University of Miami International and Comparative Law Review

Volume 20
Issue 1 *Volume 20 Issue 1 (Fall 2012)*

Article 3

10-1-2012

Universal Civil Jurisdiction and the Extraterritorial Reach of the Alien Tort Statute: The Case of *Kiobel* Before the United States Supreme Court

Paul Barker

UNIVERSAL CIVIL JURISDICTION AND THE EXTRATERRITORIAL REACH OF THE ALIEN TORT STATUTE: THE CASE OF *KIOBEL* BEFORE THE UNITED STATES SUPREME COURT

Paul Barker

I. INTRODUCTION

On March 5, 2012, the Supreme Court of the United States surprised the international human rights community by making a procedural order for a re-hearing of *Kiobel v. Royal Dutch Petroleum*.[1] This case had been brought under the Alien Tort Statute ("ATS") by Nigerian plaintiffs against British, Dutch, and Nigerian multinational oil companies for aiding and abetting human rights abuses committed by the Nigerian government.[2] The order called for new argument on the extraterritorial application of the ATS, effectively transforming the plaintiffs' appeal, which had questioned corporate liability under international law, into a case with the potential to reverse over three decades of precedent.[3] For more than thirty years, U.S. courts have applied the ATS extraterritorially,[4] including to so-called "foreign-cubed"[5] cases involving a *foreign* plaintiff suing a *foreign* defendant for violations of international law committed in the territory of a *foreign* sovereign. The Supreme Court must now decide whether federal or international law prevents the ATS from extending beyond U.S. borders.

Federal courts in the United States have to date been engaged in an exercise of universal civil jurisdiction when deciding extraterritorial ATS cases that have no traditional jurisdictional connections or factual nexus with the nation. The development of the modern principle of universal jurisdiction reflects the radical transformation of the subject matter of international law. Its primary concern used to be inter-state relations, but after World War II, the focus has largely been on the protection of individuals from human rights abuses committed by their own governments, as well as the enforcement of criminal responsibility for grave breaches of international law such as war

---

[1] John Bellinger, *Stop Press: Supreme Court Orders Kiobel Reargued to Address Extraterritoriality*, LAWFAREBLOG (Mar. 5, 2012, 7:03 PM), http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/.

[2] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

[3] Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012).

[4] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[5] Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2894 n.11 (2010) (Stevens, J., concurring).

crimes and crimes against humanity.[6] Universal jurisdiction is recognized under public international law as the basis for a state to exercise prescriptive jurisdiction over the most heinous international crimes committed by anyone, regardless of their location;[7] indeed, it is cautiously promoted by the international community as a tool in the fight against impunity—the bringing to justice of the world's worst human rights abusers in an era of individual responsibility and accountability.[8] Yet its use remains politically and diplomatically sensitive, and the scope of its application is highly contested, particularly in the realm of private transnational litigation as opposed to criminal prosecutions by a state.[9] This essay shall demonstrate that although there is no express rule of international law prohibiting the extraterritorial application of the ATS in "foreign-cubed" cases, the United States has stood alone in authorizing such an exercise of universal civil jurisdiction.[10] Even if the Supreme Court in *Kiobel* does find that foreign-cubed ATS claims alleging heinous violations of international norms area valid exercise of universal civil jurisdiction under international law, the ATS must still overcome the statutory presumption against extraterritorial effect, which was recently reaffirmed by the Court in *Morrison v. National Australia Bank Limited*.[11]

---

[6] *Kiobel*, 621 F.3d at 154 (Leval, J., concurring).

[7] Vaughan Lowe & Christopher Staker, *Jurisdiction*, *in* INTERNATIONAL LAW 313, 326 (Malcolm D. Evans ed., 3d ed. 2010).

[8] Rosemary A. DiCarlo, Remarks at the Security Council Debate on International Criminal Justice and the Rule of Law (Jan. 19, 2012) (transcript available at http://usun.state.gov/briefing/statements/182192.htm).

[9] Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 155–57 (2006).

[10] Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.), 2002 I.C.J. 3, 77 (Feb. 14) (Joint Separate Opinion) [hereinafter Arrest Warrant Case]. Recent developments in Canada and the Netherlands suggest that the principle of universal civil jurisdiction may be gaining traction. In March 2012, Canada passed the Justice for Victims of Terrorism Act, which requires a "real and substantial connection to Canada" but has been referred to as Canada's ATS. Rene Provost, *Canada's Alien Tort Statute*, EJIL: TALK! (March 29, 2012), http://www.ejiltalk.org. The same month, a Dutch court awarded 1 million euros to a Palestinian doctor imprisoned in Libya in the first Dutch case in which the principle of universal civil jurisdiction has been used. *Dutch Compensates Palestinian for Libya Jail*, BBC NEWS MIDDLE EAST (March 28, 2012), http://www.bbc.co.uk/news/world-middle-east-17537597.

[11] *Morrison*, 130 S. Ct. at 2888.

If the ATS survives this challenge—a daunting one in that *Morrison* overturned forty years of case law applying American securities laws extraterritorially—the Court will have to address the lower courts' failure to abide by its guidance in yet another case, *Sosa v. Alvarez-Machain*, which sought to restrict ATS claims to only the most widely-condemned and well-defined international law violations.[12]

The First Congress enacted the Alien Tort Statute in 1789 as part of the Judiciary Act.[13] It grants U.S. federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations[14] or a treaty of the United States."[15] The original meaning of the ATS remains elusive; it is "a legal Lohengrin" in that "no one seems to know whence it came."[16] The tersely-drafted statute, unsupported by any records of congressional intent, lay dormant for almost two centuries until, in 1980, the Court of Appeals for the Second Circuit famously interpreted it as a potent weapon in international human rights litigation.[17] Since then, the ATS has frequently been employed by foreign citizens seeking compensation in United States courts for alleged human rights abuses in violation of customary international law, regardless of the nationality of the perpetrator or the location of the act.[18] In its 2004 *Sosa v. Alvarez-Machain* opinion, the Supreme Court treated the Second Circuit's judgment in *Filartiga* favorably.[19] There, the Court decided that the ATS itself creates no cause of action, but was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations ... based on the present-day law of nations

---

[12] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[13] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350).

[14] In ATS jurisprudence, U.S. courts have used the terms "customary international law" and "law of nations" interchangeably. *Kiobel*, 621 F.3d at 116, n.3.

[15] 28 U.S.C. § 1350 (1948).

[16] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

[17] *Filartiga*, 630 F.2d at 878.

[18] *E.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); In re Estate of Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1993); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Chowdhury v. Worldtel Bangladesh Holding, Ltd., 588 F. Supp.2d 375 (E.D.N.Y. 2008); Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

[19] *Sosa*, 542 U.S. at 725, 731–32 (2004).

... rest[ing] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of violations of safe conduct, infringements of the rights of ambassadors, and piracy.[20] The courts, therefore, have the authority to recognize norms "that already exist or may ripen in the future into rules of customary international law,"[21] provided that they meet the *Sosa* guidance.

Though only a small number of cases have been litigated, the ATS has revolutionized the enforcement of international human rights norms by providing individuals the standing to directly invoke international law against former state officials or their aiders and abettors.[22] However, the ATS does not supersede the law of sovereign immunity under the Foreign Sovereign Immunity Act, which is why claims are typically brought against individuals and not against states.[23] Although the Constitution of the United States requires personal jurisdiction over a defendant in an ATS claim,[24] this can be achieved by "tag jurisdiction" affected during the defendant's transitory presence in the forum, or "minimum contacts" for a corporate

---

[20] *Id.* at 724–25. The Paquete Habana, 75 U.S. 677 (1900). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works or jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.* (Gray, J.); North Sea Continental Shelf (Ger. v. Den. & Ger. v. Neth.) 169 I.C.J. 3, ¶¶ 73, 77 (Feb. 20) (noting that the International Court of Justice has required "a very widespread and representative participation . . .carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*opinio juris*), in order to establish a rule of customary international law).

[21] Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995).

[22] Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (stating that individuals have traditionally been considered as objects, not subjects, of international law and do not have a right of standing before international tribunals such as the International Court of Justice).

[23] *E.g.,* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (There, an ATS claim was dismissed for lack of subject matter jurisdiction. The sole basis for obtaining jurisdiction over a foreign sovereign is the FSIA.).

[24] Donovan & Roberts, *supra* note 9, at 13, 23.

defendant, just as in non-ATS transnational civil litigation.[25] ATS claims against foreign corporations have become particularly controversial, as they are seen by critics to be using "corporations as proxies for what are essentially attacks on [foreign] government policy."[26]

The ATS is often described as an example of American legal "exceptionalism"—particularly when contrasted with the United States Government's refusal to join the International Criminal Court and its mission to make international law for others while standing apart from the rule-based system it created and advocates.[27] Critics variously argue the following: the lower courts have disregarded the limitations placed by the Supreme Court in *Sosa* on the type of international law violations that can be recognized under the ATS;[28] the extraterritorial effect of the ATS in foreign-cubed cases is contrary to international law;[29] and the ATS does not apply universal human rights norms at all but imposes American law masquerading as international law—"the law of the hegemon"—on non-consenting states.[30] The ATS is also politically divisive. The George W. Bush administration sought to curtail the ATS's application to conduct abroad and to corporations; the Obama administration originally acted as *amicus* to

---

[25] *E.g.*, Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987).

[26] Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, *in* FOREIGN AFFAIRS 102, 107 (Sept.–Oct. 2000) available at http://www.foreignaffairs.com/articles/56438/anne-marie-slaughter-and-david-bosco/plaintiffs-diplomacy# ("The ever more litigious nature of American society is starting to affect an unexpected area: foreign policy. Increasing numbers of individuals, both American and foreign, are now using U.S. courts to defend their rights under international law in ways impossible just a few years ago.").

[27] LOUIS HENKIN, THE AGE OF RIGHTS 74, 76 (1990) ("From the beginning, the international human rights movement was conceived by the United States as designed to improve the conditions of human rights in countries other than the United States (and a very few like-minded liberal states). . . . [The United States] did not strongly favor but it also did not resist the move to develop international agreements and international, but, again, it saw them as designed for other states.").

[28] Supplemental Brief of Chevron Corporation et al. as Amici Curiae in Support of Respondents, Kiobel, v. Royal Dutch Petroleum, 132 S. Ct. 1738 (2012) (No. 10-1491).

[29] *Id.* at 3.

[30] Kenneth Anderson, The ATS, Incentives, and Tradeoffs (Mar. 6, 2012), http://opiniojuris.org/2012/03/06/the-ats-incentives-and-tradeoffs/.

the plaintiffs in *Kiobel*.[31] However, as discussed infra, the United States has dropped its support for the *Kiobel* plaintiffs in the latest round of briefs submitted in response to the Court's extraterritoriality question.[32] ATS jurisdiction can be complementary to traditional transnational litigation in federal and state courts.[33] As the court noted in *Filartiga*, federal courts frequently exercise jurisdiction over torts committed in a foreign territory, subject to *forum non conveniens*[34] and conflict of laws principles.[35] In many cases, however, the ATS provides the only possible means for a plaintiff to bring suit in the United States.

---

[31] *See, e.g.*, Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 271 (2004) (arguing that criticism of ATS claims against corporate defendants rests on four myths: "that United States courts cannot hold private corporations civilly liable for torts in violation of international law; that there is a flood of such cases that would impose liability on corporations simply for doing business in a difficult country; that statutory amendment or doctrinal reversal is necessary to stem this flood of litigation; and that domestic litigation is in any event a bad way to promote higher corporate standards"); Brief of Amici Curiae BP America et al. in Support of Respondents, Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2nd Cir. 2010) (No. 06-4800) (comparing Brief for United States as Amicus Curiae in Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) with Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2010)). U.S. courts are likely to defer to the views of the Executive Branch regarding the content of international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §112(c) (1987).

[32] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Shell Petroleum, 621 F.3d 111 (2nd Cir. 2010) (No. 06-4800).

[33] In some instances where ATS claims have failed, plaintiffs have gone on to successfully pursue a private tort claim in state courts applying normal conflicts rules. *See, e.g.*, Doe v. Exxon Mobile Corp., 573 F. Supp. 2d 16 (D.C. 2008).

[34] The doctrine of *forum non conveniens* as applied by American courts requires a court to balance both public and private factors (such as the location of witnesses and evidence, the adequacy of alternative jurisdictions, the burden on the defendant, choice of law, and public policy) in order to determine whether a claim should be dismissed to an adequate alternative forum including the courts of a foreign sovereign, where such an alternative forum exists. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6, 254 n.22 (1981).

[35] *Filartiga*, 630 F.2d at 885 ("Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.").

Recent developments in *Sarei v. Rio Tinto*[36] and *Kiobel* cases have catapulted the extraterritoriality issue to the fore, with the Supreme Court poised to decide in the near future whether the ATS can apply to acts committed in foreign countries. The often overlapping and ideologically-charged political and legal debates have become increasingly heated as a result of the recent proliferation of class action claims against foreign corporations that are alleged to have encouraged, assisted or participated in human rights violations committed by a foreign government on non-US territory.[37] Concerns about the universal scope of the ATS are also compounded by foreign states' longstanding misgivings over the notoriously plaintiff-friendly nature of civil litigation in the United States. As the English judge Lord Denning once observed, litigants are drawn to the United States "as a moth is to the light," as a result of various factors such as favorable rules on costs, contingency fees, and discovery; the right to jury trial; an opt-out class action system; and the availability of punitive damages.[38] The $4.5 billion jury verdict against the Bosnian Serb leader Radovan Karadzic is a particularly striking example of the fusion of the ATS with the modern U.S. tort liability system.[39] It is important to note, however, that most judgments are never collected, and remain moral victories only.[40]

It is the purpose of this essay to outline the unique history of the ATS and ATS litigation, to examine whether the U.S. courts' exercise of universal civil jurisdiction in ATS cases is permissible under both public international law and American law and, accordingly, whether and in what circumstances the Supreme Court should uphold the statute's extraterritorial application. The first part of this essay shall proceed by introducing the landmark ATS cases relating to these

---

[36] Sarei v. RioTinto, PLC, 671 F.3d 736 (9th Cir. 2011).

[37] Brief of the Governments of the United Kingdom of Great Britain, as Amici Curiae in Support of the Respondents, Kiobel v. Royal Dutch Shell Petroleum, 621. F.3d 111 (2nd Cir. 2010) (No. 06-4800).

[38] Smith Kline & French Lab Ltd. v. Bloch, [1983] 2 All ER 72, 74; *see also* Amici Brief of the United Kingdom et al., *supra* note 37, at 26.

[39] David Rohde, *Jury in New York Orders Bosnian Serb to Pay Billions*, NY TIMES, Sept. 26, 2000, at A10.

[40] Susan Simpson, Alien Tort Statute Cases Resulting in Plaintiff Victories, THE VIEW FROM LL2 ((Dec. 18, 2010), http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/.

issues—*Filartiga*, *Sosa*, *Sarei*, and *Kiobel*—before turning, in the second part, to a specific examination of the principle of universal jurisdiction under international law and the presumption against extraterritoriality under U.S. law. The final part of this essay will examine some of the extraterritoriality arguments made in *Sarei* and *Kiobel*.

There are plausible legal arguments both for and against the extraterritorial application of the ATS, and the outcome will doubtless turn on U.S. canons of statutory interpretation rather than international law *per se*. However, on balance, there are effective mechanisms, such as the doctrine of *forum non conveniens* or the customary international law rule requiring exhaustion of local remedies, that could be employed to mitigate the political concerns about universal civil liability without the need to revoke the extraterritorial application of the ATS. This practice would ensure that victims of the most heinous human rights abuses might continue to seek compensation in U.S. courts when they would have no other forum or would be unjustly denied justice in a foreign court having a traditional jurisdictional connection.

II. MODERN APPLICATION OF THE ATS: THE LANDMARK CASES

A. Filartiga v. Pena-Irala

The first modern ATS claim, *Filartiga*, was an extraterritorial case between two non-resident aliens. The case concerned a claim by citizens of the Republic of Paraguay against a Paraguayan former police chief, Pena, for the torture and killing of their son and brother, Joelito, in Paraguay.[41] Upon learning that Pena had emigrated to the U.S., Joelito's sister, who was also living in the U.S., served him with a complaint alleging that, acting under color of his authority as a Paraguayan official, he had caused her brother's death by torture. She sought compensatory and punitive damages of $10,000,000.[42] The Filartiga's claimed jurisdiction under the general federal question jurisdiction provision[43] and the Alien Tort Statute.[44] However the

[41] *Filartiga*, 630 F.2d at 878.
[42] *Id.* at 879.
[43] 28 U.S.C. § 1331 (LexisNexis 1980).
[44] *Filartiga*, 630 F.2d at 879.

district judge dismissed the claim for lack of subject matter jurisdiction, holding that the law of nations does not regulate a foreign state's treatment of its own citizens.[45] The district court thus did not consider the defendant's alternative argument for dismissal on the grounds of *forum non conveniens*.

The U.S. government supported the plaintiffs in appealing the district court's decision and submitted an amicus memorandum criticizing the outcome. The United States argued that the ATS had evolved over time to reflect the developing concern of international law with how a nation treats its own citizens.[46] Moreover, the prohibition against torture was one of "only a few rights hav[ing] the degree of specificity and universality to permit private enforcement . . . ."[47] The United States continued:

> This does not mean that [the ATS] appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations. The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.... [O]fficial torture is both clearly defined and universally con-

---

[45] *Id.*

[46] Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, *supra* note 22, at 4.

[47] *Id.* at 6.

> demned. Therefore, private enforcement is entirely appropriate.[48]

On appeal to the Second Circuit, the plaintiffs principally sought to base federal jurisdiction upon the ATS.[49] The Court of Appeals accordingly considered the threshold jurisdictional question to be whether the alleged conduct violated the law of nations. Finding that official torture was clearly and unambiguously prohibited,[50] the Court of Appeals concluded that "whenever an alleged torturer is found and served with process by an alien within our borders, [the ATS] provides federal jurisdiction."[51] The court famously declared, "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[52] The court also held that "it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[53] Although the court did not directly address the issue, it appears to have believed there would be no prescriptive jurisdiction question, because by applying the law of nations, the court was not applying U.S. law extraterritorially.[54]

B. Sosa v. Alvarez-Machain

The Supreme Court in Sosa favorably recognized the Second Circuit's decision in Filartiga almost twenty-five years later.[55] Plaintiff Humberto Alvarez-Machain ("Alvarez") was a Mexican national who had been abducted in Mexico by a gang of Mexican nationals,

---

[48] *Id.* at 22–23 (internal citations omitted).
[49] *Filartiga*, 630 F.2d at 880.
[50] *Id.* at 884.
[51] *Id.* at 878.
[52] *Id.* at 890.
[53] *Id.* at 887.
[54] Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 342 n.88 (2001).
[55] *Sosa*, 542 U.S. at 731.

including the defendant-petitioner.[56] The kidnappers were acting on the orders of the United States Drug Enforcement Agency, which wanted Alvarez delivered to the U.S. to face trial for the alleged torture and murder of a DEA agent.[57] The plan was developed after Alvarez was indicted by a federal grand jury because Mexico had failed to extradite him to the United States.[58]

The DEA believed that Alvarez, a physician, had acted to prolong the DEA agent's life in order to extend the interrogation and torture.[59] Alvarez was abducted and held overnight in Mexico before being brought by private plane to Texas where federal officers arrested him.[60] Following his acquittal, Alvarez sued Sosa and four other Mexicans under the Alien Tort Statute, and four DEA agents and the United States under the Federal Tort Claim Act.[61]

The Supreme Court held that the ATS is a jurisdictional statute only "in the sense of addressing the power of the courts to entertain cases concerned with a certain subject,"[62] and thus does not confer a cause of action. However, the Court rejected Sosa's argument that the ATS merely confers jurisdiction on the federal courts but does not authorize them "to recognize any particular right of action without further congressional action."[63] The ATS was not passed "as a jurisdictional convenience to be placed on the shelf for use by a future Congress."[64] Rather, the Court held that the ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[65] The Supreme Court rejected Alvarez's claim, holding that his detention of less than a day, followed by his transfer to U.S. law enforcement authorities, did not

---

[56] *Id.* at 698.
[57] *Id.*
[58] *Id.* at 697–98.
[59] *Id.* at 697.
[60] *Id.* at 698.
[61] *Sosa*, 542 U.S. at 698.
[62] *Id.* at 714.
[63] *Id.* at 712.
[64] *Id.* at 719.
[65] *Id.* at 712. The Supreme Court rejected the argument that "the grant of federal-question jurisdiction [under 28 U.S.C. section 1331] would be equally as good" as the ATS, because only the ATS permits the judiciary to develop the federal common law in the field of foreign relations. *Id.* at 731 n.19.

violate a "norm of customary international law so well defined as to support the creation of a federal remedy."[66]

The Court based this decision on an analysis of the historical context of the ATS, finding that when the ATS was first enacted, the law of nations was understood as comprising two principal elements.[67] First, there was the law pertaining to the rights and obligations between states, which "occupied the executive and legislative domains, not the judicial."[68] The second, "more pedestrian" element essentially comprised the *lex mercatoria* and maritime law, the transnational regulation of individuals engaging in international trade and admiralty. This was a body of judge-made law, which therefore was within the judicial sphere.[69] Yet there was also a third sphere in which these two principal elements of international law—the one concerned with state diplomacy and the other with individually enforceable rights—overlapped. The Court here relied on Blackstone's reference in his *Commentaries* to three specific offenses against the law of nations that were incorporated into English criminal law—violation of safe conducts, infringements of the rights of ambassadors, and piracy—and concluded, "[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort."[70]

The Supreme Court found that there was good reason for the First Congress to provide a judicial remedy in the federal courts for such violations of the law of nations. Prior to the founding of the Republic, the Continental Congress had been unable to "cause infractions of treaties or of the law of nations [for which the United States might be held accountable] to be punished."[71] One infamous

---

[66] *Id.* at 738; *see also* William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 646 (2006) (suggesting that it is for the federal courts to determine whether a common law remedy may be derived from customary international law).

[67] *Sosa*, 542 U.S. at 714.

[68] *Id.* at 714.

[69] *Id.* at 715.

[70] *Id.*

[71] *Id.* at 715 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed., 1893)).

example was the "Marbois incident" of 1784, when the Secretary of the French Legion was verbally and physically assaulted in Philadelphia by another Frenchman.[72] A second such incident occurred in 1787, when a New York City constable entered the residence of a Dutch diplomat with an arrest warrant for one of his servants.[73] Concerns persisted that the states were failing to provide remedies for the adequate vindication of the law of nations, yet the national government was powerless to act.[74] The Framers therefore responded by expressly including cases "affecting Ambassadors, other public ministers and Consuls" under the U.S. Constitution's Article III grant of federal jurisdiction.[75] This was followed by the First Congress's passing of the Judiciary Act, which included the ATS, and granted federal jurisdiction over suits brought by diplomats.[76]

The Court therefore concluded that the First Congress intended the ATS to afford to aliens a federal forum for the "relatively modest set of actions alleging violations of the law of nations" at the time.[77] The Court found no evidence to suggest that the First Congress envisaged causes of action for violations of the law of nations beyond Blackstone's three criminal offenses.[78] But neither did the Court find any evidence of developments since then restricting the federal courts from recognizing a claim under the law of nations as a claim of common law.[79] Nevertheless, the Court concluded that federal courts' discretion to recognize new common law causes of action for violations of the law of nations should be tightly circumscribed: "[C]ourts should

---

[72] *Id.* at 716–17.
[73] *Sosa*, 542 U.S. at 717; Sarei v Rio Tinto, PLC, 671 F.3d 736, 801 (9th Cir. 2011).
[74] *Sosa*, 542 U.S. at 717. It is interesting to note that, contrary to the contemporary perception of the United States as having always been a unilateralist or isolationist power that pays little regard to international law, contemporary research into the legal history of the United States Constitution and international law suggests that the Framers were in fact guided by a profound sense of the political and moral importance of formal international recognition and compliance with the law of nations to the future viability and success of the Republic. *See* David M. Golove and Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition,* 85 N.Y.U.L. REV. 932, 934–35 (2010).
[75] *Sosa*, 542 U.S. at 717.
[76] *Id.*
[77] *Id.* at 720.
[78] *Id.* at 724.
[79] *Id.* at 724–25.

require any claim based on the present-day law of nations to rest on a norm of international character *accepted by the civilized world* and defined with a *specificity* comparable to the features of the 18th-century paradigms we have recognized."[80]

The Supreme Court cited five reasons for this judicial caution and restraint. First, the prevailing conception of the common law has changed since 1789. Today, "there is a general understanding that the law is not so much found or discovered as it is either made or created;"[81] this legal realist suspicion of judicial power is particularly acute when it comes to international norms which evolve over time and by their nature can be highly contested and uncertain. Second, after the Court's decision in *Erie R.R. v Tompkins*,[82] there is no general federal common law that federal courts have the authority to derive; even in regards to the specialized body of federal common law relating to foreign relations that continues to exist post-*Erie*, federal courts should "look for legislative guidance before exercising innovative authority over substantive law."[83] Third, in the great majority of cases, it is the legislature rather than the judiciary that should create private rights of action.[84] Fourth, the principle of separation of powers requires courts to be particularly wary of recognizing new private causes of actions that might infringe on the discretion of the legislative and executive branches in the conduct of foreign relations.[85] This is of particular concern because contemporary international human rights law imposes limits on a state's power over its own citizens, and ATS claims may accordingly seek to impugn the conduct of a foreign state.[86] Fifth, federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations."[87] The Supreme Court highlighted that Congress has taken no action to promote such suits, and that the Senate has "expressly declined to give

---

[80] *Id.* at 725 (emphasis added).
[81] *Sosa*, 542 U.S. at 725–26, 729 ("[W]e now tend to understand the common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.").
[82] 304 U.S. 64 (1938).
[83] *Sosa*, 542 U.S. at 726.
[84] *Id.* at 727.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 728.

the federal courts the task of interpreting and applying international human rights law."[88] This is evidenced, for example, by the U.S. Senate's declaration that the International Covenant on Civil and Political Rights is not self-executing and therefore not directly enforceable by individuals in U.S. courts.[89]

Contrary to Justice Scalia's concurrence, the majority did not consider that these developments should operate to prevent "further independent judicial recognition of actionable international norms."[90] Instead, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door keeping, and thus open to a narrow class of international norms today."[91] Recognizing that customary international law has been part of the domestic law of the United States since the country's founding, the Court stated that:

> It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals ... We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.[92]

The question of extraterritorial application of the ATS was briefed and argued,[93] but was ultimately not relied upon by the Supreme Court in its opinion. In his concurrence, however, Justice Breyer questioned whether the expansive scope of jurisdiction under the ATS is consistent with the notions of international comity that requires states to limit the reach of its laws and their enforcement out of respect for the sovereignty of other nations.[94] "Such consideration is

---

[88] *Id.* at 728.
[89] *Sosa,* 542 U.S. at 728.
[90] *Id.* at 729.
[91] *Id.*
[92] *Id.* at 730.
[93] Petitioner's Supplemental Opening Brief at 12, Kiobel v. Royal Dutch Shell Petroleum, 621 F.3d 111 (2010) (No. 10-1491).
[94] *Sosa*, 542 U.S. at 761.

necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote."[95] Nonetheless, Justice Breyer observed that there is a "procedural consensus" that:

> suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening.[96]

Regarding extraterritoriality, it is interesting to note that Justice Souter's opinion of the Court refers to the 1795 opinion of Attorney General William Bradford as support for the inference that the ATS conferred jurisdiction over a narrow set of common law actions derived from customary international law.[97] Although the Court does not discuss that opinion in the context of extraterritorial application of the ATS, Attorney General Bradford supported civil tort actions being brought in the U.S. by aliens against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone.[98] Seven years after the ATS became law, "there can be no doubt," Bradford wrote, that "the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations...."[99] Accordingly, leading advocates of the extraterritorial application of the ATS have sought to rely on the 1795 opinion as clear precedent "supporting the use of US courts for *Filartiga*-type recovery"

---

[95] *Id.*
[96] *Id.* at 762 (Breyer, J., concurring).
[97] *Id.* at 721.
[98] *Id.*
[99] *Id.*

under the ATS.[100] At the very least, Bradford's opinion supports the proposition that the ATS applies extraterritorially where there are sufficient connections with the United States, such as the nationality of the defendant. In its latest brief in *Kiobel*, however, the United States Government "acknowledges that the opinion is amenable to different interpretations" and does not necessarily support the extension of the ATS to foreign-cubed cases.[101]

The European Commission filed an amicus brief in the *Sosa* case to express its concern over the extraterritorial application of the ATS and to urge the Supreme Court to construe the statute consistently within the limits the Commission understood as being imposed by international law on a state's jurisdiction.[102] The Commission argued that the ATS should be interpreted in accord with the *Charming Betsy* principle that "an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains."[103] The European Commission did not consider the existence and scope of universal civil jurisdiction to be well established; thus, the ATS should be strictly interpreted so as to apply to "conduct with no nexus to the United States only where that exercise accords with principles governing universal [criminal] jurisdiction."[104] The ATS should therefore apply only to human rights violations over which international law recognizes universal criminal jurisdiction—such as torture, genocide, war crimes, and crimes against humanity—and should be exercised only when the claimant would otherwise be subject to a denial of justice.[105] Indeed, this is the position that Justice Breyer appears to have taken in his separate concurring opinion.[106]

---

[100] Koh, *supra* note 31, at 271.

[101] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 8 n.1, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2010) (No. 10-1491) 2012 WL 2161290.

[102] Brief of Amicus Curiae in the European Commission in Support of Neither Party at 2–3, 12, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) 2004 WL 177036 (citing Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

[103] *Id.* at 3.

[104] *Id.* at 26–27.

[105] *Id.* at 16, 26–27.

[106] *Sosa*, 542 U.S. at 760–63 (Breyer, J., concurring).

The Australian, Swiss and British governments were similarly insistent in their amici brief that "[a]bsent the recognition of universal jurisdiction for a particular matter (e.g., piracy), there is no basis in international law for the creation of an *explicit* U.S. civil cause of action involving disputes among aliens, wherever domiciled, based on foreign activities that have no effects within the United States."[107]

C. *The* Kiobel *Case and the Liability of Corporations under the ATS*

The 1995 decision by the Second Circuit Court of Appeals in *Kadic v. Karadzic*[108] opened the door to a second generation of ATS claims brought not against individuals, but against multinational corporations for aiding and abetting human rights violations abroad. *Kadic* concerned an ATS claim against Bosnian Serb leader Radovan Karadzic for rape, torture, and summary executions committed with genocidal intent by his forces in the war against the newly independent Bosnia and Herzegovina.[109] The district court dismissed the suit because Karadzic did not qualify as a state actor.[110] The Court of Appeals reversed, holding that non-state actors may be liable for violations of international law that require state action, and that Karadzic could in any event be liable for crimes such as torture—which must be committed by state officials or under color of law to amount to a crime under international law—because he had acted in concert with the former Yugoslavia, the statehood of which was not disputed.[111] By recognizing that a private actor could be liable under the ATS by acting in concert with a state actor or with significant state support, the Court of Appeals allowed claims against corporations for aiding and abetting to proceed.[112]

---

[107] Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner at 7, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), 2004 U.S.S.Ct. Briefs LEXIS 910.

[108] 70 F.3d 232 (2d Cir. 1995).

[109] *Id.* at 236–37.

[110] 70 F.3d 232 (2d Cir. 1995).

[111] *Id.* at 244–45.

[112] LOUIS HENKIN, SARAH CLEVELAND ET AL. (EDS.), HUMAN RIGHTS 1113–1114 (2d ed., 2009).

D. The Circuit Split and Kiobel

A divisive split between the circuits has since emerged on the question of corporate liability under the ATS. In July 2011, the Court of Appeals for the District of Columbia Circuit in *Doe v. ExxonMobil Corp.*[113] and the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.*[114] rejected the Second Circuit's decision in *Kiobel* that corporations are not liable for violations of customary international law. In October 2011, the Ninth Circuit did the same in *Sarei v. Rio Tinto PLC.*[115] The division between the Second Circuit and the other circuits led the Supreme Court to grant certiorari in October 2011 in the *Kiobel* case on the question of whether corporations are immune from tort liability under the ATS.[116]

The *Kiobel* plaintiffs are Nigerian residents who in 2002 filed a putative class action suit under the ATS,[117] alleging that Dutch, British, and Nigerian oil exploration and production companies aided and abetted the Nigerian government in committing human rights abuses including torture; rape; cruel, inhuman and degrading treatment; arbitrary arrest and detention; crimes against humanity; property destruction; forced exile; extrajudicial killings; and violations of the rights to life, liberty, security, and association.[118] The Second Circuit dismissed the complaint for lack of subject matter jurisdiction. The majority determined that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights" and that corporate liability "has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*."[119] Agreeing that the plaintiffs could not support their aiding and abetting claim, Judge Leval concurred in the judgment dismissing the complaint. However, he was dismayed that, according

---

[113] 654 F.3d 11 (D.C. Cir. 2011).
[114] 643 F.3d 1013 (7th Cir. 2011).
[115] 671 F.3d 736 (9th Cir. 2011).
[116] Lyle Denniston, *Court to Rule on Suing Corporations and PLO (UPDATED)*, SCOTUSBLOG (Oct. 17, 2011, 10:18 AM), http://www.scotusblog.com/2011/10/court-to-rule-on-suing-corporations/.
[117] All of the plaintiffs had received political asylum in the United States by the time the case was filed. Petitioners' Supplemental Opening Brief, *supra* note 93, at 1.
[118] *Kiobel*, 621 F.3d at 123.
[119] *Id.* at 121, 145.

to the decision of the majority, "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form."[120] Judge Leval argued that no precedent of international law supports the distinction between natural persons and corporations.[121] Rather, "the position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve."[122]

E. Extraterritoriality in the Kiobel *Case: The* Sarei *Connection*

The unexpected sidelining of the corporate liability issue by the Supreme Court in *Kiobel* is the result of the tactical machinations of the plaintiffs in another case, *Sarei v. Rio Tinto*.[123] The Ninth Circuit's October 2011 decision in *Sarei* sided with Judge Leval's concurrence in *Kiobel* and affirmed that corporations can be held liable under the ATS.[124] This was the second en banc opinion of the Ninth Circuit in the long-running *Sarei* case, which alleged that Rio Tinto played a role in racial discrimination, war crimes, crimes against humanity, and genocide committed against residents of Bougainville, Papua New Guinea.[125] In addition to the corporate liability issue, the court's latest opinion raises a number of other controversial issues concerning the ATS, including extraterritoriality.[126]

---

[120] *Id.* at 149–50 (Leval, J., concurring).
[121] *Id.* at 151 (Leval, J., concurring).
[122] *Id.* at 152 (Leval, J. concurring).
[123] *Sarei*, 671 F.3d 736 (9th Cir. 2011).
[124] *Id.* at 747.
[125] *Id.* at 743.
[126] *Id.* at 744. The court also considered the following: whether claims of aiding and abetting liability fall outside the scope of international law; whether the federal courts have jurisdiction under Article III of the Constitution to adjudicate alien versus alien claims; the need for an exhaustion of local remedies requirement; and the role of political question, international comity and Act of State doctrines in ATS litigation. *Id.* at 748, 749, 754.

Significantly, the *Sarei* court held that the ATS does not violate the presumption against the extraterritoriality of U.S. statutes.[127] Referring to the Supreme Court's finding in *Sosa* that piracy was one of the paradigmatic cases that the First Congress had in mind when enacting the ATS, the court found that this was one of several "clear indications" of the ATS's extraterritorial applicability.[128] Other indications included the fact that the statute creates jurisdiction for claims brought by aliens and that the law to be applied is the law of nations.[129] The court noted that there was no suggestion anywhere that the presumption against extraterritoriality existed when the ATS was enacted in 1789.[130]

The Ninth Circuit also based its reasoning on the distinction between the ATS, which is a jurisdictional statute, and the claims made under it, which are "international [norms] ... derived from international law."[131] The traditional concerns underlying the presumption against extraterritoriality—conflict with the sovereign prerogatives of a foreign state—do not apply because "the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place."[132]

In November 2011, Rio Tinto petitioned the Supreme Court for certiorari asking whether the ATS can apply extraterritorially. Accordingly, it is *Sarei*, not *Kiobel*, which presented extraterritoriality as its central issue. However, "[i]n a fascinating tactical maneuver," the *Sarei* plaintiffs waived their right to respond to Rio Tinto's petition.[133] The Court inevitably ordered the plaintiffs to respond, but the resulting delay would have prevented the Court from hearing the case before the end of the term.[134]

---

[127] *Id.* at 745–747
[128] *Id.* at 745.
[129] *Sarei*, 671 F.3d at 746.
[130] *Id.* at 745.
[131] *Id.* at 746.
[132] *Id.*
[133] Michael D. Goldhaber, *The Global Lawyer: Human Rights Plaintiffs Can't Even Pick Their Poison*, THE AMLAW DAILY (March 19, 2012, 4:00 PM), http://amlawdaily.typepad.com/amlawdaily/2012/03/the-global-lawyer-human-rights-plaintiffs-cant-even-pick-their-poison.html.
[134] *Id.*

The Supreme Court therefore chose *Kiobel* to be the case to address extraterritoriality. Royal Dutch Shell Petroleum and its amici had already raised the extraterritoriality issue in their *Kiobel* briefs, arguing that the ATS should not be construed to apply to conduct within a foreign nation's borders.[135] At the hearing on February 28, 2012, Justices Kennedy and Alito, and Chief Justice Roberts pursued this line of argument. Observing that *Kiobel* involves Nigerian plaintiffs alleging violations of international law in Nigeria, Justice Alito asked, "What business does a case like that have in the courts of the United States?"[136] On March 5, 2012, the Court decided to take no further action in *Sarei*, instead issuing the surprise procedural order directing new briefing and argument in *Kiobel* on a question that was not even presented to the Court: "Whether and under what circumstances the Alien Tort Statute, 28 U.S. sec. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[137]

III. INTERNATIONAL LAW: UNIVERSAL CIVIL JURISDICTION, EXTRATERRITORIALITY AND THE ATS

In order to understand the basis for the exercise of universal jurisdiction in ATS transnational civil litigation, it is necessary to appreciate its origins in international criminal law. Universal jurisdiction concerns the restrictions placed by international law on the extraterritorial jurisdiction of a sovereign state's courts, but it is also closely interlinked with those substantive international law offenses applicable to individuals. Although public international law has traditionally been defined as the law governing the relations between states alone,[138] in practice, customary international law—historically known as the "law of nations"—has for centuries recognized legal rights and obligations relating to individuals, as the Supreme Court

---

[135] Brief for the Respondents § III.B., Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010) (No.10-1491), 2012 WL 259389.

[136] Oral Argument at 10:02 AM, Kiobel v. Royal Dutch Petroleum, No. 10-1491, http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.

[137] *Kiobel*, 132 S. Ct. at 1738.

[138] HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27–29 (1973).

acknowledged in *Sosa*.[139] International law not only encompasses the principle of *state* responsibility, which invokes liability at the governmental level for breaches of international law attributable to the state, but also that of *individual* responsibility for conduct labeled as criminal and attributable to an individual under international law.[140] Indeed, the right of states to directly prosecute individuals for crimes against international law has a long pedigree,[141] and is closely linked to the exercise of extraterritorial jurisdiction by the courts of sovereign states. The principle of universal jurisdiction emerged in the sixteenth century as a corollary to the development of the substantive international law crime of piracy, which in the absence of an international criminal tribunal could only be prosecuted by sovereign states in their domestic courts.[142] "[A] person guilty of piracy has placed himself beyond the protection of any State. He is no longer a national,"[143] but is considered by international law to be *hostis humani generis* – an enemy of mankind – of whom all states have an interest in prosecuting, regardless of whether the act of piracy was committed by a national of that state or within its territorial waters or against one of its vessels.[144]

The contemporary interest in universal jurisdiction in both criminal and civil proceedings reflects the radical change in the subject matter of international law since 1945. The primary concern used to be inter-state relations, but since World War II the focus has shifted to certain "universal" norms and the protection of individuals from human rights abuses inflicted by their own governments.[145] Accordingly, the principle of universal jurisdiction is now utilized or

---

[139] *Sosa*, 542 U.S. at 714; *see* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 66 (1769) ("The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more states, *and the individuals belonging to each*.") (emphasis added).

[140] INTERNATIONAL LAW: CASES AND MATERIALS 456 (Lori F. Damrosch, Louis Henkin, Sean D. Murphy, & Hans Smit (eds., 5th ed., 2009)).

[141] *Id.*

[142] In re Piracy Jure Gentium [1934] AC 586, 589 (Privy Council).

[143] *Id.*

[144] Damrosch, *supra* note 140, at 456.

[145] *Kiobel*, 621 F.3d at 154 (Leval, J., concurring).

advocated as a tool in the "fight against impunity."[146] It has taken on a radical role in international relations, seeking to privilege the demands for individual justice over the classical international law principles of sovereign immunity and non-interference.

A. *Universal Jurisdiction and International Law Today: Balancing Sovereignty and Justice*

In an international system predicated on the principles of the sovereign equality of states and non-interference by one state in the internal affairs of another, there is a clear need to prevent conflicts arising from one state prescribing laws for persons situated in the territory of another state.[147] Accordingly, international law does not permit a state to apply its own laws extraterritorially to conduct occurring in a foreign state unless it is justified in accordance with one of the accepted principles governing prescriptive jurisdiction, which is "the authority of a state to make its law applicable to persons or activities."[148]

Traditionally, international law has required there to be a clear connecting factor, or nexus, between the legislating state and the conduct that it seeks to regulate.[149] Hence, the most firmly established principles of prescriptive jurisdiction in international law are *territoriality*, which recognizes the right of a state to prescribe laws that apply within its territory, and *nationality*, under which a state may apply its laws to its citizens wherever they may be.[150] Under the *protective principle*, a state may also exercise prescriptive jurisdiction to protect its national or security interests.[151] Some states also claim the right to

---

[146] The "fight against impunity" is a central goal of the United Nations system of international criminal justice. *See, e.g.*, "Strengthen fight against impunity through ICC, Ban tells States parties", UN NEWS CENTRE (Dec. 6, 2010), http://www.un.org/apps/news/story.asp?NewsID=36971&Cr=international.

[147] Lowe & Staker, *supra* note 7, at 319.

[148] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 231 (1987); *see also* Lowe & Staker, *supra* note 7, at 313 (Explaining that, under public international law, the term "jurisdiction" is used to describe "the limits of the legal competence of a State … to make, apply, and enforce rules of conduct upon persons.").

[149] Lowe & Staker, *supra* note 7, at 320.

[150] *Id.* at 320–23.

[151] *Id.* at 325–26.

regulate foreign conduct that harms its nationals under the *passive personality* principle.[152] The United States has adopted a broader notion of territorial jurisdiction that accords U.S. courts jurisdiction to prescribe law "with respect to conduct outside its territory that has or is intended to have substantial effects within its territory."[153]

Universal jurisdiction is the only legal basis under international law for a state to exercise prescriptive jurisdiction over acts with no connection to it by territory, nationality or need for protection.[154] The scope of the principle remains unsettled and its application is controversial in both criminal and civil proceedings. The revival of the Alien Tort Statute in the United States has made this particularly true in the realm of civil litigation.

As briefly stated above, in the absence of an international criminal court, the principle of universal jurisdiction arose out of efforts to combat the impunity of individuals who committed crimes proscribed by international law, such as piracy and slave trading.[155] The motive for the exercise of universal jurisdiction was originally a practical one, for pirates and slave traders were often able to avoid the ordinary territorial or national jurisdiction of states.[156] In the post-World War II era, however, it is now the heinousness of an offense that determines the permissibility of the exercise of universal jurisdiction.[157] The prosecution of Nazi leaders at Nuremberg after the Second World War built on the piracy precedent in holding individuals responsible for conduct labeled as criminal under international law, including war crimes and crimes against humanity, which reaffirmed that individuals

---

[152] *Id.* at 330.

[153] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987); Lowe & Staker, *supra* note 7, at 322.

[154] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (asserting that a state has universal jurisdiction to define and punish certain offenses "recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 [territoriality, nationality, protection of state interests] is present.").

[155] Damrosch, *supra* note 140, at 804–815.

[156] Lowe & Staker, *supra* note 7, at 326–27; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 comment a. (1987).

[157] Lowe & Staker, *supra* note 7, at 327.

are subjects, not merely objects, of international law.[158] In a parallel development, states have cautiously come to recognize that certain international crimes, such as torture or genocide, are so heinous that they affect the international order as a whole and should be considered as an "offence against the law of nations."[159] The prohibition of these crimes is said by international law to have the character of a *jus cogens*, or peremptory norm.[160] Such claims involve the violation of obligations under international law that the International Court of Justice has described as being owed *erga omnes*,[161] or to everyone. The repression of these crimes is therefore in the interest of the entire international community; hence, any state is arguably permitted by international law to prosecute them, regardless of whether the offense occurred within its territorial jurisdiction or was committed by or against one of its nationals.[162] Universal jurisdiction can attach to these crimes either on the basis of a treaty, such as the Geneva Conventions or the Convention Against Torture, or under customary international law.[163]

As Second Circuit Judge Leval explained in *Kiobel*, the Nuremberg Trials and the U.N. Charter marked the beginning of international law's contemporary focus on universally shared moral objectives and

---

[158] Damrosch, *supra* note 140, at 456. *See also* Harold Hongu Koh, *Transnational Public Law Litigation* 100 YALE L.J. 2347, 2358 (1991) (describing the 1946 war crimes trials as the origin of "transnational public law litigation").

[159] Arrest Warrant Case, *supra* note 10, ¶ 39; *see also, e.g.*, Demjanjuk v. Petrovsky, 776 F2d 571, 582–583 (6th Cir. 1985) (U.S. applied the principle of universal jurisdiction in granting the extradition of Demjanjuk to Israel for war crimes and crimes against humanity committed in Poland during the war.).

[160] *Jus cogens* norms are "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331. "The full content of the category of *jus cogens* remains to be worked out in the practice of states and in the jurisprudence of international tribunals." OPPENHEIM, INTERNATIONAL LAW, 7–8 (Jennings and Watts eds., 9th ed. 1992); R v. Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, ex parte Pinochet, 2. W.L.R. 827, 38 I.L.M. 581 (1999) per Lord Browne-Wilkinson.

[161] Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3 ¶¶ 33–34 (Feb. 5, 1970) (referring to the prohibition of international crimes such as genocide or slavery as generating "obligations *ergaomnes*" which, "[i]n view of the importance of the rights involved," all states have a legal interest in protecting).

[162] Lowe & Staker, *supra* note 7, at 326.

[163] Arrest Warrant Case, *supra* note 10, ¶¶ 22–41.

the protection of individuals from human rights abuses by their own governments.[164] The classical law of nations had never concerned itself with the internal affairs of states; rather, "cloaked by an iron curtain of sovereignty," how a state treated its own people was its own business.[165] Yet moral outrage over the Holocaust rendered this absolutist position indefensible. "Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law."[166] The calls for an end to impunity for perpetrators of the gravest human rights abuses reflect the growing influence of international norms dedicated to the protection of the individual from both state and non-state actors. However, there remains a need to be realistic about the prospects for compliance with international human rights standards when sovereignty often still functions as an iron curtain, where the jurisdiction of the International Criminal Court remains highly circumscribed, and when potential Security Council-authorized intervention in an attempt to end human rights abuses is often frustrated by calculations of *realpolitik*. Even in an era of humanitarian intervention and the idea of the "responsibility to protect," state sovereignty continues to be justified on the grounds that, in a world where power is distributed unevenly between states, it preserves order by preventing acts of aggression and interference.[167]

Nevertheless, states have occasionally been successful in invoking universal jurisdiction in order to prosecute foreigners for violations of international criminal law committed abroad. Famous examples of criminal prosecutions based on universal jurisdiction include Israel's trial of the Nazi war criminal Adolf Eichmann in 1962[168] and the *Pinochet* case decided by the House of Lords in 1999.[169] Further, in *Demjanjuk v. Petrovsky*, the U.S. courts recognized the exer-

---

[164] *Kiobel*, 621 F.3d at 154 (Leval, J., concurring).

[165] Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 4 (1999).

[166] *Id.*

[167] Louis Henkin, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 4 (1999).

[168] Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 298–304 (Sup. Ct. Israel 1962).

[169] R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97.

cise of universal criminal jurisdiction.[170] Building on universal criminal jurisdiction precedents, human rights lawyers have sought accountability for human rights abuses through transnational civil litigation, often when traditional diplomatic channels have failed to deliver justice to victims.[171]

Some states consider this radical new aim of universal jurisdiction to be a threat to orderly international relations. Indeed, the International Court of Justice in the *Arrest Warrant Case* has held that the principle cannot trump the immunity of an incumbent foreign minister.[172] Comments of national delegations at the United Nations General Assembly Sixth Committee (Legal) about the scope and application of universal jurisdiction demonstrate that there is still little consensus within the international community about the crimes the principle applies to.[173] There exists general concern over universal jurisdiction's legal, political, and diplomatic consequences.[174] In the opinion of the British government, "universal jurisdiction in its true sense is only clearly established for a small number of specific crimes: piracy and war crimes, including grave breaches of the Geneva Conventions."[175]

The International Court of Justice has indirectly examined the principle of universal jurisdiction in the context of sovereign immunity. In the *Arrest Warrant* case, Belgium asserted universal jurisdiction in issuing a warrant for the arrest of the sitting Congolese Foreign Minister related to alleged offenses committed outside of Belgium territorial jurisdiction against non-Belgian victims.[176] Looking to various sources of international law, Judges Higgins, Kooijmans and Buergenthal noted the authorization of universal jurisdiction in the

---

[170] 776 F.2d 571 (6th Cir. 1985).

[171] Slaughter & Bosco, *supra* note 26.

[172] Arrest Warrant Case, *supra* note 10, ¶ 59.

[173] General Assembly of the United Nations Legal – Sixth Committee, The scope and application of the principle of universal jurisdiction (Agenda item 84), http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml.

[174] *Id.*

[175] UK Mission to the UN, Scope and application of the principle of universal jurisdiction, (April 15, 2011), http://www.un.org/en/ga/sixth/66/ScopeApp UniJuri_StatesComments/UK&Northern%20Ireland.pdf.

[176] Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14, 2002)

Geneva Conventions and Convention Against Torture.[177] The most high-profile example of state practice involving the exercise of universal jurisdiction was the *Pinochet* case in the English House of Lords. The jurisdictional basis in that instance was the Convention Against Torture, which requires a state to extradite or prosecute any individual found within its territory who is accused of torture anywhere in the world,[178] and so there was an obligation rather than a right to exercise universal jurisdiction.[179] Germany has also prosecuted genocide under the principle of universal jurisdiction.[180]

With regards to customary international law, Judges Higgins, Kooijmans, Buergenthal found that there was no established general practice of states exercising universal jurisdiction.[181] But neither did they find evidence of an opinio juris on the illegality of universal jurisdiction.[182] These three judges did, however, identify "striking" contemporary trends towards bases of jurisdiction other than territoriality, including "effects" jurisdiction and passive personality jurisdiction, as well as the ATS itself.[183] They also considered the famous dictum in the *Lotus* case that, in the absence of an international law rule to the contrary, states may exercise prescriptive jurisdiction over acts that take place abroad.[184] Noting that "the dictum represents the high water mark of laissez-faire in international relations," the judges nevertheless agreed that:

> While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nations for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications

---

[177] Arrest Warrant Case, *supra* note 10, ¶¶ 27–29, 38.
[178] *Id.* ¶ 22; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85, Article 5(2) [hereinafter Convention Against Torture].
[179] *Id.* ¶ 44.
[180] *Id.* ¶ 24.
[181] Arrest Warrant Case, *supra* note 10, ¶ 45.
[182] *Id.*
[183] *Id.* ¶¶ 46–48.
[184] The S.S. Lotus Case P.C.I.J. Ser. A, No. 10 at 4 (1927).

> pointing to the gradual evolution of a significant principle of international law to that effect.[185]

The joint separate opinion also provided guidelines on the proper exercise of universal jurisdiction. For example, "universal criminal jurisdiction [should] be exercised only over those crimes regarded as the most heinous by the international community."[186] Further, a state with an ordinary basis of jurisdiction should be given the opportunity to demonstrate its commitment to act upon the charges itself.[187]

B. Universal Jurisdiction in Civil Litigation

Does the exercise of universal jurisdiction over civil cases fundamentally differ from that of criminal prosecutions? Bradley suggests that civil remedies are "conceptually outside of the universal jurisdiction authority;" instead, the theory of universal jurisdiction is crime-based.[188] Donovan and Roberts, however, have suggested that there is an emerging acceptance of universal civil jurisdiction.[189] They argue that universal jurisdiction should be viewed holistically, not as separate principles of universal *criminal* jurisdiction on the one hand and universal *civil* jurisdiction on the other. Rather, universal jurisdiction over civil claims is best understood as a civil dimension to the universal jurisdiction to impose criminal penalties.[190] Donovan and Roberts point to the obligation to make reparations under the international law of state responsibility, or the payment of compensation as an effective remedy to human rights violations or as an adjunct to international criminal law.[191] Furthermore, they argue that "[t]he goals

---

[185] Arrest Warrant Case, *supra* note 10, ¶¶ 51–52 (citing OPPENHEIM, INTERNATIONAL LAW 998 (Jennings and Watts eds., 9TH ed. 1992)).
[186] *Id.* ¶ 60.
[187] *Id.* ¶ 59.
[188] Bradley, *supra* note 54, at 346–47.
[189] Donovan & Roberts, *supra* note 9, at 142.
[190] *Id.* at 153.
[191] *Id.*; *see also* Rome Statute, art. 75, Jul. 17, 1998, 2187 U.N.T.S. 3 (conferring ICC power to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.").

of criminal and tort law overlap" in that punishment and compensation both serve to condemn past, and deter future, wrongdoing.[192]

There is an unquestionable virtue in permitting the exercise of universal civil jurisdiction to afford remedies to those who have suffered the most heinous abuses of their fundamental rights and who are likely to be deprived of an effective remedy in the place where the offense was committed. However, international law is compelled to seek a balance between order and justice among nations.[193] The question is where that balance should be struck, which is not the same as asking what the status quo has been. There are several significant factors that mitigate against the unbridled exercise of universal jurisdiction, including respect for international comity. Universal jurisdiction over private suits is a particularly vexing issue, because it gives rise to the risk of multiple proceedings and entails reduced state control over the litigation; criminal cases involve prosecutorial discretion by public authorities which can account for broader public policy considerations, such as the impact on foreign relations, whereas private claims do not.[194] Even in civil cases, however, the courts can provide a voice for these public interests through legal and procedural doctrines such as personal jurisdiction, *forum non conveniens*, sovereign immunity, act of state and political question. These doctrines empower the courts to block inappropriate cases or remove them from the forum.[195] Nevertheless, critics of universal civil jurisdiction, such as Bradley, suggest that the courts cannot be expected to accurately assess the competing foreign policy interests, a function more appropriately addressed by the executive and legislative branches of government.[196]

English courts have had occasion to consider universal civil jurisdiction in the context of transnational human rights litigation. In the conjoined appeals to the House of Lords in *Jones v. Saudi Arabia*, the English claimants sought damages from the Ministry of the Interior of Saudi Arabia and blamed Saudi officials for systematic torture suffered

---

[192] Donovan & Roberts, *supra* note 9, at 154.
[193] *See generally* Hedley Bull, *Order vs. Justice in International Society*, POL. STUDIES 19(3) 269–83(1971).
[194] Donovan & Roberts, *supra* note 9, at 155.
[195] *Id.* at 155–56.
[196] Bradley, *supra* note 54, at 347.

by the claimants while imprisoned in Saudi Arabia.[197] This was not a case involving the exercise of universal civil jurisdiction but was instead an ordinary tort claim implicating private international law by virtue of the location of the defendants.[198] The claimants were British nationals; though the act occurred outside of England's jurisdiction, conflict of laws rules permitted the court to authorize service on the defendants in Saudi Arabia on the grounds that the claim was for tortious damages sustained within England.[199] The Court of Appeal had allowed the claims against the individual Saudi officials but found the claim against the state to be barred by the law on sovereign immunity.[200] The appeal turned on sovereign immunity, which the House of Lords ultimately held to protect all the defendants from suit. The House of Lords went further in distinguishing the exercise of universal criminal jurisdiction over Pinochet, for which the authority was derived from the Convention Against Torture, and the exercise of universal jurisdiction in civil proceedings, which the court held was not supported under international law.[201]

The House of Lords based its reasoning in part on the Convention Against Torture's distinction between criminal and civil remedies. Convention Articles 5 and 8 demonstrate the exercise of universal criminal jurisdiction by requiring a state party to extradite or prosecute an individual accused of torture found within its territory.[202] Article 14 provides that a state shall provide compensation to victims of torture. The Law Lords found that this provision on civil liability does not apply extraterritorially. Lord Bingham referred to the U.S. declaration under the Convention that "article 14 requires a State Party to provide a private right of action for damages only for acts of torture *committed in territory under the jurisdiction of that State Party*."[203] Lord Bingham was likewise categorical in his overall survey of international law, stating that "there is no evidence that states have recognised or given effect to an international law obligation to exercise universal

---

[197] Jones v. Saudi Arabia [2006] UKHL 26 at 1.
[198] *Id.* at 2.
[199] *Id.*
[200] *Id.* at 29.
[201] *Id.* at 29–34.
[202] *Id.* at 46; Convention Against Torture, *supra* note 178.
[203] Convention Against Torture, *supra* note 178, ¶ 20 (emphasis added).

jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial or learned opinion that they should."[204] Lord Bingham concluded that:

> It is, I think, hard to resist the suggestion...that the Court of Appeal's decision represented a 'unilateral assumption of jurisdiction by one national legal system'. The court asserted what was in effective universal tort jurisdiction in cases of official torture, for which there was no adequate foundation in any international convention, state practice or scholarly consensus, and apparently by reference to a consideration (the absence of a remedy in the foreign state . . .) which is, I think, novel. Despite the sympathy one must of course feel for the claimants if their complaints are true, international law, representing the law binding on other nations and not just our own, cannot be established in this way.[205]

C. *Universal Civil Jurisdiction under the ATS*

The leading example of a law conferring universal jurisdiction in civil litigation is the Alien Tort Statute in the United States. The U.S. Congress endorsed the *Filartiga* interpretation of the ATS when it enacted the Torture Victim Protection Act ("TVPA"), legislation that implements the Convention Against Torture but was also designed to address the uncertainty following the *Filartiga* decision as to whether the ATS created a federal cause of action in respect of torture.[206] Congress has gone further than any other national legislature in authorizing the exercise of universal civil jurisdiction over torture by permitting TVPA claims without a citizenship or territorial connection

---

[204] *Id.* ¶ 27.
[205] *Id.* ¶ 34.
[206] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); H.R. REP. NO. 102-367 pt. 1, at 3; Anthony J. Bellia Jr. and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 461 (2011).

to the United States.[207] The universal civil jurisdiction conferred on U.S. courts by the ATS and TVPA to date has set the United States apart from the rest of the world.

In 2004, the United States Supreme Court in *Sosa* upheld the jurisdictional grant of the ATS, albeit taking a restrictive approach to the recognition under federal common law of "a tort...in violation of the law of nations."[208] Under *Sosa*, plaintiffs face a two-stage requirement of showing that the alleged act violates a norm of international law and that the norm is of sufficient specificity and universality to be cognizable under federal common law.[209] As noted above, however, the Court did not directly address the question of the permissibility of extraterritorial application of the ATS under U.S. or international law. The few lower courts that have recognized that they are exercising universal jurisdiction have relied on the *Restatement (Third) of the Foreign Relations Law of the United States*, which without citing authority states, "[i]n general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."[210]

The United States has been subjected to heavy criticism from other states concerning the exercise of universal jurisdiction in many of the ATS cases. In the UK case *Jones v. Kingdom of Saudi Arabia*, Lord Hoffmann suggested that the ATS is contrary to customary international law and refuted U.S. Supreme Court Justice Breyer's "speculation" in *Sosa* that international criminal jurisdiction over certain criminal offenses by state officials may eventually lead to the acceptance of universal tort jurisdiction in international law.[211] "It is not for a national court to 'develop' international law by unilaterally adopting a

---

[207] Donovan & Roberts, *supra* note 9, at 148–49. In *Kadic v. Karadzic*, the Second Circuit rejected the defendant's claim that the TVPA had limited the claims that could be brought under the ATS. 70 F.3d 232 (2d Cir. 1995).

[208] *Sosa*, 542 U.S. at 729–30.

[209] *Id.* at 724–25.

[210] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (1987) (citing Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995); Presbyterian Church v. Talisman Energy, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 371 (E.D. La. 1997)).

[211] Jones v. Saudi Arabia [2006] UKHL 26 ¶ 99.

version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states," Lord Hoffmann stated.[212] In the International Court of Justice *Arrest Warrant Case*, Judges Higgins, Kooijmans and Buergenthal observed:

> In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, *it has not attracted the approbation of States generally*.[213]

The ATS has no equivalent in any other country of the world.[214] Indeed, various nations have on numerous occasions filed complaints with the U.S. Department of State or submitted *amicus* briefs to American courts arguing against extraterritorial application of the ATS.[215] In one case, the United Kingdom and Germany objected

---

[212] *Id.* ¶ 63.

[213] Arrest Warrant Case, *supra* note 10, at 77; *see also Jurisdictional Immunities of the State (Ger. v. It.)*, 2012 I.C.J. 143 (February 3) (emphasis added) (where the ICJ also rejected universal jurisdiction on state immunity grounds).

[214] Attempts in the British Parliament to create a statute conferring universal civil jurisdiction over torture have been opposed by the government as contrary to international law. Memorandum Submitted by the Ministry of Justice to the Joint Committee on Human Rights, Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims, Twenty-fourth Report of Sess. 2008–2009, HL Paper, HC 553, Aug. 11, 2009, at Ev. 40.

[215] *See* App. A to Brief of Amici Curae BP America et al. in Support of Respondents, Kiobel v. Royal Dutch Petroleum, Co., 132 S. Ct. 1738 (2012) (No. 10-1491), www.courtappendix.com/kiobel/protests (last visited Dec. 25, 2012).

that extraterritorial application of the ATS "infringes the sovereign right of States to regulate their citizens and matters within their territory."[216] The Australian and British governments also submitted an *amici* brief in a recent case directly addressing extraterritoriality, *Sarei v.Rio Tinto*, in which the governments argued that "there is no basis in international law for the creation of an U.S. civil cause of action involving disputes among aliens" and that "international law does not permit the United States to exercise extraterritorial civil jurisdiction to adjudicate claims bearing so little connection to the United States."[217]

It is certainly ironic that the U.S. civil litigation system stands alone in the world in facilitating "international law" claims by individuals while the American government is so reluctant to submit itself to international human rights and international criminal law instruments. John Bellinger, the former Legal Adviser of the U.S. Department of State under President George W. Bush, has described the U.S. as "something of a rogue actor":

> We are perceived, accurately, as having in effect established an International Civil Court – a court with jurisdiction to decide cases brought by foreigners arising anywhere in the world, by the light only of its own divination of universal law, and through the extraterritorial application of U.S. law concerning rights and remedies. By itself, this can be grating enough to foreign governments. But it is especially so when taken together with both the fact that the U.S. often argues vigorously against the assertion by foreign courts of universal jurisdiction to hear cases involving U.S. officials and the fact that the U.S. has declined to join

---

[216] App. B to Brief for the United States as Amicus Curiae in Support of Petitioners at 4a, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919) 2008 WL 408389.

[217] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees/Cross-Appellants at 7, 2, Sarei v. Rio Tinto, PLC, 671 F.2d 736 (9th Cir. 2011) (No. 02-56256) 2009 WL 8174961.

> the International Criminal Court because of concerns about that tribunal's jurisdiction.[218]

Ultimately, this is an area of relative uncertainty in international law. There is, however, as Judges Higgins, Kooijmans and Buergenthal have observed, no rule of customary international law prohibiting the exercise of universal civil jurisdiction.[219]

As the following discussion on extraterritorial application of the ATS shall seek to demonstrate, a better view is that the United States may apply the ATS to "foreign-cubed" cases lacking a factual nexus with the United States where the alleged conduct amounts both to a violation of international law *and* where international law would permit the exercise of universal criminal jurisdiction over that act. The exercise of universal civil jurisdiction under the ATS would therefore effectively be limited to violations of *jus cogens* norms, such as torture or genocide, or to cases where there are sufficient traditional jurisdictional connections with the United States. Arguably, however, the more decisive issue before the Supreme Court in *Kiobel* will be the effect of federal law governing the extraterritoriality of U.S. statutes, to which we now turn.

D. U.S. Law on the Extraterritorial Application of Acts of Congress

Extraterritorial application of U.S. law is a matter of congressional intent. Congress has the constitutional power to legislate extraterritorially,[220] but United States statutes are presumed not to apply abroad absent statutory language or legislative history indicating a contrary intention.[221] The Supreme Court has articulated three rationales for restricting the extraterritorial application of U.S. legisla-

---

[218] John B. Bellinger, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches, The 2008 Jonathan I. Charney Lecture in International Law*, 42 VAND. J. TRANSNAT'L L. 1, 8 (2009).
[219] Arrest Warrant Case, *supra* note 10, ¶ 48.
[220] U.S. Const. art. I, § 8; EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
[221] *Arabian Am. Oil Co.*, 499 U.S. at 248.

tion:[222] avoidance of international conflicts;[223] assumption that Congress aims to address domestic concerns;[224] and respect for the separation of powers and relative competence of the Executive and Legislative branches in the realm of foreign relations.[225]

In the words of Justice Oliver Wendell Holmes, "all legislation is prima facie territorial."[226] Since the 1990s, the Supreme Court has interpreted this presumption more strict and broadly than before.[227] In *EEOC v. Arabian American Oil Co.*, the Supreme Court reaffirmed that "a long standing principle of America law" requires that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[228] The 2010 decision of the Supreme Court in *Morrison v. National Australia Bank Ltd.* is particularly relevant in the ATS context. In reaffirming the presumption that "when a statute gives no clear indication of extraterritorial application, it has none," the Court reversed lower courts' standard practice of construing the Securities Exchange Act 1934 to apply extraterritorially in foreign-cubed Section 10(b) claims by *foreign* plaintiffs against *foreign* defendants in connection with securities traded on *foreign* exchanges.[229]

The presumption against extraterritoriality is an offshoot of the *Charming Betsy* canon, according to which U.S. courts will interpret an ambiguous statute so as to avoid violating international law.[230] In *Murray v. Schooner Charming Betsy*, Chief Justice Marshall stated "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[231] The *Charming Betsy* rule is a firmly established rule of U.S. statutory interpretation. It is reflected in section 114 of the *Restatement (Third) of Foreign Relations*

---

[222] *See* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 379 (2010).
[223] F. Hoffmann-La Roche Ltd v. Empagram, 542 U.S. 155, 164 (2004).
[224] *Arabian Am. Oil Co.*, 499 U.S. at 248.
[225] Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993).
[226] American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).
[227] Knox, *supra* note 222, at 374.
[228] *Arabian Am. Oil Co.*, 499 U.S. at 248.
[229] Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (emphasis added).
[230] Knox, *supra* note 222, at 352.
[231] 6 U.S. (2 Cranch) 64, 118 (1804).

Law, which provides: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[232]

The *Charming Betsy* was cited in Justice Breyer's majority opinion in *F. Hoffmann-La Roche Ltd. v. Empagran.* In that case, the Supreme Court held that an ambiguous antitrust statute should be interpreted "to avoid unreasonable interference with the sovereign authority of other nations.... This rule of construction reflects principles of customary international law - law that (we must assume) Congress ordinarily seeks to follow."[233]

The Supreme Court has developed an exception to the presumption against extraterritorially for criminal cases based on "the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish the crime under the law of nations."[234] In *United States v. Bowman*, American and British defendants were criminally indicted for conspiracy to defraud the United States based on conduct that occurred at sea and in Brazil. The Supreme Court applied U.S. law extraterritorially, holding that "Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."[235] Although the subject matter of the ATS overlaps with matters traditionally the concern of criminal law, there is no case law to suggest that the *Bowman* exception inference could be applied to private law statutes.

The primary question in *Kiobel* will therefore be whether the statutory presumption against extraterritoriality should apply to the ATS. The Ninth Circuit,[236] the Southern District of New York,[237] and various academic commentators[238] have all made the argument for a distinction to be drawn between the ATS and other federal statutes,

---

[232] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115.
[233] F. Hoffmann-La Roche Ltd. v. Empagran S.A. , 542 U.S. 155, 164 (2004).
[234] U.S. v. Bowman, 260 U.S. 94, 97–98 (1922).
[235] *Id.* at 98.
[236] Sarei v. Rio Tinto PLC, 671 F.3d 736 (9th Cir. 2011).
[237] In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 246–47 (S.D.N.Y. 2009).
[238] *See, e.g.*, Bradley, *supra* note 54, at n.88.

such as the Securities Exchange Act, on the grounds that the ATS applies substantive international law, not U.S. law, and is therefore subject to international jurisdictional law, which recognizes a right to exercise universal jurisdiction over violations of the most serious international norms.[239] There is neither a conflict of laws nor jurisdictional overreach because all states have consented to the exercise of jurisdiction over such violations of international law.[240] One may argue that the presumption against extraterritoriality would therefore only come into play if, for example, the courts were to apply federal rules of secondary liability for human rights abuses.[241] The canon of construction that would apply if courts apply international law under the ATS is the *Charming Betsy*[242] rule: a statute may not violate international law. In order for "foreign-cubed" cases not to run afoul of *Charming Betsy*, international law must grant universal jurisdiction over the alleged violation of international law that is the basis for the ATS claim.[243]

IV. THE ARGUMENTS ON EXTRATERRITORIALITY RAISED IN *SAREI* AND *KIOBEL*

The question considered by the Supreme Court in the *Kiobel* plaintiff's petition for certiorari concerned the "narrow" issue of the liability of corporations under the ATS. However, numerous amicus briefs submitted by interested governments and corporations in support of the defendant-respondents sought to direct the Court to the broader issue of the statute's extraterritorial application, arguing that this was the more important question.[244] Respondents' original brief also argued as an alternative ground to its corporate liability points that the ATS does not extend to conduct occurring within the territory of a foreign state.[245] The procedural order of March 5, 2012, suggests

---

[239] Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1082–1083 (2011).
[240] *Id.* at 1083–84.
[241] *Id.* at 1084.
[242] 6 U.S. (2 Cranch) 64, 118 (1804).
[243] Colangelo, *supra* note 239, at 1091.
[244] Brief of Amici Curiae for BP America et al., *supra* note 31, at 11; Supplemental Brief of Chevron Corporation et al., *supra* note 28, at 2.
[245] Brief for Respondents, *supra* note 135, at 54.

that these briefs have had the desired effect, with the Supreme Court transforming *Kiobel* from a corporate liability suit that would have been a mere set-back had plaintiffs lost,[246] into a case that has the potential to decimate the use of the ATS in international human rights litigation before the U.S. courts.

In response to the Supreme Court's order, in June 2012 the *Kiobel* plaintiff-petitioners submitted a supplemental brief arguing that the ATS should be given extraterritorial effect.[247] Respondents bolstered their earlier arguments on extraterritoriality in supplemental argument filed in August 2012.[248] Further, as discussed later herein, the United States has also submitted a new amicus brief, in which it abandoned its earlier support for the plaintiff-petitioners.

A. Sarei

The extraterritoriality arguments raised by respondents and their amici in *Kiobel* reflect many of the concerns raised in dissenting and minority opinions of the Ninth Circuit in *Sarei*. *Sarei* was a foreign-cubed suit, involving a foreign plaintiff suing a foreign defendant for torts alleged to have occurred entirely in the territory of a foreign state.[249] The defendant's only connection to the United States is that it does business there.[250] Although Rio's business activities in the U.S. provided a sufficient basis for the constitutional exercise of personal jurisdiction under the *International Shoe* line of authority,[251] the minority in *Sarei* considered there to be "*no* nexus between the acts complained of in this action and the United States."[252] In his dissent, Judge Kleinfeld rejected the majority's opinion as amounting to an exercise of universal jurisdiction "over all the earth, on whatever

---

[246] Harvard Law School, The Future of Alien Tort Statute Litigation: a Talk by Paul Hoffman (March 11, 2011), http://www.law.harvard.edu/news/2011/ 03/11_paul-hoffman-alien-tort-statute.html.

[247] Petitioners' Supplemental Opening Brief, *supra* note 93, at 6.

[248] Supplemental Brief for Respondents, Kiobel v. Royal Dutch Shell Petroleum, 621 F.3d 111(2010) (No. 10-1491), 2012 WL 3127285.

[249] Sarei, 671 F.3d 736.

[250] *Id.* at 794 (Bea, J., concurring and dissenting).

[251] International Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing the constitutional due process requirements of "fair play and substantial justice").

[252] *Sarei*, 671 F.3d at 795 (Bea, J., concurring and dissenting).

matters we decide are so important that all civilized people should agree with us," and an assertion of "entitlement to make law for all the peoples of the entire planet" in violation of the fundamental international law principle of the sovereign equality of states[253]—all in disregard of the *Charming Betsy* rule requiring a statute to be construed so as not to violate international law.[254] Judge Kleinfeld argued that the ATS, interpreted in accord with the presumption against extraterritoriality, was intended only to remedy wrongs committed within the United States.[255] Compared to the express indications in the Torture Victim Protection Act, he could see no evidence of congressional intent that the ATS should apply extraterritorially.[256] Judge Kleinfeld also refuted the majority's reliance on the 1795 Attorney General's advisory opinion, because it concerned torts committed in a foreign land by Americans, not foreign-cubed cases.[257]

Judge Kleinfeld further suggests that the "only wrong the First Congress could have possibly contemplated as providing for universal jurisdiction would have been piracy".[258] Furthermore, he elaborated, the First Congress's intention to include piracy within the ambit of the ATS cannot, after *Morrison*, support the statute's extraterritorial application.[259] As in Justice Kavanaugh's dissent in the D.C. Circuit's *Doe VIII v. Exxon Mobil* opinion,[260] Judge Kleinfeld reasons that piracy takes place on the high seas and is therefore distinguishable from the exercise of jurisdiction over acts that take place in the territory of a foreign sovereign, "because imposition of any state's law [over piracy on the high seas] could offend no other state's governance of its own territory."[261] The majority rejected this line of argument, noting that the Supreme Court in *Sosa* sought to address concerns about respect for a

---

[253] *Id.* at 797–98 (Kleinfeld, J., dissenting).
[254] *Id.* at 809–10 (Kleinfeld, J., dissenting).
[255] *Id.* at 810 (Kleinfeld, J., dissenting).
[256] *Id.* (Kleinfeld, J., dissenting).
[257] *Id.* at 811 (Kleinfeld, J., dissenting).
[258] *Id.* at 808 (Kleinfeld, J., dissenting).
[259] *Id.* at 809–810.
[260] Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 78–79 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) ("The high seas are jurisdictionally unique. They are 'the common highway of all nations,' governed by no single sovereign." (quoting The Apollon, 22 U.S. 362, 371 (1824)).
[261] *Sarei*, 671 F.3d at 798.

foreign state's sovereignty by limiting ATS claims to violations of universally accepted international norms.[262]

Although the Ninth Circuit in *Sarei* was concerned with interpreting a U.S. statute and not discerning the international law of universal jurisdiction, there is an interesting parallel to Judges Higgins, Kooijmans and Buergenthal's joint separate opinion in the *Arrest Warrant Case*. There, these judges note that, though piracy is the classic example of a crime subject to universal jurisdiction under international law, this does not mean that universal jurisdiction is limited to crimes committed outside the territory of a sovereign state. "Of decisive importance is that the jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas."[263]

Finally, Judge Kleinfeld considered the extraterritorial application of the ATS to be politically unwise as well as legally incorrect.[264] The issues that arise in such cases are inappropriate for adjudication, he opined, because they encroach on the proper functions of the political branches to determine U.S. foreign policy.[265] Judge Kleinfeld also referred to an ATS case against North American and European corporations relating to apartheid, claiming that the suit in the United States was a threat to peace and reconciliation in South Africa.[266]

B. Kiobel

In their latest brief on the extraterritoriality question, the *Kiobel* plaintiff-petitioners argue that existing doctrines of judicial restraint developed by the federal courts in transnational civil litigation cases—and perhaps also an exhaustion of local remedies requirement[267]—are

---

[262] *Sosa*, 542 U.S. at 725.
[263] Arrest Warrant Case, *supra* note 10, ¶ 61.
[264] *Sarei*, 671 F.3d 814 (Kleinfeld, J., dissenting).
[265] *Id.* at 815–16 (Kleinfeld, J., dissenting).
[266] *Id.* at 818 (Kleinfeld, J., dissenting) (*referencing* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007)).
[267] Petitioners' Supplemental Opening Brief, *supra* note 93, at 16.

sufficient to dismiss inappropriate ATS cases, without the need for a total bar on extraterritorial claims.[268] The petitioners also argue that denying extraterritorial effect to the ATS: (1) is contrary to the intent of the First Congress in enacting the ATS and contrary to Congress's actions since then, particularly Congress's decision not to limit the ATS following the *Filartiga* case and its decision to implement the TVPA;[269] (2) has no basis in the circuits' decisions, all of which have rejected the argument that the ATS does not apply extraterritorially;[270] (3) would drive ATS claims into state courts as foreign transitory tort cases, contrary to the First Congress's intent to create federal jurisdiction over such claims in order to avoid the "parochial prejudices of state courts";[271] (4) is unnecessary to conform the ATS with the *Charming Betsy* canon, because "the ATS represents an exercise of adjudicative jurisdiction" over violations of international law and does not seek to enforce American law but merely allows federal courts to decide cases concerning universal customary international law norms that are "binding in every country";[272] (5) fails to appreciate that the human rights norms at issue in the case are *erga omnes* obligations under international law, and that these universal rights form a sufficient nexus with the United States when the parties are also present in the U.S.;[273] and (6) goes against the contemporary development of international human rights law—both the trend confirmed in *Filartiga* that the U.S. should not be a safe haven for perpetrators of human rights violations, and the power granted to sovereign states under international law to provide remedies for such severe human rights violations, specifically through the exercise of universal jurisdiction.[274]

Also in response to the Supreme Court's order for re-argument on the extraterritoriality question, the Obama Administration has surprised commentators by filing a new amicus brief in *Kiobel* that departs from its previous position and is now in "partial support of

---

[268] *Id.* at 11.
[269] *Id.* at 14–15.
[270] *Id.* at 17.
[271] *Id.* at 19.
[272] *Id.* at 40.
[273] Petitioners' Supplemental Opening Brief, *supra* note 93, at 40–41 (referencing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. o (1987)).
[274] *Id.* at 13.

affirmance" of the Second Circuit's decision.[275] The United States continues to believe that a corporation can be a proper defendant in an ATS claim, and that the judgment of the appellate court should therefore be reversed.[276] The United States also still believes that courts may, pursuant to the ATS, recognize a federal common law cause of action for certain violations of international law committed outside of U.S. territory.[277] Significantly, however, the United States has in this latest amicus brief abandoned support for the *Kiobel* plaintiff-petitioners, now arguing that a private right of action is not available under the circumstances of the case, and that the plaintiffs' ATS claim should accordingly fail.[278] The new brief has also captured attention as a result of the State Department's apparent decision not to sign it. That decision, according to former State Department Legal Adviser John Bellinger, is "a not-so-subtle message – more to the human rights community than the Supreme Court – that State did not agree with the Justice Department position."[279] Indeed, there is a definite ring of *realpolitik* to the United States' argument, as evidenced by the brief's opening statement:

> [t]he United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, *including the exposure of U.S. officials and nationals to exercises of jurisdiction by foreign states*, for the Nation's commercial interests, and for the enforcement of international law.[280]

Nevertheless, the United States argues that there is no need for the Supreme Court in *Kiobel* to resolve the extraterritoriality question, and that "the Court should not articulate a categorical rule foreclosing

---

[275] Supplemental Brief for the United States, *supra* note 32.
[276] *See id.* at 27.
[277] *Id.* at 6.
[278] *Id.* at 5.
[279] Alison Frankel, *Kiobel Brief Shows State/DOJ Split Over Human Rights Litigation*, THOMSON REUTERS NEWS & INSIGHT (June 14, 2012), http:// blogs.reuters.com/alison-frankel/2012/06/15/kiobel-brief-shows-statedoj-split-over-human-rights-litigation/.
[280] Supplemental Brief for the United States, *supra* note 32, at 2 (emphasis added).

any such [extraterritorial] application of the ATS."[281] Indeed, the U.S. brief states that extraterritorial claims may, under certain circumstances, be consistent with *Sosa*.[282] Furthermore, the brief affirms that the decision in *Filartiga* "is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights."[283] Thus, *Filartiga* and its line of cases should, consistent with Congressional action to date, remain good law, and new ATS claims involving foreign conduct should be decided individually on a case-by-case basis.[284] Instead of developing its argument on extraterritoriality and international law, the United States argues that the actual issue in the case is the constitutional question of "whether a private right of action should be created by the courts as a matter of federal common law ... [which concerns] the allocation of responsibility among the Branches of the United States Government for the creation of private rights of action under U.S. law."[285]

The United States' conditional support for extraterritorial application of the ATS is of little avail to the *Kiobel* plaintiffs, however, as the United States now believes that the Court should fully reject the plaintiffs' claims:[286]

> In this case, foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory, without any connection to the United States beyond the residence of the named plaintiffs in this putative class action and the corporate defendants' presence for jurisdictional purposes. Creating a federal common-law cause of action in these circumstances would not be consistent with *Sosa*'s requirements of judicial restraint.[287]

---

[281] *Id.* at 4; *see also id.* at n.11 ("[T]he government urges the Court not to adopt ... a categorical rule" against extraterritoriality.).
[282] *Id.* at 13.
[283] *Id.*
[284] *See id.* at 5–6.
[285] Supplemental Brief for the United States, *supra* note 32, at n.3.
[286] *See id.* at 21.
[287] *Id.* at 13–14.

The brief continues, arguing that federal courts that are "engaged in judicial law-making should not recognize a cause of action that is significantly more expansive in this respect than the express extraterritorial cause of action created by Congress" in the TVPA.[288] However, the United States, without elaboration, leaves open the question of whether a cause of action could stand against a U.S. national or corporation for aiding and abetting conduct by a foreign government on its own territory, or generally for acts of foreign sovereign outside its territory or on the high seas.[289] (In their supplemental brief, the Respondents attack this "malleable" qualification as being incompatible with the *Morrison* presumption against extraterritoriality.)[290] The United States brief seeks to distinguish *Filartiga* on the grounds that the U.S. cannot be said in *Kiobel* to be harboring a torturer or "enemy of mankind" found residing in its territory.[291] Although the U.S. has sufficient contacts to exercise personal jurisdiction over the *Kiobel* defendants, these corporations are nationals of Nigeria, the United Kingdom and the Netherlands.[292] Implicitly disavowing moral leadership, the United States takes the view that, "if foreign nations with a more direct connection to the alleged offense or the alleged perpetrator [i.e. the United Kingdom, Netherlands or Nigeria] choose not to provide a judicial remedy, the United States could not be faulted by the international community for declining to provide a remedy under U.S. law."[293]

The U.S. administration's argument remains consistent with its previous position on the compatibility of the ATS with international law, which is a matter of considerable debate among foreign governments and within the larger international law community, as noted in the introduction. In a footnote in its brief, the United States asserts that, regardless of *Kiobel*, no doubt should exist about the American government's right under international law to impose civil or criminal

---

[288] *Id.* at 21.
[289] *Id.*
[290] Supplemental Brief for Respondents, *supra* note 248, at 35; *see also* Supplemental Brief for the United States, *supra* note 32, at 3–4, 8, 33–36.
[291] Supplemental Brief for the United States, *supra* note 32, at 19.
[292] *See generally id.* (making repeated references to these nations).
[293] *Id.* at 20.

sanctions for torture committed in foreign territories. The footnote also expressly states that "[t]he United States does not suggest that an extraterritorial private cause of action would violate international law in this case."[294] But the U.S. government does not provide any supporting argument for this claim, instead seeking to guide the Court away from extraterritoriality and towards the constitutional separation of powers as the basis for deciding the case. The United States does, however, assert that traditional transnational litigation doctrines such as *forum non conveniens*, act of state, and the political question doctrine, should be applied with "special vigor" in ATS claims involving extra-territorial conduct, particularly where there is a weak nexus between the U.S. and the territory where the conduct complained of occurred.[295] Indeed, the United States suggests that the courts should not approach *forum non conveniens* with the restraint characteristic of non-ATS transnational civil litigation, and that dismissal on *forum non conveniens* grounds "should not be the rare exception."[296] Furthermore, the United States argues that *Kiobel* is an appropriate case for a mandatory exhaustion-of-local-remedies requirement in order to demonstrate respect for foreign sovereigns and to avoid conflict in regards to foreign relations.[297]

In their original pleadings submitted before the Supreme Court made its March 5 order for re-argument, Respondents and their amici had already raised the extraterritoriality question, arguing that the lower courts' interpretation of the ATS: is contrary to U.S. rules on statutory interpretation designed to respect international comity and uphold America's international obligations;[298] violates international law and is contrary to the fundamental principle that international law does not condone the unilateral exercise of jurisdiction by one state over foreign non-consenting states;[299]disregards the principle of separation of powers by permitting judicial interference with questions implicating U.S. foreign relations,[300] thereby ignoring the Supreme

---

[294] *Id.* at n.3.
[295] *Id.* at 22, 24.
[296] *Id.* at 24.
[297] *Id.* at 22.
[298] Brief for Respondents, *supra* note 135, at 54–55.
[299] Supplemental Brief of Chevron Corp. et al., *supra* note 28, at 3.
[300] *Id.* at 28–30.

Court's restrictive *Sosa* approach to the recognition of federal common law causes of actions derived from customary international law norms;[301] and risks further conflict with foreign nations because ATS claims involve allegations of misconduct by foreign governments.[302]

In both their original brief and their new supplemental brief on extraterritoriality, Respondents urge the Supreme Court to apply the presumption against extraterritoriality in the *Morrison* line of cases as well as the *Charming Betsy* rule that a statute should be interpreted in compliance with international law.[303] "Few cases could be more remote from the circumstances that promoted the First Congress to enact the Alien Tort Statute."[304] Neither the language of the ATS nor its historical context overcomes the *Morrison* presumption.[305] The two canons of interpretation, Respondents argue, foreclose the extension of the ATS to a foreign-cubed case such as *Kiobel*, and the practice since 1980 of the federal courts in granting extraterritorial effect to the ATS should be reversed.[306]

The amici brief of Chevron Corporation et al., authored by Harvard Law School professor Jack Goldsmith, claims that international law does not recognize universal civil jurisdiction.[307] For support, Goldsmith refers to the House of Lords' consideration in *Jones v. Saudi Arabia* of the Convention Against Torture, which requires states parties to exercise universal criminal jurisdiction over torturers found within their territory, but does not indicate extraterritorial application of Article 14, which provides for compensation for victims of torture.[308] The Respondents' supplemental brief also cites the *Jones* decision and notes the scarcity of other authorities as support for the proposition that universal jurisdiction applies to criminal, but not civil jurisdiction.[309] Hence, Respondents argue, "universal civil jurisdiction

---

[301] *Id.*
[302] Brief of Amici Curiae for BP America et al., *supra* note 31, at 5, 15.
[303] Brief for Respondents, *supra* note 135, at 54–55; Supplemental Brief for Respondents, *supra* note 248, at 12.
[304] Supplemental Brief for Respondents, *supra* note 248, at 1.
[305] *Id.* at 7.
[306] *Id.* at 1, 3.
[307] Supplemental Brief of Chevron Corp. et al., *supra* note 28, at 12.
[308] *Id.* at 13; Jones v. Saudi Arabia [2006] UKHL 26 ¶ 25.
[309] Supplemental Brief for Respondents, *supra* note 248, at 40–44.

has *not* been universally accepted, as *Sosa* and *Charming Betsy* require."[310]

The Goldsmith brief also rejects the opinion in *Sarei* that the ATS "provides a domestic forum for claims based on conduct that is illegal everywhere, including where that conduct took place"[311] and therefore does not intrude on the sovereignty of foreign states. Goldsmith argues that the lower courts have used the ATS jurisdiction to impose federal common law causes of action to extraterritorial conduct. This is not genuine international law but "a globally unique, judge-made U.S. law to regulate the activities on foreign soil contrary to the consent of nations."[312]

The British and Dutch governments note in their joint amici brief for *Kiobel* that they "have maintained over a long period of time their opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged activities in foreign jurisdiction that caused injury" on the grounds that "such exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts."[313] In reviewing the case law on the presumption against extraterritoriality in statutory interpretation, the governments suggest that the presumption should also be applied to common law claims under the ATS.[314] They observe that the lower courts have been asserting jurisdiction in ATS cases without a "sufficiently close connection" to the United States and in respect to claims for violations of international law that go beyond the strict *Sosa* test of no less "definite content and acceptance among civilized nations than the 18th-century paradigms."[315] These governments urge the Supreme Court to set jurisdictional limits to the ATS and also to provide guidance on whether plaintiffs should be required to exhaust local remedies even where a sufficient factual nexus sustained United States jurisdiction under international law.[316]

---

[310] *Id.* at 44.
[311] Supplemental Brief of Chevron Corp. et al., *supra* note 28, at 5.
[312] *Id.* at 15.
[313] Brief of the Governments of the United Kingdom of Great Britain et al., *supra* note 37, at 2.
[314] *Id.* at 29–30.
[315] *Id.* at 31.
[316] *Id.* at 32.

The exhaustion of local remedies point is an important one. While requiring plaintiffs to have exhausted remedies in the more closely connected forum before pursing an ATS claim would not assuage all concerns about foreign-cubed jurisdiction, it would demonstrate U.S. respect for the jurisdictional interests of other states (unless such efforts would be futile or the plaintiffs were subject to a denial of justice in the natural forum). This would also be consistent with Congress's decision to include the exhaustion requirement in the TVPA.[317] The rule about exhaustion of local remedies is grounded in international law's recognition that a state may have an interest in hearing a case that involves its nationals or acts on its territory.[318] The view that justice is best served locally is expressed in the International Criminal Court's principle of complementarity, whereby the court only has jurisdiction if those states with a territorial or national connection to the crime are "unwilling or unable genuinely" to investigate and, if necessary, prosecute.[319] Likewise, the Princeton Principles on universal criminal jurisdiction give priority to territorial jurisdiction, because "societies that have been victimized by political crimes should have the opportunity to bring the perpetrators to justice, provided their judiciaries are able and willing to do so."[320] In *Sosa*, the Supreme Court observed that an exhaustion requirement might be warranted in ATS cases when "appropriate."[321] In the first en banc hearing of *Sarei* by the Ninth Circuit in 2008,[322] a majority of the panel considered that there was no "absolute" exhaustion requirement under the ATS,[323] but the controlling plurality opinion by Judge McKeown nevertheless recognized a role for "[p]rudential exhaustion" where the claim has only a weak nexus to the United States and "do[es] not involve matters of 'universal concern'."[324] Judge Reinhardt, dissenting, objected that "[n]o rule of domestic or international law requires plaintiffs who are

---

[317] Torture Victim Protection Act of 1991, *supra* note 206, at Section 2(b).
[318] Donovan & Roberts, *supra* note 9, at 158.
[319] Rome Statute of the International Criminal Court art. 17(1), July 17, 1998, 2187 U.N.T.S. 90.
[320] PRINCETON UNIV. PROGRAM IN LAW AND PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 53 (2001).
[321] *Sosa*, 542 U.S. 692, at 733 n.21.
[322] *Sarei*, 550 F. 3d 822.
[323] *Id.* at 824.
[324] *Id.*

alleging serious violations of human rights to exhaust local remedies when there is evidence that plaintiffs would further risk their lives by doing so."[325] On remand, the district court held that "it would be inappropriate to impose a prudential exhaustion requirement on Plaintiffs' claims for crimes against humanity, war crimes, and racial discrimination," but that there was an exhaustion requirement in regards to the other claims for violations to the rights to health, life, and security of the person; cruel, inhumane, and degrading treatment; international environmental violations; and a consistent pattern of gross human rights violations.[326]

Donovan and Roberts note that the exhaustion requirement "should not be uncritically converted into conditions that might block the exercise of universal jurisdiction," but note that it could effectively be employed as a means of respecting the interests of a state with traditional jurisdictional connections to the claim, provided that state is able to provide justice.[327]

V. CONCLUSION: WHAT FUTURE FOR THE EXTRATERRITORIAL APPLICATION OF THE ATS?

In light of the current composition of the Supreme Court, it seems unlikely that the outcome of *Kiobel* will turn on international law as opposed to American law.[328] If, however, one accepts that the ATS implicates public international law (both substantively, as shown by the claims of torture and extrajudicial killing made by the *Kiobel* plaintiffs, and procedurally in the sense of the permissible exercise of universal jurisdiction by U.S. courts), it is important not to lose sight of how international law norms are interpreted and developed—a process to which domestic courts have always been central.[329] In the epilogue to his thought-provoking monograph on public international

---

[325] *Id.* at 842 (Reinhardt, J., dissenting).
[326] *Sarei*, 671 F. 3d 736, 743 (9th Cir. 2011).
[327] Donovan & Roberts, *supra* note 9, at 159.
[328] *See generally* Lori F. Damrosch, *Main Essay – Medellin and Sanchez-Llamas: Treaties from John Jay to John Roberts, in* INTERNATIONAL LAW IN THE SUPREME COURT: CONTINUITY AND CHANGE 452 (David L. Sloss, Michael D. Ramsey and William S. Dodge, eds.).
[329] The Paquete Habana, 175 U.S. 677 (1900).

law, *From Apology to Utopia*, Martti Koskenniemi asks, "[w]hy is it that concepts and structures that are themselves indeterminate nonetheless still end up always on the side of the status quo?"[330] Koskenniemi suggests that legal institutions are structurally biased to prefer certain outcomes, and that legal rules make that which is contingent and contestable seem natural or unavoidable.[331] For example, it can be argued that, "while domestic courts in the West sometimes extend the jurisdiction of domestic anti-trust law, they rarely do this with domestic labour or human rights standards, though nothing in the standards themselves mandates such distinction."[332] These claims are, of course, contestable. But the American legal realist tradition has also long viewed law and politics as fundamentally inseparable; hence, the American aversion to judge-made law (as articulated by the Supreme Court in *Sosa*) as compared with England and Europe, where legal realism never fully took hold.[333] Within the narrow space that has been left open for debate in the federal courts (the door left "ajar subject to vigilant doorkeeping," in the words of Justice Souter[334]), the question is how (or why) judges will justify their decisions when faced with compelling arguments from both sides.

To characterize the judicial application of customary rules of international law in United States courts as "judicial imperialism[335]" is misguided.[336] Long before the era of international courts and tribunals was ushered in by the Hague Peace Conferences, international law was given effect to by domestic courts, and domestic courts have always had a role in shaping international law as well.[337]As the joint separate

---

[330] M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 606 (2d ed. 2005).

[331] *Id.* at 606–07; *see also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1998) (exploring, in the Critical Legal Studies tradition, the role of political ideology in law making).

[332] Koskenniemi, *supra* note 330, at 608.

[333] *See generally* Guglielmo Verdirame, *The Divided West: International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553, 562 (2007).

[334] *Sosa*, 542 U.S. at 729.

[335] *Sarei*, 671 F.3d at 818 (Kleinfeld, J., dissenting).

[336] *See supra* note 20 for a discussion on customary international law in U.S. courts.

[337] Brief of Amicus Curiae Thomas J. Schoenbaum, J.D., Ph.D., in Support of Petitioners at 4, Kiobel v. Royal Dutch Petroleum, 456 F. Supp. 2d. (2010) (No. 10-1491), 2011 WL 6962954; The Paquete Habana, 175 U.S. 677 (1900).

opinion in the *Arrest Warrant Case* concludes, state practice (including the decisions of domestic courts) "is neutral as to the exercise of universal jurisdiction,"[338] but the trend is towards a greater acceptance of the principle.[339] Therefore, there is no rule of international law prohibiting the extraterritorial application of the ATS. One need not subscribe to an overly-liberal interpretation of the *Lotus* principle[340] to reach this conclusion. Moreover, there appears to be little justification on the grounds of respect for international comity, state sovereignty, or the separation of powers for prohibiting the exercise of universal civil jurisdiction with regards to violations of so-called peremptory norms, which arguably include the prohibitions on piracy, war crimes, genocide and torture, over which international law recognizes a right to exercise universal criminal jurisdiction. Indeed, this would be largely consistent with the restrictive approach to the recognition of federal common law causes of action taken by the Supreme Court in *Sosa*.

The ATS is more vulnerable under the presumption against extraterritoriality than it is under the *Charming Betsy* canon. In light of the Supreme Court's decision in *Morrison*, and the ideologically-charged nature of the debate, the future of the ATS most certainly

---

[338] Arrest Warrant Case, *supra* note 10, ¶ 45.

[339] *Id.* ¶ 52.

[340] S.S Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). "[Tlhe first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." *Id.* at 18–19.

hangs in the balance. It is well settled under U.S. law that Congress has the power to legislate extraterritorially,[341] but evidence of the First Congress's intent in enacting the ATS has been lost in history. The 1795 Attorney General's opinion referenced in *Sosa* suggests that, at the very least, Congress intended the ATS to apply to claims against U.S. defendants for violations of international law committed in a foreign state.[342] A more ambitious, but still highly plausible, argument, advanced by the *Kiobel* petitioners,[343] is that the presumption against extraterritoriality should not apply to a statute that applies international law; the ATS is "a vehicle for the enforcement of universally applicable international norms," so there is no conflict of laws or jurisdictional overreaching when it is applied extraterritorially.[344]

Underlying this debate is the political concern that corporate defendants are being unfairly targeted in United States courts. The federal courts have a variety of tools at their disposal to ensure that ATS cases that neither have traditional jurisdictional connections to the United States, nor meet the high threshold for the exercise of universal jurisdiction under international law (that broadly corresponds to the test articulated in *Sosa*), are removed from the docket. As the United States' amicus brief in support of the *Filartiga* plaintiffs made clear, a dismissal on *forum non conveniens* grounds is appropriate where a remedy is available in a forum having more established jurisdictional connections than the U.S. court.[345] The United States' latest *Kiobel* brief also adopts this position.[346] As the ICJ has counseled, a due consideration must be paid to the jurisdiction of other states when a state is considering the exercise of universal jurisdiction.[347] Donovan and Roberts propose a "balancing test," which would consider the availability of a remedy in the forum with traditional jurisdictional links and would be open to submissions by the affected state.[348] U.S.

---

[341] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
[342] *Sosa*, 542 U.S. at 721.
[343] Petitioners' Supplemental Opening Brief, *supra* note 93, at 35.
[344] Colangelo, *supra* note 239, at 1088.
[345] Memorandum for the United States as Amicus Curiae, *supra* note 22, at n.48.
[346] Supplemental Brief for the United States, *supra* note 32, at 28.
[347] Arrest Warrant Case, *supra* note 10, ¶ 59.
[348] Donovan & Roberts, *supra* note 9, at 159. This might raise questions such as whether to respect an amnesty granted in respect of peremptory crimes committed in that country as part of a process of peace and reconciliation.

courts could also find in the customary international law requirement that the plaintiff first exhausts local remedies, a requirement that already exists in the TVPA.

In the *Arrest Warrant* case, Judges Higgins, Kooijmans, and Buergenthal observed:

> One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations.[349]

For the Supreme Court to overrule over thirty years of precedent would be a major blow to the fight against impunity. Critics suggest that diplomacy is the more appropriate path,[350] but progress by such means has been measured in decades, if at all. The ATS has had an immediate, revolutionary impact on the enforcement of international human rights norms. Yet it has not brought down the international order, nor does it threaten to do so. In fact, it is remarkable how little attention the ATS has received outside the American legal system and academy.[351] Moreover, the vast majority of ATS cases have historically been dismissed on *forum non conveniens* or

---

[349] Arrest Warrant Case, *supra* note 10, ¶ 5.

[350] *See* Bellinger, *supra* note 218, at 8 (describing the "diplomatic costs" of ATS litigation). "Beyond the ATS…we also need to focus on the many other tools the U.S. government, and in particular the State Department, can use to prevent and redress human rights abuses. Some of these are tools of persuasion – for example, the State Department's annual human rights reports, which review countries' human rights practices and focus attention on reported abuses. The State Department also conducts quiet and public diplomacy, in bilateral and multilateral fora, and administers a variety of programs intended to foster development of the rule of law in other countries – a critical aspect of preventing and redressing human rights abuses." *Id.*

[351] Kenneth Anderson, Bleg: What Do Non-US Legal Scholars Think about ATS Doctrines?, OPINIOJURIS, (April 19, 2009), http://opiniojuris.org/2009/04/19/ bleg-what-do-non-us-legal-scholars-think-about-ats-doctrines/.

other procedural grounds.[352] The case in which the fate of the ATS will be decided concerns corporate defendants. They are typically multinational companies that have already had to accept broad assertions of personal jurisdiction in conventional transnational litigation before U.S. courts, based on very weak jurisdictional contacts arising out of the global nature of their business activities.[353] In this light, the claim that extraterritorial ATS cases will have a "chilling" effect on foreign direct investment is less compelling.[354] If the Supreme Court pursues the extraterritoriality question to its end, it will face a clear choice: effectively kill the ATS and thereby grant immunity from civil suit to those who commit human rights abuses abroad; or re-establish clear limits on the kind of claims and circumstances in which it is appropriate for U.S. courts to take an extraterritorial ATS case. Such a decisions would be aligned with the developing international law of universal jurisdiction and the United States' long-avowed commitment to the promotion of respect for human dignity, regardless of territorial boundaries.

---

[352] K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 2 T.J.I.L. 40 n.6 (2004).

[353] *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987) (deciding that the minimum contacts required for jurisdiction between the forum and a foreign corporation were satisfied on a "stream of commerce" theory).

[354] Brief of Amici Curiae BP America et al., *supra* note 31, at 2.