The Door Ajar: The Life of the Alien Tort Statute before and after Kiobel v. Royal Dutch Petroleum

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Introduction

“There is little danger that judicial enforcement [of customary international law] will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation’s commitment to the protection of human rights.” - U.S. Department of State (1980) 1

In the beginning, the First Congress of a young United States of America passed 28 U.S.C. section 1350, known today as the Alien Tort Statute [hereinafter “ATS”]. 2 Nothing more has been absolutely certain since then. Since the April 2013 Supreme Court decision of Kiobel v. Royal Dutch Petroleum [hereinafter “Kiobel”], 3 the future of international human rights litigation in U.S. federal courts flounders in a quagmire of complex precedent and wants a light in the darkness. This paper seeks to find the foundation of the relationship of the law of nations to at least one sovereign state, the United States, then investigates the life of a major liaison in this regard, the Alien Tort Statute, and explores the viability of the ATS as a channel for international human rights litigation moving forward. Consistent judicial opinion, contextual and textual evidence of congressional intent and the Constitution itself support that the raison d’etre of the ATS has been to uphold the law of nations consistently in cases of violations of accepted international norms of human conduct which are properly brought to United States forums for adjudication; the Supreme Court’s most recent conception of the statute notwithstanding, the vitality of this bedrock component of American judicial fabric will remain.

This paper makes three main arguments: one, that despite an intended and requisite place for our federal judiciary in reinforcing international law, the Kiobel Court incorrectly applied the presumption against extraterritoriality to the ATS which is a purely jurisdictional statute and

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2 28 U.S.C. § 1350, stating, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.”

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building upon its precedent,\(^4\) misunderstands the nature of the jurisdiction involved and the proper substantive rule of decision for ATS cases; two, future causes of action that will continue to be successful under the ATS will at least be those that continue to adhere to the contours of *Filartiga v. Pena-Irala*\(^5\), where connection to the U.S. deriving from substantial personal jurisdiction over a defendant, for example in the ways of U.S. citizenship and permanent or longtime residency, will suffice to overcome the presumption; lastly, within this framework, international law lends support for the contention unaddressed by the *Kiobel II* court that jurisdiction over corporations for civil liability validly exists as well.

It is therefore necessary to first address the foundational misunderstanding which influenced the Court to make its most critical holding in *Kiobel*--that the presumption against extraterritoriality should not in fact apply to the ATS because the statute provides only for the adjudicative jurisdiction of a U.S. court to apply customary international law which has existed as a valid rule of decision separate and not a part of U.S. federal common law.\(^6\) The next section traces the development of the ATS through its jurisprudential precedent and the relationship of the Court’s most recent pronouncement in *Kiobel* built upon this questionable foundation.\(^7\) The propriety of the major thrust of *Kiobel*, the application of the presumption against extraterritoriality to the ATS, is then explored.\(^8\) After having discussed the important perpetual misunderstandings which have plagued the ATS over the course of its life and usage, this paper explores why and how the statute will continue to be successfully used as a channel for international human rights litigation despite the Court’s decision in *Kiobel*\(^9\) and argues that the Alien Tort Statute can and must survive.\(^10\)

**“Jenga”--Revisiting the Jurisdictional Philosophy Question of the Alien Tort Statute**

“Section 1350... is one of several provisions in the Judiciary Act [of 1789] ‘reflecting a concern for uniformity in this country’s dealings with foreign nations

\(^5\) Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).
\(^6\) See infra at p. 3.
\(^7\) See infra at p. 8.
\(^8\) See infra at p. 15.
\(^9\) See infra at p. 25.
\(^10\) See infra at p. 34.
and indicating a desire to give matters of international significance to the jurisdiction of federal [courts].”” - U.S. Department of State (1980)


The following questions are at the core of the debate swirling around the Alien Tort Statute: what is the intended scope of its jurisdictional grant? Does it extend to violations of the law of nations occurring outside the physical territory of the United States? And if so, would such an adjudication constitute an improper extraterritorial extension of U.S. federal common law? These questions are only pertinent because the Supreme Court in Sosa v. Alvarez-Machain interpreted its precedent to find that customary international law is interpreted and applied through a continuing enclave of post-Erie federal common law. However, these inquiries now made more requisite since Kiobel are obviated through a reading of constitutional grants of federal jurisdiction which does not apply the law of nations through the arguably nonexistent U.S. federal common law. In this way, there is strong support for the contention that U.S. federal district courts were originally endowed with the power to adjudicate both federal questions, which “[arise] under the Constitution, laws of the United States and treaties” and a law of nations, as separate entities. While there is debate between scholars adhering to the modern position and revisionist constitutional scholars, the spirit underlying the ratification of pertinent clauses of Article III and the textual framing of the language support the distinction of federal jurisdiction over customary international law in its own right rather than through any continuing enclave of federal common law.

Both the Supremacy Clause and the “Arising Under” Clause of Article III indicate that the Framers intended the Constitution, laws and treaties to be the supreme law of the land while

additionally designating other distinct heads of jurisdiction of the federal courts which affected the foreign relations of the U.S.\textsuperscript{16} The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\textsuperscript{17}

The Arising Under Clause provides in parallel: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...”\textsuperscript{18} Therefore, the Founders designated the “Constitution,” “Laws,” and “Treaties” to be the supreme municipal law of the land binding on the states and enforceable in federal courts.\textsuperscript{19} However, these clauses contain no implicit reference to a customary law of nations as the rest of the Arising Under does wherein it designates further heads of jurisdiction to the federal courts\textsuperscript{20}:

\begin{quote}
\textit{to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.}
\end{quote}

This revealing textual distinction is supported importantly by the early Supreme Court decision of American Insurance Co. v. Canter\textsuperscript{21}. Chief Justice Marshall, in the course of determining whether an inferior territorial court created by the Florida territorial legislature had jurisdiction to adjudicate “cases in admiralty,” ultimately stated that cases of admiralty and maritime

\begin{footnotes}
\item[16] Id. at 39.
\item[17] U.S. Const. art. VI, cl. 2
\item[18] U.S. Const. art. III, sec. 2, cl. 1.
\item[21] 26 U.S. (1 Pet.) 511 (1828).
\end{footnotes}
jurisdiction, which involve the law of nations, were not categorically cases arising under “the Laws of the United States” within the meaning of Article III. In sum, it is revealing that the text of the Constitution purports to show that the “cases of admiralty” and “cases affecting ambassadors” along with the other six types of “Controversies” comprise distinct heads of federal court jurisdiction which exist separately from the three forms of federal municipal law (“Constitution, laws and treaties”) of the “Arising Under” grant of Article III. Therefore, as the final type of controversy listed over which the federal judiciary was to have jurisdiction apart from the arising under grant, “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”, this paper argues this piece of the Constitution appears to imply a foundation for alienage jurisdiction which the ATS then more explicitly granted.

The spirit underlying the ratification of the federal jurisdictional clauses of Article III, Clause Two also reinforces the unique charge of the federal courts to apply international customary law. Supporters of the Constitution feared offense to national foreign relations by inconsistent state court decisions attempting to apply the law of nations. Therefore, the Founders included independent federal jurisdiction outside the realm of questions of federal municipal law (“Constitution, laws, treaties”) within Article III for admiralty cases and other state-state controversies, such as ambassadorial and alienage cases. As Alexander Hamilton explains in The Federalist:

> the peace of the whole ought not to be left at the disposal of a part.  
> ... As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

It is evident from the blueprint for the government of the United States and its authors that the federal judiciary was intended to have jurisdiction to interpret and apply the law of nations in a number of cases and controversies apart from the federal municipal law.

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22 Id. at 545-46.  
26 The Federalist No. 80, at 535-36 (Alexander Hamilton).
The propriety of the federal judiciary to adjudicate controversies implicating customary international law in its own right rather than through any continuing enclave of federal common law is especially strong when the constitutional backing is supplemented by a further congressional authorization. In the case of the Alien Tort Statute, the First Congress, “reflecting a concern for uniformity in [American] dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions” enacted the Judiciary Act of 1789. The federal courts’ mandate via the ATS in controversies of alienage requiring application of customary international law was made even more specific, as the district courts were given “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” in the same way, and separately and not under the purview of, how Congress had given district courts original jurisdiction to hear federal questions under Section 1331.

Indeed, the Supreme Court has held that limitations on traditional federal question section 1331 jurisdiction are not the same as limitations on the constitutional power of Congress to confer jurisdiction on federal courts. As a foundation to this, the Ninth Circuit at least has observed that “the 'Arising Under' Clause of Article III is construed differently, and more broadly, than the 'arising under' requirement for federal question jurisdiction.” As one district court of the First Circuit has intelligently agreed, “Section 1331 standing alone would not provide plaintiffs with jurisdiction [over a private right of action arising under federal law for a violation of a treaty or of international law norms] in the absence of an express Congressional directive [such as the type] found in Section 1350 and in the TVPA.” Consequently, this paper proposes that the grant of original jurisdiction by Congress to the district courts to adjudicate cases brought by aliens for violations of the law of nations under Section 1350 rather than 1331

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27 Federal courts are empowered to adjudicate cases authorized by Article III of the Constitution and the Congress. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (“The district courts of the United States, as we have said many times, are ‘courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.’”).
33 In re Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. Haw. 1992).
also supports that adjudicating the law of nations was thought to be outside the purview of questions of federal municipal law.

To understand the current conversation regarding the Alien Tort Statute requires an understanding of the First Congress’s conversation with the Constitution. For the foregoing reasons, there is support rooted in the Constitution that the intended scope of the jurisdictional grant of the ATS was to be as expansive as the scope of the law of nations; adjudications of violations of the law of nations occurring outside the physical territory of the United States, with which the *Kiobel* Court was concerned, would not constitute an improper extraterritorial extension of U.S. federal common law, simply because only customary international law itself and not federal common law would be applied. Some conversations are worth having again.

To Be Continued--the Development of ATS Cases to *Kiobel v. Royal Dutch Petroleum*

“[It is] a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came.” - Of the Alien Tort Statute, Judge Friendly (1975)\(^{35}\)

While having laid dormant for two hundred years, the ATS was nonetheless intended to be an important part of the federal government’s fabric as a participant in the international community. From the most recent landmark consideration in *Filartiga*\(^{36}\) to the Supreme Court’s pronouncements in *Sosa*\(^{37}\) and continuing with *Kiobel*\(^{38}\), judicial treatment of the ATS has produced varying and dubious precedent, epitomizing the inherent nature of adversarial litigation, like a “Rorschach blot, in which each of the contending sides…sees what it was predisposed to see anyway.”\(^{39}\) In the wake of *Kiobel*, an important segment of human rights litigation in the United States will depend upon the abilities of supporters of the ATS or their adversaries to convince the greater share of courts to interpret exceedingly equivocal precedent their way.

i. **The Rise of the Alien Tort Statute**

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\(^{35}\) *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).
\(^{36}\) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).
The ATS became an instrument for holding accountable human rights violators in 1980 when the Second Circuit decided the landmark case of Filartiga v. Pena-Irala. In that case, suit was brought by the sister, on visitor visa to the U.S., of a Paraguayan citizen who had been allegedly tortured to death in Paraguay by another Paraguayan citizen and state official also holding alien visitor-visa status; a U.S. federal court considered as a matter of recent first impression the propriety of rendering a judgment upon a defendant under such circumstances. The court cited the need to look to the evolution of the collective practice of states to derive standards that have ripened into recognized “law of nations” over the years by “the general assent of civilized nations” for purposes of the statute. The final holding found torture perpetrated under color of official authority to be violative of universally accepted norms of the international law of human rights, regardless of the nationality of the parties; importantly, the court found federal jurisdiction was provided by the ATS, “whenever an alleged torturer is found and served with process by an alien within [U.S.] borders.”

Since then, the growth of the scope of ATS litigation has continued, but qualified always in important respects by the tenets of the Supreme Court’s decision in Sosa. For example, the Second Circuit again in Kadic v. Karadzic stated that the ATS could be used against private actors. And since, courts have also recognized torture, prolonged arbitrary detention, and cruel, inhuman, or degrading treatment or punishment (“CIDT”) as international law norms actionable under the ATS. However, the Supreme Court has required any such claims adjudicated by federal courts to be “based on the present-day law of nations resting on a norm of international

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40 630 F.2d 876 (2nd Cir. 1980).
42 Id. at 878.
character defined with a specificity comparable to the features of the 18th-century paradigms [of piracy and violations of ambassadorial and safe conduct agreements].”

Among such specifications, the Court in Sosa also made important pronouncements regarding the appropriate rule of law to be applied and the process for its application. In a succinct but not altogether plain statement, the Sosa Court perpetuated the “incorporation of international law” debate, where the “modern position” holds that federal courts may apply customary international law without the need for prior congressional authorization and a “positivist” position would require “positive authority for the incorporation” of customary international law into the U.S. legal system, such as express authorization by the Constitution or a statute. While addressing whether the ATS either created or authorized the courts to recognize any particular right of action without further congressional action, the Court stated, “Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”

Positivist scholars, such as Professors Curtis Bradley and Jack Goldsmith, have argued that this statement indicates that the Sosa Court found authority for the incorporation of customary international law in the ATS itself, supporting a conception of positive incorporation as a matter of post-Erie federal common law into the U.S. legal system. However, scholars of the modern position, such as Professor William Dodge, arguing that congressional authorization is unnecessary because customary international law is already traditionally part of the U.S. legal system, believe that the Sosa Court stated that the function of the federal common law would be to simply act as a portal through which aliens could then bring claims with customary international law, not federal common law, operating as the rule of decision.

The Sosa Court also first addressed the foreign policy implications which might be encountered in hearing certain suits under the ATS. Ultimately, the door was left open for the

48 Sosa, 542 U.S. at 712.
49 Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, 120 HARV. L. REV. 869, 895 (2007). (“[T]he Court inferred, from a jurisdictional statute that enabled courts to apply CIL as general common law, the authorization for courts to create causes of action for CIL violations, in narrow circumstances, as a matter of post-Erie federal common law.”)
narrow class of claims involving international norms as sufficiently specific and universally recognized as the original paradigms of piracy and issues affecting ambassadors and safe passage but “subject to vigilant doorkeeping.” The Court considered the rationale of *Morrison v. Nat'l Austl. Bank Ltd.*[^52], which has formed the basis of the *Kiobel* decision, of purportedly barring the application of a U.S. statute extraterritorially which lacks express authorization in the statute; the *Sosa* Court concluded instead much more permissibly that *in the context of private rights of action under international norms, federal courts should act with caution in the event of equivocal language by Congress.*[^53] Thus, the Court did not bar judicial progress in recognizing private rights of action under a statute like the ATS but held that any recognition of new international norms fitting original paradigms must be made cautiously as determinations do bear on foreign policy concerns where foreign defendants are made subject to U.S. domestic law.[^54]

Secondly, the fact that the Court upheld subject matter jurisdiction under the facts of *Sosa*, where an alien Mexican citizen sued another alien Mexican citizen for collaboration with the U.S. Drug Enforcement Agency in effecting his forcible abduction in Mexico, in what has been termed a foreign-cubed-case since *Kiobel* is also telling in these matters. *There, the Court implicitly determined that the substantial connection of a defendant to the U.S. deriving heavily from the jurisdiction of a federal court over persons properly before it outweighs any consideration of a presumption against extraterritoriality.* The Court reaffirms the dismissal of the Petitioner’s argument in the very first paragraphs of the decision that his abduction from Mexico and forcible return to the U.S. to stand trial could affect the disposition of his case in court due to an alleged violation of the extradition treaty between the U.S. and Mexico; the Court explicitly states, “the fact of Alvarez’s forcible seizure [does] not affect the jurisdiction of a federal court.”[^55] The very fact that the *Sosa* Court upheld subject matter jurisdiction under such facts supports the argument that even before *Kiobel v. Royal Dutch Petroleum* connection to the U.S. through substantial personal jurisdiction of a court weighed heavily in favor of the propriety of adjudication. After a review of the many foreign policy concerns implicated in ATS

[^51]: *Sosa*, 542 U.S. at 729.
[^53]: “While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.” *Sosa*, 542 U.S. at 727.
[^54]: *Id.*
[^55]: *Id.* at 698.
adjudication, the Court’s position was straightforward—“nothing Congress has done is a reason for us to shut the door to the law of nations entirely.”  

ii. *Kiobel v. Royal Dutch Petroleum, Part I and II*

The context of the most recent pronouncements of import in the life of the ATS, the case of *Kiobel v. Royal Dutch Petroleum*, 57 first bloomed in the Second Circuit in 2010. The original question to be resolved on appeal, which subsequently grew to tack a much different course, was whether international law recognized liability for corporations for purposes of suit under the ATS. The facts of *Kiobel I* concerned plaintiffs alleging that defendant corporations aided the Nigerian government in suppressing their resistance to oil exploration by allowing corporate property to be used as a staging ground for attacks and by providing food and compensation for Nigerian soldiers. 58 The court found that the plaintiffs failed to allege a violation of the law of nations under the ATS holding that customary international law had rejected corporate liability for international crimes. 59 For support, the majority argued that no international tribunal, including the Nuremberg Trials, had ever held a corporation liable for a violation of the law of nations, and that other traditional sources of customary international law also rejected the idea of corporate liability. 60 The concept of corporate liability was determined by the Second Circuit not to satisfy *Sosa* as “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” to be recognizable as providing a basis for suit under customary international law prescribed by the ATS. 61 The majority, concluding with the dubious admission of uncertainty as to whether or not in the future “the concept of corporate liability will ‘gradually ripen into a rule of international law’”, could reiterate only that “for now, and for the foreseeable future, the Alien Tort Statute [would] not provide subject matter jurisdiction over claims against corporations.” 62

After certiorari was granted to review the decision by the Second Circuit, it became clear by the second round of oral argument in October 2012 that the main question before the Supreme Court had changed and a *Kiobel II* was in progress. The question of the legal personality of corporations in international law had been forgone to address rather, whether entertaining an

56 *Id.* at 731.
57 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010).
58 *Id.* at 113.
59 *Id.*
60 *Id.* at 148.
61 *Id.* at 149.
62 *Id.*
ATS suit under the circumstances would violate the presumption against extraterritoriality, or the presumption that U.S. laws do not apply to acts that occurred outside of the territory of the U.S. unless statutory language explicitly allows for it. Indeed, when the Court issued an unanimous opinion, riddled with differing concurrences, in April 2013, the question of corporate liability was relegated to a single final paragraph while the rest of the decision was embattled with a discussion over jurisdictional scope and adjudicable causes of action of the ATS. The majority’s principal position relied on an interpretation of the doctrine of the presumption against extraterritoriality application of U.S. law to hold that, for the most part, no violations of international law happening outside of United States’ territory are actionable under the ATS.\textsuperscript{63}

Continuing with the majority’s qualified language, as holding true to form in ATS matters, each of the three concurring opinions had distinctly inconclusive things to say about the future of the matter. Justice Kennedy contributed the first caveat referencing that there might be other future cases of international law violations not covered by the majority’s holding and in such instances, “the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”\textsuperscript{64} The respectable Justices Alito and Thomas intelligently took heed of the potential for future arguments that a tort may not be deemed to have occurred extraterritorially if any aspect of the tort’s commission, such as its planning, occurs in the U.S.\textsuperscript{65} A laborious, requisitely \textit{ad hoc} test proposed by this second concurrence would find, “a cause of action [to fall] outside the scope of the presumption only if the event or relationship that was ‘the focus of the congressional concern’ under the relevant statute takes place within the United States.”\textsuperscript{66}

Finally, Justice Breyer, joined by Justices Ginsburg, Kagan and Sotomayor, finds the majority’s use of the presumption against extraterritoriality flawed; the better approach in the opinion of the four Justices would allow ATS claims for violations of international law only where they are sufficiently tied to the territory of U.S., specifically where “the alleged tort occurs on American soil, the defendant is an American national, or the defendant’s conduct substantially and adversely affects an important American national interest.”\textsuperscript{67} The final criteria includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well

\textsuperscript{63} Kiobel, 133 S. Ct. at 1669.
\textsuperscript{64} \textit{Id}.
\textsuperscript{65} \textit{Id}. at 1670.
\textsuperscript{66} \textit{Id}.
\textsuperscript{67} \textit{Id}. at 1671.
as criminal liability) for a torturer or other common enemy of mankind.\textsuperscript{68} The only thing clear from the Supreme Court’s final word, aside from the fact that the corporate liability question had mostly been dodged, is that a standard for determining ATS cases is still quite demonstrably unclear.

As an epitome of this conclusion, in the crux of the decision after the majority purports to categorically bar all ATS suits involving acts occurring outside the territory of the U.S., the final paragraph concludes with the qualification that the presumption against extraterritoriality however is \textit{displaceable} “where claims touch and concern the territory of the United States with sufficient force.”\textsuperscript{69} The Court in a footnote relies on the “congressional focus test” as established in its precedent \textit{Morrison} to define what “sufficiently touches and concerns” the U.S. in order to displace the presumption.\textsuperscript{70} In the course of explaining the “canon of construction, or presumption about a statute’s meaning” which presumes that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears,\textsuperscript{71} the \textit{Morrison} Court states that the presumption is not self-evidently dispositive but that its application requires further analysis.\textsuperscript{72} Citing its method of analysis in \textit{EEOC v. Arabian American Oil (“Aramco”)},\textsuperscript{73} the Court reiterates that it must be determined whether a dispute in a case was the “focus” of Congress’s concern in passing a legislative statute which regulates the conduct at issue.\textsuperscript{74} This is the language cited by the \textit{Kiobel} court for reiterating that the doctrine of a presumption against the extraterritorial application of U.S. domestic law is an inquiry of congressional intent. It is from this analytical framework that the Supreme Court has perplexingly determined that the Alien Tort Statute was not intended to encompass actions occurring outside the physical bounds of the U.S. that violate the law of nations, a body of law which in itself exists most fundamentally outside of the physical territory of any \textit{one} nation.

\textbf{The Propriety of the Presumption against Extraterritoriality in \textit{Kiobel v. Royal Dutch Petroleum}}

\begin{itemize}
\item \textit{Id.}
\item Kiobel, 133 S. Ct. at 1669.
\item \textit{Id. citing Morrison}, 130 S. Ct. 2869.
\item \textit{Morrison}, 130 S. Ct. at 2884.
\item \textit{Aramco}, 499 U.S. 244, 248 (1991).
\end{itemize}
Thirty-three years before the Supreme Court spoke in *Kiobel*, the Second Circuit stated with sound insight that, “common law courts of general jurisdiction regularly [have] adjudicated transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.” As unraveled in Part II, this statement has its roots in an understanding of the intent of the Founders in creating a federalist structure of government and the resulting language of Article III of the Constitution to endow the judiciary with extraterritorial jurisdiction which the First Congress perpetuated through the Judiciary Act of 1789. The decision of the Court in *Kiobel* to apply the presumption against extraterritoriality to the ATS indicates a fundamentally and arguably incorrect conception of the mandate of U.S. federal courts. The purely jurisdictional nature of the ATS and the confusion of lower courts since the *Kiobel* decision how to apply the presumption underscores its mistaken application to the ATS.

i. The “Presumption against Extraterritoriality” Was Improperly Triggered in *Kiobel*

Despite the support for original federal jurisdiction over matters implicating the law of nations independently of and concurrently with federal common law jurisdiction, the *Kiobel* Court misunderstood its *Sosa* precedent concerning the place of customary international law in relation to U.S. domestic law. By purporting to reiterate that the law of nations is adjudicated through the “limited enclaves” of post-*Erie* federal common law in ATS suits, the Court improperly found that the presumption against the extraterritorial application of U.S. domestic law applied to the Alien Tort Statute. However, even acknowledging the *Kiobel* pronouncement citing *Morrison* that a statute’s language must plainly indicate congressional intent for application extraterritorially, a *United States’ statute that does not involve the application of United States law, but rather international law, will not trigger the presumption to begin with.

Supreme Court jurisprudence has traditionally held that international law is part of U.S. law, however this does not detract from the idea that customary international law is obtained

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75 Filartiga, 630 F.2d at 885, see also Marcos I, 978 F.2d at 499-500 (rejecting the argument “that there is no extraterritorial jurisdiction over civil actions based on torture”).
76 See supra p. 2-6.
77 Id.
78 Morrison, 130 S. Ct. 2869, 2877.
79 “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” The Paquete Habana, 175 U.S. at 700.
and used differently than federal common law. Positivist legal scholars interpret the pertinent language in *Sosa* concerning post-*Erie v. Tompkins Railroad*\(^{80}\) notions of federal common law to argue that positive authority for the incorporation of customary international law into the U.S. legal system expressly through the Constitution or a statute is required for its application.\(^{81}\)

Thereby, their argument is that the ATS is a jurisdictional statute that enables federal district courts to apply customary international law ("CIL") as general common law, authorizing courts to create causes of action for CIL violations, in narrow circumstances, as a matter of post-*Erie* federal common law.\(^{82}\)

The rebuttal to this however is that it is contradictory for a statute to be both purely jurisdictional and creative of substantive causes of action; as the Court has clearly stated, "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."\(^{83}\) The vesting of jurisdiction in the districts courts by the ATS to hear claims from aliens arising from violations of the law of nations therefore does not necessarily imply that courts will do so using federal common law. In *Sosa*, the Court held that the common law simply provided a right to sue\(^{84}\) and, rather than authorizing courts to create causes of action for CIL violations as post-*Erie* common law, "recognized that customary international law is already part of the U.S. legal system" and would so provide the substantive rule of law.\(^{85}\)

Using customary international law as the substantive rule of law in ATS cases is facilitated when the ATS is understood as a grant of "adjudicative jurisdiction," or jurisdiction of a sovereign over the person of a defendant, rather than "prescriptive jurisdiction," whereby a

\(^{80}\) *Erie v. Tompkins Railroad*, 304 U.S. 64 (1938).


\(^{82}\) *Id.* at 895.


\(^{84}\) *Sosa*, 542 U.S. at 714.

\(^{85}\) William Dodge, *Customary International Law and the Question of Legitimacy*, 120 Harv. L. Rev. F. 19, 21 (2007). Professor Dodge further supports this argument by citing theories of distinction within the evolution of natural law where customary international law as it has developed is not seen as being positively made by sovereign nations as U.S. federal common law is, i.e. "Because positive customary international law [is] grounded in state practice and consent, it was not open to the same charge of judicial lawmaking as the common law more generally. Judges applying customary international law still "found" the law, but they found it now in state practice rather than in principles of natural law." See also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 876 (1987) ("[C]ourts do not create but rather find international law, generally by examining the practices and attitudes of foreign states.").
sovereign subjects a person to its own laws.\textsuperscript{86} As Professor Dodge explains, adjudicative jurisdiction “is the same kind of jurisdiction that courts exercise in conflict-of-laws cases when they apply law that is not made by their own sovereign to parties over whom they have personal jurisdiction.”\textsuperscript{87}

In this respect, courts enforcing norms of customary international law over parties whom they have personal jurisdiction are exercising conditional universal jurisdiction.\textsuperscript{88} Unlike traditional universal jurisdiction which allows a state “to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern,”\textsuperscript{89} regardless of where the conduct took place, conditional universal jurisdiction is based on contact with the forum requiring minimum contacts to adjudicate violations of international norms which may not rise to the level of those of universal concern.\textsuperscript{90} In this way, under the ATS, U.S. courts should rightly be able to adjudicate violations of customary international law norms \textit{even outside the subset of international law violations subject to universal jurisdiction} as an application of conditional universal jurisdiction where a defendant is sufficiently within the personal jurisdiction of a federal court applying customary international law as the substantive rule of law.

Structural safeguards exist for a court exercising conditional universal jurisdiction “requiring plaintiffs to still pass through a veritable obstacle course of civil procedure [and along with tools for a court such as the \textit{forum non conveniens} doctrine], such eliminates all but the most firmly grounded cases.”\textsuperscript{91} Thus, viewing ATS litigation as courts enforcing norms of

\textsuperscript{86} Jurisdiction to prescribe is jurisdiction “to make [a state’s] law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court; jurisdiction to adjudicate is jurisdiction “to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings.” Restatement of Foreign Relations Law of US § 401(a)(b).


\textsuperscript{89} Universal jurisdiction is “jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.” Restatement (Third) of Foreign Relations Law of the United States § 404 (1987).


\textsuperscript{91} Id. at 149.
customary international law over parties whom they have personal jurisdiction via conditional universal jurisdiction would not trigger the presumption against extraterritoriality.

Even where the ATS is seen as constituting prescriptive jurisdiction, there is still continuing success for the litigation of “offenses recognized by the community of nations as of universal concern” in the U.S. as an exercise of traditional universal jurisdiction which does not offend the presumption against extraterritoriality. Typically, a regulating state has “jurisdiction to prescribe” over conduct or effects occurring within its territory and conduct by one of its nationals, however even absent one of these bases, a state also has universal jurisdiction to prescribe punishment for certain offenses “of universal concern.”92 Indeed, universal jurisdiction is invoked where “there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.”93 As Justice Breyer stated in Sosa, “The fact that this procedural consensus exists [in international law today to prosecute certain universally condemned behavior] suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity.”94 Therefore, the prescribing of punishment and/or remedies95 even as an application of U.S. domestic law where the ATS is viewed as a prescriptive jurisdictional mechanism does not offend the presumption against extraterritoriality as it would only further international comity for those well-recognized norms that give rise to universal jurisdiction.

The idea that claims under the ATS successfully adjudicated as violations of the law of nations are defined by “international norms” multilaterally accepted by the world community is revealing. As recently reiterated, “Kiobel reaffirmed the ruling in Sosa that federal courts are limited in recognizing causes of action to those violations of international norms that are

94 Sosa, 542 U.S. at 762 (Breyer concurring).
95 Breyer further discusses the legitimacy of universal civil jurisdiction: “That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement § 404, Comment b. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Brief for European Commission as Amicus Curiae 21, n. 48, citing 3 Y. Donzallaz, La Convention de Lugano du 16 septembre 1988 concernant la competence judiciaire et l’execution des decisions en materie civile et commerciale, PP 5203-5272 (1998).” Id.
'specific, universal, and obligatory.'” (emphasis added)96 This is to say that federal courts are not creating more federal common law but rather, recognizing more violations of CIL, while it functions as the law of decision. Likewise, the substance of the rule of decision looks to international “norms” to determine the propriety of alleged violations of the law of nations which does not offend other countries that also recognize the same international legal norms. The rationale of the Ninth Circuit in Sarei v. Rio Tinto had great merit when it stated:

“The norms being applied under the ATS are international, not domestic, ones, derived from international law. As a result, the primary considerations underlying the presumption against extraterritoriality—the foreign relations difficulties and intrusions into the sovereignty of other nations likely to arise if we claim the authority to require persons in other countries to obey our laws—do not come into play.”97

The United States’ judiciary has a role to adjudicate claims by parties that are properly before its courts and the adjudication of claims under the ATS relying on international norms for definition of the causes of action does not unduly step on the toes of other sovereigns or offend American foreign policy. As K. Lee Boyd writes, “the current structure of human rights litigation in the United States makes it virtually impossible that exercising universal jurisdiction in this country will have any detrimental ‘collateral consequences’ to foreign relations, to foreign policy, or to the sacrosanct separation of powers.”98 “Mere executive fiat cannot control the disposition of a case before a federal court,” wrote the Second Circuit strongly in 2007, holding that the principle of separation of powers not only counsels but requires the judiciary to conduct an independent inquiry as to whether a political question exists when taking a case, rather than rolling over and too hastily assuming it is outside of its purview.99 In the first round of oral argument in Kiobel, Justice Kagan inquired insightfully about a variation on the Marbois incident, where instead of being attacked in Philadelphia, a French ambassador to Britain is attacked in London by a United States citizen who then comes home to the United States, and the

97 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 746 (9th Cir. 2007).
French ambassador wants to bring an action in the U.S. The Justice asked, “Wouldn't the ATS have contemplated exactly that sort of action? Why would it make any difference whether the attack on the French ambassador by a United States citizen occurred in Philadelphia or occurred in London?” The answer is that, “it is no infringement on the sovereign authority of other nations to adjudicate claims cognizable under the ATS, so long as the requirements for personal jurisdiction are met.” The judiciary has a responsibility to stand its ground as one of the branches of our government and entertain claims that violate internationally-accepted norms of conduct for parties properly before the federal courts.

ii. The “Congressional Focus Test” in *Morrison* Applied to the ATS Highlights the Impropriety of the *Kiobel* Court’s Application of the Presumption Against Extraterritoriality

“The United States Supreme Court does not say that the presumption against extraterritoriality is a ‘clear statement rule,’ if by that is meant a requirement that a statute say ‘this law applies abroad.’ Assuredly context can be consulted as well.” - *Morrison v. National Australian Bank. Ltd.*

Recently, the U.S. District Court for Eastern District of Virginia in the decision of *Al Shimari v. CACI Int’l, Inc.* purported to categorically bar suit under the ATS in light of the Court’s *Kiobel* decision but in the process has made admissions which highlight the fundamental fallacy of applying the presumption against extraterritoriality to cases relying on the ATS. In rendering the very fresh decision, the court admitted, “it is unclear whether and to what extent the ‘touch and concern’ analysis as explained by Morrison should be applied to the ATS, a jurisdictional statute with a potentially unlimited scope in a manner that would not eviscerate the presumption.” Ultimately, unlike the more clearly domestic statutory language referenced in *Morrison v. Nat’l Austl. Bank. Ltd.* which the examination of congressional statutory intent has previously concerned, the jurisdictional nature of the ATS and the definition by customary international law of the causes of action intended for coverage by Congress exposes the impropriety of the presumption to the ATS.

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101 Sarei v. Rio Tinto, PLC, 671 F.3d at 746.
102 *Morrison*, 130 S. Ct. 2869, 2883.
103 *Al Shimari v. CACI Int’l, Inc.* 2013 WL 3229720.
104 Id. at 19.
105 See infra note 101-104, at 17.
In the *Aramco* case, cited by the *Morrison* court, the examples of previous implications of the presumption against extraterritoriality occurred where the language of the statutes at issue more clearly was intended to regulate domestic conduct within the U.S. and where it was not so clear, statutory language looked to other U.S. statutes to define terms. The Court in *Aramco* for example references the Americans with Disabilities Act of 1990\(^{106}\) as exemplary of a statute with “boilerplate” language which was deemed not to have been intended to apply extraterritorially.\(^{107}\) This determination was not difficult to make as the Americans with Disabilities Act is riddled with language referencing American states’ ability to receive financial assistance from the U.S. Secretary of Health and Human Services to assist their blind populations.\(^{108}\) Such statutory language does not as a facial matter implicate extraterritorial concerns. On the other hand, the Petitioners in *Aramco* contended that Title VII of the Civil Rights Act\(^{109}\) containing broad language referencing foreign commerce thus evinced the validity of extraterritorial application; the Court dealt with this contention by countering that the definition for the key language “commerce” was supplied by another U.S. statute which had been deemed non-extraterritorial.\(^{110}\) The ATS which states, “The district courts *shall have original jurisdiction of any* civil action by *an alien* for a tort only, *committed in violation of the law of nations* (emphasis added)”\(^{111}\) can be differentiated from these statutes in that it is not facially domestic (rather intrinsically international) and borrows from the body of customary international law to give form to the key term of “the law of nations.”

The Alien Tort Statute by its plain language is intrinsically extraterritorial and it relies on “norms” defined by customary international law to give form to the key term of “the law of nations.” Firstly, the statute is one which grants subject matter jurisdiction to resolve, at least as often as not, extraterritorial issues, not one which directly regulates conduct, in contrast to the conduct specific statutes defined by U.S. law in *Aramco*.\(^{112}\) As the recent *Shimari* decision concedes, “It is no small distinction that the [Kiobel] Court's explanation involved statutes that

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\(^{106}\) 42 U. S. C. § 1201 et seq.
\(^{107}\) *Aramco*, 499 U.S. at 251.
\(^{108}\) 42 U. S. C. § 1201 et seq.
\(^{109}\) 42 USCS § 2000e.
\(^{110}\) “Title VII's definition of ‘commerce’ was derived expressly from the LMRDA, a statute that this Court had held, prior to the enactment of Title VII, did not apply abroad.” *Aramco*, 499 U.S. at 253.
\(^{112}\) See supra notes 101-104, at 17.
regulated conduct, while the ATS is purely jurisdictional." Secondly, an analysis of the potentially relevant conduct considered by Congress under this substantially wide grant of subject matter jurisdiction to the federal courts indicates the counter-intuitiveness of an argument against an extraterritorial intention. The *Shimari* decision in its confusion over *Kiobel* states the point well: “Were courts to look at the focal point of the conduct contemplated by the ATS, its application would be limitless, as violations of international and customary law could conceivably arise anywhere. Such a conclusion would render *Kiobel*’s application of the presumption paradoxical.” The application of the presumption is paradoxical because the “focal point” of conduct contemplated by Congress under the ATS is regulated and defined by the body of multilaterally-accepted “norms” under customary international law as to the substantive causes of action. Violations of these multilaterally-accepted “norms” under customary international law could potentially arise anywhere the law of nations exists, which is not nation-specific, but intrinsically includes the entire world community. Therefore an act/tort committed anywhere customary international law exists would not involve the presumption against extraterritorial application of United States domestic law.

Finally, the presumption only limits the statutory language concerning the substantive causes of action allowable under the ATS; federal courts’ jurisdiction to hear claims by an alien for any civil action violating law of nations which are properly before them remains, no matter where the pertinent acts occurred. The *Kiobel* court relying on *Morrison* has effectively stated that the presumption applies to the scope of federal common law claims asserted under the ATS, rather than to the scope of ATS subject matter jurisdiction. This interpretation has been supported by district courts since *Kiobel* such as the Southern District of Ohio in the Seventh Circuit since August 2013. Other district courts such as the *Shimari* court under the Fourth Circuit have been concerned over a “potentially limitless application of the ATS” due to a broad grant of subject matter jurisdiction over “violations of customary international law which could

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113 Al Shimari v. CACI Int’l, Inc. 2013 WL 3229720, note 4, *citing* *Kiobel*, 133 S. Ct. at 1664.
114 *Id.* at 19, note 5.
115 *See* supra note 89, at 18. “Kiobel reaffirmed the ruling in Sosa that federal courts are limited in recognizing causes of action to those violations of international norms that are ‘specific, universal, and obligatory.’”
116 “The principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.” *Kiobel*, 133 S. Ct. at 1664.
117 *See* Ahmed v. Magan, Civil Action No. 2:10–cv–00342, 2013 WL 4479077, United States District Court, S.D. Ohio, Eastern Division (August 20, 2013). (In granting the judgment, the court concluded that the *Kiobel* presumption is not a question of subject matter jurisdiction, but instead concerns the types of claims that may be pleaded under the ATS.)
conceivably arise anywhere."

The answer to these concerns is that U.S. federal district courts are counseled to only recognize claims involving international norms as sufficiently specific and universally recognized as the original paradigms, as the *Kiobel* court has recognized. These determinations are the applicable limits to the claims of violations of the law of nations which could potentially arise anywhere under the broad subject matter jurisdictional grant of the ATS. Therefore, by viewing the presumption against extraterritoriality as only concerned with the substantive causes of action allowable under the ATS, district courts should rightly able to ask two related questions: (1) whether petitioners have stated a proper claim under the ATS; and (2) whether such a claim includes conduct occurring in the territory of a foreign sovereign. An affirmative answer to the second question can be adjudicated as long as there is also an affirmative answer to the first question.

Ultimately, while this paper argues that a provision of jurisdiction for claims involving the law of nations indicates a congressional intent of extraterritoriality, the Supreme Court in *Kiobel* has decided that such an aspect is not necessarily involved; also deciding that the law of nations is obtained as a continuing enclave of U.S. federal common law rather than from a coterminous body of customary international law in U.S. law, the *Kiobel* court has concluded thus that the presumption against extraterritoriality is attached to the ATS and that in order to “displace” it claims must touch and concern the territory of the United States with “sufficient force.” As it appears human rights plaintiffs in the U.S. will henceforth be required to move this burden of proof as a result of this questionable application of the presumption to the ATS, the following section discusses the continuing vitality of the Alien Tort Statute.

The Continuing Vitality of the Alien Tort Statute after *Kiobel v. Royal Dutch Petroleum*

“It’s wide open.”

- Kathy Roberts (Legal Director, *Center for Justice and Accountability*)

For supporters of a positivist understanding of the evolution of customary international law and a limited interpretation of the reach of the Alien Tort Statute, the *Kiobel* decision is cited

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118 Al Shimari v. CACI Int’l, Inc., 658 F.3d 413 (4th Cir. 2011).
120 In counseling district courts to consider the principles underlying the presumption against extraterritoriality before deciding whether to recognize a cause of action for the particular conduct alleged in a complaint, the *Kiobel* court clarified that this analysis will also determine “not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.” *Kiobel*, 133 S. Ct. at 1664.
as a qualified victory, at least a step closer to sealing the vigilantly-kept U.S. courthouse doors of human rights litigation. For proponents of the ATS as a basic grant of original jurisdiction to adjudicate under the law of nations and looking to the collective practice of states to derive it, the decision is a maze of qualified language leaving the door open for the next wave of litigation.

i. Defining Nexus—Sufficiently Touching and Concerning the United States

If the presumption against extraterritoriality is for now stuck with the ATS, then much remains to be made of a vacillating sentence in the decision’s final paragraph—“where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”121 The first question to ask is one Paul Hoffman, lead plaintiff’s counsel in Kiobel, has posited recently since the decision—“Is the opinion about geography or connection”?122 And the choice diction used by the Court that the presumption may be “displaced” rather than “overcome” bears emphasis—in other words, does the presumption not apply at all when claims do sufficiently touch and concern the United States?123

There is strong support evidenced by previous intimations of the Court and statements on behalf of the Executive branch that the Court will be hard-pressed not to recognize a fact pattern which tailors to the Filartiga v. Pena-Irala model seminally-approved by the Second Circuit.124 For Filartiga type cases, geography should carry the day, where substantial connection to the U.S. will be found when the plaintiff can subject a defendant, foreigner or U.S. citizen, to significant in personam jurisdiction of a court because the individual is found within the geographic territory of the United States. At least five members of the Court (Kennedy, Ginsburg, Breyer, Sotomayor, Kagan) have displayed some form of defense for, and serious scrutiny of arguments challenging, the legitimacy of an ATS suit on the basis of a factual situation like Filartiga. For example, in the second round of oral arguments in Kiobel, Justice Breyer retorted to an argument by the Respondent, “We took [the validity of universal jurisdiction] in Filartiga.”125 Justice Kagan continued the onslaught, citing Sosa’s usage of the

121 Kiobel, 133 S. Ct. at 1669.
124 Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).
facts of Filartiga, “then it quotes Filartiga: ‘For purposes of civil liability, the torturer has become like the pirate and slave trader before him, an enemy of all mankind.’ So we gave a stamp of approval to Filartiga... .” The Kennedy pushes the Respondent to explain how the principle of extraterritoriality would apply to such a situation, “Assume we think the Second Circuit was right, pre-congressional action under the Alien Tort Statute. ... .” The reply by Respondent was an attempt to dodge a direct discussion about a fact pattern similar to Filartiga, “We do not believe that you need to address Filartiga... you don't need to overrule, so to speak, Filartiga on Justice Kennedy's question.” The excuse given then was that Congress had passed the “Torture Victims Protection Act” in the intervening period since which applies to the conduct in Filartiga and thus that judge-made law is no longer necessary to address such a situation. However, what is important is that the Second Circuit did use judge-made law for its ruling in Filartiga which stood then and still stands now, with implied acceptance by the Supreme Court, despite the subsequent passage of the TVPA by Congress. The basic premise is that the ability of a federal U.S. court to apply the law as the special prerogative of a sovereign state is rarely ever affected by other considerations when the physical person of an individual defendant is within its jurisdiction.

Cases where connection to the U.S. derives from existence of significant personal jurisdiction over the physical person of an individual defendant are also likely to continue being favorably entertained by federal courts under the ATS which fit the characteristics delineated by Justice Breyer in his concurring opinion of Kiobel. Indeed, four justices led by Breyer agreed that ATS cases could move forward when either (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

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126 Id. at 40.
127 Id. at 37.
128 Id. at 23, 39.
129 Id. at 39.
130 See further, “Justice Ginsburg: Do I understand your argument on brief correctly, that you would say from --the revival of 1350 from Filartiga was wrong because nothing happened -- nothing happened in the United States there? Marcos was wrong because nothing -- the wrong occurred abroad? Does your -- the argument you're making now that this is not applicable to things that happened offshore exclude Filartiga and Marcos?” Id. at 23; “Justice Sotomayor: But you're asking us to overturn our precedents. ... You're -- you're basically saying Filartiga and Marcos, Sosa, they were all wrong.” Id. at 38.
131 Further support of this argument can be evidenced by the fact that in Sosa, the Court dismisses the Petitioner’s argument that his abduction from Mexico and forcible return to the U.S. to stand trial could affect the disposition of his case in court due to an alleged violation of the extradition treaty between the U.S. and Mexico, holding “the fact of Alvarez’s forcible seizure [does] not affect the jurisdiction of a federal court.” Sosa, 542 U.S. at 698.
preventing the United States from becoming a safe harbor for a torturer or other common enemy of mankind.”\textsuperscript{132}

The second prong of this proposed test concerning American nationals is especially meritorious as it bears on the principle of nationality, which as a counter to the presumption against the extraterritorial application of domestic law, permits a sovereign to regulate the conduct of its nationals, \textit{and, arguably, those equally enjoying the protections of its laws}, regardless of the location of their persons or acts.\textsuperscript{133} As Mr. Hoffman predicts, “the Court would look at an American defendant very differently from a [case involving a foreign defendant, foreign plaintiff and acts principally occurring outside the U.S.].”\textsuperscript{134} The Restatement of Foreign Relations Law of the U.S. explains, just as international law allows nations to apply their law to their citizens acting abroad, it likewise recognizes a state’s right to apply its law to its residents.\textsuperscript{135}

Beyond simple presence within U.S. territory, as under visa status like the defendant in \textit{Filartiga}, a U.S. interest is stronger where the defendant has lawful permanent resident status which indicates intent to reside permanently.\textsuperscript{136} Recently, in informing the Southern District of Ohio, Eastern Division of the effect of \textit{Kiobel} in the case of \textit{Ahmed v. Magan}, attention was drawn to the Department of State’s November 2011 Statement of Interest indicating, “the Executive’s assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Magan who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts.”\textsuperscript{137} On August 20, 2013, the court granted the final judgment against Magan finding that as a permanent resident of the United States, the \textit{Kiobel} presumption against extraterritoriality had been rebutted in such a situation.\textsuperscript{138} Therefore, cases should be found to “sufficiently touch and concern the U.S.” where personal jurisdiction can be established over the physical person of an individual defendant like in \textit{Filartiga},

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\textsuperscript{132} \textit{Kiobel}, 133 S. Ct. at 1671.  \\
\textsuperscript{133} Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804).  \\
\textsuperscript{134} Paul Hoffman, Partner, Schonbrun DeSimone Seplow Harris Hoffman & Harrison, LLP, Lead Plaintiffs’ Counsel in \textit{Kiobel} v. Royal Dutch Petroleum, BASF, “Human Rights Litigation after the 2013 \textit{Kiobel} Decision” Panel, July 16, 2013. It bears mention that even \textit{Filartiga} was technically a “foreign-cubed case” and successfully proceeded. Had the alleged torturer, Pena-Irala, been an American national or legal permanent resident and the case occurred today after \textit{Kiobel}, it is difficult to imagine a federal court dismissing it, even with the act of torture occurring in Paraguay.  \\
\textsuperscript{135} Restatement (Third) of Foreign Relations Law of the United States § 402(2) cmt. e. (1987).  \\
\textsuperscript{136} \textit{Ahmed} v. Magan, Plaintiff’s Brief Regarding the Impact of \textit{Kiobel} v. Royal Dutch Petroleum On This Case, Case: 2:10-cv-00342-GCS-MRA Doc #: 108 Filed: 05/30/13.  \\
\textsuperscript{137} \textit{Id.} at p. 7.  \\
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especially where the nature of a defendant’s presence within the U.S. is significant, in the way of American nationality, citizenship or longtime permanent residency; for non-natural juridical persons a similar nexus of connection to the U.S. should apply, discussion following.

ii. Answering the Second Circuit--Corporate Liability in International Law before and after Kiobel II

“So long as they incorporate, businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot’s political opponents, or engage in piracy—all without civil liability to victims.” - Judge Leval

The question which first caused the barnyard riot and gave life to Kiobel v. Royal Dutch Petroleum still remains without definite answer—whether international law extends the scope of civil liability for violations of recognized norms to a defendant who is a private actor such as a corporation? A majority of the Second Circuit answered “no” in what has come to be known as Kiobel I. This singular opinion has met with hot opposition since, both by a powerful concurring opinion and other U.S. Circuits which are already in disagreement such as the Seventh, Ninth, Eleventh and D.C. When the question was finally kicked up to the United States’ highest court for an answer in April 2013, the Kiobel II Court addressed the issue in only a single closing sentence. Nonetheless, that remark coupled with a historical conception of juridical persons under international law is telling of the coming end to the current existence of multinational corporations outside of the bounds of international law.

In the event that a Kiobel III ever comes to pass, the Supreme Court will overturn the increasingly mistaken Second Circuit Kiobel I holding that civil liability does not exist for corporations under international law, which it mostly declined to address in April 2013. What the Kiobel II Court did take the time to say concerning corporate liability is embodied succinctly in a single sentence in the last paragraph of the opinion, “Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices [to displace the presumption against extraterritoriality].” The very fact that the majority made such a closing remark is important in itself because the Court can be taken to be implicitly establishing subject

139 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010) (Leval concurring)
140 This very question originally raised in Sosa, 542 U.S. at 732 n.20.
141 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010).
142 See infra notes 153-157.
143 Kiobel, 133 S. Ct. at 1669.
matter jurisdiction over corporate liability in the context of interpreting the correct application of international law through the ATS. Therefore while the Court has subject matter jurisdiction in ATS cases to determine in what circumstances the case against a corporate defendant would displace the presumption, more than mere corporate presence, such as through an affiliate office used to advise investors (the basis of the case against Royal Dutch Petroleum), would have to be implicated in the future. Such an indication by the Court necessitates the foundational premise that the Court does in fact believe corporate actors as juridical persons to properly be subjects of international law in the first place. A Kiobel III Court would likely agree with Judge Leval that, “Without any support in either the precedents or the scholarship of international law, [taking] the position that corporations, and other juridical entities, are not subject to international law... [the Second Circuit] Kiobel majority opinion is a radical departure from established principles of international and domestic law.”

There is much scholarly support for the position that liability of juridical persons under international law has been recognized as far back as by the quadripartite Allied victors of World War II in the war criminals trials before the Nuremberg Military Tribunals. One major example references language of the quadripartite London Agreement of August 8, 1945 which established the International Military Tribunal and its jurisdiction. Analysis is particularly made of the first Article to support the contention that the draftsmen did not intend to exclude criminal corporations from its scope. The International Military Tribunal thus had jurisdiction over corporations. Secondly, Control Council Law No. 10 for the punishment of persons guilty

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144 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010) (Leval concurring).
145 Harold Hongju Koh, Separating Myth from Reality About Corporate Responsibility Litigation, 7 J Int'l Econ. L. 263, 266 (2004) (arguing that “the Nuremberg Charter permitted prosecution of a private group or organization” such as Flick, I.G. Farben and Krupp).
147 (“Art. 1 of the quadripartite agreement provides for the trial of war criminals, ‘whether they be accused individually or in their capacity as members of organizations or groups or in both capacities’. Here the word ‘individually’ is clearly intended to contradict ‘representative’ liability. Certainly, it is not used to distinguish ‘individual’ from ‘corporate’ liability. That corporations are legitimate legal entities made no difference. I.G. Farben was subject to international law not as a criminal organization (like the Gestapo) but because it had violated international law.”) Andrei Mamolea, The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap, 51 Santa Clara L. Rev. 79 (2010), citing Abraham L. Pomerantz, Feasibility and Propriety of Indicting I.G. Farben and Krupp as Corporate Entities (Gantt Papers, Aug. 27, 1946).
of war crimes to effect the terms of the London Agreement has been argued to have recognized private individual and corporate liability as well-entrenched elements of international law. Accepting that the Nuremberg trials dealt with international recognition of criminal liability, there is support for the well-established history of liability for juridical persons in international law.

In addition to the contrary established precedent in international law, courts of other circuits around the U.S. already disagree with the increasingly singular Second Circuit Kiobel I holding that there is no liability for juridical persons such as corporations under international law. Even other district courts within the Second Circuit have held contrarily before; for example the Presbyterian Church of Sudan v. Talisman Energy court in appreciating the number of international treaties involving corporations found that a private corporation is a juridical person lacking any per se immunity under U.S. domestic or international law and that corporate liability had attained the status of customary international law. Importantly, some of these recent treaties providing for corporate liability include the U.N. Convention Against Transnational Organized Crime and Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In Sarei v. Rio Tinto, the Ninth Circuit concluded that corporations could be held vicariously liable for violations of jus cogens norms. While on two separate occasions, the Eleventh Circuit has before noted that corporations may be liable for aiding and abetting violations of international law. The trend amongst lower courts shows the Second

implying that the Farben company itself had committed the relevant war crime, even though the Tribunal had no jurisdiction over Farben as such.


Sarei v. Rio Tinto, PLC., 487 F.3d 1193, 1202-03 (9th Cir. 2007).

See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Romero v. Drummond Co., Inc., 552 F.3d 1303 (11th Cir. 2008), However eventually overruled by the Supreme Court holding that the Torture Victim Protection Act (“TVPA”) extends liability only to individuals, not corporations. Mohamad v. Palestinian Authority, 132 S.Ct. 1702, 1710-11 (2012).
Circuit to be increasingly alone in its opinion that international law does not contemplate juridical person liability.

As human rights litigation against multinational corporations moves forward (under a well-founded belief that the Supreme Court must soon declare corporate liability exists under international law), the pertinent question presented by *Kiobel II* is still to determine whether the opinion contemplates “geography or connection” regarding the U.S. as the condition for displacing the presumption against extraterritoriality. By acknowledging that “corporations are often present in many countries” the *Kiobel II* opinion itself seems to already evince that connection to the United States, along with outright geographical presence within the territory, might be strong enough to displace the presumption.

The importance of connection to the United States is already playing out in a number of cases against organizations and corporations. For example, a recent case in the D.C. Circuit was allowed to proceed with valid subject matter jurisdiction under the ATS where the United States Embassy in Nairobi, Kenya was attacked by a foreign terrorist organization.\(^{156}\) Even though the case involved foreign nationals and a foreign group and events that occurred on foreign soil, the circumstances were still found to “touch and concern the United States with sufficient force” to displace the presumption. The court noted that a case involving such an attack has more of a connection “to U.S. national interests than a case whose only tie to our nation is a corporate presence here.”\(^{157}\)

The Southern District of Florida is also currently reviewing an ATS case against Chiquita Brands alleging knowing payments to the terrorist Colombian paramilitary AUC committing human rights violations through its connections to the U.S. by way of its headquarters in North Carolina and the authorization of the payments coming from the U.S.\(^{158}\) If subject matter jurisdiction is upheld in this case, a blow would be dealt to the concurring opinion of Justices Alito and Thomas in *Kiobel II*, who insisted the international law violation would have to occur inside the United States.\(^{159}\)

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157 Id.
159 See supra note 58-59, at 10.
Lastly, while the 2011 D.C. Circuit case *Doe v. Exxon Mobil Corp.*\(^{160}\), finding Exxon guilty of human rights violations by aiding and abetting Indonesian soldiers violently guarding corporate facilities and connected to the U.S. through its headquarters in the U.S., has been vacated and remanded in light of *Kiobel II*, we wait to see whether the district court now in D.C. will rule as it appears likely the Chiquita court in Florida may, in favor of sufficient connection to the U.S. In interpreting the loaded final paragraph of *Kiobel v. Royal Dutch Petroleum II*, the decision remains with our district courts whether to take further steps to the end the impunity of multinational juridical persons with all the liberties\(^{161}\) yet none of the liabilities to which private citizens are equally subject.

**Conclusion**

The Alien Tort Statute will continue as a liaison for the interpretation and application of the law of nations in U.S. federal courts, because that was the function given it by the First Congress. The application of the presumption against extraterritoriality to the ATS in the April 2013 decision of *Kiobel* is misplaced firstly because the Court has misinterpreted its precedent; the presumption should not apply to the ATS because the statute provides only for the adjudicative jurisdiction of a U.S. court to apply customary international law which has existed as a valid rule of decision separate and not a part of U.S. federal common law. Nonetheless, adjudication of “offenses recognized by the community of nations as of universal concern” in federal courts as an exercise of traditional universal jurisdiction still would not offend the presumption against extraterritoriality nor international comity. Also, because the presumption only limits the statutory language concerning the substantive causes of action, the jurisdictional nature of the ATS and the definition by customary international law of the causes of action intended for coverage by Congress exposes the impropriety of the presumption to the ATS under the *Morrison* congressional statutory intent analysis.\(^{162}\) Moreover, the United States’ judiciary has a role to adjudicate claims by parties that are properly before its courts and the adjudication of claims under the ATS relying on international norms for definition of the causes of action

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\(^{161}\) Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), permitted political independent expenditures by corporations, associations or labor unions on political candidates, entitling corporations composed of citizens as well as private citizens to the protections of the First Amendment.

\(^{162}\) See supra note 101-104, at 17.
does not unduly step on the toes of other sovereigns or offend American foreign policy, which is the principal reason for the presumption against extraterritoriality; therefore, jurisdiction of federal courts to hear claims by an alien for any civil action violating law of nations which are properly before them should remain, no matter where the pertinent acts occurred.

Going forward under *Kiobel*, cases should nonetheless be found to “sufficiently touch and concern the U.S.” where personal jurisdiction can be established over the physical person of an individual defendant like in *Filartiga*, especially where the nature of a defendant’s presence within the U.S. is significant, in the way of American nationality, citizenship or longtime permanent residency. Also, the *Kiobel* Court appears to have implicitly recognized subject matter jurisdiction for non-natural juridical persons such as corporations in the context of interpreting the correct application of international law through the ATS in the final paragraph of the decision. District courts appear amenable to the legal theory that substantial connection to the United States, such as via authorization of payment or acts complicit in human rights violations originating in the U.S., as well as outright geographical presence, such as headquarters located within the territory, might be strong enough to displace the presumption to establish corporate liability post-*Kiobel*. 