

DETERMINING WHICH HUMAN RIGHTS CLAIMS  
“TOUCH AND CONCERN” THE UNITED  
STATES: JUSTICE KENNEDY’S *FILARTIGA*

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INTRODUCTION

If statutes were zombies, the Alien Tort Statute of 1789<sup>1</sup> (ATS) would lead the undead who walk among us. By one conventional narrative, the statute arose from the misty eighteenth-century murk, then lay moribund for nearly two centuries until 1980, when the Second Circuit breathed a strange new life into it with *Filartiga v. Pena-Irala*.<sup>2</sup> That decision then remained a

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1 Enacted as part of the Judiciary Act of 1789, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)), the Alien Tort Statute now provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at § 1350 note), extends *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), to U.S. citizens, providing in pertinent part:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative . . . .

2 630 F.2d at 876. In *Filartiga*, the Second Circuit found that deliberate torture under color of law violated the law of nations and ruled that the ATS therefore provided subject matter jurisdiction over a human rights claim brought by Paraguayan citizens against a Paraguayan police official for torture that occurred entirely in Paraguay. *Id.* at 878. For a powerful corrective to the conventional history of the statute and its interpretation, see generally Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014) (tracing the rise of the ATS as an accountability mechanism for torts committed by aliens).

“monstrous” curiosity<sup>3</sup>—generating more academic conferences than cases and more awards of tenure than damages—until 1984, when the Court of Appeals for the District of Columbia Circuit decided *Tel-Oren v. Libyan Arab Republic*.<sup>4</sup> The three-way split among the panel in *Tel-Oren* suggested that there was no consensus that *Filartiga* had been rightly decided, and the death watch began in earnest, even as the years passed and jurisdiction was sustained in numerous cases that fit the *Filartiga* model. This issue of the *Notre Dame Law Review*, in assessing the impact of *Kiobel v. Royal Dutch Petroleum*,<sup>5</sup> marks the thirtieth anniversary of the statute’s first premature obituary.

Like the proverbial reports of Mark Twain’s demise, it is easy to exaggerate the death of alien tort litigation in the aftermath of *Kiobel*. After all, the Supreme Court there decided—unanimously for the second time in nine years<sup>6</sup>—that the ATS does not provide jurisdiction in a high-profile case, deploying a rhetoric of caution in the interpretation of this ancient statute. Equally significant, the majority in *Kiobel* expanded the existing presumption against the extraterritorial application of U.S. law,<sup>7</sup> applying it for the first time to a purely jurisdictional statute instead of substantive statutes like the securities laws,<sup>8</sup> antidiscrimination laws,<sup>9</sup> and labor laws.<sup>10</sup> The essential problem with this approach is not that courts, litigators, and scholars failed to anticipate the issue.<sup>11</sup> To the contrary, over the decades since *Filartiga*, extraterritoriality and the related choice of law issues have frequently been front and center at the pre-trial stages of ATS litigation.<sup>12</sup> The problem with the

3 GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 2 (2003).

4 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

5 133 S. Ct. 1659 (2013).

6 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

7 See Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT’L L. 841 (2013).

8 *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

9 *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 246–47 (1991).

10 *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 290–91 (1949).

11 Cf. Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671 (2014).

12 The *Filartiga* court itself recognized that “[i]t is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.” *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). The issue of extraterritoriality arose repeatedly in the ATS cases involving various members of the Marcos family. See, e.g., *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at i, Estate of Marcos v. Hilao*, 513 U.S. 1126 (1995) (No. 94-775) (asserting as one question for review “[w]hether the Alien Tort Statute . . . applies extraterritorially”). In 1988, the Department of Justice submitted a forty-page amicus brief arguing that the ATS should not apply to cases between aliens involving conduct that occurred outside of the United States, an argument that was rejected by the Ninth Circuit. See *Trajano v. Marcos (In re Estate of Marcos)*, 978 F.2d 493, 499–501 (9th Cir. 1992) (“[S]ubject-matter jurisdiction was not inappropriately exercised under § 1350 even though the actions of Marcos-Manotoc which caused a fellow citizen to be the victim of official torture and murder occurred outside of the United States.”). See generally David Cole, Jules Lobel, & Harold Hongju Koh, *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners*

majority's approach in *Kiobel* is instead that it contradicts the Supreme Court's own precedents and leaves the lower courts with precious little guidance in determining the circumstances under which the presumption against extraterritoriality might be overcome in future ATS cases. In this Article, I show that what guidance there is in *Kiobel* emerges not from the majority opinion but from the concurrences, especially the cryptic single paragraph from Justice Anthony Kennedy.

### I. *SOSA*, THE PRESERVATION OF *FILARTIGA*, AND REVISIONISM 2.0

In *Sosa*, the Supreme Court determined conclusively that the ATS was purely jurisdictional,<sup>13</sup> an issue on which the lower courts had been divided ever since Judge Bork's separate opinion in *Tel-Oren*.<sup>14</sup> It also ruled that the statute had effect from the moment of its enactment.<sup>15</sup> That was a critical analytical move, because it meant that the ATS did not lie dormant until such time as Congress might see fit to define and implement the norms that would fall within the subject matter jurisdiction of the federal courts. To the contrary, even without that congressional action, the statute "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."<sup>16</sup> In short, the *Sosa* Court established that the ATS does not *create* a cause of action, but that it does *recognize* a cause of action, derived from the common law, for certain violations of international law: "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."<sup>17</sup> *Sosa* thus requires that the tort be "committed" in violation of international law, not that international law itself recognize a right to sue in domestic courts and not that Congress adopt implementing legislation defining the wrong.

That the cause of action could be defined by the common law and not by the law of nations is entirely consistent with the hornbook principle that international law does not specify the means of its domestic enforcement. The law of nations can define the underlying conduct as wrongful and establish the obligation to assure conformity without specifying a statute of limitations, the requirements of standing, or the precise contours of direct and secondary liability. International law "never has been perceived to create or

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*in* *Trajano v. Marcos*, 12 HASTINGS INT'L & COMP. L. REV. 1 (1988). In 2003, the Department of Justice renewed its argument from the *Marcos* and *Sosa* cases that no cause of action could be inferred for wrongs that occurred outside of the United States. See Brief for the United States of America as Amicus Curiae at 29–31, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

13 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

14 See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring).

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

16 *Id.* at 712.

17 *Id.* at 724.

define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.”<sup>18</sup> “In consequence, to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the ‘law of nations’ portion of section 1350.”<sup>19</sup>

In order to determine which international norms fall within the common law authority of the federal courts, the *Sosa* Court considered the state of the common law in 1789, when the ATS was adopted, and identified three paradigmatic torts that would have been actionable under the ATS without further action by Congress or by the community of sovereign states: the violation of safe conducts, infringing the rights of ambassadors, and piracy.<sup>20</sup> Explicitly rejecting *Sosa*’s argument that the actionable norms under the ATS were frozen as of 1789, the Court ruled that the recognition of a claim under the “present-day law of nations” as an element of common law would extend to “norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>21</sup> What the actionable norms across the centuries have in common is a “specific, universal, and obligatory”<sup>22</sup> character, combined with the potential for personal liability; indeed, the essence of *Sosa* is that the ATS authorizes federal courts to develop common law rules of liability where the underlying abuse violates such a norm. This is precisely what the lower courts had done, *Sosa* noted with approval,<sup>23</sup> in *Filartiga*,<sup>24</sup> *Kadic*,<sup>25</sup> and *In re Estate of Marcos*.<sup>26</sup> In fact, the *Sosa* Court did not question a single case in which this demanding and traditional standard had been satisfied, other than the arbitrary arrest claim advanced by Alvarez-Machain himself.

The *Sosa* Court thus recognized that the lower courts had sustained jurisdiction under the ATS only for certain egregious violations of international human rights law.<sup>27</sup> The Court urged caution in the judicial task of identify-

18 *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring). The *Sosa* Court cited Judge Edwards’s opinion in *Tel-Oren* with approval. See *Sosa*, 542 U.S. at 732.

19 *Tel-Oren*, 726 F.2d at 778.

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

21 *Id.* at 724–25.

22 *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994).

23 *Sosa*, 542 U.S. at 732 & n.20.

24 *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

25 *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995).

26 *Hilao*, 25 F.3d at 1475.

27 See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (torture, sexual assault); *Kadic*, 70 F.3d at 236 (torture, genocide, war crimes); *Hilao*, 25 F.3d at 1475 (torture, summary execution, arbitrary detention); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1350 (N.D. Ga. 2002) (genocide, torture, inhumane treatment, arbitrary detention); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360 (S.D. Fla. 2001) (summary execution, war crimes); *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627 (JSM), 1996

ing actionable norms of international law, referring for example to the enforceability of “only a very limited set of claims,”<sup>28</sup> and “the modest number of international law violations with a potential for personal liability.”<sup>29</sup> Relatedly, it identified a number of case-by-case considerations that would limit the adaptation of the law of nations to private rights of action.

Even as it acknowledged a cause of action for certain international law violations, the Court in *Sosa* stated that “there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.”<sup>30</sup> These considerations include: (i) a transformation in the prevailing conception of the common law since 1789, from “a transcendental body of law outside of any particular State but obligatory within it unless . . . changed by statute” into a body of norms more made (or created) than found (or discovered);<sup>31</sup> (ii) case-based limitations on federal common law-making, especially the *Erie* Doctrine;<sup>32</sup> (iii) the institutional preference for allowing Congress to create private rights of action;<sup>33</sup> (iv) the possibility of collateral consequences, especially the risk of adverse foreign policy consequences; and (v) the Court’s lack of “congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field [that] have not affirmatively encouraged greater judicial creativity.”<sup>34</sup>

This rhetoric of caution in *Sosa* was a dramatic new restriction on ATS litigation only according to those litigants and scholars who had systematically exaggerated the reach of the ATS in the first place. After all, the federal courts have routinely dismissed ATS claims that did not clear the high and traditional evidentiary hurdle that a norm must be “specific, universal, and obligatory.”<sup>35</sup> In *Flores v. Southern Peru Copper Corp.*,<sup>36</sup> for example, the Sec-

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WL 164496, at \*2 (S.D.N.Y. Apr. 9, 1996) (genocide); *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995) (summary execution); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994) (arbitrary detention).

28 *Sosa*, 542 U.S. at 720.

29 *Id.* at 724.

30 *Id.* at 725.

31 *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

32 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

33 “While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.” *Sosa*, 542 U.S. at 727.

34 *Id.* at 728.

35 *Id.* at 732 (quoting *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994)); see also *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2000) (concluding that a United States corporation’s purchase or lease of property from a foreign government with full knowledge that the property had been unlawfully confiscated on the basis of religion did not establish a violation of the law of nations by the corporation); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (stating that fraud is not a violation of the law of nations); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (stating

ond Circuit affirmed that ATS claimants were required to allege a violation of specific, universal, and obligatory norms.<sup>37</sup> Without calling into question its analysis in *Filartiga* or *Kadic*, the *Flores* court concluded that environmental torts were not currently in violation of international law.<sup>38</sup> From *Filartiga* onward, plaintiffs have tended to lose in cases where their lawyers were overly creative in asserting that a particular norm had achieved the status of customary international law but not in cases where the tort at the heart of the case was committed abroad.<sup>39</sup> On the other hand, the great bulk of human rights claims that were justiciable pre-*Sosa* remain justiciable post-*Sosa*: torture, genocide, extrajudicial killing, disappearances, arbitrary detention, crimes against humanity, war crimes, and slavery, *inter alia*. In *Roe I v. Bridgestone Corp.*,<sup>40</sup> the court ruled that allegations of child labor met the *Sosa* standard, concluding that “[i]t would not require great ‘judicial creativity’ to find that even paid labor of very young children in these heavy and hazardous jobs would violate international norms.”<sup>41</sup>

In the aftermath of *Sosa*, revisionists and human rights advocates alike claimed victory.<sup>42</sup> Certain academics found incoherence, as though *Sosa* were some jurisprudential Rorschach test, in which courts and litigants would

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that international law does not address claims for loss of money from state lottery distribution system); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14–15 (D.D.C. 2005) (finding that corporations are not liable for torture in the absence of state participation); *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004) (stating that defamation is not a violation of international law); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (concluding that full First Amendment freedoms do not exist at international law).

36 343 F.3d 140 (2d Cir. 2003), *republished at* 414 F.3d 233 (2d Cir. 2003).

37 *Id.* at 252.

38 *Id.* at 254.

39 *See, e.g.*, *Cisneros v. Aragon*, 485 F.3d 1226, 1230 (10th Cir. 2007) (rejecting a husband’s sexual abuse of his wife as a violation of the law of nations); *Hereros ex rel. Riruako v. Deutsche Afrika-Linien Gmbh & Co.*, 232 F. App’x 90, 95 (3d Cir. 2007) (holding that the use of slave labor by companies in South Africa from 1890 to 1915 is not actionable under the ATS); *Taveras v. Taveraz*, 477 F.3d 767, 774 (6th Cir. 2007) (holding that the safe conduct norm does not cover cross-border parental abduction of a child); *Frazer v. Chi. Bridge & Iron*, No. Civ.A. H-05-3109, 2006 WL 801208, at \*5 (S.D. Tex. Mar. 27, 2006) (finding that the operation of a construction site absent a safety engineer does not violate the law of nations); *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 132 (E.D.N.Y. 2005) (stating that the use of herbicides in war is not prohibited by international law), *aff’d sub nom.* *Viet. Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008).

40 492 F. Supp. 2d 988 (S.D. Ind. 2007).

41 *Id.* at 1022.

42 *Compare, e.g.*, Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) (finding in *Sosa* a confirmation of the revisionist position), with William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007) (detailing how the argument of Bradley et al. rests on a fundamental “misreading” of *Sosa*).

find whatever they were predisposed to see.<sup>43</sup> The self-styled “revisionists” were fairly certain that they won *Sosa*, finding in the Court’s rhetoric of caution a complete vindication of their approach. But that interpretation requires an Olympian detachment from the fact that “revisionist” arguments were fully and passionately advanced by the government, by *Sosa*, and by their amici in the litigation as fatal obstacles to *Filartiga* and its progeny. The majority obviously rejected that position. Those arguments certainly do dominate Justice Scalia’s concurrence, but that is the only place that the petitioners’ full-throated “revisionism” is accepted. Indeed, most human rights advocates think that they won the war and lost the battle in *Sosa*,<sup>44</sup> because the Court endorsed the power of federal courts to infer a cause of action from customary international law—the very heart of Bradley and Goldsmith’s “revisionist” attack on *Filartiga*.<sup>45</sup> As Justice Scalia rightly observed, of the hundreds of ATS decisions in the federal courts over the last quarter-century, the only decision disapproved of by the majority was *Alvarez-Machain* itself, suggesting that the hard-line “revisionist” critique of ATS litigation rested more on caricature than portrait.

Because the post-*Sosa* nature of ATS causes of action is central to a proper understanding of *Kiobel*, it must be emphasized that the ATS does not authorize the making of substantive U.S. law or its application abroad—the very “sin” to which the presumption against extraterritoriality is addressed. In *Morrison v. National Australia Bank*,<sup>46</sup> Congress had adopted a substantive legal regime, which was then improperly projected into a foreign sovereign’s territory when an alien plaintiff sued an alien defendant for conduct outside

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43 See Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT’L L.J. 1, 22 (2007) (“The first wave of scholarly and judicial reactions to the *Sosa* opinion is in and the ‘spinning’ has begun.”).

44 See, e.g., 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, 171 (2005) (noting that although the Supreme Court held against the plaintiff in *Sosa*, “it did so in a manner that does not appear to undermine the prior case law in which claims [of international human rights violations] were found actionable under the ATS”); 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, 2244–47 (2004); Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 534 (2005) (“*Sosa* affirmed the cautious approach adopted by most of the lower courts and left the door open for current and future case that address the most egregious violations of international law.”).

45 Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 837–876 (1997). For the effort to recast revisionism after the *Sosa* decision, see Bradley et al., *supra* note 42, at 891–935. For what I believe is a definitive repudiation of the newest version of revisionism, see generally Dodge, *supra* note 42, and Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011). See also Anthony J. Bellia Sr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 829–33 (2012); Steinhardt, *supra* note 44, at 2279–83.

46 130 S. Ct. 2869 (2010).

the territory of the United States.<sup>47</sup> Other cases announcing and applying the presumption against extraterritoriality also involved substantive statutory regimes adopted by Congress.<sup>48</sup> By contrast, after *Sosa*, the applicable substantive standard in ATS litigation must be *international* law norms comparable to the “18th-century paradigms [that the Supreme Court has] recognized[,]” like piracy and attacks on diplomats.<sup>49</sup> In other words, the remedial exercise at the heart of ATS litigation distinctly does not—indeed after *Sosa*, *cannot*—involve the application of substantive U.S. law abroad,<sup>50</sup> and every court faced with the argument that the ATS does not apply to wrongs committed in foreign territory rejected it, both before<sup>51</sup> and after<sup>52</sup> *Sosa*.

*Sosa* was what *Morrison* called a “foreign-cubed case,” in that it involved an alien plaintiff, an alien defendant, and foreign conduct, and would have been inexplicable if all ATS cases involving foreign conduct were for that reason barred.<sup>53</sup> To the contrary, as noted, the *Sosa* Court cited multiple foreign-cubed cases with approval,<sup>54</sup> including *Filartiga*,<sup>55</sup> *Kadic*,<sup>56</sup> and *In re Estate of Marcos*.<sup>57</sup> It is significant that the government’s brief in the *Sosa* litigation explicitly invoked the presumption against extraterritoriality as a reason to dismiss Alvarez-Machain’s case,<sup>58</sup> but it was to no avail. The *Sosa* Court did not even make extraterritoriality a factor in the impressionistic

47 *Id.* at 2883.

48 *See, e.g.*, *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 246 (1991) (anti-discrimination statute); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 282 (1949) (labor law).

49 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

50 Professor William Dodge has made this point forcefully. *See* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 37 (2010).

51 *See, e.g.*, *Trajano v. Marcos (In re Estate of Marcos)*, 978 F.2d 493, 499–501 (9th Cir. 1992) (“[W]e are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980).

52 *See, e.g.*, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745–47 (9th Cir. 2011) (en banc); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20–28 (D.C. Cir. 2011). A handful of dissenting judges have accepted the argument. *See Sarei*, 671 F.3d at 798 (Kleinfeld, J., dissenting); *Exxon Mobil*, 654 F.3d at 71 (Kavanaugh, J., dissenting).

53 *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.11 (2010) (Breyer, J., concurring).

54 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004); *see supra* text accompanying notes 23–26.

55 *Filartiga*, 630 F.2d at 890.

56 *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

57 *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994).

58 *See* Brief for the United States as Respondent Supporting Petitioner at 46–50, *Sosa*, 542 U.S. 692 (No. 03-339) (explaining that the Ninth Circuit’s conclusion that “[section 1350] reaches a tort committed against an alien *anywhere* in the world” is “seriously mistaken” due to the presumption against extraterritoriality).



determination of whether a cause of action would be inferred<sup>59</sup>—let alone whether jurisdiction was proper or whether a claim had been stated.

In summary, *Sosa* struck a careful balance between assuring a forum for the advancement of claims like those in *Filartiga*, *Kadic*, and *In re Estate of Marcos*, and closing the door to overly creative applications of the ATS, with the result that excessively restrictive interpretations of the statute and excessively expansive ones are equally disapproved. But *Sosa* does put to rest whatever controversy may have existed about the legitimacy of the *Filartiga* paradigm, in which the survivors of human rights abuse may sue individual defendants for the tortious effects of conduct deemed wrongful under the demanding and traditional standards of international law.<sup>60</sup>

## II. *KIOBEL*: NARROW HOLDINGS + BROAD LANGUAGE = UNFORCED ERRORS

In *Kiobel*, the Supreme Court barred the Nigerian plaintiffs' case seeking relief against foreign corporations for violations of the law of nations outside the United States. The Court explicitly based its decision on the fact that *Kiobel* was a "foreign-cubed" case,<sup>61</sup> a term of art traceable to *Morrison* and referring to the fact that foreign plaintiffs were suing foreign defendants for conduct that occurred entirely in foreign territory.<sup>62</sup> Applying that rubric to the facts of *Kiobel*, the Supreme Court emphasized that "all the relevant conduct took place outside the United States"<sup>63</sup> but established in the next sentence that the presumption against extraterritoriality might be overcome in ATS cases "where the claims touch and concern the territory of the United States . . . with sufficient force to displace" it.<sup>64</sup>

In other words, *Kiobel*'s unprecedented presumption against the extraterritorial application of purely jurisdictional statutes leaves open the possibility that the ATS might reach foreign conduct so long as it sufficiently "touches and concerns" the United States. From that perspective, *Kiobel* resolved the narrow case before the Court, on the particular facts alleged in that complaint, without offering conclusive guidance on the resolution of cases involving, for example, U.S. nationals as defendants, conduct within the jurisdiction or control of the United States or performed under contract with

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59 *Sosa*, 542 U.S. at 724–28.

60 *See supra* note 2.

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

62 *See supra* note 53 and accompanying text.

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

64 *Id.* Section IV of the majority opinion in *Kiobel* reads in its entirety:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

*Id.* (citation omitted).

the U.S. government, or other such linkages to the United States. Notably, the brief of the United States on the question of extraterritoriality explicitly preserved *Filartiga* and its foreign-cubed progeny even as it suggested that the U.S. connections in *Kiobel* were simply too attenuated.<sup>65</sup>

The responsibility for defining the elements of *Kiobel*'s "touch and concern" test now falls to the lower courts, and they can be expected to generate the next "cert-worthy" conflict among the circuit courts of appeals. The exact phrase—"touch and concern"—appears in other legal settings. Whether a covenant "runs with the land," for example, depends in part on whether it "touches and concerns" the land itself,<sup>66</sup> although that has no self-evident connection to alien tort litigation. Another possibility based on the exact formulation—"touch and concern"—is as an element of specific rather than general jurisdiction.<sup>67</sup> In *Elemery v. Holzmann*, for example, the court ruled that:

A federal court's jurisdiction over a person, may be either general—"adjudicatory authority to entertain a suit against a defendant without regard to the claim's relationship *vel non* to the defendant's forum-linked activity"—or specific—authority "to entertain controversies based on acts of a defendant that *touch and concern* the forum."<sup>68</sup>

If this is what the majority had in mind, it seems eccentric to screen in cases that touch and concern "with sufficient force," instead of a test that more naturally tests the relationship between a claim and a defendant's jurisdictional contacts. Lower courts asked to apply the "touch and concern" test have not embraced the specific jurisdiction gloss. Indeed, post-*Kiobel*, even when the claim arises out of decisions made in U.S. territory by U.S. corporations, some lower courts have dismissed cases solely because the tortious conduct occurred abroad.<sup>69</sup> Although that disposition is clearly erroneous for reasons outlined below,<sup>70</sup> at a minimum, it undermines the specific jurisdiction interpretation of the *Kiobel* test.

Chief Justice Roberts's invocation of international principles<sup>71</sup> in support of the "touch and concern" test is fundamentally anachronistic. His version of international law is its ancient "negative" form of jurisdictional line-drawing and abstention, instead of its contemporary "affirmative" forms of substantive law for communal problems, like environmental degradation and

65 Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 13–14, 19, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

66 See, e.g., *Dryden v. Calk*, 771 F. Supp. 181, 183 (S.D. Tex. 1991).

67 See, e.g., *Steinberg v. Int'l Criminal Police Org.*, 672 F.2d 927, 928 (D.C. Cir. 1981) (Ginsburg, J.).

68 533 F. Supp. 2d 116, 123 (D.D.C. 2008) (emphasis added) (quoting *Steinberg*, 672 F.2d at 928).

69 See, e.g., *Balintulo v. Daimler AG*, 727 F.3d 174, 194 (2d Cir. 2013); *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 U.S. Dist. LEXIS 103981, at \*32–34 (N.D. Ala. July 25, 2013); *Al Shimari v. CACI Int'l, Inc.*, No. 1:08-cv-827, 2013 U.S. Dist. LEXIS 92937, at \*5–6, \*17–18 (E.D. Va. June 25, 2013).

70 See *infra* Section III.D.

71 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

egregious human rights violations.<sup>72</sup> For this reason, the Court's international law touchstone—avoiding international strife—may not always cut in favor of dismissing ATS claims with no territorial link to the United States. The government of the United States made exactly this point in its brief to the *Filartiga* and *Kadic* courts, urging the *exercise* of jurisdiction in those foreign-cubed cases, specifically to avoid diplomatic strife.<sup>73</sup>

The one thing that the *Kiobel* presumption cannot mean is that ATS cases must be limited to tortious conduct within the United States. That *Kiobel* does not create such a blanket rule is clear from the separate opinion of Justices Alito and Thomas. They concurred in the judgment but would have required that the “domestic [i.e., U.S.] conduct” of the claim must be “sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations.”<sup>74</sup> In other words, Justices Alito and Thomas insisted that ATS jurisdiction can be proper only if the breach of *Sosa*-qualified norms occurs in the territory of the United States. That standard would of course bar some of the most celebrated decisions in the history of ATS litigation, including those cited with approval in *Sosa* itself, like *Filartiga*, *Kadic*, and *In re Estate of Marcos*. That the other seven Justices in *Kiobel* did not adopt the Alito-Thomas restriction suggests in turn that foreign injury cases can survive, so long as there is a sufficient connection to the United States.<sup>75</sup> Justice Kennedy's concurrence, providing a fifth vote for the Roberts opinion, explicitly confirms that the ATS might still apply to “human rights abuses *committed abroad*” in cases not covered by the “reasoning and holding” of *Kiobel*.<sup>76</sup> In short, *Kiobel* cannot provide a bright-line rule based exclusively on a territorial inquiry into where the plaintiffs' injuries occurred. Beyond that first principle, however, it is not clear exactly what exactly Justice Kennedy had in mind, although he is now the fulcrum of the Court in ATS cases. Doubtless cases involving alien plaintiffs, alien corporate defendants, exclusively foreign conduct, and foreign injury with no connection to the United States are foreclosed, but the Kennedy concurrence reaches new heights in what looks like intentional obscurity. In its entirety, Justice Kennedy's opinion reads as follows:

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72 On the essential transformation of modern international law from a negative code of abstentions into a code of affirmative and mutual obligations, see WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 62 (1964).

73 Memorandum for the United States as Amicus Curiae at 21–23, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090); Statement of Interest of the United States, *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

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

75 From this perspective, the district court in *CACI* committed reversible error, applying the bright-line standard in the Alito concurrence as though it were the majority rule. *Al Shimari v. CACI Int'l, Inc.*, No. 1:08-cv-827, 2013 U.S. Dist. LEXIS 92937, at \*2 (E.D. Va. June 25, 2013) (concluding that it “lack[ed] ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign”); *see also id.* at \*17–18.

76 133 S. Ct. at 1669 (Kennedy, J., concurring) (emphasis added).

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.<sup>77</sup>

This reference to “other cases” will remain cryptic until Justice Kennedy decides to clarify it, but one of his first observations in the oral argument suggests that he is prepared to distinguish an attenuated case like *Kiobel* from a proper case like *Filartiga*:

[I] agree that we can assume that *Filartiga* is a binding and important precedent, it's the Second Circuit. But in that case, the only place they could sue was in the United States. He was an individual. He was walking down the streets of New York, and the victim saw him walking down the streets of New York and brought the suit. In this case, the corporations have residences and presence in many other countries where they have much more—many more contacts than here.<sup>78</sup>

In other words, because *Filartiga* had no prospect of a meaningful hearing in Paraguay and because Peña-Irala had in essence used the United States as a safe haven, the ATS provided a forum of necessity. By apparent contrast, the defendants in *Kiobel* were amenable to suit in a variety of places, including Nigeria, the United Kingdom, and the Netherlands. In addition, *Filartiga* and its post-*Sosa* progeny clearly qualify as cases that involve “allegations of serious violations of international law principles protecting persons,” and they are not “covered . . . by the TVPA” because they involve allegations of war crimes, crimes against humanity, genocide, or the like.<sup>79</sup> Nor are those cases “covered . . . by the reasoning and holding”<sup>80</sup> of *Kiobel* because they do not involve foreign corporations, the foreign corporate defendants are not merely present in the United States, or the claims have some other legal or factual connection to the United States.

It is possible that Justice Kennedy's vision of *Filartiga* is a tangle of doctrines generally kept separate, especially personal jurisdiction, *forum non conveniens*, subject matter jurisdiction, comity, corporate presence, and the presumption against the extraterritorial application of substantive U.S. law. On the other hand, it is also possible to suggest a coherent way out of the chaos, namely using international law—including but not limited to interna-

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77 *Id.* (citation omitted).

78 Transcript of Oral Argument at 13–14, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

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

80 *Id.*

tional standards governing a nation's jurisdiction to prescribe—to determine which ATS cases “touch and concern” the United States and which do not. Justice Kennedy has famously turned to international standards, especially in the interpretation of the Eighth Amendment prohibition on cruel and unusual punishment, and he is viewed as one of the Court's “transnationalists,” in Professor Harold Koh's provocative characterization.<sup>81</sup>

So, what would Justice Kennedy's use of international law look like in determining which human rights cases “touch and concern” the United States? At a minimum, that use of international law would update the majority's obsolete fixation on the jurisdictional aspect of international law and offer a compelling symmetry with *Sosa*. Just as international law defines the positive substantive norms that are actionable under the ATS per *Sosa*, international law should define the positive jurisdictional reach of the ATS post-*Kiobel* and the kinds of claims it covers.

### III. AS A MATTER OF INTERNATIONAL LAW, WHAT “TOUCHES AND CONCERNS” THE UNITED STATES?

International law, which from the beginning of the Republic has been “part of our law,”<sup>82</sup> and which must be considered in the interpretation of federal statutes,<sup>83</sup> offers one authoritative definition of which cases “touch and concern” the United States. At a minimum, international law recognizes and protects every state's sovereign interest in the conduct of its nationals, including corporations, even when their conduct occurs abroad. International law also clearly recognizes and guards the interest of every state in protecting the integrity of its essential government functions, including the detention of prisoners—wherever these functions may be fulfilled or threatened. Equally clear, international law recognizes and protects the prerogative of a state to regulate conduct within its territory or within its jurisdiction and control. *A fortiori*, the conduct of an American corporation, under contract with the United States government, for the performance of governmental functions like the treatment of detainees at a U.S. facility, necessarily “touches and concerns” the United States. In addition, international law independently recognizes the sovereign interest of every state in certain grave violations of international law—including torture—and requires states to provide a meaningful remedy for those who have survived such abuses, whether at the hands of government actors or at the hands of natural and juridical persons working under contract with the government. Domestic courts should not place the United States in breach of its international obligations—and in disregard of its national commitment to the protection of human rights—by denying even the possibility of a remedy for abuses of this magnitude.

81 Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52 n.67 (2004).

82 *The Paquete Habana*, 175 U.S. 677, 700 (1900).

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

A. *The Irreducible Sovereign Interest of a State in the Conduct of Its Nationals*

Under international law, every sovereign is touched and concerned by the conduct of its own nationals. According to the International Court of Justice (ICJ), nationality “constitute[s] the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”<sup>84</sup> One inherent consequence of the connection between state and national (or citizen) is the applicability in principle of the state’s laws to its nationals. International law refers to this prerogative of sovereignty as a state’s “jurisdiction to legislate” (or prescribe) with respect to its own citizens. In this respect, section 402(2) of the *Restatement (Third) of the Foreign Relations Law of the United States* is entirely consistent with traditional and contemporary international authorities, providing, subject to certain reasonableness limitations, that “a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.”<sup>85</sup>

The Supreme Court has long recognized that the conduct of U.S. nationals—even when they live or act abroad—touches and concerns the sovereignty of the United States. In *Blackmer v. United States*, the Court observed:

While it appears that [Blackmer] removed his residence to France . . . it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States.<sup>86</sup>

The Court noted explicitly that the case raised no issue of international law because “[t]he Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy.”<sup>87</sup> The universal<sup>88</sup> understanding of the prescriptive connection between every state and its nationals is sufficient to distinguish any ATS case involving U.S. defendants from *Kiobel*.<sup>89</sup>

84 *Nottebohm Case (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 4, 23 (Apr. 6).

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

86 *Blackmer v. United States*, 284 U.S. 421, 436 (1932) (citation omitted).

87 *Id.* at 437 n.2 (citation omitted); *accord* *United States v. Bowman*, 260 U.S. 94, 98 (1922); *The Apollon*, 22 U.S. (9 Wheat.) 362, 369 (1824).

88 See 2 THE HARVARD RESEARCH IN INTERNATIONAL LAW: ORIGINAL MATERIALS 519 (John P. Grant & J. Craig Barker eds., 1966). The Supreme Court has repeatedly acknowledged the authority of *The Harvard Research* on matters of international law. See *United States v. Alvarez-Machain*, 504 U.S. 655, 685 n.31 (1992) (Stevens, J., dissenting); *United States v. First Nat’l City Bank*, 379 U.S. 378, 396 n.17 (1965) (Harlan, J., dissenting).

89 In the immediate aftermath of *Kiobel*, some district courts have rightly determined that cases against U.S. citizens sufficiently “touch and concern” the United States to over-

For these purposes, international law draws no distinction between natural and juridical persons: within the state of their nationality, corporations are inarguably within the jurisdiction to prescribe. In some cases, corporate nationality is a simple question of where the corporation is incorporated. Thus, for example, the International Law Commission has determined—for purposes of diplomatic protection—the same understanding that has governed jurisdiction to prescribe, namely that “the State of nationality [of a corporation] means the State under whose law the corporation was incorporated.”<sup>90</sup> As with natural persons, special cases may arise making the determination of a particular corporation’s nationality contestable,<sup>91</sup> and a choice of law rule may be necessary when more than one state’s law applies. But none of that potential complexity undermines the essential connection of the United States to the conduct of companies incorporated in the United States.

*B. The Irreducible Sovereign Interest of a State in Conduct that Occurs Wholly or Substantially Within Its Jurisdiction or Control*

International law recognizes another category of cases that “touch and concern” the United States to the extent that they involve conduct that occurs within the territory of the United States or within its jurisdiction or control. The territoriality principle of jurisdiction to prescribe may be considered the *sine qua non* of sovereignty: every state retains legislative authority over conduct that occurs within its physical territory, meaning that it can attach legal consequences to such conduct, even if its effects are felt somewhere else. In the ATS context, tortious conduct by a defendant within U.S. territory in violation of the law of nations or a treaty of the United States would satisfy *Kiobel*, in which the Court found that none of the relevant conduct occurred in the United States. Tortious conduct in American territory in violation of the law of nations would satisfy even the most demanding test adopted by Justices Alito and Thomas in their separate concurrence in *Kiobel*.

Crucially, the international principle of territoriality is not limited to the physical boundaries of a state but also includes areas within a state’s effective control and jurisdiction. Famously that includes vessels on the high seas,

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come the *Kiobel* presumption, even if the tort was committed abroad. *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 U.S. Dist. LEXIS 114754, at \*36–44 (D. Mass. Aug. 14, 2013); *Ahmed v. Magan*, No. 2:10-cv-00342, 2013 U.S. Dist. LEXIS 117963, at \*4 (S.D. Ohio Aug. 20, 2013) (report and recommendation of magistrate judge), *adopted by* No. 2:10-CV-00342, 2013 U.S. Dist. LEXIS 142538 (Oct. 2, 2013).

90 Int’l Law Comm’n, Draft Articles on Diplomatic Protection with Commentaries, 58th Sess., art. 9, at 52, U.N. Doc. A/61/10; GAOR, Supp. No. 10 (2006).

91 *Id.* (“[W]hen the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”).

which international law treats as extensions of the flag state's territory,<sup>92</sup> and special regimes that govern jointly administered areas or international condominiums.<sup>93</sup> Because international law recognizes the reality that the modern world of jurisdiction is not divided neatly into territorially defined boxes, it was no violation of international law when the Supreme Court determined that the presumption against extraterritoriality did not apply to U.S. military facilities located outside of the United States.<sup>94</sup> Applied to ATS cases post-*Kiobel*, these precedents suggest that services provided under a U.S. government contract and delivered at a U.S. military installation—completely under U.S. military control though located in a foreign country—“touch and concern” the territory of the United States. Under international law, control of that magnitude translates into effective jurisdiction, which translates in turn into prescriptive authority, a legislative prerogative that reflects the international community's conclusions about which matters touch and concern which states. There is no doubt that Abu Ghraib was within the reach of U.S. law as far as international law is concerned, and there is no principled distinction at international law that would exclude the application of the ATS there.

*C. The Irreducible Sovereign Interest of a State in Its Essential Governmental Functions, Whether Carried Out, or Threatened by, Nationals or by Non-Nationals*

Under principles of international law, the conduct of non-nationals may also touch and concern the United States “with sufficient force to displace the [*Kiobel*] presumption.”<sup>95</sup> Specifically, international law has long recognized the legitimacy of a state's jurisdiction to prescribe with respect to conduct outside its territory that involves its national security or essential government functions, regardless of the actor's nationality.<sup>96</sup> This so-called “protective principle” is sometimes oversimplified to cover only terrorism and related crimes, but it also clearly covers extraterritorial conduct that involves essential and routine government functions, like maintaining security, running detention facilities, controlling immigration, and minting currency, *inter alia*. In *United States v. Bowman*,<sup>97</sup> for example, the Supreme Court relied on the protective principle in a case involving a conspiracy to defraud a corporation in which the United States was a stockholder, acknowl-

92 S.S. *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7); Geneva Convention on the High Seas art. 6, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

93 See, e.g., The Antarctic Treaty arts. I & V(1), Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. See generally Vincent P. Bantz, *The International Legal Status of Condominia*, 12 FLA. J. INT'L L. 77 (1998).

94 See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the detainee petitioners were in “a territory that, while technically not part of the United States, is under the complete and total control of our Government”); *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

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

96 See generally IA SHEARER, STARKE'S INTERNATIONAL LAW 183–212 (11th ed. 1994).

97 260 U.S. 94 (1922).



edging “the right of the Government to defend itself against obstruction, or fraud *wherever perpetrated*.”<sup>98</sup> Crucially, the protective principle covers foreign conduct not only by the state’s own nationals but also by foreign citizens.<sup>99</sup> The fact that ATS cases sound in tort and not criminal law does not diminish the state interest in the conduct of those who operate under a government contract, providing essential services instead of threatening them. In either case, international law recognizes that a state is intimately connected to—touched by and concerned with—the conduct of its contractors.

International law doctrines other than jurisdiction to prescribe reinforce the necessary juridical relationship between contractors—regardless of citizenship—and the governments with which they do business. In its authoritative catalogue of the circumstances under which a state may bear responsibility under international law, the International Law Commission (ILC) concluded that: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>100</sup>

In its authoritative commentary to article 8, the ILC clarified that even unauthorized or illegal conduct by a private actor can trigger the state’s responsibility as a matter of international law: “[W]here persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.”<sup>101</sup>

Recognizing the potential for its own state responsibility internationally, the United States requires that its contractors—regardless of citizenship and location of service—operate in a dense regulatory environment, profoundly controlled by the government itself. All of this qualifies as evidence of the kind of contractor conduct that “touches and concerns” the United States.<sup>102</sup>

98 *Id.* at 98 (emphasis added).

99 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) & cmt. f (1987) (recognizing that a state’s jurisdiction to prescribe extends to “certain conduct outside its territory *by persons not its nationals* that is directed against the security of the state or against a limited class of other state interests” (emphasis added)).

100 Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 53d Sess., art. 8, at 47, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

101 *Id.* art. 8, at 48 cmt. 8.

102 See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (expanding the United States’ special maritime and territorial jurisdiction to include U.S. operated facilities overseas by amending 18 U.S.C. § 7 to include “the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States”); Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261–3267 (2012)) (subjecting contractors to federal criminal prosecution).

*D. The Irreducible Sovereign Interest of a State in Grave Violations of International Human Rights Law*

At the time the ATS was adopted, Emmerich de Vattel was the most influential international jurist, and he clearly articulated the communal interest in assuring accountability for certain international wrong-doers:

[Although] the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule, the villains who, by the quality and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race.<sup>103</sup>

The Supreme Court has clearly understood and vindicated that interest in a variety of settings, especially those involving pirates and slave traders. In the modern era, torture, genocide, and crimes against humanity make the perpetrators the enemies of all humankind because humanitarian disasters and grave human rights violations respect no territorial lines.<sup>104</sup> Because these grave wrongs have international ramifications no matter what their domestic location may be, there is the obligation of all nations to support and promote the international order as the “society of the human race.”<sup>105</sup> As acknowledged by the European Commission in its amicus brief in *Kiobel*, some wrongs—no longer limited to piracy and slave trading—are “so repugnant that all States have a legitimate interest and therefore have the authority to suppress and punish them.”<sup>106</sup>

Modern international law recognizes that gross violations of human rights touch and concern all nations, including the United States. The term of art for such wrongs is that they are said to violate obligations *erga omnes*, of legal interest to all states. The doctrine of *erga omnes* recognizes “the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country.”<sup>107</sup> In *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*,<sup>108</sup> the ICJ explained that *erga omnes* obligations may “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the *principles*

103 1 EMMERICH DE VATTEL, *THE LAW OF NATIONS* § 233, at 170 (reprinted ed. 1805) (1758).

104 See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169, 179, 186–87 (2d Cir. 2009) (finding that nonconsensual medical experimentation with an anti-meningitis drug was a factor in a polio outbreak in Nigeria, triggering an international outbreak spreading across much of Africa and re-infecting twenty previously polio-free countries); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

105 2 VATTEL, *supra* note 103, § 35, at 211.

106 See Brief of the European Comm’n on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party at 16, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

107 *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1962 I.C.J. 319, 425 (Dec. 21) (separate opinion of Judge Jessup).

108 Judgment, 1970 I.C.J. 3 (Feb. 5).

and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>109</sup>

International law grants a wide measure of discretion to states to enforce international law through their domestic judicial systems:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . . .<sup>110</sup>

In a more modern idiom, international law secures the sovereign authority of a state to hold accountable those who violate a customary norm of human rights law.

But international law goes further than simply allowing domestic accountability: it requires states to provide a meaningful remedy against perpetrators. Vattel himself envisioned these state obligations with “respect to great crimes . . . such as are equally contrary to the laws, and the safety of all nations,”<sup>111</sup> in which “[n]ations . . . are bound to observe towards each other all the duties which the safety and advantage of that society require[ ].”<sup>112</sup> And today, the *erga omnes* legal obligation imposed upon all states to participate in the prevention and remedy of gross violations of human rights by any other state is well established.<sup>113</sup> Equally significant, certain treaties include provisions *aut dedere aut judicare*, which require states to “extradite or prosecute” those who violate the treaty, and there is an emerging understanding in customary law that those who commit crimes against humanity are subject to

109 *Id.* at 32 (emphasis added).

110 S.S. *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). The ICJ has continued to rely on the *Lotus* principle. See, e.g., Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 415 (July 22); Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 238–39 (July 8); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 15, 101, 135 (June 27); see also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 77–79 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) (stating that *Lotus* “represents a continuing potential in the context of jurisdiction”).

111 2 Vattel, *supra* note 103, § 76, at 225.

112 *Id.* § 1, at 195.

113 See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9) (finding that Israel’s violations of its *erga omnes* obligation “to respect the right of the Palestinian people to self-determination” and towards “certain of its obligations under international humanitarian law” were “the concern of all States”); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Judgment, 1996 I.C.J. 595, 616 (July 11) (stating that “the rights and obligations enshrined by the Convention [on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277] are rights and obligations *erga omnes*” and that “the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention”).

the same obligation even if it is not contained in a treaty.<sup>114</sup> Historically, the wrongs alleged in this case, including torture, have triggered the *aut dedere aut judicare* obligation and therefore touch and concern the United States.

In the recent case of *Belgium v. Senegal*, the ICJ examined the obligation of *aut dedere aut judicare* within the context of the Convention Against Torture, and clarified the nature and basis of the state obligation.<sup>115</sup> The court held unanimously that Senegal was required to take action to hold an individual within its territory accountable for violations of customary international law norms.<sup>116</sup> “State parties . . . have a common interest to ensure, in view of their shared values,” that acts in violation of international human rights norms “are prevented and that, if they occur, their authors do not enjoy impunity.”<sup>117</sup> Further, a nation’s obligation is “triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred.”<sup>118</sup>

The Supreme Court explained in *Kiobel* that the presumption against extraterritoriality is designed to prevent “unintended clashes between our laws and those of other nations which could result in international discord.”<sup>119</sup> But immunity—or safe haven in the United States—for breaches of international norms that satisfy *Sosa*, i.e. norms that are specific, universal, and obligatory, *also* potentially disrupts diplomatic relations, even if the essential wrongs were committed abroad. For this reason, the Court’s international law touchstone—avoiding discord—may not always cut in favor of dismissing ATS claims with no territorial link to the United States.

#### IV. ONCE MORE WITH FEELING: CORPORATIONS ARE NOT IN PRINCIPLE IMMUNE FROM OBLIGATIONS UNDER INTERNATIONAL LAW

In *Kiobel*, the Supreme Court pointedly ignored the question at the heart of the Court of Appeals’ decision and much of the public interest in the case, namely whether corporations may in principle bear international obligations to respect human rights norms.<sup>120</sup> The conflict among the circuit courts, which triggered the grant of certiorari in *Kiobel*, remains as trenchant as ever, with the Second Circuit as the sole outlier among the circuit courts of appeals in an overall consensus that corporations are not immune from inter-

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114 See Special Rapporteur, *Fourth Rep. on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), Int’l Law Comm’n, U.N. Doc. A/CN.4/648 (May 31, 2011) (by Zdzisław Galicki) (reporting on the customary international law norm of *aut dedere aut judicare* for crimes against humanity).

115 See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 426, 449, 451–63 (July 20).

116 *Id.* at 451–63.

117 *Id.* at 449.

118 *Id.*

119 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted).

120 *Id.* at 1669.

national law for purposes of the ATS.<sup>121</sup> It is important that domestic law not recognize a law-free zone for corporations, effectively immunizing entities that commit or participate in serious human rights violations. International law neither creates nor tolerates such an immunity.

First, certain egregious conduct violates international human rights standards, whether committed by state or non-state actors. Although it is true that international criminal tribunals distinguish between natural and juristic persons for purposes of their own jurisdiction, nothing in international law precludes the imposition of civil or tort liability for corporate misconduct. Thus, the proper question is not whether human rights treaties explicitly impose liability on corporations. It is whether those treaties distinguish between juristic and natural individuals in a way that exempts the former from all responsibility. There is nothing in the text or context of those treaties supporting that distinction.

Second, it is wrong to conclude from the alleged absence of human rights cases against corporations that they are exempt from human rights norms: international law never defines the means of its domestic implementation and remediation, leaving states a wide berth in assuring that the law is respected and enforced as each thinks best. It hardly follows that states remain free to allow violations so long as a corporation commits the wrong. Equally important, in adopting the ATS, Congress directed the federal courts to allow civil actions for violations of international law that take tortious form, without specifying the types of defendants who might be sued. As recognized by the Supreme Court, “[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants.”<sup>122</sup> Over a century ago, the Attorney General of the United States concluded that corporations are in principle capable of violating the law of nations or a treaty of the United States for purposes of the ATS.<sup>123</sup>

In determining that corporations could have no obligations under international law, the Second Circuit in *Kiobel* apparently felt compelled by dicta in a footnote in *Sosa*,<sup>124</sup> but nothing in *Sosa* requires so distorted a focus. To the contrary, *Sosa* rejected the aggressive corporate immunity positions advanced by business groups appearing as amicus curiae, reasoning only that “the determination whether a norm is sufficiently definite to support a cause of action” is “related . . . [to] whether international law extends the scope of

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121 Prior to the Supreme Court’s decision in *Kiobel*, every other circuit court to address the issue disagreed with the Second Circuit’s conclusion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745–46 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated*, 527 F. App’x 7 (D.C. Cir. 2013); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

122 *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 438 (1989).

123 *Mexican Boundary—Diversion of the Rio Grande*, 26 Op. Att’y Gen. 250 (1907) (concluding that aliens injured by a private company’s diversion of water in violation of a bilateral treaty between Mexico and the United States could sue under the ATS).

124 *Kiobel*, 621 F.3d at 123, 149.

liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>125</sup> The Supreme Court thus distinguished those wrongs that require state action (e.g., torture)<sup>126</sup> from those that do not (e.g., genocide). The text shows that the Court in *Sosa* was referring to a single class of non-state actors (natural and juristic individuals), not to two separate classes as assumed by the Second Circuit panel in *Kiobel*.

Nor is it relevant that the *Sosa* Court would only recognize a cause of action, derived from the common law, for certain violations of international law: “The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”<sup>127</sup> The ATS requires only that the tort be “committed” in violation of a specific, universal, and obligatory norm of international law, not that international law itself recognize a right to sue or distinguish for purposes of civil liability between natural and juristic individuals. Authoritative interpretations of international law also establish that there is no law-free zone for corporate actions, especially with respect to human rights obligations.<sup>128</sup> And because corporate liability for serious harms is a universal feature of the world’s legal systems, it qualifies as a general principle of law—one of the sources of international norms.<sup>129</sup>

Equally important, the Second Circuit approach, if made general, would place the United States in breach of its international legal obligation to provide a meaningful remedy for violations of human rights, no matter who or what violates them. The Second Circuit majority’s conclusions allow governments to privatize their way around their obligations under international human rights law: the simple expedient of creating a corporation to run prisons or maintain civil order or fight wars would effectively block the imposition of liability on the entity that is directly responsible for the violation. The Second Circuit’s approach thus conflicts with the obligation of states to pro-

125 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 & n.20 (2004).

126 It is clear in context that the Supreme Court was referring to “torture” as defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85. Other international instruments prohibiting torture do not have the state action requirement, including common article 3 of the Geneva Convention on the Laws of War. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

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

128 *See supra* Section III.A.

129 Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(c) (1987) (“A rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.”).

vide a meaningful remedy for such abuses.<sup>130</sup> This conclusion has already been articulated by the Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations, who noted in 2009: “As part of their duty to protect, States are required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction—in short, to provide access to remedy.”<sup>131</sup>

#### CONCLUSION

Modern litigation under the ATS replicates some of the fundamental changes in contemporary international law. In the thirty-four years since the *Filartiga* decision, some major developments in international legal thinking have been reflected in decisions under the ATS, including, among others, the progressive narrowing of an exclusive domestic jurisdiction, the attenuation of the distinction between state and non-state actors, the weakening of the distinction between public international law and private international law, and the partial blurring of the distinction between treaty and custom. Although *Kiobel* suggests that there is an outer limit to ATS jurisdiction, that decision hardly amounts to the death knell of human rights litigation under the statute. If anything, *Kiobel* invites considerably more litigation than it resolves. Perhaps, when the Supreme Court is again asked to clarify its understanding of the Alien Tort Statute—as it inevitably will be—the substantive *and* the jurisdictional standards of international law in all its current breadth will inform the Court’s disposition.

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130 See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 15, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (“[W]here a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”).

131 Special Rep. of the U.N. Secretary-General, *Promotion of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 87, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

