The Alien Tort Statute, Separation of Powers, and the Limits of Federal-Common-Law Causes of Action

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In Kiobel v. Royal Dutch Petroleum Co.,¹ the Supreme Court considered whether the Alien Tort Statute ("ATS")² authorized a suit by foreign plaintiffs against foreign corporate defendants for aiding and abetting the human rights abuses of a foreign government. Before that ruling, no court had ever held that the ATS does not allow for suits alleging extraterritorial conduct. Yet the Supreme Court unanimously held in Kiobel that such a suit was precluded.³

Here, I will briefly explore the reasons for this disparity. That is, what accounts for the stark difference between how the lower courts viewed the ATS and how the Supreme Court views it. The answer, I think, is the lower courts’ failure to appreciate the role of federal common law and associated separation of powers norms in determining the scope of the privately enforceable right of action authorized by the ATS. The Court held in Sosa v. Alvarez-Machain⁴ that while the ATS was a purely jurisdictional provision, it also authorized courts in some circumstances to recognize privately enforceable norms of international law under federal common law. But Sosa also stressed that courts must exercise “great caution” in determining when and under what circumstances a private action under the ATS could move forward, both because of the limited nature of federal common law and implied rights of action generally, and because of the particularly sensitive foreign policy implications of ATS suits.⁵

One precondition for an ATS suit to move forward—a precondition

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5. Id. at 725–28.
not satisfied in *Sosa* itself, and thus sufficient to resolve that case—was that courts could only recognize an international law norm under federal common law if the norm was as concretely defined and universally recognized as those commonly understood to exist when the ATS was enacted in 1789—piracy, assaults against ambassadors, and safe conducts. But *Sosa* made clear this was only one of the limitations on a private action under the ATS. That is, even if an international norm could be recognized under federal common law, this does not necessarily mean that federal common law principles would support making that norm privately enforceable in all circumstances. In my view, lower courts failed to appreciate this latter point, instead assuming that once an international norm qualified as federal common law it was automatically privately enforceable, subject to ordinary limitations that apply to any cause of action (e.g., the political question doctrine).

In other words, in a case like *Kiobel*, the lower courts asked whether a norm recognizable under federal common law is alleged, and if so, whether there is any extraordinary reason not to allow the suit to go forward, just as they would ask with any cause of action. They should have asked, in light of *Sosa*, whether federal courts, without express congressional guidance, should imply a private action under federal common law in a suit by an alien against a foreign private party, when the underlying conduct is that of a foreign government on its own soil against its own citizens. Under any plausible conception of the separation of powers, the answer to the latter question has to be no, as *Kiobel* unanimously recognized. In cases contested in *Kiobel*’s wake, lower courts must be guided by this proper framing of the question when deciding, for instance, the circumstances under which ATS suits against U.S. corporations may proceed.

This Essay proceeds in three Parts. Part I surveys the history of modern ATS litigation, and explains that before *Sosa*, the lower courts generally held the view that the ATS provided private plaintiffs a right of action to enforce certain norms of international law that were incorporated into federal common law. Part II examines *Sosa* and argues that *Sosa* represented a major shift in how the ATS was understood. The Supreme Court made clear that the ATS did not create a cause of action—it was only a jurisdictional provision—and that a cause of action to enforce norms of international law is available only if implying such a cause is consistent with separation of powers principles. Part III shows that after *Sosa*, but before *Kiobel*, the courts of appeals missed this major shift in ATS jurisprudence.

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6. *Id.* at 732.
completely, which accounts for both the lower courts’ unanimous rejection of the argument that the ATS does not apply extraterritorially (at least in some circumstances), and for the Supreme Court’s unanimous acceptance of that argument. Part III also argues that to the extent Kiobel left open the status of ATS suits against U.S. corporations for international law violations occurring abroad, the common-law approach requires rejecting such suits, at least when they implicate the conduct of a foreign sovereign on its own soil.

I. THE ATS BEFORE SOSA: A CAUSE OF ACTION FOR ENFORCING LAW-OF-NATIONS NORMS

Originally enacted as part of the Judiciary Act of 1789, the ATS provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Despite its vintage, it was invoked as a basis for federal jurisdiction in only a handful of cases during its first two centuries of existence.

That changed in 1980, when the Second Circuit held in Filartiga v. Pena-Irala that the ATS provides a cause of action for an alien plaintiff to sue foreign officials in U.S. courts for allegedly violating certain international human rights norms, such as torture by a state actor. ATS cases continued in Filartiga’s wake, principally involving similar suits—those brought by alien plaintiffs against foreign individuals accused of torture and similarly recognized human rights norms. And while the ATS’s extraterritorial scope was raised as an issue, courts did not see it as a particularly difficult one. The theory underlying these cases was that sufficiently specific and universally recognized norms of international law are “part of the common law of the United States” and, through the ATS, can be privately enforced. As the Filartiga court put it, the ATS “open[s] the federal courts for adjudication of the rights already recognized by

7. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76.
9. See, e.g., Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607); Moxon v. Fanny, 17 F. Cas. 942 (D.Pa. 1793) (No. 9,895).
11. See id. at 885–89.
12. See, e.g., In re Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).
13. Filartiga, 630 F.2d at 886.
international law." 14

This "first wave" of ATS litigation was relatively modest in scope.15 While the propriety of private human rights actions in federal courts was certainly a contested proposition,16 ATS actions in practice did not cause much real-world controversy.

The character and scope of ATS litigation changed dramatically, however, when groups (often classes) of victims of foreign government abuse began bringing ATS suits against deep-pocketed foreign and domestic corporations. Unlike Filartiga-type suits, which alleged that the defendant (normally an individual state actor) directly violated human rights norms, ATS suits against corporations alleged that those corporations aided and abetted the human rights abuses of foreign governments themselves.17 The increased financial incentives to initiate such suits (because they involved corporate defendants) and the nature of those suits (implicating the conduct of foreign sovereigns) caused significant international friction. Countries whose corporate nationals were sued, as well as foreign nations whose primary conduct was implicated, often objected to the suits.18

The foreign policy friction engendered by corporate ATS suits was, of course, made possible by the ATS's broad extraterritorial reach. That is no surprise: federal statutes are normally presumed not to reach foreign conduct precisely to avoid "clashes" with foreign governments, "which could result in international discord."19 Such clashes are inevitable when the conduct targeted by a lawsuit is the conduct of the foreign government itself. But the doctrinal view espoused by earlier cases—that the ATS itself authorized private en-

14. Id. at 887; see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring in judgment) (ATS "create[s] a cause of action"); In re Estate of Marcos, 25 F.3d at 1475 (same).


16. The two sides in the debate were well represented by Judges Edwards and Bork in their dueling concurrences in Tel-Oren, 726 F.2d at 775–821.


18. See, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citing cases and explaining that "recent ATS cases based on acts that occurred in foreign nations have often engendered conflict with other sovereign nations" (emphasis omitted)).

forcement of international law norms that otherwise qualify as federal common law—afforded no basis to narrow the ATS's extraterritorial scope, even in cases implicating foreign governments' conduct. If the ATS established a private right of action, courts were obliged to enforce it. Thus, courts did not—because, under the prevailing legal landscape, courts could not—manage the adverse foreign policy consequences of ATS suits by altering the scope of the statute's cause of action depending on the circumstances. Rather, they attempted using blunt doctrinal tools, like the political question doctrine or the act of state doctrine, just as they would do with any other cause of action. Since those doctrines' elements are necessarily stringent—courts should not lightly cut off validly enacted causes of action—very few actions were dismissed on such grounds.

II. THE ATS AFTER Sosa: ANY CAUSE OF ACTION MUST BE IMPLIED UNDER FEDERAL COMMON LAW PRINCIPLES

Sosa was the Supreme Court's first foray into the ATS, and its approach was a significant departure from Filartiga and similar cases, resulting in a radically narrowed ATS.

Sosa was not a corporate case, but it was litigated with corporate cases—and the international friction they had caused—very much on everyone's mind. The essential debate in Sosa was whether the ATS itself afforded alien plaintiffs the right to privately enforce specific, universally accepted customary international law norms, or whether it was jurisdictional only, requiring further congressional action to establish a private right of action.

The answer, according to Sosa, was neither of the above. The Court held that "the ATS is a jurisdictional statute creating no new causes of action," but that it does empower federal courts to recognize, under federal common law, a cause of action to enforce "a very limited category" of universally recognized and concrete law of nations norms. In particular, the Court held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms

22. Sosa, 542 U.S. at 724.
23. Id. at 712.
familiar when § 1350 was enacted”24—i.e., piracy, assaults against ambassadors, and safe conducts.

At first glance, Sosa seemed like a vindication of the post-Filartiga status quo. Indeed, the Court expressly noted that its articulation of the kind of international norms that may be recognized as part of federal common law was “generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.”25 Yet, Sosa was in fact a major departure from Filartiga. By holding that the ATS is purely jurisdictional, the Sosa Court flatly rejected the premise of Filartiga and later cases that the ATS itself authorized private enforcement of international law norms. Even though the Court accepted that many such norms could be recognized as substantive federal common law, such norms could be enforceable, if at all, only through a cause of action that itself must be implied under federal common law.

The distinction is crucial as a matter of fundamental separation of powers principles. The Constitution grants legislative authority to Congress, meaning Congress normally defines the contours of substantive law and decides how that law will be enforced, whether privately or otherwise.26 Courts must enforce an express right of action unless there is a very good reason not to (e.g., the suit presents a non-justiciable political question). It also means that whether to imply a right under federal common law is subject to the courts’ cautious approach to both implied rights of action generally27 and to the scope of federal common law in particular.28 And as Sosa explained at length, “great caution”29 was especially appropriate in developing federal common law in the ATS context.

The Court explained that unlike when the ATS was enacted, now “there is a general understanding that the [common] law is not so much found or discovered as it is either made or created.”30 Thus, because formulating common law inherently involves policy judgment, “the general practice has been to look for legislative guidance

24. Id. at 732.
25. Id. (citing Filartiga, 630 F.2d at 890; Tel-Oren, 726 F.2d at 781 (Edwards, J., concurring); Marcos, 25 F.3d at 1475).
29. Sosa, 542 U.S. at 728.
30. Id. at 725.
before exercising innovative authority over substantive law.” 31 The Court stressed that it “ha[d] no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.” 32

Crucially, the Court recognized that not just the development of substantive law, but also of rights of action, is normally a legislative function: “this Court has recently and repeatedly” held that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases,” because the “creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.” 33 That was especially true under the ATS, because “the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” 34

Given all of this, one limitation on the scope of federal common law in this area was the requirement of universal acceptance and concrete definition previously accepted by lower courts. 35 The Court was clear, however, that this “requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action.” 36 On the contrary, this “demanding standard of definition . . . must be met to raise even the possibility of a private cause of action.” 37 And while the Court had no occasion to decide what the other limitations on the implied right of action might be, it offered no indication that the numerous reasons for caution it articulated in the opinion should not be as relevant in crafting the contours of a right of action under the ATS as they were in determining federal common law’s definitional requirements.

31. Id. at 726.
32. Id. at 728.
33. Id. at 727.
34. Id.
35. Id. at 732.
36. Id. at 733 n.21.
37. Id. at 738 n.30 (emphasis added).
III. EXTRATERRITORIALITY OF THE ATS UNDER THE FEDERAL COMMON LAW APPROACH

A. Lower Courts Rejected Extraterritoriality Arguments Based on a Pre-Sosa (Mis)Understanding of the ATS

Defendants (and the United States) began arguing that the "great caution" Sosa required in articulating the scope of rights of action under the ATS should lead courts to decline recognizing extraterritorial rights of action under federal common law, at least in aiding and abetting cases where the underlying conduct is that of a foreign sovereign—i.e., the issue eventually presented in Kiobel. Every court of appeals rejected that argument. Their analyses demonstrate those courts' failure to appreciate the major doctrinal shift brought about by Sosa—that the separation of powers principles that moved Sosa to exercise "great caution" in recognizing international law norms as substantive federal common law must also determine the circumstances under which that substantive law can be privately enforced.

For instance, the en banc Ninth Circuit held in Sarei v. Rio Tinto, PLC—a putative class action brought against a foreign corporation for allegedly aiding and abetting the human rights abuses of the government of Papua New Guinea during that country's civil war—that there was no extraterritorial bar to a right of action under the ATS, in part because the "norms being applied under the ATS are international, not domestic, ones, derived from international law." In a passage that could easily have been written as if Sosa had never been decided, the Court continued:

The ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place. It is no infringement on the sovereign authority of other nations, therefore, to adjudicate claims cognizable under the ATS, so long as the requirements for personal juris-

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39. See, e.g., Exxon Mobil, 654 F.3d 11 (D.C. Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 746 (9th Cir. 2011) (en banc); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011); Khulumani v. Barclay Nat. Bank, 504 F.3d 254 (2d Cir. 2007).
40. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 746 (9th Cir. 2011) (en banc).
41. Id. at 746.
diction are met.42

That explanation would make sense if the ATS had created a cause of action for enforcement of the international norms recognized under federal common law. But the Ninth Circuit failed to recognize that the cause of action itself must be implied under federal common law as well. It thus ignored Sosa’s admonition that the “creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.”43 It is one thing to say that foreign sovereigns should not be surprised to be subjected to legal norms that apply around the globe. It is quite another to say that private plaintiffs and their counsel should decide whether to seek a judicial declaration that a foreign sovereign has violated fundamental human rights norms. That numerous foreign sovereigns had in fact objected to the existence of ATS actions should have made that obvious.

The Seventh Circuit in Flomo v. Firestone National Rubber Co. gave a more cursory but substantively similar answer, based on the same failure to appreciate the shift from Filartiga to Sosa. In fact, the court’s misunderstanding of the nature of ATS actions was expressly stated in the opinion itself: Judge Posner, writing for the court, stated that the “United States has enacted legislation making violations of customary international law actionable in U.S. courts: it is the Alien Tort Statute.”44 That was right under Filartiga but wrong under Sosa—the ATS does not make violations of customary international law actionable in U.S. courts, but rather grants courts jurisdiction and authorizes them to fashion federal common law. That general mistake explains the court’s more specific errors concerning the extraterritoriality question. The court first rejected the defendant’s extraterritoriality argument because courts “have been applying the statute extraterritorially . . . since the beginning; no court to our knowledge has ever held that it doesn’t apply extraterritorially.”45 It is not clear what Judge Posner meant by “since the beginning”—the statute had barely been applied between 1789 and 1980, and never to conduct occurring within the territory of a foreign sovereign. And while it is true that no court had “ever held that it doesn’t apply extraterritorially,” that is because all the pre-Sosa

42. Id.
43. Sosa, 542 U.S. at 727.
44. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1022 (7th Cir. 2011).
45. Id. at 1025.
courts incorrectly viewed the ATS itself as providing a cause of action. Judge Posner made the same mistake.

The Flomo court also concluded that if the ATS did not apply extraterritorially, "the statute would be superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country." That argument could make sense if the ATS were a cause of action and the court were attempting to discern whether Congress intended it to apply extraterritorially, on the view that Congress would not create a superfluous private action. But again, the ATS is not a cause of action, and the relevant question is whether courts should imply a cause of action under federal common law in the first instance. If anything, the existence of sufficient alternative remedies under tort and criminal law is a reason to reject implying a cause of action under federal common law.

The D.C. Circuit in Doe v. Exxon Mobil Corp.—a suit against a domestic corporation for aiding and abetting the human rights abuses of a foreign sovereign—at least recognized that ATS actions must be implied under federal common law, but failed to recognize the implications of that point to the question presented. The court offered two arguments for why a federal common law action should be allowed in the circumstances of that case. It held that while the Sosa Court was presented with the argument that the ATS did not apply extraterritorially, no Justice adopted that position. But as noted earlier, Sosa did not consider any limitations on the ATS right of action because the rule of clear definition resolved the case. More important, the common law nature of the inquiry means that the existence of a right of action should depend on the circumstances. The defendants in Sosa were Mexican civilians who were allegedly hired by the U.S. Drug Enforcement Administration to abduct the plaintiff, and "who were not affiliated with either government." That an ATS action could apply extraterritorially in those circumstances does not mean it should also apply extraterritorially in an aiding and abetting case ultimately challenging the action of a foreign sovereign.

The Exxon Mobil court also relied on the fact that Congress had expressly enacted the Torture Victim Protection Act (TVPA), which provided an express, extraterritorial cause of action for certain

46. Id.
human rights norms (torture and extrajudicial killing).\textsuperscript{49} If anything, the TVPA should have cut against the D.C. Circuit's position. While the TVPA allows for extraterritorial private suits to enforce human rights norms, it also includes several major limitations on its scope. First, it requires plaintiffs to exhaust local remedies before bringing suit in the United States.\textsuperscript{50} Second, as the Exxon Mobil court itself recognized, the TVPA does not allow for suits against corporations, including for aiding and abetting.\textsuperscript{51} Those principles should have precluded the suit in Exxon Mobil. One would think that a judicially implied cause of action should, if anything, be narrower than one Congress enacted expressly; under no circumstances should it be broader.\textsuperscript{52} The question in Exxon Mobil should have been whether it was appropriate, under separation of powers principles, for the court to imply a private right of action by an alien against a private corporation for aiding and abetting the conduct of a foreign sovereign on its own territory against its own citizens. Even without any analogous congressional enactment, the answer should be no. The fact that there existed an analogous congressional enactment that would have precluded the suit should have only made the answer more clear.

\subsection*{B. Kiobel Continued Sosa's Federal Common Law Approach in Holding that the ATS Does Not Apply Extraterritorially}

Unlike the lower federal courts, Kiobel recognized the import of Sosa's federal common law holding and unanimously concluded that there was no right of action in the given circumstances.

The Court originally granted certiorari to review the Second Circuit's holding in Kiobel v. Royal Dutch Petroleum Co.,\textsuperscript{53} that there is no corporate ATS liability.\textsuperscript{54} But after oral argument on the corporate liability question, the Court called for supplemental briefing and argument on the extraterritorial scope of ATS actions. In re-

\begin{itemize}
\item \textsuperscript{49} Exxon Mobil, 654 F.3d at 26.
\item \textsuperscript{51} Exxon Mobil, 654 F.3d at 57-58. See also Mohamad v. Palestinian Authority, 132 U.S. 1702, 1705 (2012).
\item \textsuperscript{52} See, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) ("[A]n admiralty court [articulating federal common law] should look primarily to ... legislative enactments for policy guidance," keeping "strictly within the limits imposed by Congress").
\item \textsuperscript{53} Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).
\item \textsuperscript{54} \textit{Id.} at 148-49.
\end{itemize}
In response to that question, the defendants principally relied on the presumption against extraterritoriality that normally applies to the interpretation of statutes that regulate conduct, arguing that the ATS itself should not be read to apply in the territory of a foreign sovereign. But the Court explained that the ATS did not regulate conduct at all; it is "strictly jurisdictional." Nevertheless, following Sosa, the Court explained that the ATS "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law." And "the principles underlying the [presumption against extraterritoriality]"—i.e., avoiding clashes with foreign sovereigns—"similarly constrain courts considering causes of action that may be brought under the ATS." Most important, the Court emphasized "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." That is why the Sosa Court "repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns." And those concerns, "which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." Nor, the Court explained, does Sosa's rule of clear definition and universal acceptance ameliorate the problem: "As demonstrated by Congress' enactment of the [TVPA], identifying such a norm is only the beginning of defining a cause of action." The TVPA, the Court pointed out, not only defined the scope of the substantive rule but also other limitations on the cause of action, like who could be sued: "Each of these decisions carries with it significant foreign policy implications." The Court held that nothing in the ATS's history overcomes the conclusion that federal courts should not themselves imply extraterritorial causes of action with such serious foreign policy con-

55. Kiobel, 133 S. Ct. at 1664.
56. Id. (quoting Sosa, 542 U.S. at 713).
57. Id.
58. Id.
59. Id. (emphasis added).
60. Id.
61. Id. at 1165.
62. Id.
63. Id.
sequences, especially in light of "[r]ecent experience" demonstrating that extraterritorial ATS actions can cause significant "diplomatic strife." Accordingly, the Court held that "petitioners’ case seeking relief for violations of the law of nations occurring outside the United States is barred."65

While Justice Breyer’s concurrence disagreed with the Court’s approach based on the presumption against extraterritoriality, he too employed a common law approach to determine how closely related an ATS suit must be to U.S. interests such that it can be brought in federal court. Justice Breyer concluded that Kiobel could not proceed because, among other things, the defendants are foreign corporations, the plaintiffs are foreign nationals, the conduct took place abroad, and the defendants are alleged to have aided and abetted human rights abuses, not to have committed the abuses themselves.66

Thus, while the majority and concurring opinions differed in the doctrinal niceties, the Supreme Court (unlike the lower courts) understood the question of the ATS’s extraterritorial scope as principally one of separation of powers: namely, the extent of courts’ authority, absent congressional guidance, to imply a cause of action in the given circumstances.


Understanding the ATS’ extraterritorial scope as a separation of powers question concerning the authority of courts to imply a cause of action under the circumstances should help clarify how actions litigated in Kiobel’s wake are decided. As noted, Kiobel was a suit against a foreign defendant for aiding and abetting the human rights abuses of a foreign sovereign: similar cases have already been dismissed by lower courts.67 But ATS plaintiffs have argued that Kiobel does not preclude suits against domestic corporations for aiding and abetting the international law violations of foreign sovereigns.68 Defendants have objected based on Kiobel’s plain terms: any "case seeking relief for violations of the law of nations occurring outside

64. Id. at 1669.
65. Id.
66. Id. at 1677–78 (Breyer, J., concurring in the judgment).
67. See Sarei, 671 F.3d 736 (9th Cir. 2011).
68. See, e.g., Balintulo v. Daimler AG, 727 F.3d 174 (2d. Cir. 2013).
the United States is barred." 69

Even if Kiobel's terms themselves do not dispose of the question, 70 a proper federal common law analysis should. Whether the defendant is a U.S. corporation or a foreign one, a suit alleging that the defendant is secondarily liable for the human rights abuses of a foreign sovereign implicates the same concerns of interfering with foreign sovereignty—and, thus, the same adverse foreign policy consequences. Indeed, many of the cases objected to by foreign governments were suits against domestic companies, based on the suits' interference with foreign sovereigns' prerogative to resolve domestic disputes domestically. 71 Properly framed, the question for courts remains whether they should, without congressional guidance, imply a cause of action in these circumstances—i.e., a cause of action that would allow private plaintiffs to request a judgment from a U.S. court that a foreign government is a human rights abuser. Again, separation of powers principles vest a decision with such serious implications for U.S. foreign policy to Congress, not the courts.

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While the ATS can serve as a vehicle to recognizing international law norms as substantive federal law, the principal questions concerning the scope of ATS actions turn on consideration of federal common law and separation of powers principles. That was the principal holding in Sosa, and the driver of the unanimous result in Kiobel. Courts considering questions concerning the ATS' scope after Sosa did not seem to realize that basic point. Kiobel should make it impossible to avoid.

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69. Kiobel, 133 S. Ct. at 1669. Justice Breyer would apparently allow suits where a U.S. person or entity is a defendant, id. at 1670–71, although his opinion could be read to exclude aid and abet cases from the ATS's scope, id. at 1677–78.

70. The Second Circuit recently held in Balintulo that under Kiobel, "claims based on conduct occurring solely abroad cannot be adjudicated under the ATS," regardless of the defendant's corporate citizenship. Balintulo, 727 F.3d at 188.

71. See, e.g., Sosa, 542 U.S. at 733 n.1 (describing objections of the South African government to ATS apartheid litigation); Exxon Mobil, 654 F.3d at 77 (Kavanaugh, J., dissenting) (citing cases).