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Commentary on *Kiobel v. Royal Dutch Petroleum*

The *Kiobel* Presumption and Extraterritoriality

SARAH H. CLEVELAND*

With its modern rebirth in *Filartiga v. Pena-Irala*,¹ the Alien Tort Statute (ATS) held out a potentially transformative promise. By establishing a forum in the United States for a victim of torture that had occurred at the hands of a Paraguayan police inspector in Paraguay, the ATS offered to emancipate the state-centered Westphalian system from a narrow focus on territorial sovereignty, and move toward a more globalized community focused on the protection of universal values. The ATS recognized that modern human rights perpetrators, victims, and violations move easily across borders, and that transnational accountability for such violations is in the common interest of all humanity. “The torturer,” as the inaugural opinion in *Filartiga* put it, “has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”²

The Supreme Court’s recent decision in *Kiobel v. Royal Dutch Petroleum*³ dashed that broadest utopian vision. In asserting that causes of action under the ATS are limited by the domestic law presumption against extraterritorial application of statutes, Chief Justice John Roberts appeared to firmly reassert a highly traditionalist view of the integrity of sovereign territorial states. It was also a vi-

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1. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
2. *Id.* at 890.
3. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

sion that isolated the United States in the international system since, despite extensive briefing of international law issues, the opinion rested entirely on principles of U.S. domestic statutory interpretation. Ironically, the case arose from the activities of a multinational corporate conglomerate—Royal Dutch Petroleum, a company domiciled in the United Kingdom and the Netherlands, but with a global reach, including the Nigerian activities at issue in *Kiobel*.

The Chief Justice's attempt to trim the ATS's twenty-first century transnationalist sails with seventeenth-century concepts of sovereignty and territoriality, however, was not as sweeping as may first appear. For a variety of reasons, the presumption articulated by the Court is not a traditional presumption against extraterritoriality. Instead, it is a presumption for the ATS only—a "*Kiobel* presumption"—whose broad parameters may have less to do with "territory," and may preserve more of the transformational vision of the ATS than appears at first glance. The reading of this presumption that best reconciles the opinions in the case, the history and purpose of the ATS, and the interests of the United States, would recognize that extraterritorial claims that "touch and concern" the United States sufficiently to displace the *Kiobel* presumption can and should include claims involving perpetrators who are U.S. nationals or domiciled in the United States, and other suits implicating important U.S. national interests, including piracy and the United States' important interest in denying safe haven. Ultimately, the nature of the presumption that the Court applied and its rebuttal by claims that "touch and concern" the United States should allow for a range of ATS claims to continue to be brought, including suits like *Filartiga*.

I. THE *KIOBEL* PRESUMPTION

The most important part of the majority opinion in *Kiobel* is the final paragraph. Until that paragraph, the opinion suggests the Court is adopting a categorical prohibition on adjudication of ATS claims arising in a foreign country. That is, ATS claims abroad could not be adjudicated, whether or not the violations at issue were committed by U.S. persons or were subject to the exercise of universal jurisdiction, whether the foreign state consented or objected to the suit, or whether the litigation otherwise provoked friction with foreign states. The penultimate paragraph of the majority opinion, after all, states:

We therefore conclude that the presumption against territoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.

“[T]here is no clear indication of extraterritoriality here,” *Morrison*, 561 U.S. at ___, and petitioner’s case seeking relief for violations of the law of nations occurring outside the United States is barred.⁴

But this apparently unqualified assertion is followed immediately by the final paragraph, which, when read together with the separate concurrences, suggests the Court is actually deciding much less. The Chief Justice writes:

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. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.⁵

This passage immediately raises a number of interpretive questions, including regarding how constraining the limitation of the holding is to “these facts.” The Solicitor General had urged dismissal in a holding limited to circumstances like those in *Kiobel*.⁶ Strictly applied, such a position could limit the judgment in *Kiobel* to cases involving acts of a foreign corporation, alleged to have aided and abetted violations by a foreign sovereign, committed within the sovereign’s own territory, against its own nationals, and with no connection to the United States other than the plaintiffs’ residence and the defendant’s “mere corporate presence.”

The Chief Justice’s final paragraph, however, appears to want to establish a broader rule based on the relationship between the claims and the U.S. forum, such that ATS “claims” must “touch and concern” “the territory” of the United States sufficiently to rebut a presumption against extraterritoriality. But even this rule leaves open a number of questions regarding what must touch and concern the United States, how substantial the relationship must be, and whether the requisite contact is with U.S. “territory,” a U.S. interest, or something broader.

4. *Id.* at 1669 (alteration in original).

5. *Id.*

6. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 5, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter U.S. Amicus II]. See also *id.* at 13 (“In this case, foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign’s treatment of its own citizens in its own territory, without any connection to the United States beyond the residence of the named plaintiffs . . . and the corporate defendants’ presence . . .”).

From the majority holding, we know two things: that “mere corporate presence” of a foreign corporation in the United States is not enough to rebut the presumption and that the *Kiobel* plaintiffs’ status as political asylees and legal residents⁷ was insufficient to rebut the presumption. Most other issues remain subject to further judicial development and interpretation.

Much ink doubtless will be spilled by academics and litigants in trying to divine the meaning of the Chief Justice’s final paragraph, in light of Justice Kennedy’s equally opaque one-paragraph concurrence. My primary purpose here, however, is to focus on a different aspect of the majority opinion—the character of the “presumption against extraterritoriality” that the Court articulates in this case, and how that presumption should be understood in light of the various opinions and the somewhat unique context of the ATS.

The Court gives much lip service to classic articulations of the presumption against extraterritoriality. It quotes the leading *Morrison* opinion for the proposition that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”⁸ It notes that the function of the presumption is “to protect against unintended clashes” between U.S. and foreign law and to avoid “international discord,” and emphasizes “[t]he danger of unwarranted judicial interference in the conduct of foreign policy.”⁹ After holding that the presumption applies to the ATS, the Court further concludes that the presumption is not rebutted by any “clear indication” of extraterritorial application in the text or history of the ATS.¹⁰

The majority opinion, however, repeatedly makes clear that the Court is not, in fact, directly applying the classical canon against extraterritorial application of statutes to the ATS. Instead, it is applying “principles underlying the presumption against extraterritoriality,” and adapting these to the peculiar features of the ATS as part of the courts’ common law-making authority. This was also the position of the United States, which argued as amicus that the presumption against extraterritoriality is “not directly applicable to the fashioning of federal common law,” and thus the ATS, but that “the underlying principles counsel similar restraint in the judicial lawmak-

7. *Kiobel*, 133 S. Ct. at 1669.

8. *Id.* at 1664 (quoting *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

9. *Id.* (citation omitted).

10. Although Justice Breyer’s concurrence is persuasive in demonstrating that the ATS does clearly evidence an intent to apply extraterritorially, that issue is not my focus.

ing endeavor.”¹¹

A. Jurisdictional Statute

The Court makes this point clear in at least two ways. First, under the Court’s precedents, including *Morrison*, the presumption against extraterritoriality has traditionally applied to substantive and not jurisdictional statutes—i.e., to statutes “regulating conduct.” The Court acknowledges this, and quotes *Morrison* for the proposition that “the question of extraterritorial application was a ‘merits question,’ not a question of jurisdiction.”¹² The Court also concedes that the ATS is “strictly jurisdictional.”¹³ *Sosa* held that the ATS was a jurisdictional statute, enacted with the expectation that the common law would provide a cause of action through judicial law development.¹⁴ As the Chief Justice writes, the statute “does not directly regulate conduct or afford relief,” but “instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”¹⁵

Applying the classical canon against extraterritorial application of statutes to a purely jurisdictional provision would radically expand that canon into uncharted waters—a course which, if taken, would seem to warrant greater discussion by the Court. However, the Court does not purport to extend the application of the presumption against territoriality to jurisdictional statutes such as 28 U.S.C. § 1331 (federal question jurisdiction) or § 1332 (diversity jurisdiction).¹⁶ Instead, it concludes that “we think the *principles underlying the canon of interpretation* similarly constrain courts considering causes of action that may be brought under the ATS.”¹⁷ This statement appears to recognize that the Court is adopting a position akin to that of the United States government in this respect—i.e., that the presumption does not technically apply to the ATS because it is a “strictly jurisdictional” statute, but that “principles underlying” the presumption should inform a court’s crafting of the cause of action as

11. U.S. Amicus II, *supra* note 6, at 3.

12. *Kiobel*, 133 S. Ct. at 1664.

13. *Id.* at 1664 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)).

14. *Id.* at 1663.

15. *Id.* at 1664.

16. See William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC’Y INT’L L. PROC. 396, 399 n.33 (2011) (stating that application of the presumption to jurisdictional statutes “would be contrary to common practice”).

17. *Kiobel*, 133 S. Ct. at 1664 (emphasis added).

a matter of judicial common law-making authority under the ATS. The Court closes the discussion of the presumption by reiterating that “[t]he principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”¹⁸

B. Application on the High Seas

Second, this reading is further confirmed by the question presented and the Court’s analysis of the text, history, and purposes of the ATS. In that analysis, the Court recognizes that the ATS was understood to apply to piracy and other conduct on the high seas.

The question that the Court asked the litigants to address was not a classic question about extraterritoriality. The Court did not ask whether the ATS could be understood to address activity outside the United States, but “whether and under what circumstances courts may recognize a cause of action under the [ATS], for violations of the law of nations occurring within the territory of a sovereign other than the United States.”¹⁹

The presumption against extraterritoriality has generally meant that statutes do not apply beyond U.S. territory—whether on the high seas *or* in a foreign country. The Court concedes this point, citing *Sale v. Haitian Centers Council*,²⁰ and *Amerada Hess*,²¹ for the proposition that “[t]his Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application.”²² *Sale* addressed whether a U.S. immigration statute applied to Haitian migrants interdicted on the high seas, and the Court applied the presumption against the extraterritorial application of statutes to conclude that it did not. *Amerada Hess* likewise held that a provision of the Foreign Sovereign Immunities Act did not apply to the high seas.²³

The *Kiobel* majority, however, acknowledges that the ATS was originally understood to apply to acts of piracy,²⁴ and that “[p]iracy typically occurs on the high seas.”²⁵ The majority also

18. *Id.* at 1665 (emphasis added).

19. *Id.* at 1662.

20. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–74 (1993).

21. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989).

22. *Kiobel*, 133 S. Ct. at 1667.

23. *See Amerada Hess*, 488 U.S. 428.

24. *Kiobel*, 133 S. Ct. at 1666 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723–24 (2004)).

25. *Id.* at 1667.

recognizes that the ATS was understood to apply to acts on the high seas other than piracy. The 1795 opinion of Attorney General Bradford clearly viewed the ATS as applying to the conduct of U.S. nationals on the high seas who collaborated in a French attack on a British settlement in Sierra Leone. The only interpretive question the Court raises is whether Bradford's opinion also viewed the ATS as applying in the foreign territory.²⁶

The Court explains away the historical application of the ATS on the high seas by noting that claims adjudicating an act of piracy do not "overcome the presumption against application to conduct *in the territory of another sovereign*,"²⁷ and that the Bradford opinion "hardly suffices to counter the weighty concerns underlying the presumption" in that context.²⁸ This may distinguish the historical evidence for purposes of the question at issue in *Kiobel*, which involved only application of the ATS to foreign soil.²⁹ But the acknowledged applications to the high seas are uncomfortable for reconciling the statute with the traditional presumption against extraterritoriality.

A judgment that altered the traditional canon against extraterritoriality so as to allow U.S. statutes falling within the presumption to reach conduct on the high seas would radically extend the presumption against extraterritoriality. As the D.C. Circuit recently observed, a presumption that statutes apply on the high seas but do not apply in foreign countries would be "a novel canon of statutory construction, and not one of the settled 'background canons of interpretation of which Congress is presumptively aware' when it legislates."³⁰ It would suggest, among other things, that the holdings in *Sale* and *Amerada Hess* were incorrect. No member of the *Kiobel* Court, however, suggested that the majority was engaged in such an expansion of the canon.

This fact, together with the limited scope of the question presented and the application of the canon to a jurisdictional statute, confirms that the Court did not hold that the traditional canon against extraterritorial application of statutes itself applied to the ATS. In-

26. *Id.* at 1667–68.

27. *Id.* at 1666 (emphasis added). As Justice Breyer points out, however, an act of piracy implicates the jurisdiction of another sovereign whenever piracy occurs on a vessel under the flag of another state. *See infra* note 41 and accompanying text.

28. *Id.* at 1668.

29. *Id.* at 1668–69 (concluding that "[n]othing 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." (emphasis added)).

30. *Doe v. Exxon*, 654 F.3d 11, 22 (D.C. Cir. 2011) (quoting *Lockhart v. United States*, 546 U.S. 142, 148 (2005)).

deed, these same considerations led the executive branch to conclude in *Kiobel* that the canon against extraterritorial application of statutes did not *per se* apply to the ATS.³¹

C. International Law

Nor is the *Kiobel* Court's application of a presumption against extraterritoriality in any way mandated by international law. Despite extensive briefing of the exercises of extraterritorial jurisdiction allowed under international law,³² the majority declined to confront the international law implications of ATS jurisdiction. The closest the

31. The U.S. executive branch has taken various positions regarding extraterritorial application of the ATS over time, but had only relatively recently invoked the presumption against extraterritoriality as a limitation on the statute. As noted, in 1795 the Attorney General understood the ATS as applying at least on the high seas, and likely also on the territory that is now Sierra Leone. In 1980, the United States supported application of the statute in *Filartiga* to an act of torture committed in Paraguay against a Paraguayan national, when both the perpetrator and survivors were later found in the United States. The United States noted that “a refusal to recognize a private cause of action in these circumstances” could “seriously damage the credibility of our nation’s commitment to the protection of human rights.” Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), at 22–23 (quoted in U.S. Amicus II, at 19). In 1987, the United States argued that the ATS was limited to torts for which the United States might be held responsible, not by the presumption against extraterritoriality. Brief for the United States as Amicus Curiae at 15, *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (No. 86-2448). In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the United States supported claims of gross human rights violations committed by foreign nationals against foreign nationals in Bosnia and Herzegovina. Only in its briefing in *Sosa* and thereafter did the United States assert that the presumption against extraterritoriality should be understood to bar claims under the ATS for the conduct of foreign persons in foreign countries. See, e.g., Brief for the United States as Respondent Supporting Petitioner at 46–50, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339). In *Kiobel*, the United States again backed away from this position and stated that “the government urges the Court not to adopt such a categorical rule here.” U.S. Amicus II, *supra* note 6, at 22 n.11.

32. Some briefs before the Court invoked the decision of the International Court of Justice in the *Lotus* case for the proposition that absent any international law prohibition, a state may impose the civil remedies it wishes. Other litigants contended that international law prohibitions on prescriptive jurisdiction did not apply in the ATS context, because the ATS prescribes overseas conduct based on substantive standards established by universally applicable rules of international law, rather than under U.S. domestic law. Still others maintained that the ATS is an exercise of prescriptive jurisdiction, and thus its exercise is limited to circumstances in which international law allows the exercise of extraterritorial jurisdiction, including nationality, passive personality, protective, and universal jurisdiction. Finally, still others contended that international law does not recognize civil liability for universal jurisdiction crimes and that ATS jurisdiction for that purpose accordingly was not available.

Court comes to addressing international law is to state that its concerns regarding conflicts with foreign states are not diminished by the fact that claims can be brought under the ATS “only for alleged violations of international law norms that are ‘specific, universal, and obligatory.’”³³ The Court points to the Torture Victim Protection Act for the proposition that “identifying such a norm is only the beginning of defining a cause of action,” and that other considerations, such as the scope of liability, and rules of exhaustion and limitations, all carry “significant foreign policy implications.”³⁴ This suggests that the Court was of the view that, regardless what extraterritorial exercises of authority international law might *allow*, the ATS required further discipline and constraint. The U.S. domestic law presumption against extraterritoriality that the Court invoked instead is a precautionary canon that presumes that Congress intends to legislate more restrictively than international law requires.

Thus, despite the fact that the domestic law canon against extraterritoriality does not apply to the ATS itself, and that international law did not compel this result, the Court concluded that the principles underlying the canon against extraterritorial application of statutes should be taken into account by judges in shaping the common law cause of action under the ATS. Again, as the Court put it, “[t]he principles underlying the presumption against extraterritoriality . . . constrain courts exercising their power under the ATS.”³⁵

The distinction between the actual operation of the canon and application of its underlying principles is critical. Mere application of the canon’s underlying principles liberates the presumption against extraterritoriality from some of its strictures (including its non-application on the high seas and to jurisdictional statutes) without disrupting established doctrines. The distinction further indicates that the Court is applying principles underlying the canon, not as mandated by either domestic or international law, but rather as a *precautionary* or prudential measure to avoid conflict with foreign states in the exercise of ATS jurisdiction. Accordingly, it is these precautionary principles, rather than a rigid territorial prohibition, that should inform and shape the application of the *Kiobel* presumption. Finally, the Court’s approach makes clear that in applying the principles underlying the canon, courts have common law authority to shape and adapt those principles to accommodate the unique goals of the ATS—just as the *Kiobel* majority demonstrated in adapting the

33. *Kiobel*, 133 S. Ct. at 1665 (quoting *Sosa*, 542 U.S. at 732).

34. *Id.*

35. *Id.*

principles to the ATS.

II. TWO VIEWS OF STATUTORY PURPOSE

Oddly, in its consideration of the canon, the majority never grapples with the underlying purposes of the ATS—purposes that are also an awkward fit for a classical application of the presumption against extraterritoriality. Although there is only limited historical data directly evidencing the purpose of the ATS, over time, two competing visions of the purpose of the ATS have developed. One vision, which I call the “state responsibility” reading, views the central purpose of the statute as ensuring that U.S. nationals and persons acting on behalf of the United States do not cause harm to foreign nationals that cannot be remedied in U.S. courts. The primary function of the ATS, under this vision, is to provide a damages remedy to foreign nationals who are injured by U.S. actors in a manner that is inconsistent with international law, in order to avoid escalation and adverse foreign relations consequences for the United States. Advocates of this reading, including Professor Thomas Lee³⁶ and Professors Bellia and Clark,³⁷ view the primary purpose of the ATS as remedying conduct that could give rise to U.S. responsibility under international law. They point to incidents such as the Marbois Affair in Philadelphia, and the Blackstonian offenses of violations of safe passage and assaults on ambassadors, as paradigmatic circumstances that the ATS was designed to address.

The state responsibility interpretation of the ATS, however, does not comfortably capture the third form of conduct that Blackstone considered to be an “offense against the law of nations” that gave rise to individual liability—piracy. The Supreme Court has now recognized that acts of piracy on the high seas could be remedied under the ATS in both *Sosa* and *Kiobel*. But few, if any, acts of piracy could have been attributable to the United States, given rise to a perception of state responsibility, or otherwise threatened U.S. relations with foreign states. The scourge of piracy involved a qualitatively different concern. Piracy, as the only form of individual conduct subject to universal jurisdiction in the late eighteenth century,

36. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

37. Professors Bellia and Clark argue that “the ATS restricted suits to those against U.S. citizens but allowed aliens to sue for any intentional tort involving force against their person or personal property.” Anthony J. Bellia Jr. and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 448 (2011).

was conduct that was considered in the vital national interest of every state—including the United States—to suppress. As Blackstone put it, the pirate committed an “offense against the universal law of society,” such that “every community has a right . . . to inflict . . . punishment upon him.”³⁸

Advocates of an alternative, more universalist, reading of the ATS thus point to piracy, and the modern equivalents of piracy that international law now subjects to universal jurisdiction, as evidence that the ATS was intended to reach beyond state responsibility. Like piracy, torture, war crimes, and genocide are examples of conduct that is so universally condemned by international law that the law authorizes its punishment wherever the perpetrator is found, and which it is in the national interest of the United States to punish, including under the ATS.

The *Kiobel* majority does not meaningfully address either of these underlying purposes of the ATS, and with good reason. Neither reading supports applying a presumption against extraterritoriality to the ATS. Even the narrower state responsibility view of the ATS is not consistent with territorially limiting liability to actions within U.S. borders. As Justice Kagan observed in the second oral argument, an assault by a U.S. national on a French ambassador in London would implicate U.S. foreign relations interests no less than an assault in Philadelphia.³⁹ Either would give rise to U.S. responsibility to punish the conduct. Both could severely harm U.S. foreign relations if left unremedied. And in both cases, France would expect the United States to remedy the violation.

A presumption that restricted ATS-cognizable claims to those occurring on U.S. soil—or even to those that did not occur in the territory of another state, as *Kiobel* reframed the presumption—would not provide a remedy for any number of actions that would fall within the core purposes of the ATS. These would include attacks by U.S. persons on foreign embassies and diplomats, harms committed by U.S. corporations against foreign nationals, or any number of other situations implicating foreign policy. Few of these actions are likely to occur on the high seas. They will instead most likely occur in the United States or in the territory of a foreign state.

Ironically, then, applying a presumption against extraterritoriality is in tension with the statutory purpose, even if one’s goal is to construe the statute in a manner that will “protect against unintended

38. 4 WILLIAM BLACKSTONE, COMMENTARIES *71.

39. Transcript of Oral Argument at 29–30, *Kiobel*, 133 S. Ct. 1659 (2013) (No. 10-1491).

clashes” between U.S. and foreign law and “avoid international discord” and “[t]he danger of unwarranted judicial interference in the conduct of foreign policy.”⁴⁰ Application of a presumption against extraterritorially instead would hobble the ATS and prevent it from achieving precisely those goals with respect to conduct committed outside the United States. In this sense, it is the construction imposed by the *Kiobel* majority that could constitute “unwarranted judicial interference.”

Under the more universalist view of the ATS—which is the only reading that fully captures the statute’s application to piracy⁴¹—strict application of the canon against extraterritoriality makes even less sense. The application of the ATS to piracy raises serious questions why, if the statute applied to conduct subject to universal jurisdiction in 1789, it should not also apply to conduct that is equally subject to universal jurisdiction in 2013, such as genocide, torture, and war crimes. Some commentators, and the *Kiobel* majority, attempt to portray piracy as unique even among universal jurisdiction crimes, because piracy is committed outside the territory of any state and thus is less likely to provoke conflict with a foreign state. But this distinction is overblown, as Justice Breyer demonstrates.⁴² Acts of piracy patently fall under the jurisdiction of the sovereign state whose ship is attacked, as well as the state whose nationals are harmed. Under any ordinary conception of jurisdiction, those would be the states with authority to adjudicate and punish. Universal jurisdiction simply expands that authority to other states, which have no other jurisdictional nexus to the violation. And that same dynamic is true of any harm that is subject to universal jurisdiction today—some states will possess primary jurisdiction based on a direct nexus to their territory or their nationals, but as a matter of international law, any state may punish.

However, the canon against extraterritoriality does not apply, *in toto*, to the ATS, and the various opinions suggest that there is room for adapting the “principles underlying” the canon so as to preserve most of the core purposes of the ATS. The critical question, then, is how robustly those principles should be understood to operate in the ATS context, and how to read the “touch and concern” standard articulated by the Chief Justice for rebutting the operation of

40. *Kiobel*, 133 S. Ct. at 1664 (quoting *EEOC v. Arabian Am. Oil Co.*, 449 U.S. 244, 248 (1991)); *id.* (citation omitted).

41. *Id.* at 1671 (Breyer, J., concurring) (“Recognizing that Congress enacted the ATS to permit recovery of damages from pirates and others who violated basic international law norms . . . , *Sosa* essentially leads today’s judges to ask: Who are today’s pirates?”).

42. *Id.* at 1672–73.

those principles.

III. THE "TOUCH AND CONCERN" TEST

Returning now to that final paragraph of the majority opinion, we again ask what that test requires. For example, how much does rebutting the "*Kiobel* presumption" depend on conduct that actually touches and concerns the "*territory*" of the United States, and how much does it instead concern the underlying purposes of the presumption that the Court identifies—purposes that to some extent dovetail with the motivating purposes behind the ATS, including not provoking conflict with foreign interests? The majority does refer to touching and concerning "the territory" of the United States, but the conditions that could satisfy this are quite broad.

Conduct and harm can interact with territory in a wide variety of ways. Actions may be taken inside a territory, with the impact also felt inside. Actions may be taken inside a territory, with the impact outside the territory.⁴³ Actions may be taken outside a territory, but the effects felt inside the territory (giving rise to the concept of "effects jurisdiction"). Actions and impacts may be multifarious and mixed, with actions taken both inside and outside a territory, and the impact felt both inside and outside as well. Finally, actions may be taken outside a territory, with the impact also outside the territory. The latter was the situation in *Kiobel*, and it is the only one of these situations in which the conduct or impact would not touch and concern the territory of the United States.⁴⁴ The complexity of the interface between territory and actions can be exacerbated further if the actors are multinational corporations, for which relevant decisions and actions may be taken, and injuries occur, in multiple places. In any of these scenarios, if some aspect of the relevant conduct or harm occurs in the United States, the action could touch and concern the United States.

43. It is also well established that a state can be responsible under international law for acts occurring in its own territory that exposed an individual to harmful acts abroad. See, e.g., *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) (1989) (finding the United Kingdom would be responsible for extraditing an individual to death row in the United States).

44. U.S. domestic tort law recognizes that conduct giving rise to an injury may occur in multiple locations. For example, a product may be manufactured in place A, incorporated into another product in place B, and cause injury in place C. Depending on the law of the jurisdiction, the "tort" may be understood to have occurred in all three places, not just in the final location of the injury. See, e.g., *Gray v. Am. Radiator*, 176 N.E.2d 761 (Ill. 1961).

Furthermore, the opinion states that it is “the claim” that must touch and concern the United States, *not* “the conduct.” In other words, the concerns underlying the presumption would allow for considerations not limited to the locus of *conduct*.⁴⁵ This broader phrasing suggests that a suit may successfully rebut the *Kiobel* presumption if some aspect of the claim has significant implications for, or relationship to, the United States, even if the actual *conduct* giving rise to the violation occurs elsewhere. In particular, events occurring abroad that affect the national interests of the United States could well be understood to “touch and concern” the United States sufficiently to rebut the presumption. Examples would include conduct by U.S. persons abroad, whose conduct the United States has legal authority to regulate under international law principles of nationality jurisdiction.⁴⁶ Under this principle, although mere corporate presence was not enough in *Kiobel*, domicile or nationality of a corporation or an individual could be sufficient. Likewise, an object of important U.S. interests abroad, such as an embassy or military base, could qualify, such that an attack on an embassy that resulted in the deaths of embassy employees who were foreign nationals could also touch and concern the United States. *Kiobel* leaves all of these situations still on the table.

A rigid application of the canon against extraterritoriality might be understood to require that some, or all, of the conduct giving rise to a violation must “touch and concern” the *territory* of the United States. This appears to be the preferred reading of Justices Alito and Thomas, who express frustration in their concurrence that the majority opinion “leaves much unanswered.”⁴⁷ They would have applied a definitive territorial bar to the scope of the ATS, holding that an ATS claim would be barred by the presumption against extraterritoriality “*unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa’s requirements of defi-*

45. This aspect of *Kiobel* is also consistent with the Supreme Court’s decision in *Morrison*, which detached the presumption against extraterritoriality from the location of the conduct. The fraud alleged in *Morrison* occurred in the United States, but the Court nevertheless applied the presumption because it found that the focus of the Securities Exchange Act was on the location of the transaction affected by the fraud. See William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687, 690–91 (2011).

46. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987) (“[A] state has jurisdiction to prescribe law with respect to . . . the activities . . . of its nationals wherever located.”); cf. *Lubbe v. Cape plc*, [1998] CLC 1559 (C.A.), *aff’d* [2000] 1 WLR 1545 (H.L.) (appeal taken from Eng.) (suit against U.K. parent corporation in United Kingdom on behalf of South African asbestos workers).

47. *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring).

niteness and acceptance among civilized nations.”⁴⁸ In other words, these two Justices apparently would have required that *all* the elements of a violation of an international law norm that is actionable under the ATS must have been satisfied *inside the United States* in order for the claim to be actionable under the ATS. The relevant conduct as well as the injury would have to occur in the United States. This would be an extremely high territorial bar. Indeed, this standard seemingly would exclude even piracy or any other claims arising on the high seas—and thus is inconsistent with the majority opinion that Justices Alito and Thomas joined.

This territorially restricted reading clearly did not obtain a majority, however. That fact, and the reasoning of the other two concurring opinions, suggest that there may be significant flexibility in the circumstances that would “touch and concern” the United States sufficiently to rebut the *Kiobel* presumption.

Justice Kennedy’s opinion, in particular, makes clear that he believes some scope for extraterritorial application of the ATS remains. He observes that the majority opinion “is careful to leave open a number of significant questions regarding the reach and interpretation” of the ATS.⁴⁹ He notes that “[m]any serious concerns with respect to human rights abuses *committed abroad* have been addressed” by the Torture Victim Protection Act (TVPA), which establishes an express cause of action for extraterritorial acts of torture and extrajudicial killing.⁵⁰ He further observes that

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 of the presumption against extraterritorial application may require some further elaboration and explanation.⁵¹

Thus, Justice Kennedy does not consider the door to be closed to ATS cases arising abroad. His references to “human rights abuses committed abroad” and to the TVPA, which limits civil damages actions to violations committed under the authority or color of law of “*any foreign nation*,” suggest that he believes that claims that “touch and concern” the United States adequately to rebut the *Kiobel* presumption may include, in some circumstances, claims involving

48. *Id.* at 1670 (emphasis added).

49. *Id.* at 1669 (Kennedy, J., concurring).

50. *Id.*; 28 U.S.C. § 1350 (2006).

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

gross human rights violations committed by foreign nationals, against foreign nationals, on foreign soil so long as they have some greater nexus to the United States than the facts of *Kiobel*.

Justice Breyer's concurrence with Justices Ginsburg, Kagan, and Sotomayor suggests an alternative potential reading for the "touch and concern" test. Justice Breyer would not have relied on a presumption against extraterritoriality at all, which he found inappropriate for the ATS. Nevertheless, he offers a broader rationale for when a claim might sufficiently "touch and concern" the United States for the "presumption against extraterritoriality [to] be 'overcome.'"⁵² Invoking the purposes of the ATS, Justice Breyer identifies three circumstances that, in his view, would adequately implicate U.S. interests to rebut the *Kiobel* presumption:

(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.⁵³

These three categories, Justice Breyer indicates, are designed to honor the underlying purposes of the ATS of advancing U.S. national interests by punishing violations that could cause friction with other states or offend universal norms (such as piracy), while still constraining the statute sufficiently to avoid foreign policy conflicts or running afoul of international law. Justice Breyer's first category, based on territoriality jurisdiction under international law, is uncontroversial and consistent with the views of other members of the Court. His second category, where the offender is a U.S. national, captures the core purpose of the ATS that a rigid approach to extraterritoriality would cut off. As discussed above, offenses committed by U.S. citizens against foreign nationals (who are the only valid plaintiffs under the ATS) would fall squarely within the state responsibility view of the purposes of the ATS. Such actions clearly implicate U.S. interests and could provoke friction with foreign states. Principles of nationality jurisdiction under international law also clearly recognize the authority of the United States to prescribe and punish such conduct regardless where it occurs. Justice Breyer's reading of nationality jurisdiction as sufficiently "touching and con-

52. *Id.* at 1673 (Breyer, J., concurring).

53. *Id.* at 1674.

cerning” the United States to rebut the *Kiobel* presumption thus would remedy the distortive effect that a more restrictive approach to extraterritoriality would have on one of the core purposes of the ATS.

The most interesting and likely most controversial of Justice Breyer’s categories that would “touch and concern” the United States is the third, which might be called the *Filartiga* category. This category captures conduct by a defendant that “substantially and adversely affects an important American national interest,” including “preventing the United States from becoming a safe harbor” for a “common enemy of mankind.” The third category captures the traditional violation of piracy, recognizing the significant national interest that the United States (and all states) has in punishing that conduct, regardless where it occurs. Although the piracy example could suggest that the United States also has an “important national interest” in punishing any conduct that constitutes a universal jurisdiction crime, regardless where it occurs, Justice Breyer’s category at a minimum would capture such persons who later remain in the United States for a sufficient period to suggest that the country is a safe harbor. The paradigmatic example of such a case, of course, was *Filartiga*, where the torturer later came to the United States, and remained nine months while overstaying a tourist visa. Justice Kennedy had suggested an interest in preserving the *Filartiga* precedent in the first *Kiobel* oral argument,⁵⁴ and his brief concurrence can be understood as holding open that possibility. Justice Breyer’s opinion more explicitly provides a theory and rationale for fitting the *Filartiga* precedent within the touch and concern framework. What is not clear, however, is how long individuals must stay in the United States in order to give rise to the impression of harboring. Must they be permanent residents, as in *Samantar*?⁵⁵ Or have merely overstayed a visa, as in *Filartiga*?⁵⁶ Or simply be present outside the U.N. headquarters district, as in *Kadic*?⁵⁷

Interestingly, the three categories that Justice Breyer would find adequate to satisfy the majority’s “touch and concern” test echo the circumstances under which the U.S. government urged the Su-

54. Transcript of Oral Argument at 13–14, *Kiobel*, 133 S. Ct. 1659 (2013) (No. 10-1491).

55. *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (ATS suit alleging harms committed in Somalia by a Somali national who later became a U.S. legal permanent resident), *petition for cert. filed* (No. 11-1479).

56. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

57. *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995) (ATS suit alleging violations in former Yugoslavia by Serbian national who was served outside the Headquarters District in New York while visiting the United States for a U.N. meeting).

preme Court to preserve the possibility of ATS jurisdiction. In its second amicus brief to the Court, the United States observed that “allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States.”⁵⁸ The United States articulated a state responsibility view of the purposes of the statute, urging the Court to be guided by the statute’s “legislative purpose to permit a tort remedy . . . for law of nations violations for which the aggrieved foreign nation could hold the United States accountable.”⁵⁹ The government asked the Court not to “resolve across the board” the circumstances under which an ATS cause of action could address conduct occurring abroad.⁶⁰ It underscored that “there are circumstances in which a court may recognize a federal common law cause of action based on the ATS for extraterritorial violations of the law of nations,”⁶¹ and warned in particular that “the Court should not articulate a categorical rule foreclosing any such application of the ATS.”⁶² This included *Filartiga*, which the United States portrayed as arising “in circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator.”⁶³ The government pointed to the TVPA’s cause of action that now addresses the situation in *Filartiga*, and stated that “[o]ther claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise.”⁶⁴

The government also acknowledged that piracy was a “paradigmatic tort[]” that the First Congress would have recognized as an actionable violation of the law of nations,⁶⁵ and pointed to the 1795 Bradford opinion and other sources for the proposition that “the circumstances in which a cause of action in a U.S. court might have been deemed appropriate to adjudicate an action alleging that a person violated the law of nations . . . would not necessarily have been limited exclusively to conduct occurring in U.S. territory.”⁶⁶ By contrast, under the circumstances in *Kiobel*, the government suggested the United States could not be thought responsible in the eyes of

58. U.S. Amicus II, *supra* note 6, at 4–5, 13.

59. *Id.* at 3.

60. *Id.* at 4.

61. *Id.* at 6.

62. *Id.* at 4.

63. *Id.*

64. *Id.* at 5.

65. *Id.* at 6.

66. *Id.* at 9.

the international community for affording a remedy for the company's actions, while the nations directly concerned could.⁶⁷ This overall approach, the government urged, was consistent with the predominant purpose of the ATS to "avoid[, not provok[e], conflicts with other nations."⁶⁸ The government urged that:

[t]he Court need not decide whether a cause of action should be created in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas.⁶⁹

In short, the government's position supports a reading of the various *Kiobel* opinions that would cabin the presumption against extraterritoriality to the underlying principles of avoiding conflict with foreign states. It would preserve flexibility to recognize that extraterritorial claims that "touch and concern" the United States sufficiently to displace the *Kiobel* presumption can and should include claims involving: conduct in the United States, perpetrators who are nationals or domiciled in the United States, and other implications of U.S. national interests, including piracy and the United States' important interest in denying safe haven. Early returns suggest that this, broadly speaking, is in fact how a number of courts are reading the *Kiobel* presumption and the grounds for its rebuttal.⁷⁰

67. *Id.* at 20.

68. *Id.* at 16 (Bork, J., concurring) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984)).

69. *Id.* at 21.

70. See, e.g., *Mwani v. Bin Laden*, No. 99-125 (JMF), 2013 WL 2325266, at *4 (D.D.C. May 29, 2013) (finding that ATS claims by Kenyan victims against Osama Bin Laden and Al Qaeda for the bombing of the U.S. embassy in Kenya, which was plotted in part within the United States, "'touched and concerned' the United States with 'sufficient force' to displace the presumption"); *Ahmed v. Magan*, No. 2:10-cv-00342, slip op. at 2, 7 (S.D. Ohio Aug. 20, 2013) (report and recommendation) (holding that the Somali defendant's permanent residence in the United States rebuts the *Kiobel* presumption for ATS claims involving human rights violations against a Somali national in Somalia, and awarding damages); *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 WL 4130756, at *2 (D. Mass. Aug. 14, 2013) (upholding ATS claims by Ugandan NGO alleging anti-LGBT activity in the United States and Uganda, and concluding that the *Kiobel* presumption does not apply "where Defendant is a citizen of the United States and where his offensive conduct is alleged to have occurred, in substantial part, within this country"). But see, *Balintulo v. Daimler AG*, No. 09-2778-cv(L), slip op. at 2, 4 (2d Cir. Aug. 21, 2013) (dismissing claims against U.S. and German companies for apartheid-era crimes in South Africa and mischaracterizing *Kiobel* as holding "unambiguous[ly]" that "federal courts may not, under the ATS, recognize common-law causes of action for conduct occurring in the

CONCLUSION

To be sure, the various opinions in *Kiobel* are not a model of clarity, and confusion over their import is likely to prevail for some time. Careful consideration of the various opinions in the case, however, indicates that, as in *Sosa*, while the most sweeping universalist application of the ATS has no doubt been trimmed, the door to some extraterritorial ATS claims remains ajar. The reading of the *Kiobel* majority that is most consistent with the opinion of Justice Kennedy, the interests of the United States articulated by the government, and broadly accepted purposes of the ATS should preserve its ability to continue advancing, to some extent, *Filartiga*'s promise of a borderless regime of accountability as a matter of last resort for egregious human rights violators.

territory of another sovereign”), *reh’g en banc denied*; *Al Shimari v. CACI Int’l, Inc.*, No. 09-1335, slip op. at 1, 8 (E.D. Va. June 25, 2013) (dismissing ATS claims against a U.S. company for human rights violations in Abu Ghraib prison in Iraq on the grounds that “the acts giving rise to their tort claims occurred exclusively in Iraq,” and misreading *Kiobel* as holding that “the presumption against extraterritoriality is only rebuttable by legislative act”).