

# What We Don't Talk about When We Talk about Extraterritoriality: Kiobel and the Conflict of Laws

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# ESSAY

## WHAT WE DON'T TALK ABOUT WHEN WE TALK ABOUT EXTRATERRITORIALITY: *KIOBEL* AND THE CONFLICT OF LAWS

*Louise Weinberg*<sup>†</sup>

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INTRODUCTION<sup>1</sup>

How . . . incredible it is that we should be [involved] here because of a quarrel in a far-away country between people of whom we know nothing.

—Neville Chamberlain<sup>2</sup>

Thirty-four years ago, in the celebrated case of *Filartiga v. Pena-Irala*,<sup>3</sup> a federal appeals court famously<sup>4</sup> asserted jurisdiction over a case with which the United States apparently had no connection. *Filartiga* was an action for the death by torture of a Paraguayan, in Paraguay, at the hands of a Paraguayan official. Under *Filartiga* a private right to sue for damages, in cases alleging violations of international norms of human rights, became an established<sup>5</sup> and rather prideful feature<sup>6</sup> of American justice. But last Term the Supreme Court all but killed *Filartiga*—and did so *unanimously*. The case was *Kiobel v. Royal Dutch Petroleum Co.*<sup>7</sup>

Deploying an old canon of statutory construction—a presumptive rule against extraterritorial application of acts of Congress—the *Kiobel* Court held that tortious violations of international law are not adjudicable in the United States if occurring within the territory of a foreign sovereign.<sup>8</sup> Yet under *Filartiga* and its progeny,<sup>9</sup> the Alien Tort Statute (ATS),<sup>10</sup> an ancient and rather mysterious jurisdictional grant, opens

<sup>1</sup> There is a flood of late writing on *Kiobel*, but I am finding no technical analyses, such as are offered in this Essay, bringing to bear on *Kiobel* the existing jurisprudence on the conflict of laws and the power of the forum in transnational cases. For the year 2013 alone, a limited but representative selection might include the symposium on *Kiobel* at 28 MD. J. INT'L L. 1 (2013); Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional Universalism in Retreat*, 2012–2013 CATO SUP. CT. REV. 149 (2013); Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329 (2013); Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601 (2013).

<sup>2</sup> National Broadcast by Neville Chamberlain (Sept. 27, 1938), in NEVILLE CHAMBERLAIN, IN SEARCH OF PEACE 174 (1939).

<sup>3</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>4</sup> *Filartiga* is perhaps the most famous federal court of appeals case in history. Cf. RICHARD A. WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS 286 (2004). For *Filartiga's* increasing inspiration to foreign countries, see *infra* Parts V, VI.

<sup>5</sup> See Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 466 nn.13–15 (1997).

<sup>6</sup> See *infra* Part V.

<sup>7</sup> 133 S. Ct. 1659 (2013).

<sup>8</sup> *Kiobel*, 133 S. Ct. at 1665.

<sup>9</sup> See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 743–44 (9th Cir. 2011), *vacated and remanded in light of* *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 Fed. App'x 7 (D.C. Cir. 2013); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).

<sup>10</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (“[T]he district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts,

American courts<sup>11</sup> to universal jurisdiction over tortious violations of international law, wherever occurring.<sup>12</sup> The law applied in these “alien tort” cases “arises under” federal law for purposes of Article III<sup>13</sup> because the law applied in these cases is federal. International norms, when sufficiently “specific, universal, and obligatory,”<sup>14</sup> as construed, adapted, and applied in our courts as our own policy are subsumed as federal common law.<sup>15</sup>

At stake in *Kiobel* was the possibility of American justice for egregious violations of human rights.<sup>16</sup> Far more dramatic and compelling critiques of *Kiobel* than this Essay offers can be expected.<sup>17</sup> My commentary here, rather, is technical, doctrinal, and interest-analytic. My effort is simply to bring to bear on the case some perspectives from the law of conflict of laws and the law of courts. These analyses strongly suggest that the unanimous decision in *Kiobel* was hardly unavoidable,<sup>18</sup> as the reluctantly concurring *Kiobel* minority apparently believed.

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as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”). For the statutory history, see Jennifer Elsea, *The Alien Tort Statute: Legislative History and Executive Branch Views*, a Congressional Research Service Report (Oct. 2, 2003), <http://research.policyarchive.org/1864.pdf>. The notable modern addition is the Torture Victim Protection Act of 1991, codified as a note to the Alien Tort Statute, which is today codified as amended at 28 U.S.C. § 1350.

<sup>11</sup> The original Alien Tort Statute explicitly provided for concurrent federal and state jurisdiction. The modern codification is silent on the point (“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.” 28 U.S.C. § 1350), but the default rule is that federal jurisdiction is always concurrent with that of the state courts unless Congress explicitly makes federal jurisdiction exclusive. *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990); HENRY FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 8–11 (1973); *see also* THE FEDERALIST NO. 82 (A. Hamilton).

<sup>12</sup> *See generally* PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* (2012).

<sup>13</sup> U.S. Const. art. III, § 2 (“The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”).

<sup>14</sup> This formulation seems to have appeared first in *In re Estate of Marcos*, 25 F.3d at 1475.

<sup>15</sup> *The Paquete Habana*, 175 U.S. 677, 680–81, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .”). *See* recently the fine exposition in Jordan J. Paust, *Kiobel, Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 VA. J. INT’L L. DIG. 18, 19 (2012).

<sup>16</sup> *Id.*

<sup>17</sup> For a particularly compelling example *see* Pierre N. Leval, *Distant Genocides*, 38 YALE J. INT’L L. 231, 231 (2013).

<sup>18</sup> It is of some interest in this regard that in January 2013, the Netherlands Supreme Court at the Hague held an oil company, Shell Nigeria, liable to Nigerian farmers for environmental damage caused by pipeline leaks, the damage occurring within the territory of a foreign sovereign, Nigeria. *See* Pieter H.F. Bekker & Brittany Prelogar, *Dutch Court Orders Shell Nigeria to Compensate Nigerians for Oil Pollution Damage Caused by Third-Party Sabotage in Nigeria*, STEPTOE & JOHNSON LLP, 1–2 (Jan. 30, 2013), <http://www.steptoel.com/publications-newsletter-714.html>. *Kiobel* was handed down only three months later, unanimously holding *against* Nigerian farmers and in favor of an affiliate of the same oil com-

Let me briefly summarize a few of these points by way of introduction.

To begin with, in his eagerness to extinguish *Filartiga*, Chief Justice John Roberts authored an obviously manipulative opinion for the Court. Roberts clearly understood that a canon of statutory construction cannot be imposed in a blanket way upon a grant of jurisdiction.<sup>19</sup> That the Court even considered so doing can be attributed to a self-inflicted wound. The Court had mistakenly held in 2004 in *Sosa v. Alvarez-Machain*<sup>20</sup> that the Alien Tort Statute was solely jurisdictional.<sup>21</sup> That mistake, in turn, can be chalked up to the Court's failure to recognize the nature of the class of statutes of which the Alien Tort Statute is a member.<sup>22</sup> If the Justices had been alerted to the nature of such texts, the explicit cause of action provided by the Alien Tort Statute might have become visible to them.

The *Kiobel* Court, moreover, did not consider the bearing of existing Supreme Court jurisprudence on the power and duty of an American trial court in the circumstances. American courts of general jurisdiction are under a duty, subject only to exceptions warranted in an individual case, to sit within their jurisdiction as written, and to open their doors to cases within that jurisdiction as written, no matter where the underlying events occurred.<sup>23</sup> Although apprised by plaintiff's counsel of the principle that guides courts in transitory actions on extraterritorial facts,<sup>24</sup> the Court chose to overlook this prin-

pany, on the very ground rejected by the Hague court—that the acts complained of took place in a foreign country. See *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662–63, 1669 (2013). To be sure, in the case at the Hague, the Dutch affiliate of Shell was obviously within Dutch regulatory power. Moreover, liability was imposed for common negligence rather than for human rights violations. However, corporate liability was imposed as primary liability, rather than on a theory of aiding and abetting, a secondary liability. Furthermore, liability was imposed notwithstanding that the oil leaks complained of were caused by sabotage by third parties. See *Bekker & Prelogar*, *supra*, at 18 (reporting that the Dutch court found that Shell Nigeria had breached its duty of care by failing to take sufficient measures to prevent sabotage by third persons to submerged pipelines so near the plaintiffs' village).

<sup>19</sup> *Kiobel*, 133 S. Ct. at 1664 (Roberts, C.J.) (“We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. . . . The ATS, on the other hand, is ‘strictly jurisdictional.’ It does not directly regulate conduct or afford relief.”).

<sup>20</sup> 542 U.S. 692 (2004).

<sup>21</sup> *Sosa*, 542 U.S. at 724 (Souter, J.) (“[T]he ATS is a jurisdictional statute creating no new causes of action . . .”).

<sup>22</sup> See *infra* Part IV.

<sup>23</sup> See *infra* Part VIII.

<sup>24</sup> Transcript of Oral Argument I, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 628670, at \*8 (Feb. 28, 2012) (“MR. HOFFMAN [for Petitioners]: . . . [W]e have a principle of transitory torts, and . . . I believe other countries have that principle as well. . . . [F]rom *Mostyn v. Fabrigas* and before, *Mostyn v. Fabrigas* being the 1774 case by Lord Mansfield talking about transitory tort, the courts clearly have the jurisdiction to adjudicate those kinds of tort claims.”).

ciple and seemed unaware of its constitutional underpinnings. As a result, the Court failed to give due weight to the general duty this principle imposes on American courts.<sup>25</sup>

The main arguments of this Essay have to do more specifically with the law of conflict of laws as applied to the particular facts of *Kiobel*. Notwithstanding that everybody connected with the case—all of the Justices, the United States as amicus, virtually all commentators, and the parties themselves—assumed that both parties in *Kiobel* were foreign, this assumption turns out to have been unwarranted.<sup>26</sup> Once the facts are given their actual value, foundational Supreme Court cases on constitutional control of choices of law kick in and point to governmental interests calling for a very different result.<sup>27</sup>

The Essay concludes with its main argument—that *Kiobel* was wrongly decided *even if the Court were right about the facts*. Justice Stephen Breyer, the author of the minority concurrence in *Kiobel*, did suggest a possible national interest in adjudicating *Kiobel*, but neither he nor any of the other Justices saw the overriding national interest in trying the case, and indeed in alien tort litigation generally. This national interest has nothing to do with the affiliations of the parties, or the concept of “significant contacts.” Even in the total absence of American territorial contacts with a case, this national interest should have sustained *Kiobel*—and *Filartiga* with it.<sup>28</sup>

## I

### A DISTANT ATROCITY

The *Kiobel* plaintiffs’ story begins during the Abacha dictatorship in Nigeria in the early 1990s. Drilling for oil had already blighted much of the landscape at the Niger Delta.<sup>29</sup> Shell, the largest of the foreign oil companies drilling in Nigeria, was moving deeper into the delta’s back country. Subsistence farmers were clustered in villages there, peoples of the Ogoni tribes.<sup>30</sup> Trees were felled on lands on which they had dwelled from time immemorial. Their streams were

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<sup>25</sup> See *infra* Part VIII.

<sup>26</sup> See *infra* Part X.A–B.

<sup>27</sup> See *infra* Part X.

<sup>28</sup> See *infra* CONCLUSION.

<sup>29</sup> See, e.g., John Vidal, *Niger Delta Oil Spills Clean-up Will Take 30 Years, says UN*, THE GUARDIAN (Aug. 4, 2011), <http://www.theguardian.com/environment/2011/aug/04/niger-delta-oil-spill-clean-up-un> (“Devastating oil spills in the Niger delta over the past five decades will cost \$1bn to rectify and take up to 30 years to clean up.”).

<sup>30</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662 (2013) (“Petitioners were residents of Ogoniland, an area of 250 square miles located in the Niger delta area of Nigeria and populated by roughly half a million people.”); see also Howard W. French, *Nigeria Accused of a 2-Year War on Ethnic Group*, N.Y. TIMES (Mar. 28, 1995), <http://www.nytimes.com/1995/03/28/world/nigeria-accused-of-a-2-year-war-on-ethnic-group.html?pagewanted=all&src=pm>.

becoming polluted.<sup>31</sup> They protested. Environmentalists and journalists rushed to the delta. At the instigation of Shell, General Abacha ordered environmentalist leaders and reporters jailed.<sup>32</sup> But the protests continued, and Shell demanded an end to them. With Abacha's help Shell recruited Nigerian soldiers and mercenaries to do the job, permitting them to use Shell's facilities as their base of operations,<sup>33</sup> and paid, fed, and housed them.<sup>34</sup> There ensued a two-year genocidal campaign of terror, killing, rape, torture, arson, and pillage<sup>35</sup>—a veritable Conradian horror.<sup>36</sup> Villages were leveled and inhabitants murdered. Hundreds of villagers were displaced. A few Ogoni were able to flee, among them Esther Kiobel.

Granted asylum in America, eventually Kiobel and other Nigerian refugees brought suit.<sup>37</sup> They sought damages for wrongful death, torture, personal injuries, and loss of property. Jurisdiction was pleaded under the Alien Tort Statute.<sup>38</sup> This statute was originally part of the First Judiciary Act of 1789.<sup>39</sup> Its current codification<sup>40</sup> still

<sup>31</sup> *Kiobel*, 133 S. Ct. at 1662.

<sup>32</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 456 F. Supp. 2d 457, 464 (S.D.N.Y. 2006).

<sup>33</sup> A characterization of Shell Nigeria's conduct as "aiding and abetting" seems inadequate in view of the direct responsibility suggested by these allegations. *Kiobel*, 133 S. Ct. at 1662. The resort to "aiding and abetting" probably reflects counsel's recognition that direct corporate liability seems unlikely to survive in the Supreme Court in any context, whether extraterritorial or not. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008) (holding that aiding and abetting securities fraud is not compensable in damages, at least where the abettor did not personally benefit; reasoning that although the civil action for fraud in the purchase and sale of securities was judicially created, in the silence of Congress it would be going too far for judges to extend this body of federal common law to secondary liability). Yet an abettor of securities fraud could hardly be surprised by the imposition of liability, since the aider and abettor of the crime of securities fraud is punishable under the general provisions of 18 U.S.C. § 2, and could hardly be surprised even in the absence of criminal sanction.

<sup>34</sup> *Kiobel*, 133 S. Ct. at 1662–63 (“[Shell] aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use [Shell’s] property as a staging ground for attacks.”).

<sup>35</sup> *Kiobel*, 133 S. Ct. at 1662 (“Throughout the early 1990’s, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property.”).

<sup>36</sup> French, *supra* note 30.

<sup>37</sup> With the assistance of environmentalists, eventually litigation was also initiated in the Netherlands. *See* Liesbeth Enneking, *The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case*, 10 *UTRECHT L. REV.* 44, 45 (2014). In the Netherlands case, there has been a victory at the Hague for one of the Nigerians, in a stunning civil suit arguably following the lead of *Filartiga*. This is referenced by Enneking as the “Dutch Shell Nigeria Case.” For developments in the case, see *supra* note 18.

<sup>38</sup> *Kiobel*, 133 S. Ct. at 1663.

<sup>39</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

<sup>40</sup> 28 U.S.C. § 1350 (2012) (“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.”). Because federal jurisdiction is not exclusive in terms, the presumption is that this jurisdiction is concurrent.

vests concurrent jurisdiction in federal and state courts<sup>41</sup> over a single rather curious form of action. The action must be brought “by an alien”; it must be for “a tort only”; and the tort must be “in violation of the law of nations.” The statute is often said to have lain dormant for its peculiarities.<sup>42</sup> On its face it seemed problematic, creating a *private* right to sue for a violation of *public* law. Still, although courts tended to dismiss,<sup>43</sup> before *Filartiga* at least twenty-two cases were brought in state and federal courts.<sup>44</sup>

It was not until 1980, in *Filartiga*,<sup>45</sup> that the Alien Tort Statute came into substantial modern use. Under *Filartiga* the plain language of the Alien Tort Statute is taken seriously. On its face the statute authorizes American jurisdiction over a foreigner’s claim of a tortious violation of international law—that is, over a federal common-law action for damages for an abuse of human rights. Under *Filartiga*, this jurisdiction is universal. In other words, under the Alien Tort Statute, a claim lies even, or especially, for violations occurring abroad—even, or especially, in cases between foreigners.<sup>46</sup>

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<sup>41</sup> See *supra* note 11; *Tafflin*, 493 U.S. at 461 (“It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.” (internal quotation marks omitted)).

<sup>42</sup> See, e.g., Simon Baughen, *Holding Corporations to Account: Crafting ATS Suits in the UK?*, 2 BRIT. J. AM. LEGAL STUD. 533, 536 (2013) (“[The ATS] lay dormant for nearly two centuries.”); Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 NW. J. INT’L L. & BUS. 475, 476 (2013) (referring to the ATS as “a long dormant, founding-era statute”).

<sup>43</sup> For an alien tort litigation in the years immediately preceding *Filartiga*, see *Huynh Thi Anh v. Levi*, 586 F.2d 625, 627 (6th Cir. 1978) (involving attempt to gain custody of children evacuated from Vietnam in “Operation Babylift”). For somewhat earlier discussion of the uncertainties surrounding alien tort litigation, see *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 (9th Cir. 1975).

<sup>44</sup> A cursory Westlaw search reveals only two federal actions brought under the statute before 1940. See *O’Reilly De Camara v. Brooke*, 209 U.S. 45 (1908); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793). Some interest in alien tort litigation seems to have arisen after World War II. Between 1945 and 1980, the year *Filartiga* came down, there were by my count some fourteen cases in federal courts and six in state courts.

<sup>45</sup> *Filartiga*, 630 F.2d at 880. Although Judge Kaufman suggested in *Filartiga* that the law to be applied might be that of Paraguay, the place of injury in that case, *Filartiga* actions came to be governed by federal common law, since they require application of international norms, which, as construed and adapted in our courts, are subsumed as federal common law. The *Paquete Habana*, 175 U.S. 677, 700 (1900). This federalization of international “norms” may be related to the positivistic insights that law emanates from a particular sovereign, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”); *The Western Maid*, 257 U.S. 419, 432 (1922) (Holmes, J.) (“[T]here is no mystic overlaw to which even the United States must bow.”).

<sup>46</sup> See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 462 (1989) (“[C]ases brought on essentially the same set of facts as *Filartiga*—actions by a torture victim against the torturer or the torturer’s superior officer where the defendant was within the personal jurisdiction of the court—have generally succeeded.”); see generally American Society of International Law, *International Litigation*

In *Filartiga* itself, for example, a Paraguayan family living in the United States, and applying for political asylum here, filed suit in federal district court against a former Paraguayan official who had overstayed his visa and was living in the United States also.<sup>47</sup> The family alleged that the official had tortured and killed their son in Paraguay. They sought damages. The Second Circuit made news by reversing the judgment of dismissal entered by the district court below; seeing the Alien Tort Statute as a grant of universal jurisdiction on its face; and applying it to torture by an official of a foreign government.<sup>48</sup>

*Filartiga*, like a modern “We hold these truths to be self-evident,” electrified international lawyers, and indeed is increasingly influencing writers and judges throughout the Western world.<sup>49</sup> It was on *Filartiga* and its progeny<sup>50</sup> that the *Kiobel* plaintiffs relied.

## II

### THE COURT STEPS IN: *SOSA*

The Supreme Court first dealt with *Filartiga* twenty-four years after it was decided, in *Sosa v. Alvarez-Machain*.<sup>51</sup> In *Sosa*, a Mexican doctor, Alvarez-Machain, allegedly assisted in the torture and killing of an American Drug Enforcement Agency official.<sup>52</sup> The good doctor<sup>53</sup> was kidnapped by Drug Enforcement Agency operatives, with the assistance of Sosa, a Mexican former police officer, for prosecution in the United States.<sup>54</sup> The question whether the kidnapping comprised a sufficient offense to the Fourth Amendment to require dismissal of the prosecution came before the Supreme Court in 1992; the Court held that it did not.<sup>55</sup> The prosecution went forward. To the mortification of the federal agents, Alvarez-Machain came away with a di-

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*In Practice: Alien Tort And Other Claims Before National Courts*, 94 AM. SOC'Y INT'L L. PROC. 149 (2000).

<sup>47</sup> *Filartiga*, 630 F.2d at 878–79.

<sup>48</sup> *Id.* at 887.

<sup>49</sup> See, e.g., Burley, *supra* note 46, at 461–62 (“Scholars and human rights lawyers hailed *Filartiga* for . . . opening up a new field of human rights litigation.”).

<sup>50</sup> For well-known examples of *Filartiga*-style litigation, see *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 743–44 (9th Cir. 2011), *vacated and remanded in light of Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 Fed. App'x 7 (D.C. Cir. 2013); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005, 1005 (1996); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 496–97 (9th Cir. 1992).

<sup>51</sup> 542 U.S. 692 (2004).

<sup>52</sup> *Id.* at 697.

<sup>53</sup> The characterization in the text is appropriately snide, since Alvarez-Machain had allegedly worked to keep a federal agent alive so that he could be tortured longer. “Alvarez-Machain . . . was present at the house and acted to prolong the agent’s life in order to extend the interrogation and torture.” *Id.* One suspects that this life-prolonging feature of his alleged crime may have confused the jury.

<sup>54</sup> *Id.* at 698.

<sup>55</sup> *U.S. v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

rected verdict of acquittal.<sup>56</sup> The government had not made out its case. The doctor then turned around and sued the American officials, and Sosa as well. He pleaded, *inter alia*,<sup>57</sup> a claim under the Alien Tort Statute.

In dealing with the alien tort claim, the *Sosa* Court assumed the existence of *Filartiga*, thus seeming to set its imprimatur on the case.<sup>58</sup> But the apparent quid pro quo for this acknowledgment took the form of new limits on the kinds of violations of international law that could be adjudicated as federal common-law claims within the jurisdiction of the Alien Tort Statute.<sup>59</sup> All the Justices agreed in *Sosa*, and agreed again in *Kiobel*, that the First Congress intended the Alien Tort Statute to be a grant of jurisdiction only.<sup>60</sup> But this conclusion seems a stretch in view of the plain language of the statute. Curious as this tort-free interpretation appears, it was taken seriously, perhaps because it figured in the famed debate between Judge Bork and Judge Edwards in the *Tel-Oren* case in the D.C. Circuit<sup>61</sup> and found considerable acceptance among scholars.<sup>62</sup>

Notwithstanding Justice Souter's adoption in *Sosa* of the "jurisdiction-only" view of the Alien Tort Statute—perhaps a sop to the conservative wing—he proceeded to take the position that the statute did, in fact, at least contemplate an action in tort in violation of interna-

<sup>56</sup> See *Sosa*, 542 U.S. at 698.

<sup>57</sup> There were additional claims against the federal officials under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), and under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for kidnapping, wrongful arrest, and wrongful detention. The discussions of the FTCA and *Bivens* claims in *Sosa* are beyond the scope of this Essay.

<sup>58</sup> *Sosa*, 542 U.S. at 725 (“[N]o development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.”).

<sup>59</sup> *Id.* (arguing for a “restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind”).

<sup>60</sup> *Id.* at 713 (“As enacted in 1789, the ATS gave the district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law.”); *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1663 (2013) (“The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action.”).

<sup>61</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984). Judge Bork argued that litigation under the Alien Tort Statute could proceed only if Congress enacted a cause of action cognizable within the jurisdiction granted. *Id.* at 778. This was an extreme interpretation that would nullify the jurisdiction granted. Judge Edwards took the text of the statute more literally and saw that the statute explicitly provided an action for a tortious violation of international law. *Id.* at 782.

<sup>62</sup> For early support of Judge Edwards's view that the ATS includes a cause of action, see Anthony d'Amato, *What Does Tel-Oren Tell Lawyers?: Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 100–04 (1985). For the view that the Alien Tort Statute is now jurisdictional only because *Sosa* so held, and that earlier readings of the statute to the contrary are irrelevant, see William Casto, *Sosa v. Alvarez-Machain and the End of History*, 43 GEO. J. INT'L L. 1001, 1001–05 (2012).

tional law. But here, too, he conceded to the conservatives that the only torts cognizable under the statute were those few that had the “definiteness” and “acceptance among civilized nations” of actions contemplated in the early Republic.<sup>63</sup> None of this backing and filling was called for. Although the Alien Tort Statute is undoubtedly an explicit grant of jurisdiction, it also clearly provides a cause of action, albeit in general terms. I surmise that the Court discounted the emphatic substantive statutory language only in part because the Alien Tort Statute originated in the Judiciary Act of 1789, a statute governing courts,<sup>64</sup> and appears today in the Judicial Code among other jurisdictional grants.<sup>65</sup> The Court’s mistake was in failing to recognize the class of statutes to which the Alien Tort Statute belongs. This is the common class of statutory causes of action that require further pleading particularizing the statutory tort. For example, nobody today would deny that the Civil Rights Act of 1871<sup>66</sup> creates “a cause of action” for a state or local official’s deprivation of a federal right. But it requires further identification of the right of which the complainant allegedly was “deprived”—some specific right enumerated in the Bill of Rights, or some unenumerated but fundamental right, or some specific statutory right.<sup>67</sup> Similarly, nobody would deny that a state wrongful death act creates a cause of action for wrongful death, even though it requires the additional pleading of the nature of the “wrong” causing the death. Negligence? Battery? Product defect? And so on.

This double-pleading feature can also be seen, analogously, in certain actions under the Constitution. A complainant relying on one of the Due Process Clauses must plead that clause, but in addition, except for cases alleging procedural faults or faulty choices of law, must plead the specific liberty of which the complainant allegedly was deprived—typically a violation of some more specific constitutional right, like the right to speak freely.

Grants of specific heads of subject-matter jurisdiction are examples of the class precisely because they identify the general subject matter of the claims cognizable within the jurisdiction granted. But typically they do so without specifying particular claims. For example,

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<sup>63</sup> *Sosa*, 542 U.S. at 732.

<sup>64</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77; *see supra* note 10.

<sup>65</sup> 28 U.S.C. § 1350 (2012); *see supra* note 40.

<sup>66</sup> Pub. L. No. 42-22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

<sup>67</sup> *Id.* (referring in general terms to the tort of subjecting a person to a “deprivation” of an unidentified statutory or constitutional right: “Every person who, under color of [law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).

the Constitution, Article III, extends federal judicial power to “all Cases of admiralty and maritime jurisdiction,” and Congress has vested that jurisdiction in the first instance in the district courts,<sup>68</sup> but neither the constitutional nor the statutory grant enumerates the specific wrongs remediable in admiralty.<sup>69</sup> Such grants can include the requisites and bounds of the jurisdiction granted—often territorial bounds, as in a state legislature’s grant of probate jurisdiction to a court sitting in each county. Others, of course, are often quite specific. A family court may have statutory jurisdiction over cases of divorce and child custody. But many subject-matter grants require additional pleading of a particular wrong. The Alien Tort Statute is a jurisdictional grant that describes with seeming specificity the exact nature of the causes cognizable within the jurisdiction granted. The action within this jurisdiction must be “for a tort” and “only” for a tort—no action in contract or replevin will lie. Furthermore, the tort must be some “*violation of the law of nations.*” Notwithstanding this degree of detail, it becomes necessary to plead what the particular violation was. Torture? Piracy? Slave trafficking? Genocide? Legislatures often frame statutory causes of action as grants of jurisdiction to the courts that will try them.<sup>70</sup> If their reference to the subject matter requires further pleading of the nature of the particular claim they fall squarely within the class of texts I have been describing. Against this background, it is untenable to read the Alien Tort Statute as a jurisdictional grant only, particularly in view of the unusually explicit cause of action it describes, an action “for a tort only in violation of the law of nations.” Both the *Sosa* and *Kiobel* Courts sensibly came round to the view that alien tort jurisdiction at least *contemplates* a private right of action for violation of international law.

Justice Souter recognized this extra pleading feature in *Sosa*, in effect, when he pointed out that, since the jurisdiction was for a tort, it was not meant to be pointless.<sup>71</sup> From his inquiry into the original intention of the First Congress and the general understandings obtaining in the early Republic, he concluded that the chief concern underlying the grant of jurisdiction was to provide a forum for local failures of respect to foreign diplomats on our soil, including disregard of letters of safe passage.<sup>72</sup> Souter cited Blackstone for the view

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<sup>68</sup> Today codified at 28 U.S.C. § 1333.

<sup>69</sup> U.S. CONST. art. III, § 2.

<sup>70</sup> See, e.g., 28 U.S.C. § 1338 (granting the district courts jurisdiction to hear claims arising under patent, copyright, or trademark law).

<sup>71</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 (2004) (“[T]he First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action . . .”).

<sup>72</sup> *Id.* at 719.

that piracy also was universally triable.<sup>73</sup> Slave trading might be another such instance.<sup>74</sup> Those were also the examples mentioned in *Filartiga*.<sup>75</sup>

Justice Souter also sought to win his majority in *Sosa* with a bow to the conservatives' widely shared but mystifying view that *Filartiga* is to be impugned because it is federal case law. Souter argued that "extending" *Filartiga* to violations of human rights too unlike those contemplated by the First Congress could offend something in *Erie*, or at any rate could offend modern understandings of *Erie*; these modern understandings, he wrote, require courts to be chary in providing federal answers to federal questions. Instead, judges should leave that task to legislatures.<sup>76</sup> But of course, a question of the meaning and extent of an international norm is more particularly a question of federal common law in our courts, as they construe and adapt or reject those norms.<sup>77</sup> And Article III extends the whole of the judicial power to all federal questions.<sup>78</sup> Nothing in *Erie* repeals Article III or in any other way delegitimizes federal case law.<sup>79</sup>

At some cost, then, to more rational views, in *Sosa* Justice Souter was able at least to put *Filartiga* on life support, barely saving it by reading it, as appeared at the time, very narrowly. Justice Scalia, concurring, protested that the Court's opinion was not a limitation on

<sup>73</sup> *Id.* at 714.

<sup>74</sup> *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

<sup>75</sup> *Filartiga*, 630 F.2d at 890 ("[T]he torturer has become . . . like the pirate and slave trader before him . . ."). For the view that the original alien tort jurisdiction was also intended for violations of human rights generally, see Jordan J. Paust, Kiobel, *Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 VA. J. INT'L L. DIG. 18, 22–23 (2012).

<sup>76</sup> *Sosa*, 542 U.S. at 726–27 ("[A]long with [a] conceptual development in understanding [the] common law has come an equally significant rethinking of the role of the federal courts in making it." (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))). "[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." However, *Erie* specifically held, in analogously describing the authority of state law, that it could make no difference to a court whether the law to be applied in civil cases is decisional or enacted. *Erie*, 304 U.S. at 78 ("And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."). It is a central holding of *Erie* that case law is not to be put at a discount. In common experience, case law is *superior* to statutory law. The Supreme Court of the United States has the last word on the meaning of federal law, and is not to be disregarded; and a state's supreme court has the last word on the meaning of state law, and is not to be disregarded.

<sup>77</sup> See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.").

<sup>78</sup> U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . .").

<sup>79</sup> See generally Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

*Filartiga* but an open invitation.<sup>80</sup> Scalia's prediction has been substantially borne out. Lawyers apparently took less notice of Justice Souter's reluctant attempts to cabin *Filartiga* than of the fact of the Supreme Court's acceptance of *Filartiga*. After *Sosa*, numerous new cases were filed.<sup>81</sup>

So matters stood when, in *Kiobel*, the unanimous Court, like blind Samson, brought the *Filartiga* edifice crashing down.

### III

#### KIOBEL: AN UNANTICIPATED QUESTION

*Filartiga* cases against private corporations rather than government officials have always been watched with special anxiety.<sup>82</sup> They often settle before trial.<sup>83</sup> Although a *Filartiga* filing was likely to result in dismissal, a company could certainly fear that some jury might impose billions in damages upon it for aiding and abetting the misdeeds of authorities in a badly governed country, putting the company's corporate reputations under a cloud simply for doing business there. The claim in *Kiobel* was one of this latter class, a claim against Dutch, British, and Nigerian companies for aiding and abetting a government—Nigeria—in its violations of human rights. The plaintiffs' perception that the Roberts Court would not impose direct *Filartiga* liability on a private corporation probably accounts for the pleading of aiding and abetting, although the Court is no friend of secondary liability either.<sup>84</sup> Indeed, the Supreme Court first heard oral argu-

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<sup>80</sup> *Sosa*, 542 U.S. at 750–51 (Scalia, J., concurring) (“[I]n this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.”). However, Justice Scalia, a chief antagonist of federal common-law claims, has no hesitation in ignoring his dislike of federal common law when it comes to fashioning new federal common-law defenses. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (Scalia, J.) (arguing that in cases that involve “uniquely federal interests” federal common law can “displace” state law).

<sup>81</sup> Preliminary research reveals approximately fifty post-2004 district court cases citing both *Filartiga* and *Sosa*. Allowing for estimated irrelevant instances, there have been at least forty filings.

<sup>82</sup> Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 Nw. J. INT'L L. & BUS. 475, 495 (2013).

<sup>83</sup> See *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 116 (2d Cir. 2010) (Jacobs, C.J.) (“[A] variety of issues unique to ATS litigation . . . resulting [in] complexity and uncertainty . . . has led many defendants to settle ATS claims prior to trial.”); see also Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 715 (2012) (stating that while many ATS suits brought against companies ultimately went to final decision, many settled). For post-*Kiobel* speculation that the question of corporate liability remains open, see *Bauman v. Daimler Chrysler Corp.*, 644 F.3d 909, 923 (9th Cir. 2011), *rev'd*, 134 S. Ct. 746 (2014); see generally Peter Henner, *When Is a Corporation a Person? When It Wants To Be. Will Kiobel End Alien Tort Statute Litigation?* 12 WYO. L. REV. 303 (2012).

<sup>84</sup> See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (denying an action for aiding and abetting securities fraud against persons who did

ment in *Kiobel* solely on the question whether the *Filartiga* cause of action encompassed suits against corporate defendants.<sup>85</sup> Numerous anxious briefs were filed on behalf of the defendant companies. It was during that first argument that Justice Alito put a wholly unanticipated question:

The first sentence in your brief . . . is really striking: “This case was filed by 12 Nigerian plaintiffs who alleged that Respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship in Nigeria between 1992 and 1995.” What does a case like that—what business does a case like that have in the courts of the United States?<sup>86</sup>

Justice Alito’s question seems to have transfixed the Court. What possible interest *could* the United States have in adjudicating a case in which all three of the kinds of contacts that “count” had nothing to do with the United States? The plaintiffs were native Nigerians. The defendant was a Dutch corporation. And the alleged atrocities were perpetrated in Nigeria. This is the triply foreign configuration referred to in oral argument as “foreign-cubed.”<sup>87</sup> What *national interest* could possibly justify American courts in taking hold of such a case?

The Supreme Court ordered reargument of this new question.<sup>88</sup> The Court was free to frame the question as having to do, broadly speaking, with the existence *vel non* of some national interest in adjudicating a case like *Kiobel*. But the Court framed the new question as an old-fashioned one about national territory rather than a modern one about governmental interest. The parties were directed to argue the question “[w]hether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>89</sup>

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not profit from but simply cooperated in the fraud); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (holding that no action can lie for aiding and abetting securities fraud).

<sup>85</sup> See Transcript of Oral Argument I, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 628670, at \*13–14 (Feb. 28, 2012). Although the Supreme Court held nongovernmental organizations to be improper defendants in litigation over alleged torture by officials of the Palestinian Authority in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1704 (2012), that action was not brought under the Alien Tort Statute. For late discussion, see generally Alison Bensimon, *Corporate Liability under the Alien Tort Statute: Can Corporations Have Their Cake and Eat it Too?* 10 LOY. U. CHI. INT’L L. REV. 199, 210 (2013).

<sup>86</sup> 2012 WL 628670, at \*11.

<sup>87</sup> Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 4486095, at \*13 (Oct. 1, 2012).

<sup>88</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 132 S. Ct. 1738, 1738 (2012) (Mem.). It is worth emphasizing that this belated issue had been neither briefed nor argued, and was not part of any judgment below. The Supreme Court nevertheless did not remand, apparently assuming that the facts were, in effect, stipulated. *But see infra* Part X.

<sup>89</sup> 132 S. Ct. at 1738 (internal citations omitted).

*Kiobel* involved facts (as the Court saw them) roughly like those of *Filartiga*: foreign plaintiffs,<sup>90</sup> foreign defendants,<sup>91</sup> and a foreign atrocity.<sup>92</sup> But *Filartiga* had been an action against a foreign official, not a private corporation. The only issue decided by the court of appeals in *Kiobel* was that pesky question of corporate liability *vel non* in alien tort.<sup>93</sup> The court of appeals had not reached the further question, whether alien tort litigation against a corporation could proceed on a theory of aiding and abetting. The district court, for its part, had rejected several of the *Kiobel* plaintiffs' claims, but it had not done so on territorial grounds.<sup>94</sup> In short, neither the parties nor the courts below had seen *Kiobel* as presenting a problem of extraterritoriality. The reargument, then, was on a question neither briefed nor argued previously—an issue not considered in the courts below: whether an American court was empowered to hear cases on wholly foreign facts. Thus revised, *Kiobel* posed an obvious threat to the survival of *Filartiga*.<sup>95</sup>

Suddenly the case became one of great moment, obviously threatening to all alien tort litigation in this country. Solicitor General Verilli would argue as amicus for the United States in support of the *Kiobel* plaintiffs.

#### IV

#### THE *KIOBEL* OPINIONS

When the Court held that the *Kiobel* case, based as it was on events arising within the territory of another sovereign, could not be tried in this country,<sup>96</sup> the weight of the decision fell with destructive

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<sup>90</sup> These were several refugees from Nigeria who had been granted asylum here. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1663 (2013).

<sup>91</sup> The three named defendants were essentially alter egos of the same company, one of which had been superceded by another, each wholly owned by the third, and all ultimately owned by the Shell Group. See *infra* Part X.B.

<sup>92</sup> But see *infra* Part X.A–B.

<sup>93</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 117 (2d Cir. 2010).

<sup>94</sup> See *generally id.* (dismissing claims for destruction of property, forced exile, and extrajudicial killing; sustaining claims for torture, arbitrary detention, and unspecified crimes against humanity).

<sup>95</sup> For presentiments of the danger *Kiobel* would present for *Filartiga*, see Ian Binnie, *Judging the Judges: "May They Boldly Go Where Ivan Rand Went Before"*, 26 CAN. J. L. & JURIS. 5, 18 (2013); Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1090 & nn.141–43 (2013); Leval, *supra* note 17, at 249. The question of the extraterritorial reach of alien tort actions had been expressly reserved in the only earlier Supreme Court review of such actions, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–13 (2004), along with an equally blinkered reservation of the question whether such actions should require exhaustion of local remedies, *id.* at 733 n.21. For thoughtful post-*Sosa* concern about restrictions on *Filartiga* actions, see Childress, *supra* note 83, at 712–15.

<sup>96</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1660 (2013).

force on *Filartiga*<sup>97</sup>—on American alien-tort litigation all together. One of the shocking features of this enormity was that the Court perpetrated it unanimously.<sup>98</sup> The Court held that this result was required by a hoary canon of statutory construction—a presumptive rule against extraterritorial application of an act of Congress. The Chief Justice, writing for the Court, offered arguments about the importance of this presumptive rule; about the national interests justifying the rule; and about the consequences of failure to apply it.<sup>99</sup> But he did not consider the importance of *Filartiga*; the national interests in *Filartiga*-style litigation; or the consequences of shutting that litigation down.

Chief Justice Roberts could not very well argue that the statutory references to “an alien,” “tort,” “violation,” and “the law of nations,” were an insufficient indication of the nature of the claims cognizable within the jurisdiction.<sup>100</sup> He simply declared that no case concerning events occurring within the territory of a foreign sovereign could be triable in this country,<sup>101</sup> untroubled by the fact that such a rule could apply even where both parties are affiliated with the United States. To be sure, the Court had also put the new question for decision in *Kiobel* without reference to the affiliations of the parties. In retrospect one can see that the question from the beginning was freighted with its own inevitable, sweepingly broad answer.

As many writers will have pointed out by the time you read this,<sup>102</sup> the Roberts Court’s new territorialism in a major transnational case

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<sup>97</sup> The threat *Kiobel* posed for *Filartiga* was sufficiently obvious at the outset that Dolly Filartiga herself had joined a brief amicus in support of the *Kiobel* petitioners. See Brief for Amici Curiae Abukar Hassan Ahmed et al., *Kiobel v. Royal Dutch Petrol. Co.* (No. 10-1491), 2012 WL 2165343, at \*1.

<sup>98</sup> The ineffectual hand-wringing of the concurring minority Justices, to be discussed *infra* this Part, should not distract the observer from the wrongness of the decision.

<sup>99</sup> For recent approval of *Kiobel*, redeemed by a fine discussion of the intellectual history of the rule against extraterritoriality, see Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671 (2014).

<sup>100</sup> In his concurrence, Justice Breyer tried to argue that in these ways the statute could be construed as contemplating application to extraterritorial events, as did the early use of the statute against pirates. *Id.* at 1672.

<sup>101</sup> *Id.* at 1669 (Roberts, C.J.) (“We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption . . . and petitioners’ case seeking relief for violations of the law of nations occurring outside the United States is barred.”).

<sup>102</sup> See, e.g., Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 69 (2009) (arguing that common decisions on issues ranging from personal jurisdiction to choice of law all have implications for global governance). In the context of commercial cases, see the valuable discussion in Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 4–6 (2008) (urging nations with strong court systems to entertain foreign litigants). For discussion of transnational corporate criminal liabilities, see generally Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011) (analyzing, among other things, U.S. prosecutions against foreign actors).

seems remarkably retrograde when considered in light of the modern reality that we live in a globalized world; that our national interests are global in scope; and that litigation necessarily arises touching American interests abroad. The Court is collapsing the global emanations of the many ramified spheres of American interest into a single planisphere,<sup>103</sup> and compressing that into the confined shape of the United States on a map, with a bulge for our territorial waters. This is the diminished America the Court saw in the 2010 *Morrison* case,<sup>104</sup> “presumptively” limiting securities fraud litigation—a much more extensive item on federal dockets than alien tort cases—to domestic transactions.<sup>105</sup> As in *Morrison*, the *Kiobel* Court relied, without qualification or embarrassment, on the case of *EEOC v. Arabian American Oil*, better known as *Aramco*,<sup>106</sup> a case so wrong that it was promptly repudiated by Congress.<sup>107</sup>

Yet I would caution humanitarians not to fault the Court too strenuously for deciding *Kiobel* on some such ground. Of course the Court’s territorialism was outdated, a lazy pasting over of a case calling for analysis of the governmental interest of the United States in adjudicating the particular cause of action in the particular case. But a more interest-analytic approach might have led the Court to strike down the Alien Tort Statute as *unconstitutional* as applied on wholly

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<sup>103</sup> Andrew Marvell, *The Definition of Love*, in METAPHYSICAL LYRICS & POEMS OF THE SEVENTEENTH CENTURY 77 (Herbert J.C. Grierson ed., 1921):

Unless the giddy Heaven fall,  
And earth some new Convulsion tear;  
And, us to joyn, the World should all  
Be cramp’d into a *Planisphere*.

<sup>104</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (employing a near-conclusive presumption against extraterritorial application of acts of Congress with respect to securities fraud litigation). For excellent discussion of the Supreme Court’s imposition of *ex ante* door-closing rules as affecting the regulation of globalized commerce, see David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41 (2014).

<sup>105</sup> *Morrison*, 561 U.S. at 267 (confining the territorial reach of the anti-fraud provision (section 10(b)) of the Securities Exchange Act of 1934 to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities”). Congress rather promptly legislated a partial override of *Morrison*, securing the powers of the Securities and Exchange Commission, at least, to deal with “extraterritorial” securities fraud. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). On the effect of *Morrison* on criminal cases, see generally David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases after Morrison and Kiobel*, 45 LOY. U. CHI. L. J. 96 (2013).

<sup>106</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013) (citing *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991)); *Morrison*, 561 U.S. at 255 (same).

<sup>107</sup> Civil Rights Act of 1991, § 109, Pub. L. No. 102-66, 105 Stat. 1071, 42 U.S.C. §§ 2000e(f), 2000e-1(b)–(c) (overriding *Aramco* prospectively). *Aramco* had removed the protections of American civil rights, employment, and labor laws from women, gays, and racial minorities seeking to qualify for posts in intolerant and repressive countries, like Saudi Arabia.

extraterritorial facts,<sup>108</sup> a holding that would have rendered *Kiobel* substantially unamenable to legislative revision.<sup>109</sup> The constitutional question was all too available. That is because only an identified governmental interest could supply the rational basis that due process requires, at a minimum, not only of assertions of subject-matter jurisdiction, but of all governmental action,<sup>110</sup> including choices of law. And the Court was unable to see any national interest in the case at all. For those who would like to entertain a hope of legislative revision, it is fortunate that the *Kiobel* Court's inability to identify such an interest was diverted to a territorial shibboleth.

One could have wished that the Chief Justice's opinion for the *Kiobel* Court had less of an appearance of manipulation to suit the work at hand. Recall that the statute the Chief Justice purported to construe was held purely jurisdictional in *Sosa*.<sup>111</sup> It was held not to provide a cause of action.<sup>112</sup> All the Justices in *Kiobel* reaffirmed and insisted on this rather disregardful reading.<sup>113</sup> Now consider that a canon of statutory construction is not readily applied to a jurisdictional grant, particularly a federal jurisdictional grant.

The Supreme Court is created by the Constitution, but all other Article III courts are created exclusively by Congress.<sup>114</sup> In other words, federal jurisdiction is always written. It is always statutory. Federal courts are therefore familiarly described as courts of limited jurisdiction. They can sit only within the written limits of some statute granting jurisdiction, and all statutory grants of jurisdiction must fall within one of the enumerated heads of jurisdiction to which the judi-

<sup>108</sup> *Cf.* *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (Brandeis, J.). In *Dick*, the Court struck down Texas's application of its own law under the Due Process Clause of the Fourteenth Amendment. Texas had increased the liability of the defendants although, in Brandeis's view, the case had nothing to do with Texas. Brandeis reasoned that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* at 411. For discussion of the body of law of which *Dick* is the foundation, see *infra* Part IX.

<sup>109</sup> The D.C. Circuit reached the due process question lurking in *Kiobel* in reviewing the prosecution of a Somali piracy abettor in *U.S. v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013) (holding that prosecution for acts committed outside the United States did not violate due process).

<sup>110</sup> Weinberg, *supra* note 95 (locating early examples of rationality review in Supreme Court cases on choice of law; arguing that governmental power arises from the identified governmental interests that provide the rational bases of law); Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291 (2012) (tracing prevailing modes of constitutional analysis to early cases on due process control of choices of law).

<sup>111</sup> *Sosa*, 542 U.S. at 724.

<sup>112</sup> *Id.* at 738.

<sup>113</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1661–62 (2013).

<sup>114</sup> U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

cial power is extended in Article III. Moreover, a federal court sits within its statutory grant of jurisdiction to the full extent of that jurisdiction. Even a challenge to a federal court's subject-matter jurisdiction cannot deprive it of its power to adjudicate the challenge. Statutory limits may be construed and interpreted as applied in particular cases, of course, and exceptions to the jurisdiction may be found in particular cases. But courts—federal courts certainly—may not invent blanket limits upon their jurisdictional grants when there are none. Whatever defenses to its jurisdiction a federal court may see fit to apply in a particular case, only Congress can limit the jurisdiction of federal courts in a blanket way. Legislatures familiarly place explicit territorial limits on a court's jurisdiction themselves, when that is what is intended, as when a probate court is designated as sitting in a certain county. But obviously that court cannot limit its own jurisdiction to the town in which it sits. It must sit as a probate court for the county, as its jurisdictional authorization mandates. If the legislature does not designate the territorial limits of a court's jurisdiction, there are none.

In part for this reason, Chief Justice Roberts became willing, but only in a back-handed way, to credit the ATS at long last with providing a cause of action—the “tort . . . in violation of the law of nations”—that the statute obviously does provide. He declared, “The question presented is whether and under what circumstances courts may recognize a *cause of action* under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>115</sup> He went on, “The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.”<sup>116</sup> By this language, Roberts recognized the statutory cause of action that had existed all along. But he put the focus on a problem, as he saw it, of extraterritoriality, as if it were an explicit statutory limit. By this means he could avoid acknowledging that he was attempting to apply a canon of construction to what he had always insisted was a jurisdictional grant, and therefore incapable of blanket judicial limitation. But in dodging Scylla, alas, Roberts came smack up against Charybdis. How could a canon of *statutory* construction apply to *case* law?—to a nonstatutory cause of action like the action opened up by *Filartiga*?

Roberts had to switch gears again. Still trying to base the conclusion he wanted to reach on something other than judicial fiat, he pitched his conclusion, in the end, on a line of reasoning that stretched the asserted rule to its intended target. He argued that the

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<sup>115</sup> 133 S. Ct. at 1662 (emphasis added).

<sup>116</sup> *Id.* at 1664.

rule against extraterritoriality—however conclusively and sweepingly he meant to apply it—is nevertheless presumptive only, as it was declared to be in *Morrison*.<sup>117</sup> So the presumption can be rebutted. But it can be rebutted only by clear inference from the statute—unfortunately still a jurisdictional grant. Still glossing over that little problem, Roberts pointed out that the ATS is, indeed, silent about its applicability to extraterritorial facts.<sup>118</sup> There was simply nothing in the statute to rebut the presumption, Q.E.D. This argument ought to have availed the Chief Justice little, however, because statutory silence cuts two ways. But Roberts was sure about the way silence cut in this case. Triumphant, he chose as the default rule for the alien tort jurisdiction one that nicely (from his point of view) defeats the object of the jurisdictional grant.

Let us pause for a moment to call to mind what Chief Justice Roberts was *not* talking about—a genocidal attack on African villagers by their lawless government and a lawless corporation. This was a murderous rampage that persisted over two years without effectual condemnation or interference, obscured from view in a primitive forest world, hurting only a few hundred primitive people. With that picture in mind, we can well understand that the Court's default rule not only virtually repealed the Alien Tort Statute but also had the inevitable effect of withholding the rule of law from lawless places. Chief Justice Roberts did not think to offer some reply to the argument, latent but anxious, that the asserted rule against extraterritoriality, when applied in the context of *Filartiga* cases, protects terrorism and genocide—in *Kiobel*, murder, rape, torture, arson, and pillage.<sup>119</sup> As Justice White had once remarked, dissenting in another transnational case, the Court had validated a “lawless act.”<sup>120</sup> So universal are the norms of international law proscribing such acts that *Filartiga* cases typically do not present a conflict of laws. As other commentators have observed, all civilized governments today outlaw murder, maiming, rape, torture, arson, and pillage, just as they outlaw piracy and trafficking in slaves.<sup>121</sup>

In the real world, much rests on confidence that there will be good order. Law and order are self-evidently necessary for the furtherance of commerce and enterprise as well as for the protection of

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<sup>117</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

<sup>118</sup> *Kiobel*, 133 S. Ct. at 1665 (Roberts, C.J.) (“To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach.”).

<sup>119</sup> See *supra* notes 35–36 and accompanying text.

<sup>120</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 456 (1964) (White, J., dissenting).

<sup>121</sup> See, e.g., Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 883 (2009).

the populace.<sup>122</sup> Yet large parts of the world struggle against violence, not infrequently under corrupt or oppressive or predatory or even murderous misgovernment.<sup>123</sup> In such a world, given our global commercial and other interests and responsibilities, it would seem the better part of wisdom, in the silence of Congress, for our courts to adopt default rules that extend the rule of law to those luckless places rather than to deny or defeat the rule of law. Stern warnings that the United States cannot rule the whole world are well enough, perhaps, if we are talking about military interventions. But they can have little to do with this reality as it may confront courts of law, which do not “rule” countries but decide cases before them. I would go further and suggest that even *statutory* territorial or other limits on American judicial power in *Filartiga* cases should not prevent a judicially crafted exception in any American court in the face of clear lawlessness and clear injury, all else equal.<sup>124</sup>

The Chief Justice’s justifications for the improvidence of a rule of law supporting lawlessness, justifications with which many readers might reluctantly have to agree, concerned a perceived need to protect the foreign relations and foreign policy of the United States from judicial interference,<sup>125</sup> and a fear of retaliatory civil actions against Americans.<sup>126</sup> However, Roberts could offer no examples, either of such interference or of such retaliation, although *Filartiga* litigation dates back to 1980. The available evidence suggests, rather, that *Filartiga* is becoming an inspiration abroad.<sup>127</sup>

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<sup>122</sup> See World Justice Project, “Report: Rule of Law” (explaining the rule of law as enabling “fair and functioning societies”), <http://www.worldjusticeproject.org/what-rule-law> (last visited Aug. 5, 2014); Chudi Ubezonu, *Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy, and Practice*, 28 INT’L LAW. 345, 358 (1994) (stating that: Nigeria became “trapped in a political quagmire created by the established military junta. On June 26, 1993, the junta, for no apparent reason other than to perpetuate itself in power, annulled the presidential elections held two weeks earlier, elections that had been adjudged free and fair by both international and domestic observers. This type of action is bound to be a disincentive to a prospective foreign investor”); see generally INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 3–4 (Wolfgang Kaleck et al. eds., 2007).

<sup>123</sup> See Leval, *supra* note 17, at 232; Robert F. Worth & Eric Schmitt, *Jihadist Groups Gain in Turmoil Across Middle East*, N.Y. TIMES (Dec. 3, 2013), <http://www.nytimes.com/2013/12/04/world/middleeast/jihadist-groups-gain-in-turmoil-across-middle-east.html?page-wanted=all&r=0>; Nick Cumming-Bruce, *U.N. Says Aid Crisis Worsens in Central African Republic*, N.Y. TIMES (Jan. 3, 2014), <http://www.nytimes.com/2014/01/04/world/africa/aid-crisis-in-central-african-republic.html>; Hannah Beech, *Deadly Terrorist Attack in Southwestern China Blamed on Separatist Muslim Uighurs*, TIME (Mar. 2, 2014), <http://time.com/11687/deadly-terror-attack-in-southwestern-china-blamed-on-separatist-muslim-ughurs/>.

<sup>124</sup> To take a mundane example, consider the tradition of equitable tolling of a statute of limitations in the interest of justice. For a current affirmation of this principle in the Supreme Court (over strong dissent), see *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1936, 1942–43 (2013).

<sup>125</sup> *Kiobel*, 133 S. Ct. at 1664–65.

<sup>126</sup> *Id.* at 1664 (citation omitted).

<sup>127</sup> See *infra* Part VI.

Even so, two of the Justices would have gone further than the Chief Justice. Justice Alito, concurring, joined by Justice Thomas, urged that an alien tort action be barred even in a case arising *within* our territorial limits—“unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”<sup>128</sup>

Justice Breyer’s concurrence was joined by the three other liberals. Bartleby-like, the liberals simply “would prefer not to”<sup>129</sup> join the Court’s opinion. Yet, while purporting to concur in the judgment only, Justice Breyer swallowed the bitter dose almost whole. Justice Breyer declared that, if it were up to him, he would not invoke a presumption against extraterritoriality.<sup>130</sup> But then he did invoke it, listing a territorial contact with the United States as the first of his proposed three alternative bases for alien tort jurisdiction:

I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.<sup>131</sup>

But the Chief Justice, in effect, had already offered the exceptions Justice Breyer proposed. Toward the conclusion of his opinion, the Chief Justice acknowledged the possibility of matters that might “touch and concern” the United States.<sup>132</sup>

Justice Breyer also offered an extended argument that the place where an action arises cannot be the only touchstone of national in-

<sup>128</sup> *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). The position is, in fact, correct. Our ordinary tort law and civil rights laws will cover most cases. See *infra* Part VII.

<sup>129</sup> See Herman Melville, *Bartleby the Scrivener*, PUTNAM’S MAGAZINE (1853), reprinted in HERMAN MELVILLE, *PIAZZA TALES* 25 (1856).

<sup>130</sup> *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

<sup>131</sup> *Id.* Cf. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 402 (1987) (recognizing, subject to a reasonableness requirement, § 403, that a sovereign may apply its law, including its case law, among other things, to: (a) the “activities, interests, status, or relations of its nationals outside as well as within its territory”; (b) “conduct outside its territory that has or is intended to have substantial effect within its territory”; and (c) certain foreign “conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests”).

<sup>132</sup> On the need for governance of foreign financial transactions, see John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can’t Come Home*, 99 CORNELL L. REV. 1259 (2014), in this symposium. For grudging acknowledgment of this reality, see *Kiobel*, 133 S. Ct. at 1669 (“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.”).

terest, since piracy could arise in the territorial waters of another sovereign.<sup>133</sup> In such limited ways, Justice Breyer sought to ameliorate Chief Justice Roberts's requirement of "a clear indication" of congressional intention that legislation have extraterritorial application.<sup>134</sup> But Breyer failed to articulate the urgently needed defense of *Filartiga*.

Justice Kennedy concurred separately also, to convey to Court watchers a narrow reading of what the Court had done, reading less broadly the opinion's more sweeping passages. Henceforth, he declared, *Filartiga* torture actions would simply be tried under the Torture Victim Protection Act.<sup>135</sup> But the Torture Victim Protection Act is hardly the remedy *Filartiga* is.<sup>136</sup> The Act requires exhaustion of local remedies—"reasonable" and "available" ones, to be sure.<sup>137</sup> But what scene of foreign atrocity is likely to have reasonable available remedies and courts empowered and eager to provide them? The *Filartigas*' lawyer was arrested and disbarred for bringing a prosecution in Paraguay.<sup>138</sup> Moreover, the Torture Victim Protection Act carries a ten-year statute of limitations.<sup>139</sup> This, at a time, for example, when

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<sup>133</sup> Justice Breyer's extended argument about piracy included the point that a ship is traditionally presumed to be under the sovereignty of the flag it flies. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring). Justice Breyer's examples included our victory over the Barbary Pirates, which brought our marine forces to the shores of Tripoli; the sinking of the *Lusitania* off the coast of Ireland with many Americans on board; the bombing of Pan American Flight 103, at sea, the plane exploding over Scotland. In arguing that the flag a vessel flies makes it the territory of another sovereign, he might have given the example of the terrorists aboard the foreign-flag vessel *Achille Lauro*, who cast into the sea an elderly American cripple in his wheelchair. See Robert Fisk, *How Achille Lauro Hijackers Were Seduced by High Life*, THE INDEPENDENT (May 5, 2013), <http://www.independent.co.uk/voices/comment/robert-fisk-how-achille-lauro-hijackers-were-seduced-by-high-life-8604519.html>. Presumably Justice Breyer did not offer the bombing of marine barracks in Lebanon during the Reagan administration, the attack of the U.S.S. *Cole* in the Yemeni port of Aden, and, more recently, attacks on our embassies in Africa and the murder of our ambassador and others in Libya, because these events occurred on our territory or on a ship under our flag. See Jim Michaels, *Recalling the Deadly 1983 Attack on the Marine Barracks*, USA TODAY (Oct. 23, 2013), <http://www.usatoday.com/story/nation/2013/10/23/marines-beirut-lebanon-hezbollah/3171593/>; CNN Library, *USS Cole Bombing Fast Facts*, CNN (Sept. 18, 2013), <http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/>; *US Envoy Dies in Benghazi Consulate Attack*, AL JAZEERA (Sept. 12, 2012), <http://www.aljazeera.com/news/middleeast/2012/09/20129112108737726.html>.

<sup>134</sup> *Kiobel*, 133 S. Ct. at 1665 ("[T]o rebut the presumption, the ATS would need to evince a 'clear indication of extraterritoriality.' It does not." (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010))).

<sup>135</sup> *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as a Note to the Alien Tort Statute, 28 U.S.C. § 1350 (2012)).

<sup>136</sup> See, analogously, *Carlson v. Green*, 446 U.S. 14, 24 (1980) (holding that the Federal Tort Claims Act could not preempt the federal common-law *Bivens* action against federal officials, the two being very different remedies, and the latter essential to enforcement of civil rights).

<sup>137</sup> Torture Victim Protection Act of 1991 § 2(b).

<sup>138</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

<sup>139</sup> Torture Victim Protection Act of 1991 § 2(c).

Argentina is seeking extradition of Franco-era<sup>140</sup> malefactors from Spain,<sup>141</sup> and Germany is making renewed efforts to bring to book surviving perpetrators of the Holocaust.<sup>142</sup> A ten-year period is one in which perpetrators are likely to be alive, and often able to command considerable loyalty and resources. In such circumstances, justified fears may keep victims from coming forward with their claims. Beyond this, the Torture Victim Protection Act, analogous to the Civil Rights Act of 1871<sup>143</sup> and its federal common-law analog, *Bivens*,<sup>144</sup> requires that the defendant have acted “under color of . . . law,” removing the possibility of private corporate liability.<sup>145</sup>

Interestingly, Justice Kennedy expressed some concern that the reasoning of the Court in support of the presumption against extraterritorial application of law was not all it should be. It was too narrowly dependent on foreign policy concerns to give assurance that it would cover future cases; moreover the reasoning about the rule against extraterritoriality might also in future have to be more fully fleshed out.<sup>146</sup> One cannot say that *Kiobel* was utterly unreasoned. But, as Justice Kennedy politely suggested, it would need fleshing out.

## V

### FILARTIGA IN FLAMES

Let us return for a moment to the oral arguments in *Kiobel*. On both those occasions the Justices seemed concerned that the United States was the only country in the world to assert universal jurisdiction in civil actions like *Filartiga*.<sup>147</sup> The implication was that *Filartiga* ought to be a subject of reproach.<sup>148</sup> But surely more fit for reproach

<sup>140</sup> Raphael Minder, *Argentina Seeks Spanish Officials' Extradition for Franco-Era Abuses*, N.Y. TIMES A6 (Oct. 2, 2013); Francisco Franco, HISTORY, <http://www.history.com/topics/francisco-franco> (noting that Generalissimo Francisco Franco ruled Spain from 1939 to 1975).

<sup>141</sup> See *Spain Stonewalls on Franco-era Abuses*, EL PAÍS (Oct. 8, 2013), [http://elpais.com/elpais/2013/10/08/inenglish/1381233605\\_231882.html](http://elpais.com/elpais/2013/10/08/inenglish/1381233605_231882.html).

<sup>142</sup> See *Late Justice: Germany to Prosecute 30 Auschwitz Guards*, SPIEGEL ONLINE INTERNATIONAL (Sept. 3, 2013), <http://www.spiegel.de/international/germany/nazi-murder-germany-may-prosecute-30-former-auschwitz-guards-a-920200.html>.

<sup>143</sup> Pub. L. No. 42-22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

<sup>144</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (implying a private right to sue federal officials for violation of the Constitution).

<sup>145</sup> *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710–11 (2012).

<sup>146</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013).

<sup>147</sup> Transcript of Oral Argument I, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 628670, at \*3–4 (Feb. 28, 2012); Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 4486095, at \*5–6 (Oct. 1, 2012).

<sup>148</sup> The approved alternative seems to be an international tribunal or fund established to distribute partial compensation to individuals for violations of human rights. Even when some such arrangement is the subject of executive agreement only, our courts hold that they are bound by these arrangements, even insofar as our residents may be stripped of

than the justice of American courts would be judicial protection of the perpetrators of atrocious wrongs. It is possible, rather, to share Judge Kaufman's pride in *Filartiga*,<sup>149</sup> especially as a phenomenon unique to the United States.<sup>150</sup> Setting to one side prudential concerns that might justify dismissal in a given case, the prudential reasons for exercising the jurisdiction are patent. *Filartiga* actions at their narrowest are essentially civil rights claims against officials of a foreign government on behalf of that government's own citizens. Our own basic civil rights law proceeds on the theory that courts at the place of a governmental violation of human rights are not trustworthy enforcers of the human rights of their own residents.<sup>151</sup> The Fourteenth Amendment

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valuable choses in action. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 688–90 (1981) (holding American hostages' rights to sue precluded by the Iranian Claims Tribunal created by bilateral executive agreement); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387–88 (2000) (preempting Massachusetts's regulation of its own contracts with companies doing business in Myanmar as an interference with the President's conduct of foreign relations).

Our courts seem routinely to defer to such tribunals or funds. The Supreme Court has even held that our courts are wholly powerless to scrutinize the wrongs of foreign governments, even in the absence of such an agreement, even in suits between private parties. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964) (fashioning a federal common-law defense prohibiting all courts from adjudicating the validity of a foreign act of state). There is an analogy to the act of state doctrine in the domestic as well as foreign judicial avoidance of political questions. But Chief Justice Marshall, who first identified the problem of "questions in their nature political," explained that an otherwise justiciable claim of violation of individual right cannot present a political question and is always justiciable. *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

Compensation is characteristically meager, and the appointed distributors of such funds, although persons of reputation and integrity, can be powerless even to discover who the fund beneficiaries are, or to distribute payouts before the deaths of beneficiaries. Cf. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425, 427–29 (2003) (prohibiting California's courts from ordering discovery of the identity of beneficiaries of insurance policies of Holocaust victims, when the information could have assisted officials in distributing the funds established for the beneficiaries by the host countries, where many such beneficiaries or their heirs resided in California, and the insurance companies were withholding the information; reasoning that the fund had been created by international agreement to which the United States adhered, and this preempted private rights to sue).

<sup>149</sup> Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (Kaufman, J.) ("Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.").

<sup>150</sup> See Burley, *supra* note 46, at 464 ("[T]he [ATS] is a source of pride, a badge of honor."); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 466 (1997) (citing endorsements of *Filartiga* by the Justice Department, the American Law Institute, and Congress).

<sup>151</sup> Cf. *Mitchum v. Foster*, 407 U.S. 225, 241 (1972) (describing concerns voiced in Congress during the Reconstruction era about the futility of relying on the courts of former slave states to vindicate civil rights). But see *White*, *supra* note 4, at 286 (referring to the failure of criminal cases at the place of atrocity or in international tribunals, contrasting civil cases under the *Filartiga* principle succeeding at last in forcing German industrialists to regurgitate profits from slave labor during the Nazi period; referring also to cases in which stonewalling banks were forced at last, under the *Filartiga* principle, to yield up moneys belonging to Holocaust victims and their survivors).

is based on the recognition of an analogous need to impose a constitutional common law of multistate norms upon the several states for violations occurring within their borders.<sup>152</sup>

The *Kiobel* Court all but annulled the subject-matter jurisdiction granted by the Alien Tort Statute for the very cases for which *Filartiga* had made it *matter*, cases in which the alleged tort occurs within the territorial borders or waters of a foreign sovereign.<sup>153</sup> It is the “distant genocide,”<sup>154</sup> precisely, that the *Filartiga* action seeks to address. Congress, attempting to codify *Filartiga* on its facts in the Torture Victim Protection Act, required that the defendant act “under color of foreign law.”<sup>155</sup> In other words, Congress read the Alien Tort Statute as grounding cases arising within the territory of a foreign sovereign, at least to the extent the misconduct of a foreign government official is likely to occur on that sovereign’s territory.

These truths considered, *Kiobel*, unanimous as it was, seems plainly wrong. Certainly it upended long-settled understandings.<sup>156</sup> Even so, we would have to agree with the unanimous *Kiobel* Court if, like the Justices, we could find no overriding national interest in adjudicating *Filartiga* cases. And we would have to agree with the *Kiobel* Court if we were shown real foreign relations problems attending specific *Filartiga* litigations. But if these two conditions are not met we can fairly conclude that *Kiobel*’s assault on *Filartiga* was gratuitous and that the Supreme Court of the United States shot down a high-flying achievement of American law—for *no reason*.

## VI

### THE FOREIGN RELATIONS OF THE UNITED STATES

The only reasons given for the *Kiobel* Court’s assault on *Filartiga* were its concerns that the *Filartiga* cause of action posed serious threats of interference with the foreign relations of the United

<sup>152</sup> David M. Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to Stenberg v. Carhart*, 24 HARV. J. L. & PUB. POL’Y 815, 819 (2001).

<sup>153</sup> WHITE, *supra* note 4, at 286 (“Until the *Filartiga v. Pena* torture case, victims were caught up in a stacked-deck game. . . . [H]uman rights violations were considered exclusively an internal matter of the very countries that had perpetrated them in the first place. . . . *Filartiga* reshuffled that deck.”).

<sup>154</sup> See generally Leval, *supra* note 17 (arguing for expanded extraterritorial jurisdiction in the United States and elsewhere).

<sup>155</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as a Note to the Alien Tort Statute, 28 U.S.C. § 1350 (2012)).

<sup>156</sup> See, e.g., *Balintulo v. Daimler AG*, 727 F.3d 174, 180–81 (2d Cir. 2013) (explaining that “[a]lthough the plaintiffs did not claim that any of the South African government’s alleged violations of the law of nations occurred in the United States, at the time they filed their complaint they assumed (as did most American courts at that time) that no such geographical connection was necessary” (footnotes omitted)); *Flomo v. Firestone Nat’l Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011) (explaining that “no court to our knowledge has ever held that [the ATS] doesn’t apply extraterritorially”).

States<sup>157</sup> and of retaliatory *Filartiga*-style actions abroad against our own citizens.

The foreign relations concern, although superficially plausible, upon closer examination seems unwarranted.<sup>158</sup> Certainly no acute quarrels have arisen on account of *Filartiga*. To the best of my knowledge not a single foreign ambassador has been recalled or an American ambassador hauled on the carpet because some aging former dictator has been haled before our courts. Certainly no problems of foreign relations existed in *Kiobel* itself. Two of the concerned foreign sovereigns in *Kiobel*, Great Britain and the Netherlands, submitted a joint brief which, while arguing that the Alien Tort Statute should not be applied extraterritorially, purported to be neutral as to the result.<sup>159</sup> This was also the approach taken by the European Union.<sup>160</sup> A country not involved in the *Kiobel* litigation filed an amicus brief in favor of the petitioners.<sup>161</sup> There was no brief or suggestion letter from the U.S. State Department urging judicial restraint. The United States filed a brief which, while arguing that the “foreign-cubed” facts of this particular case<sup>162</sup> did not warrant cognizance under *Filartiga*, nevertheless wound up supporting federal common-law claims under *Filartiga*.<sup>163</sup> Throughout both oral arguments, the United States maintained this position.

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<sup>157</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring) (observing that the Court’s decision was based almost entirely on concerns about foreign relations).

<sup>158</sup> See Jonathan Hafetz, *Human Rights Litigation and the National Interest: Kiobel’s Application of the Presumption Against Extraterritoriality to the Alien Tort Statute*, 28 MD. J. INT’L L. 107, 108 (2013) (arguing that the foreign relations problem of alien tort litigation is “overstated”).

<sup>159</sup> See Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312825, at \*4 (“This brief is purely intended to set out the Governments’ view of the most relevant international legal principles and takes no position on the underlying factual and legal disputes between the parties to this particular case.”).

<sup>160</sup> Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 2165345 (June 13, 2012).

<sup>161</sup> See Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 2165334 (June 13, 2012).

<sup>162</sup> For the argument that *Kiobel* was a domestic case notwithstanding the place of the tort in Nigeria, the Nigerian citizenship of the plaintiff, and the Dutch place of incorporation of the defendant, see *infra* Part X. For the further argument that, even if the United States lacked significant contact with either *Kiobel* or *Filartiga*, it had an important governmental interest in both cases and in alien tort litigation generally, see *infra* CONCLUSION.

<sup>163</sup> See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 2161290, at \*4 (June 11, 2014) (“[T]he Court should not articulate a categorical rule foreclosing any [*Filartiga* style] application of the ATS.”).

The Chief Justice gave as his sole example of damage to, or interference with, our foreign relations caused by *Filartiga* the fact that a dissent in an unrelated case in a lower court had noted that several countries had “complained” about *Filartiga* actions.<sup>164</sup> This is remarkably weak support, but in any event it is hardly surprising that the representatives here of foreign countries would be found trying to promote their own interests in protecting their own officials from liability, or, with at least equal assiduity, their companies, wherever those companies were doing business and whatever business they were doing. Foreign sovereigns can vindicate their enterprise-protective interests in their own courts. But there is no principle requiring an American court to subordinate to the enterprise-protective interests of a foreign sovereign any interest the United States might have in applying its own law in its own courts.<sup>165</sup> All the Justices in *Kiobel*, nevertheless, were persuaded that our foreign relations could be disrupted or damaged should *Kiobel* be remanded for litigation and *Filartiga* allowed to survive. Justice Breyer, concurring in the judgment, concurred as well in perceiving the supposed threat but ventured to suggest that the threat to our foreign relations could be contained by *forum non conveniens*<sup>166</sup> and other defenses to be found in the foreign

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<sup>164</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013) (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (noting objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Reasonably friendly relations with these countries have not suffered because of *Filartiga*.

<sup>165</sup> This is a bedrock principle of our law. See the foundational cases: *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935) (Stone, J.) (holding in a workers’ compensation case that the place of employment was free to enforce its own tort law, and neither the Due Process Clause nor the Full Faith and Credit Clause required it to defer to the law of the place of injury, as to hold that in a true conflict the state must always apply the other state’s law but never its own would be an “absurd result”); *Pacific Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 498 (1939) (stating that the place of injury, similarly, was free under the Due Process and Full Faith and Credit Clauses to apply its law in disregard of the law of the place of employment); *Lauritzen v. Larsen*, 345 U.S. 571, 581–82 (1953) (holding, as a matter of general admiralty law, that more than one country might have an interest in remediation of a maritime tort, and that it was not required that any one particular interested place govern).

<sup>166</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1677 (2013) (Breyer, J., concurring). But see, for example, the reversal of the dismissal for *forum non conveniens* in a related litigation against Shell. *Wiwa v. Royal Dutch Petrol. Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (remarking that if the courts were to grant jurisdiction in alien tort cases only to dismiss for *forum non conveniens* the courts will have done “little to enforce the standards of the law of nations”). For further argument along this line, see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–800 (1993) (holding, among other things, that principles of comity are prudential only and discretionary in each particular case); see generally Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003) (analyzing the increasing level of deference among the high courts of several nations); Louise Weinberg, *Against Comity*, 80 GEO. L. J. 53 (1991) (concluding that comity in practice produces far more negative than positive consequences).

relations jurisprudence commonly applied by our courts in individual cases.<sup>167</sup>

Our courts generally do say they must block extraterritorial applications of law in transnational cases because they do not want to interfere with the rights of foreign sovereigns to govern what happens on their own territory.<sup>168</sup> The presumption then, in this regard, is the functional equivalent of a rule of deference to the law of the place of transaction or occurrence or injury.<sup>169</sup> Yet the concern about foreign relations cannot realistically be a concern about interfering with the laws that prevail where the events in litigation occurred, for six reasons:

First, the atrocities complained of in cases like *Filartiga* and *Kiobel* are universally outlawed, even at the places of atrocity or in the home countries of corporate defendants. In *Kiobel*, the place of injury, Nigeria, may insulate foreign companies from certain liabilities, but, like other countries with substantial economies, Nigeria also has general laws outlawing murder, rape, arson, and pillage. There may be corrupt or evil government at the place of atrocity. But the very point of the universal jurisdiction exercised in *Filartiga* litigation is that all civilized nations subscribe to the same specific, universal, and obligatory norms of human rights.<sup>170</sup> So *Filartiga* claims cannot interfere with the official views of the place of occurrence or any other putatively civilized country, however badly governed. *Ex hypothesi*, there is no conflict of laws in these cases.

Second, precisely because there is no conflict of laws in *Filartiga* cases, foreign countries worth deferring to cannot justly complain when international norms to which they subscribe find enforcement wherever the perpetrators can be found. As for foreign courts under terrorist governments, or in countries host to predatory companies, they can hardly expect that our courts should extend “comity” to them in cases concerning their governments’ official terror or the unpunished predations of companies doing business there.<sup>171</sup>

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<sup>167</sup> See generally Andrew S. Bell, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 23–49 (2003).

<sup>168</sup> See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).

<sup>169</sup> See generally James Donnelly-Saalfeld, *Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria Have Not Been Remedied by Nigerian Courts, the African Commission, or U.S. Courts*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 371 (2009) (discussing the likely inadequacy of foreign courts, whether or not foreign law is like our own, and the failures of American courts in addressing this inadequacy).

<sup>170</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–81 (2d Cir. 1980) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

<sup>171</sup> During the writing of this Essay, however, the whole Court agreed that comity is so far due the host country of atrocity-committing companies and their sole owners, that the extension of personal jurisdiction over them be reversed. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761–62 (2014) (scolding the Ninth Circuit for failing to consider the principles of comity on which *Kiobel* relied). *Daimler* was a *Filartiga* action adjudicating corporate com-

Third, *Filartiga* creates no interference with the sovereign right of a country to govern events within its borders at the time of occurrence. In *Kiobel*, Nigeria had every opportunity to prevent these violations, but instead facilitated them.

Fourth, lest it be supposed that this country's policy in alien tort litigation is to defer to the law of the foreign country in which alien torts occur, Congress, in the Alien Tort Statute, identified and mandated the body of law to be administered within the subject-matter jurisdiction it grants, and that law is most assuredly *not* the law of the place of occurrence. The violation must be a violation of "the law of nations" constituting a "tort,"<sup>172</sup> which in our courts is subsumed as federal common law. On its face the Alien Tort Statute *rejects* the sovereign right of the place of occurrence or any other particular place to govern that occurrence by its own municipal law. To the extent that imposition of a territorial limit on the Alien Tort Statute represents a desire to defer to the law of a foreign sovereign, that would be to repeal, not construe, the Alien Tort Statute.

Fifth, even if that argument can be overcome, the laws of the government allegedly responsible for atrocity can readily be afforded exclusive governance of the atrocity right here in the United States by any American court. Our courts have power to apply the law of any sovereign if there is a rational basis for doing so. It is this power that prompted Judge Kaufman in *Filartiga* to suggest that the law of Paraguay might govern that case.<sup>173</sup> However, to reconcile application of the law of the place of occurrence with Congress's choice of "the law of nations," an American court would have to be convinced in each case that the place of occurrence would enforce international norms.

Sixth, it is the exercise of jurisdiction in this country that *Kiobel* trashed, no matter what law is applied. None of the opinions in *Kiobel* suggest that the case could proceed *if only Nigerian or Dutch or English law were applied*.

These arguments considered, the asserted concern about foreign relations can have little to do with any principle of "comity" either to foreign courts or foreign law.

If, as is more likely, the fear of injury to our foreign relations is in some measure a concern about retaliatory litigation, as Chief Justice

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plicity in "disappearances" of persons in Argentina during that country's "Dirty War." *Id.* at 751.

<sup>172</sup> 28 U.S.C. § 1350 (2012).

<sup>173</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980); *see also* *Lauritzen v. Larsen*, 345 U.S. 571, 582–83 (1953) (providing a framework under which each of a number of countries in an international admiralty case might have sufficient contact with the case's underlying facts to warrant application of its law).

Roberts suggested in *Kiobel*,<sup>174</sup> that seems equally without foundation—for the very reason the Justices in *Sosa* and *Kiobel* urged as ground for complaint. They saw as a *fault* that the United States, almost without exception, is the *only* country the courts of which have provided damages for violations of human rights abroad.<sup>175</sup> They are right about American exceptionalism in this regard. In the three decades since *Filartiga* there has not been a single example in any country of a retaliatory *Filartiga*-style action for damages against American officials or companies for a violation of international norms.<sup>176</sup> True, there are occasional prosecutions abroad of our nationals, if not convictions, for violations of human rights, whether in international tribunals or the courts of foreign countries,<sup>177</sup> and prosecutions against our high officials are a threat, however ineffectual.<sup>178</sup> Such prosecutions will occur, given a certain anti-Americanism.<sup>179</sup> In this matter, American judicial concerns about reciprocal comity seem to be unreciprocated.<sup>180</sup> In *Filartiga* itself, Judge Kaufman was careful to limit the case explicitly to civil actions only,<sup>181</sup> duplicating one of the functions of the words “tort only” in the jurisdictional grant, and avoiding any conflict with international agreements or treaties concerning criminal prosecution to which we are or may become signatory. Un-

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<sup>174</sup> *Kiobel*, 133 S. Ct. at 1669 (“Moreover, accepting petitioners’ view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”).

<sup>175</sup> *Kiobel*, 133 S. Ct. at 1668 (explaining that there is “no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms”).

<sup>176</sup> See Leval, *supra* note 17, at 231 (noting that “no other nation’s courts will entertain such a suit”).

<sup>177</sup> These prosecutions are rare and can be strikingly unsuccessful. On the *fainéant* performance of the European Court of Human Rights, see Alan Cowell & Andrew Roth, *Ruling on Katyn Killings Highlights Russia-Poland Rift*, N.Y. TIMES, Oct. 22, 2013, at A8 (terming “incomprehensible” the technical jurisdictional grounds on which the European Court of Human Rights failed to adjudicate the Katyn Massacre and cover-up).

<sup>178</sup> See generally MICHAEL HAAS, GEORGE W. BUSH, WAR CRIMINAL?: THE BUSH ADMINISTRATION’S LIABILITY FOR 269 WAR CRIMES (2009) (examining the possibility of prosecutions against the Bush administration); INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 121 (observing the war on terror’s effect on the outcome of a conference on war crimes and current politics); STEPHEN MACEDO, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (2004) (exploring the development of support for universal jurisdiction to prosecute governments that commit crimes).

<sup>179</sup> See US: Geneva Case Against Bush Shows Need to Prosecute Torture: Ex-President Cancels Switzerland Trip After Threatened Protests and Criminal Complaints, HUMAN RIGHTS WATCH (Feb. 7, 2011), <http://www.hrw.org/news/2011/02/07/us-geneva-case-against-bush-shows-need-prosecute-torture>.

<sup>180</sup> See Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT’L L. 259, 260 (2012).

<sup>181</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

like foreign courts and international tribunals, the United States has no record of asserting universal *criminal* jurisdiction—jurisdiction in the absence of crimes or war crimes against this country—and the United States is most unlikely to assert such a jurisdiction in retaliation to prosecutions of American officials abroad. Our response to prosecution of Americans at the places of their foreign crimes is characteristically deferential.<sup>182</sup>

Far from any retaliatory reaction, admiring tort cases mirroring *Filartiga* in intention are reportedly beginning to emerge abroad.<sup>183</sup> *Filartiga* has impressed Western courts, in particular English-speaking courts, and is discussed in foreign journals as a credit to American justice.<sup>184</sup> With increasing confidence plaintiffs in foreign courts are referring to the American Alien Tort Statute. Among these are cases filed against corporations, including English and Dutch cases against Royal Dutch Shell, for environmental damage to farmers in Nigeria.<sup>185</sup> According to Liesbeth Enneking, *Filartiga*-style litigation deploying universal jurisdiction and the common law is occurring in the United Kingdom, Canada, and Australia. And the absence of “alien tort” legislation has not been an impediment to this litigation, which

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<sup>182</sup> See Mark Kukis, *Should Iraq Prosecute US Soldiers?*, TIME, Aug. 26, 2008, available at <http://content.time.com/time/world/article/0,8599,1836217,00.html>. We may be unduly deferential to the host countries of the American military personnel who are accused of crimes. Certainly exception should be made for Americans accused of crimes in countries providing barbaric penalties or deficient process.

<sup>183</sup> The most salient foreign case representing a modern tendency toward universal civil jurisdiction in human rights cases is also the most recent, and is the *Dutch Shell Nigeria Case*, brought by a Dutch chapter of Friends of the Earth and four Nigerian farmers. According to Liesbeth Enneking, other examples of human rights litigation abroad influenced by *Filartiga* include civil claims in the *Trafigura* case before the High Court in London brought by Ivorians, and the *Probo Koala* toxic waste dumping case, as well as “claims against Shell by 11,000 Nigerians from the Bodo community in relation to two serious oil-spill incidents in the Niger Delta that are currently also pending before [the High Court].” Enneking, *supra* note 37, at 45.

<sup>184</sup> For examples see *Oguru v. Royal Dutch Shell PLC*, Court of the Hague, Docket No. HA ZA 09-579 (Neth.) (action by Nigerian villagers alleging that oil spills caused by Royal Dutch Shell deprived them of their livelihood); *The People of Nigeria Versus Shell: The Course of the Lawsuit* (Dec. 2009), <https://www.milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit>; *Vereniging Milieudefensie v. Royal Dutch Shell*, Court of the Hague, Docket No. HA ZA 09-579 (Neth.) (same); Kirshner, *supra* note 180, at 260 (remarking that parallel proceedings are advancing in Nigeria; also referring to *Guererro v. Monterrico Metals PLC*, [2009] EWHC (QB) 2475 (Eng.)). For the settlement in this latter case, see *Peruvian Torture Claimants Compensated by UK Mining Company*, LEIGH DAY (July 20, 2011), <http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-mining>.

<sup>185</sup> See *supra* note 18. The Dutch case is one of ordinary tort rather than human rights. On other such actions see generally Simon Baughen, *Holding Corporations to Account: Crafting ATS Suits in the UK?*, 2 BRIT. J. AM. LEGAL STUD. 533, 558–68 (2013); Binnie, *supra* note 95, at 18 n.4 (listing English cases of assertions of extraterritorial jurisdiction); LIESBETH F.H. ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND 92, 104 (2012).

proceeds on general tort principles, emphasizing duties of conduct rather than human rights.<sup>186</sup>

Another, more compelling concern, not explicitly mentioned in *Kiobel*, might be that adjudication here could upset delicate negotiations between the U.S. State Department and affected foreign countries, or might embarrass the executive in some other way in the conduct of foreign affairs,<sup>187</sup> or differ somewhat in the balance of sticks and carrots that the President may be offering foreign governments in hopes of improving their treatment of minorities or encouraging them to abide by treaty commitments or to give up weapons of mass destruction.<sup>188</sup> Whatever its merits, this supposed concern is already the subject of effective protective devices. The State Department can file amicus briefs and letters of suggestion, to which courts tend to defer when they see good reason for doing so.<sup>189</sup> The Court has preempted state law touching on foreign relations when the context is an ongoing dispute or negotiation.<sup>190</sup> And the courts have adopted potent protective doctrines as a matter of federal common law, such as the “act of state” doctrine<sup>191</sup> and *forum non conveniens*. Indeed, it is the frequent injustice of dismissals on such grounds as these that should concern us rather than the popular bugaboos of interference with foreign governance and threats of retaliation.

Nor can the Court’s concern have to do with our security, although none of the Justices mentioned this, perhaps not wanting to seem cowed by terrorism. It might be imagined that terrorists will attack us if a *Filartiga* action is brought against terrorists or organizations supporting them. However, *Filartiga* actions against terrorist organizations are not maintainable under the cognate Torture Victim Protection Act,<sup>192</sup> and had *Filartiga* survived intact, it is more likely than not that our courts would be guided by that statute as an expres-

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<sup>186</sup> See Binnie, *supra* note 95, at 2.

<sup>187</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Congress overrode *Sabbatino* for cases in which the expropriated property is within our territorial jurisdiction. 22 U.S.C. § 2370(e)(2) (“Hickenlooper Amendment”).

<sup>188</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372, 388 (2000).

<sup>189</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1439–41 (2012).

<sup>190</sup> *Crosby*, 530 U.S. at 374–77 (2000) (preempting Massachusetts’s regulation of its own contracts with companies doing business in Myanmar as an interference with the President’s ability to calibrate the tightening or easing of sanctions to the conduct of Myanmar).

<sup>191</sup> *Sabbatino*, 376 U.S. at 416. See the discussion of Chief Justice Marshall, *supra* note 148. A claimed violation of individual right, in this most authoritative of views, if presented in an otherwise proper case, should *always* be justiciable. *Marbury v. Madison*, 5 U.S. at 170–71. See generally Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887 (1994) (arguing that no question of law can be confided to the political branches, and no claim of individual should be dismissed on the ground that it presents a political question).

<sup>192</sup> *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708–11 (2012).

sion of the will of Congress. An action against a particular terrorist is possible, but of course if a terrorist is captured here he is prosecuted.<sup>193</sup> If captured on the battlefield abroad during hostilities he is typically confined at Guantanamo or some other such facility, and afforded military hearings.<sup>194</sup> If a wanted terrorist is abroad and his whereabouts known, the President might order him targeted with drones.<sup>195</sup> This may be viewed as “extrajudicial killing” or, on the other hand, a method, in a “war” on terrorists, of safeguarding civilians more effectually than can be done with indiscriminate bombing or heavy-handed military interventions.<sup>196</sup> Civil litigation in American courts is a very different matter. Transparently, deference in our courts to the power of foreign sovereigns to (mis)govern at the expense of the lives of their civilians (and our diplomats, soldiers, aid workers, medics, and journalists) can hardly add luster to the character of the United States among nations.<sup>197</sup>

There might seem to be a risk that some action taken by our country or by Americans will infuriate and enflame peoples of cultures very different from ours in ways we cannot always predict. But no public furor, rational or irrational, in any country, has ever greeted an occasionally successful *Filartiga* litigation.

Finally, American legal and constitutional culture, like our music and our movies, are world envied. Our ideals are ideals toward which many peoples worldwide are striving. Our provision of a measure of justice for an individual damaged by an abuse of human rights must be at least as much the subject of admiration as of head-wagging. If we win our ideological wars it is likely to be because of the soft power of our ideals.<sup>198</sup> In this view, American alien tort litigation surely advances America’s moral standing and authority in the world.<sup>199</sup>

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<sup>193</sup> See *id.*

<sup>194</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

<sup>195</sup> Michael D. Shear & Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES, Feb. 6, 2013, <http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?pagewanted=all> (reporting on documents about performing drone strikes on U.S. citizens abroad who are considered terrorists).

<sup>196</sup> Ned Resnikoff, *The War on Terror is the Problem, Not Drones*, MSNBC, Feb. 6, 2013, available at <http://www.msnbc.com/the-ed-show/the-war-terror-the-problem-not-drones>.

<sup>197</sup> For the impact on perceptions abroad of our fidelity to American ideals, see, for example, *India-America Relations on Edge*, N.Y. TIMES, Jan. 15, 2014, at A22; David Brunnstrom & Lesley Wroughton, *U.S., India Meet to Get Ties Back on Track After Dispute*, REUTERS, Jan. 14, 2014, available at <http://www.reuters.com/article/2014/01/15/us-india-usa-meeting-idUSBREA0E01X20140115>.

<sup>198</sup> See G. John Ikenberry, *Soft Power: The Means to Success in World Politics*, FOREIGN AFFAIRS (May–June 2004).

<sup>199</sup> For the post-*Kiobel* argument that American alien tort litigation advances the United States’s strategic interests, see generally Hafetz, *supra* note 158.

All this considered, the Supreme Court appears to have shut down, or tried to shut down, an important body of litigation out of sheer ideological bluster on the right and confusion on the left. When suggestions of calamity and retaliation, and pious utterances about “extraterritoriality” and “comity,” are all that is needed to deny access to courts that are powerful, confident, and independent enough to provide a measure of justice in cases of egregious wrongs, all that is accomplished is an appearance of injustice, or worse, complicity.<sup>200</sup>

## VII THE CRYSTAL BALL

Let us pause for a moment to look into the future. Assuming that Congress cannot bring itself to override *Kiobel* as it overrode *Aramco*—the discredited case on which *Kiobel* (and *Morrison*) relied<sup>201</sup>—what options are available to courts below? The fate of *Filartiga* on its facts was probably correctly predicted by Justice Kennedy, concurring in *Kiobel*. He read the Court’s opinion as confining torture cases under *Filartiga* to the Torture Victim Protection Act.<sup>202</sup> But what of other *Filartiga* actions? Perhaps *Filartiga* litigation will somehow go forward as if there had been no change. The phenomenon is not unknown.<sup>203</sup> Or courts might read *Kiobel* narrowly. The Ninth Circuit recently achieved a particularly adroit feat of narrow reading, vacating and remanding the dismissal of a post-*Kiobel* alien tort case on the following reasoning (note the particularly deft use of the phrase, “on other grounds”):

In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien

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<sup>200</sup> Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 456 (1964) (White, J., dissenting). Of course *Filartiga* litigation against a corporate defendant would present very different problems from the expropriation involved in *Sabbatino*. But Congress overrode even *Sabbatino* on its facts, since the property in litigation was here, in our own territorial waters. 22 U.S.C. § 2370(e)(2) (“[Hickenlooper Amendment]”). Inexplicably, in failing to provide a convincing or simply principled rationale for denying long-established access to American justice, the unanimous Supreme Court is exhibiting itself as instead providing blanket protection from accountability for crimes against humanity to multinational giants like Shell.

<sup>201</sup> *Kiobel v. Royal Dutch Petrol Co.*, 133 S. Ct. 1659, 1664 (2013) (citing *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991)); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (same).

<sup>202</sup> See *supra* notes 135–45 and accompanying text.

<sup>203</sup> Consider that anti-busing legislation was enacted during the Nixon administration, with little or no effect on federal judicial busing decrees during that period. See Gary Orfield, *Congress, the President, and Anti-Busing Legislation, 1966–1974*, in 2 SCHOOL BUSING: CONSTITUTIONAL AND POLITICAL DEVELOPMENTS 109 (Davison Douglas ed., 1994) (noting that the courts found the poorly drafted legislation “either meaningless or unconstitutional”).

Tort Statute, 28 U.S.C. § 1350. *Kiobel v. Royal Dutch Petroleum*, —U.S. —, 133 S. Ct. 1659, 1669, 185 L.Ed.2d 671 (2013) (suggesting in dicta that corporations may be liable under ATS so long as presumption against extraterritorial application is overcome); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 761 (9th Cir. 2011) (en banc) (holding that corporations may be liable under ATS), *vacated on other grounds*, U.S., 133 S. Ct. 1995, 185 L.Ed.2d 863 (2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011) (same), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020-21 (7th Cir. 2011) (same). Additionally, the district court erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d. Cir. 2009).<sup>204</sup>

In another “foreign-cubed” scenario, a foreign wrongdoer might be using this country as a haven, in which case, notwithstanding foreign wrongdoing and a foreign plaintiff, an American national interest might arise. Justice Breyer, concurring in *Kiobel*, thought as much.<sup>205</sup> *Filartiga* might have been such a case. But the defendant in such cases is within the jurisdiction of some court in this country with ready access to ordinary common-law remedies. *Filartiga* would hardly matter.

The question arises whether *Filartiga* might survive in a “foreign-squared” case.<sup>206</sup> To suit the rule of *Kiobel*, that could be a case in which both parties are foreign but the violation of international law occurred in the United States. One can imagine, for example, Iranian undercover operatives torturing an Iranian refugee in this country on suspicion that he is a spy for this country. Other “squared” configurations would fall afoul of *Kiobel*'s rule that there can be no alien tort adjudication of events occurring within the territory of a foreign sovereign. Presumably courts would have to see the “two foreigners in America” case as “touching and concerning” the United States. But again, the ready availability of state common-law remedies for torts on our soil makes approval of resort to *Filartiga* most unlikely. Indeed,

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<sup>204</sup> *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013). Internal citations have not been omitted—in order to convey more fully the Ninth Circuit's ingenuity.

<sup>205</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760 (2004).

<sup>206</sup> One commentator thought *Doe v. Exxon* would survive *Kiobel* because Exxon has extensive operations in the United States, employs tens of thousands of Americans, is headquartered in the United States, and sends many thousands of barrels of oil from Indonesia to the United States every year. See Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013), <http://www.scotusblog.com/?p=162617> (suggesting that corporations with more than a “mere corporate presence” may be subject to liability). In reality, *Exxon* and *Kiobel* are similar as far as the U.S. activities of the defendant are concerned. See *infra* Part X.B. For a case jerry-rigged to appear “domestic cubed” (and succeeding thus far), see *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756 (D. Mass. 2013).

given the ready availability of ordinary tort law to deal with events occurring here in the United States,<sup>207</sup> “extraterritoriality” is hardly a malfunction of *Filartiga* litigation. Rather, it is evidently both its essence and its point. Far from being the killer flaw in *Filartiga* actions, “extraterritoriality” is their *sine qua non* of *Filartiga* actions. Extraterritoriality was not a problem overlooked when Judge Kaufman read the plain language of the Alien Tort Statute to create an extraordinary remedy for atrocity abroad. Rather, had *Filartiga* survived *Kiobel* intact, extraterritoriality would increasingly have been perceived as a defining feature of alien tort litigation.

It is also possible in theory for a “foreign squared” case to arise in which an American defendant acting abroad committed a *Sosa*-sufficient tort to a foreigner. In *Kiobel*, if the company acting in Nigeria had been an American company, presumably this would have “touched and concerned” the United States and could have overcome the presumptive rule against extraterritoriality. Where an American official is the defendant in a “squared” case, however, the result is likely to be governed by *Sosa*. There, the defendants were American officials, the plaintiff a Mexican, and the officials’ relevant misconduct occurred partly in Mexico.<sup>208</sup> The Court in *Sosa* specifically rejected *Filartiga* in this “squared” configuration as threatening an open-ended displacement of *Bivens*,<sup>209</sup> the federal common-law action for a constitutional tort by a federal official.

What about the case of a single foreign contact? This case must confront the same difficulties. Where the plaintiff is a foreign suitor, she is alleging a tort by an American defendant on American soil, and ordinary common law or civil rights remedies will render *Filartiga* superfluous and therefore unavailable. If the defendant is a foreigner over whom there is transient jurisdiction here, the American plaintiff and the American event will easily evoke these same bodies of law. *Filartiga* might come into play where two Americans become involved in a *Sosa*-sufficient tort abroad, since *Kiobel* is not in the way in matters “touching and concerning” the United States, and presumably a human rights violation by an American person causing damage to an American person would fall within our sphere of interest.

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<sup>207</sup> The Supreme Court customarily ousts civil rights relief in favor of ordinary tort remedies if available. The Court denies federal relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where state common-law remedies are arguably available; see, for example, *Wilkie v. Robbins*, 551 U.S. 537 (2007). It also denies state relief under *Bivens*’ older analog for actions against state officials, *Monroe v. Pape*, 365 U.S. 167 (1961), when ordinary tort remedies are available; see, for example, *Paul v. Davis*, 424 U.S. 693 (1976).

<sup>208</sup> *Sosa*, 542 U.S. at 697–99.

<sup>209</sup> 542 U.S. at 736–37.

It might be supposed that it would help to bring a more usual *Filartiga* case in state court or under the general federal-question jurisdiction of the United States district courts,<sup>210</sup> rather than in their alien tort jurisdiction. However, the *Sosa* Court threw cold water on the latter expedient; Justice Souter feared that permitting federal-question jurisdiction in alien tort cases would somehow open the floodgates of federal common law.<sup>211</sup> Justice Souter need not have been concerned. Under any head of jurisdiction in any court, the Supreme Court's rulings—even its new territorialism—would tend to remain the same, as the Supremacy Clause requires. True, *Kiobel* was pinned to the Alien Tort Statute; but the extraterritoriality defense is not so pinned, as *Morrison* suggests. True, *Kiobel*'s presumption against extraterritoriality is supposed to apply to statutes, not cases. But in *Kiobel* itself the presumption was applied to a common-law cause of action. After *Kiobel*, cases arising within the territory of a foreign sovereign would still be dismissed, with or without the presumption, simply because *Kiobel*'s foreign relations rationale seems to require dismissal. Even if a *Filartiga* action somehow survived an immediate motion to dismiss, it would still be circumscribed by the requirements of *Sosa* sufficiency, preemption in torture cases by the Torture Victim Protection Act, and the Court's emerging jurisprudence insulating *Filartiga* defendants other than individual government officials.<sup>212</sup>

We are seeing, then, that much of the heady speculation about cubes, squares, and alternative courts or heads of jurisdiction, is probably pointless. The best hope may lie, rather, in courts recognizing that some supposedly “foreign-cubed” cases like *Kiobel* may actually be *domestic* cases, “touching and concerning” the United States. I will turn to that argument in a later Part.<sup>213</sup>

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<sup>210</sup> 28 U.S.C. § 1331. Professor Casto urges this latter course. William Casto, *Sosa v. Alvarez-Machain and the End of History*, 43 GEO. J. INT'L L. 1001, 1003 (2012). Professor Casto argues adroitly that *Sosa* unmoored alien tort from the alien tort jurisdiction, so that the intentions of the founders become irrelevant, and § 1331 becomes open to cases *Sosa* would exclude. But I fear that federal-question jurisdiction could not keep *Filartiga* alive, for the reasons stated in the text. Decided cases, although technically distinguishable, in the Roberts Court would be held to control the substantive issues in any *Filartiga* style case under any head of jurisdiction. See Weinberg, *supra* note 95, at 1093–94.

<sup>211</sup> *Sosa*, 542 U.S. at 731 n.19. With some inconsistency, Justice Souter also insisted that he did not mean to “imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law.” *Sosa*, 542 U.S. at 731. However, under the Due Process Clauses, and *Erie* as well, federal law applies where it applies, and state law applies where it applies, and in both instances it does not matter whether the law applied is statutory law or case law. U.S. Supreme Court cases are supreme federal law in any court or under any head of federal jurisdiction, anything in a state's statutes or constitution to the contrary notwithstanding.

<sup>212</sup> On this last point, see *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1704 (2012).

<sup>213</sup> See *infra* Part X.

## VIII

## THE CONSTITUTION AND THE TRANSITORY ACTION

Let us indulge for a moment the Justices' unanimous assumption that *Kiobel* was a case based on wholly foreign facts. It may come as something of a shock, on that view of the facts, that the Supreme Court's new territorialism is in serious tension with Supreme Court cases on what the Constitution requires in interstate cases and suggests for international ones, particularly with regard to access to courts.

Under the Privileges and Immunities Clause of Article IV of the Constitution,<sup>214</sup> in interstate cases the right of access to courts for nonresident plaintiffs is guaranteed, no matter where their claims arose—or even, assuming personal jurisdiction, no matter where their defendants reside. Cases on access to courts, open courts, equal protection, the right to travel,<sup>215</sup> and so on, are to the same effect. In the case of *Hughes v. Fetter*, the Court held, by Justice Black, that state courts of general jurisdiction are under a constitutional duty to adjudicate a transitory cause of action arising in a sister state.<sup>216</sup> Justice Black reasoned that access to otherwise competent courts for ordinary torts, wherever arising, is compelled by “the national policy of the Full Faith and Credit Clause” of Article IV.<sup>217</sup> *Hughes* began as an action for wrongful death, the fatal injury having occurred out of state.<sup>218</sup> Justice Black reasoned that the forum state simply had no interest in not taking the case.<sup>219</sup> He pointed out that the state had “no real feeling” against wrongful death actions. Wrongful death was triable in that state.<sup>220</sup> In short, *Hughes v. Fetter* holds that a state court of general jurisdiction must adjudicate an ordinary tort wherever it arises.<sup>221</sup>

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<sup>214</sup> U.S. Const. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”). These “Privileges” include access to courts for residents of sister states. *Corfield v. Coryell*, 6 F. Cas. 546, 552–53 (C.C.E.D. Pa. 1823). *Cf.* *The Slaughter-House Cases*, 83 U.S. 36, 79 (1872) (“It is . . . the right of the citizen of this great country, protected by implied guarantees of its Constitution, [to have] . . . free access to . . . courts of justice in the several States.” (quoting *Crandall v. State of Nevada*, 73 U.S. 35, 44 (1867))).

<sup>215</sup> In *Saenz v. Roe*, 526 U.S. 489, 502–03 (1999), the right to travel was finally located in the Privileges and Immunities Clause. U.S. CONST. art. IV, § 2, cl. 1.

<sup>216</sup> 341 U.S. 609, 613 (1951); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 545 (1935). Concededly, the parties in *Hughes* were joint domiciliaries of the forum state. For cases specifically on such facts, see *infra* Part X.C.

<sup>217</sup> *Hughes*, 341 U.S. at 613; U.S. CONST. art. IV, § 1.

<sup>218</sup> *Hughes*, 341 U.S. at 610.

<sup>219</sup> *Id.* at 612–13.

<sup>220</sup> *Id.* at 613.

<sup>221</sup> For interesting discussion of this subject in the context of *Filartiga* and *Kiobel*, see generally Chimene I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81 (2013).

Analogously, under the Supremacy Clause and the classic case of *Testa v. Katt* (also authored by Justice Black), state courts are under a constitutional obligation to adjudicate *federal* actions otherwise properly before them.<sup>222</sup> Just as state courts are under a duty to try transitory claims arising in other states, they are under a similar duty to try federal claims, again without regard to where a claim arose, all else being equal.<sup>223</sup>

In the silence of Congress about the territorial scope of legislation, these constitutional ground rules clearly point to a default rule contrary to the default rule applied in *Kiobel*. The proper rule would give nonresidents access to our courts when in the exercise of a jurisdiction granted, within that jurisdiction's own written bounds and none other. True, the interstate case and the federal-state case are only analogies and are as different from the international case as they are from each other. Nevertheless they reflect a background of "postulates which limit and control."<sup>224</sup> They are a powerful reminder to American lawyers and judges of the duty of American courts to exercise a jurisdiction given. In the international case, subject to prudential defenses such as *forum non conveniens* (which are not blanket rules but are discretionary in the individual case), we can conclude, as Judge Kaufman did in *Filartiga*, that American courts are under a general obligation to adjudicate transitory actions otherwise properly before them—including cases in which the underlying events occurred abroad.<sup>225</sup> The *Kiobel* Justices' conviction that our courts are, or should be, powerless to deal with events occurring within the territory or waters of another sovereign has no basis in these long-settled understandings.

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<sup>222</sup> *Testa v. Katt*, 330 U.S. 386, 389–90 (1947) (holding under the Supremacy Clause that state courts must take federal cases and enforce federal laws). Since *Testa* the Supreme Court has consistently held that state courts must accept jurisdiction over a federal cause of action and apply federal law. See *Hayward v. Drown*, 556 U.S. 729, 734 (2009); *Howlett v. Rose*, 496 U.S. 356, 367 (1990); *Martinez v. California*, 444 U.S. 277, 283–84 n.7 (1980).

<sup>223</sup> See *Claffin v. Houseman*, 93 U.S. 130, 137 (1876) ("The . . . State . . . is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.").

<sup>224</sup> *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

<sup>225</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) ("It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.")

## IX

## SOME OTHER CONSTITUTIONAL GROUND RULES

I cannot help noticing the outdatedness of the *Kiobel* Court's exclusively territorial approach to a question which may be considered one of choice of law and, ultimately, one of constitutional law. Preliminarily, I have to say that the Court's new territorialism is markedly inattentive to progress in choice-of-law methods in state and federal courts over the last three-quarters of a century.<sup>226</sup> Because governmental interests can and do transcend territorial boundaries, and often overlap, the rule of law can be hijacked by territorial rules that are unconnected to the merits of particular cases.

The conflicts question—and, ultimately, the constitutional question—in *Kiobel*, released from its ill-fitting jurisdictional straitjacket, was whether American courts could be allowed to continue to adjudicate foreign atrocities under the rule of *Filartiga*. Because *Filartiga*, like *Kiobel*, is widely assumed to have been a case on wholly foreign facts,<sup>227</sup> the question was whether American human rights law under *Filartiga* could reasonably be applied in *Kiobel*. The ultimate constitutional question, stated more concisely, was whether the *Filartiga* doctrine comprised an irrational displacement by American law of the law of a more relevant foreign sovereign. In more general terms, would the application of our federal common law of human rights in *Kiobel* be arbitrary or irrational because our law can have no relevance to foreign events involving foreign people? Has the choice of American law in all “foreign-cubed” *Filartiga* litigation been unconstitutional all along, as a matter of due process? Has it been arbitrary and irrational because without rational basis?

If there is a rational basis, then, for *Filartiga* litigation, *Filartiga* is a constitutional remedy because it is a *reasonable* one, *ex hypothesi*. Reasonableness, then, is the test of constitutionality and thus of the propriety of a choice of law. But what is the test of reasonableness? It must be admitted that the Supreme Court's test of reasonableness in cases on the conflict of laws certainly does seem to have to do with territorial contacts. The Supreme Court, by Justice Brennan, set out the modern due process test for choices of law in 1981 in *Allstate Insur-*

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<sup>226</sup> See Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1633–45 (2005) (describing the twentieth century revolution in choice-of-law thinking). Cf. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 253–54 (1958) (famously analyzing traditional territorialist choice-of-law rules and concluding that such rules generate “problems where none existed before, and more often than not [dispose] of those false problems unsatisfactorily”; introducing a new interest-analytic means of classifying conflicts and choosing law). The choice-of-law revolution is widely attributed to Currie's work.

<sup>227</sup> *Filartiga*, 630 F.2d at 885 (Kaufman, J.) (describing the case as “outside [the United States'] territorial jurisdiction”).

ance *Co. v. Hague*, a test which endorses earlier understandings<sup>228</sup> and has never been disapproved:

[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.<sup>229</sup>

Under this test, the *Hague* Court controversially<sup>230</sup> approved forum law favoring its resident plaintiff even though the plaintiff was not a resident of the forum state at the time the claim arose.<sup>231</sup> And *Hague* trebled the liability of the defendant, although the forum had only general jurisdiction over the defendant, and the defendant was a different branch of the defendant insurer<sup>232</sup> than the branch from which the insurance was obtained.<sup>233</sup> *Hague* was decided by a 4:4 plurality (Justice Stewart did not participate), but the *Hague* test was ac-

<sup>228</sup> Cf. *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 541–42 (1935).

<sup>229</sup> 449 U.S. 302, 312–13 (1981); see *Alaska Packers*, 294 U.S. at 541–42 (“Objections which are founded upon the Fourteenth Amendment must, therefore, be directed, not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process.”).

<sup>230</sup> See, e.g., John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 187–89 (1981) (criticizing the reasoning in *Hague*). *Contra*, Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1024 (1982). For further discussion see Linda J. Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 104 (1981). It should be noted that the result in *Hague* was not controversial as far as the courts below were concerned. Both had gone the same way.

<sup>231</sup> *Hague*, 449 U.S. at 312–14.

<sup>232</sup> The jurisprudence of general jurisdiction over corporate subsidiaries has since been modified. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (holding that foreign subsidiaries of an American company are not amenable to suit here for injuries to Americans abroad). Cf. *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (Ginsburg, J.) (holding that Daimler lacked sufficient contacts with California to be considered “at home” there, and thus was not amenable to suit there in a *Filartiga* action by an Argentina plaintiff against Daimler for aiding and abetting the Argentina torts of its subsidiary, Mercedes-Benz). The assertion of jurisdiction in *Daimler* would seem to be particularly attenuated. But I pause to note the possibility that the American theory of general jurisdiction, as traditionally applied, enshrined a necessary legal fiction, somewhat analogous to the theory of personalization of a ship. These fictions serve key functions in the administration of justice, presenting reasonably relevant defendants and providing funding for necessary compensation. For an insightful description of the functions of the latter fiction, see *The China*, 74 U.S. (7 Wall.) 53, 63–69 (1868). But instrumentalism of this sort is unlikely to be viewed today with an approving eye.

<sup>233</sup> These features of *Hague* in effect rejected the reasoning, while preserving the rule, of the Court's foundational choice-of-law case, *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (Brandeis, J.) (holding, under the Due Process Clause of the Fourteenth Amendment, that Texas had no power to expand the liability of the defendant reinsurers in an action on the insurance policy, because: “nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. . . . The fact that plaintiff Dick's permanent residence was in Texas was without significance. At all times here material, he was physically present and acting in Mexico”).

knowledge, reasserted, and quoted in full by Chief Justice Rehnquist, writing for the Court in *Phillips Petroleum Co. v. Shutts*.<sup>234</sup> Under this test, as in earlier Supreme Court cases informing modern conflicts thinking,<sup>235</sup> it does not matter if another sovereign also has legitimate governmental interests.<sup>236</sup> The interested forum is free to choose its own law.<sup>237</sup>

The *Hague-Shutts* rule is also buttressed by an additional doctrine, emerging from a pair of cases written by Justice Brandeis in the 1930s, neither of which were interstate cases. The first was a transnational conflicts case little known by writers on constitutional law, but one which is considered fundamental to modern conflicts theory, *Home Insurance Co. v. Dick*.<sup>238</sup> The second was the famous federal-state conflicts case, *Erie Railroad Co. v. Tompkins*.<sup>239</sup> Each of these cases involved what a conflicts expert, schooled in the writings of Brainerd Currie, would identify as a “false conflict.”<sup>240</sup> That is, in each of these cases, only one of the two concerned sovereigns had any interest in applying its law. Each of these two cases held that an American court could not constitutionally displace the law of the only relevant sovereign with its own irrelevant law.<sup>241</sup> In *Erie* the only relevant law was state law; and

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<sup>234</sup> 472 U.S. 797, 818–20 (1985) (holding that, although the forum with only inconsiderable contacts with a class could take jurisdiction of a class action, it could not apply its own law to the substantive rights of the class).

<sup>235</sup> See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 582–83 (1954) (pointing out that any number of countries in a transnational case might have significant contacts with the case warranting application of their law); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935) (holding, under the Due Process Clause, that the place of contracting was free to apply its workers’ compensation law on behalf of an injured worker, notwithstanding that the place of injury was elsewhere; explaining that although full faith and credit could be required of judgments, it could not be required of choices of law, since this would lead to the “absurd result,” *Alaska Packers*, 294 U.S. at 523, that in every two-state case the forum must apply the other state’s law, but never its own). Since *Alaska Packers*, full faith and credit arguments in choice of law are taken as equivalent to due process arguments. See *Hague*, 449 U.S. at 308.

<sup>236</sup> *Alaska Packers*, 294 U.S. at 550 (“No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts, and in the circumstances the full faith and credit clause does not require that the statutes of Alaska be given . . . effect [in California].”).

<sup>237</sup> Although the Court has never said so, the interested forum probably ought not to depart from its own law, and arguably cannot constitutionally do so, no matter what the interests of other sovereigns. This teaching seems implicit in cases like *Hughes v. Fetter*, 341 U.S. 609 (1951), discussed *supra* Part VIII. Cf. Weinberg, *supra* note 166, at 59–60 (noting that the costs of comity “might outweigh the conceivable benefits”). See generally Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984) (arguing that a departure from forum law may discriminate against a resident party).

<sup>238</sup> 281 U.S. 397 (1930).

<sup>239</sup> 304 U.S. 64 (1938).

<sup>240</sup> The false conflict case (as opposed to the no-conflict case, in which the laws of both concerned sovereigns are the same) was first identified by Currie, *supra* note 226.

<sup>241</sup> *Dick*, 281 U.S. at 411; *Erie*, 304 U.S. at 78.

in *Dick* the only relevant law was foreign law.<sup>242</sup> True, the rationales of the two cases differ. *Erie* was based on a lack of national power, in the absence of any national interest, to substitute some irrelevant general rule for the relevant law of an identified state.<sup>243</sup> And *Dick* was based on the forum state's lack of power to substitute its own irrelevant law for the relevant law of Mexico.<sup>244</sup> In *Dick*, the displacement of relevant law was held to be a violation of *due process*.<sup>245</sup> But one realizes, in retrospect, that *Erie* could have been based on due process too.<sup>246</sup> In each of the cases the forum had *no rational basis* for its expansion of the defendant's liability because it had no legitimate governmental interest in doing so. Together with the *Hague-Shutts* test, these principles of law's applicability are the measures of the process that is due.

Constitutional provisions can reflect background "postulates which limit and control,"<sup>247</sup> but can also reflect background postulates that empower and facilitate.<sup>248</sup> In our progressive reformulations of the question in *Kiobel*, we are finding that, in the end, what is needed to ground governmental power is *a legitimate governmental interest*. The question in *Kiobel*, on both the conflicts and constitutional levels, was whether, in the absence of territorial contacts with the United States (as the *Kiobel* Court saw the facts), there existed *any national interest* in adjudicating and remedying the alleged violations of human rights, such that applying our human rights law under *Filartiga* would not be arbitrary or fundamentally unfair.

I will turn to that question in my concluding argument, but I pause to note that the opinions in *Kiobel* were bare not only of the Supreme Court precedents mentioned in this Essay, but also of American legal reasoning as we have understood it ever since Alexander Hamilton deployed it in his great state paper on the Bank,<sup>249</sup> and Chief Justice John Marshall unpacked it in the great case of *McCulloch*

<sup>242</sup> See *Dick*, 281 U.S. at 411; *Erie*, 304 U.S. at 78.

<sup>243</sup> See *Erie*, 304 U.S. at 78.

<sup>244</sup> See *Dick*, 281 U.S. at 411.

<sup>245</sup> *Id.* at 410–11.

<sup>246</sup> Weinberg, *supra* note 95, at 1069–70.

<sup>247</sup> *Monaco*, 292 U.S. at 322.

<sup>248</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1809) (Marshall, C.J.) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.")

<sup>249</sup> Alexander Hamilton, *The Argument of the Secretary of the Treasury Upon the Constitutionality of a National Bank* 4 (1791).

[E]very power vested in a government, is in its nature SOVEREIGN, and includes, by *force* of the *term*, a right to employ all the means requisite and fairly applicable to the attainment of the *ends* of such power and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral; or not contrary to the essential ends of political society.

*v. Maryland*, when he declared, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>250</sup> Their arguments in reliance on law’s “ends” and “means” provide such a useful framework for thinking about the applicability of law that today that framework undergirds the tiered scrutiny deployed in virtually all constitutional cases.<sup>251</sup> The inquiry looks to the ends—the governmental purposes—of law, and then considers whether the means employed are tailored to those ends. Thus today’s Justices must know, but seemed, in *Kiobel*, not to remember, that the scope of law, statutory or decisional, is necessarily determined in the first instance by its purposes—its ends—the governmental interests to be served.

True, in *Kiobel* Chief Justice Roberts expatiated at length on the purposes of the rule against extraterritoriality. But he had nothing to say about the purposes of—the national interest in—the phenomenon the Court was targeting for demolition, *Filartiga*. In failing to inquire into the rational bases, if any, supporting what was at stake in the case—alien tort litigation—the *Kiobel* Court flung aside constitutional guarantees of *reason* in favor of a good old unreasoning *rule*. Rules versus reason. It is an old controversy, but should have been laid to rest long ago. There is no substitute for reason.

I do not doubt that it was bad process and bad policy to impose a Draconian territorial rule upon the Alien Tort Statute so as to render it unfit for use. If, however, in *Kiobel*, there were no territorial contacts with the United States and nothing touching and concerning the United States, and if for those very reasons there was no discernible interest of the United States in adjudicating *Kiobel*, I would have to concede that to bestow upon the *Kiobel* plaintiffs a cause of action under our law would have been to impose liability arbitrarily on the defendant—a denial of due process.

But in fact *Kiobel* was not without significant territorial contacts with the United States.

## X

### HIDING IN PLAIN SIGHT

Thus far we have accepted the Court’s view that the parties in *Kiobel* were both foreign. Since the place of the tort, Nigeria, was also foreign, there were no “contacts” in the case—to paraphrase the *Hague-Shutts* test—sufficient to generate a legitimate national interest

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<sup>250</sup> 17 U.S. (4 Wheat.) at 421.

<sup>251</sup> See generally Weinberg, *supra* note 95.

in applying our human rights law, such that application of our law under *Filartiga* would have been unreasonable and unfair. Although I will argue at the close as promised that the case was wrongly decided even if this assumption were sound, I should point out that the assumption was wrong.

#### A. Compensatory Interests: The Plaintiffs

It is hard to keep in mind, reading the opinions of the Justices in *Kiobel* and the transcript of the reargument, that the *Kiobel* plaintiffs were not “Nigerians,” or at least not *only* Nigerians. Nigeria was their probable place of birth, and perhaps they were Nigerian nationals or citizens in a formal sense.<sup>252</sup> But they were actually residents of the United States, long-time legal residents. (Chief Justice Roberts mentioned this, but he did so casually, as if it were a matter of no significance.<sup>253</sup>) Ironically, although the plaintiffs had their only home right here in the United States, the plaintiffs’ lawyer could not comfortably *say* so. An action pleaded under the Alien Tort Statute, of course, must be brought “by an alien.” In the first oral argument in the case, counsel did say that the plaintiffs were residents of the United States; but this was part of a response to a question about alternative forums, and passed unremarked. In the second oral argument, again in response to a question about alternative forums, counsel managed to say, more relevantly, “They sued here because this is where they live. This is their adopted homeland. . . .”<sup>254</sup> And later, more vaguely, “[O]ur clients are here, they’re here.”<sup>255</sup> Indeed, they had been living “here” for nigh on twenty years. They had fled from Nigeria, had been granted asylum here, and had no intention of returning or going anywhere else. Any student of the conflict of laws could tell you that on these facts and with these intentions, the *Kiobel* plaintiffs were *domiciled* here.<sup>256</sup>

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<sup>252</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662 (2013).

<sup>253</sup> *Id.* at 1663 (Roberts, C.J.) (“[P]etitioners moved to the United States where they have been granted political asylum and now reside as legal residents.” (citing Supp. Brief for Petitioners 3 & n.2)).

<sup>254</sup> Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 4486095, at \*6 (Oct. 1, 2012).

<sup>255</sup> *Id.* at \*17.

<sup>256</sup> “Domicile” is a term of art in the law of conflict of laws, as it is, variously, in state laws, for example, governing taxation of estates upon death. In the conflict of laws “domicile” is a quantum of presence, coupled with no present intention of moving anywhere else. The domiciliary party is always a substantial “contact” with the forum state, and injury to her has substantial effect or impact upon the forum state, no matter where the injury occurred. Although in days gone by the domiciliary state might consider itself selfish in counting the residence of the plaintiff as a significant contact, today this is increasingly understood to be the major contact a forum can have with a case. See, e.g., M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT’L LAW 316, 374–81 (2009).

The answer to a question depends on the purpose for which it is asked. The *Kiobel* plaintiffs were Nigerians—for purposes of pleading jurisdiction under the Alien Tort Statute. But they were also legal residents of the United States for purposes of weighing the impact of the tort on the United States—that is, for purposes of evoking the interest of this nation in remedying harms to its residents, wherever caused.<sup>257</sup> That they were legal residents also mattered for purposes of rebutting the supposed presumption against extraterritorial application of acts of Congress. Such changes in dealing with personal status in different contexts<sup>258</sup> arguably were within the contemplation of the drafters of the Alien Tort Statute.<sup>259</sup> In *Kiobel*, these somewhat different questions should not have been fudged together. Differentiated answers to different questions would not have required mental gymnastics beyond the capabilities of the Court or the Chief Justice. Think, for example, of the recent “Obamacare” case,<sup>260</sup> in which, for purposes of avoiding the Anti-[Tax] Injunction Act,<sup>261</sup> the fine for disobeying the Affordable Care Act’s “individual mandate” was held to be a “penalty, not a tax.”<sup>262</sup> But for purposes of testing the constitutionality of the individual mandate, the fine for disobeying it was held to be “a tax, not a penalty.”<sup>263</sup> However, having merely “scotch’d” the *Filartiga* snake nine years previously in *Sosa*, the *Kiobel* Court was now intent on killing it.<sup>264</sup>

I have said that the *Kiobel* plaintiffs were settled residents of the United States. One pesky issue does arise in identifying residence. That identification might be thought to depend on the point in time at which residence is established. If residence in a country is established only after the events in suit, it might be thought that such resi-

<sup>257</sup> For recent discussion of the relevance of the plaintiff’s residence to the choice-of-law inquiry, see *Am. Guarantee and Liability Ins. Co. v. U.S. Fidelity & Guaranty Co.*, 668 F.3d 991, 996–1000 (8th Cir. 2012) (interstate conflict in a commercial case).

<sup>258</sup> On this class of questions, see generally, in this symposium, Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 CORNELL L. REV. 1441 (2014); and see *infra* Part X.B.

<sup>259</sup> See Berry, *supra* note 256, at 321–22 (reporting that the word “foreigner” was deleted from the proposed enactment and the word “alien” substituted for it, in order to open American courts “to residents of the United States”).

<sup>260</sup> See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (sustaining the “individual mandate” of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A, on the reasoning that, although a mandate to purchase a good is (supposedly) beyond the commerce power of Congress, and imposes a condition on spending (supposedly) beyond Congress’s spending power, it is also a tax within Congress’s taxing power).

<sup>261</sup> The particular anti-injunction statute at issue, 26 U.S.C. § 7421(a), provides that no court may enjoin assessment or collection of a tax. The taxpayer must first pay the tax and then sue for a refund.

<sup>262</sup> *Sebelius*, 132 S. Ct. at 2655.

<sup>263</sup> *Id.* at 2595.

<sup>264</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act III, sc. 2 (Eugene M. Waith ed., 1954) (“*Macbeth*. We have scotch’d the snake, not kill’d it.”).

dence, being after-acquired, is irrelevant. Is the only relevant residence the place where the plaintiff lived at the time of the events in controversy? Or is it the place where the plaintiff resides at the time of litigation? In *Home Insurance Co. v. Dick*, Justice Brandeis assumed—and this was an important part of his reasoning—that the only relevant time in determining the plaintiff's residence was the time when the underlying events took place.<sup>265</sup> Although Dick was born in Texas, and resided at the time of litigation in Texas, at all relevant times, Justice Brandeis insisted, “the plaintiff was a resident of Mexico.”<sup>266</sup> In Brandeis's view, neither the place of birth nor the after-acquired residence of the plaintiff could, consistent with due process, apply its law to expand the liability of the defendants, over whom there was only jurisdiction *quasi-in-rem*, when at all times relevant to the events in litigation the plaintiff resided at the place of the underlying events, Mexico.

But, in that respect, *Home Insurance Co. v. Dick* has been departed from. The Supreme Court jettisoned Brandeis's view on this point fifty years later in *Allstate Insurance Co. v. Hague*.<sup>267</sup> In *Hague*, the Court held, by Justice Brennan, that the *after-acquired* residence of the plaintiff had a legitimate governmental interest in applying its law to provide a more complete remedy for the plaintiff. This interest also enabled the forum in *Hague* to impose expanded liability upon a different branch of the defendant insurer, over whom there was only general jurisdiction.<sup>268</sup> Under *Hague*, then, the *existing* interests of the putatively concerned states are what need to be considered. Contacts long since extinguished do not count. It is the *present* residence of the plaintiff in the forum state that invokes the adjudicatory and compensatory interests of the forum.<sup>269</sup> The present residence of the plaintiff, all else equal, is rationally empowered to apply plaintiff-favoring law. It would have made little sense to count Mrs. Hague a resident of Wisconsin, where all relevant events occurred, after she had married a Minnesota man, left Wisconsin for good, and taken up a new life and a bona fide residence in her new husband's state. She was administering the estate of her first husband in Minnesota and, as representative of the local estate, was suing the local branch of the insurer. The insurance payment sued for would have had to be paid into the estate in Minnesota among the other estate assets, if any, that she could mar-

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<sup>265</sup> 281 U.S. 397, 408 (1930).

<sup>266</sup> *Id.*

<sup>267</sup> 449 U.S. 302, 318 (1981).

<sup>268</sup> *Id.*

<sup>269</sup> For an arguably analogous current example, see *de Csepel v. Rep. of Hung.*, 714 F.3d 591 (D.C. Cir. 2013) (furnishing a remedy to the plaintiff whose residence in the United States was acquired after the alleged wrongful conversion of the artifacts to which he claimed title).

shal.<sup>270</sup> Wisconsin had little or no interest in balking full recovery for her in Minnesota, the place where she was actually domiciled at the time of litigation,<sup>271</sup> and the Wisconsin branch of the insurer did not need the protections of Wisconsin law, not being a party to the widow's lawsuit.

How does *Kiobel* differ from *Hague* in this? At the time of litigation, the United States had a distinct interest in remedying the tort to its resident, and could rationally apply its *Filartiga* cause of action to vindicate that interest. As to that interest, it was immaterial where the place of events happened to be. As *Hague* and *Hughes v. Fetter* teach, it cannot matter to the forum's existing interest in applying its law to favor its plaintiff that the underlying events occurred elsewhere. The only conceivable interest Nigeria could have retained vis-à-vis the *Kiobel* plaintiffs, as their former residence and perhaps the place of their formal citizenship, would have been in the services its diplomats in the United States could have rendered for their comfort upon their arrival here long ago.

#### B. Regulatory Interests: The Defendants

Also hiding in plain sight in *Kiobel* was the truth about the named defendant, the Royal Dutch Petroleum Company. This was the company whose only contact with the United States was supposed to be a small office in New York City maintained by an affiliate to deal with public relations vis-à-vis potential shareholders.<sup>272</sup> How did this small office become the only contact between the United States and the *Kiobel* case? This small office in New York was put forward as the basis of general jurisdiction over the defendant, however questionable such jurisdiction after *Goodyear*,<sup>273</sup> and with a decision in *Daimler*<sup>274</sup> imminent. It was the flimsiness of this "minimal and indirect American presence" of "a Dutch company" that convinced Justice Breyer that the case was, in effect, a lawsuit on stilts.<sup>275</sup>

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<sup>270</sup> *Hague*, 449 U.S. at 305.

<sup>271</sup> *Id.* at 305–06.

<sup>272</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1677 (2013) (Breyer, J., concurring).

<sup>273</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (Ginsburg, J.) (holding that the bare fact of ownership of the tortfeasor company by an American company is an insufficient contact with this country of a foreign tortfeasor subsidiary unless the subsidiary itself has sufficient contacts with the forum state to be considered "at home" in it).

<sup>274</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, at \*9–11 (2014) (holding that general jurisdiction over a parent corporation, Daimler, without sufficient contacts with California to consider the parent "at home" in California, were insufficient to ground an action by an Argentina plaintiff in California state court for the human rights violations in Argentina of a foreign subsidiary doing business in Argentina, Mercedes-Benz).

<sup>275</sup> *Kiobel*, 133 S. Ct. at 1678 (Breyer, J.) ("Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, it would be farfetched

In Esther Kiobel's amended complaint, three foreign oil companies were joined as defendants.<sup>276</sup> The first was Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), the company directly involved in the Nigerian atrocities.<sup>277</sup> Its motion to dismiss for want of personal jurisdiction had been granted,<sup>278</sup> but the Nigerian company did not raise this dismissal in the court of appeals, and the plaintiffs took the position that the jurisdictional issue was waived.<sup>279</sup> However that may be, the Nigerian company remained physically present by counsel<sup>280</sup> and filed a brief in the Supreme Court.<sup>281</sup> The second named defendant was Shell Transport and Trading, sole owner of the Nigerian subsidiary.<sup>282</sup> The third was the Royal Dutch Petroleum Co., a sister subsidiary of Shell Transport and Trading,<sup>283</sup> not to be confused with the giant company Royal Dutch Petroleum LLC. Although Royal Dutch Petroleum had nothing to do with the case, it was an occupant of that small office in New York where both it and Shell Transport were served with process.<sup>284</sup>

Royal Dutch Petroleum's small office in New York City was doing some pretty heavy lifting in the case. First, this small office lay conveniently within the territorial limits of effective service of domestic process of the United States District Court for the Southern District of New York.<sup>285</sup> Second, this same small office was also allowed on all sides to constitute the "minimum contact" between the case and the State of New York sufficient to ground a constitutional exercise of the district court's general jurisdiction over the person of the defendant

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to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest. . . . Thus I agree with the Court that here it would 'reach too far to say' that such 'mere corporate presence suffices.'" (contrasting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)).

<sup>276</sup> See *id.* at 1662; Amended Class Action Complaint at 1, *Kiobel v. Royal Dutch Petrol. Co.* (S.D.N.Y. 2004) (No. 02 CV 7618).

<sup>277</sup> *Kiobel*, 133 S. Ct. at 1662–63.

<sup>278</sup> *Kiobel v. Royal Dutch Petrol. Co.* (S.D.N.Y. 2010) (No. 02-7618), 2010 WL 2507025, at \*10 (unreported op.).

<sup>279</sup> Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 4486095, at \*4 (Oct. 1, 2012).

<sup>280</sup> The interests of Shell Nigeria were particularly engaged, given the parallel litigation against it going on at the Hague. See *supra* note 18.

<sup>281</sup> Supplemental Brief for Respondents, *Kiobel v. Royal Dutch Petrol. Co.* (No. 10-1491), 2012 WL 3127285, at \*1 (2012).

<sup>282</sup> Amended Class Action Complaint at 12–13, *Kiobel v. Royal Dutch Petrol. Co.* (S.D.N.Y. 2004) (No. 02 CV 7618).

<sup>283</sup> *Id.*; see also *Kiobel*, 133 S. Ct. at 1662.

<sup>284</sup> *Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring).

<sup>285</sup> For purposes of service within the United States, the relevant rule requires a presence within the state in which the district court sits. FED. R. CIV. P. 4(k); see also FED. R. CIV. P. 4(h)(i).

Royal Dutch Petroleum Company.<sup>286</sup> Third, the small New York office apparently served, for want of any perceived alternative, as the alleged significant contact for purposes of establishing a “significant relationship”<sup>287</sup> between the case and *the United States*, sufficient to overcome the Court’s presumptive rule against extraterritoriality. Buried in the case was a further question, which I suspect the Court did not want to reach, and which I remain very glad it did not reach,<sup>288</sup> the constitutional question whether imposition of liability under American human rights law, in a “foreign-cubed” case, on the basis of flimsy general jurisdiction over the small office in New York of an unrelated subsidiary, would be arbitrary or fundamentally unfair within the meaning of the Fifth Amendment’s Due Process Clause.<sup>289</sup>

These are four very different functions to pile onto a small office in New York City.<sup>290</sup> Whether adroitly or in confusion, or because there was a difference of opinion whether issues of personal jurisdiction had been waived altogether, Chief Justice Roberts did not deal at all with questions of personal jurisdiction. It was enough for him that, given his view of the plaintiffs as foreign “nationals,” and the fact that the events in suit occurred in Nigeria, he could conclude that the United States had nothing to do with the case.<sup>291</sup> It served his purpose that the minority, concurring, was convinced that the one named defendant, having nothing to do with the case beyond its convenient small office in New York, lacked sufficient contact with this country to

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<sup>286</sup> In the second oral argument in *Kiobel*, the Justices appeared to view the jurisdiction over Royal Dutch Petroleum as doubtful, and seemed surprised or even disappointed to learn that the question of personal jurisdiction over this defendant had not been argued in the court of appeals and might be considered waived. See Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 4486095 (Oct. 1, 2012), at \*3–4. Waiver was disputed by counsel for the defendant, however. *Id.* at \*22. General jurisdiction over a subsidiary (or unrelated branch), in a case in which the parent was not particularly “at home” in the forum state, was rejected by the Court as this Essay went to press. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>287</sup> The phrase “most significant relationship” is typically used by federal courts in choosing which state’s law to incorporate on issues traditionally governed by the states within cases otherwise governed by federal law. It is taken, as used throughout, from RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS (1971).

<sup>288</sup> See *supra* notes 108–10 and accompanying text.

<sup>289</sup> *Cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”).

<sup>290</sup> *But see* Katherine L. Caldwell, *Harboring Pirates on the New York Stock Exchange? A Look at “Mere Corporation Presence” in Kiobel*, 91 DENV. U. L. REV. ONLINE 19, 22–24 (2013) (arguing that the small office in New York might be important since public relations vis-à-vis potential shareholders could affect the defendant’s value on the New York Stock Exchange). Breyer correctly did not count the NYSE listing itself as a “contact,” remarking that foreign corporations are often listed. *Kiobel*, 133 S. Ct. at 1677.

<sup>291</sup> *Kiobel*, 133 S. Ct. at 1669.

rebut the presumption against extraterritoriality.<sup>292</sup> But it was not, precisely, Royal Dutch Petroleum's lack of connection with the *case* that impelled Justice Breyer's concurrence. Perhaps Justice Breyer believed that Royal Dutch Petroleum, having been named a party and served with process, had to have *something* to do with it. Rather, it was the flimsiness of Royal Dutch Petroleum's contacts *with the United States* that impelled Justice Breyer to concur in the judgment, taking the rest of the liberal wing with him.<sup>293</sup> The minority Justices were obviously unwilling to expose a foreign company to heavy liabilities for alleged misconduct in Nigeria on the thinking that an unrelated affiliate's small office in New York invoked a national interest in so doing. A small New York office of an unrelated affiliate, an office devoted to public relations with potential shareholders, furnished a contact so inconsiderable for purposes of trying an international atrocity as to be beneath notice.<sup>294</sup>

The skeptical reader may be troubled by known actual facts.<sup>295</sup> Who can pretend that Royal Dutch Petroleum was not Shell?<sup>296</sup> The huge parent and its various artificial subsidiaries were alter egos. The Royal Dutch Petroleum Company enjoyed only a brief existence roughly coinciding with the litigations in New York, from 2002 to 2007, as a corporate "shell" for Shell Petroleum Co., until reabsorbed

<sup>292</sup> *Id.* at 1672, 1677–78 (Breyer, J., concurring).

<sup>293</sup> *Id.*

<sup>294</sup> *But see* Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 325 (2002) (proposing a more globalized perspective on jurisdiction given the globalization of human activity).

<sup>295</sup> Shell Petroleum Development Company of Nigeria, Ltd., is wholly owned, as was Royal Dutch Petroleum Co., by Shell. Amended Class Action Complaint at 12–13, *Kiobel v. Royal Dutch Petrol. Co.* (S.D.N.Y. 2004) (No. 02 CV 7618).

<sup>296</sup> Shell redeployed in the instant case its Brief in Opposition in *Kiobel v. Shell Petrol. N.V.*, 2011 WL 3584741 (Aug. 12, 2011). Shell conveniently described therein the parties defendant to the suit as: "Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, and the Shell Transport and Trading Company, Ltd., formerly known as The 'Shell' Transport and Trading Company, p.l.c. Shell Petroleum Development Company of Nigeria, Ltd., was a defendant in the district court, but was not a party to the proceedings before the court of appeals and is not a respondent here." *Id.* at \*ii. Shell's Rule 29.6 Statement therein further described the respondent companies in three paragraphs, as follows:

Respondent Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, is a wholly owned subsidiary of Royal Dutch Shell, p.l.c.

Respondent the Shell Transport and Trading Company, Ltd., formerly known as The 'Shell' Transport and Trading Company, p.l.c. is a wholly owned subsidiary of Respondent Shell Petroleum N.V., except for one share that is held by a dividend access trust for the benefit of one class of ordinary shares of Royal Dutch Shell, p.l.c.\*

\*Royal Dutch Shell, p.l.c. is a publicly traded company. No publicly traded company has a 10% or greater stock ownership in Royal Dutch Shell, p.l.c.

by it.<sup>297</sup> Shell Petroleum, in turn, is wholly owned by Royal Dutch Shell PLC. And all these entities are owned by the Shell Group of the United Kingdom.<sup>298</sup> A veritable shell game. (Pun intended.) Who can share the Justices' near—"Arabian Nights" reverence for corporate veils, however thin and many-layered? Their tolerance for corporate shell upon corporate shell? (This pun also intended.) As for Shell Transport and Trading Company, it was delisted from the New York Stock Exchange in 2005 and now apparently exists only in Shell archives, having been succeeded by a revived Royal Dutch Petroleum Company.<sup>299</sup>

The Shell Group is organized under the laws of the United Kingdom.<sup>300</sup> It has certain executive offices in the Netherlands.<sup>301</sup> As of November 1, 2013, it is Europe's largest oil company, and has global operations.<sup>302</sup> It has incorporated numerous subsidiaries organized under the laws of the various places in which it is exploring and drilling for oil or conducting any of its other enterprises.<sup>303</sup> But in any realistic appraisal, a principal place of Shell's business, probably *the* principal place of Shell's business, appears to be the United States.<sup>304</sup> Shell has deployed billions in rig assets for exploration in our territorial waters off Alaska, and is drilling in our territorial waters in the

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<sup>297</sup> The "Royal Dutch Petroleum" designation appears, disappears, and reappears at the Shell Group's convenience throughout the history of Shell. Royal Dutch Petroleum existed as an independent Dutch corporation in 1907, but was merged with the Shell Transport and Trading Company Ltd., and became a British corporation. See *Our History*, SHELL, <http://www.shell.com/global/aboutshell/who-we-are/our-history.html>. Nevertheless the executive offices are maintained in the Netherlands as "Royal Dutch Shell," and handles Shell's financial decisionmaking at the highest level.

<sup>298</sup> See Brief of Appellees/Cross-Appellants, *Kiobel v. Royal Dutch Petrol. Co.*, 2007 WL 7419445, at *i* (2d Cir. 2007). At Shell's searchable website it can easily be ascertained that the Netherlands is not the place of Shell's incorporation, although Shell has executive headquarters there. See *Shell at a Glance*, SHELL, <http://www.shell.com/global/aboutshell/at-a-glance.html>. Shell's place of incorporation was and remains the United Kingdom, where the company began in 1897 as the small import-export business of Samuel Marcus, who previously sold used furniture and collected seashells. See *Our History*, SHELL, <http://www.shell.com/global/aboutshell/who-we-are/our-history.html>.

<sup>299</sup> See *The "Shell" Transport and Trading Company, p.l.c.*, SHELL, <http://www.shell.com/global/aboutshell/investor/shareholder-information/unification-archive/st-archive.html> (last visited Mar. 28, 2014).

<sup>300</sup> See *NYSE Governance Standards*, SHELL, <http://www.shell.com/global/aboutshell/investor/corporate-governance/nyse-gov-standards.html> (last visited Mar. 28, 2014).

<sup>301</sup> See *Shell at a Glance*, SHELL, <http://www.shell.com/global/aboutshell/at-a-glance.html>.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> See *Shell in the United States*, SHELL, <http://www.shell.us/> (last visited Mar. 28, 2014). Another helpful description of Shell's operations in the United States appears at the New York Stock Exchange website. *Royal Dutch Shell plc*, NYSE EURONEXT, <http://www.nyse.com/listed/rdsa.html>.

Gulf of Mexico with another great fleet of expensive delicate rigs.<sup>305</sup> It runs a large credit card business from executive offices in the United States, and one of the largest franchising businesses in the world, franchising the Shell gas stations ubiquitous in this country.<sup>306</sup> It maintains huge petrochemical plants here.<sup>307</sup> Shell began its life as an oil company exploring for oil in California at the turn of the last century.<sup>308</sup> Today Shell goes to the furthest reaches of the planet to find petroleum to satisfy our voracious market, the world's biggest.<sup>309</sup> In Justice Ginsburg's current formulation for cases of general jurisdiction,<sup>310</sup> Shell is "at home" here. Shell is us.

A company engaging in sufficiently massive activities here to be considered "resident" invokes American regulatory interests in American human rights law<sup>311</sup> vis-à-vis that company's conduct abroad.<sup>312</sup> It is true that regulatory interests have an altruistic component that might suggest an unreal level of disinterestedness. Yet our law, for example, prohibits bribery of foreign officials.<sup>313</sup> Congress's international commerce power, and the inherent national powers over foreign affairs,<sup>314</sup> together imply power to punish abuses of the means of international commerce,<sup>315</sup> including power to prohibit companies availing themselves of the benefits of our laws and our market from committing or supporting acts of atrocity in other countries, as well as power to prohibit their inducing official corruption in other countries.<sup>316</sup> Just as we become concerned if one of our big box stores is selling goods made by workers in unsafe working conditions abroad, we become concerned if one of the largest gas companies in our country is selling gas made from crude oil the extraction of which is

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<sup>305</sup> See *Shell in Alaska*, SHELL, <http://www.shell.us/aboutshell/projects-locations/alaska.html>.

<sup>306</sup> See *Shell Payment Cards*, SHELL, <http://www.shell.us/products-services/shell-cards.html>.

<sup>307</sup> See *Projects and Locations*, SHELL, <http://www.shell.us/aboutshell/projects-locations.html>.

<sup>308</sup> See *Our History*, SHELL, <http://www.shell.com/global/aboutshell/who-we-are/our-history.html>.

<sup>309</sup> See *Our Purpose*, SHELL, <http://www.shell.com/global/aboutshell/who-we-are/our-purpose.html>.

<sup>310</sup> Cf. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

<sup>311</sup> See, e.g., Mia Swart, *Justice Takes a Step Back for Sake of Profit* (Sept. 2, 2013), <http://www.bdlive.co.za/opinion/2013/09/02/justice-takes-a-step-back-for-sake-or-profit> (stating in the aftermath of *Kiobel* that "the dream of Nuremberg, that there should be no impunity for serious human rights violations, has been deferred" and referring to Shell as a "US-based corporation").

<sup>312</sup> Foreign Corrupt Practices Act of 1977 (codified as amended at 15 U.S.C. § 78dd-1).

<sup>313</sup> *Id.*

<sup>314</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

<sup>315</sup> Cf. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (stating that regulation of the instrumentalities of interstate commerce are within Congress's power).

<sup>316</sup> Foreign Corrupt Practices Act of 1977 (codified as amended at 15 U.S.C. § 78dd-1).

made to go smoothly by terrorizing villagers abroad. Even if such wrongdoing did not put downward pressure on American wages, Congress would still have power; although *Steel v. Bulova* may be marked for the current Court's hatchet, that famous case did hold the obvious, that Congress has power to regulate the foreign activities of residents of this country.<sup>317</sup>

Ironically, the defendants in the *Kiobel* litigation were treated for the most part as mere aiders and abettors of the atrocities alleged.<sup>318</sup> This is partly, no doubt, because the two who were in the personal jurisdiction of the trial court had no role in the events in suit. Moreover, there was an unresolved question whether alien tort cases under *Filartiga*, by analogy to American civil rights actions, are “officer suits,” requiring that the defendant be a government official acting under color of law.<sup>319</sup> But for these oddities of the case, primary liability, for Shell Nigeria, at least, would not have been inappropriate.<sup>320</sup> As Chief Justice Roberts wrote, under the necessity of taking the allegations of the complaint as true, “According to the complaint, . . . respondents enlisted the Nigerian Government to violently suppress the burgeoning demonstrations.”<sup>321</sup> Aiding and abetting emerges only after this primary instigation:

Throughout the early 1990's, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further alleged that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks.<sup>322</sup>

These allegations suggest that the Court had no need to rely on the sole national interest in adjudicating *Kiobel* that Justice Breyer could identify—the concern that this country not become a haven for

<sup>317</sup> *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282–83 (1952).

<sup>318</sup> *Kiobel*, 133 S. Ct. at 1662–63.

<sup>319</sup> See Simon Baughen, *Holding Corporations to Account: Crafting ATS Suits in the UK?*, 2 BRIT. J. AM. LEGAL STUD. 533, 536–37 (2013) (discussing early post-*Filartiga* cases involving the question of liability of corporations and other private actors).

<sup>320</sup> See, e.g., *Abdullah v. Pfizer, Inc.*, 562 F.3d 163, 188–89 (2d Cir. 2009) (concluding that Pfizer could face primary liability for violation of international norms because “the violations occurred as the result of concerted action between Pfizer and the Nigerian government”).

<sup>321</sup> *Kiobel*, 133 S. Ct. at 1662 (emphasis added).

<sup>322</sup> *Id.* at 1662–63. It seems unsurprising that Shell called on the Nigerian military for suppression of protest. The history of the British empire in India furnishes a familiar if rough analogy. That history involves a trading company's suborning of local princes, and, when unrest disturbed commerce, the company's pressing for military intervention. In that case, although the military presence in India was the British army, the army was eventually composed largely of native troops.

foreigners who violate human rights abroad.<sup>323</sup> The United States has positive regulatory interests vis-à-vis Shell, if we can see Shell as the ultimate perpetrator of the alleged atrocities, and if the Supreme Court had not placed parents beyond reach for the torts of their subsidiaries<sup>324</sup>—the defendant, if we can lift all its corporate veils and call it simply “Shell.”<sup>325</sup> And, as we have seen, the United States has *compensatory* interests vis-à-vis the plaintiffs, its own residents.

Once we see the parties for what they are, the Court’s perception of “extraterritoriality” becomes an embarrassment. Access to the *Filartiga* remedy in fact would not have been extraterritorial at all, but fully justified by the national interests, regulatory and compensatory, in the parties, who very much “touched and concerned” this country.

### C. Adjudicatory and Civic Interests: The Forum

We have already visited *Hughes v. Fetter*, and its constitutionally required rule that, all else being equal, a state court must take a sister state’s transitory cause of action.<sup>326</sup> Justice Black, the author of *Hughes*, did not rely upon the interest-analytic tools the Court had made available in earlier conflicts cases. But in his own way he made clear that, in *Hughes*, there was no conflict of laws.<sup>327</sup> Both states had enacted wrongful death statutes, and both states regularly tried wrongful death claims. Black saw that the forum had no real interest in declining to take the case.<sup>328</sup> But, to modern eyes, *Hughes* may be not so much about the forum’s lack of interest in *declining* the sister-state’s case, as about the forum’s positive interest in *taking* it. In *Hughes*, both the plaintiff and the defendant were residents of the forum state.<sup>329</sup> As any student of conflicts law can tell you, the joint residence of the parties has power to resolve the dispute between them.<sup>330</sup> The state

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<sup>323</sup> *Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring).

<sup>324</sup> See *supra* note 232.

<sup>325</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, at \*8–10 (2014) (Ginsburg, J.) (holding that a parent company is not subject to general jurisdiction in a suit against a subsidiary where the parent is not particularly “at home”). *Daimler* was a *Filartiga* action against the parent for the tort of the subsidiary, Mercedes Benz, involving “disappeared” individuals during the “Dirty War” in Argentina. *Id.* at \*5. In *Daimler*, Justice Ginsburg, astonishingly, scolded the Ninth Circuit for failing to consider the principles of “comity” relied on in *Kiobel*, when obviously there is no genocide, not one, however distant, to which an American court needs to extend comity.

<sup>326</sup> See *supra* Part VIII.

<sup>327</sup> See *Hughes v. Fetter*, 341 U.S. 609, 612 n.10 (1951).

<sup>328</sup> *Id.* at 613.

<sup>329</sup> *Id.*

<sup>330</sup> Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (Kaufman, J.) (“It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders.”); Ely, *supra* note 230, at 211 (discussing the power of the joint domicile).

forum has civic and adjudicatory interests in maintaining the peace of the state in which both disputants live, in allowing them their mutually preferred venue, and in providing access to a local court for which they are in some part paying taxes. We have just seen that in *Kiobel*, as in *Hughes v. Fetter*, the parties were not foreign to the United States but were both lawful residents of the United States. Given the settled residence here of both the plaintiff refugees and the defendant Shell, and their lack of any intention to quit the United States, the parties, in fact, were and are *domiciled* here. The United States, then, had all the power of the joint residence of the parties to resolve their dispute.

Exercise of this power could hardly offend Nigeria, either as the place of events or the home country of Shell Nigeria, or offend the United Kingdom, Shell's home country, or the Netherlands, home of its chief financial and executive offices. None of these countries is likely to have atrocity-favoring law. A relevant enterprise-protective law of some kind is certainly a possibility.<sup>331</sup> If any of them have enterprise-protective law they are free to apply it in their own courts, where, indeed, parallel litigation is proceeding at the time of this writing.<sup>332</sup> The forum in the United States remained free to apply the laws of any of those places as well as its own.<sup>333</sup> Nor does adjudication at the joint residence in any way undercut governance by the sovereign whose territory was the scene of the events in suit. That place retains whatever power it ever had and should have exercised to prevent such harmful events from occurring. It retains power to prosecute in its own courts those who perpetrated those harms, and to adopt a *Filartiga*-style private right to sue as well, if the victim of atrocity for some reason returns to the place of the tort to sue. But the place of occurrence has no power to reach out and control the judges and courts of a different country, the United States, when the latter are attempting to provide a peaceful resolution for a dispute between its own current residents by furnishing a civil forum to them.

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<sup>331</sup> See, e.g., ENNEKING, *supra* note 185, at 4 (discussing Nigerian laws protecting operators of oil pipelines from liability for sabotage and parent companies from liability for the torts of its subsidiaries).

<sup>332</sup> See Kirshner, *supra* note 180, at 260 (reporting that parallel proceedings are advancing in Nigeria).

<sup>333</sup> Thus, in *Filartiga*, Judge Kaufman could suggest that the law of Paraguay might be applied. 630 F.2d at 889. I pause to note that in this circumstance due process may be satisfied in the sense that the law of the place of injury, assuming its law favors the plaintiff and thus furthers the safety of its territory, would be rational in application. But the rationality of the choice, taken in isolation, may be an insufficient basis on which to ground the discrimination that occurs at the defendant-favoring forum when a defendant is denied her own state's defendant-protective law simply because the underlying event, perhaps fortuitously, occurred out of state. Had the event occurred at a point only a mile away within the defendant's home state, the defendant would have enjoyed that protection. Cf. Weinberg, *supra* note 237.

The adjudicatory interest of the United States in resolving the dispute between its residents<sup>334</sup> arises in no small measure from the ultimate *raison d'être* of courts. Aeschylus saw this when, in the final moments of his great trilogy, the *Oresteia*, the first court in the history of humankind comes into existence.<sup>335</sup> At that dramatic climax, the cycle of violence that followed upon the death of Agamemnon is removed from the realm of disorder and given to courts to resolve. The murder of Agamemnon, awful as it is, is not on the scale of the crimes against humanity alleged in *Kiobel*. Still, it is instructive that the policies of this first court in the world, as imagined by Aeschylus, are not solely deterrent or compensatory but also adjudicatory and civic, establishing order and the rule of law. Interestingly Aeschylus sees these interests also as *retributive*. In this first court in the world, at the right hand of Justice, sit the Furies.

#### CONCLUSION: THE NATIONAL INTEREST

It is more important than anything I have said thus far to make clear that *Kiobel* was wrongly decided even if the Court were *right* in thinking the case wholly foreign.

It is an irony that back in 2004, the Justices in *Sosa* were talking about the governmental interests underlying the Alien Tort Statute, and in 2013 in *Kiobel*, about the governmental interests underlying a rule against extraterritoriality. But none of the Justices in either case were talking about the governmental interest underlying what was at stake—the *Filartiga* cause of action. To be sure, Justice Breyer, concurring for the *Kiobel* minority, did say, and presumably all would agree, that our country has a general interest in not becoming a haven for the perpetrators of genocide or torture.<sup>336</sup> But Judge Kaufman never mentioned this interest in *Filartiga*. Justice Breyer's "haven" argument, in effect, was simply a rejoinder to Chief Justice Roberts's "magnet" argument<sup>337</sup>—that our nation has no interest in becoming a magnet for all the world's complaints of violations of international law. That observation, however, has no bearing on *Filartiga* actions because *Filartiga* plaintiffs can hardly be said to be forum shopping.

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<sup>334</sup> See Petitioners' Supplemental Opening Brief, *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2096960, at \*8 (arguing that all nations have adjudicatory power over cases in which the parties are within their jurisdiction).

<sup>335</sup> AESCHYLUS, *THE ORESTEIA* 172–73 (Ted Hughes trans., Farrar, Straus & Giroux eds., 2000).

<sup>336</sup> *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

<sup>337</sup> See *Kiobel*, 133 S. Ct. at 1664 (referring with approval to "the 'presumption that United States law governs domestically but does not rule the world'" (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007))). Chief Justice Roberts also argued that there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. *Id.* at 1668 (internal citation omitted).

The Supreme Court cannot assume such plaintiffs have a *choice*, while at the same time the Court complains that the United States has been the *only* nation willing and able to adjudicate their cases. It cannot be presumed that they have a choice, when *Filartiga* cases against foreign officials depend on the fortuity that the defendant may be in the United States. It cannot be complained that *Filartiga* is a magnet for foreigners' grievances, when Congress specifically *required* that the plaintiff, at least nominally, be an "alien."

In none of the *Kiobel* opinions can we find awareness of Judge Kaufman's own identification, in *Filartiga*, of the interest of the United States in alien tort litigation. Judge Kaufman read the Alien Tort Statute transformatively, but he did so by taking it seriously. He read literally the jurisdiction's precise requirements. This plain reading revealed that the ancient statute was quite fit for modern use. Judge Kaufman was able to accept the applicability of the statute, as pleaded, in *Filartiga*—a case that appeared wholly Paraguayan to him, because he experienced an electrifying flash of insight, opening his eyes to the national interest in both the statute and in its application in the particular case.

The national interest of the United States in taking a human rights case like *Filartiga*, Judge Kaufman explained, was by definition a mutual, reciprocal<sup>338</sup> interest shared by all civilized nations. The experience of two world wars, Judge Kaufman wrote, had taught all civilized nations the necessity of protecting human rights.<sup>339</sup> "The torturer, like the pirate and slave trader before him," he declared, quoting Blackstone,<sup>340</sup> "is *hostis humani generis*, the enemy of all mankind." To Blackstone's short list of universal enemies we would surely add the perpetrator of genocide and the terrorist. Every nation where this universal enemy can be found, indeed, would seem to have a civic *duty* to lend its courts to the task of bringing him to book—as well as a national interest in doing so. As Blackstone put it, this duty is incumbent on every nation to ensure "that the peace of the world be main-

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<sup>338</sup> To better see the reciprocal nature of this shared interest, imagine for a moment that in some dark future day the Supreme Court should finally succeed in shutting down American courts completely for trial of violations of civil rights occurring here in our own country. The thinking behind *Filartiga*—the hope—would seem to be that the courts of nations still willing to extend the rule of law and order, and still protective of the rights of individuals, would open their doors to an American seeking justice there, in just such a case as *Filartiga*—at least if that is where the perpetrator can be found.

<sup>339</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

<sup>340</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (1769) ("[W]here the individuals of any state violate [the law of nations], it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.").

tained.”<sup>341</sup> This reciprocal mutual interest in preserving the peace of the world is why the enemy of all civilized nations can be sued wherever found.<sup>342</sup> This is what is meant by universal jurisdiction. It surely must be part of this identified national interest to bring some measure of justice to survivors of the sufferings such enemies inflict on the innocent.

Among all the arguments and opinions in *Kiobel*, only Solicitor General Verilli, for the United States, in the second oral argument in *Kiobel*, touched on this national interest, and then only after acknowledging presumed interests to the contrary. “We also have interests in ensuring that our Nation’s foreign relations commitments to the rule of law and human rights are not eroded.”<sup>343</sup> In the ensuing colloquy, it became clear that Verilli was staking out what Justice Scalia identified as a new position for the United States.<sup>344</sup> It is one of the riddles of *Kiobel* that General Verilli’s thinking seems to have eluded the grasp of the Justices comprising the Court’s “liberal” wing.

In its way, *Filartiga* is as inspiring a national achievement for human rights as *Brown v. Board of Education*. *Filartiga* accomplished this without regard to what other countries are yet failing to do, with confidence in the courage and power of our courts, setting a magnificent example to all civilized nations. With *Kiobel*, the Supreme Court has all but demolished this achievement. The Justices unanimously accomplishing this demoralizing result were inexplicably blind to the national interest in preserving and honoring it.

*Kiobel* does scant honor to the traditions of this country’s tough, independent courts. It would far better become our character among nations to give rather than withhold the *Filartiga* remedy that our courts stand ready and able to provide.<sup>345</sup> Amid the press of our modern global interests, the Supreme Court’s rusty Victorian lock on the

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<sup>341</sup> *Id.*; cf. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 404 (1987) (providing that a “state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade,” and other analogous offenses).

<sup>342</sup> Judge Kaufman, sitting in a then-premier admiralty jurisdiction, would have been comfortable with universal venue in human rights cases, since there is universal venue in admiralty. A vessel against which claims have arisen can be arrested and sued *in rem* wherever found, and if necessary sold to fund its liabilities.

<sup>343</sup> Transcript of Oral Argument II, *Kiobel v. Royal Dutch Petrol. Co.*, 2012 WL 4486095, at \*43–44 (Oct. 1, 2012).

<sup>344</sup> *Id.* at \*44.

<sup>345</sup> Cf. *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (Chase, C.J.) (“[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.”). Chief Justice Chase’s maritime observations have special bearing here, since admiralty is notably a field in which—as in alien tort litigation—international norms become federal common law, venue is universal, and the defendant can be sued wherever found.

necessary reach of acts of Congress in our courts can only be deplored. *Kiobel's* destruction of *Filartiga* is the least comprehensible part of this, and, while we await unlikely revision or overrule, it fully deserves the condemnation of scholars.

