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NOTE

KIOBEL V. ROYAL DUTCH PETROLEUM:
The Future of ATS Litigation

R. Ethan Hargraves†

I. INTRODUCTION

On April 17, 2013, the Supreme Court handed down a historic decision: *Kiobel v. Royal Dutch Petroleum.*¹ The Court’s decision concerned the interpretation of a statute whose text is nearly as old as the United States itself: the Alien Tort Statute (ATS).² The ATS allows aliens to bring suit for violations of the law of nations in an American court.³ For almost 200 years after its enactment, the ATS saw limited application, but all of that changed with the decision of a Second Circuit Court of Appeals in 1980 allowing the ATS to be applied to claims for international human rights abuses committed abroad.⁴ For the next several decades, litigants from all over the globe used the ATS to seek redress of such injuries in the federal courts of the United States.⁵ Almost ten years ago, the Supreme Court attempted to rein in the broad discretion of the lower federal courts to recognize causes of action in violation of the law of nations,⁶ but to little avail. In *Kiobel,* the Court applied a rule of statutory construction to the ATS for the first time, holding that the courts could not use the ATS to recognize causes of action based on conduct that occurred beyond the sovereignty of the United

† Editor-in-Chief, Liberty University Law Review, Volume 8. J.D. Candidate, Liberty University School of Law, May 2014; B.A., English Literature, Bryan College, 2011. I dedicate this Note to my Savior Jesus Christ, without whom I would have no purpose in life. I dedicate this Note to every person who invested in the cultivation of my professional and academic pursuits—not the least of whom are my parents, Gary and Carole Hargraves. And finally, I dedicate this Note to my beautiful wife, Alanna, without whom this work and so much else in my life would not have been possible.

2. The Alien Tort Statute was included as part of the First Congress’s Judiciary Act of 1789. *See infra* note 8.
3. *See infra* Part II.A.
4. *See infra* Part II.D.
5. *Id.*
6. The Supreme Court in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), mandated that the lower courts should exercise “great caution in adapting the law of nations to private rights.” *Id.* at 728.
States.\(^7\) The Court’s decision should have been the death knell to a majority of cases traditionally brought under the ATS, but there is anything but uniformity in the application of *Kiobel* by the lower courts. Many lower courts acknowledge that *Kiobel* has changed ATS litigation, but the nature and extent of the change is already a point of contention. The interpretations of many lower courts leave the door of the ATS wide open, despite the Supreme Court’s attempt to close it in *Kiobel*. The Supreme Court has spoken on the future of ATS litigation; now it falls to the lower courts to properly apply that decision.

This Note addresses the Supreme Court’s decision in *Kiobel* and what that decision means for ATS litigation. Part II of this Note presents the history of the ATS, covering its origin as well as the trend of modern cases as it began in 1980 and highlighting the differences between the traditional and modern implementations of the ATS. Part III of this Note addresses the Supreme Court’s decision in *Kiobel*. Part IV examines how *Kiobel*’s language has since been interpreted by the lower federal courts and why most of those decisions have missed the mark. Part V of this Note offers a commonsense interpretation of *Kiobel* already adopted by at least one district court, and demonstrates how, if the lower federal courts continue in their current trend of ignoring the proper interpretation of *Kiobel*, the ATS could once again return to life despite the Supreme Court’s attempt to put it to rest.

II. BACKGROUND

A. *The Origin of the Alien Tort Statute*

Although currently and primarily referred to as the Alien Tort Statute, the provision was originally described as the Alien Tort Clause and was included in § 9 of the First Judiciary Act of 1789—\(^8\)the act that created the judicial system of the United States and defined the boundaries of its jurisdiction.\(^9\) In its original form the Clause gave district courts jurisdiction “concurrent with the courts of the several States, or the circuit courts, as the

\(^7\) *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

\(^8\) Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76–77 (1789), http://memory.loc.gov/cgi-bin/ampage?collId=lsl&fileName=001/lsl001.db&recNum=200.

\(^9\) 46 Mass. Prac., Federal Civil Practice § 1:2 (“In enacting the Judiciary Act of 1789, Congress established a framework for the federal court system and further defined the federal courts’ jurisdictional boundaries, which had been set forth rather ambiguously in the Constitution.”).
case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."\textsuperscript{10} The Supreme Court has since clarified that the ATS is "a jurisdictional statute creating no new causes of action."\textsuperscript{11} In other words, the language of the statute "besp[eaks] a grant of jurisdiction, not power to mold substantive law."\textsuperscript{12}

The Alien Tort Clause arose out of the need to fill a particular void in the judicial authority of the United States courts\textsuperscript{13}—the inability to adjudicate infractions against the law of nations.\textsuperscript{14} The Founders, familiar with the works of Blackstone, understood that there was an obligation among civilized nations to recognize through domestic law "those principles of natural justice."\textsuperscript{15} It was these principles that the newborn judicial system of the United States found itself unable to protect. This embarrassing lack of judicial authority led the first Congress to issue a resolution asking the states to provide the necessary forums for adjudication of such infractions.\textsuperscript{16} Unfortunately, the resolution failed to spur the states into action, leaving the fledgling judicial system impotent.\textsuperscript{17} It was then that the primary historical catalyst for the Alien Tort Clause appeared: the Marbois incident.

In 1784, Charles Julian De Longchamps was criminally indicted on the charge of making and executing a threat of physical harm against Francis Barbe Marbois, "Consul General of France to the United States, Consul for the State of Pennsylvania, [and] Secretary of the French Legation."\textsuperscript{18} De Longchamps was arrested, tried, and found guilty of violating the law of nations, which the court declared to be a part of the common law of the State.\textsuperscript{19} The court imposed a fine and a two-year prison term on De

\begin{itemize}
  \item[10.] Judiciary Act, \textit{supra} note 8.
  \item[11.] \textit{Sosa}, 542 U.S. at 724.
  \item[12.] \textit{Id.} at 713 (citing \textit{The Federalist No. 81}, at 447, 451 (Alexander Hamilton) (J. Cooke ed., 1961)).
  \item[14.] Dodge, \textit{supra} note 13.
  \item[15.] 4 \textit{William Blackstone, Commentaries} 67.
  \item[16.] Dodge, \textit{supra} note 13.
  \item[17.] \textit{Id.} at 229.
  \item[19.] \textit{Id.}
Longchamps, but in all of this there was no civil remedy available to Marbois. Congress was effectively forced to apologize to Marbois for its inability to provide a civil remedy and again recommended that the states "pass laws for the exemplary punishment of such persons as may in future by violence or by insult attack the dignity of sovereign powers in the person of their ministers or servants." The Marbois incident revealed the need for a federal remedy, one that would not merely punish the violation but would, as the 1781 resolution stated, "authorise suits to be instituted for damages by the party injured." Five years after the Marbois incident, Congress provided such a remedy as part of the First Judiciary Act of 1789—the Alien Tort Clause.

B. The Text of the Alien Tort Statute

To fully understand the evolution from the traditional to the modern applications of the Alien Tort Clause, it is first necessary to understand the evolution from the traditional to the modern interpretations of some key terms in the text of the Clause itself. The Alien Tort Clause changed slightly over the years, but in its current statutory form it still provides the federal courts with "jurisdiction [over] 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." Critical to a proper understanding of the Alien Tort Clause are the phrases "law of nations" and "tort only." The Supreme Court has held that by using the term "tort only" the drafters of the ATS meant to denote a specific subset of violations against the law of nations that implicated "a judicial remedy and at the same time threaten[ed] serious consequences in international affairs." Probably the best example of such a "tort" is the one committed in the Marbois Incident, where the tort itself (assault) was made a violation of the law of nations by the fact that it was committed against an ambassador of a foreign nation. It was such a tort that "if not adequately redressed could rise to an issue of war." Thus, the term "tort only" was

20. Id. at 118.
22. Id. at 227 (quoting 21 Journals of the Continental Congress 1774–1789 at 1137).
meant, among other things, to limit the jurisdiction of the ATS to only those individual, redressable injuries that were also violations of the law of nations.

The more difficult phrase in terms of interpretation has been "the law of nations." The difficulty is surprising given the general consensus on what exactly the phrase was meant to invoke—a part of the general common law. The Supreme Court in Sosa recognized that our understanding of the law of nations, particularly with respect to the violations that would be actionable under the ATS, continues to be informed primarily by the writings of Sir William Blackstone. The Court recognized three specific offenses against the law of nations that Blackstone had indicated carried a kind of personal liability: violations of safe conduct; infringements upon the rights of ambassadors; and, the crime of piracy. Blackstone did not describe these as the only offenses against the law of nations that carried personal liability; rather, he described them as three specific offenses that were made violations of the law of nations by an underlying characteristic—the fact that they were "incident to whole states or nations."

27. A Pennsylvania district court indicated merely four years after the Judiciary Act of 1789 that an action for replevin could not come under the purview of the Alien Tort Clause because it was not an action for a "tort only." Moxon v. The Fanny, 17 F. Cas. 942, 948 (D. Pa. 1793). The court there intimated that the phrase "tort only" may have been intended at least in part to limit the ATS to cases for civil damages. Id. See also Joseph Modeste Sweeney, A Tort Only in Violation of the Law of Nations, 18 HASTINGS INT'L & COMP. L. REV. 445, 447 (1995) (asserting that the phrase "tort only" referred to the law of prize and was meant in part to limit the jurisdiction of the ATS to cases involving redress of the civil wrong to the exclusion of cases involving the legitimacy of a prize).

28. The Court in Sosa asserted that there were three areas of violations against the law of nations: "general norms governing the behavior of national states with each other." Sosa, 542 U.S. at 714; "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries," Id. at 715; and "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." Id. The Court indicated that it was only this last category, where individual rights overlapped with norms of state relationships, that was implicated by the use of the limiting term "tort only." Id.

29. Id. at 739 ("The law of nations that would have been applied in [ATS cases] was at the time part of the so-called general common law.").

30. Id. at 715.

31. Id.

32. See 4 WILLIAM BLACKSTONE, COMMENTARIES 68.
As part of being “incident to whole states or nations” these three offenses carried the distinct threat of subjecting nations to the risk of war.\textsuperscript{33} In each case the potential of the offense to carry a risk of war had nearly everything to do with the nationalities and statuses of the parties involved;\textsuperscript{34} an offense committed against an ambassador to a foreign nation is made a violation of the law of nations by the very fact that it is committed against an \textit{ambassador to a foreign nation},\textsuperscript{35} where logically the same offense committed against a non-alien who is not an ambassador from another country would simply be an assault. In the same way, a violation of the safe passage rights of an alien is a violation by the fact that it is committed against a foreign citizen.\textsuperscript{36} Likewise, the crime of piracy is made a violation of the law of nations by the fact that the perpetrator simultaneously renounces his citizenship and declares war on all nations.\textsuperscript{37}

These three offenses constitute the clearest examples of specific violations of the law of nations that would have been present in the minds of the men who drafted the original text of the Alien Tort Clause, but they do not constitute the entirety of the law of nations. Blackstone defined the law of nations generally as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”\textsuperscript{38} But Blackstone went on to say that no individual nation “can dictate or prescribe the rules of this law” to the other nations because they “must necessarily result from those principles of natural justice, in which all the learned of every nation agree.”\textsuperscript{39} And in the construction of those general principles, or treaties as the case may be, “there is also no judge to resort to, but the law of nature and reason.”\textsuperscript{40} It was these principles that the Alien Tort Clause incorporated by its reference to the law of nations—these

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{See Id.} at 69 ("[D]uring the continuance of any safe-conduct, either express or implied, the \textit{foreigner} is under the protection of the king and the law." (emphasis added)).
\item \textsuperscript{35} \textit{See Id.} at 70.
\item \textsuperscript{36} \textit{Id.} at 68–69.
\item \textsuperscript{37} \textit{Id.} at 71. ("[T]herefore [the pirate] has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him.").
\item \textsuperscript{38} \textit{Id.} at 66.
\item \textsuperscript{39} \textit{Id.} at 66–67. Such rules may also be found in the “mutual compacts or treaties” between nations. \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 67.
\end{itemize}
principles that supplied the causes of action for the Clause from its very first use.\(^4\)

C. *The Early Days of ATS Litigation*

The first reported use of the Alien Tort Clause came only four years after its inception, in *Moxon v. The Fanny*.\(^4\) The case arose out of a capture at sea of the British vessel The Fanny by French privateers.\(^4\) The French vessel effected the capture “within the territorial jurisdiction and under the protection of the United States.”\(^4\) The libellant, representing the owners of the captured vessel, argued that the court had jurisdiction pursuant to the Alien Tort Clause.\(^4\) The court rejected this argument based upon a strict reading of the text of the Clause; the court reasoned that, as the libellant was pursuing restitution of property (The Fanny) in addition to damages for the tort of marine trespass, the action was not one “for a tort only.” \(^4\)

The next mention of the Alien Tort Clause came just two years after *The Fanny* in *Bolchos v. Darrel*, where one Captain Bolchos had captured a Spanish ship and brought it into a South Carolina port.\(^4\) On board the ship were slaves belonging to one Savage, whose agent, Edward Darrel, seized and sold them once the ship came into port.\(^4\) Bolchos, a French citizen, sued for restitution of the slaves pursuant to a treaty between the United States and France.\(^4\) The common law court of the state dismissed the action as belonging under admiralty jurisdiction.\(^4\) The district court agreed that the action came under its admiralty jurisdiction, but in its dicta the court

\(^{41}\) Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004) (“[T]he ATS was intended to have practical effect the moment it became law, on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time.”).

\(^{42}\) *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793).

\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 943.

\(^{46}\) *Id.* at 948 (emphasis added) (“It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.”).

\(^{47}\) *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795).

\(^{48}\) *Id.*

\(^{49}\) *Id.*

\(^{50}\) *Id.*

\(^{51}\) *Id.*
indicated that there would also have been jurisdiction under § 9 of the Judiciary Act of 1789—the Alien Tort Clause.\footnote{52}{Id.}

* Bolchos* and *The Fanny* were the first judicial decisions mentioning the Alien Tort Clause since its creation, but in neither case did the court actually exercise jurisdiction under the Clause.\footnote{53}{The court in *Moxon v. The Fanny* expressly stated that the Alien Tort Clause did not supply jurisdiction, 17 F. Cas. at 947–48, and while the court in *Bolchos v. Darrel* implied in dicta that jurisdiction under the Clause could have been sustained, 3 F. Cas. at 810, it did not actually hold as much.}

In *O'Reilly de Camara v. Brooke*.\footnote{54}{See *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908); Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960); Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958); Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793).} In *O'Reilly*, the plaintiff, a Spanish subject and a resident of then United States-controlled Cuba, claimed a right to slaughter cattle and receive compensation in connection with the office of "high sheriff of Havana," which he said was his by descent.\footnote{55}{Id. at 48–49.} The office of high sheriff had been abolished—leaving the plaintiff without a livelihood or compensation.\footnote{56}{Id. at 49.} The tort alleged by the plaintiff to satisfy the tort requirement of the Alien Tort Statute\footnote{57}{Id. at 49.} was that of disseisin—an assertion that he had been "wrongfully depriv[ed] . . . of the freehold possession of property."\footnote{58}{The Alien Tort Clause of the Judiciary Act had been re-codified as Revised Statute § 563(16), which gave the district courts "jurisdiction 'of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States.'" *Id.* at 48 (quoting Rev. Stat. § 563 (16)).} The Court found several "technical difficulties" that required a dismissal of the plaintiff's claim, but two were specifically related to the lack of jurisdiction under the Alien Tort Statute: first, the plaintiff had failed to establish that the tort of disseisin had been committed;\footnote{59}{BLACK'S LAW DICTIONARY 541 (9th ed. 2010).} second, even if the tort of disseisin had been committed, there was no affirmative proof that the tort of disseisin came within the meaning of the Alien Tort Statute—no
proof that it was, under these circumstances, a tort "in violation of the law of nations or of [a] treaty [of the United States]."\textsuperscript{61}

The rule that emerges from these first three cases (\textit{The Fanny}, \textit{Bolchos}, and \textit{O'Reilly}) is that jurisdiction under the ATS will attach only where: (1) the plaintiff establishes that a tort has been committed; (2) the plaintiff establishes that something about the particular tort has caused it to violate a principle of the law of nations or a treaty between the United States and another country; and (3) the plaintiff seeks redress in damages and not in any other remedy.\textsuperscript{62}

In 1960, the Second Circuit Court of Appeals cited \textit{Bolchos} as "[t]he only case [we] have found in which jurisdiction was sustained on the basis of [the Alien Tort Clause] \textit{even in part},"\textsuperscript{63} but it was not until 1961 that jurisdiction under the ATS was truly sustained for the first time, in the case of \textit{Adra v. Clift}.\textsuperscript{64} In \textit{Adra}, the plaintiff, a Lebanese National, brought suit against his ex-wife, an Iraqi National but a resident of Baltimore, Maryland.\textsuperscript{65} Plaintiff Adra alleged that his ex-wife wrongfully deprived him of the custody of their daughter by fraudulently including her on the defendant's Iraqi passport, even though the daughter was actually a Lebanese National, and by bringing her to the United States.\textsuperscript{66} Without reference to a single case or a treatise on common law torts, the court concluded that "[t]he unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody is a tort."\textsuperscript{67} The fact that \textit{Adra} sought equitable relief instead of the traditional tort remedy of damages presented no additional obstacle to the court's designation.\textsuperscript{68} Finally, the court found that, as passports were a form of political document, which by their "nature and object [are] addressed to foreign

\textsuperscript{61} \textit{Id.} at 51. The court reasoned that disseisin did not come within the meaning of the ATS—being in violation of the law of nations or a treaty of the United States—because "it is impossible for the courts to declare an act a tort \textit{of that kind} when the Executive, Congress, and the treaty-making power all have adopted the act." \textit{Id.} at 52 (emphasis added).

\textsuperscript{62} \textit{See Id.} at 45; \textit{Bolchos v. Darrell}, 3 F. Cas. 810 (D.S.C. 1795); \textit{Moxon v. The Fanny}, 17 F. Cas. 942 (D. Pa. 1793).

\textsuperscript{63} \textit{Khedivial Line, S.A.E. v. Seafarers' Int'l Union}, 278 F.2d 49, 52 (2d Cir. 1960) (emphasis added).


\textsuperscript{65} \textit{Id.} at 859.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.} at 862.

\textsuperscript{68} \textit{Id.} at 863 ("The award of monetary damages is the customary remedy for most torts, but other forms of relief for torts are not unheard of.").
powers,” the falsification of information on a passport constituted an offense against not only the laws of the individual nations involved but also an offense against the law of nations.69

In 1948, the ATS had been codified in its final form, 28 U.S.C. § 1350, which provides: “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.”70 It was in that form that the court in Adra first sustained ATS jurisdiction, and it was in that form that the statute was brought before the Second Circuit Court of Appeals, in a case that would change the face of ATS litigation—perhaps forever.

D. The Modern Trend

In 1980, nearly 200 years after the Alien Tort Clause was conceived, the Second Circuit Court of Appeals decided Filartiga v. Pena-Irala.71 It was in Filartiga that a litigant first successfully applied the founding-era statute to an entirely modern concept—the domestic adjudication of international human rights violations. The claim in Filartiga was that the defendant Americo Norberto Pena-Irala, a former General of Police in Asuncion, Paraguay, had kidnapped, tortured, and killed one Joelito Filartiga.72 The plaintiffs in the case, citizens of Paraguay and the family of the late Joelito Filartiga, asserted a claim of wrongful death against Pena to recover compensatory and punitive damages.73 The court held that the act of torture, committed by a state official, came under the jurisdiction of the ATS as a tort in violation of the law of nations:

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69. Id. at 864–65.

70. 28 U.S.C.A. § 1350 (West). The modern form of the statute differs in one important way—it no longer allows for “concurrent” jurisdiction with the state courts, but vests “original jurisdiction” in the district courts. This shift likely demonstrates the increased concern that matters implicating foreign relations be handled by the federal courts rather than the individual state courts. See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (“Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states.”); Louis Henkin, Foreign Affairs and the U.S. Constitution 156 (2d ed. 1996) (“Foreign affairs are national affairs. The United States is a single nation-state and it is the United States (not the states of the Union, singly or together) that has relations with other nations . . . and makes national foreign policy.”); see also The Federalist No. 3 (John Jay).

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

72. Id. at 878.

73. Id. at 879.
[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [the Alien Tort Statute] provides federal jurisdiction.\textsuperscript{74}

The court based its holding in part on "the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice)."\textsuperscript{75} The court's holding had several specific ramifications: (1) the court established human rights violations, specifically torture by a state official, as violative of the law of nations; (2) the court made such conduct actionable as a tort under the ATS;\textsuperscript{76} and (3) the court employed a framework whereby it could "interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." \textsuperscript{77} Each of these would be radical enough alone, but the court did not stop there; possibly the most significant portion of the holding was the categorical statement, "It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction."\textsuperscript{78} The court in \textit{Filartiga} intimated that, as long as personal jurisdiction could be satisfied (by in-state service of process), it did not matter who the parties were nor where the conduct occurred.\textsuperscript{79} This implicit authorization of extraterritorial jurisdiction, coupled with the court's expansive view of the law of nations,\textsuperscript{80} started what—compared to the ATS's pre-\textit{Filartiga} use—was a landslide of

\textsuperscript{74} Id. at 878.
\textsuperscript{75} Id. at 880.
\textsuperscript{76} Id. at 878.
\textsuperscript{77} Id. at 881.
\textsuperscript{78} Id. at 885.
\textsuperscript{79} \textit{Filartiga v. Pena-Irala}, 630 F.2d 876, 878 (2d Cir. 1980).
\textsuperscript{80} In \textit{Filartiga}, the court recited the mantra that "the law of nations . . . has always been part of the federal common law," \textit{Filartiga}, 630 F.2d at 885, but the court actually interpreted the law of nations devoid of any reference to federal common law. Instead, the court called for resort to evolving standards of international law. \textit{Id}. at 881 ("Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). In divining these standards, the court in \textit{Filartiga} said "the courts are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good." \textit{Id}. at 888.
international human rights cases. Many of those cases had little to no connection to the United States.

The holding of *Filartiga* had an immediate and noticeable effect on ATS litigation, such that within four years the Court of Appeals for the District of Columbia exclaimed, "section 1350 appears to be generating an increasing amount of litigation." Within five years after *Filartiga*, the ATS was used sixteen times—a stark contrast to the two references in dictum that it received in the first six years after its creation. In fact, in the entire 191 years prior to *Filartiga*, the statute was used only twenty-one times. Since *Filartiga*, the ATS has been a favorite of international human rights litigants. In its modern form, litigants have attempted to use the ATS to combat foreign governments for terrorist attacks on their citizens, sustain wrongful death actions against foreign military officials, prosecute war

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82. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823 (D.C. Cir. 1984) (Bork, Circuit Judge, concurring).


85. *Tel-Oren*, 726 F.2d at 775.

86. *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1469, 1473 (9th Cir. 1994).
crimes and crimes against humanity, 87 prosecute the aiding and abetting of genocide, 88 and the list goes on. 99

The ATS litigation continued in this vein with no serious limitation on the power of the courts to recognize new causes of action until Sosa v. Alvarez-Machain. 90 In Sosa, the Supreme Court finally addressed the substance of the centuries-old ATS, primarily to settle the question of whether and to what extent the federal courts could continue to supply causes of action for the jurisdictional statute. 91 The Court refused to place a categorical limitation on courts recognizing new causes of action as they had been doing since Filartiga, but the Court nonetheless warned, "the possible collateral consequences of making international rules privately actionable argue for judicial caution." 92 The Court then attempted to place the first real limitation on the creation of causes of action under the ATS since the statute's rebirth in Filartiga: "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 § 1350 was enacted." 93 This so-called limitation was ultimately more effective on paper than in practice and had the effect of keeping the door wide open as to what causes of action were available under the ATS, subject only to what the Court described as "vigilant doorkeeping." 94 Justice Scalia, concurring in part and concurring

87. Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008).
88. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247–48, 251 (2d Cir. 2009).
91. Id. at 714 ("[H]olding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era.").
92. Id. at 727.
93. Id. at 732.
94. Id. at 729.
in the judgment, described this so-called limitation as effectively “wag[ging] a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts themselves have used—invi[t]ing them to try again.”95 And try again they did.

The trend of cases post-Sosa looked largely unchanged.96 In fact, if the trend changed at all, it actually grew.97 Courts continued to exercise discretion in the creation of new causes of action. They continued to recognize human rights violations as a tort in violation of the law of nations, and they continued to apply the ATS extraterritorially. In April of 2013, however, the Supreme Court rendered a long-awaited decision that will likely change the face of ATS litigation forever.

III. KIOBEL v. ROYAL DUTCH PETROLEUM

A. Kiobel’s Holding

This landmark decision arose out of a claim by Nigerian nationals that certain foreign corporations had aided and abetted the Nigerian government in “committing violations of the law of nations in Nigeria.”98 The district court dismissed some of the claims of the Nigerian plaintiffs, which prompted an interlocutory appeal to the Second Circuit.99 The Second Circuit Court of Appeals held that the “law of nations [did] not recognize corporate liability,” and, therefore, it dismissed the entire complaint.100 The Supreme Court granted certiorari on October 17, 2011 to consider that question.101 After oral arguments, however, the Court ordered the parties to submit supplemental briefs on the question of “'[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows

95. Id. at 739, 750.
97. A search of the WestlawNext case database, using the search term “‘Alien Tort Statute’ OR ‘Alien Tort Claims Act,’” yields a result of 684 cases published between June 29, 2004—when Sosa was decided—and April 17, 2013—when Kiobel was decided.
99. Id. at 1663.
100. Id.
courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."\textsuperscript{102} The Court heard oral arguments again, this time on the issue of the supplemental briefing, then rendered its decision based solely upon its answer to that question—whether the jurisdiction of the ATS should extend abroad.\textsuperscript{103} Chief Justice John Roberts authored the unanimous decision of the Court,\textsuperscript{104} in which the Court applied a rule of statutory interpretation to the ATS and held that the jurisdiction of the statute could not reach conduct within a foreign nation.\textsuperscript{105} The Court’s analysis followed a relatively simple path. The rule of statutory interpretation known as the “presumption against extraterritorial[ity]”\textsuperscript{106} mandates that “when a statute gives no clear indication of an extraterritorial application, it has none.”\textsuperscript{107} The presumption limits the jurisdiction of the courts to domestic conditions, unless Congress has evidenced a clear intent for a statute to apply abroad.\textsuperscript{108} The Court applied the presumption to the ATS and then examined the text, history, and purpose of the statute to determine if there was sufficient evidence of Congressional intent to overcome the presumption.\textsuperscript{109} The Court found that there was no such evidence.\textsuperscript{110} The Court’s determination, which relied entirely on the statute itself and not on the particular facts of the case, was that the presumption against extraterritoriality applied to the ATS, thus preventing courts from recognizing a cause of action under the statute based on conduct that occurred abroad.\textsuperscript{111} The Court’s decision was quite clear as to the limitation of this presumption on the ATS; however, in the last paragraph of the opinion, the Court opined on the potential for cases that, unlike the one before it, had some significant connection to the

\begin{footnotes}
\item[103] \textit{Kiobel}, 133 S. Ct. at 1663.
\item[104] \textit{Id.} at 1662. Justices Kennedy, Alito, and Breyer each wrote opinions concurring in the judgment. \textit{Id.} at 1669–70.
\item[105] \textit{Id.} at 1669 ("[T]he presumption against extraterritoriality applies to claims under the ATS.").
\item[106] \textit{Id.} at 1664.
\item[107] \textit{Id.} (alteration in original) (quoting Morrison v. Nat’l Australia Bank Ltd., 130 S. Ct. 2869, 2878 (2010)).
\item[108] \textit{Id.} at 1665.
\item[109] \textit{Id.} at 1665–67.
\item[110] \textit{Id.} at 1667.
\item[111] \textit{Id.} at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").
\end{footnotes}
United States. The text of that final paragraph, which has since been seized upon by lower courts, reads as follows:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See Morrison, 561 U.S. ———, 130 S. Ct., at 2883–2888. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.\(^{112}\)

The Court's opinion up to that point had appeared to mandate a bright-line test for cases under the ATS that were based on conduct occurring abroad—there would be no jurisdiction in such cases; however, this last paragraph called all of that into question by using what seemed like the language of a narrow exception. And that is exactly how some lower courts have since interpreted the final paragraph.

B. The Aftershock of Kiobel

In a decision on July 25, 2013—a little more than three months after Kiobel—the United States District Court for the Northern District of Alabama described Kiobel as a “seismic shift” that has fundamentally altered “the legal landscape” of ATS litigation.\(^{113}\) There is no question that Kiobel has changed the landscape, but what exactly that change is has been a matter of some dispute in the lower courts. Some courts have assumed that the touch and concern language from Kiobel requires a judicial determination on a case-by-case basis of whether the specific defendant's conduct touches and concerns the territory of the United States with sufficient force.\(^{114}\) Out of all the post-Kiobel decisions, only two have

\(^{112}\) Id. (emphasis added).


\(^{114}\) See, e.g., Ahmed-Al-Khalifa v. Salvation Army, No. 3:13CV289-WS, 2013 WL 2432947 at *3 (N.D. Fla. June 3, 2013) (“[T]he allegedly unlawful denial of humanitarian aid in Nigeria does not ‘touch’ or ‘concern’ the United States in such a way that would overcome the ATS’s presumption against extraterritoriality.”); Mohammadi v. Islamic Republic of Iran, No. 09-1289 (BAH), 2013 WL 2370594 at *14 (D.D.C. May 31, 2013) (“Chief Justice Roberts's opinion for the majority left open the possibility that conduct that ‘touch[es] and concern[s] the territory of the United States ... with sufficient force to displace the
claimed to find just the right facts to "displace" the presumption against extraterritoriality. But the court in one case, *Al Shimari v. CACI International Inc.*, has taken an entirely different approach, holding that the mandate of *Kiobel* is not to engage in case-specific determinations but to apply a bright-line rule against the exercise of jurisdiction in every case where the conduct complained of took place in a foreign country.

In *Al Shimari*, Iraqi citizens brought suit against a Delaware corporation headquartered in Arlington, Virginia. The plaintiffs alleged that the defendant corporation, an American defense contractor that provided, among other things, civilian interrogators for the United States military, had engaged in various wrongful acts: "torture[,] civil conspiracy to commit torture[,] aiding and abetting torture; cruel, inhuman, or degrading treatment; and war crimes." When the Supreme Court handed down *Kiobel*, the court in *Al Shimari* stayed all pending motions and directed the parties to submit briefs on the effect of the Supreme Court's decision. The plaintiffs in their motion "invite[d] the Court to interpret *Kiobel* to hold that the presumption against extraterritoriality [could] be sufficiently displaced by their claims' sufficient connection with the United States. Indeed, Plaintiffs ma[d]e much of the 'touch and concern' language contained in the final paragraph of the *Kiobel* opinion ...." The court, however, was not convinced; it held that the presumption against

presumption against extraterritorial application' may confer jurisdiction for ATS claims arising out of conduct occurring abroad." (alteration in original)); *Mwani v. Bin Laden*, No. 99-125 (JMF), 2013 WL 2325166 at *4 (D.D.C. May 29, 2013) ("[T]he question before me today is whether the events that occurred in and around the grounds of the United States Embassy in Nairobi, Kenya on August 7, 1998, 'touched and concerned' the United States with 'sufficient force' to displace the presumption against extraterritorial application of the ATS."); *Ahmed-Al-Khalifa v. Queen Elizabeth II*, No. 5:13-CV-103-RS-CJK, 2013 WL 2242459 at *1 (N.D. Fla. May 21, 2013) ("South African apartheid does not 'touch' or 'concern' the United States in such a way that would overcome the ATS's presumption against extraterritoriality.").


117. *Id.* at *8.

118. *Id.* at *2.

119. *Id.*

120. *Id.* at *4.

121. *Id.* at *8.
extraterritoriality should apply in every case without a judicial inquiry into the facts of the specific case.\textsuperscript{122}

**IV. Analysis**

The Court in *Kiobel* properly analyzed the ATS under the rule from *Morrison*, but the lower courts have largely misunderstood *Kiobel*’s holding because they have not understood the rule from *Morrison*. A proper understanding of both of those decisions as well as of the history of the ATS reveals that *Kiobel*’s language of “touch and concern” does not mandate a case-by-case analysis on the issue of extraterritoriality. Not once, in the nearly two-hundred-year silence between the ATS’s promulgation in the Judiciary Act and the Second Circuit’s resurrection of the statute in *Filartiga*, had the courts exercised jurisdiction under the ATS over conduct occurring entirely within the boundaries of a foreign nation.\textsuperscript{123} *Kiobel* is the Supreme Court’s first decision under the ATS in light of the presumption against extraterritoriality—the rule of statutory construction that the Supreme Court reaffirmed in *Morrison v. National Australia Bank Ltd.*\textsuperscript{124} *Morrison* involved a suit by foreign plaintiffs against “foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.”\textsuperscript{125} The Court had to determine whether § 10(b) of the Securities Exchange Act applied to such misconduct.\textsuperscript{126} The Court held that § 10(b) of the Act did not apply extraterritorially because of the presumption against such a statutory interpretation.\textsuperscript{127} The Court’s holding is clear in two regards that are relevant here: first, the presumption applies in all cases where a statute is brought to bear on extraterritorial conduct; and second, the presumption may only be rebutted by clear and affirmative statutory

\textsuperscript{122} Id. ("The Supreme Court [in *Kiobel*] makes clear that the presumption against extraterritoriality is only rebuttable by legislative act, not judicial decision.").

\textsuperscript{123} See Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 862 (D. Md. 1961) (exercising jurisdiction over the act of "withholding . . . a minor child from the custody of the parent" while on United States soil); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (stating in dicta that jurisdiction could be exercised over conduct that occurred in the territorial waters of the United States).


\textsuperscript{125} Id. at 2875.

\textsuperscript{126} Id.

\textsuperscript{127} Id. at 2883.
language. With both of these principles established, the only logical explanation for Kiobel’s “touch and concern” language is that it speaks not to how or whether the presumption may be rebutted by specific facts, but to whether it is even implicated in a particular case.

A. The Presumption Against Extraterritoriality Applies in All Cases Where a Federal Statute Is Brought to Bear on Extraterritorial Conduct

The Supreme Court’s decision in Morrison and its application of that decision in Kiobel both demonstrate that the presumption against extraterritoriality applies to all federal statutes where the allegedly violative conduct took place abroad. In making its determination on this issue, the Court in Morrison announced that the presumption against extraterritoriality applies in “all cases.”128 The Court reasoned that such a bright-line rule was necessary to protect against the “results of judicial-speculation-made-law.”129 The result of the bright-line rule would be that, “[r]ather than guess[ing] anew in each case[,]” the court would simply apply the presumption in every case and thus “preserv[e] a stable background against which Congress can legislate with predictable effects.”130 Thus, the very rationale of the presumption itself militates against any kind of case-by-case determination—the presumption applies in every case.

The Court’s holding in Kiobel applies to all cases under the ATS because it applies to the ATS itself; therefore, every case under the ATS should be subject to the presumption against extraterritoriality regardless of the facts of the specific case. The Court in Kiobel held that the presumption against extraterritoriality applies to claims under the ATS and that nothing in the statute itself rebuts the presumption.131 In other words, no claim may be brought under the ATS that alleges a violation of the law of nations based upon extraterritorial conduct.

128. Id. at 2881.
129. Id.
130. Id.
131. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").
B. The Presumption May Only Be Rebutted by Clear and Affirmative Statutory Language

The Court in Morrison was clear that the presumption against extraterritoriality may only be rebutted by clear evidence of an affirmative intention by Congress that the applicable statute have extraterritorial reach. The Court in Morrison held that the presumption against extraterritoriality applied to § 10(b) of the Securities and Exchange Act, and the Court was clear as to the focus of its analysis: the determinative evidence for whether the applicable statute could apply extraterritorially was the statute itself. As § 10(b) of the Securities and Exchange Act contained no clear evidence of an affirmative legislative intent for extraterritorial application, the Court held that it had none.

The Court in Kiobel likewise held that the presumption against extraterritoriality applied to the ATS and could only be rebutted if "the ATS . . . evince[d] a 'clear indication of extraterritoriality.'" This in itself dispels the theory that the Court endorsed a case-by-case test for extraterritoriality; the Court said that for the ATS to apply extraterritorially the text of the statute itself would need to demonstrate that legislative intent—and the Court held that it did not. The entire focus of the Court's analysis was on legislative intent; and for evidence of that intent, the Court looked to "the text, history, and purposes of the ATS." At no point in the Court's analysis did it consider whether certain facts of the specific case before it could "rebut" the presumption. Every reference in the Court's

132. Morrison, 130 S. Ct. at 2877 ("Thus 'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

133. Id. at 2883 ("[T]here is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not." (emphasis added)).

134. Id.

135. Kiobel, 133 S. Ct. at 1665 (quoting Morrison, 130 S. Ct. at 2883).

136. Id. (emphasis added). The Court found that "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach," id., "[n]or d[id] the historical background against which the ATS was enacted," id. at 1666, nor did the purpose behind the passage of the ATS indicate that it was "passed to make the United States a uniquely hospitable forum for the enforcement of international norms." Id. at 1668.
opinion to rebutting the presumption accompanied a reference to legislative action, not case-specific inquiries.137

Further evidence of the nature of Kiobel's holding in this regard is found in the Court's reliance on Morrison. As noted by the District Court for the Eastern District of Virginia in Al Shimari, the Morrison Court "took note of the Second Circuit's 'north star' approach of judicially weighing the 'conduct' and 'effects' of securities cases to determine whether the presumption against extraterritoriality was sufficiently rebutted."138 This "north star" approach is almost indistinguishable from the case-by-case, fact-specific inquiry that some courts have imputed to the Kiobel decision.139 The court in Al Shimari noted that "Morrison expressly rejected the Second Circuit's view of the presumption's operation . . . namely that rebutting the presumption against extraterritoriality is for a court to 'discern' rather than for Congress to legislate."140 As the Al Shimari court rightly discerned, "Kiobel did not qualify, modify, or limit Morrison or its disapproval of judicial guessing as to the presumption's applicability, but rather heavily relied upon it in extending the presumption to the ATS."141

C. The Touch and Concern Language of Kiobel Refers Not to Whether the Presumption Is Rebutted, but to Whether the Presumption Is Even Implicated

In the final paragraph of Kiobel, the Court proffered the enigmatic "touch and concern" language that has confounded so many lower courts. If the "touch and concern" language of Kiobel does not espouse a case-by-case method for extraterritoriality under the ATS, then what is its purpose? It is clear from a careful reading of Kiobel, as well as that Court's reliance on Morrison, that the "touch and concern" phrase did not create an exception to the presumption against extraterritoriality in the context of the ATS; it

137. See supra note 136 and accompanying text. See also Al Shimari v. CACI Int'l, Inc., 1:08-CV-827 (GBL/JFA), 2013 WL 3229720 at *8 (E.D. Va. June 25, 2013) ("Nowhere in the Kiobel decision does the Court explicitly state or even suggest that the facts of a case should or could, under certain circumstances, inform a court's judgment about whether the presumption is sufficiently rebutted and thus displaced.").


139. Id. ("Thus, Plaintiffs' argument that this Court should engage in a judicial factual determination here is demonstrably flawed in that it suggests an approach similar to the Second Circuit's 'north star' approach.").

140. Id.

141. Id.
noted the inevitability of courts facing factual scenarios where some conduct had occurred abroad and some had not, and the court’s need in those cases to decide whether the presumption against extraterritorial application was even implicated. The point of contention itself, the final paragraph of Kiobel, also offers much guidance on this issue.

First, throughout the majority’s opinion in Kiobel, the Court used variations of the word “rebut” to determine if the text of the ATS would overcome the presumption against extraterritoriality;\(^{142}\) however, in the last paragraph of its opinion, the Court chose to use a different word: “displace.”\(^{143}\) It cannot be presumed that the Court simply used two different words to describe the same thing.

Second, the sentences around the word “displace” offer clarity as to its meaning. The Court’s very next two sentences stated that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.”\(^{144}\) The first sentence plainly predicts a case where a plaintiff brings a claim under the ATS based upon conduct occurring abroad but asserts that the court should exercise jurisdiction because the defendant corporation does business or is incorporated in the United States. The domestic nature of the defendant, and perhaps even some domestic conduct by that defendant, would essentially be a pretext for the plea that the court adopt an extraterritorial application of the ATS. The next sentence confirms this interpretation; the Court has definitively held that the presumption against extraterritoriality applies to the ATS and that if Congress wants an ATS equivalent that applies to non-domestic conduct, it must enact one.\(^{145}\)

Third, and perhaps most importantly, when the Court in Kiobel asserted the “touch and concern” language, it cited to a specific portion of the Morrison decision. Although Kiobel does not quote Morrison directly on this point, the section cited includes compelling evidence as to the true nature of the “touch and concern” language. The cited section includes the beginning of the final section of the Morrison decision, which addresses the

\(^{142}\) The majority opinion in Kiobel used the word “rebut” four times and the word “overcome” once in its analysis of whether the ATS overcame the presumption against extraterritoriality. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665–69 (2013). In contrast, the Court used the word “displace” only once in the entire majority opinion, and that was in the last paragraph. Id. at 1669.

\(^{143}\) Id. at 1669.

\(^{144}\) Id.

\(^{145}\) Id.
petitioners' argument in that case that the presumption against extraterritoriality was simply not implicated. In other words, the petitioners there argued that even conceding that the presumption did apply to the Securities and Exchange Act, it did not harm their particular case because they sought "no more than domestic application anyway." The Court distinguished this assertion contesting implication from an assertion contesting application of the presumption saying, "This is less an answer to the presumption against extraterritorial application than it is an assertion—a quite valid assertion—that that presumption here (as often) is not self-evidently dispositive, but its application requires further analysis." The Court then offered a metaphor that echoes quite clearly in the final paragraph of Kiobel: "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." In other words, courts should not entertain pretextual claims of "some" domestic conduct, when the claim is primarily concerned with foreign conduct. The Court in Kiobel merely echoed this principle when it stated that "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." Thus, the "touch and concern" language relates to whether the presumption against extraterritoriality is dispositive of a particular case, and not to whether a particular statute has evidenced the requisite legislative intent necessary to rebut the presumption.

V. CONCLUSION: THE FUTURE OF ATS LITIGATION

For now, the future of ATS litigation lies in the interpretations by the lower courts of the Supreme Court's decision in Kiobel. The court in Al Shimari divined the true nature of Kiobel's holding when it stated, "The Supreme Court makes clear that the presumption against extraterritoriality is only rebuttable by legislative act, not judicial decision." To read the court's decision any other way would rob all meaning from much of the

147. Id. at 2884.
148. Id.
149. Kiobel, 130 S. Ct. at 1669.
opinion. If *Kiobel* requires an across-the-board application of the presumption against extraterritoriality in every case and without any regard for the facts of specific cases, then there is only one logical meaning left for the enigmatic “touch and concern” language—it recognizes that the courts will have to discern in some cases whether the claim is truly domestic, and, thus, not at odds with the presumption, or whether “the activity forming the focal point of congressional concern occurred overseas.”

The Supreme Court has spoken, and the message is clear. It matters not how many lower courts have misapplied or even totally failed to apply the presumption against extraterritoriality by entertaining a case-specific method because the courts “have no warrant to ignore clear statutory language on the ground that other courts have done so.” Courts addressing the applicability of the ATS should abstain from recognizing causes of action for extraterritorial conduct unless and until Congress provides for it by statute. Congress has already demonstrated its willingness to provide causes of action for use by international-human-rights plaintiffs, and, as the Court in *Kiobel* stated, if Congress wishes to provide

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151. The court in *Al Shimari* noted four specific references in *Kiobel* that evidenced the need for a legislative determination on the issue of extraterritoriality:

First. [sic] *Kiobel* framed its discussion by stating that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,” suggesting that the text of the statute itself, rather than any judicial factual determination, must rebut the presumption. Second, *Kiobel* stated that “to rebut the presumption, the ATS would need to evince a clear indication of extraterritoriality,” again using language directed at the statute itself. In concluding this portion of the analysis, the *Kiobel* Court again stated that “nothing in the statute rebuts [the] presumption.” Third, the Court commented that a statute more specific than the ATS would be required if Congress intended courts to exercise jurisdiction over claims predicated on extraterritorial acts. Fourth, *Kiobel* explains that the presumption serves to maintain the respect of those matters committed to other branches, such that “the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”

*Ibid.* (internal citations omitted).


154. In 1991 Congress enacted the Torture Victim Protection Act, which provides for the “protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.” *TORTURE VICTIM PROTECTION ACT OF 1991*, PL 102–256, March 12, 1992, 106 Stat 73. The notes of decision indicate that one of the crucial differences between the ATS and the Torture Victim Protection Act (TVPA) is
for jurisdiction over extraterritorial acts in violation of the law of nations, "a statute more specific than the ATS [will] be required."\textsuperscript{155}

\textsuperscript{155} Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).