Kiobel v. Royal Dutch Petroleum Co.: First Impressions

PAUL L. HOFFMAN*

INTRODUCTION

The Supreme Court’s decision in Kiobel v. Royal Dutch Petroleum was expected to bring clarity to the litigation of corporate complicity claims under the Alien Tort Statute (ATS). The Court first granted certiorari in October 2011 on the question of whether corporations could be sued at all under the statute. After the February 2012 oral argument, the Court changed the question to whether the ATS applies to acts occurring on foreign territory and, if so, to what extent. The Court’s April 2013 decision raises as many questions as it answers. The decision underscores that the future scope of the ATS is up to Justice Kennedy, who supplied the crucial fifth vote.

* Paul Hoffman is a partner in the Venice, CA.-based law firm of Schonbrun DeSimone Seplow Harris & Hoffman LLP. He argued Sosa v. Alvarez-Machain and Kiobel v. Royal Dutch Petroleum Co. in the Supreme Court. He is also counsel in many of the other cases discussed in this essay. The author would like to thank Catherine Sweetser and Hannah Perrin Flamm for their assistance.


2. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491) (accepting the plaintiff’s questions presented in the petition for writ of cert.); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), petition for cert. filed, 2011 WL 2326721 (June 6, 2011) (No. 10-1491) (“Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the [Second Circuit] court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.”). Ultimately, the Kiobel Court did not discuss this issue upon which it granted certiorari. Yet all of the Kiobel opinions assume that corporations are proper ATS defendants. Kiobel, 133 S. Ct. at 1669.

for the majority opinion. Justice Kennedy's concurrence, though, offers little guidance about his ultimate views on the extraterritorial reach of the statute.

This essay examines the Court's opinions in search of *Kiobel*’s meaning, albeit inescapably from the perspective of a plaintiffs' lawyer, and addresses some of the issues most likely to arise in post-*Kiobel* cases. Some alternative avenues for redress for human rights victims in the event that the courts read *Kiobel* broadly are discussed briefly. As the Court noted in *Sosa v. Alvarez-Machain*, the ideological debate over the scope of the ATS has been ongoing at least since the debate between Judge Bork and Judge Edwards in *Tel-Oren v. Libyan Arab Republic*. Perhaps the *Kiobel* majority opinion, in retrospect, will have signaled an ideologically driven intent to reject *Sosa* and ATS jurisprudence as it has developed since *Filartiga v. Pena-Irala*. However, this essay assumes that *Kiobel* should be read as written, not as a disguised exercise in raw judicial power to reject *sub rosa* all future ATS litigation.

I. THE *KIOBEL* FRAMEWORK

A. Background

Prior to *Kiobel*, no court accepted the argument that the presumption against extraterritorial application of U.S. statutes limited the scope of the ATS. Virtually every ATS case since *Filartiga* has

4. Predictably, the defense bar was quick to spin the decision as erecting an insurmountable barrier to extraterritorial ATS claims. See, e.g., John Bellinger, *Reflections on Kiobel*, LAWFARE (Apr. 22, 2013, 8:52 PM), http://www.lawfareblog.com/2013/04/reflections-on-kiobel.


9. Some dissenting opinions advanced the argument. See, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 72 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), vacated, No. 09-7125 (D.C. Cir. 2013); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 809 (9th Cir. 2011) (en banc) (Kleinfeld, J., dissenting), vacated, 133 S. Ct. 1995 (2013) (mem.). Notably, Judge Kleinfeld believed that the ATS applies to the extraterritorial conduct of U.S. citizens. *Id.* at 803–04 ("What little authority there is for one world state to impose a law having effect in another has generally been limited to circumstances where the conduct affects its own citizens or interests."). Judge Kleinfeld explains that the ATS was a response to the "concern . . . that U.S. citizens might engage in incidents that could embroil the young
involved acts occurring on foreign sovereign territory. When the Justice Department advanced this argument in *Sosa*, where plaintiff and defendant were non-citizens and the acts occurred in Mexico, no Justice considered it. The *Sosa* majority recognized that the modern international law of human rights often arose in the context of acts taking place within foreign sovereign territory; the *ATS* cases that the Court endorsed in *Sosa* were all extraterritorial. Six Justices in *Sosa* found that federal courts could recognize common law causes of action based on modern international human rights norms if the norms were of the same character as those recognized by Blackstone in the 18th century.

The lack of a more significant geographic or substantive connection to the United States appeared to heavily influence the Justices in *Kiobel*. From the outset of the February 2012 oral argument, it was clear that some Justices, including Justice Kennedy, were troubled by the application of the *ATS* to the facts of the case. The

---

nation in war" and that the Bradford opinion "spoke to Americans' actions abroad, not foreign-cubed cases." *Id.* at 802, 811 (citing Ali Shafi v. Palestinian Auth., 642 F.3d 1088, 1099 (D.C. Cir. 2011) (Williams, J., concurring)).


11. See *Sosa*, 542 U.S. at 727-28. In the *Kiobel* litigation, the U.S. government also recognized this pattern. See Supplemental Brief for the U.S. as Amicus Curiae in Partial Support of Affirmance at 10, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290 [hereinafter "Supp. U.S. Br."] ("Modern [ATS] litigation . . . has focused primarily on alleged law-of-nations violations committed within foreign countries. . . . [I]n the . . . decades since *Filartiga*, federal courts have either assumed or . . . expressly held that violations of the law of nations arising in a foreign country could be brought based on the ATS.").

12. *Sosa*, 542 U.S. at 732 (citing *Filartiga*, 630 F.2d at 876, *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), and *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)).

13. *Sosa*, 542 U.S. at 725 (holding that today's law of nations claims should be "defined with a specificity comparable to the features of the 18th-century paradigms we have recognized").

14. At the outset of the argument, several comments from Justices Kennedy and Alito suggested their view that the *Kiobel* claims should not be resolved in a U.S. court:

JUSTICE KENNEDY: But, counsel, for me, the case turns in large part on this: . . . "International law does not recognize corporate responsibility for the alleged offenses here"; and . . . the amicus brief for Chevron saying "No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." Transcript of First Oral Argument at 3:19-4:2, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2012) (No. 10-1491).

JUSTICE ALITO: There's no connection to the United States whatsoever. The Alien Tort Statute was enacted, it seems to be—there seems
plaintiffs were Nigerian citizens who had been subjected to human rights violations in Ogoni in Nigeria committed by Nigerian security forces in the 1990s. The primary theory of liability was that the Nigerian subsidiaries of the defendants—Royal Dutch Petroleum Co. of the Netherlands and Shell Transport and Trading Company PLC of the United Kingdom—aided and abetted the Nigerian security forces’ acts of torture, extrajudicial execution, and arbitrary detention. The only connections to the United States, apart from plaintiffs’ current residence, were the parent corporations’ investor assistance offices in New York and their listings on the New York Stock Exchange. Though the Court reformulated the question presented broadly, the application of the ATS to such so-called “foreign-cubed” cases was at the heart of most of the briefing and argument.

After the February 2012 argument there seemed little doubt that a majority of the Court believed that the ATS should not apply in the circumstances of the Kiobel case itself. However, it was unclear what rationale the Court would employ to achieve that result. There were several plausible choices. For example, the Netherlands and United Kingdom did not dispute the legitimacy of ATS jurisdiction over the extraterritorial conduct of U.S. defendants; they argued that asserting ATS jurisdiction over their corporations for extraterritorial acts outside U.S. territory violated international law and should not be permitted. The European Union (EU) took a different approach.

to be a consensus, to prevent the United States—to prevent international tension, to—and—does this—this kind of a lawsuit only creates international tension. Id. at 12:1–7.

JUSTICE KENNEDY: But I agree that we can assume that Filartiga is a binding and important precedent, it’s the Second Circuit. But in that case, the only place they could sue was in the United States. He was an individual. He was walking down the streets of New York, and the victim saw him walking down the streets of New York and brought the suit. In this case, the corporations have residences and presence in many other countries where they have much more—many more contacts than here. Id. at 13:21–14:5.

15. Kiobel, 133 S. Ct. at 1662–63. The plaintiffs received political asylum in the United States because of these violations and were all U.S. residents. See id. at 1663.


The EU accepted the extraterritorial application of the ATS to foreign defendants for extraterritorial acts, at least, in the context of universal jurisdiction norms, so long as the plaintiffs had exhausted domestic remedies before bringing their ATS claims.\textsuperscript{18} Imposing an exhaustion requirement was one of the obvious possible options before the Court.

Royal Dutch Petroleum's primary argument was that the presumption against extraterritoriality applied to all ATS claims.\textsuperscript{19} Plaintiffs' main response to the Court's concerns about the extraterritorial application of ATS jurisdiction was to emphasize the availability of other established limiting doctrines, including forum non conveniens, personal jurisdiction, political question, and international comity, that addressed the Court's concerns.\textsuperscript{20} The Kiobel opinions agree that the Kiobel case was not an appropriate exercise of ATS jurisdiction but fracture over the analysis that leads to this result.

\textbf{B. The Roberts Majority Opinion}

Chief Justice Roberts' majority opinion recognizes that the presumption against the extraterritorial application of substantive U.S. statutes does not strictly apply to the ATS because the ATS is a jurisdictional statute that applies federal common law causes of action based on the law of nations and U.S. treaties.\textsuperscript{21} There is no evi-
idence that Congress intended the ATS to enforce only law of nations or treaty norms existing as of 1789, so applying a categorical presumption to all ATS claims makes no sense unless the First Congress intended to restrict the ATS for all time and in all circumstances. Perhaps in recognition of this fact, the majority finds it appropriate to apply the principles underlying the presumption to limit the common law claims that courts may recognize under the ATS. The principles are meant to protect against "the danger of unwarranted judicial interference in the conduct of foreign policy" and "unintended clashes between our laws and those of other nations." These concerns appear to motivate the Court's reasoning in large part. Exactly how these concerns might apply in a given case was not explained. Of course, Congress passed the ATS precisely to deal with certain cases involving highly charged foreign policy concerns, so these criteria cannot negate all ATS cases.

The majority rejected Sosa's limitation—to recognize only those ATS claims founded upon "specific, universal, and obligatory" international norms supported by the same quality of evidence as those recognized by Blackstone—as sufficient to address these concerns. Moreover, after finding the principles underlying the presumption applicable to the ATS, the opinion does not indicate if or how to apply them in cases where the concerns against which the principles protect do not arise—or where the concerns arise because U.S. courts fail to hear a case or afford a remedy. The ATS was

court is applying 28 U.S.C. § 1331, the federal question statute, extraterritorially when it hears a TVPA claim brought by a U.S. citizen based on torture in a foreign country.

vacated, No. 09-7125 (D.C. Cir. July 26, 2013). Moreover, the usual presumption is overcome when Congress intends to apply its norms outside U.S. territory even on the High Seas, see, e.g., Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173-74 (1993), one of the primary areas to which the law of nations applied when the ATS was enacted, see Sosa, 542 U.S. at 719, 724.

22. Kiobel, 133 S. Ct. at 1665.
23. Id. at 1664.
24. Id. (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). The opinion also states that the Kiobel case differed from piracy cases in that the latter may "carry[ ] less direct foreign policy consequences." Id. at 1667. The Court conducted no analysis of piracy cases to determine if this hypothesis is consistent with history. The fact that piracy should have undermined the Court's presumption analysis was simply side-stepped.
25. Id. at 1665 (quoting Sosa, 542 U.S. at 732).
26. In Filartiga, the State Department informed the Second Circuit that it furthered U.S. foreign policy interests to provide a federal forum for foreign victims of human rights abuses under the ATS. Memorandum for the United States as Amicus Curiae at 22–23, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146
enacted, after all, to provide a federal judicial forum for non-citizens to bring international law claims.\textsuperscript{27} The foreign policy imperatives surrounding such suits might require the assertion of jurisdiction over claims arising on foreign soil.\textsuperscript{28}

Indeed, some foreign governments have endorsed ATS litigation in U.S. courts arising in their territory, particularly when the defendants have fled to the United States for safe haven.\textsuperscript{29}

In Section III of the majority opinion, the Court rejects arguments that the text, purpose, and history of the ATS overcome the presumption.\textsuperscript{30} This essay is not intended to be a comprehensive critique of the majority's result or reasoning. However, the majority's analysis of history, especially when compared to Justice Souter's

\footnote{\textsuperscript{27} Sosa, 542 U.S. at 715-16 ("Before there was any ATS, a distinctly American preoccupation with these hybrid international norms had taken shape owing to the distribution of political power from independence through the period of confederation. The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" (citing James Madison, \textit{Journal of the Constitutional Convention} 60 (E. Scott ed. 1893)).

\textsuperscript{28} This appears to have been the case in the incident addressed in Attorney General Bradford's 1795 opinion in response to British protests over an attack on its colony in Sierra Leone. \textit{Breach of Neutrality}, 1 Op. Att'y. Gen. 57, 59 (1795).


\textsuperscript{30} \textit{Kiobel}, 133 S. Ct. at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").}
painstaking analysis in *Sosa*,\textsuperscript{31} is cursory. The majority’s treatment of the Bradford opinion, in particular, is perfunctory and plainly at odds with the known circumstances of the attack on Sierra Leone that the opinion addresses.\textsuperscript{32} The remaining question is whether the Court will revisit its historical analysis in ATS cases where history provides a stronger basis for ATS jurisdiction than the foreign-cubed circumstances of *Kiobel*.

No doubt ATS defendants will encourage courts to read the language in Section III as a categorical rejection of all extraterritorial ATS claims, in the hope that courts will stop reading the opinion with Section III.\textsuperscript{33} Certainly, much of the language in the Roberts opinion suggests that he would apply the presumption against extraterritoriality categorically as it was applied in *Morrison*. However, Section IV of the majority opinion creates a new test to overcome the new presumption and leaves open the question of whether the presumption applies to particular ATS claims:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. *See Morrison*, 130 S. Ct. 2883-2888. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.\textsuperscript{34}

This paragraph applies the new presumption to the foreign-cubed facts in *Kiobel*. ATS claims that “touch and concern the territory of the United States” with “sufficient force” may overcome the presumption, but “mere corporate presence” of the kind presented in *Kiobel* is insufficient. The facts in *Kiobel* suggest what the Court considers “mere corporate presence” to be, though this term is not further defined. It is not clear, for example, whether a foreign corpo-

\textsuperscript{31} *Sosa*, 542 U.S. at 714.

\textsuperscript{32} *Id.* See Curtis Bradley, *Attorney General Bradford’s Opinion and the Alien Tort Statute*, 106 AM. J. INT’L LAW 509 (2012). In particular, it is indisputable that Attorney General Bradford, the prosecutor in the case arising out of the Marbois incident, understood the ATS to be available to redress an attack on British territory in Sierra Leone and that the issue of whether the ATS extended to acts on foreign soil never arose.


\textsuperscript{34} *Kiobel*, 133 S. Ct. at 1669. This is the full text of Section IV.
ration with more extensive U.S. operations would be subject to ATS suits based on its foreign operations. Would a foreign corporation involved in extensive slave labor on foreign territory be immune from suit by its victims if it gained an unfair economic advantage in the United States because of such practices?

Claims based on conduct occurring in part on U.S. territory, or with some other substantial connection to the United States, may not be barred based on the majority’s new test. The majority opinion, though, provides little guidance about the meaning of “touch and concern” so these and other similar issues must await further consideration.

C. The Kennedy Concurrence

Justice Kennedy supplied the majority’s crucial fifth vote. His concurrence reads in full:

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. 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 TVPA nor by the reasoning and holding of today’s case; and in those disputes the proper implementation


36. This formulation has never appeared previously in an ATS case. There is no apparent body of existing law to which the Court is referring in using this formulation.
of the presumption against extraterritorial application may require some further elaboration and explana-

Justice Kennedy’s opinion undermines the argument that the majority’s Section III contains Kiobel’s holding. If Kiobel leaves open “significant questions regarding the reach and interpretation” of the ATS, and if some ATS cases will fall outside the scope of the TVPA and of Kiobel’s “reasoning and holding,” then Kiobel cannot represent a categorical ban on all extraterritorial applications of the ATS.

What does the Kennedy concurrence mean? Justice Kennedy voted with the majority, so he accepts the basic framework provided by a presumption against the extraterritorial application of ATS claims. The presumption will screen out all or most foreign-cubed cases where the only U.S. connection is “mere corporate presence.” What it means beyond that is unclear. Justice Kennedy declined to join Justice Breyer’s framework but this does not necessarily mean he rejects all of Justice Breyer’s analysis. In particular, Justice Ken-

Most important, Justice Kennedy’s concurrence, combined with Section IV of the majority opinion, allows him to define the extraterritorial reach of the ATS as narrowly or broadly as he chooses in the future. It seems highly likely that a split in the circuits will de-

D. The Alito Concurrence

Justice Alito’s concurring opinion, joined by Justice Thomas, underscores the Court’s unanimous understanding that Kiobel’s holding is limited and leaves many important questions for the future. Justices Alito and Thomas write separately to present their view: to approve ATS cases only if “the domestic conduct is sufficient to violate an international law norm that satisfied Sosa’s requirements.”

37. Kiobel, 133 S. Ct. at 1669 (Kennedy, J., concurring).
38. Id.
39. Id.
40. Kiobel, 133 S. Ct. at 1670 (Alito, J., concurring) (expressing agreement with the majority’s “narrow approach”).
41. Id. (emphasis added).
By failing to support Justice Alito’s “broader standard” for barring cases based on the presumption against extraterritoriality, seven Justices appear willing to recognize some ATS claims arising at least in part outside U.S. territory.

E. The Breyer Concurrence

Since Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in the rejection of the ATS claims in *Kiobel*, no Justice supported the application of the ATS to the *Kiobel* claims. Yet the Breyer opinion rejects not only the claims but also the presumption as the proper analytical framework to govern valid extraterritorial ATS claims. Relying heavily on established U.S. foreign relations law, Justice Breyer would find jurisdiction if:

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.

The Breyer opinion finds that the “lack [of] sufficient ties to the United States” prevents the ATS from providing jurisdiction and renders it “farfetched to believe . . . that this legal action helps to vindicate a distinct American interest, such as in not providing a safe

42. Id.

43. The Roberts and Breyer opinions have the appearance of ideological blocks vying for Justice Kennedy’s crucial fifth vote. Justice Kennedy’s concurrence suggests that he has not yet committed to either camp completely.

44. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (“Unlike the Court, I would not invoke the presumption against extraterritoriality.”).

45. It is not clear whether Justice Breyer views the application of the presumption as an issue of subject matter jurisdiction or a merits question. The Roberts majority opinion treats the issue as a merits decision and finds that “the principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.” Id. at 1665. (Roberts, C.J.). The Court has treated the application of the presumption against extraterritoriality as a “merits” issue. *See, e.g.*, Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2876–77 (2010).

46. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

47. Id.
harbor for an 'enemy of mankind.'”

The question for the future is whether there are five votes on the Court for any of this analysis. In future cases, will there be some overlap between Justice Breyer’s analysis and the “further elaboration” of the Kiobel presumption? Justice Breyer’s opinion is notable for its effort to bring international law into the analysis of the scope of the ATS in comparison to the majority opinion. There is little question that the ATS was enacted to enforce international norms by means of civil tort actions suggesting that international law should play a significant role in determining the scope of the statute.

F. Some Observations

First, the Court treated Sosa as binding authority instead of overruling this pivotal decision determining that the federal courts could recognize modern law of nations violations based on international human rights law. Therefore, lower courts should be seeking to reconcile the Kiobel decision with Sosa. This is feasible: Kiobel only rejects ATS claims in that case’s specific fact situation; Sosa endorsed the majority of pre-2004 ATS cases, all of which involved extraterritorial conduct but mostly in factual settings distinct from Kiobel’s. Only a categorical bar on ATS claims arising on foreign soil would be in tension with a core Sosa holding and ATS interpretation since Filartiga.

48. Id. at 1678. The focus on a “distinctly American interest” indicates that Justice Breyer had retreated somewhat from his discussion of universal jurisdiction in Sosa. Sosa, 542 U.S. at 762 (Breyer, J., concurring). On the other hand, international law principles of universal jurisdiction may support the legitimacy of the exercise of ATS jurisdiction in some ATS cases (e.g. Filartiga-type cases).

49. Even Justice Alito, most keen to limit the application of the ATS, treats Sosa as binding authority. See Kiobel, 133 S. Ct. at 1670 (Alito, J., concurring) (“[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa’s requirements of definiteness and acceptance among civilized nations.”).

50. Sosa, 542 U.S. at 712. The universal application of customary international human rights norms is at the heart of post-World War II developments and the Filartiga line of ATS cases.

Kiobel ignored but did not overrule the aspect of Sosa finding that Congress authorized federal courts to recognize claims based on modern violations of fundamental human rights. Justice Kennedy joined the Sosa majority that brought the ATS into the twenty-first century; his Kiobel concurrence leaves room for the Kennedy of Sosa to reconcile with the Kennedy of Kiobel.

Second, the Court appears unanimous in its understanding that the Kiobel holding is narrow, leaving unresolved many significant issues about the ATS’s scope. Even the Justices who would like to bar all extraterritorial claims acknowledge that the Court has not done so. This agreement that the Kiobel decision is narrow is utterly inconsistent with the argument that Kiobel bars all extraterritorial applications of the ATS.

Third, the Morrison framework, which contemplates the potential for conflicting substantive requirements over extraterritorial conduct that both the U.S. and foreign governments seek to regulate, is ill-suited to ATS cases. The ATS enforces only a modest number of universally accepted international norms. As such, in ATS cases, concerns about the substantive conflict of laws, which the Morrison framework aims to prevent, arise only with respect to whether damages should be awarded according to the common law method in effect at the time the ATS was enacted. The Kiobel majority suggests that the recognition of a damages claim amounts to an extraterritorial extension of U.S. substantive law. Given all of the ways in which states enforce international norms through their legal systems, it seems likely that the Court will revisit this aspect of its rationale in a case with a closer nexus to U.S. territory or U.S. citizens. Moreover, even if the Court meant for a Morrison-like analysis to govern ATS claims, the lower courts will still have to come up with a methodology to account for the myriad factual circumstances in which ATS claims arise.

52. Sosa, 542 U.S. at 724–25 (“We assume . . . that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with Filartiga . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of the common law.”).


54. Id. at 1671 (“We added that the statute gives today’s courts the power to apply certain ‘judge-made’ damages law to victims of certain foreign affairs-related misconduct.”).


56. Chief Justice Roberts’ majority opinion cites Morrison several times. Even if the
Fourth, the Kiobel presumption will be the main initial screening mechanism for ATS cases and will remake the ATS landscape in significant ways no matter how it is elaborated.\textsuperscript{57} It is unclear how the Kiobel majority views the relationship between the new presumption and existing limiting doctrines (e.g., forum non conveniens, political question, international comity) commonly litigated in ATS cases.\textsuperscript{58} Will the new Kiobel presumption become the last line of defense to ATS claims whenever the courts are dissatisfied with the results of the more traditional screening doctrines? Courts across the country will have to develop methods to interpret the new presumption. The most important observation in analyzing Kiobel may be the impossibility of predicting the presumption’s future application.

\textsuperscript{57} The Kiobel presumption would have barred some recent ATS corporate complicity cases. The most obvious case whose ATS claims Kiobel would have barred is Wiwa v. Royal Dutch Petroleum, which settled in June 2009 for $15.5 million. See Jad Mouawad, \textit{Shell to Pay $15.5 Million to Settle Nigerian Case}, N.Y. Times, June 8, 2009, at B1. In the immediate aftermath of Kiobel, the plaintiffs in Sarei, a case pending for nearly fifteen years, conceded that they could not meet the Kiobel standard. Plaintiffs-Appellants/Cross-Appellees’ Supplemental Brief at 1, Sarei v. Rio Tinto, PLC, 722 F. 3d 1109 (9th Cir. 2013) (Nos. 02-52666, 02-56390, 09-56381). Without explanation, the Ninth Circuit \textit{en banc} dismissed the case with prejudice. \textit{Sarei}, 722 F. 3d 1109 (9th Cir. 2013).

\textsuperscript{58} In Sosa, the Court discussed a number of limiting principles that apply to ATS cases, including a sufficiently definite international norm, exhaustion of remedies outside the United States, and the “policy of case-specific deference to the political branches.” \textit{Sosa}, 542 U.S. at 733 n.21. It is not clear how the Kiobel presumption will relate to the other limiting doctrines.
II. THE APPLICATION OF THE KIOBEL PRESUMPTION

A. Categorical or Case-By-Case Analysis

Section IV of the majority opinion, discussing extraterritorial cases that “touch and concern” U.S. territory with “sufficient force” to displace the presumption, can only mean that courts must examine the facts of every case to see if they “touch and concern” U.S. territory sufficiently. Yet the most crucial threshold issue for future ATS cases is whether courts will interpret Kiobel properly to require this case-by-case analysis, or whether defendants will prevail in arguing that Kiobel represents a categorical ban of extraterritorial ATS cases. The latter is a possible, if not the most plausible, reading of Kiobel—one that begs a definition of “extraterritorial” for causes of action based on international law norms, not U.S. securities law.\(^5\)

Kiobel should require a case-by-case analysis because the ATS, as a statute that enforces only some treaties and customary norms (including future ones yet to arise\(^6\)), requires courts to consider the nature of the norm at hand. Congress possesses no mechanism to specify which norms should have extraterritorial effect, and, unless the majority has overruled Sosa \textit{sub silentio},\(^6\) Congress need not pass legislation for a norm to be enforceable extraterritorially. Courts cannot rely slavishly on the usual application of the presumption, which Kiobel does not require, or on the inapposite Morrison analysis\(^6\) to determine which norms the ATS enforces.


60. \textit{Sosa}, 542 U.S. at 730 ("The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction.").

61. \textit{Id.} at 724 ("[A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law."). It is possible that this is what the majority means when it states in Section IV that "a statute more specific than the ATS would be required." Kiobel, 133 S. Ct. at 1669. Future courts should not lightly assume that the Court undermined Sosa in this way without saying so.

62. The \textit{Al Shimari} court found that the presumption was a matter of subject matter jurisdiction under the ATS. \textit{Al Shimari}, 2013 WL 3229720, at *1 ("As the Court held in \textit{Kiobel}, the presumption against extraterritorial application applies to the ATS. . . . Therefore, Plaintiffs’ claims under the ATS [arising from acts occurring exclusively in Iraq] are dismissed for want of jurisdiction."). However, the \textit{Kiobel} majority opinion seems clearly to find that the allegations in plaintiffs’ complaint in \textit{Kiobel} were adequate to
Some early interpretations of *Kiobel* have eschewed a detailed analysis of the *Kiobel* opinions in favor of a categorical approach. For example, one district judge recently dismissed ATS claims arising in Iraq against U.S. military contractors based on his reading of *Kiobel*. The district court focused on the need for legislative action to overcome the presumption, concluding, based on the *Kiobel* majority’s references to *Morrison*, that the presumption applies categorically; and dismissed Section IV of *Kiobel*—containing the case’s holding—as “textually curious” and irrelevant. Justice Kennedy’s concurrence cannot be squared with the categorical exclusion of all extraterritorial ATS cases: he explicitly conditions his vote on the notion that some cases will fall outside *Kiobel*’s reasoning and holding. Justice Alito’s concurrence recognizes that the majority opinion is a narrow one.

Hopefully, other courts will take the narrow focus of the *Kiobel* opinions seriously. It is bizarre to suggest that Section IV of the majority opinion was written for no reason. It is obvious that Section

---

63. Their interpretations will not be the last word. In *Al Shimari*, the judge recognized this possibility, noting that the “touch and concern” language “may be interpreted by some as leaving the proverbial door ajar for courts to eventually measure its width.” *Al Shimari*, 2013 WL 3229720, at *9. The U.S. magistrate judge in *Mwani v. Bin Laden* also recognized the impending split and immediately certified to the Court of Appeals his decision to grant subject matter jurisdiction for ATS claims arising from the bombing of a U.S. embassy in Kenya. *Mwani*, 2013 WL 2325166, at *4. As this essay was completed, the Second Circuit decided *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), in which a panel decided that *Kiobel* created a bright line rule against the extraterritorial application of the ATS. A petition for rehearing was filed on September 18, 2013.

64. *Al Shimari*, 2013 WL 3229720, at *7 (“[The *Kiobel* Court] held that the text of the ATS failed to rebut the presumption that the statute would not be extraterritorially applied.”). Recently, some courts have dismissed pro se complaints based on *Kiobel*, sometimes taking a categorical approach to the extraterritoriality presumption. See, e.g., *Ahmed-Al-Khalifa v. Trayer*, No. 3:13-CV-00869, 2013 WL 3326212, at *2 (D. Conn. July 1, 2013).

65. *Al Shimari*, 2013 WL 3229720, at *9 (“[T]he presumption’s best practice . . . is the universal application of the presumption, providing the stable backdrop against which Congress is free to indicate otherwise.”).

66. *Id.*
IV, when read with Justice Kennedy’s concurrence and the self-conscious narrowness of the decision, indicates that the Court had not reached agreement on how the presumption would apply in non-foreign-cubed cases.

Courts should also reject the categorical interpretation of Kiobel because it signifies that Kiobel overturned an entire body of law sub silentio. Indeed, if the Kiobel presumption were categorical, one would expect the Supreme Court to note that its new rule was inconsistent with nearly every ATS case since Filartiga, though admittedly there is no requirement that the Court provide a decent burial to more than three decades of jurisprudence. Early declarations of the categorical nature of the Kiobel presumption seem likely to mature into a set of conflicting circuit decisions ripe for further Supreme Court elaboration of the new presumption.

B. Cases Against U.S. Defendants

Kiobel leaves unanswered the critical issue of whether and to what extent the new presumption immunizes the extraterritorial actions of U.S. corporations (and individuals). Although the majority opinion does not address the significance of U.S. citizenship to its presumption analysis, the discussion of Attorney General Bradford’s opinion reveals that the ATS should be available for acts committed by U.S. citizens both on the High Seas and on foreign soil. The

67. A district court recently found that the U.S. citizenship of a corporate defendant did not overcome the Kiobel presumption. Giraldo v. Drummond Co., No. 2:09-cv-01041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013) (mem.). This decision is hardly a definitive interpretation of Kiobel. As the court acknowledged, “Kiobel has not given courts a road map for answering [the] question” of what, more than corporate presence displaces the presumption. Id. at *8.

68. Kiobel, 133 S. Ct. at 1667–68.

69. Supp. U.S. Br., supra note 11, at 6–8 (recognizing that the Bradford opinion concerns a historical incident that “occurred in part on land” and “within the territory of a foreign sovereign”; and finding that Bradford himself “plainly knew that some of the conduct at issue occurred within the territory of Sierra Leone”). See also Supplemental Brief of Amici Curiae Professors of Legal History William R. Casto et al. in Support of Petitioners at 18–22, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165337 (“Bradford then opined that the ATS offered a civil remedy for acts that had been committed in British sovereign territory.”). See also Curtis A. Bradley, Attorney General Bradford’s Opinion and the Alien Tort Statute, 106 AM. J. INT’L L. 509, 520–21 (2012) (finding it “unlikely” that “Bradford had in mind only conduct that occurred either in the United States or on the high seas” because “[m]any of the allegations specifically concerned pillaging and destruction of property in Freetown” and because Bradford’s correspondence “w[as] focused on breaches of neutrality by the U.S. citizens,
majority deflects the significance of the Bradford opinion because the Sierra Leone incident involved U.S. citizens while Kiobel is foreign-cubed. The Court will struggle to distinguish a future case involving extraterritorial international law violations committed by U.S. citizens from the Bradford opinion, one of the few historical records discussing causes of action cognizable under the ATS and finding the acts of U.S. citizens on foreign sovereign territory among them.70

The concerns expressed in Kiobel that motivate applying the principles underlying the presumption against extraterritoriality do not exist in the same way in ATS cases against U.S. defendants. When U.S. courts apply international law to U.S. citizens for their acts abroad, there is no potential for conflict with the laws of other nations. The United States has an indisputable right under international law to apply such norms to its own citizens no matter where the offending acts occurred. Indeed, the United States may have a duty to do so. Similarly, the argument that the ATS should avoid reaching foreign-cubed situations based on the canon of statutory interpretation to avoid conflict with international law unless no other interpretation is possible71 has no force when the defendant is a U.S. citizen.72 The United States has an indisputable right to police its own citizens' conduct, including extraterritorial conduct.73

C. Cases Involving Both Domestic and Extraterritorial Conduct

If the primary focus of the Kiobel presumption is the relationship between the conduct at issue and U.S. territory, then courts will
have to apply it to a wide array of factual circumstances. Human rights violations committed extraterritorially at the direction of actors within U.S. territory will likely overcome the presumption. In cases where the U.S.-based acts do not amount to specific directions to engage in human rights violations abroad, the courts will have to develop rules to govern the domestic acts' significance given the purposes of the presumption.

D. Cases Advancing U.S. Foreign Policy Interests

Kiobel did not present a situation in which the United States had acted with respect to the underlying violations. Yet where the political branches have condemned the violations or found them illegal under substantive U.S. law, the potential for conflict that the principles underlying the presumption are meant to prevent (i.e. conflicts with other countries and unanticipated conflicts between U.S. foreign policy and the litigation) is reduced.

E. No Safe Haven

Justices Kennedy and Alito’s initial questions at the February 2012 argument suggested that they found it inappropriate for U.S. courts to sit in judgment over foreign corporations whose home fora were available to the plaintiffs. Justice Kennedy found it appropri-


75. The United States acted with respect to the underlying violations in a subsequent ATS suit in In re Chiquita Brand Int'l., Inc, 792 F. Supp. 2d 1301. The U.S. government filed criminal charges against Chiquita, resulting in a guilty plea, for its payments to a right wing terrorist group in Colombia whose acts were at the heart of plaintiffs' allegations. Id. at 1310.

76. Plaintiffs in Balintulo v. Daimler A.G., No 09-2778-cv (2d Cir. 2009), are advancing a similar argument based on U.S. adherence to embargoes on Apartheid South Africa. See supra note 63. In Mwani, 2013 WL 2325166, a district court allowed ATS claims arising out of the attack on the U.S. Embassy in Nairobi, Kenya, involving foreign plaintiffs and defendants, to proceed notwithstanding Kiobel. As the Court stated, “[i]t is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our country is a corporate presence here.” Id. at *4.

77. The Kiobel plaintiffs had other fora in which they could have pursued their claims: the United Kingdom and the Netherlands. Transcript of Oral Argument at 6:4–24, Kiobel
ate where no alternative forum was available,\textsuperscript{78} agreeing with the Breyer concurrence's position that the United States must not be a safe haven for human rights violators.\textsuperscript{79} The 	extit{Filartiga} line of cases against individual defendants found in the United States should survive the new presumption.

It is less clear whether the "no safe haven" rationale can be applied to foreign corporate defendants—ones with significantly or incrementally more U.S. connections than "mere corporate presence." \textit{Kiobel} does not explain how courts should apply the presumption if ATS plaintiffs (say, American Jews) cannot pursue their claims against a corporate defendant (for instance, an Iranian corporation doing substantial business in the United States) because it is not possible for them to bring a case in the defendant's home forum (Iran). In \textit{Kiobel} it was apparent that the plaintiffs had access, at least theoretically, to alternative fora in the United Kingdom and the Netherlands. It is unclear whether the existence of an alternative forum is a relevant fact under \textit{Kiobel}. From \textit{Filartiga} on, it has been assumed that ensuring a forum for redress for human rights victims is a central modern purpose of the ATS.

\textbf{F. The Transitory Tort Doctrine}

The drafters of the ATS assumed that the common law included the law of nations. Since 1789, the recognition of transitory

---

\textsuperscript{78} See supra note 14.

\textsuperscript{79} \textit{Kiobel}, 133 S. Ct. at 1671 (Breyer, J., concurring).
tort claims has been the mechanism to enforce the law of nations, and U.S. courts hearing ATS cases were seen as exercising adjudicative jurisdiction over transitory tort claims between parties over whom the courts had personal jurisdiction.

The Roberts opinion rejects this longstanding interpretation of the ATS. The majority instead finds that the decision to recognize an ATS cause of action is an exercise of prescriptive jurisdiction: U.S. courts applying U.S. substantive law to the parties before the Court. The Chief Justice distinguishes ATS cases from ordinary transitory tort cases by highlighting that only in ATS cases do courts have to decide whether to recognize a cause of action based on international law as a matter of federal common law. In order to draw this distinction, Chief Justice Roberts disregards the historical context of the ATS that Sosa recognized: the ATS drafters would have thought "that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."

Given the history and purpose of the ATS, it would make no sense to relegate ATS claims to U.S. state courts. Yet with the Kiobel majority opinion's cursory treatment of the transitory tort doc-

---

80. A historical purpose of the transitory tort doctrine was to ensure a forum in which the wrongdoer could be brought to civil justice. See Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021, 1024–26 (K.B.) (Lord Mansfield) (holding that "an action of trespass can be brought in England for an injury done abroad" because "[i]t is a transitory action, and may be brought any where [sic]"); and concluding that "the action which is a transitory one is clearly maintainable in this country, though the cause of action arose abroad"). The doctrine sought to ensure that tortfeasors do not escape justice. Id. at 1025–26 (expressing concern that "there might be a failure of justice if the Chancery could not hold plea in such case, the party being here").

81. See William S. Dodge, Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy, 51 HARV. INT’L L. ONLINE 35, 42 (2010), available at http://www.harvardilj.org/2010/05/online_51_dodge/ (“In sum, there is no evidence that the ATS was originally understood as an exercise of prescriptive jurisdiction, and plenty of evidence that torts in violation of the law of nation[s] were considered a subset of transitory torts.”).


83. Id. at 1660.


85. See, e.g., William R. Casto, The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467, 480–81 (1986); Supplemental Brief of Amici Curiae Professors of Legal History William R. Casto et al. in Support of Petitioners at 18–22, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165337 (“[t]he Bradford Opinion unequivocally demonstrates that he understood the ATS to provide civil jurisdiction over the tortious acts that were transitory and had occurred in British Sierra Leone”).
trine, it is unclear whether the Court will recognize future ATS cases based on tort claims that foreign countries recognize as valid claims rooted in international law. As other legal systems develop remedies for extraterritorial torts of the kind litigated in ATS cases, perhaps a future court will look more closely at this issue.

G. Connection or Territory

Many of the preceding issues will be determined by whether the Kiobel presumption is concerned exclusively with the contacts between an ATS claim and U.S. territory or with an analysis of the overall connection between the ATS claim and U.S. interests defined more broadly. The latter view is more in keeping with the history and purpose of the ATS, as reflected by the Bradford opinion. If a U.S. citizen attacked a foreign Ambassador on foreign soil and sought safe harbor in the United States, then unquestionably the Founders intended that the Ambassador would have an ATS claim against the U.S. citizen in such circumstances.

The Kiobel case may have lacked an adequate connection to U.S. territory or interests, but had the defendant been a U.S. corporation the analysis of the adequacy of the connection and interests would be different. A matrix of factors centered around connection to U.S. territory and interests, rather than U.S. territory alone, would advance the purposes of the ATS far better than blind adherence to a "bright line" rule against all extraterritorial claims.

IV. The Future Direction of Corporate Complicity Litigation

It is too early to determine Kiobel's effect on corporate complicity litigation. But two effects are likely: ATS litigation will move into state courts, and plaintiffs will name individual corporate officers as defendants under the Torture Victim Protection Act (TVPA).

86. With other countries exercising jurisdiction over extraterritorial torts, the Court may address the transitory tort doctrine and its relevance to the ATS in the future. See Ashraf Ahmed El-Hojouj, No. 400882/HA ZA 11-2252 (Neth.); Bodo Cmty. v. Shell Petroleum Co. of Nigeria, [2012] EWHC (QB) HQ11X01280 (Eng.).

87. See supra notes 77, 86. As more foreign courts assume jurisdiction over extraterritorial torts, some cases may be brought in foreign courts.

In many ATS cases, plaintiffs have asserted state law tort claims along with ATS and other federal claims. In *Doe v. Unocal Corp.*, for example, after the district court granted Unocal’s motion for summary judgment on plaintiffs’ ATS claims, plaintiffs filed a complaint asserting state law tort claims in Los Angeles Superior Court. These claims were scheduled for trial in April 2005 when the parties reached a settlement in the fall of 2004.

Corporate complicity cases filed in state courts will raise a host of new issues. State tort law, rather than international law, will define the human rights violations at issue. In many cases, the elements of state tort law claims may be easier to satisfy than the elements of international human rights violations. Indeed, common law complicity theories are broader than international theories largely derived from international criminal law.

State courts will have to wrestle with threshold issues potentially involving both state and federal dimensions such as personal jurisdiction, *forum non conveniens*, international comity, and the act of state doctrine. The state tort statutes of limitations will vary but usually will be shorter than the ten-year ATS statute of limitations. Tolling doctrines will vary by state.

Defendants are likely to argue that federal law and policy preempt state tort claims. At least one district court has accepted this argument, but this theory goes far beyond existing doctrine. Of

---

89. Doe v. Unocal, 963 F. Supp. 880, 897–98 (C.D. Cal. 1997) (denying in part a motion to dismiss plaintiffs’ ATS claims arising in Burma against a U.S. corporation, finding that “[s]ubject-matter jurisdiction over plaintiffs’ claims against the remaining defendants is available under the Alien Tort Claims Act”).

90. Subsequently, the summary judgment was reversed in part. Doe v. Unocal Corp., 395 F.3d 932, 962 (9th Cir. 2002) (reversing the district court’s grant of summary judgment in favor of Unocal on plaintiffs’ ATS claims for forced labor, murder, and rape, but not for torture). The 9th Circuit took the case *en banc* on February 14, 2003.

91. Complaint for Plaintiff, Doe v. Unocal, Nos. BC 237 980 and BC 237 679 (Cal. Super. Ct. 2000). The state case was scheduled for trial in the spring of 2005, based, *inter alia*, on plaintiffs’ agency theory that Unocal could be held liable for the actions of its foreign subsidiaries in Burma.


93. Compare *Restatement (Second) of Torts* § 876(a), (c) (1979) (civil conspiracy; aiding and abetting), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009).

94. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1188 (C.D. Cal. 2005) (“Since these strong federal foreign policy interests outweigh the weak state interests involved, the Court dismisses Plaintiffs’ state law claims pursuant to the foreign affairs
course, any argument that the ATS was intended to preempt state courts from resolving international law disputes flies in the face of the history set forth in detail in *Sosa.*

Future corporate complicity cases will focus on individual corporate officers under the TVPA. The number of these cases may rise if the scope of the ATS narrows and TVPA claims brought in federal court against individuals may be joined increasingly with state claims against U.S. corporations based on diversity jurisdiction or supplemental jurisdiction.

Without analyzing all of these issues comprehensively, it is clear that any further narrowing of the extraterritorial scope of the ATS after *Kiobel* will shift litigation to state courts or to federal courts based on diversity or other bases of federal subject matter jurisdiction.

**CONCLUSION**

The struggle over the modern meaning of the ATS is in equipoise. Four members of the Court, now led by Chief Justice Roberts,
will undoubtedly seek to limit the scope of the ATS so that its application would be occasional and exceptional. It appears that four members of the Court, now led by Justice Breyer, will continue the task started in Sosa of giving a modern meaning to the ATS based on its history and purpose, in the same cautious manner initiated by Justice Souter's Sosa opinion.

No current member of the Court appears to be a champion of a more robust application of the ATS to vindicate a broader range of human rights violations. Indeed, no Justice voted to sustain the human rights claims in either Sosa or Kiobel.

Where does Justice Kennedy stand? Justice Kennedy joined the Souter majority opinion in Sosa, which affirmed the modern vitality of the ATS and its application to serious human rights violations, including extraterritorial claims. Justice Kennedy joined a narrow Kiobel majority rejecting "mere corporate presence" as a sufficient basis for ATS jurisdiction. He agreed to a framework in which ATS claims must be examined through the prism of the principles underlying the presumption against extraterritoriality. Thus, Justice Kennedy's conception of the scope of the ATS, at least the geographic scope, lies somewhere between the territorial views advanced by Justice Alito and the international law-oriented framework advanced by Justice Breyer.

ATS cases involving extraterritorial actions are pending in several circuits. There will be decisions in several of these cases before the end of next year. The stage will be set for Justice Kennedy to decide.

99. Kiobel, 133 S. Ct. at 1669 (Kennedy, J., concurring).