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Donald I. Baker

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# Extraterritoriality and the Rule of Law: Why Friendly Foreign Democracies Oppose Novel, Expansive U.S. Jurisdiction Claims by Non-Resident Aliens Under the Alien Tort Statute\*

DONALD I. BAKER<sup>†</sup>

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*Kiobel v. Royal Dutch Petroleum Co.*<sup>1</sup> has implicated two basic foreign policy concerns among some of America's most important allies. The first concern is about human rights around the world, and how to develop and effectively implement collective and unilateral measures for discovering, punishing, and deterring those engaged in committing basic human rights violations.<sup>2</sup> The second concern is the widely-shared view that the United States has adopted an overly expansive view of extraterritorial jurisdiction combined with a unique plaintiff-favoring litigation system, which encourages improper forum shopping by private litigants seeking to win cases against

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\* © 2013 by Baker & Miller PLLC. Based on a talk delivered at the symposium *Extraterritoriality Post-Kiobel: International and Comparative Legal Perspectives* at the University of Maryland Francis King Carey School of Law, Baltimore, Maryland on November 16, 2012.

<sup>†</sup> Partner, Baker & Miller PLLC; Professorial Lecturer in Law, The George Washington University Law School. Counsel of Record for the Governments of United Kingdom, Netherlands, Australia, and/or Switzerland as amici curiae in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Rio Tinto, PLC v. Sarei*, 671 F.3d 736 (9th Cir. 2011); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). However, the views expressed are entirely based on my own experience and do not purport to be on behalf of any government that we may have represented in these or other cases involving U.S. assertions of extraterritorial jurisdiction.

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

2. See FOREIGN AND COMMONWEALTH OFFICE, HM GOVERNMENT, BUSINESS AND HUMAN RIGHTS TOOLKIT: HOW UK OVERSEAS MISSIONS CAN PROMOTE GOOD CONDUCT BY UK COMPANIES (2011); see also MINISTRY OF FOREIGN AFFAIRS, GOVERNMENT OF THE NETHERLANDS, HUMAN RIGHTS MEMORANDUM: RESPONSIBLE FOR FREEDOM 23 (2011).

foreign defendants based on a limited or non-existent nexus with the United States.<sup>3</sup>

Moreover, on the human rights front, there appears to be stronger political and official support in foreign capitals for treaty-based cooperation arrangements with government-to-government sanctions, such as trade embargos, which are more direct and effective ways of punishing and deterring human rights violations by a wrongdoing state.<sup>4</sup> In addition, the United States is quietly criticized in the international legal community for being unique among leading democracies in having failed to support the creation of the International Criminal Court, which is seen as a more focused way of dealing with the worst human rights violators.

Under these circumstances, the Australian, British, and Dutch governments have been leaders in trying to get the U.S. Supreme Court to squarely face the issue of the proper limits on national jurisdiction imposed by international law on private damage cases brought under the Alien Tort Statute (ATS).<sup>5</sup> The United Kingdom and Netherlands were finally successful with their first brief in *Kiobel*.<sup>6</sup>

These foreign governments' basic argument in their briefs has been that preserving the traditional international law restrictions on

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3. Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Neither Party at 26–29, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter Neth.–U.K. *Kiobel* Br. II] (“The risks of improper interference with the rights of foreign sovereigns are significantly enhanced in ATS (and other) cases because the U.S. has chosen to adopt plaintiff-favoring rules and remedies that other nations do not accept [as a matter of public policy][.]”).

4. *Id.* at 34–36 (“Protection against human rights abuses can be more fairly and effectively achieved by seeking international consensus and cooperation through treaties than by resort to private civil litigation in distant courts[.]”).

5. 28 U.S.C. § 1350 (2006). *See* 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 15–18, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339); Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions in their Petition for a Writ of Certiorari at 15–18, *Sarei v. Rio Tinto*, PLC, No. 11-649 (U.S. filed Dec. 28, 2011) [hereinafter Austl.–U.K. *Rio Tinto* Cert. Br.].

6. Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 29–33, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter Neth.–U.K. *Kiobel* Br. I] (“These numerous A.T.S. actions against foreign corporations for activities that have no significant nexus with the U.S. reemphasize the importance of this court taking the first available opportunity to make clear to the lower courts that an A.T.S. case should not be allowed to proceed unless it can satisfy the basic limitation on national civil jurisdiction imposed by international law[.]”).

extraterritorial jurisdiction by U.S. courts is a more important policy goal because it is consistent with the active pursuit of other government-to-government initiatives that deal more directly with human rights violations in faraway places.<sup>7</sup> This choice is consistent with the position taken by the U.S. government's earlier amicus briefs on international law and comity in the ATS cases.<sup>8</sup> The U.S. Solicitor General's second brief in *Kiobel* argued against U.S. jurisdiction where foreign plaintiffs are suing foreign defendants for foreign actions, while leaving the door open to possible assertions of extraterritorial jurisdiction in ATS cases where the defendants were American individuals or companies, or the foreign plaintiff was a U.S. resident.<sup>9</sup> When the Supreme Court issued its *Kiobel* decision on April 17, 2013, all nine Justices accepted the Anglo-Dutch position, with the Chief Justice's opinion for five Justices going somewhat further in excluding foreign plaintiffs' ATS claims from the U.S. courts.<sup>10</sup>

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7. *Id.* at 25–27 (“Protection against human rights abuses can be more fairly and effectively done by seeking international consensus [on ways to further improve the protection of human rights] and [by] encouraging states to [implement] domestic legislation that [enables them to carry out] their obligations under international human rights instruments [to which they are party] within their jurisdiction[.]”).

8. *See generally* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendants-Appellees/Cross-Appellants, Supporting Affirmance of the Order of Dismissal, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (Nos. 09-56381, 02-56256, 02-56390) (outlining the U.S. position in ATS cases that federal law must comply with international law); Reply Brief for the United States at 5, *Sosa*, 542 U.S. 692 (No. 03-484) (asserting that it is the job of the Executive Branch to ensure that law enforcement tactics comply with international law).

9. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 25–26, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter U.S. *Kiobel* Br. II]. This brief is more extensively discussed in Part VI below. The Solicitor General's initial brief in *Kiobel*, signed by the State and Commerce Departments, had supported the Petitioners on the question of corporate liability. Brief of the United in Support of Petitioners at 12–13, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter U.S. *Kiobel* Br. I].

10. *See Kiobel*, 133 S. Ct. at 1669. Justice Breyer's somewhat more tailored concurring opinion pointed to the second Dutch-British brief as recognizing a few narrow exceptions to the almost pure territoriality approach adopted by the majority. *Id.* at 1675–76 (Breyer, J., concurring in the judgment) (citing *Neth.–U.K. Kiobel Br. II*, *supra* note 3, at 15–16, 19–23). These limited exceptions involved potential suits for overseas torts based on nationality principles or the presence of defendant individuals in the territory of the forum state. Justice Breyer's opinion, which was joined by Justices Ginsburg, Sotomayor, and Kagan, was seen as an apparent effort to get the Court and the lower courts to stick more closely to the cautious balancing which characterized Justice Souter's majority opinion in *Sosa*. It seems likely that he was trying to persuade Justice Kennedy to join, and thus have this opinion become the majority opinion for the Court in *Kiobel*.

## I. TRADITIONAL INTERNATIONAL LAW

Ever since Chief Justice Marshall's early decisions involving international shipping disputes, the Supreme Court has recognized that international law places important limitations on the ability of the U.S. courts to exercise jurisdiction over overseas individuals and situations.<sup>11</sup>

Basically, international law has long provided that a sovereign should only exercise civil jurisdiction over legal wrongs occurring within its territory or at least having a substantial nexus with its territory, citizens, and/or residents. Broader jurisdiction has long been accepted for conduct occurring on the high seas, including piracy, on the theory that such an exercise of extraterritorial jurisdiction was necessary if such wrongdoers were to be punished and it did not infringe the jurisdiction of another sovereign.<sup>12</sup> In the twentieth century, the United States generated periodic diplomatic and legal conflicts by going a step further and developing and using the so-called "effects doctrine" to exercise national jurisdiction over foreign parties for overseas activities that have a significant effect within U.S. territory.<sup>13</sup> Gradually, this concept has come to be more broadly accepted and used by other major jurisdictions, when seen as "part of a single broad principle according to which the right to exercise jurisdiction depends on there being *between the subject matter and the state exercising jurisdiction a sufficiently close connection* to justify that state in regulating the matter and perhaps also to override any competing rights of other states."<sup>14</sup>

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11. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," unless the act contains "express words or a very plain and necessary implication [to the contrary]."); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."); *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another.").

12. Because piracy was an activity occurring on the high seas, ATS cases based on piracy would not involve the U.S. courts attempting to exercise jurisdiction over conduct that occurred in territory of a foreign sovereign. See Eugene Kontorovich, *A Tort Statute, With Aliens and Pirates*, 107 NW. U. L. REV. COL. 100, 102-03 (2012) (discussing the impact of piracy on the creation and interpretation of the ATS).

13. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (illustrating the effects doctrine).

14. LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 457-58 (Sir Robert Jennings & Sir Arthur Watts eds., Longmans 9th ed. 1992) (1905) (emphasis added).

For generations, diplomatic tensions stemming from U.S. assertions of extraterritorial jurisdiction over non-resident foreign parties have been intensified because the United States has chosen to create a legal system that is far more favorable to private plaintiffs than anything that any major foreign power has chosen to adopt. The pro-plaintiff litigation advantages consist of potential punitive damages, mandatory jury trials in civil damages cases, opt-out class actions, unregulated contingent fees, and the “American” cost rule that does not require a plaintiff to pay a successful defendant’s litigation costs.<sup>15</sup> This combination necessarily attracts big-ticket private cases to the United States, even when the factual nexus to the United States is tenuous or almost non-existent.

In response, foreign governments have filed numerous amicus briefs over the years, urging the U.S. appellate courts to curb what they regard as “judicial imperialism” by U.S. courts in private civil cases under other federal statutes.<sup>16</sup> These briefs have become more successful in recent years in persuading the U.S. Supreme Court to reject U.S. jurisdiction over commercial cases by non-citizens claiming damages for foreign conduct. The most prominent examples are *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,<sup>17</sup> where the Court rejected foreign purchasers’ Sherman Act antitrust claims, and *Morrison v. National Australia Bank Ltd.*,<sup>18</sup> where the Court rejected

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15. See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the “Odd Man Out” In How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 381–88 (1999) (discussing international disfavor with the contingency fee system and highlighting foreign alternatives); see also Neth.–U.K. Kiobel Br. II, *supra* note 3, at 26–29 (discussing the plaintiff-favoring rules adopted by the United States).

16. In *Hartford Fire*, 509 U.S. 764, the United Kingdom and Canada filed amicus briefs in support of the foreign defendants on the issue of jurisdiction. See Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, *Hartford Fire*, 509 U.S. 764 (Nos. 91-1111, 91-1128); Brief of the Government of Canada as Amicus Curiae in Support of Certain Petitioners, *Hartford Fire*, 509 U.S. 764 (Nos. 91-1111, 91-1128).

17. 542 U.S. 155 (2004). Multiple governments filed amicus briefs in support of reversal in *Empagran*. See, e.g., Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, *Empagran*, 542 U.S. 155 (No. 03-724); Brief for the Government of Canada as Amicus Curiae Supporting Reversal, *Empagran*, 542 U.S. 155 (No. 03-724); Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, *Empagran*, 542 U.S. 155 (No. 03-724).

18. 130 S. Ct. 2869 (2010). Multiple governments filed amicus briefs in support of the defendant in *Morrison*. See, e.g., Brief for the Republic of France as Amicus Curiae in Support of Respondents, *Morrison*, 130 S. Ct. 2869 (No. 08-1191); Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees, *Morrison*, 130 S. Ct. 2869 (No. 08-1191); Brief of the United Kingdom of Great

non-resident foreign shareholders' securities claims based on the Securities Exchange Act.

*Kiobel* differed from these earlier cases in a few respects. First, the plaintiffs were alleging rather generalized wrongs as opposed to specific cartel overcharges or market-distorting misrepresentations. Second, the non-resident class of plaintiffs would be harder to identify and manage by U.S. courts and their losses will be more difficult to identify and quantify than losses suffered by overseas purchasers of products or securities. These realities underscore the basic question raised by *Kiobel*: *why should international law on extraterritorial jurisdiction somehow be watered down because the non-resident alien plaintiffs are claiming compensation for human rights injuries suffered abroad, rather than for the types of commercial injuries one finds in antitrust or securities cases?* Asking this question generates a series of significant underlying questions not only about international law but also about the history and purpose of the ATS, as well as its efficacy and fairness as a device for compensating the victims of foreign human rights wrongs.

## II. THE GOALS OF THE ALIEN TORT STATUTE

The ATS was enacted by the first Congress in 1789 under the newly-adopted U.S. Constitution. Its origins and goals are both obscure and seemingly limited. In the wake of several attacks on foreign ambassadors to the new nation, Congress apparently wanted to enable injured ambassadors to recover damages without having to rely on state courts.<sup>19</sup> In addition, there were ongoing disputes over foreign ships that had been seized or damaged during the Revolutionary War.<sup>20</sup> Finally, piracy on the high seas was already recognized as an exception to the normal territoriality-based rules and was therefore the one area where universal civil jurisdiction was already recognized under international law.<sup>21</sup>

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Britain and Northern Ireland as Amicus Curiae in Support of Respondents, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

19. See William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-510 (1986). But see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 637-45 (2002).

20. See Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

21. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (Breyer, J., concurring) ("[I]n the 18th century, nations reached consensus not only on the substantive principle that acts of piracy

The *Kiobel* plaintiffs simply sought to have the Supreme Court adopt a new, expanded rule on extraterritorial jurisdiction for human rights victims that goes well beyond (1) traditional international law recognized by international tribunals and most foreign courts, and (2) the limits on extraterritorial jurisdiction that the modern Supreme Court has recognized in dealing with disputes involving claims under antitrust, securities, and other U.S. regulatory statutes. The plaintiffs' counsel and their supporting amici had to argue, in essence, that the ATS puts violations of "the law of nations" on a different jurisdictional plane when foreign victims are claiming compensation for human rights injuries suffered abroad—as distinguished from commercial injuries that non-resident victims may suffer from a global cartel or securities fraud.<sup>22</sup>

Approaching this type of litigation in a way that is sympathetic to victims still leaves us asking a series of significant questions about the statutory purposes and likely effectiveness of such an extraterritorial crusade:

- (a) What is the principal purpose of an ATS case like *Kiobel* being brought principally on behalf of alien, non-resident plaintiffs absent from the United States? To *compensate* the victims? *Punish* wrongdoers? Or to *deter* corporations from investing in poorer countries with ethnic conflicts, legal instability, and/or dodgy political leadership?
- (b) If the principal purpose is to compensate victims, how can this be practically accomplished when the plaintiff-victims are resident in the territory of the wrongdoing state found by a U.S. jury to have engaged in grievous violations of international law? Should the U.S. jury still be awarding damages to the non-resident victims if it has become quite clear that the wrongdoing government would not let payments flow through its payments systems to the thousands, possibly

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were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him.”).

22. See, e.g., Reply Brief for Plaintiffs–Appellants–Cross-Appellees at 48–58, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (Nos. 06-4800, 06-4876).



millions, of local residents whom it has wronged?<sup>23</sup>

- (c) To the extent that a public purpose of ATS tort litigation is to deter prospective wrongdoers in the field, how effective is penalizing shareholders of a foreign corporation in causing lawless soldiers, militia, torturers, policemen, or jailers to refrain from acting cruelly on behalf of the wrongdoing state? Isn't this a second- or third-best alternative form of deterrence compared with using international law to punish or penalize the wrongdoing culprits directly under the Rome Convention establishing the International Criminal Court?<sup>24</sup>
- (d) If a major purpose of this type of ATS litigation is to pressure a government with a bad human rights record to change its ways by deterring major foreign investment in the country, doesn't such a campaign, if successful, just amount to a privately organized trade embargo—which may be consistent or inconsistent with ongoing diplomatic efforts by the United States and other democratic governments? Moreover, like a trade embargo, doesn't ATS litigation tend to primarily penalize the foreign residents who would be denied whatever jobs and other economic opportunities that the inbound investment or commerce might have generated?<sup>25</sup>

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23. Note that it is the foreign state that must be the central source of a violation under “the law of nations,” while corporations, which are the private plaintiffs’ principal targets in an ATS civil damages case, are charged with being aiders and abettors of the sovereign’s alleged wrongs.

24. I have long believed that, in the antitrust field where I regularly work, just imposing large fines and damages on a *corporation* is an insufficient form of deterrence, and therefore it is necessary to provide direct, painful sanctions against the *wrongdoing individuals* who work or act on behalf of the corporation. See Donald I. Baker, *Punishment for Cartel Participants in the U.S.: A Special Model?*, in *CRIMINALISING CARTELS* (Caron Beaton-Wells & Ariel Ezrachi eds., 2011). In the ATS context, the point is even stronger because the principal wrongdoers are normally not employees or agents of the corporation being brought into the case as an aider or abettor.

25. The post-apartheid South African Government has made this argument in opposing ATS claims based on the misdeeds of the former apartheid government. See *Neth.-U.K. Kiobel Br. II*, *supra* note 3, at 24–26; see also *id.* app. at 1a–15a (reprinting the Declaration

### III. FOREIGN GOVERNMENTS HAVE REPEATEDLY OPPOSED HAVING U.S. COURTS EXERCISE EXTRATERRITORIAL JURISDICTION OVER DISPUTES INVOLVING INJURIES CAUSED TO FOREIGN PARTIES OUTSIDE OF THE UNITED STATES

As already noted, the second Anglo–Dutch amicus brief in *Kiobel* is the latest in a long string of foreign government amicus briefs opposing U.S. exercises of extraterritorial jurisdiction in civil cases brought by private plaintiffs in the U.S. courts.<sup>26</sup> The “Interest of the Amici” section in this recent brief articulates these fundamental jurisdictional concerns very clearly:

The Governments . . . are committed to the rule of law, including the promotion of, and protection against violations of, human rights. . . .

Nevertheless, just as international law imposes human rights obligations on States, it imposes restraints on the assertion of jurisdiction by one State over civil actions between persons that primarily concern another State. *Jurisdictional restraints are a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity.* The Governments are, therefore, opposed to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States . . . .

This brief is intended to set out the views of two nations that historically have been concerned with the extraterritorial exercise of jurisdiction by the U.S. courts because of its inconsistency with international law. . . . *This brief is purely intended to set out the Governments’ view of the most relevant international legal principles and takes no position on the*

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by Penuell Mpapa Maduna, South African Minister of Justice and Constitutional Development of the Republic of South Africa, dated July 11, 2003, submitted in opposition to assertion of U.S. jurisdiction in *In re S. African Apartheid Litig.*, 238 F. Supp. 2d 1379 (J.P.M.L. 2002)).

26. See Brief of Amici Curiae BP America et al. in Support of Respondents app. at 1a–6a, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) (listing the twenty-two amicus briefs and diplomatic notes opposing U.S. jurisdiction in ATS cases).

*underlying factual and legal disputes between the parties to this particular case.*<sup>27</sup>

Later in their brief, the British and Dutch governments describe the legal responses of other foreign governments to “what they regarded as entirely inappropriate exercises of U.S. extraterritorial jurisdiction by courts and, occasionally, by legislatures.”<sup>28</sup> The most dramatic part of the earlier history involved foreign parliaments enacting so-called “blocking statutes” that (1) prevented a corporation subject to the foreign government’s jurisdiction from providing information to a U.S. court in an extraterritorial jurisdiction, and/or (2) prevented the foreign sovereign’s courts from recognizing certain U.S. judgments based on extraterritorial jurisdiction.<sup>29</sup> These statutes, which were enacted by the United Kingdom, Australia, Canada, France, South Africa, and several Canadian provinces in the 1980s, were triggered by intense foreign political and diplomatic reaction to private U.S. antitrust suits against foreign uranium producers that participated in a distressed-industry cartel orchestrated by the foreign governments.<sup>30</sup> In addition, foreign courts have sometimes rejected discovery requests made by U.S. parties under the Hague Convention, when the foreign court has regarded the U.S. case on which the discovery request was based as resting on an improper assertion of extraterritorial jurisdiction by the U.S. court.<sup>31</sup>

Thus, *Kiobel* is only the latest chapter in a longstanding story about foreign government dissatisfaction with private U.S. litigation brought against foreign nationals for offshore conduct, particularly in the antitrust area. “Fortunately,” the British and Dutch governments added in 2013, “such disputes seem to have become considerably less frequent and dramatic in recent years.”<sup>32</sup>

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27. Neth.–U.K. *Kiobel* Br. II, *supra* note 3, at 1–4 (emphasis added).

28. *Id.* at 29.

29. See, e.g., *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) (Austl.); *Protection of Trading Interests Act, 1980*, c. 11 (U.K.); *Foreign Extraterritorial Measures Act, 1985*, R.S.C. c. F-29 (Can.). See generally Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT’L L. 247 (1982) (discussing the implementation of foreign blocking statutes).

30. I know from being personally involved that the level of foreign government outrage was enhanced by the fact that the challenged cartel was created at the behest of the foreign governments in response to a U.S. embargo on foreign uranium imports designed to protect domestic U.S. uranium miners from additional competition in a distressed market.

31. See, e.g., *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 2 W.L.R. 81 (H.L. 1977) (U.K.); *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] 2 S.C.R. 39, 41 (Can.).

32. Neth.–U.K. *Kiobel* Br. II, *supra* note 3, at 29.

#### IV. THE QUESTION OF COMITY

A crucial aspect of the wave of ATS litigation is that it is often conducted by private lawyers with an economic incentive to litigate, regardless of the diplomatic difficulties they may cause for other human rights initiatives that sympathetic governments are pursuing. Unsurprisingly, other governmental amicus briefs in *Kiobel*, including those submitted by the U.S. Solicitor General and the European Commission, did not contemplate or advocate the kinds of unqualified universal jurisdiction advocated by the plaintiffs' counsel and some of their supporting amici in *Kiobel*.<sup>33</sup>

The importance of comity is obvious. Imagine the likely U.S. political reaction if some foreign country with a very different legal system, for example China or Egypt, enacted a statute exercising universal jurisdiction over numerous U.S. and other non-resident foreign corporations for anything that its courts regard as "human rights" violations (or "blasphemy") anywhere in the world!

What the foreign governments described in their *Kiobel* briefs is only part of a long-standing story about foreign government dissatisfaction with private U.S. litigation against foreign nationals for offshore conduct.<sup>34</sup> The comity concern becomes clearer when a big foreign enterprise, like Royal Dutch Shell, is sued in U.S. courts for wrongs that occurred outside of the United States, and thereby able to defend itself under the more balanced litigation systems that the foreign sovereigns have established to resolve claims against their citizens, residents, and entrepreneurs.<sup>35</sup>

The comity situation would be different if the U.S. courts only exercised extraterritorial jurisdiction against U.S. corporations for alleged human rights abuses in a faraway country, for then the

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33. For discussion of these briefs, *see infra* Part VI. The amicus brief submitted by the Argentine Government was also fairly focused on the extraterritorial jurisdiction of what I refer to as "Individual Injury Cases" in Part V. *See* Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

34. Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, *supra* note 33, at 11.

35. Neth.–U.K. *Kiobel Br. II*, *supra* note 3, at 18–23 (discussing the extent to which Royal Dutch Shell, an Anglo–Dutch corporation, might be sued in the domestic courts in the United Kingdom and the Netherlands).

“nationality” principle of jurisdiction could be brought into play.<sup>36</sup> Even so, this could require a more specific extraterritorial mandate than that present in the ATS because any such nationality-based jurisdictional claim would be subject to the presumption that U.S. statutes do not have extraterritorial application, absent explicit provision for it.<sup>37</sup>

#### V. THE FOREIGN GOVERNMENTS’ ULTIMATE CONCERN MAY BE ABOUT USING THE UNIQUE U.S. CLASS ACTION PROCEDURES TO BRING NUMEROUS NON-RESIDENT FOREIGN PLAINTIFFS INTO U.S. COURTS TO CLAIM DAMAGES FOR FARAWAY TORTS

There have been essentially two kinds of modern ATS cases: (1) an individual victim’s claims against the individual wrongdoer(s) who mistreated him, and (2) class action claims against one or more foreign corporations for aiding and abetting a foreign government’s widespread human rights abuses. The first category (“Individual Injury Cases”) includes the landmark Second Circuit decision that ushered in the modern ATS litigation era, *Filártiga v. Peña-Irala*,<sup>38</sup> and the Supreme Court’s only prior effort to sort out what kinds of ATS claims could be made, *Sosa v. Alvarez-Machain*.<sup>39</sup> The second category (“Foreign Group Redress Cases”) is typified by *Kiobel* and by the class action cases brought on behalf of millions of South African residents against companies that had invested in South Africa during the apartheid era.<sup>40</sup>

The Foreign Group Redress Cases seem to be much the more serious concern to foreign governments because these cases (1) have become the predominant form of ATS litigation, and (2) are so risky and expensive for the international corporations which foreign governments may often want to encourage to invest in poorer foreign countries. The *Kiobel* plaintiffs and their supporting amici have written quite a lot about the historic “transitory tort” doctrine and why it supports their position, with particular emphasis on the Second Circuit’s 1980 *Filártiga* decision.<sup>41</sup> The “transitory tort” doctrine, in

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36. See U.S. *Kiobel* Br. II, *supra* note 9, at 21 (suggesting that the Petitioner’s situation may be different if U.S. courts were only exercising extraterritorial jurisdiction).

37. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

38. 630 F.2d 876 (2d Cir. 1980).

39. 542 U.S. 692 (2004).

40. See, e.g., *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

41. See, e.g., Supplemental Brief of Amici Curiae South African Jurists Anton Katz, Maz du Plessis, and Christopher Gevers, in Support of Petitioners at 6–12, *Kiobel v. Royal Dutch*

essence, holds that a forum state may adjudicate a dispute between foreign parties within its territory over a tort that may have occurred in a foreign jurisdiction, applying the law of the place of the wrong.<sup>42</sup>

*Filártiga* was essentially such a case. Both parties were citizens of Paraguay, where the alleged wrongdoing took place. Both the defendant and the plaintiff were residing in the United States when the plaintiff brought the case.<sup>43</sup> The only difference from the classic “transitory tort” case was that, by virtue of the ATS, the U.S. court applied “the law of nations” rather than Paraguayan law to the tortious conduct that had occurred in Paraguay.<sup>44</sup>

However, *Filártiga* (and *Sosa* too) have little to do with the realities of the *Kiobel*-type Foreign Group Redress Cases. If the only *Kiobel* plaintiffs were a handful of Nigerians resident in the United States, the case almost certainly would not be in the Supreme Court in 2013. Instead, it would probably have been treated as a transitory tort case to which *Filártiga* could be applied and a small “U.S. resident Nigerians only” class could be employed.<sup>45</sup>

But what had made *Kiobel* a source of great practical concern to foreign governments was the use of Federal Rule of Civil Procedure 23 to certify a very large class of faraway plaintiffs with no nexus to the United States.<sup>46</sup>

In this connection, it is important to remember how unique, and sometimes controversial, our U.S. class action system is around the world. No other country, I believe, has created an opt-out class action system without a “loser pays” cost rule.<sup>47</sup> Opt-out rules tend to create

Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) (describing the “transitory tort doctrine” and its use in South Africa); Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, *supra* note 33 (addressing *Filártiga* and Individual Injury Cases under international law and the Argentine Constitution).

42. See Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 68–69 (1985) (discussing the origins of the transitory tort doctrine and its application to ATS cases).

43. *Filártiga*, 630 F.2d at 878–79.

44. *Id.* at 878.

45. The fact that *Kiobel*, like *Filártiga*, originated in the Second Circuit makes it even more likely that the earlier precedent would have been applied in this way.

46. See Neth.–U.K. *Kiobel* Br. II, *supra* note 3, at 28.

47. The Canadian province of British Columbia comes closest to providing an exception to this generalization. It does provide opt-out class actions, without requiring the losing plaintiffs to pay the defendants’ litigation costs in such cases. However, this remedy is only for classes of British Columbia residents. Canada’s other provinces generally have opt-out

much larger classes of plaintiffs, which are often more difficult to manage than a class in an opt-in class action system.<sup>48</sup> Moreover, certification of a large class greatly increases the economic pressures on defendants to settle even potentially defensible cases.<sup>49</sup> Many countries, as well as the European Commission, consider some form of collective redress desirable, but none has thought that the U.S. approach is correct.<sup>50</sup> Instead, almost every country that has authorized collective actions has adopted some form of opt-in class action or representative action, nearly always coupled with the jurisdiction's normal "loser pays" cost rule, which is seen as a safeguard against weak or frivolous litigation.<sup>51</sup> The two major exceptions are Australia and the Netherlands, which have created opt-out class actions, but still with "loser pays" cost rules.<sup>52</sup>

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class actions covering their own residents, and with varying cost rules. Thus, Canada's largest province, Ontario, has a "loser pays" cost rule which enables the defendant to recover costs either when the representative plaintiffs fail at the initial class certification stage of an opt-out class action or when the class action fails. The third major province, Quebec, permits only very limited cost recovery by a successful defendant in an opt-out class action. Unlike the United States, Canada does not have a nationwide system of federal trial courts and thus even major securities and antitrust litigation against a nationwide wrong still can end up being pursued via different, parallel class actions in the different provincial courts under their varied rules, rather than being consolidated in a single court as tends to happen in the United States under 18 U.S.C. §§ 1404 and 1407.

48. See generally Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004) (discussing broadly the issues surrounding the opt-out doctrine).

49. See *Newton v. Merrill Lynch*, 259 F.3d 154, 163–64 (3d Cir. 2001) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." (citing Comm. Note, FED. R. CIV. P. 23(f))).

50. See *Toward a Coherent European Approach to Collective Redress: Next Steps*, ¶¶ 6, 17, SEC (2010) 1192 final (Oct. 5, 2010) ("Mechanisms of collective redress could be considered . . . to remedy the current shortcomings in the enforcement of EU law. . . . Any European approach to collective redress would have to avoid from the outset the risk of abusive litigation. Such abuses have occurred in the US with its 'class actions' system. This form of collective redress contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties) the possibility of contingency fees for attorney and the wide-ranging discovery procedure for procuring evidence. Because of the increased risk of abusive litigation resulting from these combined incentives, we believe that these features are not compatible with the European legal tradition. We therefore firmly oppose introducing 'class actions' along the US model into the EU legal order.").

51. See *Neth.–U.K. Kiobel Br. II*, *supra* note 3, at 28.

52. Australia authorizes class actions, but they are subject to the normal Australian "loser pays" cost rules. *Federal Court of Australia Amendment Act 1991* (Cth) (Austl.), discussed in Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support

*Kiobel* and other Foreign Group Redress cases thus differ from the antitrust, securities, and labor standards cases that have occupied the Supreme Court for the past two decades.<sup>53</sup> In those cases, foreign governments were very much concerned about the U.S. class action plaintiffs seeking to export U.S. *substantive law* for use in adjudicating overseas disputes among foreign parties—thereby effectively foreclosing the more balanced remedies that they have chosen for their own courts.<sup>54</sup> Foreign governments supported the Supreme Court’s modern presumption against extraterritorial application of law, absent clear contrary intent from Congress. In the ATS cases, there is no disagreement that the substantive law is international public law as embodied in federal common law, and the controversial export is U.S. *procedures* that generate large classes of non-resident plaintiffs suing foreign defendants for wrongs that occur overseas.<sup>55</sup>

The supporters of the *Kiobel* plaintiffs seem to have assumed that once you have a few representative class plaintiffs resident in the United States, you have a “transitory tort case,” and, after that, everything is governed by the procedural rules of the forum, i.e. Rule 23. This totally ignores considerations of international comity when dealing with a unique *procedural* rule that totally changes the nature of the case. Then, it seems that one must look at the “substance vs. procedure” distinction, as federal courts were required to do in the wake of the Supreme Court’s landmark decision in *Erie Railroad Co. v. Tompkins*.<sup>56</sup>

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of the Defendants–Appellees at 17–23, *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191).

53. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (employment practices); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (antitrust and trade regulation); *Morrison*, 130 S. Ct. at 2869 (securities law).

54. For example, no foreign system provides the mandatory treble damages or one-way cost recovery rule for antitrust violations that are contained in Section 4 of the Clayton Act. 15 U.S.C. § 15 (2006).

55. See *Neth.–U.K. Kiobel Br. II*, *supra* note 3, at 27–28 (outlining the procedural advantages for plaintiffs in U.S. courts).

56. 304 U.S. 64 (1938). What this post-*Erie* distinction seems to amount to in practice is that, if the rule in question essentially changes the outcome, it is regarded as “substantive” so that the state rule will prevail. See *id.* at 78.



VI. THE U.S. SOLICITOR GENERAL AND THE EUROPEAN COMMISSION OFFERED SOME TAILORED VARIATIONS ON EXTRATERRITORIAL JURISDICTION IN THEIR AMICUS BRIEFS IN *KIOBEL*

The second U.S. Brief was reasonably close to the Neth.–U.K. Brief and was labeled as being “in Partial Support of Affirmance.”<sup>57</sup> The Solicitor General recommended affirmance of the dismissal because:

In this case, foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign’s treatment of its own citizens and 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 requirement of judicial restraint.<sup>58</sup>

After noting the numerous foreign government protests against U.S. assertions of extraterritorial jurisdiction in ATS cases, the U.S. Brief added a comity-sensitive point: “The ‘great caution’ urged in *Sosa* counsels against recognizing a federal common-law cause of action that has the inherent potential to provoke the international friction the ATS was designed to prevent.”<sup>59</sup>

The U.S. Brief also emphasized that “[t]his case is quite different from *Filártiga*. The United States could not be viewed as having harbored or otherwise provided refuge to an actual torturer or other ‘enemy of all mankind.’”<sup>60</sup> But the Solicitor General added that the *Filártiga* plaintiffs would still have a cause of action for overseas wrongs under the Torture Victims Protection Act—which the U.S. Brief described as “an express, but carefully circumscribed, cause of action available only against an individual for acts of torture or

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57. U.S. *Kiobel* Br. II, *supra* note 9.

58. *Id.* at 13–14.

59. *Id.* at 18.

60. *Id.* at 19. The U.S. State Department had been giving *Filártiga* a much broader reading in its prior dialogue with foreign governments. Interestingly, the State Department was not a party to the second U.S. Brief, although it appeared on the first U.S. Brief supporting the *Kiobel* plaintiffs on the issue of corporate liability.

extrajudicial killing and only when acting under color of foreign law.”<sup>61</sup>

Finally, the U.S. Brief left open the possibility of the Supreme Court recognizing extraterritorial jurisdiction in ATS cases “where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas.”<sup>62</sup>

The brief that the European Commission filed “on Behalf of the European Union” supported neither side, but it was closer to the plaintiffs’ position on extraterritorial jurisdiction than the U.S. Brief was.<sup>63</sup> In particular, the E.U. Brief advocated allowing in ATS cases “the exercise of universal jurisdiction to reach conduct and parties with no nexus to the United States—but only when the conduct at issue could also give rise to universal criminal jurisdiction.”<sup>64</sup> The E.U. Brief explained that such “[u]niversal jurisdiction is . . . founded on the sheer reprehensibility of certain crimes of universal concern which international law permits States to punish without regard to territoriality or the nationality of the offenders.”<sup>65</sup> The European Commission precedents that were cited in support of using universal *criminal* jurisdiction to justify universal civil jurisdiction under international law were found principally in a few U.S. lower court ATS decisions in cases where the United Kingdom or other foreign governments had appeared as amici to argue against such a rule.<sup>66</sup>

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61. *Id.* at 20–21. The Torture Victims Protection Act clearly does not cover the type of Foreign Group Injury claims against corporations that are alleged in *Kiobel*. See *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (rejecting organizational liability under the Torture Victims Protection Act).

62. U.S. *Kiobel* Br. II, *supra* note 9, at 21. This vague language was presumably inserted to mollify the Legal Adviser’s Office at the State Department, which has had a more expansive view of international jurisdiction in ATS cases. See *supra* note 60.

63. Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter E.U. Brief].

64. *Id.* at 4.

65. *Id.* at 13 (internal quotation marks omitted).

66. The E.U. Brief cites several examples, the most recent being *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *cert. granted, vacated and remanded*, 133 S. Ct. 1995 (2013), *dismissed on other grounds*, Nos. 02–56256, 02–56390, 09–56381, 2013 WL 3357740 (9th Cir. June 28, 2013). See E.U. Brief, *supra* note 63, at 3, 23, 32. In *Sarei*, the U.K. and Australian Governments filed two amicus briefs opposing U.S. jurisdiction at different stages of the interminable Ninth Circuit process, and then wrote a third joint brief to

There is no unanimity among the E.U. Member States on the E.U. Brief's assertion regarding universal civil jurisdiction. The E.U. Brief is subject to classic international lawyers' criticism as being too hasty in attempting to extrapolate a controversial principle of universal civil jurisdiction from a well-established principle of universal criminal jurisdiction. International law does not develop this way; rather, it requires sufficient evidence of state practice and *opinio juris*, which are still lacking in the area of universal civil jurisdiction.<sup>67</sup>

Moreover, the European Commission's "universal jurisdiction" proposal, if accepted, would often cause practical difficulties for a U.S. district court. In addition to a class certification proceeding under Rule 23, the court would be required to conduct an initial mini-trial over its jurisdiction to determine whether the wrongs alleged by the plaintiffs sufficiently meet the European Commission's "sheer reprehensibility" threshold standard, and thus qualify for "criminal" liability under international law. This would not necessarily be a quick or easy task for the court, given the likely absence of foreign witnesses or documents in such cases.

Both the E.U. Brief and the second U.S. Brief do broadly agree on an important point that ATS plaintiffs generally oppose: "If a federal common-law cause of action is created under the ATS for extraterritorial violations of the law of nations in certain circumstances, doctrines such as exhaustion [of foreign remedies] and forum non-conveniens should be applied at the outset of the litigation and with special force."<sup>68</sup> The British, Dutch, and

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the Supreme Court supporting the Defendant's petition for certiorari challenging the Ninth Circuit's 6-5 en banc decision in favor of universal jurisdiction. *See* Austl.-U.K. Rio Tinto Cert. Br., *supra* note 5, at 1-4. Immediately following *Kiobel*, the Supreme Court granted the petition for certiorari in *Rio Tinto* and remanded the case for reconsideration in the light of it *Kiobel* decision. *Sarei v. Rio Tinto, PLC*, 133 S. Ct. 1995 (2013) (mem.).

67. The E.U. Brief also overlooks the practical reality that the instigators of civil and criminal litigation have entirely different roles and responsibilities, even where the underlying wrong may be the same. In the criminal context, the prosecutor is a public official holding a judicial or executive office. In the civil context of an ATS class action case in the United States, the plaintiffs' counsel is likely to be a legal entrepreneur specializing in class action litigation, often on a contingent fee basis. The two are not remotely comparable. The private class action counsel need not respond to concerns of comity vis-à-vis foreign governments, or the broader political concerns that such a case might cause for other U.S. interests (e.g., retaliatory boycotts or trade reprisals).

68. U.S. *Kiobel* Br. II, *supra* note 9, at 22. The European Commission has consistently articulated that "before the United States may exercise universal jurisdiction under the ATS, international law requires exhaustion of local and international remedies or, alternatively, the

Australian governments repeatedly made this argument in their amicus briefs.<sup>69</sup>

Moreover, the European Commission makes a point clear that is implicit in the U.S. Brief—namely that it is not only exhaustion of local remedies in the place where the challenged wrong allegedly occurred, but also in the jurisdiction where a defendant’s enterprise is principally based. Thus, the E.U. Brief quoted with approval an earlier German brief in the *Kiobel* case that stated:

While it certainly would be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have a proven record of human rights violations and no due process, *it is certainly reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction.*<sup>70</sup>

The Netherlands and United Kingdom also urged that U.S. courts, in applying the “exhaustion of remedies” principle in an ATS case, look beyond the place of the wrong and “ought to be obliged to consider whether another state has a closer nexus to the dispute—namely, superior access to evidence and/or the presence of nationals or residents as defendants within its jurisdiction.”<sup>71</sup> Their brief explained when the British and Dutch national courts would accept jurisdiction over alleged human rights injuries caused by their corporations of subsidiaries.<sup>72</sup>

Finally, using slightly different language, both the E.U. and U.S. briefs recognized the importance of the “substantial interests of other sovereigns in adjudicating disputes over incidents occurring in their own territory, or involving their own nationals outside the United States” because doing so “would help to mitigate the potential for

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claimant’s demonstration that such remedies are unavailable or their pursuit is futile.” E.U. Brief, *supra* note 63, at 30

69. See Austl.–U.K. Rio Tinto Cert. Br., *supra* note 5, at 15–18; Neth.–U.K. *Kiobel* Br. I, *supra* note 6, at 33–34.

70. E.U. Brief, *supra* note 63, at 32 n.82 (quoting Brief of Amicus Curiae the Federal Republic of Germany in Support of Respondents at 13, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter Ger. *Kiobel* Br.]) (emphasis added)

71. Neth.–U.K. *Kiobel* Br. II, *supra* note 3, at 34.

72. *Id.* at 18–23.

international friction arising from the recognition of an extraterritorial cause of action based on the ATS.”<sup>73</sup>

## VII. CONCLUSION: POLITICS, LAW, AND EMOTIONS IN AN EVER MORE INTERDEPENDENT WORLD

A broad, loosely organized human rights community around the world has invested much energy and emotion into the *Kiobel* case and ATS litigation in U.S. courts.<sup>74</sup> Strong campaigns have been mounted against foreign governments that were participating as amici in the *Kiobel* case or considering whether to do so.<sup>75</sup> The decibel level increased substantially after the Court accepted the jurisdictional argument emphasized by the Dutch and British Governments in their first *Kiobel* brief and took the rare step of setting the case down for rebriefing and reargument on the question:

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.<sup>76</sup>

In the shrill debates that swirled through various national capitals in the wake of the Supreme Court’s reargument order, the question seemed to be: “How could a democratic government that purports to be seriously concerned about human rights violations possibly be willing to support any corporation in a major lawsuit where it is charged with having committed major human rights violations?”<sup>77</sup>

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73. U.S. *Kiobel* Br. II, *supra* note 9, at 25–26; *see also* E.U. Brief, *supra* note 63, at 4–5.

74. *See, e.g.*, Brief on Reargument of Amici Curiae International Human Rights Organizations in Support of Petitioners, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

75. Germany, which had submitted a brief supporting respondents during the first round of briefing in *Kiobel*, did not participate in the second round of briefing on jurisdiction. The German brief was quoted in the E.U. Brief on a significant jurisdictional point, during the second round of *Kiobel* briefing. *See supra* note 70 and accompanying text. The reasons for Germany’s decision not to participate in the second round of *Kiobel* briefing were not announced, but the choice occurred right in the middle of the period when the human rights community was generating public criticism against foreign governments for having opposed U.S. extraterritorial jurisdiction in *Kiobel* and other ATS cases.

76. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

77. *See* Geoffrey Robertson, *Why Does the U.K. Defend Corporations and Not Their Victims?*, THE INDEPENDENT (London), Dec. 10, 2012, <http://www.independent.co.uk/voices/comment/why-does-the-uk-defend-corporations-and-not-their-victims-8399557.html> (criticizing the British Government for its *Kiobel* amicus briefs, asserting that “[t]he only

The answer—a good appellate lawyer’s answer—is that “it is all about important *principles*, not particular *parties* or the *emotions* that they generate.”<sup>78</sup> Common-law-trained lawyers are well-aware of the historic reality that some of the great principles of constitutional law have been established in cases where one feels no emotional sympathy for the party who successfully raised the seminal point.<sup>79</sup> Conversely, we can think of famous cases where the law would have been better served if the court had been less sympathetic to a prevailing party.<sup>80</sup>

For the U.S. class action lawyers interested in human rights, a *Kiobel*-type Foreign Group Redress Case may seem to be their *only* option in dealing directly with foreign human rights wrongs, and for their overseas political supporters, the plaintiff-favoring U.S. litigation system may seem the *best* option for making somebody pay a lot of money for collective human tragedy.<sup>81</sup> By contrast, governments committed to alleviating human rights wrongs have a much *broader range* of legitimate options for dealing with the types of government-supported human rights abuses that rise to the level of being potential violations of international law. These options include: state-to-state litigation before international courts, supporting criminal prosecutions before the International Criminal Court, unilateral or collective diplomacy vis-à-vis the offending government, cutting off foreign aid or normal trade relationships, and

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redress is to sue in the U.S. under [ATS] a unique statute which permits victims from anywhere in the world to sue any company or person for a wrong ‘committed in violation of the law of the nations.’”).

78. Cf. Monroe H. Freedman, *The Lawyer’s Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995) (discussing the defense attorney’s obligation to represent not only the purely innocent but also the despicable).

79. The most obvious examples are in criminal cases where the defendant, who clearly appears to have been guilty, has his conviction reversed because the police or the prosecutors have obtained evidence in some constitutionally impermissible way. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

80. See, e.g., *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 705 (1967) (Stewart, J., dissenting) (“[I]f we assume that the price discrimination proven against the respondents had any effect on competition, that effect must have been beneficent. . . . [T]he Court has fallen into the error of reading the [statute] as protecting competitors, instead of competition . . .”).

81. See Robertson, *supra* note 77 (“If companies cannot be prosecuted for international crimes, all the more reason they should be sued for damages. The profits of their illegal conduct should be re-distributed to their victims.”).

even occasional military intervention.<sup>82</sup> In such circumstances, concerned governments, including the U.S. government, are very likely to see private class actions in the U.S. courts against non-state actors as a less effective way to deal with most serious human rights wrongs.<sup>83</sup>

*Kiobel* has been the latest battle in which numerous foreign governments have urged jurisdictional restraint on the U.S. courts. In their *Kiobel* briefs, the British and Dutch governments went out of their way to emphasize that they were focusing on the fundamental question of “why is this case even in a U.S. court when it has no connection to the United States?”—without taking any position on the underlying claims against Royal Dutch Petroleum.

As noted above, the foreign governments have been more successful since 2000 in urging an increasingly conservative U.S. Supreme Court to adopt rules that tend to restrain the jurisdictional appetite of foreign plaintiffs bringing claims in the U.S. courts.<sup>84</sup> Cases like *Empagran* and *Morrison* have involved large opt-out class action claims of the type that these foreign governments have chosen not to authorize in their own courts.<sup>85</sup> Having adopted some fairly clear comity-driven rules to limited U.S. forum shopping by counsel for overseas victims of alleged international antitrust and securities abuses, the Supreme Court might reasonably have been expected to ask: when, if ever, should an ATS class action case be allowed to proceed to trial without the kind of factual nexus that has long been recognized as necessary for a national court to exercise civil jurisdiction under traditional international law? (The answer of the Court’s five-member conservative majority in *Kiobel* appears to be somewhere between “never” and “hardly ever” on a narrow negative spectrum.)<sup>86</sup>

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82. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 630–33 (2004) (outlining various mechanisms to enforce human rights laws and principles).

83. See Neth.–U.K. *Kiobel* Br. II, *supra* note 3, at 35 (“[I]t has been the longstanding view of the Governments that the most effective way to ensure that there is no impunity for human rights abuses is to encourage and strengthen States to comply with the human rights obligations owed to those within their jurisdictions.”).

84. See *supra* notes 16–18 and accompanying text.

85. As noted, Australia does allow opt-out class actions, but subject to the country’s normal “loser pays” cost rule. See *supra* note 52.

86. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (“We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption. . . . And even where the claims touch and

The bottom line, as seen from outside the United States, essentially seems to be this: human rights abuses are a very important international concern, but the United States ought to be looking more to multilateral cooperation—as it has done in the torture victims area, but failed to do with the International Criminal Court—rather than just relying on highly-motivated private lawyers to bring broad class action cases against foreign corporations on behalf of non-resident victims for conduct having no effect within the United States. Thus, for the Dutch and British governments, the ultimate principle was to respect the jurisdictional restraints that international law has imposed and continues to impose on national governments and national courts because “[j]urisdictional restraints are a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity.”<sup>87</sup>

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concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”).

87. Neth.–U.K. *Kiobel* Br. II, *supra* note 3, at 2 (emphasis added).