

# THE ATS CAUSE OF ACTION IS *SUI GENERIS*

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## INTRODUCTION

In *Kiobel v. Royal Dutch Petroleum Co.*, the Court considered the extraterritorial reach of the tort action for violations of customary international law.<sup>1</sup> *Kiobel* was a “foreign-cubed” case in which a foreign plaintiff sued a foreign defendant for damages arising from conduct in a foreign country.<sup>2</sup> The Justices wrote four different opinions, but they were unanimous in refusing to create a federal common law tort remedy in a foreign-cubed case.<sup>3</sup> At least they were unanimous in holding that a remedy is not available in a case like *Kiobel*.<sup>4</sup> Some, including the present author, are disappointed in the Court’s decision. But in an important sense, the decision was by definition correct. When nine Justices of different political and philosophical persuasions reach a unanimous decision, it is foolhardy, or at least quixotic, to argue that the Court erred. As Justice Robert H. Jackson once quipped: “We are not final because we are infallible, but we are infallible only because we are final.”<sup>5</sup> After *Kiobel*, the federal courts will have to decide whether any significant<sup>6</sup> aspect of the common law tort for violations of international law should survive the Court’s unanimous decision.

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1 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

2 *Id.*

3 See *id.*; *id.* at 1669 (Kennedy, J., concurring); *id.* at 1669 (Alito, J., concurring); *id.* at 1670 (Breyer, J., concurring).

4 A remedy may be available in a foreign-cubed case implicating a direct U.S. interest, like protecting the proper operation of the U.S. market system, and probably is available where an international criminal seeks a retirement or vacation haven in the United States. See *infra* notes 144–51, 162–66 and accompanying text.

5 *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

6 There are no extraterritorial objections to an international tort action arising from conduct on American soil, but the likelihood of the federal courts creating a remedy for such misconduct is quite small. See *infra* note 82 and accompanying text.

In considering whether the Alien Tort Statute (ATS)<sup>7</sup> action survives *Kiobel*, the courts should pay careful attention to the action's *sui generis* nature. We all learned in law school that a cause of action consists of a norm or rule of conduct that establishes the illegality of particular conduct and a remedy for the violation of the norm. We seldom, however, need to pay careful analytical attention to the differences between the norm and the remedy. With the exception of ATS claims, every cause of action under American law involves a norm and a remedy legislated by the same sovereign. In international torts, however, the norm and the remedy do not come from the same sovereign. The norm comes from international law, and the remedy is legislated by federal courts.

Because ATS actions are *sui generis*, there is a very real potential for courts to resort to forms of analysis that make sense in the usual context of tort litigation and arbitrarily apply these established forms to international torts. The presumption against extraterritoriality is an example of a general tort concept that does not adapt well to ATS claims.<sup>8</sup> Rather than using labels to decide these cases, the courts should adopt a functional analysis keyed to the international tort's unique nature. The ultimate result will be the same in some cases but may be different in others.

The ATS is a subject matter jurisdiction statute and does not create a statutory cause of action. In *Sosa v. Alvarez-Machain*, the Court explained that the ATS “‘clearly does not create a statutory cause of action,’ and . . . the contrary suggestion is ‘simply frivolous.’”<sup>9</sup> Nevertheless there is a relationship between the ATS and the substantive cause of action. The *Sosa* Court held that the ATS should be read as an implicit congressional authorization or approval of tort remedies to be fashioned by the federal courts as federal common law.<sup>10</sup> This notion of common law stemming from a grant of jurisdiction is not new. The federal common law of admiralty<sup>11</sup> and of collective bargaining agreements<sup>12</sup> usually are traced to grants of jurisdiction.<sup>13</sup> But a congressional authorization to create federal common law is significantly different from a legislative cause of action. In the latter situation, Congress has legislated a remedy and a norm or rule of conduct, and determining the

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7 28 U.S.C. § 1350 (2006).

8 See *infra* notes 60–68 and accompanying text. Another tort concept that is a bad fit for ATS claims is the idea of official capacity. See William R. Casto, *Notes on Official Immunity in ATS Litigation*, 80 *FORDHAM L. REV.* 573, 580–86 (2011).

9 542 U.S. 692, 713 (2004) (quoting William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 *CONN. L. REV.* 467, 479–80 (1986)).

10 *Id.* at 720.

11 See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 654–59 (6th ed. 2009). Admiralty law is common law in the sense that it is judge-made law.

12 *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); see FALLON ET AL., *supra* note 11, at 663–65.

13 The better view is that these areas of the law are intrinsically federal. See FALLON ET AL., *supra* note 11, at 653–54.

substantive scope of the cause of action is almost entirely a matter of statutory interpretation. In the former, the statute is silent on the substantive issue of who should win or lose on the merits. The grant of jurisdiction simply tells the courts the general subject matter that the common law action should address. The actual substantive contours of the cause of action that dictate who should win or lose are left to the courts' sound discretion.<sup>14</sup> For example, the ATS says nothing about a possible defense of official immunity or how clearly a norm of international law must be established in order to support a remedy. The courts have assumed these and other tasks.<sup>15</sup>

While the ATS provides few significant insights into the substantive scope of the international tort action, clear congressional guidance lies hidden in plain sight. In 1992, Congress expressly endorsed the modern concept of an international tort action by enacting the Torture Victim Protection Act (TVPA).<sup>16</sup> In doing so, the Congress consciously codified *Filartiga v. Pena-Irala*,<sup>17</sup> which was a foreign-cubed case. The TVPA cannot be read as anything other than a conscious determination that even in a foreign-cubed case, U.S. law should provide a tort remedy for violations of the international law against torture and extrajudicial killings.

If Congress has overtly considered and enacted a statutory rule of decision for the international torts of torture and extrajudicial killing, the courts should treat the statutory rule as something akin to persuasive precedent in ATS actions. Thus in the TVPA, Congress explicitly addressed the extent to which the availability of a remedy under another country's laws should preclude a TVPA remedy, and the same issue may arise in an ATS action. Although the TVPA on its face does not apply to an ATS claim involving the slave trade or aiding and abetting torture, the courts should nevertheless defer to Congress's expressed political wisdom regarding the availability of a remedy under a foreign nation's law.<sup>18</sup>

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14 This has been the practice regarding the admiralty grants of jurisdiction, which have been construed as authorizing the federal courts to fashion a judge-made admiralty law. See *infra* notes 61–65 and accompanying text.

15 See Casto, *supra* note 8, at 580–86 (discussing courts' development of federal common law of official immunity); *infra* notes 34–41 and accompanying text (noting courts' development of the norms to be vindicated).

16 28 U.S.C. § 1350 (2006).

17 630 F.2d 876 (2d Cir. 1980).

18 In crafting the TVPA, Congress consciously grappled with the relevance of the availability of remedies in other countries and legislated an exhaustion requirement. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(b), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note). Surely Congress's consciously expressed political wisdom should be embraced by courts for ATS litigation. See William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 660–61 (2006). Unfortunately, some courts have preferred their own political judgment on this issue to Congress's. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 754–55 (9th Cir. 2011) (en banc) (refusing to accept defendant's argument "that exhaustion is always required" for all claims).

The present Article occasionally invokes the political wisdom or judgment found in the TVPA. In fashioning common law rules, judges are not bound by the TVPA, but judges should give serious consideration to the Act's statutory precedent. If a court chooses to ignore the clear implications of an analogous TVPA rule, the court, as a practical matter, may be substituting its political judgment for Congress's judgment. To repeat, however, the idea of deference to a formally enacted congressional judgment should apply only if the relevant TVPA rule stemmed from conscious congressional decisionmaking.

In some cases, an issue may arise under the TVPA that Congress has not consciously considered. In these cases, courts construing the TVPA itself must grapple with the Act's particular words and give the TVPA a reasonable judicial construction. In this situation, the judicial construction is not based upon Congress's conscious political judgment. When a rule of decision under the TVPA is not based upon Congress's considered political judgment, there is no basis for deferring to the TVPA rule in an ATS case.

This Article begins by recalling the distinctions among the entirely different concepts of subject matter jurisdiction, the norms giving rise to a tort action, and the remedy.<sup>19</sup> Then the Article turns to the Justices' opinions in *Kiobel* with special attention paid to the Chief Justice's use of the presumption against extraterritoriality.<sup>20</sup> Finally, the Article considers situations in which the United States has a distinct interest that easily justifies an extraterritorial remedy.<sup>21</sup>

## I. ANATOMY OF AN INTERNATIONAL TORT ACTION

All complaints in federal court are divided into three parts.<sup>22</sup> Because our national courts are courts of limited jurisdiction, the first paragraph of every federal complaint must allege the court's subject matter jurisdiction. The rest of the complaint presents the plaintiff's substantive claim. The second part of the complaint, which takes up the most space, describes particular conduct by the defendant that violates some legal norm or rule of conduct. The third and final part, which frequently is a single sentence, prays for a judicial remedy. Each of these three parts implicates legal rules that are quite different from the other two. At least that is the theory.

### A. Subject Matter Jurisdiction

In *Sosa v. Alvarez-Machain*, the Court held that the ATS is only a subject matter jurisdiction statute and does not create a cause of action.<sup>23</sup> The statute merely provides that a federal court may adjudicate an international tort

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19 See *infra* Part I.

20 See *infra* Part II.

21 See *infra* Part III.

22 FED. R. CIV. P. 8(a). Of course, there are also defenses that must be raised by the defendant. *Id.* 8(b).

23 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

action and is therefore silent on the tort action's substantive contours.<sup>24</sup> Moreover, there is evidence that sophisticated members of the first federal Congress understood this distinction between substance and jurisdiction and viewed the Judiciary Act's jurisdictional provisions in this light.<sup>25</sup>

The *Sosa* Court also addressed the substantive scope of the international tort action and held that the legal norm or rule of conduct comes from international law, but that the remedy is provided by domestic federal common law.<sup>26</sup> The ironic result is that *Sosa* turned the ATS into a redundant anachronism. Most people believe that customary international law is a peculiar type of federal common law.<sup>27</sup> Moreover, the remedy clearly is controlled by traditional federal common law. Therefore the well-pleaded complaint in an international tort action is replete with federal questions. The plaintiff may not prevail without first alleging a violation of international law, which is technically classified as federal law, and then establishing that federal law provides a remedy. There is no state law or foreign domestic law anywhere in the complaint. As a result, the courts' general federal question jurisdiction embraces international tort actions, and the ATS is an anachronistic redundancy insofar as jurisdiction is concerned.<sup>28</sup>

### B. *Legal Norm or Rule of Conduct*

In international tort actions, the legal norm or rule of conduct comes from international law—not the domestic law of the United States or of any other country. We classify customary international law as federal common law, but this particular type of common law is unlike any other.<sup>29</sup> Like the tort action, it is *sui generis*. In our modern legal culture, the phrase “common law” has come to mean legal principles legislated by judges. In legislating common law, judges fashion legal rules that they, the judges, believe make sense for our society. In contrast, international law may not be legislated by any particular country.<sup>30</sup> When a federal court applies international law as federal common law, the court lacks legislative authority. In international tort actions, a court discovers pre-existing rules of conduct that have been

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24 *Id.*

25 *Id.* at 713; Casto, *supra* note 9, at 479 n.60.

26 *See Sosa*, 542 U.S. at 724–29.

27 *See* Casto, *supra* note 18, at 641; *see also infra* notes 29 and 31 and accompanying text (elaborating on customary international law's status as “federal common law”).

28 Casto, *supra* note 18, at 664–65. In this respect, the ATS is like the many specialized federal question statutes in the U.S. Code that were enacted when the general federal question statute had an amount-in-controversy requirement. After the removal of the amount-in-controversy requirement in the general statute, specialized federal question statutes no longer served any purpose, with a few exceptions not relevant to ATS claims. *See* FALLON ET AL., *supra* note 11, at 746–47.

29 Casto, *supra* note 18, at 641–42. As a practical matter, classifying international law as federal law empowers the Supreme Court to correct erroneous state court interpretations of international law.

30 *See* Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 116 (Malcolm D. Evans ed., 2d ed. 2006).

“legislated’ through the political actions of the governments of the world’s States.”<sup>31</sup> The special provenance of the norms remedied in international tort actions should play a significant role with respect to the tort’s extraterritorial reach.

In *Sosa*, the Court held that the international norms to be remedied must be “accepted by the civilized world and defined with . . . specificity.”<sup>32</sup> *Kiobel* elaborates upon this limitation by noting that the international law norm must be “‘specific, universal, and obligatory.’”<sup>33</sup> This requirement of universal acceptance and specificity is best viewed as a prudential, remedial concept and not as a principle of international law.<sup>34</sup> Because the requirement is domestic common law and not international law, it should be viewed as a remedial limitation.

The requirements of specificity and universal acceptance drastically shorten the list of international law norms remedied by the common law tort. In addition, suits for torture and nonjudicial killing are preempted by the TVPA. As a practical matter, one of the most significant remaining rules of conduct is the norm that forbids aiding and abetting torture and nonjudicial killing.<sup>35</sup> The apparent depredations in *Kiobel* clearly fit the international rule of conduct regarding aiding and abetting. Shell was not providing indirect assistance to a foreign government’s implementation of a policy unrelated to Shell’s direct interests. The plaintiffs alleged that Shell’s subsidiary provided Nigerian military and police forces with “food, transportation, and compensation” for the purpose of attacking remote villages and “beating, raping, killing, and arresting residents.”<sup>36</sup> This alleged direct support of Nigerian kill teams cannot have been a lark or a frolic. If true, the only credible explanation is that Shell sought to facilitate a more economical extraction of natural resources by aiding and abetting the killing and tortur-

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31 Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561–62 (1984).

32 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); *accord Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Kennedy, J., concurring); *id.* at 1671 (Breyer, J., concurring); *see also Casto*, *supra* note 18, at 652–54.

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

34 *See* Ingrid Wuerth, *Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1938 (2010). Professor Wuerth concludes that the norm to be enforced is therefore a domestic-law norm. *Id.* at 1936–37. Classifying the requirement as a remedial limitation avoids confusion over the problem of extraterritoriality and is more in keeping with the Supreme Court’s description of the tort.

35 *See, e.g., Romero v. Drummard Co.*, 552 F.3d 1303, 1315–16 (11th Cir. 2008) (recognizing that the ATS allows plaintiffs to seek relief for claims of aiding and abetting torture and extrajudicial killing); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1078–98 (C.D. Cal. 2010), *order vacated sub nom. Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013) (holding that aiding and abetting of human rights abuses, with respect to the facts at issue, did not meet the requirements of specificity and international acceptance required by the ATS). In addition, international law clearly outlaws a few other attacks on life and human dignity including the slave trade and genocide.

36 *Kiobel*, 133 S. Ct. at 1662–63.

ing of villagers who were “protesting the environmental effects of [Shell’s] practices.”<sup>37</sup>

### C. Remedy

The legal norm or rule of conduct is used to determine whether the defendant has acted unlawfully. The remedy establishes the legal consequences of the defendant’s unlawful conduct. As a matter of practice, American lawyers instinctively understand this difference, but we usually roll the two concepts together into a single, almost seamless concept called a cause of action. Nevertheless, remedial rules are quite different from rules of conduct. For example, we all know that even if a defendant is acting unlawfully, a court will not grant the remedy of an injunction if the plaintiff’s remedy at law is adequate. Similarly, the Supreme Court has held in a series of cases that a private plaintiff who is harmed by the defendant’s violation of an act of Congress is not entitled to a remedy unless the act clearly provides a private remedy.<sup>38</sup>

The distinction between a legal norm or rule of conduct and the consequent remedy is charged with enormous significance in international tort actions. The norm and the remedy come from two entirely different sources of law. The norm comes from international law, which is based upon the practice of nations. International law norms have been crafted by the community of nations to regulate the entire world. In contrast, the remedy comes from idiosyncratic U.S. domestic law, which is legislated by the United States and by no other nation.

Because the United States lacks unilateral power to legislate international law, virtually all the restrictions imposed upon international tort actions are best viewed as domestic law and not international law. *Kiobel*’s holding that the tort remedy is not available in a foreign-cubed case is a remedial restriction imposed as a matter of domestic federal common law. This particular restriction, however, is just one of many restrictions imposed upon the remedy, and many of the other restrictions are pertinent to the issue of extraterritoriality.<sup>39</sup> As a practical matter, and without regard to issues of extraterritoriality, the panoply of limitations effectively bars the federal courts from roaming the world to correct any and all wrongs.

Insofar as the issue of extraterritoriality is concerned, the most significant remedial restriction is that the international norm must be accepted by the civilized world. Because international law is not always clear, there is a danger that federal judges might err in deciding that a particular category of conduct violates international law. If the judge were wrong, the judge would, as a practical matter, be applying an idiosyncratic domestic rule of conduct to regulate activities in a foreign country. The requirement of acceptance

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37 *Id.* at 1662.

38 See FALLON ET AL., *supra* note 11, at 690–715.

39 See *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (listing exhaustion, *forum non conveniens*, comity, and executive branch statements of interest).

guards against judges imposing domestic rules of conduct under the guise of international law. This is not to suggest that judges would consciously do so. The problem is most realistically viewed as one of mistake rather than one of abuse of power. The requirement of acceptance is a bulwark against these mistakes and also against a judge's wishful belief that a norm exists when it does not.

There are other restrictions relevant to the issue of extraterritoriality. As early as 1795, the Attorney General of the United States suggested that a federal court could not try an international tort action unless the court had personal jurisdiction over the defendant.<sup>40</sup> This limitation requires that defendants have at least some contacts with the territory of the United States. The minimum contacts necessary to obtain personal jurisdiction may not be sufficient in and of themselves to justify supplying a remedy for a defendant's overseas misconduct,<sup>41</sup> but there is no doubt that this requirement effectively excludes the vast majority of the world's disputes from courts in the United States.

In addition, other significant limitations to the international tort remedy include *forum non conveniens*<sup>42</sup> and official immunity.<sup>43</sup> Moreover, a remedy is not available in a U.S. court if the country where the tort took place provides a meaningful remedy.<sup>44</sup> Finally, the Court in *Sosa* noted that in resolving particular disputes, the courts should pay serious attention to the executive branch's statements of interest in respect of particular cases.<sup>45</sup> The executive branch's authority to provide the courts with ad hoc advice is especially relevant to the issue of extraterritoriality.<sup>46</sup>

## II. THE JUSTICES' OPINIONS

The Justices wrote four opinions in *Kiobel*, and they all concluded that the tort remedy was not available. The Chief Justice and Justice Kennedy did not announce a general rule. They literally restricted themselves to the particular facts of *Kiobel*. Justice Alito, with Justice Thomas concurring, went beyond the facts and espoused an approach to extraterritoriality that would, as a practical matter, eliminate the international tort action. Justice Breyer,

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40 See *Breach of Neutrality*, 1 Op. At'y Gen. 57, 58 (1795) (stating that a crime "may be legally prosecuted . . . in any district wherein the offenders may be found").

41 In *Kiobel*, the Chief Justice properly noted that mere corporate presence in the United States is not enough to justify providing a tort remedy for the corporation's misconduct overseas. 133 S. Ct. at 1669; see also *id.* at 1678 (Breyer, J., concurring) ("Thus I agree with the Court that here it would 'reach too far to say' that such 'mere corporate presence suffices.'" (quoting *id.* at 1669 (majority opinion))).

42 See *id.* at 1674 (Breyer, J., concurring).

43 See *Casto*, *supra* note 8.

44 See *Casto*, *supra* note 18, at 659–61 (discussing parallel remedial schemes under foreign law).

45 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); accord *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (noting that a judicial policy of "giving weight to the views of the Executive Branch" should "minimize international friction").

46 See *infra* notes 118–43 and accompanying text.

with Justices Ginsburg, Sotomayor, and Kagan concurring, also went beyond the facts and argued for an approach that would allow an extraterritorial remedy in some cases involving a distinct U.S. interest.

### A. *The Chief Justice's Opinion*

The Court's opinion, written by Chief Justice Roberts, analyzed the issue of extraterritoriality as turning on the well-known presumption against extraterritoriality. According to the Chief Justice, the issue in *Kiobel* involved the scope of a "proper claim under the ATS."<sup>47</sup> After a careful exploration of the ATS's original enactment in 1789, he concluded that nothing in the ATS rebuts the presumption against extraterritoriality.<sup>48</sup> Much of his exploration is technically flawed and, more fundamentally, gives insufficient attention to the *sui generis* nature of the common law tort action for violations of international law. If, however, focus is shifted from the presumption against extraterritoriality to the Chief Justice's clearly expressed concerns regarding *Kiobel's* foreign policy implications, his conclusion makes sense. Every member of the Court relied upon foreign policy concerns to deny an extraterritorial remedy.

Any exploration of the ATS's original enactment to determine the substantive scope of the international tort action is an anachronistic and fruitless enterprise. At the outset, there is a technical problem. The original ATS<sup>49</sup> is no longer the law and has not been the law since 1873 when Congress reenacted the statute with changes.<sup>50</sup> In 1911, Congress again reenacted the statute with another change<sup>51</sup> and finally reenacted it a third time in 1948 with additional changes.<sup>52</sup> Throughout these reenactments, Congress presumably assumed that it was simply carrying forward the statute's original subject matter jurisdiction principle, and therefore the ATS's origins continue to be relevant to its current jurisdictional scope.<sup>53</sup> There is no evidence, however, that Congress ever thought of the substantive scope of the authorized common law cause of action other than the reasonable assumption that the action would be a tort claim for violation of international law.

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47 133 S. Ct. at 1664.

48 *Id.* at 1666–69.

49 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (codified as amended at 28 U.S.C. § 1350 (2006)).

50 1 Rev. Stat. § 563(16) (1875). The amendment deleted the original ATS's express recognition of state court concurrent jurisdiction. Compare Judiciary Act of 1789, ch. 20, § 9, with Rev. Stat. § 563(16) (illustrating the amendment).

51 The 1911 reenactment added a comma after the word "only." Act of March 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087, 109. Some have argued that the comma has affected the statute's jurisdictional scope. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 518, 519 & n.352 (2011).

52 28 U.S.C. § 1350 (2006).

53 In *Sosa*, the Court noted that since 1789, "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). This statement makes sense in respect of the scope of jurisdiction conferred.

The concept of extraterritoriality is used to define the substantive scope of a tort action and is not a principle of subject matter jurisdiction. In *Morrison v. National Australia Bank Ltd.*,<sup>54</sup> the Court corrected the lower courts' misimpression that extraterritoriality limits subject matter jurisdiction. In the Court's words, "to ask what conduct [the statute] reaches is to ask what conduct [the statute] prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case.'"<sup>55</sup>

Notwithstanding the ATS's well-established jurisdictional nature, the Act has influenced the Court's analysis of the availability on the merits of a tort remedy. In *Sosa*, the Court reasoned that the first federal Congress must have assumed that a common law remedy for some violations of international law was available.<sup>56</sup> Therefore we may reasonably infer that the Act recognizes legislative power in the federal courts to create a common law remedy. In the Court's words, the ATS is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations."<sup>57</sup> It should be noted in this regard that the Court's analysis posits a congressional recognition of the federal courts' legislative power to create common law remedies. No one in eighteenth-century America believed that the common law was legislated by judges.<sup>58</sup> If our focus shifts from the statute's original enactment to the most recent reenactment in 1948, the analysis becomes sensible. By 1948, sophisticated American lawyers had come to believe that the common law is a peculiar body of law legislated by judges.<sup>59</sup>

Although the ATS authorizes the creation of a common law remedy, the Act is significantly different from a statutory cause of action. In a statutory cause of action, Congress creates both the norm and the remedy, and determining the action's substantive scope is essentially a matter of statutory interpretation. In sharp contrast, the ATS creates neither a norm nor a remedy. Therefore, interpretative rules developed to divine Congress's purpose regarding the substantive scope of a statutory claim are not directly applicable.

The Court's reading of the ATS is similar to the traditional understanding of the statutes vesting the courts with subject matter jurisdiction over admiralty cases and collective bargaining agreements. These two latter statutes usually are read as authorizing the courts to legislate a federal common

54 130 S. Ct. 2869 (2010).

55 *Id.* at 2877 (quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 585 (2009)); *accord* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citing *Morrison* for the proposition that "the question of extraterritorial application" is "not a question of jurisdiction").

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

57 *Kiobel*, 133 S. Ct. at 1663 (alteration in original) (quoting *Sosa*, 542 U.S. at 724).

58 *See generally* William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907 (1988) (discussing the shift to positivism in the United States and the relatively fast acceptance of the *Erie* doctrine that resulted).

59 *See id.* at 934, 945-46.

law of admiralty and collective bargaining agreements.<sup>60</sup> The plain meaning of these statutes obviously limits the substantive scope of the authorized common law to maritime issues and the enforcement of collective bargaining agreements, but the courts have never consulted these grants of jurisdiction to determine any of the substantive details of the authorized common law.

In the case of maritime litigation, the courts have essentially ignored the statute's reference to admiralty. Professors Grant Gilmore and Charles Black concluded that, "[a]s was inevitable when the 'maritime law' was placed in the hands of judges trained in the Anglo-American common law tradition, maritime law amongst us has been heavily influenced, substantively and methodologically, by shoreside law."<sup>61</sup> Similarly, Professor David Robertson concluded that "it has been taken as settled that United States courts are not *bound* to follow any segment of the international maritime law."<sup>62</sup>

There is another problem with looking at the ATS to determine the substantive scope of the authorized action. The statute was enacted over two hundred years ago. The same act that created the ATS also vested the federal courts with admiralty jurisdiction.<sup>63</sup> Presumably members of the First Congress believed that the newly created federal courts would resort to then-prevalent principles of admiralty law to resolve maritime claims. Does that mean that more than two centuries later, substantive admiralty law should be frozen in the late eighteenth century or in some way significantly controlled by the original grant of jurisdiction? The merits of a twenty-first-century tort claim arising from twenty-first-century misconduct should be governed by twenty-first-century principles. So it is with admiralty law,<sup>64</sup> and so it should be with international tort actions.

Setting aside the problem of anachronism, there is a more fundamental objection to using the presumption against extraterritoriality to limit the international tort action. At the beginning of the Court's opinion, the Chief Justice explained that the interpretive rule against extraterritoriality "reflects the 'presumption that United States law governs domestically but does not rule the world.'"<sup>65</sup> The international tort action, however, is quite unlike the usual statutory claim. The international action is *sui generis*. It gives effect to rules of conduct that have been recognized by all the civilized world to rule the entire world. The United States does not rule the world, but international law does. All the world's nations are bound by international law.

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60 See *supra* notes 11–13 and accompanying text.

61 GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 46 (2d ed. 1975).

62 DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 138 (1970).

63 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1333 (2006)).

64 See, e.g., *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970) (applying the modern view of wrongful death actions); see also *supra* notes 58–59 and accompanying text (discussing the shift to positivism in the United States).

65 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

Without exception, every precedent in the Court's opinion regarding the presumption against extraterritoriality involved the interpretation of an act of Congress that created a stand-alone cause of action. All of the precedents involved statutory schemes in which Congress has legislated norms or rules of conduct and provided a damage remedy for violations of the norm. When Congress creates a domestic statutory cause of action, the purpose usually is to regulate a domestic problem. Therefore in the absence of congressional guidance, the interpretive presumption stacking the deck against extraterritoriality makes sense. But the rule of conduct in international tort actions is, by definition, designed to regulate the entire world.

For example, the *Kiobel* Court invoked *Morrison v. National Australia Bank Ltd.*<sup>66</sup> nine times<sup>67</sup> as the leading precedent for the presumption. The plaintiffs in that case were Australians who purchased shares in an Australian corporation.<sup>68</sup> The shares were listed on the Australian Stock Exchange Limited but were not traded on any American exchange.<sup>69</sup> The foreign plaintiffs sued the foreign corporation for violations of U.S. securities laws.<sup>70</sup> The plaintiffs contended that an act of Congress imposed substantive rules of conduct on an Australian corporation's conduct towards Australian shareholders who purchased their shares in Australia on an Australian exchange.<sup>71</sup> The Court's decision that Congress did not intend to dictate to Australians how to treat each other in Australia should come as no surprise.<sup>72</sup>

Because the international tort action does not involve the United States' imposition of idiosyncratic American rules of conduct upon activities in a foreign nation, the presumption against extraterritoriality should not be applied to this *sui generis* tort. The difference between the international tort and the usual statutory cause of action, however, should not be pressed too far. The difference is a prudential factor rather than a logical juggernaut. There is little doubt that the mere availability of the remedy might have an impact upon conduct in a foreign country.<sup>73</sup> Nevertheless the difference is

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66 130 S. Ct. 2869 (2010).

67 *Kiobel*, 133 S. Ct. at 1661, 1664–67, 1669.

68 *Morrison*, 130 S. Ct. at 2876.

69 *Id.* at 2875.

70 *Id.* at 2876.

71 *See id.* at 2875–76, 2888.

72 *See id.* at 2883, 2888.

73 Professor Anthony Colangelo argues that the problem of extraterritoriality does not arise in ATS litigation because the norm or rule of conduct comes from international law. *See* Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65 (2013); Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329 (2013). But he presses the norm's special provenance too far. He believes that the problem of extraterritoriality has no relevance to the process of fashioning a federal common law remedy. There is little doubt, however, that the availability of this tort remedy may have some impact on how people conduct themselves in a foreign country. Justice Holmes's "bad man" analysis is relevant: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences" of his actions. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Without a legal remedy, the "mate-

significant because the rules of conduct are not idiosyncratic American rules. They are rules created by the world's nations to govern the world. Therefore, as a general proposition, there is no conflict between the international tort's rules of conduct and the legitimate domestic rules of conduct legislated by each of the world's nations.<sup>74</sup>

The *Kiobel* Court briefly recognized the difference between ATS claims and the statutory cause-of-action cases that created and elaborated upon the presumption against extraterritoriality, but the Court may not have fully analyzed the distinction between international tort actions and statutory causes of action. In a brief, conclusory sentence the Court noted that there may be some differences between international tort actions and statutory causes of action, “[b]ut we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”<sup>75</sup> Actually, the principles underlying the canon of interpretation are significantly weaker in the context of an international tort action. We may reasonably indulge a presumption that when Congress legislates rules of conduct, it has in mind domestic activities. But the ATS does not create rules of conduct. The ATS is an open-ended grant of jurisdiction over violations of international law—law that by definition rules the entire world.

More significantly, in a leading case, Justice Holmes considered the plaintiff's contention that the federal antitrust statute regulated how people should treat each other in Panama.<sup>76</sup> Holmes was surprised by this contention because “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>77</sup> Of course, in international tort actions, “the character of an act as lawful or unlawful” is not determined by U.S. law. The rule of conduct comes from international law. There is no doubt that the international legal rule against aiding and abetting torture and nonjudicial killing applies in Nigeria.

Although the presumption against extraterritoriality does not easily fit international tort actions, one of the bases for the presumption is clearly implicated by some of these tort actions. Foreign policy problems may arise when the United States regulates activities in a foreign country. The Chief Justice explained that the presumption “‘serves to protect against unintended clashes between our laws and those of other nations which could

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rial consequences” of a corporation's despicable misconduct in a foreign country are significantly diminished.

74 In the United States, this general proposition is at the heart of the *Charming Betsy* canon that, where possible, domestic law should be construed not to violate international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

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

76 See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKLEY J. INT'L L. 85 (1998).

77 *American Banana Co.*, 213 U.S. at 356.

result in international discord.”<sup>78</sup> The problem of unintended clashes, however, is not nearly as significant in international tort actions because there is no legitimate clash between clearly established principles of international law and the domestic law of any country. The Chief Justice also noted that “[t]he presumption . . . helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”<sup>79</sup> Surely every member of the Court agrees with this fundamental vision of the proper allocation of foreign policy powers among the three branches of government. In respect of foreign policy matters, either Congress or the executive (depending upon the issue) is at the top of the totem pole, and the judiciary is at the bottom. When the Chief Justice turned from the interpretive presumption to the common law tort, he reiterated his foreign policy concerns by quoting extensively from the *Sosa* Court’s opinion regarding foreign policy.<sup>80</sup>

A sound argument can be made that the foreign policy implications of cases like *Kiobel* are significantly attenuated because U.S. courts are merely giving effect to a rule of conduct that the entire world, including Nigeria, agrees is applicable to conduct in Nigeria. Presumably the Chief Justice and the other members of the Court believe that the provision of a damage remedy is the real problem in cases like *Kiobel*.

If the presumption against extraterritoriality were not used in international tort litigation, there is reason to believe that foreign policy considerations would lead the Court to reach the same result in foreign-cubed cases like *Kiobel*. Justice Breyer, with three Justices concurring, did not believe that the presumption against extraterritoriality was applicable.<sup>81</sup> Nevertheless, he agreed with the Court’s conclusion.

In *Kiobel*, the Chief Justice indicated that the presumption against extraterritoriality served as a proxy for foreign policy concerns.<sup>82</sup> If so, the proxy serves no apparent purpose in classes of cases that do not implicate serious foreign policy concerns. *Kiobel* should be read as being based upon foreign policy concerns and not the blind application of the presumption against extraterritoriality. In classes of cases without significant foreign policy concerns, the presumption would serve no purpose other than to create an arbitrary limitation to the remedy.

In *Kiobel*, the Chief Justice also expressed a concern that providing a remedy would mean that other nations “could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”<sup>83</sup> By renouncing extraterritoriality in

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78 *Kiobel*, 133 S. Ct. at 1664 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

79 *Id.*

80 *See id.* at 1664–65.

81 *Id.* at 1670 (Breyer, J., concurring).

82 *See id.* at 1664 (majority opinion).

83 *Id.* at 1669.

*Kiobel*, the Court avoided “such serious foreign policy consequences, and . . . defer[red] such decisions, quite appropriately, to the political branches.”<sup>84</sup>

Justice Breyer responded to this specific concern by referencing a broad array of limiting principles that restrict the international tort action to a narrow range of relatively uncontroversial cases.<sup>85</sup> These limiting principles “obviate the majority’s concern that our jurisdictional example would lead other nations . . . to hale our citizens into their courts.”<sup>86</sup> Another response to the Chief Justice’s concern is that the issue has already been resolved by the political branches. When Congress considered enacting the TVPA, the Bush I Administration expressed this very concern and a minority of the Senate Judiciary Committee expressly reiterated it in the Senate report of the bill that became the TVPA.<sup>87</sup> Congress, however, was unpersuaded and enacted the TVPA, which President George H.W. Bush then signed into law. Likewise, the Chief Justice’s concern has no relevance when the United States hales its own citizens into its own courts.<sup>88</sup>

In addition to Justice Breyer’s response and Congress’s prior institutional rejection of the proposition, there is a powerful empirical argument against the Chief Justice’s theoretical concern. The courts in ATS cases, and Congress in the TVPA, have already let the cat out of the bag. Foreign nations are not particularly interested in the peculiar United States’ allocation of legislative power between the judiciary and the legislature. From the viewpoint of foreign nations, the United States has been providing a worldwide tort remedy for over thirty years. Moreover, it is an empirical fact that foreign nations have not haled our citizens into their courts.<sup>89</sup> Perhaps other nations have not returned the favor because, as Justice Breyer has noted, the United States’ tort remedy is severely restricted by an array of limiting principles unrelated to extraterritoriality. In any event, in the thirty-plus years since U.S. courts began trying international tort actions, the Chief Justice’s concern has not reached fruition.

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84 *Id.*

85 *Id.* at 1677 (Breyer, J., concurring).

86 *Id.* (internal quotation marks omitted).

87 S. REP. NO. 102-249, at 15 (1991) (stating the minority views of Senators Simpson and Grassley).

88 See Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1778–79 (2014).

89 In over thirty years, the only significant litigation against one of our citizens in another country’s courts apparently is a 2009 conviction in absentia of a CIA station chief in Italy. See Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1535 n.384 (2014). The case was a criminal prosecution for kidnapping and rendition (presumably for torture) in Italy of an Italian resident. If the alleged facts are true, this case bears no resemblance to ATS claims. The defendant simply violated domestic Italian criminal law in Italy. Moreover, the defendant was prosecuted by the Italian government itself, and not by the victim. See Jim Yardly, *Italy: Former C.I.A. Chief Requests Pardon for 2009 Rendition Conviction*, N.Y. TIMES, Sept. 14, 2013, at A7, available at <http://www.nytimes.com/2013/09/14/world/europe/italy-former-cia-chief-requests-pardon-for-2009-rendition-conviction.html>.

There is reason to believe that the majority would reconsider the value of the presumption against extraterritoriality in classes of cases that do not significantly implicate foreign policy concerns. One of the more significant aspects of the majority opinion is what the Court did not hold. In the final paragraph of the Chief Justice's opinion, he concluded, "*On these facts*, all the relevant conduct took place outside the United States."<sup>90</sup> Elsewhere, the Chief Justice has warned against reaching beyond the facts of a case to decide issues not before a court. He believes that "the cardinal principle of jurisdictional restraint [is] if it is not necessary to decide more, it is necessary not to decide more."<sup>91</sup> If the Chief Justice's concluding words in *Kiobel* are taken literally, the Court's decision should be read as not intimating an opinion regarding cases that are not foreign-cubed<sup>92</sup> and perhaps even foreign-cubed cases in which the United States has a distinct interest.<sup>93</sup>

### B. Justice Kennedy's Opinion

Justice Kennedy concurred in the Court's opinion and, like the Chief Justice, assumed that the presumption against extraterritoriality applied. In addition, he elaborated on the Chief Justice's final statement that "[o]n these facts, all the relevant conduct took place outside the United States."<sup>94</sup> Justice Kennedy made explicit what was implicit in the Chief Justice's opinion. He noted that future "cases may arise . . . [not] covered by . . . the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial applications may require some further elaboration and explanation."<sup>95</sup>

### C. Justice Alito's Opinion

Justice Alito, with Justice Thomas concurring, took the most extreme position regarding the existence of an ATS cause of action. As a practical matter, he wants to eliminate the entire international tort action. He believes that the remedy should be available only when a defendant's "domestic conduct [in the United States] is sufficient to violate an international law norm that satisfies *Sosa*[ ]."<sup>96</sup> His approach would be the death knell for ATS claims. Independent of international law, the United States maintains a robust system of common law and constitutional tort remedies. Given this empirical fact, it is highly unlikely that a single member of the Court, much less Justices Alito and Thomas, would vote to enable plaintiffs to

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90 *Kiobel*, 133 S. Ct. at 1669 (emphasis added).

91 *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). It should be noted that the Supreme Court's limited resources, and its obligation to provide guidance to all the nation's courts justify a less strict philosophy of judicial restraint.

92 See *infra* notes 152–61 and accompanying text.

93 See *infra* notes 167–69 and accompanying text.

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

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

96 *Id.* at 1670 (Alito, J., concurring).

use an international tort action to make an end run around existing domestic law tort actions in a case involving domestic misconduct.<sup>97</sup> Perhaps Justice Alito decided that discretion was the better part of valor. It is a little late in the day to argue that the international tort action does not exist. The lower courts have been adjudicating these claims for nearly forty years, and Congress has endorsed the idea by enacting the TVPA. Finally, the Court's *Sosa* opinion embraced the concept while setting limits to the action's scope.

#### D. Justice Breyer's Opinion

Justice Breyer, with Justices Ginsburg, Sotomayor, and Kagan, agreed that the tort remedy should not be extended to a foreign-cubed case like *Kiobel*.<sup>98</sup> Justice Breyer, however—like Justice Alito—chose to address potential fact patterns not present in *Kiobel*.

The language of Justice Breyer's opinion makes frequent use of the word "jurisdiction" without stating whether he means legislative jurisdiction or the federal courts' subject matter jurisdiction. For example, he states more than once that, "[i]n this case . . . the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction."<sup>99</sup> When Justice Breyer and the other Justices make superficially ambiguous statements like this, they cannot possibly be referring to the courts' subject matter jurisdiction. The issue in *Kiobel* was extraterritoriality—not subject matter jurisdiction—and extraterritoriality simply is not a subject matter jurisdiction concept.<sup>100</sup> In *Kiobel*, the Court reached the merits of the claim. If the *Kiobel* case had been dismissed for lack of subject matter jurisdiction, the plaintiffs would have been free to refile in a state court of general jurisdiction.<sup>101</sup>

The best reading of Justice Breyer's opinion is that most of his references to jurisdiction refer to the federal courts' legislative jurisdiction or power to make common law, and not the courts' subject matter jurisdiction to adjudicate particular claims. For example, he wrote, "[W]e should look to international jurisdictional norms to help determine the statute's jurisdictional scope."<sup>102</sup> Then he immediately turned to sections 402 to 404 of the current *Restatement (Third) of the Foreign Relations Law*,<sup>103</sup> which cover a country's power to legislate substantive laws that regulate conduct.<sup>104</sup> These sec-

97 See *Casto*, *supra* note 18, at 657–59.

98 *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

99 *Id.*; see also *id.* at 1674 ("I would interpret the statute as providing jurisdiction only where distinct American interests are at issue."); *id.* at 1677 ("Applying these jurisdictional principles to this case . . . I agree with the Court that jurisdiction does not lie.").

100 See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); see also *supra* notes 54–55 and accompanying text.

101 Moreover, the case would not be removable to federal court because the district court would lack subject matter jurisdiction.

102 *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring).

103 *Id.*

104 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

tions do not address the concept of subject matter jurisdiction to adjudicate a claim.<sup>105</sup>

To a certain extent, Justice Breyer's reliance on the *Restatement* is misplaced. The issue of extraterritoriality in ATS is whether courts should exercise their conferred common law powers to create a remedy. The *Restatement* addresses the limits of a country's power to prescribe and is silent on the issue of whether a country, acting within the limits of international law, should exercise its legislative authority. Nevertheless, to the extent that countries generally recognize legislative authority over particular categories of cases, the creation of a tort remedy should not present significant foreign policy problems.

Like the Chief Justice, Justice Breyer reads the ATS as empowering courts to legislate a federal common law of remedies for violations of international law.<sup>106</sup> But unlike the Chief Justice, he does not read the ATS as being neutral on the substantive scope of the remedy.<sup>107</sup> He starts with an assumption that the statute directs courts to legislate a damage remedy against pirates and their modern-day counterparts.<sup>108</sup> He apparently uses this concept of modern-day pirates to encompass the obvious fact that customary international law has changed since 1789.<sup>109</sup> At the same time, he sees comity as a counterbalance to the statute's nudge toward the creation of a remedy.<sup>110</sup> The decision to create a remedy must "be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement."<sup>111</sup>

As a matter of respect for a foreign country's sovereignty, Justice Breyer believes that the international tort remedy should be made available "only where distinct American interests are at issue."<sup>112</sup> He believes that this limitation "also should help to minimize international friction."<sup>113</sup> Breyer suggests three situations involving a distinct American interest, but only two have any significance.<sup>114</sup> He believes that an extraterritorial international tort remedy should be available against U.S. citizens for their egregious misconduct overseas and against foreigners who seek a vacation or retirement haven

105 The concept of subject matter jurisdiction is addressed in the *Restatement*. *Id.* § 421.

106 *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring).

107 *Id.* at 1674.

108 *Id.*

109 *Id.* at 1671.

110 *Id.*

111 *Id.* at 1671; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring) (asking whether exercise of ATS jurisdiction would be consistent with notions of comity).

112 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

113 *Id.*

114 *Id.* The insignificant situation involving a distinct American interest is an "alleged tort . . . on American soil." *Id.* As a practical matter, the federal courts are highly unlikely to create an international tort remedy for misconduct on American soil. *See supra* note 91 and accompanying text.

in the United States.<sup>115</sup> These two situations do not offend notions of comity because the distinct U.S. interest is obvious, and foreign nations agree that the United States may properly create a remedy in these two situations.<sup>116</sup>

### III. CASES INVOLVING DISTINCT UNITED STATES INTERESTS

Notwithstanding the Court's refusal to create a tort remedy in foreign-cubed cases like *Kiobel*, the United States has a self-evident interest in providing a remedy in these cases. We are part of an international community and are more or less committed to and bound by the values embodied in international law. Presumably all the Justices agree that the United States has an interest in giving effect to well-established principles of international law.<sup>117</sup> Therefore *Kiobel* must be read as a decision that this obvious national interest, standing alone, is not enough to warrant the judicial creation of a remedy in foreign-cubed cases. This does not mean that the United States has no interest in giving effect to rights under international law in a foreign-cubed case. It does mean, however, that absent additional considerations, a judge-made, common law remedy is not available. In cases involving considerations either not present or not considered in *Kiobel*, a far stronger argument can be made in favor of the creation of a remedy.

#### A. Constitutional Considerations

Where relevant, the Constitution's framework of government always should be considered. Under the plan of the Constitution, primary responsibility for making foreign policy is vested in the President and Congress, while the judiciary plays a distinctly secondary role.<sup>118</sup> In this regard, international tort actions obviously implicate the nation's foreign policy.<sup>119</sup> Therefore, when shaping the substantive scope of the tort remedy, courts should welcome foreign policy insights from the (more) political branches of government. In particular, there is an established principle that in considering the disposition of a particular international tort case, "federal courts should give serious weight to the executive branch's view of the case's impact on foreign policy."<sup>120</sup> Certainly, courts should not effectively bar either Congress or the

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115 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

116 See *infra* notes 152–56, 162–66 and accompanying text.

117 In particular, Justice Breyer's requirement of "distinct American interest" apparently means something more than the general interest of all nations to give effect to international law.

118 See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* chs. II–V (2d ed. 1996).

119 See *Kiobel*, 133 S. Ct. at 1665.

120 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); see also *Kiobel*, 133 S. Ct. at 1671, 1677 (Breyer, J., concurring) (noting that federal courts should give deference to the foreign policy views of the executive). The *Sosa* Court noted this principle in the specific context of an international tort action against U.S. corporations. The practice of deference to the executive branch in cases implicating foreign policy is a murky subject. See Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort*

executive branch from the foreign policy process. Unfortunately, however, a decision regarding the tort's extraterritorial reach can have precisely this exclusionary effect.

On balance, Congress has championed the concept of an international tort action. The First Congress enacted the ATS using broad language that encompassed "all causes."<sup>121</sup> More significantly, insofar as the substantive scope of the tort is concerned,<sup>122</sup> Congress chose in 1948 to reenact the statute.<sup>123</sup> While the ATS does not directly address the modern concept of a federal tort action, the TVPA does. In enacting this recent legislation, Congress was fully aware of the *Filartiga* decision and consciously chose to endorse and codify that decision.<sup>124</sup> Moreover, Congress's clear purpose was to enact an extraterritorial remedy for violations of international law in a foreign-cubed case. The TVPA must be read as a conscious legislative endorsement of the concept of an international tort remedy in a foreign-cubed torture case.

To be sure, the TVPA does not specifically address a tort remedy for aiding and abetting torture, but nothing in the statute even hints at the possibility that the victims of aiding and abetting torture should be denied a remedy. Indeed, the statute's legislative history establishes precisely the opposite intent.<sup>125</sup> To say that the statute precludes a common law remedy for aiding and abetting defies common sense. For example, consider a slight variation of the alleged facts in *Kiobel*. Suppose that a U.S. corporation, with full knowledge of what was to transpire, helicoptered governmental kill teams into a remote village to murder and torture the inhabitants. Suppose further, as was alleged in *Kiobel*, that the corporation, with full knowledge of the mission's purpose, was paying the kill teams' salaries. What is the possible basis of a credible distinction between providing a remedy

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*Statute*, 107 AM. J. INT'L L. 601, 612–18 (2013). There is no doubt, however, that it exists. The practice probably is not subject to principled analysis.

121 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)).

122 See *supra* notes 63–64 and accompanying text.

123 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006).

124 See, e.g., H.R. REP. NO. 102-367, at 3–4 (1991) (citing the *Filartiga* decision as demonstrating the need for the TVPA legislation); S. REP. NO. 102-249, at 3–4 (1991) (same).

125 The House Report explains:

[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [sic] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. REP. NO. 102-367, at 4.

Likewise, the Senate Report provides that "claims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact." S. REP. NO. 102-249, at 5 (footnote omitted).

against the torturers but not against a fully complicit American aider and abettor?<sup>126</sup>

Congress, through the ATS and especially the TVPA, has recognized and endorsed the concept of an international tort action. In marked contrast, the executive branch's judgment has been mixed. In *Filartiga*, which was a foreign-cubed case, President Carter's Administration supported the tort remedy,<sup>127</sup> as did the Clinton Administration.<sup>128</sup> More recently, President Obama's Administration has espoused a more nuanced approach to extraterritoriality in ATS litigation.<sup>129</sup> In contrast, the Reagan and Bush II Administrations vehemently opposed ATS litigation.<sup>130</sup> As a matter of constitutional government, it would be a mistake to view either of these diametrically opposed attitudes as either correct or incorrect. Rather, the differing views quite properly represent differing visions of foreign policy. The best reading of this mixed record is the unexceptional conclusion that different Presidents have different visions of appropriate foreign policy. Indeed, one of the primary purposes of a presidential election is to empower the voters to affirm or reject existing presidential policies. When the Court determines the extraterritorial reach of the common law remedy, the Court is, in effect, preferring one past President's view of foreign policy over another President's vision. The Court, however, does not ordinarily pick winners and losers in foreign policy disputes.

As a practical matter, a judicial decision to deny an extraterritorial remedy will bar some Presidents from implementing their views of appropriate foreign policy. If a President, like President Carter, President Clinton, or President Obama, believes that foreign policy is best served by bringing international tortfeasors to justice, the President's only political remedy will be to go hat-in-hand to Congress. The net result is that the Supreme Court will have made a foreign policy decision that literally preempts the President from the foreign policy decision-making process. Under the plan of the Con-

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126 *Kiobel*, itself, involved a foreign aider and abettor and therefore implicated foreign policy concerns that are not present in a suit against a U.S. corporation. See *supra* notes 78–79 and accompanying text.

127 Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), reprinted in 19 INT'L LEG. MATERIALS 585, 601–06 (1984); see Stephens, *supra* note 89, at 1481–82.

128 See Stephens, *supra* note 89, at 1504.

129 In *Kiobel*, the government argued against an extraterritorial remedy but cautioned against a general one-size-fits-all rule regarding extraterritoriality: "Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise." Supplemental Brief for the United States as Amicus Curiae in Support of Partial Affirmance at 5, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491). In particular, the government cautioned that an extraterritorial ATS remedy against "a U.S. national or corporation" might be appropriate. *Id.* at 21. The Obama Administration expressly disclaimed the Bush II Administration's more categorical argument against extraterritoriality in two prior cases. *Id.* at 21 n.11.

130 See Stephens, *supra* note 89, at 1486–87, 1504–05. The Obama Administration has rejected the Bush II Administration's categorical approach. See *supra* note 129.

stitution, the Court should be leery of forbidding particular Presidents from implementing their particular visions of appropriate foreign policy.

In sharp contrast, a Supreme Court decision in favor of an extraterritorial remedy will not preempt either Congress or the President. Whether the Court holds for or against the extraterritorial remedy, the Congress may correct the Court's decision.<sup>131</sup> More significantly, if the Court holds in favor of an extraterritorial remedy, the Court will not preempt Presidents whose views of foreign policy lead them to disfavor the international tort action. These Presidents may still provide statements of interest to the courts on a case-by-case basis. As the *Sosa* Court noted, in particular cases the "federal courts should give serious weight to the executive branch's view."<sup>132</sup>

In the context of *Chevron* deference to agency interpretations of statutes,<sup>133</sup> Justice Scalia has considered the interaction between judicial decisionmaking and changing executive branch policies.<sup>134</sup> One of his insights is that the proper meaning of an ambiguous statute might change over time: "[I]t seems to me desirable that [an agency] be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of Congressional oversight."<sup>135</sup> In Scalia's mind, if the Supreme Court were to pronounce its own vision as an authoritative interpretation of a statute, the judicial interpretation would preempt the executive branch's power to interpret and reinterpret the law to fit the times. He believes that "[o]ne of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change."<sup>136</sup> Elsewhere, Justice Scalia has argued against this "ossification of federal law."<sup>137</sup> The issue of extraterritoriality does not involve *Chevron* deference, but a holding that there is no extraterritorial remedy nevertheless will ossify federal law and place the issue beyond the control of a President whose views of appropriate foreign policy do not coincide with the Court's judgment.

In *United States v. Mendoza*,<sup>138</sup> Chief Justice Rehnquist voiced this same concern about preempting changes of policy from one President to another. Writing for a unanimous Court, he held that the ordinary rules of offensive issue preclusion should not be applied against the United States itself. He explained that "the panoply of important public issues raised in government litigation may quite properly lead successive administrations of the executive

131 Given Congress's generally expansive approach to this tort remedy, *see supra* notes 121-25 and accompanying text, it is reasonable to favor an extraterritorial remedy.

132 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *see supra* note 45 and accompanying text.

133 *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

134 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513.

135 *Id.* at 518.

136 *Id.* at 517.

137 *United States v. Mead Corp.*, 533 U.S. 218, 247, 249 (2001) (Scalia, J., dissenting).

138 464 U.S. 154 (1984).

branch to take differing positions with respect to the resolution of a particular issue.”<sup>139</sup> Therefore, the Court unanimously refused to apply nonmutual collateral estoppel to bar the Reagan Administration from re-litigating a specific issue previously decided by a district court in the Carter Administration.<sup>140</sup>

To quote Justice Scalia, when the Court bars the international tort remedy’s extraterritorial application, the rule of decision applies “for ever and ever,”<sup>141</sup> and there is an “ossification of federal law.”<sup>142</sup> Justice Scalia gave scant attention to the possibility that Congress might change the law to fit changing times. Perhaps he thinks that the enormous friction and inertia inherent in the legislative process significantly restricts Congress’s practical ability to amend or correct Supreme Court error. If so, a judicial determination to deny the remedy’s extraterritorial reach will significantly limit Congress’s ability to implement its view of appropriate policy. This restriction on the remedy seems inconsistent with Congress’s general endorsement of the concept of an international tort action in the ATS and especially the TVPA.

In the case of *Chevron* deference, executive agencies derive their power from a congressional delegation, and if Congress is dissatisfied with the agency’s or the Court’s interpretation of the law, Congress in theory may correct the interpretation. But in the case of international tort actions, an ossification of federal law directly implicates the executive’s independent constitutional power to participate in shaping foreign policy. Notwithstanding the executive’s clear constitutional role in the arena of foreign affairs and the equally clear foreign policy implications of the international tort action, a ruling against extraterritoriality inevitably will exclude the executive branch from implementing some particular President’s visions of proper foreign policy.

If a particular President believes that an expansive approach to the tort action is in the nation’s best interest, a judicial determination against extraterritorial applications forecloses the President’s ability to guide the nation’s foreign policy regarding the enforcement of international law. To be sure, the President might beg Congress to change the Court’s decision, but this would place the President in a distinctly subordinate role with respect to foreign policy. To repeat, friction and inertia in Congress would seriously impede the President’s ability to participate in the process. The President would be at the mercy of Congress. This is contrary to the Constitution’s allocation of independent presidential authority to participate in making the nation’s foreign policy. The practical result would be to ossify the Supreme

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139 *Id.* at 161; *id.* at 164; *see also* Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

140 *See Mendoza*, 464 U.S. at 154.

141 Scalia, *supra* note 134, at 517.

142 *Mead Corp.*, 533 U.S. at 249–50 (Scalia, J., dissenting).

Court's policy judgment and to place the Court over the head of the President in making foreign policy on this particular issue.

Of course, it is an empirical fact that some Presidents have had and probably will have a more jaundiced view of the international tort action, but to repeat: a ruling that the tort has extraterritorial scope will not freeze these Presidents out of the process. If a President believes that particular litigation is detrimental to foreign policy, the executive has the power to influence the litigation by submitting a statement of interest to the court. This avenue for executive relief cannot be dismissed as mere theory. Federal courts clearly pay careful attention to executive statements of foreign policy concerns.<sup>143</sup>

The administration of foreign policy is a highly nuanced and constantly changing process that is disserved by blanket rules like the presumption against extraterritoriality. In this regard, some overseas depredations by U.S. corporations may shock the conscience of an administration inclined as a general matter to dislike international tort actions. Moreover, so few international tort actions are actually filed that a case-by-case analysis will not overwhelm the executive.

### B. *United States Markets*

In some cases, a strong argument can be made that the United States has a distinct and significant economic interest in a corporation's third-world depredations. The allegations in *Kiobel* of corporate torture, murder, and other despicable misconduct, if true, are impossible to explain on any basis other than that Royal Dutch embarked upon these depredations in order to gain a commercial advantage in the extraction of Nigerian oil. In recent years, Nigeria has accounted for nine to eleven percent of U.S. crude oil imports.<sup>144</sup> If a significant amount of Royal Dutch's Nigerian oil is being sold in the United States through Shell Oil, its wholly owned subsidiary,<sup>145</sup> the Shell family of corporations has obtained a competitive advantage in its sales to U.S. markets—an advantage obtained through alleged torture, murder, and other heinous acts.

Using market systems to allocate goods and services is one of the most important public policies in our society. Many believe that our market economy brought us victory in the Cold War. When one competitor gains a com-

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143 See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), the Court held that the individual defendant was not entitled to the protection of foreign sovereign immunity, but left open the possibility that the defendant might be entitled to a defense of official immunity. *Id.* at 2292–93. On remand, the district judge rejected the official immunity defense, because the “government has determined that the defendant does not have foreign official immunity.” *Yousuf v. Samantar*, No. 1:04 CV 1360, 2011 WL 7445583, at \*1 (E.D. Va. Feb. 15, 2011).

144 U.S. ENERGY INFO. ADMIN., NIGERIA OVERVIEW 12 (2013), available at <http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf>. More recently, the percentage has gone down but still remains significant. *Id.*

145 See HOOVER'S INC., HOOVER'S COMPANY RECORDS: SHELL OIL COMPANY 2 (2014).

petitive advantage over others through torture and murder, the market's operation becomes distorted by unlawful and unacceptable advantages. Such a conscious assault on our domestic system for allocating goods and services should be enough to support a judicial remedy.

The Court briefly considered a similar market-based argument in *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*,<sup>146</sup> which involved the extraterritorial reach of the Sherman Act's price-fixing rules. *Hoffmann* was a foreign-cubed case in which the foreign plaintiffs alleged that an international price-fixing conspiracy injured the plaintiffs in a foreign country. The plaintiffs argued that extending the Sherman Act to these facts would "help protect Americans against foreign-caused anticompetitive injury."<sup>147</sup> The Court recognized the validity of the argument but held that the domestic effect was "neither clear enough, nor of such likely empirical significance, that it could overcome" the interpretative presumption against extraterritoriality.<sup>148</sup>

In an international tort action, the basis for an extraterritorial remedy is significantly stronger than in *Hoffman*. The norms or rules of conduct under international tort laws are not unilaterally imposed by the United States on activities in a foreign country. They are norms that the foreign country, itself, has embraced as a member of the family of nations. In addition, *Hoffman* involved an international conspiracy that directly harmed U.S. citizens in the United States. In other words, there was a readily available pool of U.S. plaintiffs to sue and thereby assure the existence of fair competition in the U.S. market. In the case of international torts, U.S. citizens seldom have standing to challenge unfair competitive advantages acquired abroad through torture and murder. Without an international tort remedy, there will be no one with standing to protect U.S. buyers and sellers from despicable competitive misconduct.

Chief Justice Roberts has expressed some concern regarding the problem of entrusting a private plaintiff with the power to force federal courts to adjudicate violations of international law.<sup>149</sup> This concern, however, is significantly offset by the many restrictions placed upon the private plaintiff's power. Moreover, the idea of using international tort plaintiffs as private attorneys general to accomplish societal goals unrelated to the plaintiff's specific injuries is no stranger to tort law. Every first semester law student learns that the fundamental purposes of tort law are to compensate and to deter, and deterrence is not limited to the specific defendant who coincidentally is sued in any particular case.<sup>150</sup> Recidivism is relatively rare among tortfeasors. By making an example of a particular defendant's misconduct, tort law implements general societal values to deter others from committing torts. In

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146 542 U.S. 155, 174–75 (2004).

147 *Id.* at 174.

148 *Id.* at 174–75.

149 See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013).

150 See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 19 (2000). William Prosser made essentially the same point over seventy years ago. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 27–28 (1941).

addition, when Congress was considering the TVPA, the executive branch and some Senators specifically argued that empowering plaintiffs to become private attorneys generally would create foreign policy difficulties.<sup>151</sup> Nevertheless, Congress rejected this argument and enacted the TVPA. What is the possible basis for arguing that private attorneys general are desirable in tort actions for torture but undesirable in tort actions for consciously aiding and abetting torture?

### C. *United States Citizens as Defendants*

Justice Breyer, with three Justices concurring, argued that there is an especially strong case for allowing a common law remedy against an American citizen who has violated international law in a foreign country.<sup>152</sup> A country's interest in regulating its own citizen's despicable misconduct in a foreign country has been recognized for centuries. In 1800, John Marshall explained,

The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. . . . This principle . . . is supported everywhere by public opinion, and is recognized by writers on the law of nations.<sup>153</sup>

More recently, the American Law Institute has recognized this fundamental principle,<sup>154</sup> and foreign nations agree.<sup>155</sup> In *Kiobel*, the European Commission, writing as amicus curiae, advised that it is “‘uncontroversial’ that the ‘United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign.’”<sup>156</sup>

To be sure, any lawyer worth her salt can conjure hypothetical situations where a foreign country might wish to shelter a U.S. corporation from responsibility for mistreating the foreign country's citizens.<sup>157</sup> Of course, there may be unusual situations in which a foreign government has a legitimate interest in coming to the aid of a U.S. corporation. These unusual situations should be handled on an ad hoc basis in which a court would con-

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151 See S. REP. NO. 102-249, at 13 (1991) (minority views) (noting that the TVPA “might create serious difficulties with the management of foreign policy”).

152 *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

153 10 ANNALS OF CONG. 597 (1800) (statement of Rep. John Marshall).

154 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

155 See Cassel, *supra* note 88, at 1778–79, 1782.

156 *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring) (quoting Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 11, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491)).

157 For example, a clever lawyer might argue that the availability of a tort remedy would discourage the American corporation from assisting the foreign country in developing the country's natural resources. This possibility should be viewed in light of the sad fact that many—probably most—situations giving rise to an international tort action involve a foreign government's complicity with the violation of international law.

sider specific representations from the country involved and statements of interest from the federal government's executive branch. In *Sosa*, the Court recommended this ad hoc solution in discussing a specific suit against a U.S. corporation.<sup>158</sup>

In considering the availability of an extraterritorial remedy, a court should not blind itself to the presence of other U.S. interests beyond the mere nationality of the defendant. For example, our citizens typically are present in the United States. In addition, the United States has a general interest in giving effect to clearly established principles of international law. Moreover, courts should be reluctant to preempt the foreign policy views of Presidents who have a more expansive view of the tort remedy.

Finally, many suits against U.S. corporations implicate the proper functioning of the U.S. market system. As an example, plaintiffs in a suit involving Chiquita Brands International, Inc. have alleged that Chiquita has aided and abetted heinous violations of international law as part of its banana operations in Columbia.<sup>159</sup> Like the *Kiobel* case, the purpose of this alleged misconduct, if true, is to gain a market advantage in the sale of bananas, and in the *Chiquita* case, most of the bananas are destined for the U.S. market. When an American has knowingly violated well-established international law overseas to gain a market advantage in the United States, why should courts presume that the American is not responsible for this despicable misconduct?

The extent to which Royal Dutch was marketing its Nigerian oil in the United States is not entirely clear. On the other hand, Chiquita bananas obviously are destined primarily for American markets. If Chiquita is violating international law to gain a marketing advantage in the United States, there is a significant harm to competitors like Dole, Del Monte, and fledgling banana operations in Florida and California. At the same time, these competitors lack standing to sue Chiquita because they have not been directly harmed by the tortious misconduct in Columbia. Under the circumstances, Chiquita's actions have a substantial and consciously intended impact on the territory of the United States. In the American Law Institute's words, the United States has "jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory."<sup>160</sup>

The alleged facts in *Chiquita* involve a classic case of the effects corollary to the principle of territoriality. Notwithstanding Justice Holmes' opinion that antitrust legislation should not be applied to conduct in another country, later courts eventually decided that the Sherman Act regulated conduct

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158 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

159 *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1305–06 (S.D. Fla. 2011). I assume for the purpose of discussing extraterritoriality that the plaintiffs in *Chiquita* have alleged conduct that violates principles of international law that are accepted by the world's nations.

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

in foreign countries that had or was intended to have a substantial effect in the United States.<sup>161</sup> If the allegations in *Chiquita* are true, Chiquita intentionally committed a tort in Columbia with the expectation that its tortious conduct would have a substantial effect on its sale of bananas in the United States. The allegations make no sense unless Chiquita was intentionally seeking a market advantage. Why would a business corporation violate international law unless it sees a substantial advantage? Even using an amoral calculus, a tortfeasor surely would not engage in despicable misconduct that would not result in a substantial advantage to the tortfeasor.

#### D. *United States as a Safe Haven*

Justice Breyer believes that a tort remedy should be available against foreigners who come to the United States after violating clearly established international law in a foreign country. The United States should not be a safe haven for its own citizens, and the same is true of foreigners who come to America. This is exactly what happened in the *Filartiga* case that started the modern tort action. After torturing Joelito Filártiga to death in Paraguay, the torturer came to New York and overstayed his visa.<sup>162</sup> The torturer's purpose was unclear. Perhaps he was on vacation or perhaps he wished to become a permanent resident.

Why would the United States want to become a vacation or retirement home for torturers? Members of Congress had this specific issue in mind when the TVPA was enacted. The Senate Report for the TVPA explained that the Act would "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States,"<sup>163</sup> and many members of Congress reiterated this precise point in floor debates.<sup>164</sup> Given this clear congressional policy judgment, why would the United States wish to become a vacation and retirement haven for those who consciously aid and abet torture?

When someone comes to the United States, she submits herself to U.S. domestic law. This fundamental rule has been clear at least since 1689 when Ulrich Huber wrote that "persons within the limits of a government, whether they live there permanently or temporarily, are deemed" subject to the government's laws.<sup>165</sup> Consistent with this centuries old concept, "the United

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161 The leading opinion came from Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The effects corollary has been expanded beyond the Sherman Act to all situations. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

162 *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–89 (2d Cir. 1980).

163 S. REP. NO. 102-249, at 3 (1991).

164 See 138 CONG. REC. S2667–69 (daily ed. Mar. 3, 1992) (statement of Sen. Specter); 137 CONG. REC. H11244 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli); 135 CONG. REC. H6423–24 (daily ed. Oct. 2, 1989) (statement of Rep. Brooks); *id.* at H6424 (statement of Rep. Bereuter); *id.* at H6426 (statement of Rep. Leach).

165 Ulrich Huber, *Huber's De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS 136, 164 (Ernest G. Lorenzen ed., 1947). Huber's brief essay is reputed to be the

Kingdom and the Netherlands, while not authorizing such damage actions themselves, tell us that they would have no objection to the exercise of American jurisdiction in cases such as *Filartiga* and *Marcos*” in which the foreign tortfeasor voluntarily came to the United States.<sup>166</sup>

### E. Other Considerations

There may be cases involving other considerations that involve a distinct U.S. interest. For example, what about an international outlaw who seeks a financial safe haven in the United States? The power and comparative stability of our economy makes the United States one of the world’s safest markets for capital investment. Suppose an international outlaw wishes to harbor her wealth in the United States without actually coming to the United States. A good argument can be made in favor of a remedy against such a person. The United States has a distinct interest in not becoming a financial safe haven for international outlaws.

Finally, suppose that a U.S. citizen has been tortured in a foreign country. The United States has an obvious interest in protecting our citizens who venture abroad. Congress agrees, and in the TVPA, Congress consciously and specifically provided for suits by our citizens. If the remedy is available against torturers, the remedy should also be available against those who consciously aid and abet the torture of one of our citizens. This would be especially true where the aider and abettor is a U.S. corporation or citizen.

The idea that a country may protect its citizens abroad is called the “passive personality principle”<sup>167</sup> and is somewhat controversial in international law: “The principle has not been generally accepted for ordinary torts.”<sup>168</sup> But an international tort action is not an ordinary tort. The passive personality principle is controversial in significant part because of the element of unfair surprise.<sup>169</sup> In the case of an international tort action, however, a defendant cannot claim unfair surprise. No one should be heard to say that they actually thought that aiding and abetting torture is okay.

### CONCLUSION

Over thirty years ago, the federal courts in the *Filartiga* case fashioned a common law tort remedy for the violation of a clearly established rule of international law. *Filartiga* was a foreign-cubed case, and the executive branch lent its full support to the creation of the remedy. *Filartiga* was a torture case, and some twenty years later, Congress formally endorsed the

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most widely read document on conflict of laws, and he was the first to use the phrase “conflict of laws.” See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.5 (3d ed. 2000).

166 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1676 (2013) (Breyer, J., concurring).

167 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987).

168 *Id.*

169 See *United States v. Yunis*, 681 F. Supp. 896, 901–03 (D.D.C. 1988).

new tort remedy and expanded it to include extrajudicial killing and to make the remedy available to U.S. citizens.

In the beginning, the new tort remedy's substantive scope was unclear, but there obviously was a need to craft significant limitations to the remedy.<sup>170</sup> Since *Filartiga*, both Congress and the courts have adopted a number of important restrictions on the plaintiff's right to recover. The Court's decision in *Kiobel* is one of these restrictions.

In determining the breadth of *Kiobel's* extraterritorial restriction, courts should not ignore other restrictions already in place. The remedy is only available for a small handful of rights that are clearly embraced by the international community, and these rights were consciously crafted by the world's nations to outlaw specific and egregious misconduct in all of the world's nations. Moreover, as a matter of comity, the tort remedy is not available with respect to misconduct in the foreign country if that country provides a meaningful remedy. Finally, even if one of the clearly defined rules of international law has been violated and the *lex loci delicti* does not provide a meaningful remedy, the courts may nevertheless limit the remedy in a particular case based upon an ad hoc statement of interest from the executive branch. All these significant limitations (and others) are fully applicable in every case in which a plaintiff seeks an extraterritorial remedy.

If anything, the array of powerful restrictions upon the tort remedy supports a mild presumption in favor of an extraterritorial remedy. After all, the international tort remedy involves truly heinous conduct like the slave trade, genocide, and consciously aiding and abetting torture and murder. Why would the United States not want to provide a narrowly constricted tort remedy for misconduct that all the world's nations, including the United States, condemn as a matter of international law? The presumption in favor of the remedy is also supported by the constitutional consideration that courts should not preempt a particular President's view of appropriate foreign policy.

To say that there should be a presumption in favor of the severely limited extraterritorial tort remedy is not to say that the presumption may not be overcome. In *Kiobel*, all of the Justices believed that foreign policy concerns justified refusing to create a remedy. The plaintiffs, however, did not allege, and the Justices did not consider, the presence of a significant impact on the United States' market system. Nor did the case involve any other distinct U.S. interest.

In determining whether an extraterritorial remedy is available in other classes of cases, the Court should reconsider the relevance of the presumption against extraterritoriality. In international tort actions, the presumption only makes sense as a proxy for foreign policy concerns. To repeat: *Kiobel* should be read as being based upon foreign policy concerns and not the blind application of the presumption against extraterritoriality. If a particu-

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170 See, e.g., Casto, *supra* note 9, at 472 n.33.

lar class of cases does not generally implicate foreign policy concerns and involves the vindication of a distinct U.S. interest, the presumption has little relevance.

