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THE HISTORY OF THE RISE OF THE ALIEN TORT STATUTE AND THE FUTURE IMPLICATIONS OF *KIOBEL V. ROYAL DUTCH SHELL*

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I. INTRODUCTION

The Alien Tort Statute (ATS) was enacted as the Alien Tort Clause of the Judiciary Act of 1789.[1] This obscure piece of legislation, unfamiliar to most, gained renewed attention in the last few decades through a series of tragic cases involving deplorable conduct.[2] As ATS litigation steadily increased over the years, due mainly to creative plaintiffs' lawyers,[3] many pertinent questions were left unanswered, that is, until the 2013 significant Supreme Court ruling in *Kiobel v. Royal Dutch Petroleum*.[4]

The Alien Tort Statute's development is as interesting as it is unusual, given that this clause lay dormant for nearly 200 years before its recent resurrection.[5] This article will examine the history of the Alien Tort Statute and look into the surrounding circumstances of the enactment of the statute to place it in context. The article will then examine the circumstances surrounding the resurrection of the ATS and the landmark cases that guided litigators in pursuing ATS claims against state and non-state actors.

The article will also briefly address the economic consequences of ATS litigation. Looking at the overall economic effects of ATS litigation may shed light as to how *Kiobel v. Royal Dutch Petroleum* will alter this area of law and ultimately impact business decisions going forward. Finally, the article will look at the Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.*, to evaluate whether the ruling effectively signals the end of ATS litigation.[6]

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1. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

2. *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (involving the wrongful death action of two Paraguay citizens against another citizen of Paraguay for the alleged torture of their son, which caused his death); *see also* Kadic v. Karadz?ic, 70 F.3d 232 (2d Cir. 1995) ("Two groups of victims from Bosnia-Herzegovina brought actions against self-proclaimed president of unrecognized Bosnian-Serb entity under, inter alia, Alien Tort Claims Act for violations of international law.").

3. *See, e.g., Filartiga*, 630 F.2d at 890 (taking action in the United States under the Alien Tort Statute after criminal proceedings against the Filartigas' son's murderer in Paraguay were unsuccessful); *Kadic*, 70 F.3d 232 (holding subject-matter jurisdiction in a private cause of action is supported by the Alien Tort Act of 1789 for "genocide, war crimes, and crimes against humanity" against the self-proclaimed president of Bosnia-Serb).

4. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. __, 133 S. Ct. 1659 (2013).

5. The last case to examine the Alien Tort Statute was *Respublica v. De Longchamps* in 1784. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

6. *Kiobel,* 569 U.S. __, 133 S. Ct. at 1659.

II. History of the Alien Tort Statute

The Alien Tort Statute was enacted as the Alien Tort Clause of the Judiciary Act of 1789.[7] Without a legislative history to fall back on, the Supreme Court has had difficulty discerning the true intent of the Alien Tort Statute, which may be one of the reasons it lay dormant for so many years.[8] The Alien Tort Statute provides that "[t]he 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 or a treaty of the United States."[9]

There were two noteworthy incidents leading up to the passage of the Alien Tort Statute.[10] The first incident was in 1784 when a French adventurer, known as Chevalier De Longchamps, verbally and physically assaulted Francis Barbe Marbois, the secretary of the French Legion in Philadelphia.[11] The assault led the French Minister Plenipotentiary[12] to lodge a formal protest with the Continental Congress, threatening to leave the United States unless something was done.[13] Ultimately, De Longchamps was prosecuted under Pennsylvania state law for a crime against the law of nations, which the Pennsylvania Supreme Court held to be part of Pennsylvania's common law.[14] It was, however, a source of embarrassment that there was no federal remedy afforded to Marbois and after this incident, the Continental Congress recommended that the states "pass laws for the exemplary punishment of such persons as may in

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7. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (providing district and circuit courts jurisdiction over all tort causes of action where an alien sues for the violation of a law of nations or U.S. treaty); *see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587 (2002) (explaining the Judiciary Act of 1789 alien tort provision is commonly known as the Alien Tort Statute and is also less accurately referred to as the Alien Tort Claims Act).

8. *See* Bradley, *supra* note 8, at 588 ("[T]he Alien Tort Statute . . . was an insignificant source of federal court jurisdiction during most of its history. Before 1980, jurisdiction had been upheld under this Statute in only two reported cases, one in 1795 and the other in 1961.").

9. 28 U.S.C. § 1350 (2012).

10. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784); William R. Castro, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Laws of Nations*, 18 CONN. L. R. 467, 467–68 (1986) ("The origin and purpose of the Act have been considered obscure . . . .").

11. *Respublica*, 1 U.S. (1 Dall.) at 111.

12. *minister plenipotentiary*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/minister%20plenipotentiary (last visited Jan. 6, 2015) (defining minister plenipotentiary as "a diplomatic agent ranking below an ambassador but possessing full power and authority").

13. Bradley, *supra* note 8, at 639.

14. *Respublica*, 1 U.S. (1 Dall.) at 116.

future by violence or by insult attack the dignity of sovereign powers in the person of their ministers or servants."[15]

The second major incident occurred in 1787, when a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants.[16] Subsequently, at the request of the Secretary of Foreign Affairs, the Mayor of New York City arrested the constable in turn, but due to a lack in federal or state law regarding the breach of privileges of Ambassadors, there was no actual legal remedy for the Dutch Ambassador.[17] Secretary of Foreign Affairs John Jay complained, "[t]he federal government does not appear . . . to be vested with any judicial powers competent to the Cognizance and Judgment of such Cases [sic]."[18] The state court did indeed punish the offender for violating the law of nations.[19]

These two acts exemplified what would be considered a tort in violation of the law of nations, but, as illustrated, there was no federal remedy available for these types of situations, which the First Congress aimed to address.[20] These two acts prefaced the passage of the ATS and, it is noteworthy that both incidents occurred within the forum of the United States.[21] This detail will become significant in following discussions regarding the application of the ATS.[22]

The concept of the law of nations is based on the view of natural law[23] "that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation,

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15. 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 315 (John C. Fitzpatrick, ed., Johnson Reprint Corp. 1968) (1933).

16. Castro, *supra* note 11, at 494.

17. *Id.*

18. 34 JOURNALS OF THE CONTINENTAL CONGRESS 1788–1789 111 (Roscoe R. Hill, ed., Johnson Reprint Corp. 1968) (1937).

19. Castro, *supra* note 11, at 494. The constable was sentenced to three months jail. *Id.*

20. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114–17 (1784) (finding that the law of nations was a part of Pennsylvania law; therefore, de Longchamps could be punished under Pennsylvania common law); Castro, *supra* note 11, at 492 (explaining that, because Congress lacked the power to deal with de Longchamps, Congress was only able to offer a reward for his apprehension and pass a resolution passing a resolution approving of state prosecution).

21. Castro, *supra* note 11, at 494.

22. *See, e.g.*, Respublica, 1 U.S. (1 Dall.) 111 (occurring in Pennsylvania); Castro, *supra* note 11, at 494 (stating the Marbois Affair, regarding the arrest of the Dutch Ambassador's servant, occurred in New York).

23. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66–77 (1769).

may theoretically be said to exist in the law of nations."[24] As Judge Blackstone explained, "[t]he law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[25] Blackstone mentioned three principal offenses under the law of nations, which included: "(1) Violation of safe-conducts; (2) Infringement of the rights of ambassadors; and, (3) Piracy."[26] The understanding at the time was that both state and individual actors who committed crimes in violation of the law of nations could be held civilly liable for those acts.[27]

The two subsequent cases invoking the ATS related to the wrongful seizure of slaves from a vessel in port in the United States[28] and the wrongful seizure of a vessel in United States territorial waters.[29] The Supreme Court has generally treated the high seas the same as foreign soil for the purpose of the presumption against extraterritorial application of a statute.[30] The extraterritoriality of the ATS will become a question of great importance, which will be discussed in length with the reemergence of ATS litigation in the twentieth century.

These incidents and subsequent usage of the ATS created an area of tort claims under the presumption the ATS applies extraterritorially.[31] The ATS contains no list or limitations of applicable customary international law or treaties of the United States, and it expressly applies to "any" civil action for a tort in violation of such international law.[32]

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24. United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

25. BLACKSTONE, *supra* note 24, at 66.

26. *Id.* at 68.

27. *See id.* at 68–69 (describing the scope of the law of nations to include "civil transactions and questions of property").

28. *See generally* Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607) (holding neutral property found upon an enemy ship is subject to capture).

29. *See generally* Moxon v. The Fanny, 17 F. Cas. 942, 942 (D. Pa. 1793) (No. 9,895) (holding the courts cannot give redress to British owners of a vessel captured by a French vessel within the territorial jurisdiction of the United States).

30. *See* Save v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993) (observing "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested).

31. *See, e.g.,* United States *ex rel.* Quirin v. Cox (*Ex parte* Quirin), 317 U.S. 1 (1942) ( )

32. *See id.* at 29–30 ("It is no objection that Congress . . . had not itself attempted to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which the law condemns . . . . Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting . . . [by reference]. It chose the latter course."); *see*, e.g., Yamashita v. Styer (*In re* Yamashita), 327 U.S. 1, 8 (1946) for the Supreme Court's analysis in recognizing of a civil cause of action regarding command responsibility.

For over 200 years, Congress did not impose any limits on the scope of the ATS, including limits to its subject matter,[33] its extraterritorial reach, or its provision of a cause of action or right to a remedy.[34] However, since those early cases involving wrongful seizure of slaves, the ATS remained unused and largely unknown to the legal community for nearly two centuries.[35] ATS-related litigation finally reemerged in the late twentieth century, largely centered on sympathetic cases involving brutal regimes and atrocious government conduct.[36] With easy facts and judgments usually granted by default, plaintiffs' lawyers used early ATS cases essentially as symbolic victories, but in the process they initiated judicial precedent that would lead to more complex litigation.

III. JURISDICTION TO PRESCRIBE PUBLIC LAW

At this point, to further comprehend the nature of the cases that make up ATS litigation, it is important to recognize the various jurisdictional theories in public international law that inform our understanding of how the Alien Tort Statute and U.S. domestic law may interact with international law. Typically, there are five recognized bases of prescriptive jurisdiction: (1) territory; (2) nationality; (3) passive personality; (4) protection; and (5) universality.[37]

The exercise of state jurisdiction over persons, property, or acts or events varies by each state, and these variations can be attributed to historical and geographical factors that continue to play an important role in international law, albeit with geographical factors becoming less influential due to advancements in telecommunications but still important nonetheless. The "increasing speed of communications, the more sophisticated structure of commercial organizations or enterprises with transnational ramifications, and the growing international character of criminal activities" have led to a "noticeable trend towards the exercise of

33. *See, e.g., Moxon*, 17 F. Cas. at 948–49 ("[T]his court is particularly by law vested with authority where an alien sues for a tort only in violation of the laws of nations . . . and this is a case falling under that description.").

34. *See* Alvarez-Machain v. United States, 331 F.3d 604, 615, 620 (9th Cir. 2003), *rev'd sub nom.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (rejecting the argument that Mexico's sovereign rights prevent the unauthorized exercise of U.S. police power on Mexican soil and recognizing remedies available under the ATS).

35. The last case to examine the Alien Tort Statute was Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

36. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980) (providing an overview of Supreme Court decisions regarding regime brutality and wrongful government conduct).

37. *See generally* I.A. SHEARER, STARKE'S INTERNATIONAL LAW 183–212 (11th ed. 1994).

jurisdiction on the basis of criteria other than that of territorial location."[38]

A. *Territorial Jurisdiction*

Territorial jurisdiction is the "exercise of jurisdiction by a state over property, persons, acts, or events occurring within its territory, which is clearly conceded by international law to all members of the society of states."[39] As described by Lord Macmillan: "It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits."[40]

There are two territorial principles, subjective territorial principle and objective territorial principle. Subjective territorial principle allows states to extend its jurisdiction to prosecute and punish crimes commenced within their territory but completed or consummated in the territory of another state.[41] Although this principle was not adopted as a general rule of the law of nations, significant applications of the principle have become part of international law as a result of the provisions of the Geneva Convention for the Suppression of Counterfeiting Currency (1929) and the Geneva Convention for the Suppression of the Illicit Drug Traffic (1936).[42] Objective territorial principle allows States to apply their territorial jurisdiction to offences or acts commenced in another state where the act is consummated or completed within their territory, or produced gravely harmful consequences to the social or economic order inside their territory.[43] Put another way, objective territorial principle focuses on "the setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain."[44]

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38. *Id.* at 183.

39. *Id.*

40. Compania Naviera Vascongado v. S.S. Cristina, [1938] A.C. 485 (H.L.(E.)) 496–97 (appeal taken from Eng.).

41. *See* ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 73–74 (3d ed. 2007) (describing the various jurisdictional tests that are operated by different States regarding the qualified territorial principle).

42. *Id. See generally* International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 2623 ("The Government of the Finnish Republic and the Royal Government of Afghanistan, being equally desirous of strengthening the ties of sincere friendship existing between the two countries, have decided to conclude a treaty of friendship . . . ."); Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S. 4648 (referencing the terms of the 1936 League of Nations Convention between the United States of America and Argentine Republic).

43. BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 643 (6th ed. 2011).

44. *Id.*

B. *Nationality and Passive Personality Jurisdiction*

According to present international practice, nationality jurisdiction is found in the active nationality principle or the passive nationality principle, also known as passive personality.[45] Under the active nationality principle, "jurisdiction is assumed by the state which the person, against whom proceedings are taken, is a national. The active nationality principle is generally conceded by international law to all states desiring to apply it."[46]

Under the passive nationality principle, "the state of which the person suffering injury or a civil damage is a national" assumes the jurisdiction for that case.[47] The Restatement (Third) of the Foreign Relations Law of the United States also states in § 402 that the principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals because of their nationality, or to assassinations of a state's diplomatic representatives or other officials.[48] Both of these principles are "subject to certain qualifications" under the justification "that each state has a perfect right to protect its citizens abroad, and if the territorial state of the *locus delicti* neglects or is unable to punish the persons causing the injury, the state of which the victim is a national is entitled to do so if the persons responsible come within its power."[49] The argument against this theory is "that the general interests of a state are scarcely attacked, 'merely because one of its nationals has been the victim of an offence in a foreign country.'"[50]

C. *Protective Jurisdiction*

The protective principle of jurisdiction is recognized by international law and states that "each state may exercise jurisdiction over crimes against its security and integrity or its vital economic interests."[51] The two "rational grounds for the exercise of this jurisdiction" are as follows:

> 1. the offences subject to the application of the protective principle are such that their consequences may be of the utmost gravity and concern to the state against which they are directed;

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45. *Id.*

46. *Id.*

47. *Id.*

48. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. (1987).

49. CARTER & WEINER, *supra* note 44, at 643.

50. *See id.* (referencing a "passive nationality principle [that] is embodied in several national criminal codes").

51. *Id.*

> 2. unless the jurisdiction were exercised, many such offences would escape punishment altogether because they did not contravene the law of the place where they were committed (*lex loci delicti*) or because extradition would be refused by reason of the political character of the offence.[52]

The Restatement in § 402(3) states that the bases of "jurisdiction to prescribe law with respect to . . . (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[53]

D. *Universal Jurisdiction*

Jurisdiction based on the universal principle states: an offense "comes under the jurisdiction of all states wherever it be committed. Inasmuch as by general admission, the offence is contrary to the interests of the international community, it is treated as a *delict jure gentium* and all states are entitled to apprehend and punish the offenders."[54] This theory of jurisdiction is based on ensuring that no offense goes unpunished due to jurisdictional entanglements.[55]

The Restatement of the law on foreign relations of the United States summarizes the international law principles of prescriptive jurisdiction as follows:

> Restatement § 402. Bases of Jurisdiction to Prescribe:
> Subject to § 403, a state has jurisdiction to prescribe law with respect to
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

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52. *Id.*

53. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. 238 (1987). Subsection (3) recognizes a special basis of jurisdiction to prescribe, which permits a state to safeguard a limited class of state interests. *Id.*

54. *See* CARTER & WEINER, *supra* note 44, at 643–44 (discussing possible offenses that might arise under this principle).

55. *Id.* at 644.

> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.[56]

Restatement § 404. Universal Jurisdiction to Define and Punish Certain Offenses:

> A state has 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, even where none of the bases of jurisdiction indicated in § 402 is present.[57]

According to this section, a state is permitted to apply its laws to punish certain offenses even though that state may not have a strong link to the act in terms of involving its territory, citizenship of the actor, or citizenship of the victim.[58] "Universal jurisdiction over the specific offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations."[59]

However, as much as the condemnation of such terrorism is universal, the methods of punishing these acts are not. As such, although international agreements hold certain acts to be subject to universal jurisdiction, it remains to be seen "whether universal jurisdiction over a particular offense has become customary law for states not party to such an agreement."[60]

It is also important to note for the subject of this article that universal jurisdiction is not limited to criminal law.[61] "In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."[62] The nature of universal jurisdiction would lend support to the theory behind the Alien Tort Statute being a jurisdictional statute, which would confer jurisdiction to U.S. courts based on actions committed extraterritorially.[63] Any act committed within the ter-

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56. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. 237–38 (1987).
57. *Id.* at 254.
58. *Id.*
59. *Id.*
60. *Id.* at 255.
61. *Id.*
62. *Id.*
63. 28 U.S.C. § 1350 (2012).

ritory of the United States would immediately be subject to various state and federal, criminal and civil law violations.[64] This is what makes the ATS a unique piece of legislation—providing relief to plaintiffs against defendants for actions committed outside of the United States for violations of the law of nations, treaties, or for piracy. The subject of extraterritorial application, which was once assumed, will become a hotly contested issue as ATS litigation develops.

IV. The New Wave of ATS Litigation

The new wave of ATS litigation started in 1980 when the Court of Appeals for the Second Circuit found that it had jurisdiction over a tort action brought by the family of Joelito Filartiga.[65]

A. *Filartiga v. Pena-Irala*[66]

Joelito Filartiga was a Paraguayan Citizen who, at seventeen years old, was tortured and killed by the Inspector General of Police, Americo Norberto Pena-Irala, in retaliation for his father, Dr. Joel Filartiga's political activities.[67] The defendant Pena-Irala, was a resident of Brooklyn, New York, and the court was asked to find whether he could be held directly responsible for the death of Joelito Filartiga through the commission of acts of torture and tried in the New York court under the ATS.[68] The court determined that, "whenever an alleged torturer is found and served with process by an alien within our borders of the United States, the Alien Tort Statute provides federal jurisdiction."[69] The district court dismissed the original action for want of subject matter jurisdiction but the Second Circuit accepted as true, the allegations contained in the Filartigas' complaint and affidavits for the purposes of the appeal.[70]

The court also stated that it "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[71] The court further determined that the ATS did allow for adjudication of modern customary international law violations according

64. *Id.*

65. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 876 (2d Cir. 1980) (holding that regardless of the parties' nationalities, the Alien Tort Statute provides federal jurisdiction).

66. *Id.*

67. *Id.* at 878.

68. *See id.* at 879 (detailing the defendant was charged under numerous statues, but the principle one on appeal was the Alien Tort Statute).

69. *Id.*

70. *Id.* at 878.

71. *See id.* at 881 (discussing how certain traditional laws have ripened and are not suitable for civilized nations).

to the "law of nations" mentioned in the ATS.[72] The current notion of "law of nations" that the court recognized related to the general principles of public international law.[73] The Second Circuit referred to Article Thirty-Eight of the Statute of the International Court of Justice, the United Nations charter, General Assembly resolutions, International Covenant on Civil and Political Rights, and other sources regarding the prohibition on torture.[74]

In addressing the federal jurisdiction issue, the *Filartiga* court stated, "common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred."[75] The court went on to address the "articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, § 9(b) 1 State. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue."[76] Claiming that "where in personam jurisdiction has been obtained over a defendant," and the alleged acts are a violation of the law of the lands where the tort occurred, then based on the Alien Tort Statute, state court jurisdiction would be proper.[77]

Torture is generally perceived as one of the few acts that would violate the notion of *jus cogens* or peremptory norms, with which all nations must abide.[78] The concept of *jus cogens* relates to such fundamental principles of international law that are accepted by the international community as a whole and to which no derogation is permitted.[79] A main characteristic of *jus cogens* is that there need not be any consent to these norms, as they are so universally accepted.[80]

In the concluding remarks to this case, the *Filartiga* court articulates the modern issue of applying the ATS, and its reasoning for reaching its decision:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized na-

72. *Id.* at 885.

73. *See id.* at 884 (identifying how the "law of nations" addressed in the Alien Tort Statute is synonymous with international law).

74. *See id.* at 881–84 (recognizing how civilized nations have come together to create various international sources prescribing acceptable standards of international behavior).

75. *Id.* at 885.

76. *Id.*

77. *Id.*

78. Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002).

79. *Id.* at 964.

80. *Id.* at 945.

> tions have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[81]

In light of these human rights concerns, the Court eventually ruled in favor of the Filartigas and entered a judgment in favor of Joelito Filartiga's father and sister in the amount of $375,000 in compensatory damages and $10,000,000 in punitive damages.[82]

B. *Kadic v. Karadzic*[83]

Further development of ATS precedent came in *Kadic v. Karadzic*.[84] The background to this case shows that the plaintiffs "are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia."[85] Acting on behalf of themselves and other victims, their claim is based on the "various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war."[86] Radovan Karadzic was "the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina which . . . claim[ed] to exercise lawful authority, and d[id] in fact exercise actual control, over large parts of the terri-

81. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

82. *See id.* at 865 ("It is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture.").

83. Kadic v. Karadz?ic, 70 F.3d 232 (2d Cir. 1995).

84. *Id.*

85. *Id.* at 236.

86. *Id.* at 236–37.

tory of Bosnia-Herzegovina."[87] As President, Karadzic was in command of the military forces that perpetrated these crimes.[88] Karadzic was charged with rape, torture, summary execution, forced pregnancy and other acts alleged to constitute genocide, crimes against humanity, and war crimes.[89]

The District Court dismissed the case for lack of subject matter jurisdiction, and the Second Circuit reviewed the basis by which Karadzic urged the court to affirm the District Court's rulings.[90] In the court's review of the subject matter jurisdiction question, the *Kadic* court referred to the *Filartiga* decision in establishing federal subject-matter jurisdiction when a three-part test could be satisfied.[91] The court stated, "this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations."[92] As the first two conditions were easily met, the court turned to the analysis of the third prong, analyzing whether the acts alleged constituted a violation of the law of nations.[93] The court noted that in the process of this analysis, "it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States)."[94]

The main question presented to the court was whether non-state actors could be held liable for international law violations.[95] Karadzic argued that appellants had not alleged a violation "of the norms of international law because such norms bind only states and persons acting under color of a state's law," and does not apply to private individuals.[96] Karadzic claimed, as the President of the Republic of Srpska, the name given to the area he had control over, he was not a state actor and thus, the norms were not binding upon him.[97]

The court did not agree that the law of nations, "as understood in the modern era, confines its reach to state action. Instead, [the court held] that certain forms of conduct violate the law of nations whether under-

87. *Id.* at 237.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 238.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See generally id.* ("[T]he parties have briefed . . . the threshold issues of personal jurisdiction and justiciability under the political question doctrine.").
96. *Id.* at 239.
97. *Id.*

taken by those acting under the auspices of a state or only as private individuals."[98] The *Kadic* court also cited as authority for this decision, that the Executive Branch had recognized the applicability of the ATS to private individuals through "an opinion of Attorney General Bradford in reference to acts of American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795."[99] The Restatement (Third) of the Foreign Relations Law of the United States proclaims, "individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."[100] Thus, the court concluded that non-state actors could be held liable under the ATS for their direct perpetration of offenses violating the law of nations.[101]

C. *Doe v. Unocal Corp.*[102]

In the mid-1990s, various plaintiffs relying on the *Filartiga* and *Kadic* precedents brought suit against corporations and corporate officers under the Alien Tort Statute. The landmark case involving corporate liability came in *Doe v. Unocal Corp.*[103]

In *Doe,* fifteen Burmese plaintiffs alleged that Unocal, a private U.S.-based corporation jointly participated with the Burmese (now Myanmar) government in perpetrating forced labor, rape, torture and murder in connection with a gas pipeline project.[104] Unocal allegedly contracted with the Burmese government to engage the Burmese military to provide security for the pipeline project.[105] This signified a joint venture between Unocal and the Burmese military, which subsequently carried out various human rights violations.[106] It was alleged that Unocal knew of the serious risk of the potential for human rights violations and also knew that

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98. *Id.*

99. *Id.*; *see also* Breach of Neutrality, 1 Op. Att'y Gen. 57, 58 (1795) ("[H]ostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the district or circuit courts.").

100. *See Kadic*, 70 F.3d at 240 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. (1987)).

101. Helena Lynch, *Liability for Torts in Violation of International Law: No Hook Under Sosa for Secondary, Complicit Actors*, 50 N.Y.L. SCH. L. REV. 757, 757 (2006).

102. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

103. *See id.* at 936–39 (deliberating a case where Unocal Corporation allowed the Myanmar military to provide security for the construction of a gas pipeline through the Tenessarim region, and allegedly knew human rights violations were occurring in connection with the project).

104. *Id.* at 936.

105. *Id.*

106. *Id.* at 937.

such violations were occurring in relation to the pipeline project.[107] "The successive military governments of Burma, now Myanmar, have a long and well-known history of imposing forced labor on their citizens."[108] Evidence showed that "even before Unocal invested in the project; it was made aware by its own consultants and partners of [the] record [of the Burmese Military's] use of forced labor and history of other human rights violations in connection" with such projects.[109] Unocal was also made aware after the investment in the project of allegations that the Burmese Military was actually committing such violations in connection with the Project.[110]

The Court of Appeals for the Ninth Circuit concluded, "forced labor is a modern variant of slavery that, like traditional variants of slave trading, does not require state action to give rise to liability under the ATCA."[111] The court also adopted a standard for aiding and abetting—"knowingly providing practical assistance that has a substantial effect."[112] The court relied on post-World War II tribunals as well as the ICTY and International Criminal Tribunal for Rwanda in determining the standards for aiding and abetting.[113] The court did hold that rape, torture, and murder required state action,[114] but based on the "individual liberty" standard set-forth in *Kadic,* it found that such violations did not require state action when committed in furtherance of slave trading.[115] The court determined that plaintiffs had sufficiently pled that Unocal aided and abetted the commission of forced labor, murder and rape by state actors.[116]

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107. *Id.* at 938.

108. *Id.* at 940.

109. *Id.*

110. *Id.*

111. *Id.* at 947.

112. *Id.*

113. *See generally id.* (discussing the standards used by various international tribunals for aiding and abetting such crimes).

114. *Id.* at 946.

115. *Id.*; *see also* Kadic v. Karadz?ic, 70 F.3d 232, 243–44 (2d Cir. 1995) (["A]lleged atrocities are actionable under the Alien Tort [Claims] Act, without regard to state action, to the extent that they were committed *in pursuit of genocide or war crimes* . . . .") (emphasis added).

116. *Doe I*, 395 F.3d 932. The Ninth Circuit decision was under review when the parties settled the case. *Id.* Plaintiffs alleged that Unocal knew of the history behind the Burmese military and its reputation for committing human rights violations, and were in fact informed of such violations after the project was underway. *Id.*

D. *Sosa v. Alvarez-Machain*[117]

Following these high profile rulings of the lower courts, the Supreme Court finally issued an opinion regarding the ATS in *Sosa v. Alvarez-Cachain*.[118] Sosa was a Mexican individual who filed suit in the United States District Court for the Central District of California alleging that the Drug Enforcement Administration (DEA) had instigated his abduction from Mexico for criminal prosecution in the United States.[119] He claimed the United States was liable under the Federal Tort Claims Act and another Mexican national, who was involved in the abduction, was liable under the Alien Tort Statute for a violation of international law.[120]

In 1985, Enrique Camarena-Salazar, an agent for the DEA, was captured on assignment in Mexico and taken to a house in Guadalajara where he was tortured over the course of two days and then subsequently murdered.[121] Based on eyewitness testimony, it was believed that "Humberto Alvarez-Machain, a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture" of the agent.[122]

In 1990, Alvarez was indicted by a federal grand jury for the torture and murder of Camarena-Salazar; the United States District Court for the Central District of California issued a subsequent warrant for his arrest.[123] "The DEA asked the Mexican Government for help in [extraditing] Alvarez into the United States, but when the requests and negotiations [to do so failed], the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States [to stand] trial."[124] The petitioner, Joe Fancisco Sosa and "a group of Mexican nationals, . . . abducted Alvarez from his home, held him overnight in a motel, and brought him into the United States on a private plane."[125] Federal officers arrested Alvarez once he was in United States' territory.[126]

Alvarez made a motion to dismiss the indictment on the grounds that his seizure "violated the extradition treaty between the United States and

117. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

118. *See generally id.* (questioning lower court's rulings on ATS that limited the jurisdictional scope of the statute).

119. *Id.* at 698.

120. *Id.*

121. *Id.* at 697.

122. *Id.*

123. *Id.*

124. *Id.* at 698.

125. *Id.*

126. *Id.*

Mexico."[127] The District Court granted Alvarez's motion for a judgment of acquittal.[128] After returning to Mexico, Alvarez initiated a civil claim against Sosa, the United States, and four DEA agents, among others.[129] The Supreme Court addressed Alvarez's claim based on the Federal Tort Claims Act and the Alien Tort Statute.[130]

The Supreme Court found the ATS to be a "jurisdictional" statute for a very limited set of international law violations and instructed lower courts to "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."[131] The Supreme Court in *Sosa* declined to "close the door to further independent judicial recognition of actionable international norms," and stated that "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door keeping."[132]

In applying the *Sosa* test, courts often look to precedent from various international law sources including the international criminal tribunals as a source to provide widespread acceptance and definition of specific elements of an offense, as well as to set standard of what violations of international norms would suffice to incur liability.[133] The Supreme Court in *Sosa,* affirmed that customary international law (or at least that part that it described as international norms with "definite content" and "widespread acceptance") should serve as the guide in determining which international norms were actionable under the Alien Tort Statute.[134]

The Supreme Court did not directly answer questions related to the class of perpetrators to which the ATS could extend, but it did add a footnote to the jurisdictional question before it and mentioned two court of appeals opinions on whether non-state actors could be held liable for particular violations of international law under the ATS.[135] Footnote 20 of the decision states:

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 725.

132. *Id.* at 729.

133. *See generally* Wiwa v. Dutch Petroleum Co., 626 F. Supp. 2d 377 (S.D.N.Y. 2009) (referring to international criminal law sources to confirm crimes against humanity establish a customary international law norm).

134. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (asserting federal courts should look to normally accepted international law before creating a new private claim under federal common law).

135. *Id.*

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. *Compare Tel-Oren v. Libyan* Arab Republic, 726 F.2d 774, 791–95 (CADC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).[136]

Plaintiffs have argued that this footnote was indicative of the Supreme Court recognizing that a corporation can be held liable for violations of international law, with the question being limited to which norms allow for non-state actor liability as presented in *Kadic*.[137] Conversely, corporate defendants have, not surprisingly, used the vague language of the footnote to argue that the footnote should be read as questioning whether corporations, as a class of non-state actors, can be held liable under international law.

E. *Flomo v. Firestone Natural Rubber Co., LLC*[138]

With varying interpretations of corporate liability, another major development in ATS precedent came when the Court of Appeals for the Seventh Circuit issued a unanimous decision in *Flomo v. Firestone Natural Rubber Co.*[139] Although the court dismissed the case on other grounds,[140] Judge Posner essentially embraced all of the arguments pertaining to corporate liability under the ATS by holding that corporations can be held liable under the ATS.[141]

The *Flomo* case "pit[ted] 23 Liberian children against the Firestone Natural Rubber Company, which operated an 118,000–acre rubber plantation in Liberia through a subsidiary . . . ."[142] The plaintiffs claimed that "Firestone [utilized] hazardous child labor on the plantation[,]" and asserted that this practice amounted to a "violation of customary international law."[143] Firestone responded by arguing "that conduct by a corporation or any other entity that doesn't have a heartbeat . . . can

136. *Id.*
137. Doe I v. Unocal Corp., 395 F.3d 932, 945–46 (9th Cir. 2002).
138. Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011).
139. *Id.*
140. *Id.* at 1025.
141. *See generally id.* (detailing corporate liability in a case filed by Liberian Children under the Alien Tort Statute alleging hazardous working conditions).
142. *Id.* at 1015.
143. *Id.*

never be a violation of customary international law, no matter how heinous the conduct."[144]

The *Flomo* court referred to other cases that haggled over the meaning of the footnote in the *Sosa* case and made note of the split decision in the initial *Kiobel v. Royal Dutch Petroleum Co.*, which held that "because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation."[145] *Flomo* ultimately disagrees with the majority opinion in the initial *Kiobel* case by recognizing that "[a]t the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organization—and did so on the authority of customary international law."[146] The court goes further and proffers the notion that even if "no corporation *had* ever been punished for violating customary international law" then "[t]here [would] always [be] a first time for litigation to enforce a norm; there has to be. There were no multinational prosecutions for aggression and crimes against humanity before the Nuremberg Tribunal was created."[147]

The *Flomo* court also makes note that the Alien Tort Statute is based on civil matters, "and corporate tort liability is common around the world."[148] The court states, "[i]f a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe it could be, then *a fortiori* if the board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable."[149] It is worth mentioning, "[i]f a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals; as only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law."[150]

V. Opening of the Gates: Vicarious Liability

With corporate defendants open to liability under the ATS, a new wave of litigation was created in the United States. These cases were based

144. *Id.* at 1017.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1019.
149. *Id.*
150. *Id.*

around the issue of vicarious liability through the theory of respondeat superior, in an attempt to hold corporations accountable for actions undertaken beyond the border of the United States.[151] Corporations were previously bound by local rules when conducting business outside the United States, thus did not have to consider any liability for such actions in U.S. courts.[152] These guidelines frequently led to more relaxed standards of working conditions and risk-taking behavior based on the relative weakness of foreign judiciaries compared to the court system in the United States.[153]

One of the major theories of vicarious liability is the theory of agency and respondeat superior.[154] The theory of agency is utilized when a subsidiary corporation is acting as the agent of the parent corporation.[155] Agency law states that through apparent or real authority, an agent of the principal may bind the principal in contractual obligations and as a logical derivative of such empowerment, the agent may also expose the principal to certain liabilities based on the agent's actions.[156]

Using the theory of agency, the plaintiff must show the existence of such a degree of control over the agent by the parent entity, that the parent must be held liable for the actions of the agent.[157] Courts are willing to "pierce the corporate veil" using the theory of agency in cases of personal injury, and, as a reasonable deduction, the theory may be used to hold a parent entity liable for violations of federal statutes.[158]

The crux of agency theory relies on the establishment of a degree of control by the principal over the agent to show the principal directed the agent to undertake certain wrongful acts, or at the very least provided the

151. *See generally* Leming v. Oilfields Trucking Co., 282 P.2d 23, 30 (Cal. 1955) (describing a situation when a corporation can be liable for the torts of others through the concept of respondeat superior).

152. *See generally* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161 (2012) (stating "[t]he economic worry with respect to corporate liability under the ATS is that it will impose heavy costs on companies doing business abroad").

153. *See generally id.* (describing the need to prevent human rights abuses of repressive regimes that occur in other territories).

154. RESTATEMENT (SECOND) OF AGENCY (1958); VINCENT R. JOHNSON, MASTERING TORTS: A STUDENTS GUIDE TO THE LAW OF TORTS 204 (5th ed. 2013).

155. ROBERT W. HAMILTON ET AL., THE LAW OF BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 240 (12th ed. 2014).

156. *Id.* at 23–24; JOHNSON, *supra* note 155, at 207.

157. RESTATEMENT (SECOND) OF AGENCY (1958). *See generally* HAMILTON ET AL., *supra* note 156, at 15–41 (discussing different degrees of control required for an agent to bind their principal).

158. *See generally* Leming v. Oilfields Trucking Co., 282 P.2d 23 (Cal. 1995) (affirming a personal injury judgment against a corporation, holding them personally liable under agency law).

agent with the authority to undertake such wrongful acts that the principal will be held liable for the acts of the agent.[159] Upon discovery of such a relationship, both the principal and agent could be held jointly and severally liable for the consequences of the wrongful acts committed.[160]

The theory of agency can be related to the theory of respondeat superior, whereby a parent company is held liable for the acts of its employees.[161] The chain holding this theory together is the establishment of an employer-employee relationship.[162] The actions of the employee, however, must be within the scope of their employment during the commission of the wrongful conduct; arbitrary and self-serving acts outside the scope of benefiting the employer in a business sense are excluded under this theory.[163] Within this construct, wrongful acts need not be carried out under direct orders from the employer, but an employee's act that occur within the scope of apparent authority can hold the employer liable as long as the wrongful act in question furthers the interest of the employer.[164] Therefore, the existence of smoking gun evidence showing a direct command from the employer need not be present in order for an employer to be held liable for the acts of its employee.[165]

The traditional employer-employee model of vicarious liability may be a tougher standard to prove than the standard used in *Unocal's* aiding and abetting test,[166] yet it also provides another well-established legal theory to link liability between two seemingly separate entities. In *Unocal,* the court did not rule on the plaintiff's alternate theories of liability, as explained in footnote 20:

> Plaintiffs also argue that Unocal is liable for the conduct by the Myanmar Military under joint venture, agency, negligence, and reckless-

159. JOHNSON, *supra* note 155, at 204. *See generally* HAMILTON ET AL., *supra* note 156, at 15–41 (providing examples of conduct that can constitute as sufficient control needed for an agent to bind a principle).

160. *See generally id.* at 243 (stating the rule of joint and several liability holds that two or more tortfeasors may be subject to liability for the same harm and may be sued by the plaintiff, together or separately).

161. *Id.* at 204. *See generally* HAMILTON ET AL., *supra* note 156, at 15–41 (discussing the nature of how these theories interact).

162. *See generally Leming*, 282 P.2d 23 (holding Oilfields Trucking liable for a personal injury tort due to an employee-employer agency relationship).

163. *See generally* RESTATEMENT (THIRD) OF LAW OF AGENCY (2006) (examining and clarifying the set of principles that define the law of agency, including the relationship between the employer and employee).

164. Aliota v. Graham, 984 F.2d 1350, 1359 (3d Cir. 1993).

165. *Id.*

166. *See* Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (explaining the aiding and abetting test that "impos[es] liability for lending of moral support" can be less restrictive than showing actual causation between the employer/employee).

> ness theories. The District Court did not address any of Plaintiffs' alternative theories. Because we reject the District Court's general reasons for holding that Unocal could not be liable under international law, and because we hold that Unocal may be liable under at least one of Plaintiffs' theories, i.e., aiding and abetting in violation of international law, we do not need to address Plaintiffs' other theories, i.e., joint venture, agency, negligence, and recklessness. Joint venture, agency, negligence, and recklessness may, like aiding and abetting, be viable theories on the specific facts of this ATCA case. Moreover, on the facts of other ATCA cases, joint venture, agency, negligence, or recklessness may in fact be more appropriate theories than aiding and abetting.[167]

Whether previous cases invoking the ATS had sufficient facts to constitute an employer-employee relationship or principal-agent relationship went unanswered by the courts, and at no point did any court delineate a bright line test using any of these theories as being instructive when trying to hold a defendant liable under the ATS.[168]

VI. Ensuing Problems: Economic Consequences of ATS Litigation

Besides the interest of legal scholars and the parties directly involved in ATS litigation, it is worth mentioning the overall economic consequences of ATS litigation as it relates to the public in general. Several public policy arguments are made in favor of upholding the precedent set in various circuit courts regarding the viability of ATS litigation, including preventing the United States from becoming a safe haven for those who had violated the law of nations outside the borders of the United States.[169] Analyzing the economic consequences of ATS litigation may also have an influence on how future ATS litigation will continue, and could even have an impact on how Congress may address this issue. Since earlier cases invoking ATS were largely symbolic, the rise in ATS litigation itself could be linked to the economic viability of such litigation for plaintiffs' lawyers. By holding corporate defendants liable, and with the precedent set

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167. *Id.* at 947.

168. *See id.* at 948 ("In different ATCA cases, different courts have applied international law, the law of the state where the underlying events occurred, or the law of the forum state, respectively.").

169. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 193 (1994) (explaining that many court decisions and judicial proceedings have concluded "aiders and abettors" violate U.S. law). *See generally* Sykes, *supra* note 153 (examining policy issues associated with corporate liability for extraterritorial torts under the Alien Tort Statute).

to actually hold these corporations accountable, it became more economically viable, as well as a morally imperative, for certain plaintiffs' lawyers to pursue such litigation.[170]

The increase in ATS litigation had two separate economic consequences related to corporate liability. From the corporation's point of view, the increase in legislation would lead to an increased cost of doing business, as corporations would now need to take ATS liability into consideration when conducting business abroad.[171] This would in theory, limit the scope of what corporations were willing to do abroad based on the liability they would face for actions taken outside the territory of the United States. In the alternative, corporations would, at the very least, need to accommodate for potential litigation expenses regarding certain conduct, even if the threat of ATS related lawsuits was not enough to change the way corporations conducted business abroad.[172] Overall, it would have the effect of reducing profit margins and potentially to redistribute money away from U.S. corporations and into the pockets of foreign plaintiffs.[173] This is strictly based on the operational nature of how litigation would affect the margins of the company. Whether shareholder action and consumer loyalty of the product or service would be affected due to corporate actions is an unknown variable in this equation. Thus, the positive externalities that could benefit a corporation by doing the right thing is immeasurable at this point, and it seems as though at least some corporations have declined to recognize those factors when conducting business abroad, as it has led to these ATS cases.[174]

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170. *See generally* Sykes, *supra* note 153 (examining corporate litigation and the potential economic impact of extended litigation).

171. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 190 (1994) (explaining that the uncertainties regarding litigation could lead to corporations to increase the cost of doing business across all spectrums). *See generally* Sykes, *supra* note 153 (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

172. *See generally* Sykes, *supra* note 153 (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

173. *See generally id.* (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

174. *See generally id.* (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

Based on the rulings of various courts, ATS litigation had developed into a state of uncertainty against corporations.[175] Courts granted parts of ATS litigation while rejecting other issues.[176] Corporate defendants were liable, yet it was uncertain in what circumstances and under which nation's tort laws.[177] Despite the ambiguity of ATS litigation, ATS suits could be used as a brand-damaging tool utilized by plaintiffs' lawyers.[178] Lawyers could use the ATS suit against the corporation and threaten a drawn out litigation process, which could be effective in negotiating a settlement from the corporate defendant. This could yield monetary compensation even if it may not have been enough of a threat to actually change the way corporations conducted its business.[179]

Conversely, the increase in ATS litigation and the potential for high verdicts and settlements could mean an increase in plaintiff- related litigation in the United States. There are few tort systems in the world such as the United States, considering the entire industry surrounding tort claims in the United States, with plaintiffs' lawyers on one side and corporate and natural defendants (along with their insurance companies) on the other side.

There are various arguments regarding the merits and inefficiencies in terms of economic value that is brought on by the U.S. tort system. In

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175. *See e.g.*, Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 190 (1994) (explaining that, "[T]he rules for determining aiding and abetting liability are unclear" and the lack of clarification results in courts ruling different ways). *See generally* Sykes, *supra* note 153 (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

176. *See e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. __, 133 S. Ct. 1659 (2013) (examining how the courts differed in assessing the claims. The District Court dismissed some of the claims, while the Court of Appeals dismissed all of the claims). *See generally* Sykes, *supra* note 153 (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

177. *See generally* Sykes, *supra* note 153 (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

178. *See generally id.* (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

179. *See, e.g.*, *Cent. Bank of Denver*, 511 U.S. at 189 ("Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial.").

fact, most arguments against the U.S. system of torts are based on economics.[180] Critics of the tort system lament that it is an inefficient way of delivering benefits to the injured.[181] The main argument against the tort system claim is that the high cost of litigation and compensation payouts raises the cost of insurance for everybody.[182] This can become a chicken and the egg scenario, as many tort claims that rise to the level of litigation come about when the insurance company or corporate defendant does not offer a proper settlement amount to the injured in an attempt to save money. If the insurance companies or defendants offered a fair settlement offer from the beginning, many plaintiffs might not feel the need to hire a lawyer and pursue legal means to be made whole. However, many plaintiffs feel that they have no choice but to force the hand of corporations or insurance companies through the use of a lawyer because, individually, they lack the expertise and the financial resources necessary to fight these large entities on their own.[183]

Another argument against the tort system, especially in the United States where there is no single unified national healthcare system, is that tort claims increase the cost of health care in the country.[184] This increase in cost can also be attributed to any other industry that could be subject to tort claims. Products liability cases, medical malpractice, pharmaceutical litigation have been big industries that deal with a substantial number of tort claims. According to economist Reed Olsen, "tort law generally . . . serve[s] two legitimate purposes. First the law serves to compensate victims for their losses. Second, the threat of liability serves to deter future accidents."[185]

While early ATS cases focused on state actors committing violent crimes against humanity in violation of the law of nations, recent ATS cases have focused on corporations conducting business abroad in a manner not suitable in its home country.[186] Since industrialized nations have

180. *See generally* Sykes, *supra* note 153 (examining corporate liability under the Alien Tort Statute regarding the impact of extraterritorial torts on corporations; their potential economic problems; economic considerations; and analyzing the role of the agency in veil piercing cases involving corporate subsidiaries).

181. *See generally id.*

182. *See generally id.*

183. *See generally id*

184. *See generally id*

185. Reed N. Olsen, The Efficiency of Medical Malpractice Law: Theory and Empirical Evidence 3 (Oct. 2000) (unpublished manuscript), *available at* http://courses.missouristate.edu/ReedOlsen/medmal%20claims.pdf.

186. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. __, 133 S. Ct. 1659, 1669 (2013) (explaining Congress addressed these issues regarding human rights concerns in the Torture Victim Protection Act (TPVA) of 1991, and will be amended following the statutory scheme enacted by Congress).

established stricter guidelines for safety compared to third world countries, many corporations have moved operations to these developing countries where the corporation is faced with less liability and regulation.[187]

To hold corporations liable for conduct committed in other sovereign jurisdictions could result in international relations issues regarding state sovereignty, but it could also prevent corporations from seeking liability havens to engage in conduct prohibited by the laws of the United States or its home country.[188]

While U.S. courts continued to hold that they had jurisdiction to hold corporate defendants liable for a violation of the law of nations and U.S. treaties, it remained a deterrent to corporations calling for a similar level of caution when conducting business outside the borders of the United States as they would when operating domestically.

VII. LIMITING THE SCOPE OF ALIEN TORTS ACT: *KIOBEL VS. ROYAL DUTCH SHELL PETROLEUM CO.*[189]

The *Kiobel* case involved Nigerian nationals residing in the United States who filed suit against Royal Dutch Shell, alleging that the company aided and abetted the Nigerian Government in committing violations of the law of nations.[190] The opinion described the facts of the case as follows:

> Petitioners were residents of Ogoniland, an area of 250 square miles located in the Niger delta area of Nigeria and populated by roughly half a million people. When the complaint was filed, respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company P.L.C., were holding companies incorporated in the Netherlands and England, respectively. Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was incorporated in Nigeria, and engaged in oil exploration and production in Ogoniland. According to the complaint, after concerned residents of Ogoniland began protesting the environmental effects of SPDC's practices, respondents enlisted the Nigerian Government to violently suppress the burgeoning demonstrations. Throughout the early 1990's, the complaint alleges Nigerian military

187. *See generally id.* (contending a major attraction for locating to this area was the advantages of the less strict regulations).

188. *See generally id.* ("This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns.").

189. *Id.*

190. *Id.*

> and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further allege that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by al-lowing the Nigerian military to use respondents' property as a staging ground for attacks.[191]

The petitioners were able to flee Nigeria and were granted political asylum in the United States where they reside as legal residents and subsequently brought this action based on the Alien Tort Statute.[192] "According to petitioners, 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 the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[193] Royal Dutch Petroleum is a multinational oil and gas company headquartered in the Netherlands and incorporated in the United Kingdom. The company was created in a merger between Royal Dutch Petroleum and UK-based Shell Transport & Trading, and is one of the biggest oil companies in the world. Shell Oil Company, located in the United States, is one of Royal Dutch Petroleum's largest subsidiaries.[194]

The Supreme Court granted certiorari to address the issue of the scope of the Alien Tort Statute, and whether it was intended to apply extraterritorially.[195] The question was whether a claim under the ATS may reach conduct occurring in the territory of a foreign sovereign.[196] The Supreme Court stated that the Court typically applies the presumption that an Act of Congress does not apply to regulating conduct abroad.[197] The Court noted that the ATS is "strictly jurisdictional"[198] and "does not directly

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191. *Id.* at 1662–63.

192. *Id.* at 1663.

193. *Id.*

194. *Royal Dutch Shell PLC*, ENCYCLOPEDIA BRITANNICA (May 23, 2013), http://www.britannica.com/EBchecked/topic/511369/Royal-Dutch-Shell-PLC.

195. *Kiobel,* 569 U.S. __, 133 S. Ct. at 1659.

196. *Id.*

197. *See id.* at 1664 (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)) (discussing that "'[w]hen a statute gives no clear indication of an extraterritorial application, it has none' [citation omitted] and reflects the 'presumption that United States law governs domestically but does not rule the world'").

198. *Kiobel*, 569 U.S. __, 133 S. Ct. at 1664 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)). *See generally* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (explaining the exclusive jurisdictional control of the district courts and the specific instances where district courts are preferred over state courts).

regulate conduct or afford relief."[199] The Court further emphasized, however, its need to exercise judicial caution in considering which claims can be brought under the ATS in light of foreign policy concerns.[200] As the Court highlighted, "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[201] The Court stated that the presumption against extraterritorial application "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[202] The court further asserted:

> 'For us to run interference in . . . 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.' The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.[203]

The Court stated that to rebut the presumption against extraterritorial application, the ATS would need to evince a "clear indication of extraterritorial[ity],"[204] which the Court did not find in this case.[205]

The Court uses as one of its final points that there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.[206] Citing Justice Story, "[n]o nation has ever yet pretended to be the *custos morum* of the whole world."[207] As mentioned earlier, the Court discussed the United States' embarrassment of its "potential inability to provide judicial relief to foreign officials injured in the United States"[208] while also stating, "[t]he

199. *Kiobel,* 569 U.S. __, 133 S. Ct. at 1664.

200. *Id.*

201. *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)).

202. *Id.* (quoting EEOC v. Arabian-American Oil Co., 499 U.S. 244, 248 (1991)).

203. *Id.* at 1665 (citation omitted).

204. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

205. *See Kiobel,* 569 U.S. __, 133 S. Ct. at 1665 (finding the ATS does not expressly apply to foreign actions).

206. *See id.* at 1668 (finding no evidence to support the assertion that the United States would be willing to provide relief to foreign countries).

207. *Id.* (quoting United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551)).

208. *Id.*

ATS ensured that the United States could provide a forum for adjudicating such incidents. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign."[209]

Thus the Court "conclude[d] that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."[210] For claims to touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application, and Congress has the ability to do exactly that, but must do so with a statute more specific than the ATS.[211]

VIII. SITTING IN LIMBO: THE FUTURE IMPACT OF *KIOBEL VS. ROYAL DUTCH SHELL*[212]

Despite the seemingly drastic implications and initial reaction by several courts since the Supreme Court's ruling in *Kiobel vs. Royal Dutch Petroleum*, the future of ATS litigation may not be all together dead.[213] The *Kiobel* test, should it be called as such in future cases, still does not clearly define what facts would qualify under the *Kiobel* reasoning to invoke the Alien Tort Statue, as the opinion carefully explained that the instant facts were insufficient.[214]

The decision most definitely limits the scope of the ATS, but, as noted before, the scope of those limits remains undefined.[215] The new test that can be derived from the last section of the opinion states that to determine whether a claim "displace[d] the presumption against extraterritorial application,"[216] the claim must, "touch and concern the territory of the Unites States" with "sufficient force."[217] The court went on to note that "corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices [to displace the

209. *Id.* at 1668–69.
210. *Id.* at 1669.
211. *Id.*
212. *Id.* at 1668.
213. *See* Oona Hathaway, *Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases (acknowledging that *Kiobel* has renewed the focus on corporations in the United States).
214. *See Kiobel*, 569 U.S. __, 133 S. Ct. 1659 (Breyer, J., concurring) (discussing the narrow line of cases that fall within the majority's holding).
215. *See id.* at 1673 (Breyer, J., concurring) (criticizing the majority's holding for leaving open the jurisdictional reach of ATS).
216. *Id.* at 1669.
217. *Id.*

presumption]."[218] Under the facts of *Kiobel* as mentioned above, the defendants were, "two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York (actually owned by a separate but affiliated company) that helps to explain their business to potential investors" and this mere presence was not enough.[219]

Despite the ruling in the *Kiobel* case, some activists have expressed cautious optimism in regard to future viability of the ability to bring a suit under the ATS for extraterritorial torts.[220] This optimism is based largely on the concession that "foreign-cubed"[221] cases—cases where foreign plaintiffs sued foreign defendants for conduct that occurred extraterritorially—lie outside the bounds of ATS application. Still, such ruling left the door open for cases where one of the parties is a U.S. citizen and such citizenship would be enough to "touch and concern" the interests of the United States.[222]

This optimism is backed up by a careful reading of the case, as the *Kiobel* Court did not bar all ATS suits entailing the violation of human rights occurring exclusively abroad.[223] Nor did it mention that the corporate citizenship was irrelevant in the fact of extraterritorial conduct in violation of the law of nations.[224] The Court's language regarding corporate citizenship suggests that it may be relevant to the "touch and concern" element of the test as it must do so "with sufficient force" to overcome the presumption against applying a law extraterritorially.[225] The Court went on to note that "mere corporate presence" does not "suffice" to displace the presumption because "corporations are often present in many countries."[226] This indicates that the particular circumstances in this case did not suffice, but that a higher degree of presence may be enough to overcome the presumption against applying the statute extraterritorially, which could perhaps mean, that if the plaintiff or the defendant corporation was a U.S. corporation, this may be enough to touch and concern the territory of the United States.[227] The term "suffice" in-

218. *Id.*

219. *Id.* at 1677 (Breyer, J., concurring).

220. *See generally* Hathaway, *supra* note 214 (suggesting *Kiobel* may not have created new questions and dangers for corporations operating abroad).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. __, 133 S. Ct. 1659, 1669 (2013).

227. *See generally id.* (discussing the need for a distinct American interest in order for a court to have jurisdiction).

dicates a sliding scale compared to an absolute bar, yet it remains to be seen whether U.S. citizenship itself is enough to overcome *Kiobel* and resurrect the Alien Tort Statute as a viable option of bringing relief to plaintiffs for actions taken against them in violation of the law of nations, treaties, or through piracy on foreign soil.[228]

This optimistic interpretation for those proponents of keeping the ATS a viable statute is further bolstered through the concurrences in the *Kiobel*.[229] Justice Kennedy joined Chief Justice Roberts's opinion, but deemed it necessary to pen a separate concurrence to briefly discuss the majority opinion and to emphasize that the opinion "is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[230] Justice Kennedy goes on to express his concern regarding the landscape of international human rights law and his satisfaction that the Court left certain questions open regarding the Alien Tort Statute, even though he agreed with the courts ultimate decision on this case.[231] He states:

> Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPS nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.[232]

Justice Breyer wrote a separate opinion, joined by Justice Ginsburg, Sotomayor and Kagan, concurring in the judgment of the Court but not with its reasoning, which lends hope to those proponents who see the door as ajar in bringing future claims based on the ATS.[233] Justice Breyer agreed with the ultimate outcome of the majority court's decision in *Kiobel*, but fundamentally disagrees with some of its reasoning.[234] Particu-

228. *See generally id.* (stating mere corporate presence will not suffice to give a court jurisdiction over the case).

229. *See id.* (presenting the justices concurring opinions).

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

231. *Id.*

232. *Id.*

233. *Id.* at 1670 (Breyer, J., concurring).

234. *Id.*

larly he disagrees with the presumption against extraterritorial application but more importantly he stated that he

> would find jurisdiction under this statute 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.[235]

Justice Breyer referenced the *Filartiga* decision, which states that, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[236] Furthermore, Justice Breyer would find jurisdiction in cases that involve similar conduct but did agree that in the present case, "the parties and relevant conduct lack[ed] sufficient ties to the United States for the ATS to provide jurisdiction."[237]

Justice Breyer pointed out the Court's presumption against extraterritorial application offers, "only limited help in deciding the question presented, namely 'under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'"[238] As further proof that the door remains ajar for future ATS litigation Justice Breyer states:

> The majority echoes in this jurisdictional context *Sosa*'s warning to use "caution" in shaping federal common-law causes of action. But it also makes clear that a statutory claim might sometimes "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." It leaves for another day the determination of just when the presumption against extraterritoriality might be "overcome."[239]

Justice Breyer considered preventing the nation from becoming a safe harbor for violators of the most fundamental international norms to be a vital national interest and an important jurisdiction related interest.[240] This justifies the application of the ATS in light of the statute's basic purpose, "that of compensating those who have suffered harm at the hands

235. *Id.* at 1671.
236. *Id.*
237. *Id.*
238. *Id.* at 1673.
239. *Id.* (citations omitted).
240. *Id.* at 1674.

of, *e.g.*, torturers or other modern pirates."[241] His reasoning in the concurring opinion may be a premonition of the direction the court will take in future ATS cases that have closer connections to issues and parties related to the territory of the United States.

Justice Breyer also disagrees with majority's application of the presumption against extraterritoriality.[242] He states:

> In my view the majority's effort to answer the question by referring to the "presumption against extraterritoriality" does not work well. That presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." The ATS, however, was enacted with "foreign matters" in mind. The statute's text refers explicitly to "alien[s]," "treat[ies]," and "the law of nations." The statute's purpose was to address "violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs." And at least one of the three kinds of activities that we found to fall within the statute's scope, namely piracy, *ibid.*, normally takes place abroad.
>
> The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas. That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies. Indeed, in the early 19th century Chief Justice Marshall described piracy as an "offence against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are."[243]

Justice Breyer also points to the majority's view that, "pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction."[244] In reply, Justice Breyer agrees that pirates should be fair game "wherever found" and subsequently asked the question that was also asked in *Sosa*: "Who are the pirates of today?"[245] To this question the Breyer opinion states:

> Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are "fair game" where they are found. Like those pirates, they are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment."[246]

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241. *Id.*
242. *Id.* at 1672.
243. *Id.* (citations omitted).
244. *Id.*
245. *Id.*
246. *Id.*

The approach by the Breyer opinion is "analogous to, and consistent with, the approaches of a number of other nations."[247] It would be consistent with the Restatement and, as the concurrence states,

> its insistence upon the presence of some distinct American interest, its reliance upon courts also invoking other related doctrines such as comity, exhaustion, and *forum non conveniens*, along with its dependence . . . upon courts obtaining, and paying particular attention to, the views of the Executive Branch, all should obviate the majority's concern that our jurisdictional example would lead "other nations, also applying the law of nations," to "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."[248]

Most importantly, Breyer adds:

> this jurisdictional view [of not adopting the presumption against extraterritoriality] is consistent with the substantive view of the statute that we took in *Sosa*. This approach would avoid placing the statute's jurisdictional scope at odds with its substantive objectives, holding out "the word of promise" of compensation for victims of the torturer, while "breaking it to the hope."[249]

IX. Final Thoughts

It seems that the Supreme Court in the *Kiobel* gutted the thirty-year development of the Alien Tort Statue to provide relief for those who had no other authority to appeal to other than the United States. Some lower courts have even read the *Kiobel* decision to extend further than its language dictates. In *Balintulo v. Daimler AG*, the Second Circuit held that the *Kiobel* decision absolutely barred ATS suits based on conduct occurring abroad, even when the conduct was against U.S. defendants.[250] Judge Cabranes dismissed the plaintiffs argument that corporate citizenship in the United States would sufficiently "touch and concern" the United States to displace the *Kiobel* presumption.[251] Judge Cabranes further overly relied on the *Kiobel* decision when he stated that "[t]he Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States."[252] He further explained that,

247. *Id.* at 1677.
248. *Id.*
249. *Id.*
250. Balintulo v. Daimler AG, 727 F.3d 174, 182 (2d Cir. 2013).
251. *Id.* at 189.
252. *Id.* (citing *Kiobel*, 569 U.S. __, 133 S. Ct. at 1662, 1668–69).

because the plaintiffs did not allege any misconduct occurred within the territory of the United States, their case was essentially barred by *Kiobel*.[253]

The plaintiffs attempted to overcome the presumption against extraterritorial application of the ATS by pointing to American interests in combating apartheid, yet these arguments were not persuasive to the court.[254] Judge Cabranes wrote, "[t]hese case-specific policy arguments miss the mark . . . the canon against extraterritoriality application is 'a presumption about a statute's meaning'" rather than a guide to individual facts.[255] Under this reasoning, the court did not even reach the question of American interests and whether or not the present case sufficiently "touched and concerned" these interests as the alleged conduct did not meet the *Kiobel* threshold according to the Second Circuit.[256] One thing is for sure, the Second Circuit's overly broad interpretation of the *Kiobel* decision will further discourage future ATS litigation.

The Alien Tort Statute may have been conceived initially to provide relief for foreign dignitaries residing within the United States, but diction used when Congress passed the legislation reveals further contemplation for the statute in reference to the state of international law at the time. Even though the domestic incidents such as Francis Barbe Marbois' assault initially triggered the discussion regarding a statute to confer federal jurisdiction for such issues, the statute broadly refers to, "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."[257]

The plain language of the statute invokes terms associated with international law, an area of law that would be applied universally beyond just the territory of the United States, which too many scholars, indicates the presumption against extraterritorial application is improper.

More importantly, the *Kiobel* court was presented with the option of clarifying the boundaries of the statute and could have strictly limited to cases that arise *only* within the territory of the United States, but contrary to the Second Circuit's reading of the case, the plain language of the *Kiobel* decision points otherwise.[258]

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253. *Balintulo*, 727 F.3d at 189–90.

254. *Id.* at 191.

255. *Id.*

256. *Id.* at 191–92.

257. 28 U.S.C. § 1350 (2012).

258. *See generally* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. __, 133 S. Ct. 1659 (2013) (holding the presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Statute, and nothing in the history, purposes, or text of the statute rebuts that presumption).

It will remain to be seen if a case arises in the future where the facts and/or parties to the suit sufficiently touch and concern the interests of the United States to overcome the presumption set out in *Kiobel*. As much as one would hope that such cases do not occur, if some atrocities against mankind were to be committed by an entity sufficiently connected to the United States, one would hope that the American justice system will not cower at the prospect and allow it to become a safe haven for *hostis humani generis* even if that enemy comes in the form of a corporation.