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Extraterritoriality and Human Rights After Kiobel

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Extraterritoriality and Human Rights After *Kiobel*

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Are human rights extraterritorial? In this Essay, I address the question from three different perspectives. In Part I, I step back to consider the first principles of human rights law. Whatever our disagreements about the implementation of human rights norms, they are clearly absolute prohibitions, binding both within and without the territory of any one state. The prohibition on genocide, for example, is a prohibition on committing acts defined as genocide anywhere. Extraterritoriality, however, is relevant to the enforcement of human rights norms, to determine when a state has the right or the obligation to impose sanctions on those who violate human rights outside the territory of that state. The second and third sections of this Essay address two aspects of the debate over the extraterritorial enforcement of human rights. In Part II, I discuss efforts to hold corporations liable for human rights violations. In Part III, I address the narrow issue decided by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*[1]—the application of the Alien Tort Statute (ATS)[2] to cases involving some degree of extraterritoriality because of the location of the human rights violations, the citizenship of the defendants, or the plaintiffs' lack of connections to the United States.

I.

The modern concept of human rights is, by definition, extraterritorial. Human rights today are not dependent on geography or government, but are rights of all human beings. The consequences of this broad generalization, of course, are hotly contested. But it is important to start with this first principle: extraterritoriality is the

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

2. 28 U.S.C. § 1350 (2006).

starting place for human rights norms in the twenty-first century.

A.

The concept of human rights traces back to the ancient religious and natural law norms that regulated the conduct of individuals and their treatment of others.[3] William Blackstone recognized that history as underlying all of international law, which he grounded in "maxims and customs . . . of higher antiquity than memory or history can reach"[4] and interpreted through "the law of nature and reason."[5] Blackstone viewed this law as governing interactions among states and their citizens, not just state-to-state relations, defining the law of nations as regulating all intercourse between "two or more independent states and the individuals belonging to each."[6]

As positivism dominated legal theory in the nineteenth century, scholars narrowed the scope of international law to address state-to-state relations. Norms governing private interactions were categorized as private international law. According to the positivist view, only agreements accepted by states could create binding international law norms. Individuals were relegated to a dependent status: to the extent that individuals had any rights under international law, those rights were by-products of the rights of states. Thus, foreign citizens might be entitled to some protection because violations of their rights were considered violations of the rights of their states of citizenship. The rights of religious minorities were protected as an extension of the rights of the states in which they constituted a majority. As summarized by Oppenheim, "the Law of Nations is primarily a law between States," and, as a result, states are "the only subjects of the Law of Nations."[7]

Within this positivist framework, human rights law developed through agreements among states. In the late nineteenth century, states signed treaties in which they agreed to prohibit and punish conduct such as the slave trade[8] or the mistreatment of injured and

3. *See* MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS 18–60 (2004).

4. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67.

5. 4 *id.* at *67.

6. *Id.* at *66.

7. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 636 (H. Lauterpacht ed., 8th ed. 1955).

8. For a discussion of the gradual development of international rules barring slavery and the slave trade, see Roger S. Clark, *Steven Spielberg's* Amistad *and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 393–410 (1999).

captured soldiers during armed conflict.[9] These treaties were binding only on the states that ratified them. In general, they gave individuals no right to enforce rights or to seek compensation when injured by a violation. Instead, enforcement was either non-existent or left to states in their relationships with each other.

During the decades following the atrocities of World War II, states dramatically expanded human rights commitments through a web of human rights treaties.[10] In addition, as acceptance of human rights norms expanded, the prohibitions codified in many of these treaties developed into customary international law or *jus cogens* norms, binding on all states even without state consent. The Nuremberg Tribunal marked the beginning of this process when it recognized that the prohibition of crimes against humanity was binding on all states because it was "recognized by all civilized nations" and "regarded as being declaratory of the laws and customs of wars."[11] The tribunal applied the prohibition as a rule of customary international law, even though the underlying treaty only bound states that were party to it.[12]

These universal human rights norms are "extraterritorial" by definition. That is, they apply everywhere, across borders. Genocide, slavery, and torture are prohibited everywhere, without restrictions imposed by geography or state lines.[13] It is important to pause for a

9. *See* Geneva Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field (1864), 22 Stat. 940 (1865).

10. For an overview of the development of international human rights norms after World War II, see Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filártiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53, 64–75 (1981).

11. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 254 (1947).

12. *Id.* at 253–54. The Hague Conventions on the Laws and Customs of War on Land of 1907 stated that "[t]he provisions [of this Convention] do not apply except between contracting Powers, and then only if all belligerents are parties to the Convention." Convention (IV) Respecting the Laws and Customs of War on Land art. 2, Oct. 18, 1907, 36 Stat. 2277, 2296, 1 Bevans 631, 644.

13. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade . . . [or] (d) torture."); *see also* Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (stating that "genocide . . . is a crime under international law," with no qualifications or exceptions); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85

moment to consider the significance of this. When genocide or slavery or torture occurs in Nigeria or Colombia or the United States, a universal norm has been violated. International law prohibits this conduct everywhere. Specific treaties may have geographical limitations, but universal norms do not.

B.

The consequences of these universal prohibitions are more contested. What do the universal prohibitions of genocide, slavery, and torture signify in terms of implementation and enforcement? Does international law bind all states to prohibit conduct that violates universal norms as a matter of domestic law, hold perpetrators accountable, or provide redress to victims? Or is implementation—including prohibition, punishment, and redress—left to each state?

Several treaties obligate states to prohibit certain conduct as a matter of domestic law, extradite or prosecute those accused of such behavior, or deliver the accused to an international tribunal for prosecution.[14] Some treaties also obligate states to provide redress to those harmed by human rights violations.[15] Many scholars argue that customary international law has adopted additional obligations to redress violations of international law, binding on all states, not just those that explicitly ratify these treaties. In 2005, the General Assembly endorsed a general right to redress when it adopted a broad-ranging set of principles on the right to a remedy and reparation.[16] The principles call on states to provide victims of human rights violations with access to justice and effective remedies, including reparation.[17] The principles also call on states to prevent, investigate, and punish human rights violations.[18]

[hereinafter Torture Convention] ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.").

14. *See, e.g.*, Genocide Convention, *supra* note 13, art. 1 (stating that genocide "is a crime" which states "undertake to prevent or punish"); Torture Convention, *supra* note 13, art. 5 (requiring that states prosecute or extradite torturers).

15. *See, e.g.*, Torture Convention, *supra* note 13, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.").

16. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

17. *Id.* ¶¶ 11–23.

18. *Id.* ¶¶ 1, 3(b), 4.

The ongoing struggle of the human rights movement and civil society more generally is to incorporate affirmative obligations into the international understanding of the human rights norms. It is not enough to prohibit certain conduct on paper; there must also be an obligation to prevent, investigate, punish, and provide redress.

II.

Corporations bear responsibility for human rights violations around the world.[19] Corporate agents commit such violations directly, as when corporate security forces kill or injure people. Corporate actors also conspire in and finance violations committed by government officials. But victims of corporate human rights violations are hard-pressed to find a venue with the legal authority to hold a multinational corporation liable for its human rights violations. Corporations use multiple legal structures to insulate themselves from accountability. And multinational corporations have used their considerable economic might around the world to create protections for their own due process and substantive rights, while carefully blocking efforts to develop similar protections for those injured by their activities.

A.

The concepts of territoriality and extraterritoriality are meaningless when applied to modern corporations. Multinationals often choose the place of their incorporation—and, therefore, their nationality—because of the financial and legal implications, not due to their ties to their "home" state. They set up subsidiaries, holding companies, and other entities based on the same logic. The result is a web of corporate structures explicitly designed to minimize accountability and liability for the impact of their operations, including accountability and liability for human rights violations. Within this web, territorial and extraterritorial have little meaning.

Phillip Blumberg traced the origins of this liability-shifting structure to the early-twentieth-century decision to allow corporations

19. For historical perspective on corporate human rights abuses, as well as modern examples, see Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 45–47, 49–53 (2002).

to own stock in other corporations.[20] Corporate shareholders were granted the same limited liability protection as individual shareholders, despite the shared business that linked the parent and subsidiary companies:[21]

> [This structure] overlooked the fact that the parent corporation and its subsidiaries were collectively conducting a common enterprise, that the business had been fragmented among the component companies of the group, and that limited liability – a doctrine designed to protect investors in an enterprise, not the enterprise itself – would be extended to protect each fragment of the business from liability for the obligations of all the other fragments.[22]

A century later, the result is a legal structure that wrongly attributes legal independence to each component company and ignores the corporate group's multiple, amorphous, and often artificial legal identities.[23] As such, it is misleading to term regulation of the various pieces of the multinational corporation as extraterritorial merely because the parent company is based elsewhere. Determining the proper venue to sue a multinational corporation is a classic shell game.

The facts underlying the *Kiobel* case decided by the Supreme Court in April 2013 provide one example. Although personal jurisdiction was not litigated in *Kiobel*,[24] the facts are similar to those in *Wiwa v. Royal Dutch Petroleum Co.*,[25] which was filed six years earlier and settled in 2009. The *Wiwa* complaint was based in part on

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20. PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 56–59 (1993).

21. *Id.* at 58–59.

22. *Id.* at 59.

23. As Blumberg explained:

> These very large corporations typically operate as multi-tiered multinational groups of parent and subsidiary corporations collectively conducting worldwide economically integrated enterprises that for legal or political purposes have been fragmented among the constituent companies of the group.

Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 298 (1990).

24. In the *Kiobel* case, defendants failed to challenge personal jurisdiction in their Rule 12 motion to dismiss, thereby waiving the challenge and, in effect, consenting to personal jurisdiction. They also failed to file a forum non conveniens motion; it is not clear whether the federal courts would consider such a motion timely if it were filed after the case is remanded to the district court.

25. 226 F.3d 88 (2d Cir. 2000).

actions of the global Shell/Royal Dutch Petroleum multinational enterprise, and also on actions of its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd. (SPDC).[26] Profits from the Nigerian operation flow up the chain to the parent corporation, although it would take a forensic accounting team to unravel where those profits end up (and where taxes on those profits should be paid).[27] Although Shell Oil Company, the U.S. subsidiary, does billions of dollars of business in the United States, those U.S. ties were not attributed to Royal Dutch Petroleum, the parent company, for the purposes of personal jurisdiction.[28] Instead, personal jurisdiction was based on a handful of direct ties between Royal Dutch Petroleum and New York State.[29] According to corporate-friendly rules, Shell U.S.A. is a separate entity from the others, and litigation against Royal Dutch Petroleum in the United States for events that occurred in Nigeria is "extraterritorial." But that conclusion merely reflects Royal Dutch Petroleum's artificial (but perfectly legal) business decisions, made precisely to insulate its various divisions from the legal obligations incurred by other divisions.

In another infamous example, after the Union Carbide disaster in Bhopal, India, a 1984 chemical leak that killed thousands of people and injured tens of thousands more, representatives of the victims of the leak argued that the Union Carbide should be viewed as a single legal entity, rather than as independent parts:

> In reality there is but one entity, the monolithic multinational, which is responsible for the design development and dissemination of information and technology worldwide, acting through a neatly designed network of interlocking directors, common operating systems, global distribution and marketing systems, financial and other controls. . . . Persons harmed by the acts of [a] multinational corporation are [not] in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the

26. *Id.* at 92.

27. *See id.* (describing Shell/Royal Dutch Petroleum Company as a "vertically integrated network of affiliated but formally independent oil and gas companies").

28. *See id.* at 93.

29. *Id*. at 94–99. The court did not consider plaintiffs' argument that Shell U.S.A. was the alter ego of Royal Dutch Petroleum. *Id*. at 95 n.4.

> multinational enterprise that caused the harm is liable for such harm. The defendant multinational corporation has to bear this responsibility for it alone had at all material times the means to know and guard against hazards likely to be caused by the operation of the said plant, designed and installed or caused to be installed by it and to provide warnings of potential hazards.[30]

U.S. courts rejected this approach, dismissing the case on the basis of forum non conveniens after concluding that there was insufficient connection between the U.S. parent company and the Indian operation to justify suit in U.S. courts.[31]

On rare occasions, the shell game turns around and bites the corporation (to mix a metaphor). In 1993, Ecuadorans sued Texaco Oil in a U.S. federal court, seeking damages for environmental harms in Ecuador.[32] Texaco, a U.S. corporation, argued successfully that the lawsuit should be litigated in Ecuador, and the U.S. claim was dismissed in 2002 on the condition that Texaco submit to the jurisdiction of the courts in Ecuador.[33] In 2011, the Ecuadoran courts issued a final, enforceable judgment against Chevron Corporation—which had merged with Texaco in 2001—for nineteen billion dollars. Texaco's response to the Ecuadoran judgment has been nothing short of scorched earth. The company has employed hundreds of lawyers and dozens of law firms to file racketeering claims against all those involved in Ecuador litigation, and it has used an international arbitration procedure to block the government from enforcing the

30. Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 311, 324 (2000) (second alternation in original) (quoting Complaint ¶ 19, Union of India v. Union Carbide Corp., (Sept. 5, 1986) (India)). To view a reprint of the full complaint, see UPENDRA BAXI & AMITA DHANDA, VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE 3–12 (1990).

31. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 197 (2d Cir. 1987) (affirming forum non conveniens dismissal).

32. For an overview of this litigation, see Suraj Patel, *Delayed Justice: A Case Study of Texaco and the Republic of Ecuador's Operations, Harms, and Possible Redress in the Ecuadorian Amazon*, 26 TUL. ENVTL. L.J. 71 (2012). For diametrically opposed views of the underlying issues, compare the material posted at *About the Campaign*, CHEVRON TOXICO: THE CAMPAIGN FOR JUSTICE IN ECUADOR, http://chevrontoxico.com/about/ (last visited Apr. 3, 2013) with *Ecuador Lawsuit*, CHEVRON, http://www.chevron.com/ecuador/ (last visited Apr. 3, 2013).

33. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002).

judgment.[34]

The lesson to other multinational corporations may be to think carefully before deciding that a forum in the host state will prove favorable. But, as discussed in the following section, Chevron's use of international arbitration reflects a growing movement away from the courts to a forum even more reliably tilted in favor of corporate interests.

B.

Corporations appear to be increasingly wary of the dangers they face in litigation in the courts of the states in which they do business. As a result, they have sought to institutionalize the right to raise claims against the governments of those host states through arbitration. Regional trade agreements and thousands of bilateral investment treaties (BITs) permit corporations that invest in "foreign" states to challenge state actions before arbitration panels and to enforce any resulting damage award in local courts.[35] The treaties guarantee fair treatment, contract enforcement, protection against expropriation, and compensation for violations of other rights. They also provide access to a neutral arbitration proceeding and a guarantee that any judgment will be enforceable.

These arbitration agreements are one-sided in the sense that they provide protections for the foreign investor but do not impose any reciprocal obligations on the investor. Corporations have opposed efforts to codify corporate obligations through multilateral or bilateral treaties. Moreover, victims of corporate misbehavior have no neutral forum in which to vindicate their rights.

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34. *See* Chevron Corp. v. Donziger, 783 F. Supp. 2d 713 (S.D.N.Y. 2011); *see also* Patel, *supra* note 32, at 97–98 (describing Chevron's attempt to quash the Ecuadorian ruling through an international court of arbitration).

35. For an overview, see Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 831–41 (2012) (discussing bilateral and regional investment agreements and international investment arbitration mechanisms). For discussions of the potential for conflict between the protections that these agreements afford to corporations and the rights of natural persons, see Marc Jacob, *International Investment Agreements and Human Rights* 26–31 (Inst. Dev. & Peace Research Paper Series, Mar. 2010), *available at* http://www.humanrightsbusiness.org/files/international_investment_agreements_and_human rights.pdf, and LUKE ERIC PETERSON, RIGHTS & DEMOCRACY, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES 27–31 (2009), *available at* http://publications.gc.ca/ collections/collection_2012/dd-rd/E84-36-2009-eng.pdf.

C.

Multinational corporations have succeeded in imposing an international legal system that is heavily weighted in their favor. International law respects domestic law definitions of the corporate structure, which permit international enterprises to incorporate as multiple legally separate entities that, as a general rule, are not considered to be responsible for each other's debts and obligations, including compensation for injuries they inflict. And international law contains thousands of treaties granting corporations the right to seek arbitration when their rights are allegedly violated in a country in which they are considered to be a foreign corporation. Finally, corporations have resisted efforts to codify their international law obligations, or to create a neutral forum in which they would be required to respond to claims that they have caused damage in the places where they do business.

As a result, multinationals have a host of mechanisms to avoid legal accountability. When sued in the place where they do business, they claim that the harms were inflicted by a local subsidiary, not by the parent company, and that the subsidiary has insufficient assets to pay for the injuries. If forced to litigate in the host country, they argue that the courts of that state are corrupt or biased against them or otherwise incompetent to hear the claim.[36] When corporations are sued in their own home country or in the courts of a third country, they argue that they are the wrong defendant and are not responsible for the subsidiaries' actions or that the courts of that state have no right to hear claims occurring outside their territory.[37]

Complaints about the extraterritorial application of the ATS must be understood in this context. In the United States, the ATS has filled a small part of the enforcement gap, permitting a small number of those injured by corporate human rights abuses to file suits in U.S. courts if they can assert personal jurisdiction over the corporate defendant. Many of the cases have been filed against U.S. corporations and are not, therefore, extraterritorial. All those filed against foreign corporations involve companies with a presence in the

36. *Cf.* Chevron Corp. v. Naranjo, 667 F.3d 232, 238 (2d Cir. 2012) (describing Chevron's arguments that a judgment rendered against it by Ecuadorian courts should not be enforceable on the basis that Ecuadoran judiciary was tainted by political interests).

37. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195, 198 (2d Cir. 1987) ("UCC moved to dismiss the complaints on grounds of *forum non conveniens*, the plaintiffs' lack of standing to bring the actions in the United States . . . .").

United States sufficient both to establish personal jurisdiction and to survive a motion to dismiss for forum non conveniens. In its April 2013 decision in *Kiobel*, however, the Supreme Court narrowed the application of the ATS, as discussed in the following section.

III.

For over two decades, ATS jurisprudence assumed without discussion that the statute applied to conduct outside the United States. Most important, in its 2004 decision in *Sosa v. Alvarez-Machain*, the Supreme Court decided an ATS case involving events that took place in Mexico.[38] The Court rejected application of the statute to the facts of that case,[39] and much of the discussion and reasoning of the opinion is based on the assumption that the statute primarily concerns claims arising in the territory of foreign states.[40] The Court also declined to even address the Executive Branch's arguments about extraterritoriality.[41] In subsequent cases, a handful of dissenting opinions discussed the issue,[42] but the extraterritorial application of the statute remained relatively noncontroversial until the Supreme Court ordered the *Kiobel* litigants to brief and argue the following issue: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[43]

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38. 542 U.S. 692 (2004).

39. *Id.* at 738 (holding that a detention of less than a day, followed by transfer to lawful custody, did not violate an international norm sufficient to support a federal common law claim under the ATS).

40. The majority, for example, discussed the possibility of imposing a requirement of exhaustion of domestic remedies, *id.* at 733 n.21, a procedure that would be unnecessary unless the acts giving rise to the claim arose in the territory of a foreign state. The Court also discussed at some length the potential foreign policy concerns triggered by ATS cases, a concern that is not present in cases that do not involve foreign states. *Id.* at 727–28.

41. *See* Brief for the United States as Respondent Supporting Petitioner at 46–50, *Sosa*, 542 U.S. 692 (No. 03-339) (arguing that federal courts cannot recognize ATS claims based on conduct occurring in the territory of foreign states).

42. *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 74–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

43. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.). The Supreme Court originally granted review in *Kiobel* to consider whether the ATS applies at all to corporate defendants, but, after oral argument on that issue, the Court ordered reargument on the issue of extraterritoriality. *Id.* Although the opinion did not directly address the corporate-defendant issue, the fact that the Court acknowledged the possibility that a claim

In the April 2013 *Kiobel* decision, Chief Justice Roberts, writing for a five-Justice majority, acknowledged that the standard statutory presumption against extraterritoriality does not apply to the ATS, because the presumption applies to statutes that regulate conduct abroad.[44] The ATS, by contrast, provides jurisdiction; federal common law provides the cause of action, based on clearly defined, widely accepted international law norms.[45] The *Kiobel* majority relied instead on the "principles underlying the presumption of extraterritoriality,"[46] because of "the danger of unwarranted judicial interference in the conduct of foreign policy."[47]

The Court then rejected the argument that the text, history, and purposes of the ATS rebut this new presumption, a result with which I strongly disagree. But the majority opinion concluded by recognizing the possibility that an ATS case with sufficient ties to the United States might "displace" the presumption. In this section, I first discuss my objections to the Court's conclusion that the presumption against extraterritoriality applies to the ATS, then discuss the relatively narrow holding of the case and consider what claims are likely to be actionable after *Kiobel*.

A.

In *Kiobel*, the Court imposed a twenty-first-century standard of interpretation—requiring a clear indication that Congress intended the courts to recognize extraterritorial common law claims—on an eighteenth-century statute, and ignored the common sense reading of the text of the ATS, contemporary understanding of its reach, prior judicial interpretations, and the congressional response to the application of the statute to extraterritorial acts.

Statutory text: The text of the ATS grants federal courts jurisdiction over claims for "a tort only, committed in violation of the

might have sufficient ties to the United States to "displace" the presumption against extraterritoriality, *see infra* Part III.B, suggests that the ATS can apply to corporate defendants. Moreover, the Second Circuit held that it did not have ATS subject matter jurisdiction over a claim against a corporate defendant, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013), an argument that the Supreme Court presumably rejected since it did not dismiss for lack of subject matter jurisdiction.

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

45. *Id.* (citing *Sosa*, 542 U.S. at 713).

46. *Id.* at 1665.

47. *Id*. at 1664. The majority in effect creates a new presumption, the *Kiobel* presumption, applicable to the common law cause of action created in ATS cases. *See id*. at 1664–65.

law of nations . . . ."[48] This text includes no limits on the location of the torts that trigger federal jurisdiction. Other provisions of the same section of the First Judiciary Act did include territorial limitations,[49] indicating that the Congress that enacted the ATS had thought about such restrictions, knew how to include them, and chose not to so limit the ATS.

The Court in *Kiobel* noted that the statute uses the term "tort," and that, at the time the statute was enacted (and today as well), transitory torts could be litigated in U.S. courts no matter where the claims arose.[50] The Supreme Court relied on the common law understanding of transitory torts in *Burnham v. Superior Court of California*,[51] quoting Justice Story's observation that "by the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found."[52] The use of "tort" in the ATS thus provides strong evidence that the eighteenth-century Congress intended the statute to apply to transitory torts that constituted violations of the law of nations.

Contemporary understanding: A 1795 opinion of Attorney General William Bradford, issued just a few years after the ATS was enacted, concluded that the ATS applied to a claim arising in the territory of Sierra Leone, a sovereign state.[53] Bradford noted that the criminal prosecution of those involved in the violation of the law of nations would not be possible, but then stated:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by

48. 28 U.S.C. § 1350 (2006). The ATS was enacted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73.

49. *See* Judiciary Act of 1789 § 9, 1 Stat. 73, at 76–77 (granting the district courts exclusive jurisdiction over crimes "committed within their respective districts, or upon the high seas," and over certain seizures made "on waters which are navigable from the sea by vessels of ten or more tons burthen" or "within their respective districts as well as upon the high seas").

50. *Kiobel*, 133 S. Ct. at 1665–66.

51. 495 U.S. 604 (1990).

52. *Id.* at 611 (quoting J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 543 (1846)).

53. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795). For an extensive discussion of the Bradford opinion, including contemporaneous documents confirming that Bradford knew that the events had occurred in the territory of a foreign state, see Supplemental Brief of Amici Curiae Professors of Legal History et al. in Support of Petitioners at 18–25, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

> 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 laws of nations, or a treaty of the United States . . . .[54]

The Court discredits this source as insufficient to counter the presumption against extraterritoriality.[55] But the Bradford opinion shows that, just six years after Congress enacted the ATS, the leading lawyer in the U.S. government thought that it applied to conduct within the territory of a foreign state. Surely, this evidence is crucial to the interpretation of a statute enacted over 200 years ago, and stronger evidence of the intent of the first Congress than the strict version of the presumption against extraterritoriality recently adopted by a modern Supreme Court.

Modern judicial interpretation: The Supreme Court has considered the meaning of the ATS in multiple cases, each involving extraterritorial torts. None of those cases even hint that the location of the underlying events might be relevant to the application of the statute.[56] In addition, in the 2004 decision in *Sosa*, the Court cited the *Filártiga v. Peña-Irala* decision with approval.[57] Since *Filártiga* involved torture in Paraguay,[58] it clearly relied on extraterritorial application of the ATS. The *Kiobel* majority made no effort to explain the apparent acceptance of extraterritorial application of the ATS in the Court's own decisions.

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54. Breach of Neutrality, 1 Op. Att'y Gen. at 59.

55. *Kiobel*, 133 S. Ct. at 1667–68.

56. *See* Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (holding that the defendant was not entitled to statutory immunity, without questioning the application of the ATS to the facts, in an ATS case involving human rights abuses in Somalia); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (holding, in a case involving events in Mexico, that the claim did not state a cause of action, without questioning whether the statute would apply to a properly stated claim, and citing with approval cases applying the statute to events that took place in foreign states); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 436 (1989) (discussing the ATS and assuming that it would have applied if not for the immunity granted to the defendant, a sovereign state, in a case involving an attack on a tanker on the high seas); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964) (citing the ATS as one of several constitutional and statutory provisions "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions," in a case involving expropriation in Cuba).

57. *Sosa*, 542 U.S. at 732 (noting that *Sosa*'s holding was "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court," and citing *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), as one example of this consistency).

58. *Filártiga*, 630 F.2d at 878.

Congressional response: The Second Circuit decided *Filártiga* in 1980, over three decades ago. Since that time, Congress has expressed support for the *Filártiga* interpretation of the statute,[59] and has made no effort to narrow the reach of the ATS by excluding jurisdiction over acts occurring within the territory of foreign states. To the contrary, Congress expanded human rights claims in three separate statutes: the Torture Victim Protection Act,[60] the Anti-Terrorism Act,[61] and the "state sponsors of terrorism" exception to the Foreign Sovereign Immunities Act.[62] Each statute further extends the right to bring civil claims for human rights violations; each applies to acts occurring in the territory of foreign states; and none purports to replace or narrow the scope of the ATS. As the Supreme Court emphasized in *Sosa*, "Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded . . . by enacting legislation supplementing the judicial determination in some detail."[63]

Finally, to the extent that litigation in U.S. courts of human rights claims arising out of events in foreign states triggers concerns about fairness to the defendants, foreign policy, or inconvenience, those problems are properly addressed through one or more standard federal court doctrines: personal jurisdiction, political question or act of state, and forum non conveniens.[64] Human rights claims are not more complex or politically sensitive than dozens of other cases routinely decided by federal courts. When ATS cases have insufficient ties to the United States, trespass upon the foreign affairs powers of the Executive Branch, or require that a court judge the

59. *See* H.R. REP. NO. 102-367, at 3–4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (stating that the ATS has "important uses and should not be replaced," and noting that the *Filártiga* decision has "met with general approval").

60. 28 U.S.C. § 1350 note (2006) (authorizing U.S. citizens, as well as noncitizens, to sue for torture and extrajudicial execution).

61. 18 U.S.C. § 2333(a) (2006) (authorizing a U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism" to sue for treble damages).

62. 28 U.S.C. § 1605A (Supp. V 2011) (permitting suits for extrajudicial killing, torture, and other abuses against states labeled "sponsor[s] of terrorism" by the U.S. Department of State).

63. Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) (citing 28 U.S.C. § 1350 note).

64. For a full discussion of the application of these doctrines to extraterritorial ATS claims, see Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae on Reargument in Support of Petitioners at 1–30, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

legitimate acts of a sovereign state, the courts have applied these pre-existing doctrines and have dismissed the claims. There is nothing unique about ATS claims that requires application of novel, contorted rules of statutory interpretation.

B.

The *Kiobel* decision was clear on a few important points, while leaving many others unresolved. Most clearly, the Court unanimously rejected application of the ATS to the claims at issue in that case: foreign plaintiffs, suing a foreign corporation with a minimal presence in the United States, for events that took place entirely outside the United States.[65] The five-Justice majority reached that result after concluding that the principles underlying the presumption against extraterritoriality "constrain courts exercising their power under the ATS."[66] The majority emphasized that application of the ATS to events arising in the territory of foreign states posed "the danger of unwarranted judicial interference in the conduct of foreign policy."[67]

The opinion also left clear, however, that, in some circumstances, a claim might have sufficient ties with the United States to "displace" the *Kiobel* presumption.[68] The concluding language narrowly limited the holding to the facts of this case:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[69]

Thus, where claims "touch and concern the territory of the United States . . . with sufficient force," they will "displace the presumption against extraterritorial application," even if they arise outside of the

65. *Kiobel*, 133 S. Ct. at 1669.
66. *Id.* at 1665.
67. *Id.* at 1664.
68. *Id.* at 1669.
69. *Id.* (citation omitted).

United States.[70]

Concurring opinions on behalf of three of the Justices in the majority emphasized that the majority opinion did not address all claims arising outside the United States. Justice Kennedy noted that "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," and observed that, in his view, "that is a proper disposition."[71] He concluded that in cases "with allegations of serious violations of international law principles" that are not covered by the "reasoning and holding" of *Kiobel*, "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[72]

Justices Alito and Thomas would have preferred that the majority opinion went further. They argued that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[73] But their view that only human-rights-violating conduct within U.S. territory is sufficient to support an ATS claim obtained only two votes from the Court, and they acknowledged that the Court's conclusion takes a "narrow approach" that "leaves much unanswered."[74]

These two concurring opinions, joined by three members of the

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70. *Id.* (citing Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883–88 (2010)).

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

72. *Id*. If *Kiobel* had definitively barred all claims arising outside of the United States, there would be no need for "further elaboration and explanation" of the "proper implementation of the presumption against extraterritorial application" of the ATS.

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

74. *Id*. at 1669–70. Justice Breyer's separate concurring opinion for four Justices also recognizes that the majority opinion "offers only limited help in deciding" what cases fall within the reach of the ATS. *Id.* at 1673 (Breyer, J., concurring in the judgment).

> The majority echoes in this jurisdictional context *Sosa*'s warning to use "caution" in shaping federal common-law causes of action. But it also makes clear that a statutory claim might sometimes "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." It leaves for another day the determination of just when the presumption against extraterritoriality might be "overcome."

Id. (citations omitted). Seven of the Justices thus stated explicitly that the majority opinion leaves many issues undecided.

five-Justice majority, clarify that *Kiobel* did not address claims that have a greater connection to U.S. territory than those at issue in the *Kiobel* case.

C.

What categories of post-*Kiobel* claims will have sufficient ties to the United States to "displace" the presumption against extraterritoriality? The final paragraph of the majority opinion offered some clues. First, the majority concluded that the ATS would not support claims against a defendant with a "mere corporate presence" in the United States, given that a corporation can be "present in many countries."[75] The corporate defendants in *Kiobel* were Dutch, British, and Nigerian citizens, with minimal ties to the United States.[76] By contrast, a U.S. citizen corporation has a substantial presence in the United States and connections to this country that are qualitatively different from "mere corporate presence." Second, *Kiobel* does not preclude claims against individual defendants, who can, of course, be physically present in only one country. As a result, it seems likely that U.S. citizens, both corporate and individual, and non-citizen individuals living in the United States will have sufficient contacts with the United States to overcome the *Kiobel* presumption. Finally, the language of the concluding paragraph suggests that some claims involving conduct in the United States will "touch and concern" the United States with sufficient force to justify judicial recognition of a cause of action.

The policy reasons underlying the Court's adoption of the *Kiobel* presumption also support the view that claims against U.S. citizens, both corporate and individual, and against individuals living in the United States will continue to be actionable under the ATS. The majority rested much of its analysis of the ATS on concerns about the foreign policy consequences of such litigation.[77] Holding U.S. citizens accountable for violations of international law, no matter where committed, would not have a negative impact on foreign affairs. Similarly, denying safe haven to non-citizens who have relocated to the United States is consistent with U.S. foreign policy interests. As the Department of Justice wrote in an amicus curiae brief in *Kiobel*, recognizing a cause of action against an alleged perpetrator who is living in the United States "is consistent with the

75. *Id.* at 1669 (majority opinion).
76. *Id.* at 1662.
77. *See, e.g.*, *id.* at 1664, 1669.

foreign relations interests of the United States, including the promotion of respect for human rights."[78]

The Supreme Court's narrow holding left room to debate these issues, and commentators and litigators analyzing *Kiobel* already disagree about many aspects of the decision. Most agree on one point, however: the scope of the ATS will now be fought (again) in every pending case, and, in the likely event that the lower courts do not reach a consensus, will probably reach the Supreme Court (yet again).

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ATS human rights litigation represents a modest opportunity for a small number of victims and survivors of gross human rights abuses to seek a modicum of justice. The corporate campaign against such litigation should be recognized as yet another effort by multinational corporations to resist efforts to level the playing field of international justice. The Supreme Court's narrow holding in *Kiobel* should not bar claims against U.S. corporations or claims against foreign corporations with substantial ties to the United States.

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