KIobel V. ROYAL DUTCH PETROLEUM CO.:  
RADICAL REVISION OR ORIGINAL INTENT OF THE  
ALIEN TORT STATUTE

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I. INTRODUCTION

On April 17, 2013, in Kiobel v. Royal Dutch Petroleum Co., the U.S. Supreme Court, in a unanimous decision authored by Chief Justice Roberts, issued an important opinion limiting the scope of claims that can be brought under the Alien Tort Statute (the “ATS”). The ATS is a 220-plus-year-old statute which allows non-U.S. citizens to bring civil suits in U.S. courts for torts “committed in violation of the law of nations.” In recent years, plaintiffs, especially those seeking to sue large, multinational corporations, began utilizing the ATS as a means for seeking recovery for alleged human rights abuses occurring in foreign countries.

This paper discusses: (1) the life of the ATS prior to Kiobel; (2) the rationales behind the holding in Kiobel by the members of the Court; and (3) the status of the ATS post-Kiobel, specifically, whether the Court appears to be enlarging or contracting its position as the prime venue for global litigation, including human rights cases. Because of the importance of these issues on both the national and international level, careful evaluation is important. The reasoning set forth in the Kiobel decision, viewed in light of other recent Supreme Court holdings, may reveal the Court’s desire and directive to be judicially restrained when faced with global issues.

II. ALIEN TORT STATUTE (ATS)

Alien’s Action for Tort (also known as the Alien Tort Statute) is a one-line statute, passed as part of the Judiciary Act of 1789, that reads as follows: “The district courts shall have original jurisdiction of any civil action by an

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alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

It is believed that this statute was, in part, passed in response to several notorious incidents occurring in the U.S. involving foreign representatives, including an event that occurred in Philadelphia between French citizens in 1784 and another in New York in 1787 between a New York constable and a Dutch Ambassador. Although great injury did not occur, these incidents became international stories and drew ridicule because this newly created federal court system could not provide a remedy to a tort involving foreign citizens. In fact, it was later reported and argued during the Constitutional Convention that “the federal government does not appear …to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.” The U.S. stood in a precarious position: it was a new nation which needed to prove to the international community that it could protect its foreign visitors; otherwise, it would be viewed as responsible for those injuries by other countries. Accordingly, such activity prompted Congress to include the ATS in the Judiciary Act of 1789.

There is little history from which to understand the full legislative intent behind the ATS, since “there is no record of congressional discussion about private actions that might be subject to the jurisdictional provision or about any need for further legislation to create private remedies; [and] there is no record even of debate on the section.” In 1975, Judge Henry Friendly called the ATS “a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came.” Accordingly, determining the full intent of the ATS has “proven elusive,” and therefore many “radically different historical interpretations” have been proffered. Most commentators, however, agree that the ATS is a product of the drafters’
aspiration to give the federal government supremacy over foreign affairs and avoid international conflict arising from disputes about U.S. treatment of aliens. In sum, the ATS served as part of the protective armor designed to shield a young and vulnerable nation in a dangerous and unpredictable world.

III. LIFE OF THE ATS PRIOR TO KIOBEL

From 1789 to 1980, the ATS remained virtually latent, in that it was utilized as a basis for finding jurisdiction in only a few cases. However, in 1980, the floodgates opened for the ATS to be utilized as a tool to remedy human rights abuses, beginning with the case of Filartiga v. Pena-Irala. Some of this litigation has included suits by aliens against other aliens for torts committed outside of the United States without any evident territorial relationship. The increased utilization of the ATS during this time illustrates a trend in the judicial system toward extraterritoriality, which is defined by Black’s Law Dictionary as: “[t]he extraterritorial operation of laws; that is, their operation upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws.”

In Filartiga, the Filartigas, citizens of Paraguay, brought an action in the Eastern District of New York against Americo Pena-Irala, also a citizen of Paraguay, for wrongfully causing the death of the Filartiga's seventeen-year old son, Joëlito. The plaintiffs contended that on March 29, 1976, Joëlito Filartiga was kidnapped and tortured to death by Pena-Irala, who was then Inspector General of Police in Asuncion, Paraguay. The Filartigas claimed that Joëlito was tortured and killed in retaliation for his father’s political

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17 Id. at 464 (1989).
18 See Kiobel, 133 S.Ct. at 1663, Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (custody action suggesting jurisdiction under the ATS), Bolchos v. Darrel, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607) (ATS provided jurisdiction when wrongful seizure occurred at U.S. port and “original cause arose at sea.”); Hufbauer & Mitrokostas, supra note 4, at 2. See also Yen v. Kissinger, 528 F.2d 1194, 1202 n.13 (9th Cir. 1975) (1975 case suggesting that jurisdiction under the Alien Tort Statute “may be available” in a suit by Vietnamese Citizens against U.S. officials).
19 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
20 See, e.g., Filartiga, 630 F.2d 876 (2d Cir. 1980); Sarei v. Rio Tinto PLC, 671 F.3d 736 (9th Cir. 2011).
22 Filartiga, 630 F.2d at 878.
23 Id.
activities and beliefs. In July of 1978, Pena-Irala sold his house in Paraguay, entered the United States under a visitor’s visa and stayed beyond the terms of his visa. Dolly Filartiga, sister to the deceased Joelito, arrived in the United States in 1978 under a visitor’s visa and later applied for permanent political asylum. Soon thereafter, the Filartigas filed a complaint alleging jurisdiction under the ATS. The Second Circuit Court of Appeals held that deliberate torture perpetrated under the color of official authority violated universally accepted norms of international human rights law regardless of the nationality of the parties; thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the ATS provides federal jurisdiction.

Since 1980, human rights litigation under the ATS has evolved with great success through many district court cases, including, but not limited, to Kadic v. Karadzic and Abebe-Jira v. Negewo. In Kadic, the Second Circuit Court of Appeals considered claims brought by victims of atrocities occurring in Bosnia against the leader of the insurgent Bosnian-Serb forces filed in a United States District Court in Manhattan, holding that subject-matter jurisdiction exists under the ATS for human rights violations, such as rape, torture, extrajudicial killing and genocide. In Abebe-Jira, the Eleventh Circuit Court of Appeals considered claims brought by former Ethiopian prisoners against a former official of the Ethiopian government for similar atrocities, affirming the District Court’s holding that the ATS provides a private cause of action.

Prior to Kiobel, the most recent ATS case heard by the Supreme Court was the 2004 case of Sosa v. Alvarez-Machain. In Sosa, it was alleged that the U.S. Drug Enforcement Administration (the “DEA”) approved using Jose Francisco Sosa, a Mexican national, along with other Mexican nationals, to

24 Id.
25 Id.
26 Id at 879.
27 Id.
28 Id at 880-90.
30 Kadic, 70 F.3d at 236.
31 Abebe-Jira, 72 F.3d at 848.
abduct Humberto Alvarez-Machain, also a Mexican national, hold him overnight, and bring him to the United States to stand trial for a DEA agent’s torture and murder. After Alvarez-Machain was acquitted of the murder, he brought claims for false arrest against the United States and DEA agents under the Federal Tort Claims Act. Additionally, Alvarez-Machain claimed that his arbitrary detention by Sosa violated the law of nations under the ATS. Historically, courts encountered problems interpreting the definition of the “law of nations.” In Sosa, the Supreme Court’s position was that international norms which form the basis for an ATS claim must be specific or find their genesis in customary international law. Although the Court in Sosa found little scholarly attention given to the ATS at the time of its creation and “that a consensus understanding of what Congress intended had proven elusive,” it believed history supported two propositions:

First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.

The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violation of the law of nations.

Specifically, the Court stated:

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of

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33 Id. at 698.
34 Id.
35 Id.
37 Id.
38 Sosa, 542 U.S. at 718-20.
39 Id.
40 Id.
international law violations with a potential for personal liability at the time.⁴¹

Accordingly, in Sosa, the Court held that a tort in violation of customary international laws (or, as stated in the statute, the “laws of nations”) arises under federal law, but it confers jurisdiction only “for the modest number of violations.”⁴² As to application of their finding, the Supreme Court directed the federal courts that they “should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁴³ Accordingly, it appears courts were not to exercise jurisdiction over a claim unless the tort was as “well-defined and accepted by civilized governments as the torts that constituted violations of the law of nations in 1789.”⁴⁴

The Supreme Court, while counseling restraint in judicially applying internationally generated norms in light of foreign policy concerns, held that specific, universal and obligatory norms give rise to a very limited set of actionable violations of international law under the ATS.⁴⁵ As to the facts of the case, the Court concluded that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violated no norm of customary international law so well defined as to support the creation of a federal remedy.”⁴⁶ Accordingly, Alvarez’s claim was dismissed.⁴⁷ Thus, the Court left the lower courts wide latitude to determine which claims are sufficient to proceed under the ATS.

IV. FACTUAL AND PROCEDURAL BACKGROUND OF KIOBEL

In Kiobel, the plaintiffs alleged that throughout the early 1990s, “Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property.”⁴⁸ The plaintiffs further alleged the defendant corporations aided and abetted these atrocities by, among other things, “providing the Nigerian forces with food,
transportation, and compensation, as well as by allowing the Nigerian military to use respondent’s [defendant’s] property as a staging ground for the attacks.\footnote{Id. at 1662-63.} During the time in question, plaintiffs were residents of Nigeria.\footnote{Id. at 1662.} When the complaint was filed in the United States District Court for the Southern District of New York, respondents, Royal Dutch Petroleum Company and Shell Transport and Trading Company, P.L.C., were holding companies incorporated in the Netherlands and England, respectively.\footnote{Id.} Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd., was incorporated in Nigeria and engaged in oil exploration and production in Nigeria.\footnote{Id.} Following the alleged atrocities, plaintiffs moved to the United States where they had been granted political asylum and lived as legal residents.\footnote{Id. at 1663.}

The plaintiffs filed suit alleging jurisdiction under the ATS and requested relief under customary international law.\footnote{Id.} According to plaintiffs, respondents violated the law of nations by aiding and abetting the Nigerian Government in committing “(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”\footnote{Id.}

The District Court dismissed several of the claims, reasoning that the facts offered to support them did not give rise to a violation of the law of nations, but certified its order for interlocutory appeal related to the claims for crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention.\footnote{Id.} The Second Circuit Court of Appeals dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability.\footnote{Id.} Prior to Kiobel, the Supreme Court had offered no guidance regarding liability of corporate defendants under the ATS. Accordingly, there were divergent holdings among the federal circuit courts about whether corporate liability was actionable within the realm of the ATS, under which corporations, in recent years, had become the defendant of choice due to their deep pockets.\footnote{See Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (granting certiorari); see also Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), vacated, 133 S. Ct. 1995 (2013) and Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011).}

\footnote{Id.}
question. By agreeing to hear the Kiobel case, it was expected that the Supreme Court would decide whether corporations could be sued under the ATS for violations of the law of nations or whether such claims could be brought only against individuals. However, after oral argument, the Court, in an unusual directive, ordered the parties to file supplemental briefs addressing a different, very basic question about the statute’s extraterritorial application. The Court had determined that it was more important to decide the jurisdictional question of “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 U.S.,” which was addressed during a second oral argument. In response to the newly crafted legal question, many nations filed amicus briefs, including the United States, the Argentine Republic, Germany, the Kingdom of the Netherlands and the United Kingdom of Britain and Northern Ireland.

V. HOLDING OF KIOBEL

In Kiobel, the Supreme Court concluded that the presumption against extraterritoriality applies to claims under the ATS. Thus, the Court rejected plaintiffs’ claims, thereby barring recovery. Members of the Court, however, differed on their rationale for the holding, and such differences may provide guidance about the application of the ATS to differing fact patterns.

A. Majority Opinion Delivered by Justice Roberts

The majority opinion, written by Chief Justice Roberts, focused on the canon of statutory interpretation known as the presumption against extraterritorial application (the “Presumption”). The Presumption is defined by the Court as follows: “when a statute gives no clear indication of an extraterritorial application, it has none.”

The Presumption was recognized and described in the following Supreme Court precedents: (1) In Benz v. Compania Naviera Hidalgo, S.A., the question raised was whether the Labor Management Relations Act of 1947 was intended to cover disputes between a foreign ship and its foreign

59 Kiobel, 133 S. Ct. at 1663.
60 Id.
61 Id.
62 Id.
63 Id. at 1669.
64 Id.
65 Id. at 1664.
crew. In 1957, the Supreme Court found no extraterritorial application when it stated:

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

(2) In *EEOC v. Arabian American Oil Co.*, the Supreme Court was faced with a decision as to whether Title VII applied extraterritorially to regulate employment practices of U.S. employers who employ U.S. citizens abroad. The Court found that even Title VII did not apply extraterritorially by stating:

It is a longstanding principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only with the territorial jurisdiction of the United States.” *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). This “canon of construction…is a valid approach whereby unexpressed congressional intent may be ascertained.” *Ibid.* It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S.Ct. 671, 677-678, 9 L.Ed.2d 547 (1963).

(3) In 2007, in *Microsoft Corp. v. AT&T Corp.*, the Supreme Court reiterated its stance against extraterritoriality: “The presumption that United States law governs domestically but does not rule the world applies.”

(4) Again, in 2010, the Supreme Court in *Morrison v. National Australian Bank Ltd.*, noted that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”

As it relates to the Presumption, the *Kiobel* Court, relying upon these four cases, emphasized two points. First, although the Presumption is typically applied to discern if an Act of Congress regulating conduct applies

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67 Id. at 147.
69 Id. at 248.
70 Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).
abroad, the principles underlying the Presumption also constrain courts that are considering causes of action that may be brought under the ATS, even though the ATS does not regulate conduct but is “strictly jurisdictional.”

Second, “[t]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.” The Court also noted that “[t]hese concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.” Applying these principles, the Supreme Court determined that the Presumption applied, and it stated that the ATS does not contain the “clear indication of extraterritoriality” needed to rebut the Presumption.

The Court also considered plaintiff’s contention that even if the Presumption applied, Congress can indicate that it intends federal law to apply to conduct abroad based upon the “text, history, and purposes” of the statute. Regarding the “text” of the statute, the Court studied the actual language of the statute (“law of nations,” “any civil action,” and “torts”) and found that none of the provisions of the statute evidence that Congress clearly intended extraterritoriality.

The Court next considered the “history” (historical background) of the statute, and repeated what it had offered in the Sosa decision, noting the “three principal offenses against the law of nations” had been identified by Blackstone as having been applied to the ATS: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” The first two offenses – violation of safe conducts and infringement of the rights of ambassadors – were easy for the Court to answer, as the conduct occurs within the forum nation and for that reason, they have no extraterritorial application. The third offense – piracy – was more difficult for the Court to explain. Although the Court “has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application,” the Court refused, in this case, to regard the prior holdings as evidence of congressional intent of extraterritorial application for the ATS.

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73 Id.
74 Id. at 1665.
75 Id.
76 Id.
77 Id. at 1666 (quoting Sosa, 542 U.S. at 723-24; see 4 William Blackstone, Commentaries on the Laws of England 68 (1769)).
78 Id.
The Court did not think that the existence of a cause of action against pirates (as offered by Blackstone) was a sufficient basis for concluding that other causes of action outside U.S. territory would come under the auspice of the ATS. The Court concluded that “pirates may well be a category unto themselves.”

Finally, as it pertains to the “purpose of the ATS,” the Court found that there was “no indication that the ATS was passed to make the U.S. a uniquely hospitable forum for the enforcement of international norms.” The Court quoted *United States v. The La Jeune Eugenie*: “No nation has ever yet pretended to be the custos morum of the whole world…,” or in other words, the guardian of morals. The Court appeared concerned over diplomatic strife that could result from the United States, or any nation, that presumes such a position. As evidence of this concern, the Court noted the following: (1) negative foreign policy consequences and diplomatic strife on the home front; and (2) the opportunity that other nations would hale U.S. citizens into their courts for alleged violations of the law of nations. The Court warned that the “triggering (of) such serious foreign policy consequences” should be left to the political branches, not the judiciary. After review of the “text, history, and purposes of the ATS,” the Court chose to overlook the application of the ATS to extraterritoriality issues.

In the final paragraphs of the majority opinion, the Court concluded “that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.” The Court specifically noted, in relation to the facts of the case, that all of the relevant conduct took place outside the United States. However, the majority opinion went further to define its position by: (1) asserting that when claims “touch and concern” the territory of the United States, such touching and concerning must do so with “sufficient force” in order to rebut the Presumption; and (2) as it pertains to corporations, the Court expounded that “mere presence” of a corporation in a country would not “displace” the Presumption.

(declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas)).

80 Id.

81 Id.

82 Id. at 1668.

83 Id. (quoting United States v. The La Jeune Eugenie, 26 F. Cas. 832, 847 (No. 15,551) (C.C.Mass.1822)).

84 See id. at 1669.

85 Id.

86 Id. at 1665.

87 Id.

88 Id.

89 Id.
B. Concurring Opinion by Justice Kennedy

Justice Kennedy provided a one paragraph concurrence. He believed that the majority opinion left open a number of important questions about the application of the ATS.\textsuperscript{90} He was not inclined to provide any answers to the open questions, but implied that he would be open to being persuaded.\textsuperscript{91} Justice Kennedy seemed especially concerned about “serious violations of international law principles protecting persons” which are not covered by the majority’s holding or other statutes related to human rights.\textsuperscript{92}

C. Concurring Opinion by Justice Alito, joined by Justice Thomas

Justice Alito, joined by Justice Thomas, concurred with the majority opinion. He stated that the Supreme Court’s holding “leaves much unanswered, and perhaps there is wisdom in the Court’s preference for this narrow approach.”\textsuperscript{93} However, Justice Alito reminded the reader of the Court’s prior holding in \textit{Sosa}, implying the need to be consistent, and opined that an ATS cause of action will be barred under the Presumption “unless the domestic conduct is sufficient to violate an international law norm that satisfies \textit{Sosa’s} requirements of definiteness and acceptance among civilized nations.”\textsuperscript{94} Thus, his concurrence sets forth a “broader standard” than the majority opinion, in that the domestic conduct should be considered in light of “historical paradigms” and the “focus of congressional concern” when the ATS was enacted.\textsuperscript{95}

D. Concurring Opinion by Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan

Although Justice Breyer, along with Justices Ginsburg, Sotomayor and Kagan, agreed with the result set forth in the majority’s decision, he did not agree with its reasoning. First, Justice Breyer rejected the use of the Presumption as a bar, as he asserted that the ATS was enacted with “foreign matters” in mind, in that the statute specifically refers to “alien[s],” treat[ies],” and “the law of nations.”\textsuperscript{96} He sought to expound on the majority’s opinion related to pirates by asserting that piracy was clearly

\textsuperscript{90} \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 1669-70 (Alito, J., concurring).
\textsuperscript{94} \textit{Id.} at 1670.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 1672 (Breyer, J., concurring).
considered when the statute was drafted and that the actions of pirates took place abroad. Thus, “applying U.S. law to pirates does typically involve applying our law to acts taking place within the jurisdiction of another sovereign.”

Justice Breyer agreed with Justice Roberts’s assertion that “[p]irates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.” Then, he asserted that torturers are today’s modern pirates who have declared war against all mankind.

Justice Breyer emphasized that he would not invoke the Presumption, but would be guided by international jurisdictional practices where “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”

As it relates to nations becoming a safe harbor for the modern day pirate who commits atrocious actions abroad (e.g. genocide and torture), Justice Breyer questioned how the majority could reason in Kiobel that the ATS will not reach extraterritorial conduct unless it “touch[es] and concern[s]” the United States, in light of its own approval in Sosa of two recent American cases’ holdings whereby ATS jurisdiction was found when the parties were not American nationals and the action which took place abroad did not touch and concern the United States.

However, Justice Breyer, with respect to the Kiobel holding, agreed with the majority and noted that in this case the corporate defendants were foreign corporations (who were only present in the United States in an office owned by a separate, but affiliated company and whose only task was to educate potential investors about the company), the plaintiffs were not U.S. nationals, the conduct took place abroad, and the alleged illegal corporate conduct was not direct. Therefore, he asserted that it would “be farfetched

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97 Id.
98 Id.
99 Id.
100 Id.
101 Id. at 1669.
102 Id. at 1674-75 (“an alien plaintiff brought a lawsuit against an alien defendant for damages suffered through acts of torture that the defendant allegedly inflicted in a foreign nation, Paraguay” (citing Filartiga, 630 F.2d 876)); (“the plaintiffs were nationals of the Philippines, the defendant was a Philippine national, and the alleged wrongful act, death by torture, took place abroad” (citing In re Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1469 (9th Cir. 1994); In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 495-96, 500 (9th Cir. 1992))).
103 Id. at 1677-78.
to believe…that this legal action helps to vindicate a distinct American interest.”

E. Holding

The majority opinion may best be summarized by Justice Breyer’s statement, which set out four key propositions of law found in the majority’s opinion:

First, the “presumption against extraterritoriality applies to claims under” the Alien Tort Statute. Second, “nothing in the statute rebuts that presumption.” Third, there “is no clear indication of extraterritorial [application] here,” where “all the relevant conduct took place outside the United States” and “where the claims” do not “touch and concern the territory of the United States … with sufficient force to displace the presumption.” Fourth, that is in part because “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”

In sum, the Supreme Court in Kiobel held that the Presumption against extraterritoriality applies in ATS cases, and that the ATS only applies to cases brought by non-citizens for conduct committed within the United States, on the high seas, or outside the United States, if the claim touches and concerns the United States with sufficient force.

VI. UNANSWERED QUESTIONS ABOUT THE ATS AFTER KIOBEL

The Kiobel decision marks a definite retreat from the expansion of federal courts over the last thirty years to hear overseas human rights cases. For those plaintiffs utilizing the ATS to bring human rights claims on behalf of foreign plaintiffs against foreign defendants for acts occurring wholly abroad, the Kiobel decision has dealt an immediate blow. However, the concurrences reveal that much is left unanswered under the current ATS. Kiobel clearly signals that the ATS may still be invoked in human rights claims that arise outside the United States when those claims “touch and concern the territory of the United States,” but what remains unclear from the majority opinion is the “force” needed to rebut the Presumption that U.S. law

104 Id. at 1678.
105 Id. at 1670.
does not apply extraterritorially. Accordingly, additional litigation will be necessary to answer the U.S. nexus requirement question, which is, under the *Kiobel* test: to what extent must an ATS claim arising outside of the United States touch and concern the territory of the United States before the claims have sufficient force to displace the Presumption against extraterritorial application?

Further ambiguity is evidenced by the use of the word “territory,” indicating that the majority’s test for overcoming the Presumption depends largely on where the conduct takes place, while the standard set forth in Justice Breyer’s concurrence includes even broader considerations about a defendant’s nationality and/or whether the conduct affects the national interest, which includes when America becomes a safe harbor for a “torturer or other common enemy of mankind.” For example, if the tortious conduct occurs partially in the United States but the injury occurs overseas, Justices Alito and Kennedy appear to join with Justice Breyer, et al., in leaving open the possibility of claims under the ATS depending on whether the conduct violates certain types of international norms. For another example, if the tortious conduct occurs wholly in the United States but the injury occurs overseas, the concurrences seem open to foreign plaintiffs using the ATS to bring suit against U.S. individuals or corporations aiding and abetting serious violations of international law occurring overseas.

The question of corporate liability, the issue for which the Court originally granted certiorari, adds yet another layer of ambiguity to the Court’s holding. The majority asserts that “mere presence” of a corporation in the United States does not displace the Presumption; however, it does not foreclose the possibility of corporate liability altogether. Further, it is silent about whether a corporation that is domiciled or headquartered in the United States would meet the nexus test. Justice Breyer’s concurrence, particularly the portion of the standard which focuses on the nationality of the defendant, suggests that he would be open to corporate liability for certain corporations under the ATS.

**VII. HUMAN RIGHTS LAW BEYOND THE ATS**

Although the Court is clear about its concern that overly aggressive judicial enforcement of human rights claims under the ATS could create unwanted international discord, legal redress can still be found outside of the ATS to address and/or prevent human rights atrocities. Due to the significant foreign policy implications that arise from its decisions, the Court

107 *Kiobel*, 133 S. Ct. at 1674.
has sought to defer these human rights issues to the political branches. Indeed, in 1992, Congress enacted legislation with extraterritorial application on which plaintiffs can rely to litigate human rights cases entitled the Torture Victim Protection Act (“TVPA”). The TVPA allows civil suits in the United States under certain circumstances against individuals who, under actual or apparent authority of color of law of any nation, subject an individual to torture or killing. The TVPA stands in contrast to the ATS in terms of its detailed provisions, extensive legislative history, and, therefore, its more transparent guidance. Further, because of the Court’s determination that the ATS is a purely jurisdictional statute, congressional action is available to extend or further limit extraterritoriality of the ATS and/or create new law for human rights protection. In so doing, Congress would respond to the apparent requests from the court system seeking political direction as it relates to the ATS, and it would relieve courts from the burden of inferring the intentions of the first Congress.

Additionally, plaintiffs can file claims in federal court under ordinary tort law for human rights abuses based on diversity jurisdiction. In these cases, for conduct occurring outside the United States, claims generally would be governed by the substantive tort law of the place where the conduct took place. Plaintiffs may also bring these cases in courts of other countries or in international tribunals.

The most effective manner in which to deal with human rights abuses may be the creation of international treaties or other international vehicles, which would regulate standards consistent with international principles. Multilateralism has been a key feature of U.S. policy. In the past, despite some temporary departures, the United States has taken a leadership role in creating an extensive network of global treaty rules and international institutions, on grounds that multilateral action promises greater rewards than does a policy of going it alone.

113 Id. at 726 (“. . . the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”).
114 See generally HUFBAUER & MITROKOSTAS, supra note 4.
VIII. VIEW OF THE FUTURE

The “innovative”\textsuperscript{116} actions American courts had allowed in ATS litigation since \textit{Filartiga} were aggressive and vigorous in favor of extraterritoriality. This position, along with the \textit{Sosa} decision, produced wildly differing results on a number of significant issues in the lower courts.\textsuperscript{117} Depending on the perspective, America’s assertive nature has been viewed differently. Most human rights advocates encouraged an expansive approach.\textsuperscript{118} However, others believed the ATS litigation threatened to spin out of control,\textsuperscript{119} by way of economically impacting U.S. trade and foreign investment,\textsuperscript{120} to causing grave foreign policy consequences,\textsuperscript{121} to the concern that “other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”\textsuperscript{122}

Although American laws are the supreme of the land, it follows, as Justice Story declared, that “it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.”\textsuperscript{123} It seems improbable that the drafters envisioned the ATS extending to non-U.S. activities of non-U.S. entities, especially in light of the fact that the U.S. was a “fledgling Republic-struggling to receive international recognition”\textsuperscript{124} The Court in \textit{Kiobel} did begin to resolve, upon review of history, some outstanding questions as to its stance on universal jurisdiction and extraterritoriality. Also, it provided some guidance to the recent assertive approach taken by many American courts by holding that ATS appears to only apply to cases brought by non-citizens for conduct committed within the United States, on the high seas, or outside the United States, if the claim touches and concerns the United States with sufficient force. The Court, as it did in \textit{Sosa}, however, left the precise reach of the ATS to be addressed by lower courts.

\textsuperscript{118} See Lee, supra note 10, at 841.
\textsuperscript{119} See HUFBAUER & MITROKOSTAS, supra note 4, at 7.
\textsuperscript{120} Id. at 37-44.
\textsuperscript{121} See Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).
\textsuperscript{122} Id.
\textsuperscript{123} JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS, 19, 21 (1834).
\textsuperscript{124} \textit{Kiobel}, 133 S. Ct. at 1668.
Consistent with Kiobel, we see in a number of other circumstances whereby U.S. courts have recently begun to exhibit a concern over being the main venue for foreign disputes. Courts have held that the Racketeer Influenced and Corrupt Organization Act does not apply to extraterritorial corporate activities and that the principal antifraud provision of the federal securities laws does not apply extraterritorially to foreign transactions.

Further, within a week after issuing the Kiobel decision, the Supreme Court agreed to hear Bauman v. DaimlerChrysler Corp., another case invoking claims under the ATS and the Torture Victims Protection Act for conduct occurring in Argentina. This case asks whether a foreign parent corporation can be subject to suit in the United States for wrongs allegedly committed by a foreign subsidiary, based on the foreign parent’s relationship with a separate, non-party U.S. subsidiary, when the U.S. subsidiary did not even participate in the alleged wrongdoing. The decision by the Supreme Court to hear this case indicates that it is ready to provide further guidance over the ability of U.S. courts to assert jurisdiction over foreign parent corporations and to expound upon the U.S. nexus required under the ATS, as established in Kiobel.

Many of these decisions seem to signal a message that both the liberal and conservative members of the Supreme Court, even though their underlying reasoning may differ, are united in their concern about U.S. courts becoming the primary site for foreign disputes.

IX. CONCLUSION

Long ago, Congress created the ATS for specific reasons – reasons that were not artfully summarized or recorded. And, because of the lack of documentation, historians and scholars can only speculate as to those specific reasons. Regardless, this Supreme Court seems concerned about the recent expansion of U.S. courts to offer unilateral justice of foreign disputes determined by U.S. standards, and aside from serious violations of international norms that bear a substantial relation to the United States, it appears to be signaling its concern over policy-making better left to the political branches.

The Kiobel decision should not be considered a loss for human rights activists or a win for “Corporate America” but a return to the appreciation

125 See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010).
128 Id.
that the U.S. judicial system exists for protection of our citizens and land, and we must be careful in regulating foreign activities unilaterally.