* at 566–67.

32. 1 COMM'N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND (2006), available at [http://www.sirc-csars.gc.ca/pdfs/cm\\_arar\\_bgv1-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf).

33. *See id.* at 59.

34. Ian Auster, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A5.

In January 2004, Arar filed a complaint against various U.S. officials, including former U.S. Attorney General John Ashcroft, seeking damages and alleging that they had sent him to Syria for the purpose of subjecting him to torture and detention there, and had indeed conspired with Syrian officials to do so.<sup>35</sup> For why, asked Arar and his lawyers,<sup>36</sup> would the United States send a man whom it suspected of being an al-Qaeda terrorist to Syria, which the United States claimed at the time was a state sponsor of terrorism that practices torture, and not to Canada, the United States' friend and ally? The only plausible explanation, Arar and his lawyers posited, was that U.S. officials believed that Syria would detain and use coercive interrogation methods on Arar to obtain information that the FBI had not been able to get, and which they thought Canada could not obtain through ordinary police methods. As it turned out, Arar had no information to provide.

Arar argued that since U.S. officials were constitutionally forbidden from torturing him in New York, they could not intentionally subject him to torture by outsourcing it, namely by shipping him to Syria to be tortured there.<sup>37</sup> Despite Arar's strong claims on the merits, the district court, a divided Second Circuit panel, and a divided en banc Second Circuit decision dismissed Arar's claims.<sup>38</sup> Each decision found, under somewhat different reasoning, that Arar had no *Bivens*' claim for damages.<sup>39</sup> Perhaps most importantly for this discussion, the en banc majority held that because the high level government officials were acting based on official U.S. policy and were not simply some rogue agents, no claim for damages should be allowed since the action really was against the U.S. government and not the individual officers.<sup>40</sup>

Arar also asserted a claim under the TVPA, which the courts also dismissed.<sup>41</sup> The TVPA does not provide for a cause of action for torture committed by a U.S. official acting solely under U.S. law; Arar claimed that U.S. officials conspired with Syrian officials to

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35. Complaint at 2–4, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. CV-04-0249 DGT VVP).

36. I was one of Arar's lawyers.

37. Complaint, *supra* note 35, at 10.

38. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287–88 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009).

39. *Id.*

40. *Arar v. Ashcroft*, 585 F.3d 559, 574–76 (2d Cir. 2009) (en banc).

41. *Id.* at 563.



have him tortured in Syria.<sup>42</sup> There was no doubt that, had federal courts been able to assert personal jurisdiction over one of the Syrian officials involved in Arar's torture, the TVPA would have provided a private cause of action, because Arar would have been suing a Syrian official who had acted under color of Syrian law. The Second Circuit held, however, that Arar's suit against U.S. officials for a joint conspiracy with the Syrians did not state a claim under the TVPA, because the statute only provided a cause of action for torture committed under color of foreign law, and the U.S. officials were acting pursuant to U.S. law, not Syrian law.<sup>43</sup> The court discounted a prior Second Circuit opinion<sup>44</sup> as well as the decisions of various courts of appeals in which federal officials acting in concert with state officials in a joint conspiracy were held to have acted under color of *state* law, even though they were acting in their capacity as federal officials.<sup>45</sup> The upshot of the Second Circuit's TVPA analysis is that a Syrian official who could be found in the United States could have been sued for damages, yet a claim could not be asserted against the U.S. officials who allegedly conspired with the Syrians. However, it makes no sense to allow U.S. courts to assert jurisdiction against foreign officials acting in their official capacity on behalf of a foreign sovereign—a scenario fraught with potential foreign policy and interference with sovereignty concerns—but not officials of the U.S. government who are part of a coordinate branch of government whose actions are ordinarily subject to review by the federal courts.

*B. Federal Courts' Dismissal of ATS Torture Claims Against U.S. Officials*

The Second Circuit's dismissal of Arar's claims is not exceptional, but the norm. Every other circuit has also dismissed actions by citizens and aliens alike for torture claims arising out of U.S. officials' conduct abroad in the "war on terror."<sup>46</sup> For example, aliens' torture claims brought against U.S. officials pursuant to the

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42. *Id.* at 566.

43. *Id.* at 568.

44. *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969).

45. *See Hinds v. Fed. Deposit Ins. Corp.*, 137 F.3d 148, 159 (3d Cir. 1998) (citing Third, Fifth, Sixth, Eighth, and Ninth Circuit cases to support the assertion that "federal officials are subject to section 1983 liability . . . where they have acted under color of state law, for example in conspiracy with state officials").

46. *See, e.g., Padilla v. Yoo*, 678 F.3d 748, 769 (9th Cir. 2012); *Vance v. Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 38 (D.D.C. 2006).

ATS have been dismissed as precluded by the Westfall Act, which provides that, where the defendant “was acting within the scope of his office or employment at the time of the incident out of which the claim arose,” the United States will be substituted as the defendant.<sup>47</sup> By this provision, the Westfall Act makes the Federal Tort Claims Act,<sup>48</sup> with its broad provisions of immunity for acts committed abroad, the exclusive remedy for any tort committed by a federal official acting within the scope of his employment. Whenever an alien sues a federal official under the ATS for torture, the official invariably has claimed that his actions were committed within the scope of his employment, the U.S. has been substituted as a defendant, and the claim has been dismissed.<sup>49</sup>

Federal courts have rejected the application to U.S. officials of the identical argument that plaintiffs successfully made in the ATS lawsuits against foreign officials: that official torture is a violation of fundamental human rights norms and of criminal law and therefore cannot be undertaken by the official within the scope of his official governmental duties. As the D.C. Circuit opined: “While it may generally be unexpected that seriously criminal conduct will arise ‘in the prosecution of the business,’ here it *was* foreseeable that conduct that would ordinarily be indisputably ‘seriously criminal’ [torture] would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants.”<sup>50</sup> Therefore, such torture was within the scope of the military officials’ employment.<sup>51</sup> Other courts have similarly dismissed ATS claims, rejecting arguments that torture in violation of a *jus cogens* norm cannot be considered within the scope of a U.S. official’s employment.<sup>52</sup>

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47. 28 U.S.C. § 2679(d)(1) (2006). For a discussion of the impact of the Westfall Act on civil human rights litigation, see Elizabeth A. Wilson, *Is Torture All in a Day’s Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL’Y 175 (2008).

48. 28 U.S.C. § 1346(b) (2006).

49. *See, e.g.*, *Rasul v. Myers*, 512 F.3d 644, 660 (D.C. Cir. 2008), *vacated and remanded*, 555 U.S. 1083 (2008), *aff’d on remand*, 563 F.3d 527 (D.C. Cir. 2009).

50. *Id.*

51. *Id.*

52. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 774–75 (D.C. Cir. 2011) (dismissing ATCA torture claims brought by Iraqi victims of torture at Abu Ghraib because such torture was committed within the scope of the officials’ employment).

C. *Limiting the Extraterritorial Reach of the Constitution's Proscription of Torture*

Similarly, the D.C. Circuit has dismissed constitutional claims of torture brought by aliens arising out of their detention by military officials. Prior to *Boumediene v. Bush*,<sup>53</sup> in which the Supreme Court held that the Constitution's Suspension Clause applied to detainees held at Guantánamo Bay,<sup>54</sup> the D.C. Circuit and district courts in that circuit had consistently held that the constitutional proscription of cruel and inhumane punishment did not reach U.S. officials who tortured aliens abroad.<sup>55</sup> In *Rasul v. Myers*,<sup>56</sup> first decided by the D.C. Circuit just prior to the Supreme Court's holding in *Boumediene*, the court reiterated that rule in dismissing a *Bivens* damage action brought by former detainees at Guantánamo against high government officials for alleged torture they suffered during their detention.<sup>57</sup>

The Supreme Court vacated the *Rasul* dismissal after the *Boumediene* decision, ordering the D.C. Circuit to review its decision in light of *Boumediene*.<sup>58</sup> However, in *Kiyemba v. Obama*,<sup>59</sup> the D.C. Circuit held that the Court's *Boumediene* decision only involved the applicability of the Suspension Clause to Guantánamo and did not affect prior circuit law that the Due Process Clause did not apply to aliens without property or presence within the United States.<sup>60</sup> When the D.C. Circuit revisited *Rasul*, it noted that "the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause."<sup>61</sup> While the court is technically correct that *Boumediene* explicitly addressed only the Suspension Clause, *Boumediene*'s extended discussion of the Constitution's extraterritorial reach clearly undermined the D.C. Circuit's prior holdings that the Constitution simply did not apply to aliens tortured

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53. 553 U.S. 723 (2008).

54. *Id.* at 771.

55. *Harbury v. Deutch*, 233 F.3d 596, 602–03 (D.C. Cir. 2000); *In re Iraq and Afghanistan Detainee Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

56. 512 F.3d 644 (D.C. Cir. 2008).

57. *Id.* at 663–65.

58. *Rasul v. Myers*, 555 U.S. 1083, 1083 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009).

59. 555 F.3d 1022 (D.C. Cir. 2009), *vacated per curiam*, 130 S. Ct. 1235 (2010).

60. *Id.* at 1026–27.

61. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009).

abroad. The Court's review of its prior extraterritorial jurisprudence in *Boumediene* made clear that "these decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."<sup>62</sup>

The D.C. Circuit, however, chose not to rest its decision on the ground that the Constitution does not apply to torture of aliens abroad, holding instead that the defendants were entitled to qualified immunity because reasonable officials would not have known that the prohibition against torture applies to Guantánamo until at least after *Boumediene* was decided in 2008.<sup>63</sup> Indeed, the court's dicta suggests that, even now, it is not clearly established that the constitutional proscription against torture applies to Guantánamo or any other U.S. military base abroad, and that U.S. officials who engaged in torture abroad now would still be entitled to qualified immunity.<sup>64</sup>

More recently, in *Ali v. Rumsfeld*,<sup>65</sup> the D.C. Circuit revisited the issue of whether the Constitution protects aliens abroad from torture by U.S. officials, this time in the context of claims brought by Iraqi citizens allegedly tortured at the Abu Ghraib prison by U.S. officials.<sup>66</sup> As in *Rasul v. Myers*, the court based its decision dismissing plaintiffs' claims on qualified immunity grounds.<sup>67</sup> The D.C. Circuit reiterated the *Rasul* statement that the *Boumediene* decision was limited to the Suspension Clause and did not apply to any other constitutional provision.<sup>68</sup> However, the court went further and noted in dictum that even were the *Boumediene* functional test to apply to a claim of torture, the alleged torture took place in Iraq—at the time an "active theater of war"—and therefore the Fifth and Eighth Amendments would undoubtedly not apply under *Boumediene*.<sup>69</sup>

In summary, while foreign government officials can be sued in the U.S. for officially sanctioned extraterritorial torture (at least until now), U.S. government officials generally cannot. A host of doctrines

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62. *Boumediene v. Bush*, 553 U.S. 723, 755 (2008).

63. *Rasul*, 563 F.3d at 529.

64. *Id.* (stating that the D.C. Circuit's prior law that the Constitution does not apply to U.S. actions against aliens abroad remains undisturbed by the Supreme Court's opinion in *Boumediene*, with the exception of the Suspension Clause, which does not apply in some circumstances).

65. 649 F.3d 762 (D.C. Cir. 2011).

66. *Id.* at 764–65.

67. *Id.*

68. *Id.*

69. *Id.* at 772.

preclude any civil accountability for a U.S. official that orders or engages in torture abroad. The Westfall Act generally precludes ATS liability taken within the scope of official employment;<sup>70</sup> the TVPA has been held not to apply to U.S. officials who are acting under color of U.S., not foreign law;<sup>71</sup> the D.C. Circuit has held that constitutional proscriptions do not apply to U.S. official torture of aliens abroad and in any event officials who engage in such torture are shielded by the doctrine of qualified immunity;<sup>72</sup> and as the Second Circuit decided in *Arar*, courts have generally held that no private cause of action can be implied under *Bivens* to give aliens or even citizens a claim against U.S. officials for torture committed abroad.<sup>73</sup>

### III. *JUS COGENS*, FUNDAMENTAL NORMS, AND CIVIL LIABILITY FOR U.S. TORTURE ABROAD

The basic proposition that stems from the ATS cases until now is that foreign officials who commit abuses abroad which violate *jus cogens* human rights norms can be sued in U.S. courts and are not entitled to immunity, even if they are acting on behalf of their government. The *jus cogens* analysis applied in these ATS cases should be applicable to cases against U.S. officials. Courts should utilize the concept of *jus cogens* human rights violations in analyzing lawsuits against U.S. officials for officially sponsored torture committed against aliens abroad. The use of *jus cogens* principles in litigation against federal officials, and not simply foreign officials, would have several important consequences. First, it would remove the inconsistency that has developed in federal courts between the treatment of foreign officials and federal officials who torture aliens. Second, *jus cogens* principles should be an important substantive aid in determining which constitutional norms should be applicable to U.S. officials acting extraterritorially.

The Supreme Court and other courts have struggled with the question of when constitutional norms apply to U.S. government

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70. See *supra* notes 47–49 and accompanying text.

71. *E.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009).

72. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009); *Ali*, 649 F.3d at 764–65.

73. *Arar*, 585 F.3d at 568.

actions against aliens abroad.<sup>74</sup> In the Supreme Court's latest opinion on the issue, *Boumediene*, the Court articulated a functional test, which took a middle position between the view that the Constitution simply does not apply to governmental action against aliens abroad, and the more cosmopolitan perspective that all of the provisions of the Constitution apply wherever and whenever the government acts.<sup>75</sup> Based on that test, the Court found that detainees held at Guantánamo Bay could seek a writ of habeas corpus to challenge their detentions.<sup>76</sup> Nonetheless, the D.C. Circuit, as already mentioned, has held that the Supreme Court's *Boumediene* decision did not disturb prior circuit law which had held that the Constitutional proscriptions against torture did not apply to U.S. actions against aliens abroad.<sup>77</sup>

Importing the ATS *jus cogens* analysis into the constitutional extraterritorial framework would provide clarity, consistency, and principled decision-making. An approach to the extraterritorial application of the Constitution abroad that asked whether the constitutional principle at issue reflects a fundamental, non-derogable norm of international law preserves governmental flexibility in dealing with different cultures, societies, and legal systems, as well as the myriad problems that afflict foreign policy, yet also recognizes that there are certain types of conduct that are so contrary to the fundamental norms of civilized society that the Constitution must prohibit the government from engaging in them whenever, wherever, and against whomever it acts. The cases the *Boumediene* Court relied on—*United States v. Verdugo-Urquidez*,<sup>78</sup> *Johnson v. Eisentrager*,<sup>79</sup> the Insular Cases, and the opinions by Justice Harlan and Justice Frankfurter in *Reid v. Covert*<sup>80</sup>—are all premised on the proposition that when the government acts abroad, there may be circumstances when it acts in the context of a different legal regime that permits a practice that the Constitution would prohibit were the actions to occur here. In *Verdugo*, Mexican law did not require a search warrant;<sup>81</sup> in *Eisentrager*, military law and the international law of war permitted

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74. See Jules Lobel, *Fundamental Norms, International Law and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 324–34 (2011).

75. See *Boumediene v. Bush*, 553 U.S. 723, 764–67 (2008). For a discussion of Justice Kennedy's functional compromise, see Lobel, *supra* note 74, at 316–18.

76. *Boumediene*, 553 U.S. at 795.

77. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009).

78. 494 U.S. 259 (1990).

79. 339 U.S. 763 (1950).

80. 354 U.S. 1 (1957).

81. *Verdugo-Urquidez*, 494 U.S. at 262–63.

trial of war crimes committed by enemy combatants by military tribunal;<sup>82</sup> in the Insular Cases, the law of newly acquired territories did not provide for jury trials; in *Reid*, an agreement between Great Britain and the United States permitted trial by U.S. court-martial of defendants who committed crimes in Great Britain while accompanying members of the armed forces overseas.<sup>83</sup>

Unlike the rights at issue in those cases, there are some rights, such as the right to be free of torture, genocide, or slavery, that are treated as fundamental and never derogable by the international community as a whole. While nations obviously do engage in torture, genocide, and slavery, no country asserts the legal authority to do so, and laws of other nations prohibit such practices. The cultural and legal diversity rationale partially underlying the *Boumediene* functional test is thus inapplicable to such non-derogable universal norms.

Moreover, the international community, including the U.S. government, has not merely accepted these rights as fundamental, but has agreed that it is never “practicable” to engage in such conduct as, for example, torture, summary execution, or genocide, irrespective of whatever “realistic” or “practical” foreign policy arguments are made to support such actions. To use fundamental international law norms to inform the Constitution’s reach would thus both provide a limiting normative principle and also meet the practical concerns that the Court focused on in *Boumediene*.

Finally, *jus cogens* norms should inform the application of such doctrines as qualified immunity and Westfall Act substitution of the United States as a defendant for purposes of the ATS. That a norm is considered so fundamental to the international community that all nations, including the United States, consider it to be non-derogable even in wartime or national emergencies suggests that any official ought to know that it is impermissible to engage in such activity, even if the government authorizes it. Officials who commit war crimes, genocide, slavery, or torture should not be accorded qualified immunity, even where higher officials authorized their actions. So too, the D.C. Circuit is simply wrong that such criminal actions can be considered to be within the scope of official employment. These

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82. *Eisentrager*, 339 U.S. at 786.

83. *Reid*, 354 U.S. at 15.

fundamental human rights principles should inform domestic immunity doctrines, just as they have been utilized by the courts in the ATS context.

#### IV. POSTSCRIPT: THE *KIOBEL* DECISION

This Essay was written prior to the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>84</sup> That decision held that "the presumption against extraterritoriality applies to claims under the ATS."<sup>85</sup> One could thus view the *Kiobel* decision as lessening the tension and contradiction set forth in this Essay by removing U.S. jurisdiction to adjudicate claims against foreign government officials who commit serious human rights abuses against aliens extraterritorially, just as the federal courts have accorded immunity to U.S. officials who commit such abuses.

Yet the *Kiobel* decision does not resolve the tension set forth here for several reasons. First, as Justice Kennedy noted in his concurrence, the TVPA explicitly provides a cause of action for aliens and citizens to sue foreign governmental officials who commit certain serious human rights abuses abroad.<sup>86</sup> Nonetheless, the courts have held that the TVPA does not allow aliens or citizens to sue U.S. officials who commit those same abuses abroad—even when they are acting in concert with foreign governmental officials who could be held liable. Thus, the contradiction that a federal action can be maintained against foreign state torturers, but not U.S. official torturers, for their conduct abroad, survives *Kiobel*.

Second, and perhaps more importantly, while the *Kiobel* majority significantly narrowed the use of ATS jurisdiction to sue human rights abusers for extraterritorial violations, it did not close the courthouse door completely. As Justice Kennedy's critical and vague concurrence recognizes, the majority opinion left open "a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."<sup>87</sup> Most importantly, the majority implicitly recognized that at least some abuses committed against aliens abroad would be actionable in U.S. courts when it stated that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against

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84. 133 S. Ct. 1659 (2013).

85. *Id.* at 1669.

86. *Id.* (Kennedy, J., concurring).

87. *Id.*



extraterritorial application.”<sup>88</sup> This strongly suggests that there might be some claims which arise from conduct abroad, and therefore would normally be subject to the presumption against extraterritoriality, but which nonetheless “touch and concern” U.S. territory with sufficient strength to displace the presumption. The Court is silent on what those types of claims might be. Similarly, while the majority opinion holds that “mere corporate presence” in the United States does not suffice for the extraterritorial application of ATS jurisdiction,<sup>89</sup> it does not address whether an U.S. corporation can be held accountable pursuant to ATS jurisdiction for acts occurring abroad which are planned in the United States.

Yet if U.S. corporations can be sued for at least some human rights violations occurring abroad—and that question is not yet answered—then why should U.S. officials who commit the same violations be accorded immunity? Absolute immunity from ATS jurisdiction for U.S. officials is still inconsistent with the Court’s allowing at least some ATS cases to go forward.

Moreover, Justice Kennedy’s brief concurrence, when combined with Justice Breyer’s concurrence on behalf of four justices who disagreed with the majority’s reasoning, suggests that in some cases foreign officials could be held liable under ATS jurisdiction for acts occurring abroad. Kennedy obscurely noted that cases “may arise with allegations of serious violations of international law principles protecting persons” which are not covered by either the TVPA or the “reasoning and holding of today’s case,” in which the “proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”<sup>90</sup> As one commentator has noted, Justice Kennedy’s concerns at oral argument with preserving *Filártiga* and cases like it may be behind this vague concurrence.<sup>91</sup>

In addition, Justice Breyer’s concurrence on behalf of himself and three other Justices would uphold ATS jurisdiction where, *inter alia*, the alleged torturer or human rights abuser has relocated to the United States and seeks a “safe harbor” from civil and criminal

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88. *Id.* (majority opinion).

89. *Id.*

90. *Id.* (Kennedy, J., concurring).

91. Anton Metlitsky, *Commentary: What’s left of the Alien Tort Statute?*, SCOTUSBLOG (Apr. 18, 2013, 10:06 AM), <http://www.scotusblog.com/?p=162581>.

liability here.<sup>92</sup> Breyer explicitly refers to *Filártiga* and the *Marcos* litigation as instances in which the courts of appeals properly found jurisdiction where an alleged human rights abuser had fled to or relocated in the territory of the United States.<sup>93</sup> It is plausible that faced with a case involving a foreign government official accused of a serious human rights abuse (that is not torture or summary execution and thus not covered by the TVPA), who has fled his home country and is living in the United States, at least Justice Kennedy and the four Breyer concurrers would hold that ATS jurisdiction lies.

Leaving this possibility open, as Justice Kennedy and the majority seem to do, raises anew the tension at the core of this Essay. Why should foreign governmental officials who commit human rights abuses abroad and have fled their home countries and are living in the United States be subject to federal court jurisdiction to hold them civilly accountable for their violations, while U.S. officials, who engage in the identical abuse be accorded a safe haven here? Federal courts ought to have a stronger claim to assert jurisdiction against the latter than the former. *Kiobel*, then, far from resolving the contradiction presented here, seems to continue it, albeit in a much more muted form.

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92. *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring in the judgment).

93. *Id.* at 1675.