

# KIOBEL V. ROYAL DUTCH PETROLEUM: DELINEATING THE BOUNDS OF THE ALIEN TORT STATUTE

TARA MCGRATH\*

## I. INTRODUCTION

The Alien Tort Statute (ATS) has been deemed a “legal Lohengrin,”<sup>1</sup> after the knight who mysteriously emerges on a swan-drawn boat in the Richard Wagner opera—no one knows from where it came or for what purpose it appeared. The one-sentence statute simply states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>2</sup> Compounding problems, the ATS’s early history is sparse—after the first Congress passed the statute as part of the Judiciary Act of 1789, the statute lay largely dormant for almost 200 years.<sup>3</sup>

In 1980 the statute was finally resurrected in the landmark case *Filartiga v. Pena-Irala*,<sup>4</sup> in which the Second Circuit recognized an ATS claim for torture perpetrated under the color of official authority.<sup>5</sup> Since then, ATS litigation has proliferated in federal courts, offering aliens redress for violations of customary international law

---

\* J.D. Candidate, 2014, Duke University School of Law.

1. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“This old but little used section is a kind of legal Lohengrin . . . no one seems to know whence it came.”).

2. 28 U.S.C.A. § 1350 (West 2012).

3. See William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 468 n.5 (1986) (noting two early court cases that did cite the ATS, but only as an alternative basis for jurisdiction over admiralty cases (citing *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895))).

4. 630 F.2d 876 (2d Cir. 1980).

5. *Id.* at 878. It is indeterminate why the ATS was seldom utilized before *Filartiga*, though one reason may be the uncertainty surrounding the statute’s reach and application. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (describing the ATS as “an area of law that cries out for clarification”).

(CIL), even when the alleged misconduct occurred abroad.<sup>6</sup> Courts have generally assumed that the ATS encompasses extraterritorial claims, although the issue has not yet been definitively resolved by the Supreme Court.<sup>7</sup> That very question—whether and under what circumstances the ATS allows federal courts to recognize extraterritorial causes of action for violations of CIL—is now before the Court in *Kiobel v. Royal Dutch Petroleum*.<sup>8</sup>

In determining the scope of the ATS, the Court must strike a balance between ensuring that the United States does not become a haven for *hostis humani generis*—enemies of all mankind<sup>9</sup>—while preventing federal courts from infringing on the sovereignty of other nations. A reflection on the text and purpose of the statute, the common law of the era, and an Opinion written by Attorney General William Bradford, demonstrates that the ATS was intended to have an extraterritorial reach, and thus the Court should hold that the ATS does apply to causes of action arising on foreign soil. Moreover, in light of the limited claims that survive the standard set out in the Supreme Court’s first decision on the ATS, and the existing limiting doctrines available to courts, federal judges are equipped to address extraterritorial violations of CIL under the ATS while still respecting the sovereignty of any foreign nation implicated.

## II. FACTUAL BACKGROUND

Plaintiffs are, or were, residents of the Ogoni region of Nigeria, where Shell Petroleum Development Company of Nigeria, Ltd. (SPDC) has been engaged in oil exploration and production since 1958.<sup>10</sup> In protest of the environmental degradation SPDC’s activities

---

6. See generally *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (considering a cause of action under the ATS for alleged violations of CIL occurring in Papua New Guinea); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (adjudicating a cause of action under the ATS for alleged violations of CIL arising in Sudan); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (deciding a cause of action under the ATS for alleged violations of CIL transpiring in Haiti).

7. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (deciding an ATS claim on grounds other than lack of jurisdiction to hear an extraterritorial cause of action).

8. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. argued Oct. 1, 2012); Petitioners’ Supplemental Opening Brief at 6, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. June 6, 2012) [hereinafter Brief for Petitioners].

9. See *Filartiga*, 630 F.2d at 890 (“[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.”) (emphasis added).

10. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (2011) (No. 10-1491).

caused, residents of the Ogoni region organized the Movement for the Survival of the Ogoni People.<sup>11</sup> In response, the Sani Abanacha dictatorship engaged in widespread and systematic attacks against the Ogoni population, directed in particular at opponents of SPDC's drilling activities.<sup>12</sup> From 1993 through 1994, Nigerian military forces purportedly beat, arrested, raped, and even killed Ogoni people.<sup>13</sup>

In 2002, Nigerian plaintiffs brought a putative class action suit in the United States District Court for the Southern District of New York, pursuant to the ATS, against oil company defendants.<sup>14</sup> The defendants were Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, incorporated in the Netherlands and the United Kingdom respectively.<sup>15</sup> Plaintiffs alleged Defendants enlisted the aid of the Nigerian government to oppress the resistance movement, acting through their subsidiary SPDC, and thereby aided and abetted violations of CIL by the Nigerian government.<sup>16</sup> Specifically, Defendants allegedly “(1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers.”<sup>17</sup> Plaintiffs brought claims against Defendants for “aiding and abetting (1) extrajudicial killings; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”<sup>18</sup>

Plaintiffs thus asserted a “foreign-cubed” ATS claim, one in which both the plaintiff and defendant were foreign to the jurisdiction in which the case was being adjudicated, and the alleged misconduct occurred abroad.<sup>19</sup> Defendants twice moved to dismiss on the grounds that Plaintiffs’ claims were barred by the act of state doctrine<sup>20</sup> and

---

11. *Id.*

12. Brief for Petitioners, *supra* note 8, at 4.

13. *Kiobel*, 621 F.3d at 123.

14. *Id.* at 123–24.

15. *Id.*

16. *Id.* at 123.

17. *Id.*

18. *Id.*

19. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 794 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part) (defining a “foreign-cubed” ATS case as one in which “a *foreign* plaintiff [sues] a *foreign* defendant for alleged torts which occurred entirely on *foreign* soil”).

20. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (establishing the act of state doctrine by stating that “the courts of one country [shall] not sit in judgment on the acts of the

the doctrine of international comity,<sup>21</sup> and that Plaintiffs failed to state a claim on which relief could be granted.<sup>22</sup> The District Court dismissed several of Plaintiffs' claims because they were not defined by CIL with the particularity required by *Sosa v. Alvarez-Machain*.<sup>23</sup> Yet the court refused to dismiss Plaintiffs' claims of aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, and degrading treatment.<sup>24</sup> Instead, recognizing the importance of the alleged human rights violations and the difference of opinion among the courts regarding ATS litigation, the District Court certified its entire order for interlocutory appeal.<sup>25</sup>

### III. LEGAL BACKGROUND

#### A. Initial Understanding of the ATS

Two foreign relations clashes helped give rise to the ATS, both of which occurred on American soil: the attack of the Secretary of the French Legion in Philadelphia, dubbed the "Marbois Incident," and the attack of a Dutch diplomat in New York.<sup>26</sup> Congress feared that if federal courts were left without a legal remedy, the assault of a foreign ambassador could serve as a catalyst for war.<sup>27</sup> The United

government of another done within its own territory").

21. See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (defining the doctrine of international comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws").

22. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 459–60 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2d Cir. 2010), *cert granted*, 132 S. Ct. 472 (2011) (No. 10-1491).

23. 542 U.S. 692 (2004); *Kiobel*, 456 F. Supp. 2d at 463–68 (dismissing plaintiffs' claims for aiding and abetting property destruction, forced exile, extrajudicial killing, and violations of the rights of life, liberty, security, and association).

24. *Kiobel*, 456 F. Supp. 2d at 463–67.

25. *Id.* at 467–68.

26. See *Sosa*, 542 U.S. at 716–17 (noting that in response to the Continental Congress's inability to deal with cases like the Marbois Incident, the Framers drafted Article III § 2 of the United States Constitution and the First Congress enacted the Judiciary Act, which included the ATS (citing *Respublica v. De Longchamps*, 1 U.S. 111 (1784); *Casto*, *supra* note 3, at 494 & n.152)); *id.* at 717 n.11 (describing the French minister plenipotentiary's formal protest following the Marbois Incident as including a threat to leave Pennsylvania if the attacker was not satisfactorily brought to justice).

27. See *id.* at 715 (2004); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) ("[O]ne of the principal defects of the Confederation that our Constitution was intended to remedy was the central government's inability to 'cause infractions of treaties or of the law of nations, to be punished.'" (quoting 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 19 (Rev. ed. 1937) (Notes of James Madison))).

States Supreme Court affirmed:

It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on [the] minds of the men who drafted the ATS with its reference to tort.<sup>28</sup>

The ATS, as enacted in the Judiciary Act of 1789, provided the new federal district courts with “cognizance, concurrent with the courts of the several States, or the circuit courts . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>29</sup> It was but “a grant of jurisdiction, *not* power to mold substantive law.”<sup>30</sup>

Six years later, Attorney General William Bradford considered the possibility of prosecuting under the ATS American citizens who had “aided[] and abetted a French fleet in attacking [a] settlement” of British subjects off the coast of Sierra Leone.<sup>31</sup> Specifically, American citizens were accused of participating in the “pillaging and destruction of property in Freetown.”<sup>32</sup> The episode aroused a formal protest from Great Britain concerning the role American citizens played in the attack,<sup>33</sup> and it was to these complaints that Bradford addressed his Opinion.<sup>34</sup> Bradford appeared uncertain whether criminal liability could stand, but insisted: “[T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a

---

28. *Sosa*, 542 U.S. at 715.

29. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77.

30. *Sosa*, 542 US at 713 (finding support for a reading of the statute as jurisdictional based on the use of the word “cognizance”) (emphasis added).

31. Breach of Neutrality, 1 Op. Att’y Gen. 57, 58 (1795); see Curtis A. Bradley, *Attorney General Bradford’s Opinion and the Alien Tort Statute*, 106 AM. J. INT’L L. 509, 518 & n.62 (2012) (noting that David Newell and Peter Mariner were the two American citizens who allegedly participated in the attack).

32. Bradley, *supra* note 31, at 520–21; see *id.* at 524 (detailing a memorial sent to Bradford complaining of the attack that described Newell as having “led a party of French soldiers in Freetown” and Mariner as having been “exceedingly active in promoting the pillage of Freetown” (citation and internal quotation marks omitted)).

33. See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum* at 9, No. 10-1491 (U.S. June 11, 2012) [hereinafter Brief for the United States] (noting Great Britain’s protest was inspired by a concern “that [American] citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system”) (citation omitted).

34. Bradley, *supra* note 31, at 518–20 (stating that “Bradford’s opinion was a response to a specific set of complaints” as set out in a diplomatic note from Britain’s minister plenipotentiary in the United States and a memorial jointly written by “the acting governor of the Sierra Leone colony[] and . . . an agent of the proprietors of a slave-trading station” located near the attack).

remedy by a *civil* suit in the courts of the United States [under the ATS].”<sup>35</sup> Most notably, the Opinion, when read in light of the diplomatic correspondence submitted to Bradford, demonstrates that the attack was not limited to the high seas and that Bradford was primarily concerned with the events that occurred on foreign land, in Freetown, Sierra Leone.<sup>36</sup>

### B. *Filartiga to Sosa*

The “rarely-invoked” ATS finally emerged once more in *Filartiga v. Pena-Irala*, in which the Second Circuit held that whenever an alleged violator of international human rights law is “found and served with process by an alien within [American] borders, [the ATS] provides federal jurisdiction.”<sup>37</sup> There, Paraguayan citizens brought suit against a former Paraguayan government official for wrongfully causing the death of their son while in Paraguay, though the defendant was served with process in the United States.<sup>38</sup> The court construed the ATS “not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”<sup>39</sup> Since then, ATS litigation has become increasingly widespread, and circuit courts have adjudicated these cases on much the same assumption as the *Filartiga* court: when personal jurisdiction is satisfied, and when the plaintiff alleges a civil claim for a violation of international law, the ATS provides federal jurisdiction.<sup>40</sup>

In its first decision directly addressing the ATS, the Supreme Court in *Sosa v. Alvarez-Machain* seemed to agree with the reasoning

35. 1 Op. Att’y Gen. 57, 59.

36. See Brief for the United States, *supra* note 33, at 8 (“[Bradford] plainly knew that some of the conduct at issue occurred within the territory of Sierra Leone, and his reference to ‘acts of hostility’ for which the ATS afforded a remedy could have been meant to encompass that conduct.”); Bradley, *supra* note 31, at 521 (“While it is conceivable that some of the actions in question could have constituted piracy . . . [t]he central focus of the materials before Bradford, and of his opinion, was on the conduct of [the American] citizens” in Freetown).

37. 630 F.2d 876, 878 (2d Cir. 1980).

38. *Id.* at 878–79.

39. *Id.* at 887.

40. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (looking to international law to determine the circumstances in which aiders and abettors can be liable for violations of international human rights law); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (finding it “unnecessary that international law provide a *specific* right to sue” so long as a “specific, universal, and obligatory” violation of international law is alleged).

in *Filartiga*.<sup>41</sup> In *Sosa*, a Mexican citizen alleged that the Drug Enforcement Administration orchestrated his abduction from Mexico to the United States; the plaintiff brought claims under the ATS against the Mexican citizens who assisted in his abduction, the United States, and four DEA agents.<sup>42</sup> The District Court awarded summary judgment and monetary damages to the plaintiff, and the Ninth Circuit affirmed.<sup>43</sup> The Supreme Court reversed, holding that the ATS was a jurisdictional statute that “enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law,”<sup>44</sup> and plaintiff’s claims did not fall within that category.<sup>45</sup>

Specifically, the Court found that the ATS encompassed three violations of international law historically addressed by English criminal law and enumerated by famed legal commentator William Blackstone: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>46</sup> Noting that international law had evolved following the ATS’s inception, the Court held that federal courts could recognize additional claims “based on the present-day law of nations” insofar as those laws rested on “norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” that Blackstone enumerated.<sup>47</sup>

To determine which CIL claims can be brought under the ATS in the absence of a treaty, controlling executive or legislative act, or judicial decision, the Court suggested “cautiously” looking to such sources as “the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators.”<sup>48</sup> The Court further directed that in determining “whether a norm is sufficiently definite to support a cause of action,” the lower court “should (and, indeed, inevitably must) . . . [consider] the practical consequences of making that cause available to litigants in the federal

---

41. See 542 U.S. 692, 731 (2004) (noting that the position the Court was adopting had “been assumed by some federal courts for 24 years” since the time *Filartiga* was decided).

42. *Id.* at 697–98.

43. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1064 (9th Cir. 2001).

44. *Sosa*, 542 U.S. at 712.

45. See *id.* at 738 (holding that the claims alleged by the plaintiff violated “no norm of [CIL] so well defined as to support the creation of a federal remedy”).

46. *Id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

47. *Id.* at 725.

48. *Id.* at 733–34 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

courts.”<sup>49</sup> Finally, the Court warned federal courts to proceed “with great caution” in light of the adverse foreign policy consequences when attempting to “craft remedies for the violation of new norms of international law.”<sup>50</sup>

The Court thus created a two-part test for recognizing a cause of action under the ATS: (1) whether the claim is sufficiently defined and recognized under CIL to support a cause of action, and (2) whether a court should recognize a cause of action, taking into consideration the practical consequences of making that claim available to litigants in the federal courts. In holding as a threshold matter that the plaintiff did not satisfy the first part of the test, the Court was able to dispose of the case without having to define the broader scope of the statute.<sup>51</sup> In *Kiobel*, the Court will have a second opportunity to consider the reach of the ATS.

#### IV. HOLDING

Hearing *Kiobel* on appeal, the Second Circuit reviewed the district court’s dismissal for failure to state a claim and the question of subject matter jurisdiction *de novo*.<sup>52</sup> Adhering to its precedent and *Sosa*, the court looked to CIL “to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued.”<sup>53</sup> A sharply divided court, without briefing or argument on the issue,<sup>54</sup> dismissed the case for lack of subject matter jurisdiction because the ATS does not recognize a cause of action against a juridical defendant,<sup>55</sup> finding that juridical entities are not subjects of CIL.<sup>56</sup> In so holding, the court did

---

49. *Id.* at 732–33 (footnote omitted).

50. *Id.* at 727–28.

51. *See id.* at 738 (finding it “enough to hold” that the claims asserted by the petitioner did not violate a norm of CIL sufficiently defined to support a federal remedy under the ATS).

52. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (U.S. Oct. 17, 2011) (No. 10-1491).

53. *Id.* at 128.

54. *See* Brief for Petitioners, *supra* note 8, at 5 (stating the Second Circuit held, “without briefing or argument, that corporations could not be sued under the ATS” and decided no other issue).

55. *See Kiobel*, 621 F.3d at 123 (“All defendants are corporate entities—that is, ‘juridical’ persons, rather than ‘natural’ persons.”); BLACK’S LAW DICTIONARY 1258 (9th ed. 2009) (defining a “juridical person,” also termed an “artificial person,” as “an entity, such as a corporation, created by law and given certain legal rights and duties of a human being”).

56. *See Kiobel*, 621 F.3d at 148–49 (finding that “corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations” sufficient for corporate liability to “form the basis of a suit under the ATS”).



not entertain the possibility that it lacked jurisdiction because the case presented was foreign-cubed. Instead, much like the circuit courts that had adjudicated ATS cases before, the Second Circuit assumed it had such jurisdiction.

Judge Pierre Leval issued a biting concurring opinion in which he called the majority's argument "illogical, internally inconsistent, contrary to international law, and incompatible with rulings of both the Supreme Court and [the Second Circuit]."<sup>57</sup> He asserted that international law authorizes all states to adjudicate violations of the law of nations, and then leaves it to each state itself to determine how to address these violations.<sup>58</sup> For example, the Genocide Convention simply directs state parties "to enact in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention."<sup>59</sup> Thus, according to Judge Leval, the majority found no directive from international law regarding the precise manner in which to adjudicate the violations at issue because "[t]he position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position."<sup>60</sup>

After a petition for an en banc review was denied by a divided vote, Plaintiffs filed for a writ of certiorari, which the Supreme Court granted.<sup>61</sup> The questions upon which certiorari was granted were: (1) whether the issue of corporate civil tort liability under the ATS is a merits question or an issue of subject matter jurisdiction, and (2) whether corporations are excluded from tort liability for violations of the law of nations.<sup>62</sup> After hearing oral argument in February 2012, however, the Court ordered the parties to submit supplemental briefing and that the case be reargued.<sup>63</sup> The question presented, upon which oral argument was heard, was: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a

---

57. *Id.* at 174 (Leval, J., concurring).

58. *See id.* at 175 ("Civil liability *under the ATS* for violation of the law of nations . . . is awarded in [American] courts because the law of nations has outlawed certain conduct, leaving it to each State [itself] to resolve questions of civil liability.").

59. *Id.* at 172 n.28 (quoting Convention on the Prevention and Punishment of the Crime of Genocide, art. V, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277).

60. *Id.* at 152.

61. Brief for Petitioners, *supra* note 8, at 5.

62. *Id.*

63. *Id.* at 6.

sovereign other than the United States,”<sup>64</sup> an issue the Second Circuit did not consider in its own disposition of the case.

## V. ARGUMENTS

At the second hearing of *Kiobel* in October 2012, the Supreme Court only heard oral argument on the question of whether and under what circumstances the ATS grants federal courts jurisdiction to recognize a cause of action for an extraterritorial violation of CIL.<sup>65</sup>

### A. *Petitioners’ Argument*

Petitioners contend the ATS does not and should not have a categorical territorial limitation. Specifically, they argue such a limitation would be contrary to the text and purpose of the statute, federal courts have adjudicative jurisdiction to hear these claims, and there are sufficient limiting doctrines under which federal courts can dismiss inappropriate ATS cases.

#### 1. The Text and Purpose of the ATS

Petitioners claim the first Congress “invested the [ATS] with a geographic scope commensurate with the reach of the law of nations and treaty violations it was enacted to adjudicate.”<sup>66</sup> The statute contains no express territorial limitation in stark contrast to neighboring clauses of the Judiciary Act of 1789.<sup>67</sup> Moreover, such a limitation would be contrary to the overarching purpose of the ATS—preventing international tension by ensuring federal courts are equipped to handle violations of CIL, such as an attack on an ambassador.<sup>68</sup> Even if the Marbois Incident had occurred in a foreign country, Petitioners argue, the first Congress would have wanted federal courts to adjudicate the case, for “[h]arboring the attacker and failing to provide a forum to redress such a violation would have created precisely the diplomatic problem the ATS was enacted to prevent.”<sup>69</sup>

64. *Id.*

65. *Id.*

66. *Id.* at 1.

67. *Id.* at 21–22 (noting that other provisions are limited with language like “crimes and offences . . . committed within their respective districts” (citing Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77)).

68. *Id.* at 15–16.

69. *Id.* at 16.

Further, Petitioners claim that in granting federal courts jurisdiction over violations of the law of nations, the Founders necessarily had in mind extraterritorial transitory torts, which at the time could only be heard in state courts.<sup>70</sup> The transitory tort doctrine, adopted from English common law, provides that a “tortfeasor owe[s] an obligation to the victim that [can] be enforced wherever the tortfeasor [is] found, regardless of where the tort occurred.”<sup>71</sup> Petitioners assert that a second purpose of the ATS was to “insulate such aliens from [the] parochial prejudices of the state courts,” and that a categorical territorial limitation on the ATS would have accomplished precisely the opposite.<sup>72</sup>

Petitioners point to Attorney General William Bradford’s Opinion following the Sierra Leone attack as contemporaneous evidence of the scope of the statute. In the Opinion, Bradford states definitively that the ATS could serve as a vehicle of redress for victims of the attack.<sup>73</sup> As part of the Sierra Leone attack did take place on shore—on foreign land—and not solely on the high seas, Petitioners contend the Opinion clearly evidences that the ATS authorizes federal courts to adjudicate causes of action arising on foreign soil.<sup>74</sup>

Although Respondents allege that the statutory canon of presumption against extraterritoriality applies to the ATS, a canon which states “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,”<sup>75</sup> Petitioners highlight that the presumption does not apply to jurisdictional statutes and that the ATS is a jurisdictional statute.<sup>76</sup> Application of the presumption to the ATS would be illogical because the comity concerns behind the canon do not apply—under the ATS, federal courts are enforcing CIL, universally recognized international standards of conduct, rather than American norms.<sup>77</sup> Moreover, even if the presumption did apply, it would be easily rebutted by the fact that the ATS was expressly intended to enforce the law of nations, which applies

---

70. *Id.* at 18.

71. *Id.* at 27.

72. *Id.* at 19 (citation omitted).

73. *Id.* at 31–32.

74. *Id.* at 17.

75. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

76. *See* Brief for Petitioners, *supra* note 8, at 34 (noting, as an example, that the presumption does not apply to the jurisdictional provisions of the Securities Exchange Act but does apply to the substantive regulation of conduct prescribed by the Act (citing *Morrison*, 130 S. Ct. at 2877 (2010))).

77. *Id.* at 35.

extraterritorially.<sup>78</sup>

Finally, Petitioners assert “no court has ever held that the ATS is limited to conduct on [American] soil.”<sup>79</sup> If Congress were dissatisfied with the reach of the ATS as applied in federal courts, it would have amended the statute—yet, since *Filartiga* recognized an extraterritorial cause of action under the ATS thirty-two years ago, Congress has taken no such action.<sup>80</sup>

## 2. Jurisdiction to Adjudicate and Limiting Doctrines

Petitioners argue that recognizing extraterritorial causes of action under the ATS does not violate international law; rather, it is “authorized under international law based on jurisdiction to adjudicate.”<sup>81</sup> *Sosa* confirmed that under the ATS, federal courts apply international law to adjudicate the parties’ rights, and simply use federal common law to “supply the other rules necessary to govern the conduct of the litigation.”<sup>82</sup> As federal courts hearing ATS claims are recognizing violations of universal norms that are substantially paralleled the world over, the risk of unduly infringing on a foreign nation’s sovereignty and thereby violating international law dissipates.<sup>83</sup> In addition, because a federal court must first obtain personal jurisdiction over the defendant, foreign nations can be assured that the United States will have at least some tie to the case before it adjudicates the issue.<sup>84</sup> Personal jurisdiction stands as the threshold barrier in every ATS case, and may serve as a particularly high barrier in foreign-cubed cases.<sup>85</sup>

Finally, Petitioners assert that existing limiting doctrines, like comity, forum non conveniens, and exhaustion of domestic remedies, ensure federal courts can dismiss those ATS cases that raise serious “concerns about the appropriateness of asserting federal

78. *Id.* at 9.

79. *Id.* at 8.

80. *Id.* at 17–18.

81. *Id.* at 38 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987) (noting that a “state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable”)).

82. *Id.* at 39.

83. *See id.* at 40 (stating that the United States is authorized “to adjudicate ATS claims arising abroad . . . [because] customary international human rights norms are *erga omnes*—obligations owed to all states”).

84. *Id.*

85. *Id.* at 53.

jurisdiction.”<sup>86</sup> Utilizing limiting doctrines to weed-out untenable ATS cases is in line with the Supreme Court’s directive and warning in *Sosa*—and it is a practice that can operate on a case-by-case basis.<sup>87</sup>

### *B. Respondents’ Argument*

Respondents contend that the ATS does not apply extraterritorially for the following reasons: (1) Congress did not expressly grant this authority in the ATS, and thus the presumption against extraterritoriality applies; (2) adjudicating extraterritorial causes of action in foreign-cubed cases violates international law; and (3) it is necessary to defer to Congress when such important foreign policy concerns are at play.

#### 1. The Presumption Against Extraterritoriality

Respondents argue that because the ATS does not explicitly provide for application of American law to conduct on foreign soil, the statutory canon of presumption against extraterritoriality applies. In a foreign-cubed ATS case, the presumption is triggered because the court applies federal common law to adjudicate an extraterritorial cause of action.<sup>88</sup> Such an application of the ATS interferes with a foreign nation’s ability to independently regulate its affairs, which raises comity concerns that the presumption attempts to prevent, and which can lead to precisely the type of diplomatic problems the First Congress was trying to avoid.<sup>89</sup>

Although the ATS extends to piracy on the high seas, Respondents claim that the high seas and foreign territory are perfectly distinct: “Whereas the territory of a foreign nation is plainly within that nation’s sovereign authority,” the high seas is a region subject to no sovereign, and thus adjudication of conduct on the high seas does not infringe any nation’s sovereignty.<sup>90</sup> Moreover, the

---

86. See *id.* at 52 (“[A]ny concerns . . . are adequately addressed by existing doctrines designed to manage such issues in transnational cases); *id.* at 52 n.43 (“Foreign sovereign immunity and the political question and act of state doctrines may apply in some ATS cases arising out of conduct on foreign soil.” (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.21 (2004))).

87. See *id.* at 7 (suggesting that *Sosa* “specifically endorsed” certain ATS cases arising from extraterritorial violations of human rights and that limiting doctrines enable federal courts to “implement appropriately the judicial caution indicated by *Sosa* on a case-specific” basis).

88. Supplemental Brief for Respondents at 12, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Aug. 1, 2012) [hereinafter Brief for Respondents].

89. *Id.* at 2 (citing *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004)).

90. *Id.* at 26.

Supreme Court has held that “when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.”<sup>91</sup> Thus, even if conduct on the high seas served as an exception, the presumption would still apply to ATS causes of action arising out of conduct on foreign soil.<sup>92</sup>

Next, Respondents argue that although the ATS is a jurisdictional statute, it is accompanied by a federal common-law lawmaking authority and thus is not beyond the reach of the presumption.<sup>93</sup> Respondents claim that this explains seeming anomalies between neighboring statutes in the Judiciary Act, some of which contain express geographical limitations, and some of which, like the ATS, do not.<sup>94</sup> The lawmaking feature of the ATS also explains why the ATS is not comparable to transitory tort cases under common law: in transitory tort cases, “the cause of action is afforded by the law of the place of the conduct; the forum state does not append its own cause of action to another state’s substantive norm.”<sup>95</sup>

## 2. *Charming Betsy* and Prescriptive Jurisdiction

Respondents argue that the ATS does not extend to causes of action arising on foreign soil, because to hold otherwise would violate international law.<sup>96</sup> The rule outlined by the Supreme Court in *Murray v. Schooner Charming Betsy*<sup>97</sup> states that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>98</sup> Though under the ATS federal courts address violations of CIL, in doing so they apply *federal common law*.<sup>99</sup> Thus, in recognizing an ATS case with an extraterritorial cause of action, federal courts would be imposing American law on foreign nations, thereby exercising prescriptive jurisdiction rather than adjudicative jurisdiction.<sup>100</sup> As outlined in the

91. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

92. Brief for Respondents, *supra* note 88, at 26–27.

93. *Id.* at 19.

94. *Id.* at 19–23.

95. *Id.* at 17.

96. *Id.* at 38.

97. 6 U.S. 64 (1804).

98. *Id.* at 118.

99. Brief for Respondents, *supra* note 88, at 38.

100. *Id.* at 37–39. See *F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315–16 (“International law imposes different limitations upon a state’s exercise of its jurisdiction, depending upon whether the jurisdiction exercised is prescriptive or [adjudicative] jurisdiction.”).

Restatement of Foreign Relations Law, courts can only exercise prescriptive jurisdiction with respect to:

(1)(a) a conduct that, wholly or in substantial part, takes place within its territory, (b) the status of persons, or interests in things, present within its territory, (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.<sup>101</sup>

None of these circumstances is generally applicable in a foreign-cubed case.<sup>102</sup> Recognizing federal-common-law claims under the ATS when there is no accepted basis for prescriptive jurisdiction would violate international law, and thus would violate the *Charming Betsy* rule.<sup>103</sup>

Additionally, Respondents contend that courts do not have universal jurisdiction to recognize extraterritorial causes of action under the ATS. The Restatement of Foreign Relations Law establishes when universal jurisdiction is authorized:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.<sup>104</sup>

Respondents note that the Restatement refers only to universal criminal jurisdiction, not universal civil jurisdiction.<sup>105</sup> In fact, “foreign governments and tribunals view the assertion of civil—as opposed to criminal—universal jurisdiction as a violation of international law,” and therefore a reading of the ATS as granting universal civil jurisdiction would also violate the *Charming Betsy* rule.<sup>106</sup>

---

101. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

102. Brief for Respondents, *supra* note 88, at 39.

103. *Id.* at 38.

104. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

105. Brief for Respondents, *supra* note 88, at 40.

106. *Id.* at 40–44.

### 3. Case-Specific Doctrines Administered by Courts versus Congressional Line-Drawing

Respondents emphasize that there is substantial disagreement that a private right of action in the United States is the best way to implement international human rights.<sup>107</sup> Broadening the scope of the ATS thus poses significant risks to America's interests.<sup>108</sup> For example, the Nigerian government formally protested against the United States hearing *Kiobel*, claiming that adjudication in the United States would jeopardize reconciliation attempts by the Nigerian government, compromise its efforts to secure foreign investment, undermine the nation's sovereignty, and strain its relationship with the United States.<sup>109</sup> Additionally, fear of adverse effects from foreign-based ATS litigation may encourage corporations to "divest from foreign nations, disserving [American] foreign policy interests and harming foreign beneficiaries of that investment."<sup>110</sup>

As the potential for international discord is extremely high in well-publicized, foreign-cubed ATS cases, Respondents press for a rule that would require courts to defer to Congress.<sup>111</sup> Respondents emphasize that "policy arguments . . . [cannot] supply a substitute for Congress's affirmative expression of will."<sup>112</sup> As Congress has the ability to expressly authorize extraterritorial causes of action under the ATS, it would be imprudent to broaden the scope of the statute without further direction from the Legislature.

## VI. ANALYSIS

A categorical bar on extraterritorial causes of action under the ATS is unwarranted and unnecessary. Contemporaneous evidence, such as the Bradford Opinion, demonstrates that the ATS was intended to apply extraterritorially and thus the presumption against extraterritoriality is inapplicable. Additionally, contrary to Respondents' argument, applying the ATS to extraterritorial causes of

---

107. *Id.* at 50–51 (noting, as an example, that South Africa prefers to address CIL violations under its own law "rather than by relying upon private plaintiffs pursuing redress in [American] courts under adversarial [American] procedures").

108. *Id.* at 51.

109. *Id.* at 5.

110. *Id.* at 52.

111. *Id.* at 48.

112. *Id.*



action does not violate international law when courts recognize only the narrow violations of CIL outlined in *Sosa*. Even in cases that meet the *Sosa* standard, federal courts can utilize limiting doctrines to dismiss claims that may raise serious foreign policy concerns. Finally, the ATS serves as an important tool in combatting violations of international human rights; without a stronger showing that Congress intended to bar extraterritorial claims under the ATS, it would be unwarranted to deny aliens with meritorious claims a forum in which to litigate.

*A. Contemporaneous Evidence and the Presumption Against Extraterritoriality*

The early history of the ATS lends considerable weight to the contention that the ATS authorizes federal courts to adjudicate causes of action arising abroad. As Justice Story explained in *United States v. Smith*,<sup>113</sup> the law of nations was part of the common law.<sup>114</sup> A violation of the law of nations, such as piracy, was deemed “an offence against the universal law of society,” and the pirate “an enemy of the human race.”<sup>115</sup> With this background, it would have been illogical to categorically exclude claims arising on foreign territory when the drafters clearly understood that violations of the law of nations occur the world over and are violations against all nations alike. In addition, the Blackstonian norms that the drafters had in mind when crafting the ATS could certainly occur extraterritorially, piracy on the high seas being the most obvious example.<sup>116</sup> If a CIL violation was committed extraterritorially, it would be adverse to the purpose of the ATS to allow this violation to go unpunished provided the perpetrator was later found in the United States. For instance, although the Marbois Incident occurred in Philadelphia, had the attacker assailed the ambassador elsewhere and then fled to the United States, Petitioners correctly argue that it is unlikely the United States would have provided a safe haven—to do so would inspire precisely the diplomatic tension the drafters of the ATS sought to avoid.<sup>117</sup>

---

113. 18 U.S. 153 (1820).

114. *Id.* at 161.

115. *Id.*

116. *See id.* at 162 (defining piracy as “robbery upon the sea” generally and noting it was the practice of all nations to punish “persons, whether natives or foreigners, who ha[d] committed this offence against any persons whatsoever”).

117. Brief for Petitioners, *supra* note 8, at 16.

Moreover, the United States may have had an obligation to provide a remedy under international law as it stood when the ATS was enacted. As Blackstone stated, “where the individuals of any state violate this general law [of nations], it is then the interest *as well as the duty* of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world be maintained.”<sup>118</sup> Echoing similar concerns, the United States, as *amicus curiae*, requested that the Court be guided “by the legislative purpose [of the ATS] to permit a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the United States accountable.”<sup>119</sup> In fact, the Framers unambiguously provided for jurisdiction over cases involving an alien and an American citizen under Article III of the Constitution,<sup>120</sup> which extends the judicial power to “controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>121</sup>

Further contemporaneous support that the ATS applies extraterritorially rests in Bradford’s Opinion following the Sierra Leone attack. Bradford plainly stated that victims of the attack could bring suit in American courts under the ATS.<sup>122</sup> While Respondents suggest Bradford’s opinion might have been directed at allegations of misconduct on the high seas alone,<sup>123</sup> Bradford was specifically responding to complaints that American citizens pillaged and destroyed property in Freetown, Sierra Leone.<sup>124</sup> We do not know whether Bradford would have decided differently had American

118. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769) (emphasis added).

119. Brief for the United States, *supra* note 33, at 3.

120. See Bradley, *supra* note 31, at 522 (explaining that federal courts have jurisdiction under Article III of the Constitution to hear a foreign-squared case, but warning that the Constitutional basis for hearing foreign-cubed cases “is much less clear, at least when the suits involve alleged breaches of the law of nations rather than a treaty”). A “foreign-squared” ATS case is one involving “foreign conduct, foreign plaintiffs, but an [American] defendant.” Brief for Respondents, *supra* note 88, at 9.

121. U.S. CONST. art. III, § 2 cl. 1.

122. See 1 Op. Att’y Gen. 57, 59 (finding that victims who had been attacked by American citizens overseas had a “remedy by *civil* suit in the courts of the United States” under the ATS); see also Brief for the United States, *supra* note 33, at 7 (stating that some of the conduct at issue in the Bradford Opinion occurred within the territory of Sierra Leone).

123. See Brief for Respondents, *supra* note 88, at 28 (claiming that Bradford concluded “the ATS was available as to conduct on the high seas, not conduct on the soil” of Sierra Leone and that the “materials he reviewed in preparing his opinion allege[d] both sorts of conduct”).

124. See Bradley, *supra* note 31, at 520–21 (finding it unlikely that Bradford had in mind only conduct that occurred on the high seas; rather that he “appeared to be endorsing extraterritorial application of the statute”); see also *supra* notes 31–36 and accompanying text.

citizens not been the perpetrators, yet his Opinion demonstrates rather definitively that a categorical exclusion of extraterritorial causes of action would have been inconsistent with his understanding of the ATS.

### *B. Sosa and Jurisdiction Under the ATS*

In *Sosa*, the Supreme Court held it would not violate international law for federal courts to adjudicate certain violations of CIL.<sup>125</sup> Yet, the Court failed to address whether a territorial limitation applies to the ATS. While the Court emphasized that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of [CIL],”<sup>126</sup> the Court made no suggestion that extraterritorial causes of action were categorically barred. Rather, in an important footnote, the Court stated that it would “certainly consider . . . in an appropriate case” an exhaustion limitation, requiring a plaintiff to exhaust remedies in the domestic legal system before turning to American courts.<sup>127</sup> Unless the Court recognized an extraterritorial cause of action under the ATS, whether in a foreign-cubed case or a foreign-squared case, an exhaustion limitation would be completely unnecessary.<sup>128</sup> Federal courts seem to have interpreted the *Sosa* opinion similarly, as they continue to hear foreign-cubed ATS cases.<sup>129</sup>

---

125. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (“[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms . . .”).

126. *Id.* at 720.

127. *Id.* at 733 n.21.

128. Suppose an ATS claim had a single foreign element, such as if one of the parties was a resident of the United States and the conduct substantially occurred in the United States. A federal court would be authorized to adjudicate the claim under international law because the court would have prescriptive jurisdiction. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (“A state has jurisdiction to prescribe law with respect to (1)(a) a conduct that, wholly or in substantial part, takes place within its territory . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory . . .”). Additionally, while an exhaustion requirement is usually imposed to afford the state where the violation occurred a chance to redress the violation according to its own procedures, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 680 (7th Cir. 2012), such concerns would not be at play in the hypothetical ATS claim posed since the alleged misconduct occurred in the United States. Thus an exhaustion limitation would be wholly unnecessary.

129. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 742–46 (9th Cir. 2011) (adjudicating a foreign-cubed case in which the plaintiffs were foreign, the defendants were foreign, and the alleged misconduct took place in Papua New Guinea); *Jean v. Dorelien*, 431 F.3d 776, 777–79 (11th Cir. 2005) (remanding for further proceedings a foreign-cubed case in which plaintiffs were Haitian, defendant was a Haitian military official, and the alleged misconduct took place in

Ultimately, whether a federal court is violating international law will turn on how faithfully the court applies international law.<sup>130</sup> As the Ninth Circuit explained, the ATS provides “a domestic forum for claims based on conduct that is illegal everywhere, including the place where the conduct took place”; thus adjudicating a proper ATS claim can be “no infringement on the sovereign authority of other nations,”<sup>131</sup> so long as applicable substantive and procedural hurdles are first overcome.<sup>132</sup> No federal court has held that adjudicating an extraterritorial cause of action under the ATS violates international law, though courts often dismiss these claims on other grounds.<sup>133</sup> In applying the stringent *Sosa* standard, federal courts have often been compelled to dismiss ATS claims for failing to state cognizable violations of CIL.<sup>134</sup> As recent ATS litigation demonstrates, federal courts are more than capable of faithfully applying *Sosa* and, in so doing, diligently examining international law so as to afford aliens a forum in which to litigate violations of CIL without overreaching the jurisdictional grant of the ATS.

---

Haiti).

130. See Anthony Colangelo, *Response: Adjudicative versus Prescriptive Jurisdiction, Translating Historical Intent, and a Brief Universal Jurisdiction Rejoinder*, SCOTUSBLOG (July 20, 2012, 12:50 PM), <http://www.scotusblog.com/2012/07/response-adjudicative-versus-prescriptive-jurisdiction-translating-historical-intent-and-a-brief-universal-jurisdiction-rejoinder> (explaining that if a court, in adjudicating an ATS claim, applies a “conduct-regulating rule [that] faithfully and accurately reflects extant international law,” the court’s “exercise of jurisdiction over entirely foreign activity” will not be a violation of international law).

131. *Sarei*, 671 F.3d at 746.

132. See *Sosa*, 542 U.S. at 733 n.21 (stating that it may be appropriate to apply principles to limit “the availability of relief in the federal courts for violations of [CIL]” but refusing to list such principles as the case could be disposed on other grounds).

133. See BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 12 (2d ed. 2008) (finding that following *Filartiga*, approximately 150 lawsuits had been filed under the ATS as of late 2006, but “fewer than two dozen cases . . . sustained ATS claims,” namely for failure to state a cognizable violation of CIL).

134. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258–60 (11th Cir. 2009) (finding plaintiffs’ allegations that defendants, in one form or another, cooperated with local authorities to rid bottling facilities of unions did not meet the heightened pleading standard required to satisfy the ATS after *Sosa*); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008) (holding that plaintiffs’ claim that defendants manufactured and supplied herbicides laced with poison to be used as defoliants was not a cause of action sufficiently defined under CIL to warrant a federal remedy under the ATS); *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2006) (dismissing a child abduction case brought under the ATS on the ground that parental child abduction did not present a binding norm of CIL giving rise to a cause of action under the ATS).

### C. Adequacy of Limiting Doctrines

Limiting doctrines like forum non conveniens and the exhaustion of domestic remedies can serve to ensure that federal courts dismiss cases that pose serious foreign policy concerns.<sup>135</sup> For instance, following a motion for forum non conveniens, a court must determine whether an adequate alternative forum exists *and* whether the public and private interests weigh in favor of dismissal.<sup>136</sup> In addition, judges may require plaintiffs to exhaust local remedies in the legal system in which the claim arose, or to which the claim is connected, before filing a claim in federal court. An exhaustion requirement is a “well-established rule of customary international law,”<sup>137</sup> and one with “particularly deep roots.”<sup>138</sup> Noting as much, the European Commission, as *amicus curiae*, emphasized that before a federal court can recognize an extraterritorial cause of action, “international law requires exhaustion of local and international remedies.”<sup>139</sup>

---

135. See Brief for the United States, *supra* note 33, at 22 (supporting the use of limiting doctrines in ATS cases and suggesting that such doctrines “be applied at the outset of the litigation and with special force”).

136. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (noting dismissal may be warranted when a forum is inappropriate “because of considerations affecting the court’s own administrative and legal problems,” or when the forum proves oppressive and vexatious to the defendant (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947))).

137. Interhandel (Switz v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 27 (Mar. 21); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1987) (“Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies . . .”).

138. Matthew S. Duchesne, *The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes*, 36 GEO. WASH. INT’L L. REV. 783, 788 n.24 (2004) (noting that the exhaustion of local remedies rule “can be found in treaties dating back as far as the ninth century”). Today, a number of international treaties do in fact have an exhaustion requirement. See, e.g., International Covenant on Civil and Political Rights, art. 41(1)(c), opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (imposing an exhaustion limitation on potential petitioners); Organization of American States, American Convention on Human Rights, art. 46, Nov. 22, 1969, 1144 U.N.T.S. 123 (same); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), Nov. 4, 1950, 213 U.N.T.S. 221 (same).

139. Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 30, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. June 12, 2012) (emphasis added). The United States has itself invoked the exhaustion requirement as a defense in a case before the International Court of Justice; it sought a finding that the court had no jurisdiction to hear the matters raised on the ground that “Interhandel, whose case Switzerland [was] espousing, ha[d] not exhausted the local remedies available to it in the United States courts.” *Interhandel*, 1959 I.C.J. at 26; see *The Interhandel Case: Switzerland v. United States*, 1960 DUKE L.J. 73, 73–74 (noting that *Interhandel* involved a claim by the Swiss Government seeking “restitution of assets of its national, Interhandel, which had been vested in

Though the Court in *Sosa* did not determine whether an exhaustion requirement applies to the ATS, it did state that it would “certainly consider” applying an exhaustion limitation “in an appropriate case.”<sup>140</sup> Reading an exhaustion requirement into the ATS would be in line with precedent, as the Court previously held that “where Congress has not clearly required exhaustion, sound judicial discretion governs.”<sup>141</sup> Additionally, an exhaustion limitation would be fully consistent with the overall goals of the ATS. By permitting a country with closer ties to the tort to first decide whether it will adjudicate the claim, a federal court can ensure it is not unduly infringing on another nation’s sovereignty while still ensuring that violations of CIL do not go remediless.<sup>142</sup> Furnished with such limiting doctrines, federal courts adjudicating extraterritorial violations of CIL can adequately mitigate potential foreign policy concerns.

#### *D. Implications of a Categorical Territorial Bar*

To bar extraterritorial claims under the ATS would be to deny otherwise proper litigants, with meritorious claims, a forum in which to litigate. Though Congress supplemented the ATS by enacting the Torture Victim Protection Act (TVPA) in 1991,<sup>143</sup> Congress stated clearly that neither the TVPA nor any other statute performs a comparable function to the ATS.<sup>144</sup> Whereas the ATS extends to “any civil action by an alien for a tort” that violates CIL or a treaty of the United States,<sup>145</sup> the TVPA is limited to torture and extrajudicial killings committed under actual or apparent authority, or color of law “of any foreign nation.”<sup>146</sup> In addition, while victims of international

---

the United States during World War II” on the ground that the assets were enemy property).

140. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (highlighting that the “requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of [CIL]”).

141. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (internal citations omitted).

142. See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 680 (7th Cir. 2012) (stating that an exhaustion requirement is “based on the idea that the state where the alleged violation occurred should have an opportunity to redress it by its own means, within the framework of its own legal system”).

143. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

144. See S. Rep. No. 102-249, at 4-5 (1991) (noting that the ATS has “important uses” not covered under the TVPA, and thus that the ATS “should not be replaced”); H.R. Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. at 86 (finding that “claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered” under the ATS and thus that the ATS “should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of [CIL]”).

145. 28 U.S.C.A. § 1350 (West 2012).

146. TVPA § 2(a), 28 U.S.C.A. § 1350 note (West 2012). The TVPA is further limited as it

human rights violations could petition international tribunals, there are several reasons why these tribunals may prove inadequate. The scope of review may be far more limited than that in American courts,<sup>147</sup> and international tribunals do not generally issue legally binding decisions.<sup>148</sup> Recognizing Congress's recent affirmance of the statute and the unavailability of alternative forums for many potential ATS plaintiffs, it would be contrary to the intentions of the Legislature to severely dampen the ATS by implementing a categorical exclusion on extraterritorial causes of action.

Additionally, ATS litigation serves as an important instrument in the ongoing effort to eradicate human rights abuses around the world. As one scholar notes, ATS litigation operates as "an international check against domestic impunity," signaling that America will not serve as a shelter for dictators and their followers and that human rights violations will not go remediless.<sup>149</sup> In fact, America's "general abhorrence of erroneously denying meritorious constitutional claims" has supported broad exceptions in other areas of American law, even at the sacrifice of such principles as finality in judgments.<sup>150</sup> Thus, granted the important function of the ATS, and the country's disfavor of erroneously denying meritorious claims, it would seem inapposite to annihilate extraterritorial claims as a class without further direction from Congress.

In light of the contemporaneous evidence demonstrating that the ATS was intended to apply extraterritorially, the narrowing of actionable violations of CIL under *Sosa*, the adequacy of existing

---

sets out a definition of "torture" and "extrajudicial killing," *id.* § 3, and it imposes both a statute of limitations and an exhaustion requirement, *id.* § 2(b)–(c).

147. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 301 (1999) ("Unlike [American] federal law, there is no supreme arbiter of international human rights law . . . each court or tribunal operates as the sole interpreter of the agreement that created it, with no formal mechanisms available to interact with its counterparts in other treaty systems.").

148. See *id.* at 348 ("Unlike [American] domestic law, where judgments of both state and federal courts are enforceable against the losing party, not all human rights tribunals can issue legally binding decisions (as contrasted with recommendations for remedial action."); *id.* at 303–04 (explaining that the European Court of Human Rights (ECHR) is unique in its ability to issue legally binding rulings, but noting that the ECHR "also imposes stringent procedural hurdles that result in the dismissal of the overwhelming majority of cases prior to a hearing on the merits").

149. Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1289 (2006).

150. See Helfer, *supra* note 147, at 347 (noting that a fear of denying meritorious constitutional claims is a primary force behind the exceptions to finality rooted in American habeas corpus law).

limiting doctrines, and the important function the ATS serves, the Court should hold that the ATS can apply extraterritorially.

## VII. CONCLUSION

Petitioners correctly argue that a categorical bar on extraterritorial causes of action under the ATS is unwarranted and ill-advised. The ATS was intended to apply extraterritorially, as evidenced by the events that precipitated the Judiciary Act of 1789, Congress's purpose in enacting the statute, and Attorney General William Bradford's Opinion concerning its application; thus the presumption against extraterritoriality does not apply here. Likewise, the *Charming Betsy* rule does not stand as a bar because applying the ATS to extraterritorial causes of action does not alone violate international law, provided courts only recognize the narrow violations of CIL outlined in *Sosa*. Moreover, existing limiting doctrines can be utilized to dismiss inappropriate ATS cases, thereby mitigating the comity concerns an extraterritorial application may otherwise raise. Finally, the ATS performs an important function in remedying egregious violations of international human rights. To deny plaintiffs a forum in which to litigate through a categorical bar on extraterritorial causes of action under the ATS, without a stronger showing that such is what Congress intended, would be misguided.