

HUMAN RIGHTS THROUGH THE ATS AFTER KIOBEL: PARTIAL EXTRATERRITORIALITY, MISCONCEPTIONS, AND ELUSIVE AND PROBLEMATIC JUDICIALLY-CREATED CRITERIA

JORDAN J. PAUST †

I. INTRODUCTION

In April 2013, the Supreme Court announced its decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ One of the key issues was whether a judicially-created general presumption against extraterritorial application of federal statutes should limit the reach of the Alien Tort Statute (ATS).² As noted in Part II of this article, five of the Justices decided that a presumption against extraterritoriality applies to the ATS and four Justices decided that the presumption should not apply to the ATS. Related to extraterritoriality, the Court also had to address “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.”³ On this issue, Part II shows that a clear majority of the Justices agreed that a cause of action can arise under the ATS with respect to violations in foreign territory, either because the presumption can be overcome in some cases or because it should not apply to the ATS. However, the Justices have not agreed on what criteria should be used to limit extraterritorial reach of the ATS and no single set of criteria is favored by a majority of the Justices.

As explained in Parts III and IV of this article, each Justice has ventured beyond early, consistent, and informing attention to the reach of the ATS; the extraterritoriality manifest from the face of the statute in light of the nature of the law incorporated, its jurisdictional character, and its substantive grasp; and a clear expression of Congress that should be determinative. Further, as noted in Part V of the article, the result in *Kiobel* does not serve human dignity and is anathema to the human right of all persons to an effective remedy for violations of customary international law over which there is universal jurisdiction and an express duty of all parties to the United Nations Charter to take joint and separate action in order to achieve “universal respect for, and observance of, human rights and fundamental freedoms for all.”⁴

Copyright © 2014 by Jordan J. Paust.

† Jordan Paust is the Mike & Teresa Baker Law Center Professor, University of Houston.

1. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
2. Alien Tort Statute, 28 U.S.C. § 1350 (2006) [hereinafter ATS].
3. *Kiobel*, 133 S. Ct. at 1662.
4. See U.N. Charter arts. 55(c), 56.

II. PARTIAL EXTRATERRITORIAL APPLICATION OF THE ATS AND SPLITS AMONG THE JUSTICES

Regarding extraterritoriality under the ATS, the opinion of the Court, written by Chief Justice Roberts, concluded “that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.”⁵ This statement is curious and inapposite because there was no judicially-created presumption against extraterritoriality in 1789 when the statute was created.⁶ With respect to application of the presumption in *Kiobel*, Chief Justice Roberts stated that “[t]here is no clear indication of extraterritoriality here, . . . and petitioners’ case seeking relief for violations of the law of nations occurring outside the United States is barred.”⁷ He added, “[o]n these facts, all relevant conduct took place outside the United States [a]nd 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.”⁸

These statements of Chief Justice Roberts do not unequivocally preclude every application of the ATS to conduct abroad, however, he would likely apply the presumption against extraterritoriality. One possibility is that he would apply the presumption to bar any claim under the ATS where all of the relevant conduct involving violations of the law of nations takes place abroad. Another possibility is that he would apply the presumption, but allow ATS claims for conduct occurring abroad when “the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption.”⁹ In this way, the presumption does not obviate all extraterritorial application where all of the conduct that violates international law occurs abroad, yet the presumption significantly restricts an extraterritorial reach. I assume that he meant to include “touch and concern” and “sufficient force” as his preferred but ambiguous criteria for deciding when the presumption is displaced.

In any event, it is clear that the majority of Justices will not preclude all extraterritorial application of the ATS. Nonetheless, they have disagreed on appropriate criteria to be considered with regard to its extraterritorial reach in particular circumstances and even whether a presumption against extraterritoriality should apply to ATS litigation. For example, Justice Kennedy emphasized that “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach” of the ATS.¹⁰ He also noted that there exist “[m]any serious concerns with respect to human rights abuses committed abroad,”¹¹ and that

cases may arise with allegations of serious violations of international law

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

6. See, e.g., William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKLEY J. INT’L L. 85 n.2 (1998) (claiming that the first use was in 1818).

7. *Kiobel*, 133 S. Ct. at 1669 (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (deciding on facts that did not involve international law violations or universal jurisdiction)).

8. *Id.* (citing *Morrison*, 130 S. Ct. at 2883–88).

9. *Id.*

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

11. *Id.*

principles protecting persons, cases covered neither by [a statute such as the Torture Victim Protection Act¹²] . . . nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.¹³

Justice Kennedy assured that the “reach” of the ATS remains “open” and that there is no automatic denial of an extraterritorial reach of the ATS to conduct occurring in a foreign state, but that he would apply the presumption against extraterritoriality in some instances and that there is a need for “further elaboration and explanation” of what would be a “proper implementation” of the presumption against extraterritoriality.¹⁴

In contrast, while concurring in the judgment, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, stated that he “would not invoke the presumption against extraterritoriality” in ATS cases.¹⁵ As this article demonstrates, for several reasons, this approach is the proper interpretation and implementation of the ATS. First, the presumption against extraterritoriality was created by the judiciary after the creation of the ATS and was clearly unknown to Congress in 1789. Second, as Justice Breyer noted, the presumption “does not work well,” because it “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.”¹⁶ Meanwhile, the ATS “was enacted with ‘foreign matters’ in mind” and, importantly, the text of the ATS “refers explicitly to ‘alien[s],’ ‘treat[ies],’ and ‘the law of nations.’”¹⁷ Third, with respect to the more general question raised about whether the ATS can apply to conduct occurring in a foreign state, Justice Breyer clearly and rightly recognized that it can and stated that he “would assume that Congress intended the statute’s jurisdictional reach to match the statute’s underlying substantive grasp,” which, according to “the statute’s purposes set forth in *Sosa*,¹⁸ includes compensation for those injured by piracy and its modern day equivalents.”¹⁹ However, instead of using a judicially-created presumption against extraterritoriality and relying on international law as the unmistakable “substantive grasp,” Justice Breyer preferred to be “guided in part by principles and practices of foreign relations law” when making a choice whether the ATS should apply in a particular case.²⁰ He made it clear that he joined “the Court’s judgment but not its opinion.”²¹ This choice highlights a lack of consensus with respect to rationales, doctrines, and criteria for the application of the ATS.

Also concurring, Justice Alito, joined by Justice Thomas, would allow

12. Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992) [hereinafter TVPA].

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

14. *See id.*

15. *Id.* (Breyer, J., concurring in the judgment).

16. *Id.* at 1672 (quoting *Morrison*, 133 S. Ct. at 2877).

17. *Id.* (quoting 28 U.S.C. § 1350).

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

19. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring in the judgment) (italics removed) (citing *Sosa*, 542 U.S. at 715).

20. *Id.* at 1671. However, what he referred to is not international or foreign relations “law.” *See infra* Part III.H.

21. *Kiobel*, 133 S. Ct. at 1678.

extraterritorial application of the ATS. At the very least, he would allow extraterritorial application when ATS “claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application”²² and, in his view, such claims “will fall within the scope of the presumption” and should be barred “unless the domestic conduct is sufficient to violate an international law norm that satisfies . . . requirements of definiteness and acceptance among civilized nations.”²³

Given these opinions, the clear majority of the Court, and perhaps every Justice, would allow partial extraterritorial application of the ATS. Although for different reasons, in deciding *Kiobel*, they did unanimously agree on the ultimate result where there were foreign plaintiffs, foreign defendants, and foreign conduct that, from their perspective, did not touch and concern the United States with sufficient force or involve sufficient U.S. interests. However, they differ on rationales, doctrines, and criteria that might result in non-extraterritoriality in a particular case.

III. EVIDENT MISCONCEPTIONS AND UNSEASONABLE MIGRATIONS

A. Missing the Boat With Respect to the Early Cases

While only using two of four early cases that address the ATS, Chief Justice Roberts stated that “[t]he two cases in which the ATS was invoked shortly after its passage . . . concerned conduct within the territory of the United States. See *Bolchos* [*v. Darrel*], 3 F. Cas. 810 (wrongful seizure of slaves from a vessel while in port in the United States); *Moxon* [*v. The Fanny*], 17 F. Cas. 942 (wrongful seizure in United States territorial waters).”²⁴ What Chief Justice Roberts did not seem to appreciate is the well-recognized fact that a foreign flag vessel is the equivalent of foreign state territory²⁵ and, therefore, that conduct on board such a vessel necessarily has an extraterritorial dimension even if the conduct takes place while the foreign flag vessel is in U.S. waters. Further, as noted in another writing with respect to *Moxon* and *Bolchos*,²⁶ “[i]n *Moxon*, French persons engaged in acts that originated from a French vessel and carried onto an English vessel during its capture in U.S. waters and, as noted, . . . acts on a foreign flag vessel are acts within foreign state territory.”²⁷ In *Bolchos v. Darrel*,²⁸ “the original cause arose at sea” on a Spanish vessel and the ATS allowed the court “to take

22. *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring) (quoting *id.* (majority opinion)).

23. *Id.* at 1670. It is not clear what Justice Alito meant by “the domestic conduct,” but I assume that he meant the domestic conduct within a foreign state that violates international law, especially because domestic conduct within the United States that is violative of international law must necessarily touch and concern the territory of the United States.

24. *Id.* at 1667 (majority opinion).

25. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, *INTERNATIONAL CRIMINAL LAW* 196–97 (4 ed. 2013); Jordan J. Paust, *Kiobel, Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 VA. J. INT’L L. DIG. 18, 28 & nn.46–47 (2012) (citing U.S. and other cases on point) [hereinafter Paust, *Kiobel*]; See discussion *infra* Part III.B.

26. Paust, *Kiobel*, *supra* note 25, at 27–28; see also Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT’L L. 249, 250–51 n.3 (2004) [hereinafter Paust, *History of the Act*].

27. *Moxon v. The Fanny*, 3 F. Cas. 810, 810 (D.S.C. 1795).

28. *Bolchos v. Darrel*, 17 F. Cas. 942, 942 (D. Pa. 1793).

cognizance of the cause” between two aliens, a Spanish claimant and an agent on behalf of a British national.²⁹

Two other early cases had addressed the ATS in 1794 that were not mentioned by the Chief Justice. Another case that was prior to the *Filartiga* line of cases starting in 1980 that was not mentioned was a district court decision in 1961. In a 1794 case involving the seizure of a Dutch vessel abroad, it was stated per dictum that “the powers of the district courts are expressed . . . as to civil causes . . . where an alien sues for a tort only.”³⁰ In another 1794 case, it was stated per dictum that where a vessel was seized abroad by a foreign vessel “[i]f an alien sue here for a tort under the law of nations or a treaty . . . the suit will be sustained.”³¹ In 1961, another pre-*Filartiga* ATS case was clearly extraterritorial and had involved recognized violations of international law within Lebanon and alien disputants.³² With respect to prior trends in judicial decision, the four known cases in the 1790s demonstrate that violations of international law occurring in the equivalent of the territory of a foreign state were clearly expected to be appropriately within the extraterritorial reach of the ATS whether or not conduct touched and concerned territory of the United States. There are no early cases to the contrary and what had been undoubted extraterritoriality was also evident in the 1961 judicial application of the ATS and would be from 1980 onwards in what became known as the *Filartiga* line of cases³³ that, most significantly, was later approved by Congress.³⁴

B. Piracy Properly Understood and Its Admitted Reach

In contrast to Chief Justice Roberts, Justice Breyer was correct to emphasize that piracy does not actually occur on the high seas or “in the water,”³⁵ but that piracy unavoidably involves the boarding of some other vessel flying the flag of some state³⁶ and that, therefore, the piratical acts in violation of international law must necessarily occur in the equivalent of foreign state territory when the

29. Paust, *Kiobel*, *supra* note 23, at 27–28 (quoting *Bolchos v. Darrel*, 17 F. Cas. 942, 942 (D. Pa. 1793); *Moxon v. The Fanny*, 3 F. Cas. 810, 810 (D.S.C. 1795)); *see also* Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT’L L. 249, 250–51 n.3 (2004) [hereinafter Paust, *History of the Act*]. There would have been a breach of neutrality under the law of nations concerning the capture of neutral property, but a treaty changed that result. *Moxon*, 3 F. Cas. at 810–11.

30. *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794).

31. *M’Grath v. Candalero*, 16 F. Cas. 128 (D.S.C. 1794).

32. *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

33. *See* note 59 *infra*. *See also* *Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring in the judgment) (“Not surprisingly, both before and after *Sosa*, courts have consistently rejected the notion that the ATS is categorically barred from extraterritorial application. *See, e.g.,* [Flomo v. Firestone National Rubber Co.] 643 F.3d [1013,] 1025 [7th Cir. 2011]) (“[N]o court to our knowledge has ever held that it doesn’t apply extraterritorially”); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747 (C.A.9 2011) (en banc) (“We therefore conclude that the ATS is not limited to conduct occurring within the United States”); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20 (C.A.D.C. 2011) (“[W]e hold that there is no extraterritoriality bar”).

34. *See infra* notes 59, 61.

35. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring in the judgment).

36. *See, e.g.,* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 635, 642–43 (1818).

victimized vessel is not a U.S. flag vessel.³⁷ As Justice Breyer stressed, “at least one of the . . . activities that we found [in *Sosa*] to fall within the statute’s scope, namely piracy . . . normally takes place abroad” and “[t]he majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas.”³⁸ Most significantly, piracy implicated universal jurisdiction and, therefore, “pirates were fair game ‘wherever found’”³⁹—a profoundly important recognition understood in *Sosa*⁴⁰ and affirmed in *Filartiga*⁴¹ and its progeny where universal jurisdiction pertains, and a recognition that should guide future decision making concerning the broad extraterritorial reach of the ATS whether or not violations of international law touch and concern territory of the United States. The existence of universal jurisdiction should also constrain inappropriate use of judicially-created limits.

C. Other Early Violations of International Law and Bradford’s 1795 Opinion

It is most curious that there had been a seeming focus by some Justices on three violations of international law that happened to be addressed by the British writer Blackstone, because the Framers and early judiciary clearly had paid attention to several other serious violations of international law, including breaches of neutrality addressed by Attorney General Bradford in 1795;⁴² conduct of poisoners, assassins, and incendiaries by profession; brigandry; slave trading; war crimes; denials of justice to aliens; and, most importantly, violations of human rights here and abroad by private and public perpetrators.⁴³ A 1781

37. See *Kiobel*, 133 S. Ct. at 1672–75 (Breyer, J., concurring in the judgment).

38. *Id.* at 1672.

39. *Id.* at 1667. See also *Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (“the jurisdictional principle that any nation that found a pirate could prosecute him,” “universal jurisdiction exists,” and “universal tort jurisdiction” is appropriate); Sarei, 671 F.3d at 746 (“the ATS provides a domestic forum for claims based on conduct that is illegal everywhere” under international law); *infra* notes 59–60, 101–102; notes 88, 101–102, 129–131 and accompanying text; *infra* Part VII. Curiously, Justice Breyer did not pay sufficient attention to the fact that complicitors of international crimes are also *hostis humani generis* when they aid or abet crimes under customary international law implicating universal jurisdiction when he stated that “plaintiffs allege, not that the defendants directly engaged in acts . . . but that they helped others.” See *Kiobel*, 133 S. Ct. at 1678. Concerning responsibility for complicitors under international law, see, e.g., *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 29 (D.C. Cir. 2011) (“Congress thus directed that the courts derive the rule of law from the law of nations, and that law extends responsibility for conduct violating its norms to aiders and abettors”); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157–58 (11th Cir. 2005); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845–48 (11th Cir. 1996); *Almog v. Arab Bank, PLC*, 471 F. Supp.2d 257 (E.D.N.Y. 2007); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 374 F. Supp.2d 331, 337–41 (S.D.N.Y. 2005); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320–25 (S.D. N.Y. 2003); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp.2d 7, 52–54 (E.D.N.Y. 2005); *Estate of Ungar v. Palestinian Authority*, 304 F. Supp.2d 232 (D.R.I. 2004); *Bodner v. Banque Paribas*, 114 F. Supp.2d 117, 122 (E.D.N.Y. 2000); 1 Op. Att’y Gen. 57, 58–59 (1795) (“and abetted”); PAUST, BASSIOUNI, ET AL., *supra* note 25, at 69–74; Paust, *Kiobel*, *supra* note 25, at 27.

40. See *Sosa*, 542 U.S. at 715, 724–25, 732.

41. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (quoted in *Sosa*, 542 U.S. at 732).

42. See *Breach of Neutrality*, 1 Op. Att’y Gen. 57 (1795).

43. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 11–12, 193–202, 208–10 (2 ed. 2003); PAUST, BASSIOUNI, ET AL., *supra* note 25, at 181–83; Paust, *Kiobel*, *supra* note 25, at 22–23 & nn.19–22; Johan D. van der Vyver, *Treatment of International Human Rights Violations in the*

Resolution of the Continental Congress listed some of these and added the broad category of “infractions of treaties and conventions to which the United States are a party.”⁴⁴ Importantly with respect to human rights, Chief Justice Marshall recognized in 1810 that our federal courts “are established . . . to decide on human rights.”⁴⁵ Each of these must have been of concern to Congress.

In any event, and significantly with respect to extraterritoriality, Attorney General Bradford’s 1795 opinion recognized the undoubted extraterritorial reach of the ATS when declaring:

there can be no doubt that the company or individuals who have injured by these acts of hostility [engaged in abroad on the west coast of Africa in the territory of Sierra Leone by private U.S. citizens in violation of the customary law of nations and treaties] have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts [by the ATS] in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.⁴⁶

In a strange response to the claim by Petitioners that the language quoted above reflects the early and consistent understanding that the ATS applies extraterritorially to violations committed on the territory of a foreign sovereign, which is undoubtedly true, Chief Justice Roberts stated that the “opinion defies a definitive reading,” that the U.S. perpetrators had “violated a treaty,” and that “[t]he opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.”⁴⁷ Yet, as noted, Attorney General Bradford’s opinion had expressly recognized that “there can be no doubt” that the foreign victims “have a remedy by civil suit” under the ATS, both customary and treaty-based international law had been violated and both types of international law are expressly incorporated by reference in the statute, and there had been an undoubted reach of the ATS to extraterritorial conduct.⁴⁸

Clearly, the Bradford opinion and all of the early judicial opinions noted in Part III A support extraterritoriality in contradistinction to a subsequent

United States, 6 DUKE FORUM FOR L. & SOC. CHANGE at Part C (2014); *supra* notes 27–31. Concerning the reach of international law to non-state actors, including companies and corporations, and recognitions that international law has never been merely state-to-state, *see, e.g.*, Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT’L L. 977 (2011) [hereinafter Paust, *Nonstate Actors*]. With respect to “denial of justice,” *see* Paust, *History of the Act*, *supra* note 26, at 255 & n.13.

44. *Resolution of 1781*, 21 J. CONT. CONG. 1136–37.

45. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810). Concerning the rich history of use of human rights precepts by the judiciary, *see, e.g.*, Paust, *Nonstate Actors*, *supra* note 43, at 988–89 n.38.

46. *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58–59 (1795) (Bradford, Att’y Gen.). In 1907, the Attorney General affirmed that a private Texas dredging company had acted “in direct violation” of a treaty and that Mexican nationals injured in Mexico have a right to a remedy and a forum under the ATS. *Mexican Boundary – Diversion of the Rio Grande*, 26 Op. Att’y Gen. 250, 251–54 (1907).

47. *Kiobel*, 133 S. Ct. at 1668. It is unclear what “weighty concerns” he had in mind, but if they would have anything to do with evident congressional intent the approval of the *Filartiga* line of cases by Congress should be determinative as to whether the judicially-created presumption should apply. By itself, it is a clear indication of preferred extraterritoriality as well as forms of reach. Chief Justice Roberts did not address the salient fact that there has been congressional approval, nor did he address the jurisdictional character of the substantive law expressly incorporated in the ATS.

48. *See supra* note 46; *see also supra* Part III A-B.

judicially-created presumption that was unknown to the creators of the ATS in 1789.⁴⁹ Indeed, when coupled with the extraterritoriality manifest from the face of the statute in light of the nature of the law that is incorporated and its jurisdictional attributes, the recognitions in the Bradford opinion and early judicial opinions should overcome any such presumption.⁵⁰ Additionally, the clear expression of Congress addressed in the next section should be determinative.

D. Extraterritoriality From the Face of the Statute and a Clear Expression of Congress

On its face, the ATS applies to “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁵¹ There are no geographic or substantive limits in the statute other than the need for a violation of international law to have occurred and it would be inappropriate for a court to add limits that Congress has never chosen. Further, as noted above, the facially-evident extraterritorial reach of the ATS was recognized and undoubted in early cases and opinions of the Attorneys General.⁵² Subsequent judicial opinions have also noted that the text of the statute contains no geographic limitations and that the nature of the substantive law expressly incorporated and its jurisdictional character necessarily affirm an extraterritorial reach.⁵³ Additionally,

49. Such a presumption did not exist in 1789. *See, e.g., Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745 (9th Cir. 2011) (en banc) (“There is no indication . . . that a ‘presumption against extraterritoriality’ existed or could have been invoked by Congress in 1789”).

50. *See Paust, Kiobel, supra* note 25, at 31.

51. 28 U.S.C. § 1350 (emphasis added). The 1789 version of the statute used the equally expansive phrase “all causes where an alien sues for a tort only.” An act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). Attorney General Bradford read the 1789 statute to reach “all cases where an alien sues for a tort only . . .” *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58–59 (1795). Therefore, the unlimited textual reach has been to “all causes,” “all cases,” and “any civil action.”

52. *See supra* Part III A & C; *supra* note 46.

53. *See, e.g., Sarei v. Rio Tinto, PLC*, 671 F.3d at 745 (“we are constrained by what § 1350 shows on its face: no limitations as to . . . the locus of the injury,” quoting *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992)), 745–46 (“There is more than one ‘clear indication’ of extraterritorial applicability in both the ATS’s text and its context . . . The statute’s explicit reference to the law of nations indicates that we must look beyond the law of the United States to international law . . . These are all indications of extraterritorial applicability.”), 747 (“We therefore conclude that the ATS is not limited to conduct occurring within the United States . . .”); *Sarei*, 671 F.3d at 781 (“At the time of its enactment, the ATS was intended to encompass conduct both within and beyond the United States . . .”), 782–83 (“Because the ATS targeted violations of the law of nations . . . , both the international focus and the nature of the harm . . . signal” extraterritoriality and “[t]aken together, the language of the statute, the historical context, and the nature of the harm encompassed by ‘the law of nations,’ supply the necessary ‘clear indication’ that the ATS’s jurisdictional grant . . . includes within its ambit at least some conduct occurring outside of the United States”) (McKeown, J., concurring); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.10 (2d Cir. 2000) (“the text . . . seems to reach claims for international human rights abuses occurring abroad”); *In re South African Apartheid Litigation*, 617 F. Supp.2d 228, 247 (S.D.N.Y. 2009) (the ATS “applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives” and the text and nature of the law violated support “inapplicability of the presumption,” also noting that the ordinary presumption is not applicable in the Second and Ninth Circuits regarding ATS litigation). *See also supra* note 33; *supra* notes 16–18 and accompanying text.

[t]he very subject matter expressly covered by the Act rests in substantial part on universal jurisdiction as well as United States obligations to not deny justice to aliens injured in the U.S. or abroad and to provide access to our courts. The customary prohibition of “denial of justice” applicable at the time of formation of the Act has been expanded today under customary and treaty-based human rights law that also requires access to courts and an effective remedy for human rights violations.⁵⁴

Surprisingly, Chief Justice Roberts rightly recognized that violations of international law “affecting aliens can occur either within or outside the United States” but, instead of confirming that violations of international law expressly addressed in the ATS therefore necessarily can occur in a foreign state, he claimed that “nothing in the text of the statute suggests . . . an extraterritorial reach.”⁵⁵ In sharp contrast, Justice Breyer correctly emphasized that “[t]he ATS . . . was enacted with ‘foreign matters’ in mind” and “[t]he statute’s text refers explicitly to ‘alien[s],’ ‘treat[ies],’ and ‘the law of nations.’”⁵⁶ As he rightly added, in lieu of the borderless nature of the text:

I would assume that Congress intended the statute’s jurisdictional reach to match the statute’s underlying substantive grasp. That grasp . . . includes compensation for those injured by piracy and its modern-day equivalents And just as we have looked to established international substantive norms to help determine the statute’s substantive reach . . . so we should look to international jurisdictional norms to help determine the statute’s jurisdictional scope.⁵⁷

Of great additional significance is the fact that in 1992, when Congress enacted the Torture Victim Protection Act (TVPA),⁵⁸ “Congress endorsed the *Filartiga* line of cases,” which clearly had been based in part on universal jurisdiction, had involved conduct of foreign and U.S. individual and corporate defendants outside the United States,⁵⁹ and had often involved a mere temporary presence of the defendant in the United States.⁶⁰ The House and Senate Reports

54. Paust, *Kiobel*, *supra* note 25, at 30.

55. *Kiobel*, 133 S. Ct. at 1661, 1665.

56. *Id.* at 1672 (Breyer, J., concurring in the judgment).

57. *Id.* at 1673.

58. Pub. L. No. 102-256; 106 Stat. 73 (1992).

59. *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); Paust, *History of the Act*, *supra* note 26, at 256 & n.19; *see also* *Sarei v. Rio Tinto, PLC*, 671 F.3d at 745 (“Congress . . . implicitly ratified such lawsuits”); *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1217 (9th Cir. 2007); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.10 (2d Cir. 2000) (“[t]he text of the [ATS] seems to reach claims for international human rights abuses occurring abroad. We reached the conclusion that such claims are properly brought under the Act in *Filartiga*; Congress ratified our conclusion by passing the TVPA); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (“[t]he scope of the Alien Tort Act remains undiminished . . .”); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Sarei v. Rio Tinto PLC*, 221 F. Supp.2d 1116, 1132 n.96 (C.D. Cal. 2002). *See also* *Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring in the judgment) (“Congress, while aware of the award of civil damages under the ATS - including cases such as *Filartiga* with foreign plaintiffs, defendants, and conduct - has not sought to limit the statute’s jurisdictional or substantive reach”).

60. *See, e.g., Kadic*, 70 F.3d at 237. *Kadic* is one of the landmark decisions within the *Filartiga* line of cases, especially with respect to recognition of private actor liability for war crimes and genocide over which there is universal jurisdiction. *See id.* at 239-43.

focused on the fact that “universal principles” were incorporated; that “many of the world’s governments” abroad engage in violations in their own territory and against their own citizens; that *Filartiga* had recognized that “the universal prohibition of torture had ripened into a rule of customary international law, thereby bringing torture squarely within the language of the statute;” that the ATS “should remain intact;” and that the TVPA “would . . . enhance the remedy already available” under the ATS for alien plaintiffs and “extend a civil remedy also to U.S. citizens who may have been tortured abroad.”⁶¹ As Congress endorsed the *Filartiga* line of cases, Congress expressly affirmed its purpose in creating the TVPA:

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.⁶²

Filartiga had also addressed the duty of states under the U.N. Charter to achieve universal respect for, and observance of, human rights as well as certain “significant” General Assembly resolutions that “specify with great precision the obligations of member nations under the Charter.”⁶³

The fact that Congress clearly endorsed the *Filartiga* line of cases should be determinative with respect to the lack of any sort of presumption against extraterritoriality and should provide a key to the extraterritorial reach of the ATS to violations of customary and treaty-based international law. As noted below in Part III H, congressional endorsement of the *Filartiga* line of cases should also restrain judicial adventurism into foreign policy and foreign relations.⁶⁴

Of additional importance is the fact that, although the ATS was revised in 1878,⁶⁵ 1911,⁶⁶ and 1948,⁶⁷ Congress never chose to set limits to what had been recognized and undoubted in federal cases and Opinions of the Attorneys General prior to 1948 as its extraterritorial reach to conduct of U.S. and foreign violators of international law. For this reason, it would be inappropriate for courts to add limits to the ATS that do not exist in the text of the statute and that Congress has never chosen.

61. H.R. REP. NO. 367, 102d Cong., 1st Sess., pt. I, at 1, 85–86 (1991); S. REP. NO. 249, 102d Cong., 1st Sess., at 3–4 (1991) (same). Concerning the fact that the Executive had also recognized the extraterritorial reach of the ATS at various times, including during the *Filartiga* litigation; see, e.g., Paust, *Kiobel*, *supra* note 25, at 27 n.37.

62. TVPA, *supra* note 12, preamble.

63. *Filartiga*, 630 F.2d at 881–83.

64. See *infra* Part III H.

65. See JENNIFER K. ELSEA, CONG. RES. SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS at 5 (2003).

66. Ch. 231, Pub. L. No. 61-475, § 24, para. 17, 36 Stat. 1087, 1091, 1093 (codified as R.S. § 563, para. 16, later as 28 U.S.C. § 41, para. 17) (Mar. 3, 1911).

67. Title 28, ch. 646, Pub. L. No. 80-773, § 1350, 62 Stat. 869, 934 (June 25, 1911).

E. Origins of Causes of Action

Sosa and *Kiobel* focused on (1) “a claim under the law of nations as an element of common law”⁶⁸ when Congress has not spoken, and (2) judicial power to “recognize private claims under federal common law for violations of” international law when jurisdiction exists under the ATS.⁶⁹ For Chief Justice Roberts, from his opinion in *Kiobel*, a judicially recognized cause of action would be the only source when using the ATS:

[t]he question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.⁷⁰

With this singular focus, he avers that when courts recognize a cause of action for violations of international law occurring abroad there is a “danger of unwarranted judicial interference in the conduct of foreign policy”⁷¹ that is presumably set up by alleged “clashes between our laws and those of other nations.”⁷²

One problem with this focus is that a right to a remedy or cause of action can arise under international law as well as under an act of Congress or judicially-created “common law.” Additionally, the ATS expressly incorporates international law by reference when using the language “committed in violation of the law of nations or a treaty of the United States.”⁷³ Quite clearly it is international law that must be violated and that is incorporated by reference as the substantive law.⁷⁴ When international law provides a right to an effective

68. *Sosa*, 542 U.S. at 725.

69. *Id.* at 732. Prior to *Sosa*, nearly every judicial opinion had concluded that the ATS creates a cause of action. Early cases and opinions of the Attorneys General pointed to the same conclusion. *See, e.g.*, *United States v. Greene*, 26 F. Cas. 33, 33 (C.C.D. Maine 1827) (No. 15,258) (Story, J: “gives . . . right . . . to sue”); *M’Grath v. Candalero*, 16 F. Cas. 128 (D.S.C. 1794) (No. 6,810) (“sue here for a tort . . . the suit will be sustained”); *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794) (No. 7,216) (“the powers of the district courts are expressed . . . as to civil causes . . . where an alien sues for a tort only”); 26 Op. Att’y Gen. 250, 252–53 (1907) (ATS provides “a forum and a right of action”); 1 Op. Att’y Gen. 57, 58 (1795) (“the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States.”); Paust, *History of the Act*, *supra* note 26, at 250–52 n.3, 254 & n.11.

70. *Kiobel*, 133 S.Ct. 1661 (Roberts, C.J.).

71. *Id.* at 1664.

72. *Id.* at 1661, quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (a case addressing U.S. law and not violations of international law or universal jurisdiction). *See also infra* note 78 regarding the piracy statute.

73. 28 U.S.C. § 1350.

74. *See, e.g.*, *Kiobel*, 133 S.Ct. at 1672–73 (Breyer, J., concurring in the judgment) (quoted and addressed at text *infra* notes 133–134; *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011) (en banc) (“The norms being applied under the ATS are international”); *Id.* at 782 (McKeown, J., concurring) (“the ATS targeted violations of the law of nations at home and abroad and did so by providing the law of nations . . . as the source of the cause of action”); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 29 (D.C. Cir. 2011) (“Congress thus directed that the courts derive the rule of law from the law of nations, and that law extends responsibility for conduct violating its norms to aiders and abettors”); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (“violation of international law,” “courts may fashion common law remedies to give effect to violations of customary international law”), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (“violations of

remedy,⁷⁵ it is international law, not domestic law, that provides a right to a remedy that is being enforced through the ATS, and there will be no clash between “our laws and those of other nations.”⁷⁶ More generally, given that international law is the substantive law incorporated by reference in the ATS, international law is being enforced whether or not our courts fashion a remedy for its violation and there will be no clash between domestic laws as the substantive law that is being enforced. Further, the international law being enforced with respect to violations occurring abroad is necessarily the relevant substantive law at the place of its infraction and not foreign domestic law. As I have noted in a prior writing,

the international law that is expressly incorporated and regulates relevant conduct has no boundaries and, therefore, necessarily includes an extraterritorial dimension that is also incorporated into the statute and enhances its extraterritorial reach. The statutory phrase “any civil action” in tort in violation of international law necessarily includes any of those arising in the U.S. or abroad.⁷⁷

Furthermore, the Supreme Court has long recognized that incorporation of international law by reference as the substantive law to be enforced is the constitutional prerogative of Congress.⁷⁸ When courts enforce international law

international law”), *cert. denied*, 518 U.S. 1005 (1996); *Bowoto v. Chevron Corp.*, 557 F. Supp.2d 1080, 1099 (N.D. Cal. 2008); *Presbyterian Church of Sudan*, 244 F. Supp.2d at 320-21; *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (“the substantive principles to be applied” are those of “international law” and the word tort means a wrong); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 10, 14 (2 ed. 2003); Paust, *Kiobel*, *supra* note 25, at 20. The substantive law that is expressly incorporated is decidedly not common law or some domestic law prescribed merely by the United States and none of the early ATS cases or opinions of the Attorneys General referred to “common law” as the substantive law. *See also id.* at 9, 39-41 n.50. Because the substantive law is universal international law and treaty-based law, conflicts of law principles are necessarily irrelevant. Further, international law implicating universal jurisdiction is law that has been applied in state, federal, foreign, and international forums for the last two hundred plus years. *See, e.g.*, text accompanying *infra* notes 88, 94, 99, 101-102; *infra* note 78.

75. One such area of international law is customary and treaty-based human rights law. *See infra* Part V.

76. *But see supra* note 72.

77. Paust, *Kiobel*, *supra* note 25, at 20.

78. *See, e.g., In re Yamashita*, 327 U.S. 1, 7-8 (1946); *Ex parte Quirin*, 317 U.S. 1, 27-30 (1942); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-62 (1820) (approving incorporation by reference regarding the international crime of piracy in a 1789 statute contemporaneous with passage of the ATS); JORDAN J. PAUST, *ET AL.*, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 155-64 (West 3 ed. 2009) (also addressing other relevant statutes). Chief Justice Roberts used a phrase “[a]pplying U.S. law to pirates” [*see Kiobel*, 133 S.Ct. at 1667 (Roberts, C.J.)], but he did not seem to realize that the piracy statute approved in *Smith* incorporated customary international law by reference as the substantive law and that what is actually being enforced or applied during prosecution is customary international law over which there is universal jurisdiction, not our law. Because the ATS incorporates customary international law for suits by alien plaintiffs, it is not directly relevant whether such law is also directly incorporable without a federal statute. Nonetheless, direct incorporation of customary international law has also occurred since the Founding. *See, e.g., id.* at 132-47, 433 (in federal courts), 579-81, 588 (in state courts); *Ex parte Quirin*, 317 U.S. at 27-28; *Filartiga v. Pena-Irala*, 630 F.2d at 886-87; Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 212-14, 231-39 (2008) (also noting that customary international law is not mere “common law.” *Id.* at 219 n.42.); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS

that is incorporated by reference in a federal statute they have been permitted to do so by Congress and are not engaging in an unwarranted interference in the conduct of foreign policy. This method is exactly what Congress chose to do when it enacted the ATS as a statute applying to “any” civil action in tort involving a violation of international law that was incorporated by reference in the statute and what Congress approved when it endorsed the *Filartiga* line of cases.⁷⁹ As noted in Parts III H and VI, permission from Congress and a lack of unwarranted interference are all the more clear when the international law that is incorporated by reference and being enforced is that over which there is a universal jurisdictional competence of the United States and all other countries to engage in effective enforcement. It is even more so when relevant international law requires enforcement.⁸⁰

F. Transitory Torts

With respect to the transitory tort doctrine where, by fiction, civil claims follow the person,⁸¹ Chief Justice Roberts would seem to require that “when the cause of action arose” abroad, there should be “a well-founded belief that it was a cause of action in that place.”⁸² However, when customary international law provides a right to a remedy and universal jurisdiction pertains, there will necessarily be a right to a remedy “in that place” where the violation of international law occurred as well as anywhere else.⁸³ Similarly, a right to a remedy under a treaty will be a right “in that place” where a violation occurs in the territory of a party to the treaty and the treaty-based right to a remedy will pertain in the courts of other parties to the treaty when they obtain personal jurisdiction over the alleged violator. More generally, a violation of international law over which there is universal jurisdiction will be a violation at the place where it occurs as well as everywhere else.

LAW OF THE UNITED STATES §111(1)-(3) (1987) [hereinafter RESTATEMENT]; PAUST, *supra* note 43, at 7-10 (regarding constitutional bases, direct incorporation of customary international law, and the fact that such law is not simplistically mere common law).

79. See *supra* Part III D. It is also what the Executive has approved. See, e.g., *supra* note 61.

80. See also *Kiobel*, 133 S.Ct. at 1676 (Breyer, J., concurring in the judgment) (addressing “treaties obliging the United States to find and punish foreign perpetrators” – some of which also require civil remedies.). See also *infra* Part V.

81. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d at 885 (regarding civil suits against individuals, customary international law also permits jurisdiction over “the settlement of claims between persons ... present in the territory” under the well-recognized fiction that civil claims follow the person.); See, e.g., JOSEPH M. SWEENEY, COVEY T. OLIVER, NOYES E. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 128 (2 ed. 1981); PAUST, *ET. AL.*, *supra* note 78, at 595.

82. *Kiobel*, 133 S.Ct. at 1661 (Roberts, C.J.) (quoting *Cuba R. Co. v. Crosby*, 222 U.S. 473, 479 (1912) (a case that did not address international law or universal jurisdiction)).

83. See also *infra* Part VI.

G. *Custos Morum* – the Full Story

1. *Seven Points Regarding Custos Morum and International Law*

Chief Justice Roberts quoted a portion of Justice Story's remarks in *United States v. The La Jeune Eugenie*⁸⁴ as a basis for argument that there was "no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."⁸⁵ Justice Story had remarked: "No nation has ever yet pretended to be the *custos morum* of the whole world."⁸⁶ However, Story's remark is decidedly inapposite. First, Justice Story did not use the phrase *custos morum* in order to deny jurisdiction of our courts as a hospitable forum for enforcement with respect to violations of international law engaged in by private perpetrators – just the opposite. Second, Justice Story apparently had in mind an implied impermissibility of judging a foreign nation with respect to our morality (*i.e.*, *custos morum*) or its domestic law. Third, at the time he made his remark and subsequently, it had been and is expected that all states are guardians of international law over which there is universal jurisdiction and responsibility, especially human rights law,⁸⁷ and Story's fuller set of remarks is manifestly consistent with that viewpoint and the need for our courts to apply the universal public law of nations against foreign individual perpetrators. Fourth, writing for the Court two years earlier, Justice Story had unmistakably affirmed the propriety of U.S. sanctions against perpetrators of "an offence against the universal law of society" that like the ATS, had been incorporated by reference in a federal statute at the same time as its creation.⁸⁸ Fifth, in an 1827 opinion Justice Story affirmed that the ATS "gives . . . [a] right . . . to sue" for the enforcement of international law.⁸⁹ Sixth, in *The Santissima Trinidad*,⁹⁰ during the same year that *La Jeune Eugenie* was decided, Justice Story famously ruled for the Supreme Court that property taken abroad in violation of the law of nations "is liable to the jurisdiction of our Courts" when subsequently brought into our ports and that a presumptive exemption exists as a matter of comity only if foreign war ships demean "themselves according to law."⁹¹ Justice Story added per dictum that if a foreign sovereign "comes

84. *United States v. The La Jeune Eugenie*, 26 F.Cas. 882 (No. 15,551).

85. *Kiobel*, 133 S.Ct. at 1668 (Roberts, C.J.). See also Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT'L L. 835, 837 (2013) (confusing *custos morum* with international law that implicates "universal jurisdiction").

86. *La Jeune Eugenie*, 26 F.Cas. at 847.

87. See *infra* Part V.

88. *United States v. Smith*, 18 U.S. 153, 161, 163 (1820) (Story, J.). He would expressly refer to "universal law" in *La Jeune Eugenie*. See *infra* notes 94, 99.

89. *United States v. Greene*, 26 F.Cas. at 33.

90. *The Santissima Trinidad*, 20 U.S. 283 (1822) (Story, J.).

91. *Id.* at 353 (noting that at that time grounds for immunity of warships were "not founded upon any notion that a foreign sovereign had an absolute right."). Presenting nearly the same issues as those raised in *The Santissima Trinidad* was a case arising out of the impermissible action of a German warship of the Imperial German Navy during World War I addressed in *Berg v. British and African Steam Navigation Co. (The Prize Ship "Appam")*, 243 U.S. 124, 153–56 (1917) (quoting *The Santissima Trinidad*, *id.* at 154–55 (allowing alien private plaintiffs to sue for "restitution . . . conformably to the laws of nations and the treaties and laws of the United States" for the German

personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.”⁹² Seventh, today foreign state violations of international law can be addressed by our courts if sovereign immunity does not pertain under the Foreign Sovereign Immunities Act.⁹³

2. Story’s Focus on Universal Law and Judicial Responsibility

What Justice Story actually emphasized in *La Jeune Eugenie* was that, “in an American court of judicature, I am bound to consider the [slave] trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation.”⁹⁴ He recognized the point that “if the African slave trade is repugnant to the law of nations, no nation can rightly permit its subjects to carry it on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations.”⁹⁵ Yet, he thought that no nation should sit in judgment of the domestic laws of another nation, as opposed to sitting in judgment against private perpetrators of international law,⁹⁶ for “[i]t would be inconsistent with the equality and sovereignty of nations, which admit of no common superior. No nation has ever yet pretended to be the *custos morum* of the whole world.”⁹⁷

With respect to international law and universal jurisdiction over private perpetrators, Justice Story quoted, with approval, a British case on point⁹⁸ and affirmed “the doctrine . . . that any trade contrary to the general law of nations . . . may subject the vessel employed in that trade to confiscation” and recognized that the British courts “applied the doctrine upon principles of universal law, and asserted, that it might be applied to a claim of such a nature in

government’s violation both of the law of nations and relevant treaties)). Importantly, the Supreme Court recognized jurisdiction and the right to a remedy despite the intervention of the German ambassador, the claim that the U.S. court lacked jurisdiction, and the claim that since other proceedings had been instituted in Germany the U.S. court should decline jurisdiction. *See id.* at 147, 152. The Supreme Court also noted that “an illegal capture would be invested with the character of a tort.” *Id.* at 154.

92. *Id.* (e.g., the sovereign is not immune if the sovereign violates the law of nations). *See also* 9 Op. Att’y Gen. 356, 357 (1859) (“a law which operates on the interests and rights of other States or peoples must be made and executed according to the law of nations. A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision in his own municipal code . . . public law must be paramount to local law in every question where local laws are in conflict”).

93. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1391, 1441(d), 1602–1611, *et seq.* [hereinafter FSIA].

94. *La Jeune Eugenie*, 26 F.Cas. at 847.

95. *Id.* Earlier, Justice Story had been among those Justices who had and would consistently recognize that the President of the United States is bound by the laws of war. *See, e.g., Brown v. United States*, 12 U.S. 110, 149, 153 (1814) (Story, J., dissenting); Paust, *supra* note 78, at 240–44.

96. *See La Jeune Eugenie*, 26 F.Cas. at 847–51. This viewpoint regarding foreign domestic laws would change when they were violative of international law. *See, e.g., supra* note 92; *infra* note 105.

97. *Id.* at 847.

98. *Id.* at 847–48 (quoting *The Amedie*, 1 Act. 240, 1 Dod. 84, note (including: “We cannot certainly compel the subjects of other nations to observe any other, than the first and generally received principles of universal law . . . We are of the opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law,” avoid jurisdiction and proper sanctions))).

any court.”⁹⁹ In this sense, Justice Story affirmed an earlier affirmation by Justice Iredell of universal jurisdiction that is still of great importance with respect to the reach of United States competence to address violations of international law and as background for interpretation of the ATS.¹⁰⁰ As Justice Iredell made clear in 1795, “all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it.”¹⁰¹ It is the same general point that Justice Johnson had made in 1820 with respect to the crime of piracy, which “is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all . . . within this universal jurisdiction.”¹⁰²

On foreign policy or other concerns of governments, Justice Story noted that with respect to violations of universal law by private perpetrators, “[u]nder such circumstances this court must follow the duty prescribed to it by law, independently of any wishes of our own government or of France.”¹⁰³ In 1866, this clear focus on judicial restraint and responsibility to enforce international law was embraced by Chief Justice Chase: “we administer the public law of nations, and are not at liberty to inquire what is for the particular . . . disadvantage of our own or another country.”¹⁰⁴ Subsequent judicial opinions have affirmed that courts must be restrained from addressing foreign relations and foreign state concerns when universal jurisdiction is exercised over violations of international law and that application of identifiable international law is not to be restrained by judicially created political question or act of state doctrines, especially when Congress has incorporated international law as the substantive law to be effectuated through the ATS.¹⁰⁵

99. *La Jeune Eugenie*, 26 F.Cas. at 848.

100. See *infra* Part VI.

101. *Talbot v. Janson*, 3 U.S. 133, 159–61 (1795) (Iredell, J., concurring). Quoted approvingly by Chief Justice Marshall in *The Divina Pastora*, 17 U.S. 52, 65–66 (1819) (Marshall, C.J.).

102. *United States v. Furlong*, 18 U.S. 184, 197 (1820) (Johnson, J.). See also *United States v. Smith*, 18 U.S. at 161, 163 (*supra* text accompanying note 88; *United States v. Klintonck*, 18 U.S. 144, 147–48 (1820) (argument of the Att’y Gen.) (piracy “is an offence against all. It is punishable in the Courts of all . . . [and our courts] are . . . bound to punish”).

103. *La Jeune Eugenie*, 26 F.Cas. at 851.

104. *The Peterhoff*, 72 U.S. 28, 57 (1866) (Chase, C.J.).

105. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d at 746 (“foreign relations difficulties and intrusions into the sovereignty of other nations” are not relevant with respect to “conduct that is illegal everywhere” under international law); *In re South African Apartheid Litigation*, 617 F. Supp.2d 228, 247 (S.D.N.Y. 2009) (ATS “applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives”); *Daliberti v. Republic of Iraq*, 97 F. Supp.2d 38, 52–54 (D.D.C. 2000) (“states are on notice that state sponsorship of terrorism is condemned by the international community” and “nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit” and have “adequate warning of possible U.S. sanctions, including lawsuits in U.S. courts” (quoting *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23)); *Filartiga v. Pena-Irala*, 577 F. Supp. at 862 (no “justifiable offense” to a foreign state can occur when universal jurisdiction is exercised over violations of international law); *supra* note 91. In fact, no state has authority to authorize violations of international law and violations by a state within its borders are not lawful “sovereign,” “public,” or “official” acts and are not simplistically or in any sense merely the internal affairs of a particular state. See, e.g., *Opinion and Judgment, International Military Tribunal at Nuremberg* (1946) (“the doctrine of sovereignty of the State . . . cannot be applied to acts which are condemned as criminal by

H. Section 403 of the Restatement Is Inapplicable and Inapt

The sage recognitions noted above by Justice Story, Chief Justice Chase, and other judges are in apparent contrast to efforts by some judges to abandon judicial restraint and use an ad hoc comity-factors approach to obviate jurisdiction that Congress and the Executive have chosen when enacting extraterritorial legislation. Justice Breyer might prefer to do this under the guise of “principles and practices of foreign relations law” that are supposedly reflected in Section 403 of the Restatement.¹⁰⁶ However, it is important to note that, despite a claim made in the Restatement concerning its preference for a comity-factors limitation of the reach of certain forms of jurisdictional competence,¹⁰⁷ Section 403 is not part of international law,¹⁰⁸ much less “foreign

international law He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law”); *United States v. Von Leeb* (The High Command Case), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 489 (1950) (“International law operates as a restriction and limitation on the sovereignty of nations”); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1210 (9th Cir. 2007) (“acts of racial discrimination cannot constitute official sovereign acts,” also quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (“[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act”)); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) (“officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)”); *Doe I v. Unocal Corp.*, 395 F.3d 932, 958–59 (9th Cir. 2002); *Altmann v. Republic of Argentina*, 317 F.3d 954, 967 (9th Cir. 2002), quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987) (“violations of international law are not ‘sovereign’ acts”); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (war crimes do not raise political question concerns); *In re Estate of Ferdinand Marcos, Human Rights Litigation* *Hilao v. Estate of Ferdinand Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994) (human rights violations, including torture, are not lawful public acts of state), *cert. denied*, 513 U.S. 1126 (1995); *Liu v. Republic of China*, 892 F.2d 1419, 1432–33 (9th Cir. 1989) (act of state doctrine not applied to assassination, which is not in the “public interest,” and a strong international consensus exists that it is illegal), *cert. dismissed*, 497 U.S. 1058 (1990); *Bowoto v. Chevron Corp.*, 2007 WL 2349345 (N.D. Cal. 2007) (quoting *Siderman*); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d at 344–35 (adjudication of genocide, war crimes, enslavement, and torture is not barred by the act of state doctrine); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (defendant could not argue that torture fell within the scope of his authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) (“these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo’s official authority,” and quoting *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is “clearly contrary to precepts of humanity as recognized in both national and international law” and “there is no discretion to commit, or to have one’s officers or agents commit, an illegal act;” therefore, assassination cannot be part of official’s “discretionary” authority), *cert. denied*, 471 U.S. 1125 (1985)); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (defendant’s argument regarding “the act of state and political question doctrines is completely devoid of merit. The acts ... [of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law] hardly qualify as official public acts” and regarding the political question doctrine, the claims present “clearly justiciable legal issues”); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (torture, arbitrary detention, and summary execution “are not public official acts”).

106. See *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment); *infra* Part IV.

107. See RESTATEMENT, *supra* note 78, § 403, Comment. A.

108. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 636; PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 241–42; Paust, *Kiobel*, *supra* note 25, at 23. General patterns of practice and *opinio juris* simply do not exist to support an alleged “law” that would require courts of all countries to obviate the extraterritorial reach of domestic legislation based on permissible territorial, nationality, or protective jurisdiction in accordance with the comity-factors limitations listed in Section 403 of the Restatement. Such a

relations law.” Even more significant, Section 403 expressly does not apply when Section 404 is applicable *i.e.*, when universal jurisdiction pertains over violations of international law – especially because the very essence of universal jurisdiction is that it allows sanctions against perpetrators wherever they are found and, as expressly recognized in Section 404, there are “no links” with the forum state that is enforcing international law.¹⁰⁹ When Congress exercises such an unmistakably universal competence, Congress has chosen to allow enforcement of international law and not to ignore it or limit its reach.

It is of further interest that U.S. courts do not generally use a comity-factors approach to obviate jurisdiction, especially when the United States has nationality or protective jurisdiction;¹¹⁰ that Congress has generally ignored a comity-factors approach when adopting or reaffirming extraterritorial legislation, especially with respect to international crimes;¹¹¹ and that the political branches are best suited to identify appropriate foreign policy and related comity-type interests, their proper weight, and how and whether to balance them among themselves and among other competing interests.¹¹²

Of significant import has been the prior warning of the Supreme Court that judicial application of a statute “on a purely *ad hoc* weighing of contacts basis . . . would inevitably lead to embarrassment of foreign affairs and be entirely infeasible in actual practice.”¹¹³ Judicial use of such an approach would inevitably be haphazard, inflexible, and unreasonable with respect to various policies at stake and would be unpredictable, leaving others without adequate notice and guidance whether extraterritorial jurisdiction might be exercised in a given case.¹¹⁴ Such an outcome is especially undesirable in a democracy when unelected and relatively isolated judges would obviate the extraterritorial reach of legislation chosen by Congress and the Executive and clearly endorsed by a subsequent Congress.¹¹⁵

IV. CRITERIA PROFFERED BY CERTAIN JUSTICES ARE IN CONTRAST TO CLEAR CONGRESSIONAL APPROVAL

Criteria offered by Chief Justice Roberts and Justice Alito that are identified in Part II are tied to the judicially-created presumption against extraterritoriality. For this reason, they should not be used when the presumption is found to be inapplicable – for example, because Congress has endorsed the *Filartiga* line of

limitation would only exist under a treaty or Executive Agreement chosen by the political branches and such is the normal and preferable way to handle foreign policy consequences or concerns.

109. See, e.g., RESTATEMENT, *supra* note 78, § 404 and cmt. a; PAUST, *ET AL.*, *supra* note 78, at 639–40; PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 244; *supra* notes 59–60, 87, 91–92, 98–102.

110. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 636; PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 241.

111. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 639; PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 244.

112. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 636–39; PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 242–43.

113. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963).

114. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 637; PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 242. For these reasons, metaphors such as slot machine decision making and loose judicial cannon are not inappropriate.

115. See *supra* Part III D (regarding congressional endorsement of the ATS); see also *infra* note 136 (concerning possible dangers when universal jurisdiction applies).

cases and universal jurisdiction has been part of the substantive grasp or essential character of the law expressly incorporated in the ATS. Under the circumstances, use of their criteria to limit what Congress has endorsed would be the opposite of judicial restraint and could involve unwarranted judicial interference in foreign policy concerns that are best left to the political branches.

As noted, use of a “touch and concern the territory of the United States . . . with sufficient force” criterion would be highly restrictive and ambiguous.¹¹⁶ It would also be clearly contrary to the congressional endorsement of the *Filartiga* line of cases and a universal jurisdictional competence that has been traditionally applied in ATS cases and is necessarily part of the substantive character of law expressly incorporated in the statute. Its limiting use would also be inconsistent with traditional and previously undoubted use of the ATS in litigation involving conduct of U.S. nationals abroad in violation of customary or treaty-based international law.

It is important to note, therefore, that neither Chief Justice Roberts nor Justice Alito offered their criteria as requirements that must be met for ATS litigation. The criteria were offered for displacement of a judicially-created presumption that they considered to be applicable in general. Moreover, Chief Justice Roberts offered the criteria as “even where” dictum, not as absolute requirements.¹¹⁷ Additionally, Justice Alito focused approvingly on three violations of international law mentioned by Blackstone and accepted in *Sosa*¹¹⁸ as being within the purview of the ATS and that clearly can occur entirely outside the United States and implicate universal jurisdiction.¹¹⁹ Necessarily, therefore, “touch and concern the territory of the United States” cannot be a determinative test. Justice Alito would also require that relevant international law satisfy the need for “definiteness and acceptance among civilized nations.”¹²⁰ But this requirement is already an understandable concern with respect to adequate proof of the content of international law.¹²¹

Justice Kennedy noted that the Justices preferred “to leave open a number of significant questions”¹²² and he did not use a touch and concern criterion. Instead, he emphasized the circumstance where there are “allegations of serious violations of international law principles protecting persons.”¹²³ Presumably Justice Kennedy would recognize that application of the ATS in such a

116. See *supra* notes 8-9, 22; see also *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring) (“This formulation obviously leaves much unanswered”). Here, I treat the quoted language as one criterion, although the language can be broken up into two criteria, *e.g.*, (1) touch and concern, and (2) with sufficient force.

117. See *supra* text accompanying note 8.

118. See *Sosa*, 542 U.S. at 723–24.

119. See *Kiobel*, 133 S. Ct. at 1669–70 (Alito, J., concurring).

120. *Id.* at 1673.

121. See, *e.g.*, Paust, *History of the Act*, *supra* note 26, at 258–62, and numerous cases cited. Having considered the need for adequate proof of the content of international law, courts have found, for example, that torture, cruel and inhuman treatment; arbitrary detention; hostage-taking; disappearance of persons; summary execution; war crimes; genocide; other crimes against humanity; race discrimination; and terrorist bombings are actionable. See, *e.g.*, PAUST, *ET AL.*, *supra* note 78, at 425–98, 820, and cases cited; Paust, *Nonstate Actors*, *supra* note 43, at 987–89 & n.38.

122. See *supra* note 10.

123. See *supra* note 13.

circumstance would be clearly consistent with extraterritoriality manifest from the face of the statute in light of the nature of the law incorporated and its jurisdictional character, the early history of use of the ATS, the nature and understandable reach of piracy, attention to other early violations of international law that are addressed in Part III C, the *Filartiga* line of cases, and the endorsement of the *Filartiga* line of cases by Congress.

Justice Breyer's criteria are not tied to a presumption against extraterritoriality, which he notes should not apply, but he might abandon judicial restraint in the face of a statute with an unmistakable substantive grasp implicating universal jurisdiction and congressional endorsement of the *Filartiga* line of cases unless his third articulated circumstance will comply. As he stated, he prefers to be "guided in part by principles and practices of foreign relations law,"¹²⁴ although he might not have realized that the Restatement's comity-factors approach is not law¹²⁵ and expressly would not apply when universal jurisdiction pertains and necessarily, therefore, sanctions against perpetrators are understood to be appropriate wherever they are found.¹²⁶

At a minimum, he

would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("[F]or purposes of civil liability, the torturer has become - like the pirate and slave trader before him - *hostis humani generis*, an enemy of all mankind." (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (CA2 1980))).¹²⁷

It is this third circumstance that could include proper attention to universal jurisdiction that is within the substantive grasp of the statute as well as the *Filartiga* line of cases approved by Congress if he would affirm that conduct in violation of international law over which there is universal jurisdiction and responsibility "substantially and adversely affects an important American national interest."¹²⁸

He rightly noted that piracy was "found to fall within the statute's scope" in *Sosa*,¹²⁹ and that "*Sosa* essentially leads today's judges to ask: Who are today's pirates?"¹³⁰ He added:

Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are "fair game" where they are found. Like those pirates, they are "common enemies of all mankind and all nations have an

124. See *supra* note 20.

125. See *supra* note 108.

126. See *supra* note 109; *Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (affirming in *Sosa* "recognition of universal jurisdiction . . . is consistent with principles of international comity").

127. *Kiobel* 133 S. Ct. at 167 (Breyer, J. concurring).

128. *Id.* at 1674.

129. *Id.* at 1672 (citing *Sosa*, 542 U.S. at 715).

130. *Id.* (citing *Sosa*, 542 U.S. at 724-25).

equal interest in their apprehension and punishment.¹³¹

And in *Sosa* he had recognized that universal jurisdiction exists over “torture, genocide, crimes against humanity, and war crimes,” and that enforcement of sanctions when “universal jurisdiction” exists will be “consistent with principles of international comity.”¹³² Importantly, in *Kiobel* he rightly stressed that “just as we have looked to established international substantive norms to help determine the statute’s substantive reach . . . , so we should look to international jurisdictional norms to help determine the statute’s jurisdictional scope,”¹³³ and he assumed “that Congress intended the statute’s jurisdictional reach to match the statute’s underlying substantive grasp . . . [which] includes compensation for those injured by piracy and its modern day equivalents.”¹³⁴ Universal jurisdiction and customary and treaty-based duties to provide sanctions were also addressed in his opinion, as well as the fact that other countries have exercised such competencies.¹³⁵

One would expect, therefore, that Justice Breyer would agree that an important U.S. interest is substantially at stake at least when violations of international law implicating universal jurisdiction that are within the statute’s grasp have occurred and the U.S. has an obligation to provide effective sanctions. However, having used his personal “foreign relations” comity-factors form of judicial limitation that is not actually part of law and which, under the Restatement is clearly inapplicable when universal jurisdiction exists, he concluded that enforcement of international law in the case before the Court would not “vindicate a distinct American interest,”¹³⁶ as if he and not Congress should make such a determination.¹³⁷ Further, his conclusion would be incorrect if he assumed that the United States does not have a distinct interest at stake with respect to its compliance with and enforcement of international law.¹³⁸ From a historical perspective, that very interest was evidently of concern when

131. *Id.* (quoting the RESTATEMENT, *supra* note 78, § 404, RN 1; quoting *In re Demjanjuk*, 612 F. Supp. 544, 556 (N.D. Ohio 1985)).

132. *Sosa*, 542 U.S. at 672 (Breyer, J., concurring in part).

133. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring).

134. *Id.*

135. *See id.* at 1673–74.

136. *Id.* at 1678 (applying his “foreign relations” construct here might indicate that it is ultimately parochial, unavoidably at odds with universal jurisdiction and, therefore, on the wrong side of history).

137. *But see supra* Part III H; Rachel Lopez, *The Judicial Expansion of American Exceptionalism*, 6 DUKE FORUM FOR L. & SOC. CHANGE at Part IV (2014). Presumably he would not use his “foreign relations” construct to destroy the extraterritorial reach of our war crimes legislation (for two sets of legislation and their reach, *see, e.g.*, PAUST, BASSIOUNI, *ET AL.*, *supra* note 25, at 274–82); the piracy statute (18 U.S.C. § 1651, which is rather like the ATS); the TVPA (*supra* note 12); the torture statute (18 U.S.C. § 1091 *et seq.*); the Antiterrorism Act (18 U.S.C. §§ 2331, 2333); the state sponsored terrorism statute (28 U.S.C. § 1605A (2008)); the hostage-taking act (18 U.S.C. § 1203); the protection of internationally protected persons act (18 U.S.C. § 112); or several other forms of legislation, including that regarding aircraft hijacking, aircraft sabotage, international drug trafficking, human trafficking, or slavery and the slave trade – a few of which he mentions seemingly favorably. Focusing on the fact that universal jurisdiction and responsibility exist and appropriate deference to Congress can help to avoid such an unwanted outcome.

138. *See infra* Part V.

Congress created the ATS¹³⁹ and was expressed by Congress at the time when Congress endorsed the *Filartiga* line of cases.¹⁴⁰

V. HUMAN RIGHTS LAW AND RESPONSIBILITIES

As noted by Congress, the United States has “obligations . . . under the United Nations Charter and other international agreements pertaining to the protection of human rights.¹⁴¹ *Filartiga* had recognized that such obligations of the United States exist under Articles 55(c) and 56 of the United Nations Charter, which expressly require “universal respect for, and observance of, human rights,”¹⁴² and that such Charter-based obligations are specified also in a number of United Nations declarations.¹⁴³ In particular,

This prohibition [of torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III) (A) (Dec. 10, 1948) which states in the plainest of terms, “no one shall be subjected to torture.” The General Assembly has declared that the Charter precepts embodied in this Universal Declaration “constitute basic principles of international law.”¹⁴⁴

Further, the Executive’s Amicus Brief in *Filartiga* noted that in applying the ATS with respect to alleged torture in violation of customary international law, “courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law,” and added that “a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation’s commitment to the protection of human rights.”¹⁴⁵

The rights of access to courts and to an effective remedy are also reflected in Article 8 of the Universal Declaration of Human Rights,¹⁴⁶ which mirrors patterns

139. See Paust, *History of the Act*, *supra* note 26, at 254–55.

140. See, *supra* note 62.

141. See *id.*

142. See U.N. Charter, arts. 55(c), 56. See also *Oyama v. California*, 332 U.S. 633, 672–73 (1948) (Murphy, J., concurring, with whom Rutledge, J., joins) (a California law “stands as a barrier to the fulfillment of” the U.S. obligation under Articles 55(c) and 56 of the Charter and “[i]ts inconsistency with the Charter . . . is but one more reason why the statute must be condemned”); *id.* at 649–50 (Black, J., concurring, with whom Douglas, J., joins) (“How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?”). Obligations under the U.N. Charter prevail over those in any other international agreement. *Id.* at Art. 103.

143. See *Filartiga*, 630 F.2d at 881–83. See also *Kadic v. Karadzic*, 70 F.3d at 240; *In re Estate of Marcos Human Rights Litig.*, 978 F.2d at 499.

144. *Filartiga*, 630 F.2d at 882 (citing G.A. Res. 2625 (XXV) (Oct. 24, 1970)).

145. Memorandum for the United States as Amicus Curiae (1980), in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), at 22–23, *available at* 19 I.L.M. 585, 607–08 (1980).

146. Universal Declaration of Human Rights, art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating” human rights), U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). On the nature of the Universal Declaration (1) as customary international law, and (2) as an authoritative aid for interpretation of human rights protected by and through the U.N. Charter, see, e.g., MYRES S. MCDUGAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 272–74, 302, 325–30 (1980); PAUST, *supra* note 74, at 181, 191, 198–200, 228 n.182, 246 n.372, 256 n.468, 286 n.595, 436–37 n.48; *Filartiga v. Pena-*

of generally shared expectation concerning customary roots of the right to an effective remedy in domestic courts for violations of human rights and various other rights under international law.¹⁴⁷ As part of human rights law, rights of access to courts and to an effective remedy are also necessarily part of U.N. Charter-based obligations of all members of the United Nations to assure “universal respect for, and observance of, human rights.”¹⁴⁸

Prominent among treaty-based human rights at stake are the right of access to courts, to a remedy, and nonimmunity that are based in Articles 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights (ICCPR),¹⁴⁹ as supplemented in General Comments of the Human Rights Committee that operates under the auspices of the International Covenant.¹⁵⁰ Article 50 of the

Irala, 630 F.2d at 882 (quoted in text *supra* at note 144); *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 796–97 (D. Kan. 1980); U.S. Memorial before the International Court of Justice in Case Concerning United States Diplomatic Staff in Tehran (United States v. Iran), 1980 I.C.J. Pleadings; Memorandum for the United States as *Amicus Curiae*, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), at 9, reprinted in 19 I.L.M. 585, 593 (1980).

147. See, e.g., PAUST, *supra* note 74, at 224–29.

148. See U.N. Charter, arts. 55(c), 56. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970); 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) (“Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.”); *Filartiga v. Pena-Irala*, 630 F.2d at 881–82 (quoted in text at note 142 *supra*); TVPA, *supra* note 12, prml. (quoted in text at note 62 *supra*); Memorandum for the United States as *Amicus Curiae*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *supra* note 145, at 9 (“the Universal Declaration ... goes beyond the U.N. Charter in specifying and defining fundamental rights to which all individuals are entitled”); *Id.* at 20–21 (“It has long been established that in certain situations, individuals may sue to enforce their rights under international law. . . . The . . . international law of human rights ... endows individuals with the right to invoke international law. . . . As a result, in nations such as the United States where international law is part of the law of the land, an individual’s fundamental human rights are in certain situations directly enforceable in domestic courts”), reprinted in 19 I.L.M. 585, 592, 602–03 (1980).

149. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR], arts. 2(3)(a) (requiring signatories to “ensure that any person whose rights . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”); *Id.* at 14(1) (“All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in as suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”). Both provisions are set forth with mandatory “shall” language that provides an immediate duty and is typically self-executing. An attempted declaration of partial non-self-execution with respect to Articles 1–27 of the Covenant is incompatible with the object and purpose of the treaty and, therefore, necessarily void *ab initio* as a matter of law. See, e.g., PAUST, *supra* note 74, at 362–66; *infra* note 150. In any event, the declaration expressly does not reach Article 50 of the treaty, which mandates application of all of the provisions of the treaty within the United States. See, e.g., *infra* note 151. The ICCPR is also universal in scope. See ICCPR, *supra* at prml. (“universal”).

150. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 83–84, 412–13; *Dubai Petroleum Co., et al. v. Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) (“Article 14(1) requires all signatory countries to confer the right of equality before the courts to citizens of all other signatories. . . . The Covenant not only guarantees foreign citizens equal treatment in the signatories courts, but also guarantees them equal access to these courts,” also citing H.R. Comm., General Comment No. 13 (1984), 39 U.N. GAOR, Supp. No. 40, at 143, U.N. Doc. A/39/40 (1984); H.R. Comm., General Comment No. 7, ¶1 (1982) (“Complaints about ill-treatment must be investigated.... [and with respect to personal responsibility, t]hose found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.”); Report of the H.R. Comm., 37 U.N. GAOR,

Covenant expressly mandates that all of “[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions,”¹⁵¹ thereby assuring that rights and duties under the treaty apply with respect to judicial proceedings within the United States in which claims to fair compensation proceed.

For the victims of torture, a mandatory duty to provide fair compensation, including means for rehabilitation, is set forth in Article 14 of the Convention Against Torture¹⁵²:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.¹⁵³

Undoubtedly for these reasons, the United Nations General Assembly emphasized in 2008 and 2007 that “national legal systems must ensure that

Supp. No. 40, Annex V, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982); H.R. Comm., General Comment No. 20, ¶ 15 (1992) (“States must not deprive individuals of the right to an effective remedy, including compensation”), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994); H.R. Comm., General Comment No. 24, ¶ 11 (“a State could not make a reservation to Article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy”); *Id.* at ¶ 12 (“where there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts ... all the essential elements of the Covenant guarantees have been removed” and an attempted reservation to that effect is void *ab initio* as a matter of law because it “would be incompatible with the object and purpose of the Covenant”, U.N. GAOR, U.N. Doc. CCPR/C/Rev.1/add.6 (2 Nov. 1994)).

151. ICCPR, *supra* note 149, at art. 50. Article 50 is set forth with mandatory “shall” language that provides an immediate duty and is typically self-executing. Moreover, it expressly requires that all provisions of the Covenant shall apply in all parts of a federated state without exception. The United States had no reservation with respect to Article 50 and it clearly operates directly within the United States with respect to all of “[t]he provisions of the ... Covenant.” See PAUST, *supra* note 74, at 362.

152. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984) [hereinafter CAT].

153. CAT, *supra* note 152, at art. 14(1). Both sentences quoted contain a duty that is phrased in mandatory “shall” language that provides textual clarity regarding the immediate mandatory duty and that is typically self-executing. See, e.g., PAUST, *supra* note 74, at 72, 90 n.98, 129–30 n.14. Article 14 of the CAT necessarily applies to acts of public officials covered under Article 1 of the treaty and, therefore, Articles 1 and 14 necessarily assure nonimmunity of public officials. See also Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America*, 36th sess., U.N. Doc. CAT/C/USA/CO/2 (18 May 2006), ¶¶ 14 (the U.S. “should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction”), 15 (“provisions of the Convention . . . apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world”), 19 (there exists an “absolute prohibition of torture . . . without any possible derogation”), 28 (“The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials.”), 32 (“ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation.”), *available at*

<http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>.

victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation.”¹⁵⁴ Earlier in the Basic Principles and Guidelines on the Right to a Remedy and Reparation,¹⁵⁵ the General Assembly provided informing detail concerning the right to “equal and effective access to justice”¹⁵⁶ and to an effective judicial remedy for victims of violations of human rights law,¹⁵⁷ as well as the type of “[a]dequate, effective and prompt reparation,” compensation, rehabilitation, and “satisfaction” required by international law.¹⁵⁸

With respect to the customary and *jus cogens* crime against humanity and violation of human rights known as forced disappearance or secret detention,¹⁵⁹ it is significant that the International Convention for the Protection of All Persons From Enforced Disappearance¹⁶⁰ affirms expectations of the international community that each state party “shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation” and that reparation “covers material and moral damages and, where appropriate, other forms of reparation such as: (a) [r]estitution; (b) [r]ehabilitation; (c) [s]atisfaction, including restoration of dignity and reputation; [and] (d) [g]uarantees of non-repetition.”¹⁶¹

Within the Americas, the Inter-American Court of Human Rights awarded compensation to the family of a victim of forced disappearance in the now

154. G.A. Res. 63/166, U.N. GAOR, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 63rd Sess., at ¶ 18 (Dec. 18, 2008); U.N. Doc. A/RES/63/166 (Feb. 19, 2009); U.N. G.A. Res. 62/148, ¶ 13 (Dec. 18, 2007); U.N. Doc. A/RES/62/148 (Mar. 4, 2008). Similar prior resolutions with the same name reaffirmed many of the points contained in the 2007 and 2008 resolutions. See, e.g., U.N. G.A. Res. 61/153, pmb. (Dec. 19, 2006); U.N. Doc. A/RES/61/153 (Feb. 14, 2007); U.N. G.A. Res. 60/148 (Dec. 16, 2005); U.N. Doc. A/RES/60/148 (Feb. 21, 2006). Importantly, torture, cruel, inhuman, and degrading treatment are not merely treaty-based violations of international law (e.g., in the CAT, ICCPR, and law of war treaties). They are also violations of customary norms *jus cogens*. See, e.g., PAUST, *supra* note 74, at 4, 141–43 nn.39–40, 184 n.40, 190 n.59; RESTATEMENT, *supra* note 78, § 702(d) & cmnts. a, n, RN 11.

155. G.A. Res. 60/147, U.N. GAOR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 60th Sess. (Dec. 16, 2005); U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Right to Remedy Resolution]. For more detailed exposition of the principles and their development, see, e.g., M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 260–74 (2006).

156. Right to Remedy Resolution, *supra* note 155, Annex, part VIII, ¶ 3(c), 11.

157. *Id.*, Annex, pmb., part VIII, 12.

158. See *id.*, Annex, part IX, ¶¶15–22.

159. See, e.g., PAUST, *supra* note 74, at 34–41; RESTATEMENT, *supra* note 78, § 702(c) & cmts. a, c, n, RNs 1, 11.

160. See G.A. Res. 61/177, U.N. GAOR, 61st Sess. (Dec. 20, 2006).

161. *Id.* art. 24(4)-(5); see also *id.* at pmb. (“[T]he victims of enforced disappearance have the right to obtain reparation”). The right to “an effective remedy” and “adequate compensation” for victims of enforced disappearance was recognized earlier by the General Assembly in its 1992 Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, U.N. GAOR arts. 9, 19 (Dec. 18, 1992), 47 U.N. GAOR, Supp. No. 49, at 207, U.N. Doc. A/RES/47/133 (Feb. 12, 1993). See *id.* art. 5 (such conduct renders “perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law.”).

famous *Velasquez Rodriguez Case*.¹⁶² Article 63(1) of the American Convention on Human Rights¹⁶³ allows the Inter-American Court to decide “that fair compensation be paid to the injured party.”¹⁶⁴ As recognized by the Inter-American Court in a later case, Article 63(1) “codifies a rule of customary international law which is one of the fundamental principles of modern international law, that being the responsibility of States . . . to make reparation.”¹⁶⁵ More recently, the Court declared:

It is a principle of International Law that any breach of an international obligation resulting in harm gives rise to the duty to adequately redress such harm The obligation to compensate is governed by International Law and it may be neither modified nor disregarded by the State in reliance upon its domestic law

The reparation of the damage flowing from a breach of an international obligation calls for, if practicable, full restitution (*restitutio in integrum*), which consists in restoring a previously-existing situation. If not feasible, the international court will then be required to define a set of measures such that, in addition to ensuring the enjoyment of the rights that were violated, the consequences of those breaches may be remedied and compensation provided for the damage thereby caused. In addition, there is also the State’s obligation to adopt affirmative measures to guarantee that no injurious occurrences such as those analyzed in the case at hand will take place in the future.¹⁶⁶

Although the United States has not yet ratified the American Convention, within the United States and elsewhere in the Americas, the United States is bound to take no action inconsistent with the object and purpose of the Convention, which would necessarily include human rights to freedom from torture and cruel, inhuman and degrading treatment and the right to “fair compensation” that are protected in the Convention. This obligation arises because the United States signed the treaty in 1977 while awaiting ratification.¹⁶⁷

162. Velazquez Rodriguez, *Compensatory Damages*, Inter-Am. Ct. H.R. (ser. C) (Jul. 21, 1989), No. 7, Ann. Rep. of the Inter-Am. Ct. H.R. 1989, OAS/Ser.L/V/III.21 doc. 14, at 123 (1989), addressed in RICHARD B. LILLICH, HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS* 799–802 (3 ed. 1995).

163. American Convention on Human Rights, O.A.S. Treaty Ser. No. 36 (1969), 144 U.N.T.S. 123.

164. *Id.* art. 63(1).

165. Garrido and Baigorria, *Reparations*, (Art. 63(1), Inter-Am. Ct. H.R. (ser. C) (Aug. 27, 1998), No. 39, ¶ 40; see also *id.* ¶¶ 41, 47–65, 73 (“The case law of this Court has consistently been that the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation.”), 74 ([T]here is a “legal obligation to investigate . . . and to bring to trial and punish the authors, accomplices, accessories after the fact, and all those who may have played some role in the events that transpired.”).

166. *La Cantuta v. Peru*, Merits, *Reparations, and Costs*, 160 Inter-Am. Ct. H.R. (ser. C) (Nov. 29, 2006), ¶¶ 199–201. The Court added: “Reparations are measures aimed at removing the effects of the violations. Their nature and amount are dependent upon the specifics of the violation and the damage inflicted at both the pecuniary and non pecuniary levels. These measures may neither enrich nor impoverish the victim or the victim’s beneficiaries, and they must bear proportion to the breaches declared as such in the judgment.” *Id.* at ¶202.

167. See, e.g., Vienna Convention on the Law of Treaties, art. 18 (“A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . subject to ratification”, 1155 U.N.T.S. 331 (1969)).

Additionally, the United States is bound by the American Declaration of the Rights and Duties of Man.¹⁶⁸ The American Declaration affirms that “[e]very human being has the right to life, liberty and the security of person;”¹⁶⁹ “[e]very individual who has been deprived of his liberty . . . has the right to humane treatment;”¹⁷⁰ and “[e]very person may resort to the courts to ensure respect for his legal rights.”¹⁷¹

VI. UNIVERSAL JURISDICTION AND *CHARMING BETSY*

As noted, the judicially-created presumption of non-extraterritoriality was unknown to creators of the ATS.¹⁷² However, a different principle of statutory construction arose near that time that would operate to assure conformity of federal statutes to international law – the *Charming Betsy* rule. It is a rule that had earlier foundations and that has been continuously retained by the Supreme Court.¹⁷³ What the Court affirmed in *Charming Betsy* is that

[a]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate . . . rights . . . further than is warranted by the law of nations.¹⁷⁴

Application of the *Charming Betsy* rule requires that the ATS be interpreted consistently with the type of international law that provides universal jurisdiction and the rights under international law addressed in Part V, including the prohibition of “denial of justice” to aliens and customary and treaty-based human rights of access to courts and to an effective remedy.¹⁷⁵ In fact, *Charming*

168. O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/II.4 Rev. (1965). As a party to the Charter of the Organization of American States, 119 U.N.T.S. 3, 2 U.S.T. 5, T.I.A.S. 2367, the United States is bound by the American Declaration, which is a legally authoritative indicia of human rights protected through Article 3(k) of the O.A.S. Charter [see *id.* arts. 44, 111]. See, e.g., Advisory Opinion OC-10/89, I-A, Inter-Am. Court H.R., Ser. A: Judgments and Opinions, No. 10, ¶¶ 45, 47 (1989); Inter-Am. Comm. H.R., Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VIII (1996), OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1977) (“The American Declaration . . . continues to serve as a source of international obligation for all member states”); The “Baby Boy” Opinion, Case 2141, Inter-Am. Comm. H.R. 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), at ¶ 15 (“As a consequence of Article 3j, 16, 51e, 112 and 150 of [the O.A.S. Charter], the provisions of other instruments and resolutions of the OAS on human rights acquired binding force. Those instruments and resolutions of the OAS on human rights approved with the vote of the U.S. Government” include the American Declaration of the Rights and Duties of Man. That Declaration affirms several human rights, now protected through the O.A.S. Charter, including the right to “resort to the courts to ensure respect for . . . [one’s] legal rights” documented in Article XVIII); Roach Case, No. 9647, Inter-Am. Comm. H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987), at ¶ 48; see also LILLICH & HANNUM, *supra* note 162, at 802–04; MCDUGAL, LASSWELL, CHEN, *supra* note 146, at 198, 316; DAVID WEISSBRODT, JOAN FITZPATRICK, FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS 598–600 (3 ed. 1996).

169. American Declaration of the Rights and Duties of Man, *supra* note 168, art. I.

170. *Id.* at art. XXV.

171. *Id.* at art. XVIII.

172. See *supra* note 49.

173. See, e.g., PAUST, *ET AL.*, *supra* note 78, at 153–54, and cases cited.

174. Murray v. Schooner Charming Betsy, 6 U.S. 64, 117–18 (1804).

175. See *supra*, Part V.

Betsy requires that the ATS “can never be construed to violate . . . rights.”¹⁷⁶

As noted above, extraterritoriality is manifest from the face of the statute due to the nature of the law that is incorporated and its universal jurisdictional character and substantive grasp, no limits to such an inherent extraterritoriality are expressed in the statute, all of the early cases and opinions of the Attorneys General support extraterritoriality, and Congress has subsequently endorsed the *Filartiga* line of cases. Under these circumstances, *Charming Betsy* requires recognition that a presumption of non-extraterritoriality does not apply and, in any event, *Charming Betsy* requires that such a presumption cannot apply when international law provides universal jurisdiction and rights of access to courts and to an effective remedy. The *Charming Betsy* rule clearly should provide part of the “further elaboration and explanation” for “proper implementation” that Justice Kennedy prefers and should also condition Justice Breyer’s use of a new inhibiting set of “foreign relations” criteria when international law provides universal jurisdiction and the rights of access to courts and to an effective remedy.

As noted, use of the Supreme Court’s rationale in the *Bowman* exception to the presumption against extraterritoriality would lead to a similar result,¹⁷⁷ as affirmed in a number of lower court decisions that had applied the ATS to extraterritorial conduct after the Court’s decision in *Morrison*.¹⁷⁸

VII. CONCLUSION

The evident split in *Kiobel* has, in the words of Justice Kennedy, left open “a number of significant questions regarding” proper elaboration and explanation of the extraterritorial reach of the Alien Tort Statute.¹⁷⁹ Among these are whether a presumption against extraterritoriality should apply and, if it is used, whether

176. *Id.*

177. See Paust, *Kiobel*, *supra* note 25, at 32–34.

178. *Id.* at 33, n.67, noting that cases decided after *Morrison* have noted that *Morrison* did not overrule *Bowman* and/or that *Bowman* still provides an exception to the ordinary presumption when universal, protective, or nationality jurisdiction under customary international law exists and supports the extraterritorial reach of the ATS or a relevant criminal statute. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d at 743–46, 758–60, 763–65 (extraterritoriality of the ATS is appropriate where universal jurisdiction obtains over violations of international law of a universal nature and concern and the text shows no geographical limitation); *Sarei*, 671 F.3d at 772, 776–79 (Pregerson, J., concurring) (extraterritoriality is supported by the existence of “universal customary international law”); *Sarei*, 671 F.3d at 780–83 (McKeown, J., concurring) (the statutory focus on violations of the law of nations, the nature of the harm, and the historical context support extraterritoriality of the ATS); *Doe v. Exxon Mobil Corp.*, 654 F.3d at 20–22 (the ATS has an “obvious extraterritorial reach,” “universal jurisdiction” pertains, and *Morrison* does not control); *United States v. Campbell*, 798 F. Supp.2d 293, 305, 308–09 (D.D.C. 2011) (statute applies extraterritorially where protective jurisdiction exists and *Bowman* rationale applies instead of *Morrison*); *United States v. Ayesh*, 762 F. Supp.2d 832, 839–41 (E.D. Va. 2011) (same); *United States v. Finch*, No. 10-333, 2010 WL 3938176, at *3–4 (D. Haw. 2010) (same); *United States v. Hijazi*, _ F. Supp.2d _, 2011 WL 2838172, at *22, *24, *29 (C.D. Ill. 2011) (same); see also *United States v. Belfast*, 611 F.3d 783, 811, 813–14 (11th Cir. 2010) (applying *Bowman* despite *Morrison*); *United States v. Frank*, 599 F.3d 1221, 1230, 1233 (11th Cir. 2010) (using nationality jurisdiction under international law and *Bowman* to support extraterritoriality); *United States v. Galvis-Pena*, 2011 WL 7268437, at *5 (N.D. Ga. 2011) (applying “*Bowman* exception” and emphasizing “the inherently international scope of drug trafficking or smuggling”).

179. See text at note 10 *supra*.

inconsistent and ambiguous criteria are preferable in deciding when it is displaced. Extraterritoriality of some sort has been affirmed, but there is an evident lack of consensus on rationales, doctrines, and criteria.

For this reason, it is important to reconsider what the full set of early cases and opinions of Attorney General add for proper decision making regarding the statute's evident reach as well as what is compelled by adequate awareness of the nature of the law that is expressly incorporated by reference and its jurisdictional attributes and substantive grasp. Further, congressional endorsement of the *Filartiga* line of cases should displace a judicially-created presumption as well as supposed "foreign relations" concerns and provide needed guidance. Additionally, the *Charming Betsy* rule supplements the need to interpret the statute consistently with universal jurisdiction and responsibility as well as human rights of access to courts and to an effective remedy under international law. The rationale in the *Bowman* exception to a presumption of non-extraterritoriality supports that requirement.

More generally, it is not difficult to understand that the dignity of all is diminished when the dignity of a few is ignored. As Justice Wilson noted, "[i]f the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired."¹⁸⁰ The decision in *Kiobel* ignores the dignity of the claimants and ultimately impairs our individual dignity and that of the United States.

180. *Chisholm v. Georgia*, 2 U.S. 419, 456 (1793) (emphasis omitted). See also *Thomas v. Paret*, 524 F.2d 779, 787 n.2 (8th Cir. 1975) (Lay, J., dissenting); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 152 (1983).