AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Foundations

Kiobel v. Royal Dutch Petroleum Co., ___ U.S. ___ (2013)

Esther Kiobel resided in Ogoniland, Nigeria. She and other district residents staged several protests against the environmental impact of policies adopted by the Shell Petroleum Development Company of Nigeria, a subsidiary of the Royal Dutch Petroleum Company. Kiobel claimed that the Royal Dutch Petroleum Company responded to those protests by helping the Nigerian military brutally attack Ogoniland residents. After being granted political asylum in the United States, Kiobel and other victims of these attacks filed suit in a federal district court under the Alien Tort Statute against the Royal Dutch Petroleum Company. The crucial provision of that statute declares, "[t]he 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." The federal district court rejected Shell's motion to dismiss all claims, but that decision was reversed by the Court of Appeals for the Second Circuit. Kiobel appealed to the Supreme Court of the United States.

The Supreme Court unanimously declared that federal courts lacked jurisdiction over Kiobel's human rights claim. Chief Justice Roberts's opinion for the court insisted that the Alien Torts Statute did not give the United States jurisdiction over conduct that occurred on foreign soil. Why did he reach that conclusion? Why did Justice Breyer disagree? Who has the better argument? Justice Breyer insisted that federal courts have jurisdiction over modern-day "pirates." How did he determine who are modern-day pirates? Are his analogies correct? All justices appeared to assume that Congress could give federal courts jurisdiction to adjudicate any human rights violation that occurred anywhere. Is this a correct interpretation of the opinions below? Is this a correct interpretation of the Constitution? Should Congress vest federal courts with greater jurisdiction over human rights violations?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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Passed as part of the Judiciary Act of 1789, the Alien Torts Statute (ATS) was invoked twice in the late 18th century, but then only once more over the next 167 years. The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. . . . [T]he First Congress did not intend the provision to be "stillborn." The grant of jurisdiction is instead "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." . . .

The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," and reflects the "presumption that United States law governs domestically but does not rule the world. "

This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." As this Court has explained: "For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important

policy decision where the possibilities of international discord are so evident and retaliative action so certain." . . .

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[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court [has] repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

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[N]othing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.

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Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. . . . [W]hen Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The first two offenses have no necessary extraterritorial application. . . . Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. . . . The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.

The third example of a violation of the law of nations familiar to the Congress that enacted the ATS was piracy. Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. . . . Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.

Petitioners also point to a 1795 opinion authored by Attorney General William Bradford. In 1794, in the midst of war between France and Great Britain, and notwithstanding the American official policy of neutrality, several U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone. In response to a protest from the British Ambassador, Attorney General Bradford responded as follows:

> So far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are*

> within the jurisdiction of the . . . courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in . . . those courts. . . . But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that 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; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States. . . .
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Attorney General Bradford's opinion defies a definitive reading and we need not adopt one here. Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.

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The United States was . . . embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States. Such offenses against ambassadors violated the law of nations, "and if not adequately redressed could rise to an issue of war." The ATS ensured that the United States could provide a forum for adjudicating such incidents. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

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JUSTICE KENNEDY, concurring.

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JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

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[W]hen the ATS was enacted, "congressional concern" was "'focus[ed],'" on the "three principal offenses against the law of nations" that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The Court therefore held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." In other words, only conduct that satisfies . . . requirements of definiteness and acceptance among civilized nations can be said to have been "the 'focus' of congressional concern" when Congress enacted the ATS. As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies . . . requirements of definiteness and acceptance among civilized nations.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in the judgment.

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[T]he majority's effort to answer the question by referring to the "presumption against extraterritoriality" does not work well. That presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." The ATS, however, was enacted with "foreign matters" in mind. The statute's text refers explicitly to "alien[s]," "treat[ies]," and "the law of nations." The statute's purpose was to address "violations of the law of nations, admitting of a judicial

remedy and at the same time threatening serious consequences in international affairs." And at least one of the three kinds of activities that we found to fall within the statute's scope, namely piracy, normally takes place abroad.

The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas. That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies. . . .

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. . . . I very much agree that pirates were fair game "wherever found." Indeed, that is the point. That is why we asked, . . . who are today's pirates? 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 equal interest in their apprehension and punishment." And just as a nation that harbored pirates provoked the concern of other nations in past centuries, so harboring "common enemies of all mankind" provokes similar concerns today.

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In applying the ATS to acts "occurring within the territory of a[nother] sovereign," 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, at least where allowing such compensation avoids "serious" negative international "consequences" for the United States. 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.

The Restatement (Third) of Foreign Relations Law is helpful. Section 402 recognizes that . . . a nation may apply its law . . . not only (1) to "conduct" that "takes place [or to persons or things] within its territory" but also (2) to the "activities, interests, status, or relations of its nationals outside as well as within its territory," (3) to "conduct outside its territory that has or is intended to have substantial effect within its territory," and (4) to certain foreign "conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests." In addition, § 404 of the Restatement explains that a "state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and analogous behavior.

Considering these jurisdictional norms in light of both the ATS's basic purpose (to provide compensation for those injured by today's pirates) and . . . basic caution (to avoid international friction), I believe that the statute provides jurisdiction 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.

I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. Doing so reflects the fact that Congress adopted the present statute at a time when, as Justice Story put it, "No nation ha[d] ever yet pretended to be the *custos morum* of the whole world." *United States v. La Jeune Eugenie* (C.C.D. Mass. 1822). That restriction also should help to minimize international friction. Further limiting principles such as exhaustion, *forum non conveniens,* and comity would do the same. So would a practice of courts giving weight to the views of the Executive Branch.

As I have indicated, we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes—in particular that of compensating those who have suffered harm at the hands of, *e.g.,* torturers or other modern pirates. Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims in that "handful of heinous actions." . . . International norms have long included a duty not to permit a nation to become a safe harbor for pirates (or their equivalent).

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[T]he jurisdictional approach that I would use is analogous to, and consistent with, the approaches of a number of other nations. It is consistent with the approaches set forth in the Restatement. Its insistence upon the presence of some distinct American interest, its reliance upon courts also invoking other related doctrines such as comity, exhaustion, and *forum non conveniens,* along with its dependence (for its workability) upon courts obtaining, and paying particular attention to, the views of the Executive Branch, all should obviate the majority's concern that our jurisdictional example would lead "other nations, also applying the law of nations," to "hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."

Applying these jurisdictional principles to this case, however, I agree with the Court that jurisdiction does not lie. The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind." Thus I agree with the Court that here it would "reach too far to say" that such "mere corporate presence suffices."