

**FOREIGN JURISDICTIONAL ALGEBRA and  
KIOBEL v. ROYAL DUTCH PETROLEUM:  
FOREIGN CUBED and FOREIGN SQUARED CASES**

by  
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**INTRODUCTION**

In its recent term, the United States Supreme Court appears to have decided unanimously in *Kiobel v. Royal Dutch Petroleum*<sup>1</sup> that U.S. federal courts cannot hear and decide *foreign cubed* cases. These are cases with three fundamental foreign elements: in which a **foreign** plaintiff sues a **foreign** defendant for acts committed on **foreign** soil.<sup>2</sup> Justice Breyer in a concurring opinion joined by three other justices and Justice Kennedy in another concurring opinion seem to have left the jurisdictional door ajar, at least for *foreign squared* cases in which only two of the three foreign factors exist. This paper analyzes the *Kiobel* case's four opinions and considers possible *foreign squared* scenarios.<sup>3</sup>

This international business law case raises the jurisdictional question, what can the courts of one country do in response to multinational corporate support of government-sponsored atrocities in another country? The issue is whether a state<sup>4</sup> can decide the legal fate of foreign corporations for acts against foreign nationals in a foreign country. Specifically, in this case, under the United States Alien Tort Statute (ATS),<sup>5</sup> can United States federal courts adjudicate a civil suit brought by Nigerian citizens (*Kiobel et al.*) who now reside in the U.S. against corporations incorporated in foreign countries (here the

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Netherlands,<sup>6</sup> England,<sup>7</sup> and Nigeria<sup>8</sup>) for allegedly aiding and abetting atrocities by the Nigerian government in Nigeria?<sup>9</sup>

## **I. EXTRATERRITORIAL JURISDICTION: GENERAL PRINCIPLES**

Jurisdiction is the authority of a court to hear and decide a case. To have that authority, a court must have jurisdiction both over the subject matter of the case and over its parties. Extraterritorial jurisdiction is particularly problematic because it is the assertion of the power to make legal judgments for acts outside the geographic territory of the court's government. Such a claim is difficult when the territory is international such as on "the high seas" and in the territory of no country. It is even more complicated when the disputed acts are alleged to have occurred in another government's geographic territory and, therefore, there may be conflicting jurisdictional claims.

A court might exercise jurisdiction on a number of bases, but, in cases of concurrent jurisdiction, it is presumptuous for one country to impliedly claim that it can provide justice better than another country, especially when the other country has closer connections to the case. From the perspective of serving one's own citizens, why should money from government coffers be used to provide judicial services to citizens of other countries? If the rationale is that it serves the country's diplomatic interests, shouldn't the country's political branches, that is, its executive and legislative branches, make that decision rather than its judicial branch? If the rationale is concern for international human rights, shouldn't an international body make that decision?<sup>10</sup>

Extraterritorial<sup>11</sup> jurisdiction may be based on bilateral or multilateral agreements, or upon one or more of the following basic principles for international jurisdiction:<sup>12</sup>

1. Territoriality: over acts within a state's geographic territory with extraterritorial effect
2. Nationality: over citizens of one's state who cause harm outside that state's territory
3. Protective: to protect one's state from harm resulting from extraterritorial acts
4. Passive personality: to protect one's citizens outside the state's territory
5. Universality: to prosecute acts seen universally as crimes, regardless of where they occurred.<sup>13</sup>

## II. ALIEN TORT STATUTE

The Alien Tort Statute (ATS), adopted in the Judiciary Act of 1789,<sup>14</sup> 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.

28 U.S.C. § 1350 : US Code - Section 1350: Alien's action for tort<sup>15</sup>

It had rarely been used for two centuries until the Second Circuit in the 1980 case of *Filártiga v. Peña-Irala*<sup>16</sup> and the United States Supreme Court in the 2004 case of *Sosa v. Alvarez-Machain*<sup>17</sup> decided that private parties could bring claims under “federal common law.”<sup>18</sup> The original question in this case was whether the ATS substantively covers the acts claimed, but re-argument was ordered on the jurisdictional question of “whether a claim may reach conduct occurring in the territory of a foreign sovereign.”<sup>19</sup>

Sometimes what is omitted from an opinion is as important

as what is included. The Second Circuit had dismissed the *Kiobel* complaint on the grounds that “the law of nations does not recognize corporate liability.”<sup>20</sup> This issue was not even mentioned in any of the U.S. Supreme Court *Kiobel* opinions; in other words, corporate liability was assumed *arguendo*. This is an important point. It means that the U.S. Supreme Court has not decided that corporations may not be sued under the Alien Tort Statute. That result would have established a barrier against suits based upon ATS jurisdiction against all corporations, domestic or foreign, regardless of whether the plaintiff, defendant, and location of the acts in question were foreign.

### III. FOREIGN CUBED CASES: *KIOBEL* SUPREME COURT OPINIONS

Despite unanimity as to the result by the U.S. Supreme Court in the case of *Kiobel v. Royal Dutch Petroleum*, four separate opinions were reported. Therefore, predicting how this case will function as a precedent under *stare decisis* is somewhat complicated.

#### *A. Opinion of the Court*<sup>21</sup>

Chief Justice John Roberts, Jr. delivered the opinion of the Court, joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, Jr. Roberts wrote “[t]he question presented is whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>22</sup>

*Kiobel et al.* argued that the ATS does indeed provide for extraterritorial U.S. jurisdiction under “[t]he law of nations,” otherwise known as “customary international law,”<sup>23</sup> under

circumstances such as aiding and abetting such acts as “(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”<sup>24</sup> However, the majority decided that there is no extraterritorial jurisdiction, regardless of the existence of the circumstances above, in *foreign cubed* cases, that is, when there are three basic foreign elements, a foreign plaintiff sues a foreign defendant for acts committed on foreign soil. It based its decision on “[t]he presumption against extraterritorial application.”<sup>25</sup> Under this technical principle of statutory construction, a domestic statute does not have extraterritorial application unless such application is clearly indicated.<sup>26</sup> This approach avoids the foreign affairs implications of unintended conflicts with foreign laws.<sup>27</sup> And it reflects the desire of the judicial branch to leave foreign policy decisions with “the political branches.”<sup>28</sup> The majority acknowledged that the language of the ATS does not hint at a territorial limitation of its jurisdiction, yet here it deferred to this often ignored presumption regardless. In *Sosa*, by contrast, extraterritorial application was apparently assumed by the Supreme Court, with jurisdictional concern for foreign policy implications limited to a narrow interpretation of the relevant law of nations as “specific, universal, and obligatory.”<sup>29</sup>

The majority did consider possible grounds that might rebut the presumption against extraterritorial application of the ATS including:

1. Text of the statute -- construction of the ATS. But it found nothing explicitly demanding its extraterritorial application.<sup>30</sup>
2. Transitory torts doctrine -- that a tort, regardless of where it occurred, can provide for jurisdiction over a civil action wherever subject matter and personal jurisdiction can be

obtained.<sup>31</sup> But observed that this doctrine may have been applicable in *Sosa* where the grounds were U.S. law, but not in this case where the law was foreign law.<sup>32</sup>

3. *Stare decisis* -- judicial history and three applicable offenses referred to in prior cases to assert extraterritorial application of the ATS, “violations of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>33</sup> But argues that “[t]he first two offenses have no necessary extraterritorial application”<sup>34</sup> and that none of four contemporary cases<sup>35</sup> were extraterritorial. The third offense, “piracy,” according to the majority, typically occurs “on the high seas” and, therefore, outside of any country’s territory,<sup>36</sup> where no country has territorial jurisdiction. Therefore, foreign policy consequences are “less direct” and the offense of “piracy” does not justify jurisdiction over acts on foreign soil, as in this case.<sup>37</sup>
4. Nationality principle -- the majority read a 1795 opinion by Attorney General William Bradford as an ambiguous<sup>38</sup> nationality principle case, restricting jurisdiction to U.S. citizens for acts on foreign soil.<sup>39</sup> In this case the defendant corporations were not U.S. citizens.
5. Legislative history -- analysis of the intent of the drafters of the Alien Tort Statute. The majority quoted an opinion forty years after passage of the ATS as proof that its authors did not intend “to make the United States a uniquely hospitable forum for the enforcement of international norms”<sup>40</sup> and claimed that imputing legislative intent to apply the ATS to acts in foreign countries would be “implausible.”<sup>41</sup>

Therefore, the majority ruled that since the ATS is a domestic statute and extraterritorial application is not clearly indicated for this type of case, application of the presumption against extraterritorial application dictated that the ATS did not have extraterritorial application in this foreign cubed case.

Justice Roberts ended his opinion by raising the specter of unintended “serious foreign policy consequences,”<sup>42</sup> including a tit-for-tat backlash of lawsuits against “our citizens” in the courts of other nations for “alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”<sup>43</sup> This seems to be the kind of foreign policy analysis Justice Roberts, earlier in his opinion, reserved to the other “political” branches of government.

#### *B. Concurring Opinion: Kennedy*<sup>44</sup>

Justice Kennedy is often the “swing vote” in the current U.S. Supreme Court’s 5-4 decisions. Therefore, even though this case was a unanimous decision and Kennedy joined the opinion of the court, it is important to pay attention to his additional independent concurring opinion as it may be crucial in deciding a future extraterritorial jurisdiction foreign squared case or possibly even in foreign cubed cases with different facts, such as no legal recourse elsewhere.

Kennedy asserted that questions here are left open and that this case is not the final chapter on the ATS<sup>45</sup> and, especially, his concern for a legal response to human rights abuses outside the United States. “Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA) [not including cases against corporations] ... . Other cases may arise with allegations of serious violations of international law principles protecting persons.”<sup>46</sup>

#### *C. Concurring Opinion: Alito*<sup>47</sup>

Justices Samuel Alito, Jr. and Clarence Thomas agreed with C.J. Roberts that the case should be decided on the narrow grounds that, in an ATS case with “claims [that] touch and

concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application<sup>48</sup> and for there to be extraterritorial federal jurisdiction. However, Justice Alito wrote an additional concurring opinion, joined by Thomas, stating a preference for a broader isolationist<sup>49</sup> standard, affirming the presumption against extraterritorial application by using a “‘focus’ of congressional concern” test and re-asserting the *Sosa* requirements, with a statutory construction emphasizing the legislative intent of the 1789 authors of the ATS.<sup>50</sup>

#### *D. Concurring Opinion: Breyer*<sup>51</sup>

Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, concurred with the Court’s judgment, but not its reasoning. They rejected Roberts’s reliance on “the presumption against extraterritoriality.”<sup>52</sup> Instead, “guided in part by principles and practices of foreign relations law,” they would adopt ATS jurisdiction based upon territoriality, nationality, or protective principles: “where (1) the alleged tort occurs on American soil, [territoriality] (2) the defendant is an American national, [nationality] or (3) the defendant’s conduct substantially and adversely affects an important American national interest” [protective].<sup>53</sup> Key is Justice Breyer’s definition of important American national interests as including “a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”<sup>54</sup> Breyer, like Alito, quoted *Sosa*, but more expansively, focusing on its general principles.<sup>55</sup> However, the facts in *Kiobel* did not meet any of these standards and, therefore, federal court jurisdiction should not be granted here.



A basic distinction among the approaches of Breyer, Roberts, and, especially, Alito, is their jurisprudence, specifically their approaches to statutory construction. Whereas Alito interpreted the ATS as limited to whatever was of concern in 1789, and Roberts constrained the ATS with a restrictive presumption against extraterritoriality principle, Breyer referred to the *Sosa* characterization of the legislative history as providing “18th-century paradigms” for judges to fashion “a cause of action” “based on the present-day law of nations.”<sup>56</sup> Breyer, in his evolutionary judicial approach, noted that the purpose of the ATS was to grant a cause of action where none existed before and, therefore, frames the key question as “Who are today’s pirates?” providing a remedy to those harmed “*when those activities take place abroad.*”<sup>57</sup>

Breyer rejected application of the “presumption against extraterritoriality” to the ATS, a statute enacted “with ‘foreign matters’ in mind.”<sup>58</sup> He also rejected a legal “distinction between piracy at sea and similar cases on land,” noting, for example, that crimes on a flagged ship are within the jurisdiction of that nation as though they were on land.<sup>59</sup>

Justice Breyer’s core position on the role of the courts concerning international human rights violations is that “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.”<sup>60</sup> Thus Breyer’s presumption is different from that of Roberts; “I would assume that Congress intended the statute’s jurisdictional reach to match the statute’s underlying substantive grasp.”<sup>61</sup>

To help determine the proper jurisdictional scope of the ATS, Breyer referred to the Restatement (Third) of Foreign Relations Law, including its Section 402 jurisdiction principles

of territoriality,<sup>62</sup> nationality,<sup>63</sup> protective,<sup>64</sup> and, universality.<sup>65</sup> At the same time, Breyer accepted jurisdictional limitations, such as exhaustion of legal remedies, *forum non conveniens*, and comity, as well as courts “giving weight to the views of the Executive Branch.”<sup>66</sup>

Breyer then cited, with apparent approval, two lower federal court decisions that accepted ATS jurisdiction where the alleged conduct violated well-established international law norms and the defendant was present in the United States when the suit was filed, although both plaintiff and defendant were foreign nationals and the acts occurred outside of the U.S.<sup>67</sup> Breyer observed that such an approach “is consistent with international law and foreign practice” citing foreign authors and courts that accept jurisdiction of cases where the acts occurred abroad.<sup>68</sup>

Breyer observed that if Congress was concerned as to the judicial interpretation of the extraterritorial reach of the ATS by federal courts since *Filartiga* in 1980 or since *Sosa* in 2004, it could have limited the substantive or jurisdictional reach of the ATS by legislation, but it did not.

Therefore, Breyer concluded that his approach is consistent with *Sosa* and should not cause concern that other countries will respond by “hal[ing] our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”<sup>69</sup>

However, it would “reach too far to say” that there are grounds for jurisdiction based on the facts of this particular case -- where foreign nationals sue two foreign corporations with minimal presence in the United States (a New York City office owned by an affiliated company) for acts such as torture they allegedly helped but did not directly engage in.<sup>70</sup>

#### **IV. FOREIGN SQUARED CASES: POST-*KIOBEL***

Once again, one of the most important elements of the majority opinion is what was omitted. Among the significant questions left open is whether there might be jurisdiction under principles of nationality or territoriality. The majority opinion apparently closed U.S. courts to cases based on ATS jurisdiction when the case is a “foreign cubed” case, that is, where “a foreign plaintiff is suing a foreign defendant for acts committed on foreign soil.”<sup>71</sup> However, whether federal courts have ATS jurisdiction over “foreign squared” cases, where one of these three elements is domestic, that is, either the plaintiff or the defendant is a U.S. national (nationality) or the act is committed in the U.S. (territoriality) remains unclear.<sup>72</sup>

It is possible that as many as seven of the justices, excluding Justices Alito and Thomas as a result of their broad concurring opinion, would decide that at least some foreign squared cases that “touch and concern the territory of the United States -- with sufficient force” overcome the presumption against extraterritorial jurisdiction.<sup>73</sup> However, this is not an easy reading of Robert’s opinion.

Four justices, Breyer and the three justices joining him, seem squarely behind extraterritorial jurisdiction in some foreign squared cases. But four does not a majority make; therefore such jurisdiction appears to depend on Justice Kennedy. The possibility of U.S. federal court extraterritorial jurisdiction is enhanced by Kennedy’s dicta in his opinion.

Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA [Torture Victim Protection Act] nor by the reasoning and holding of today’s case; and

in those disputes the proper implementation of the presumption against extraterritorial implementation application may require some further elaboration and explanation.

Even though the vote was unanimous against extraterritorial jurisdiction in this case, Kennedy's vote may be the swing vote in a foreign squared case, or even in a case based upon non-ATS jurisdiction. And that might well focus on whether the United States should judicially ignore the equivalent of modern-day piracy, possibly including not only actual piracy,<sup>74</sup> but also offenses against international law.

## **CONCLUSION**

The *Kiobel* case is likely to result in continued efforts to bring foreign squared cases against multinational corporations under ATS jurisdiction and even to bring foreign cubed cases under other theories of extraterritorial jurisdiction.<sup>75</sup>

If there were an international court with jurisdiction over alleged civil violations of the law of nations anywhere in the world against individuals and business organizations, this issue would be moot. As long as such a court remains a pipe dream, the majority of the United States Supreme Court may be prepared to stand idly by, with our political branches allowing grave human rights violations to occur against persons in foreign countries who then have no legal redress for their grievances.<sup>76</sup> But that might be a topic for an international business ethics paper.

## ENDNOTES

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<sup>1</sup> *Kiobel v. Royal Dutch Petroleum*, 569 U.S. \_\_\_, 133 S. Ct. 1659; 185 L. Ed. 2d 671 (2013), *available at* [http://www.supremecourt.gov/opinions/12pdf/10-1491\\_8n59.pdf](http://www.supremecourt.gov/opinions/12pdf/10-1491_8n59.pdf).

<sup>2</sup> Oona Hathaway, *Kiobel Commentary: The door remains open to “foreign squared” cases*, SCOTUSblog (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>

<sup>3</sup> Several articles have already been written on the case. Adam Liptak, *Justices Bar Nigerian Human Rights Case From U.S. Courts*, N.Y. TIMES (April 17, 2013) [http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?\\_r=0](http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?_r=0); The Editorial Board, *A Giant Setback for Human Rights*, N.Y. TIMES, (April 17, 2013) <http://www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html>; Anton Metlitsky, *Commentary: What’s left of the Alien Tort Statute?* (April 17, 2013), <http://www.scotusblog.com/2013/04/commentary-whats-left-of-the-alien-tort-statute/#more-162581>

<sup>4</sup> State, government, country, and sovereign will be used as synonyms in this paper.

<sup>5</sup> “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350: Alien’s action for tort, *available at* <http://codes.lp.findlaw.com/uscode/28/IV/85/1350>

<sup>6</sup> *Royal Dutch Petroleum Company*, at 1.

<sup>7</sup> *Shell Transport and Trading Company*, at 1.

<sup>8</sup> *Shell Petroleum Development Company of Nigeria, Ltd. (SPDC)*, joint subsidiary, at 2.

<sup>9</sup> “[B]eating, raping, killing, and arresting residents and destroying or looting property” in response to environmental protection protests, at 2.

<sup>10</sup> This raises the question of what to do if there is no appropriate international body to resolve a dispute of this sort -- for example, where the defendant is a corporate entity rather than a nation-state. Concern for the Act of State Doctrine, that the judicial branch should not assume the role of the executive branch on matters of state, are lessened if the acts are not by a nation-state, but by a corporation. However, that concern, in practice, arises again if the corporation is acting as a proxy or alter-ego of the nation-state.

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<sup>11</sup> Extraterritorial, abroad, and outside a state's geographic territory will be used as synonyms in this paper.

<sup>12</sup> SCHAFFER, AUGUSTI, DHOOGHE, EARLE, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT (South-Western 2012, 8th ed.).

<sup>13</sup> One example seems to be Israel's single case of capital punishment, that of Adolf Eichmann for Nazi crimes of war. See Schaffer at 57.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> <http://codes.lp.findlaw.com/uscode/28/IV/85/1350>

<sup>16</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>17</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), *available at*

<http://www2.bloomberglaw.com/desktop/public/document/> .

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> 621 F.3d 111 (2010). This raises the question of whether this reasoning remains valid post *Citizens United*. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In fact, the U.S. Supreme Court did not address this issue..

<sup>21</sup> ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, AND ALITO, JJ., joined.

<sup>22</sup> *Id.* at 1, [http://www.supremecourt.gov/opinions/12pdf/10-1491\\_8n59.pdf](http://www.supremecourt.gov/opinions/12pdf/10-1491_8n59.pdf) . It was this specific question presented for unusual second oral arguments before the U.S. Supreme Court, conducted on October 1, 2012. In this case there is no bilateral or multilateral agreement.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 4. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). *See* William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L LAW 85 (1998). Available at: <http://scholarship.law.berkeley.edu/bjil/vol16/iss1/5> . *But see* Jonathan Turley, *When in Rome: Multinational Misconduct and the Presumption against Extraterritoriality*, 84 NW. U.L.REV. 598 (1989-1990) (arguing for a presumption for extraterritoriality).

<sup>26</sup> *Morrison* (slip op., at 6).

<sup>27</sup> *Aramco* at 248.

<sup>28</sup> The legislative and executive branches. *Id.* and *Sosa* at 727.

<sup>29</sup> *Sosa* at 732, quoting *Marcos*, 25 F.3d 1467, 1475 (CA9 1994).

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.* at 7; *Dennick* at 18.

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<sup>32</sup> In this case that would be Nigerian law. *Id.* at 8. Might there be an argument that international human rights law is part of federal common law?

<sup>33</sup> *Id.* at 8, *Sosa* at 724; see 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769).

<sup>34</sup> And that Blackstone's examples focus on territorial rights. Blackstone; *Id.* at 8.

<sup>35</sup> That is, at approximately the same time as the ATS was adopted. *Id.* at 9.

<sup>36</sup> *Id.* at 10. Blackstone, *supra*, at 72.

<sup>37</sup> *Id.* at 10. It seems that Roberts also argues for a limited definition of piracy (only acts on the high seas?) and that the human rights abuses here are on dry land.

<sup>38</sup> With possible universal principle application for civil suits.

<sup>39</sup> *Id.* at 11-12.

<sup>40</sup> *Id.* at 12; Justice Story "custos morum of the whole world" quote, *United States v. The La Jeune Eugenie*, 26 F.Cas. 832, 847 (No. 15,551) (CC. Mass. 1822). "A self-righteous soul can identify himself as custos morum." William Safire, *Delicious Delicto*, N.Y. TIMES, Mar 30, 1986, available at [http://wordsmith.org/words/custos\\_morum.html](http://wordsmith.org/words/custos_morum.html).

<sup>41</sup> *Id.* at 12. The majority repeatedly uses the term "sovereign" to refer to conduct occurring in foreign territories, possibly to invoke the concept of "sovereign immunity," although it does not apply here because the defendants are not foreign sovereigns.

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Id.* at 13.

<sup>44</sup> KENNEDY, J., filed a concurring opinion.

<sup>45</sup> "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Kennedy opinion, at 1.

<sup>46</sup> *Id.* at 1.

<sup>47</sup> ALITO, J., filed a concurring opinion, in which THOMAS, J., joined.

<sup>48</sup> Roberts, at 14.

<sup>49</sup> My characterization.

<sup>50</sup> Alito at 1. Apparently unwilling to expand the legal definition of "piracy" beyond that of an 18th century pirate.

<sup>51</sup> Breyer, J., filed an opinion, concurring in the judgment, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

<sup>52</sup> Breyer, at 1.

<sup>53</sup> *Id.*

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<sup>54</sup> *Id.*, and at 7.

<sup>55</sup> “[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.” Breyer, at 2, quoting *Sosa*, at 732, quoting *Filartiga*, at 890.

<sup>56</sup> *Id.* at 2, *Sosa* at 724-25.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 4. Breyer notes adverse foreign policy risks in cases such as “the Barbary Pirates, the War of 1812, the sinking of the *Lusitania*, and the Lockerbie bombing” to deny a viable sea/land distinction. *Id.* at 5.

<sup>60</sup> *Id.* “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.’” *Id.* at 8.

<sup>61</sup> *Id.* at 6.

<sup>62</sup> Restatement (Third) of Foreign Relations Law, Section 402(1).

<sup>63</sup> *Id.*, Section 402(2).

<sup>64</sup> *Id.*, Section 402(3) and Section 402(4).

<sup>65</sup> *Id.* Section 404. “[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. Breyer, at 7.

<sup>66</sup> *Id.* at 7.

<sup>67</sup> *Filartiga*, 630 F. 2d 876 (2d Cir. 1980) and *Marcos*, 25 F. 3d 1467, 978 F. 2d 493, both approved in *Sosa*, at 732.

<sup>68</sup> Breyer at 10-11. Even including “‘universal’ criminal ‘jurisdiction.’” *Id.* at 11.

<sup>69</sup> *Id.* at 14, quoting Roberts at 13.

<sup>70</sup> *Id.* at 14-15.

<sup>71</sup> Oona Hathaway, *Kiobel Commentary: The door remains open to “foreign squared” cases*, SCOTUSblog (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/> .

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

<sup>73</sup> *Supra* note 1 at 14.

<sup>74</sup> Such as in Somalia. See Billy Kenber, *Life sentences recommended for Somali pirates*, WASHINGTON POST (August 2, 2013)

[http://articles.washingtonpost.com/2013-08-02/world/41002236\\_1\\_jean-adam-robert-riggle-somali-pirates](http://articles.washingtonpost.com/2013-08-02/world/41002236_1_jean-adam-robert-riggle-somali-pirates)



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<sup>75</sup> The U.S. Supreme Court has already denied jurisdiction in another foreign cubed case this term, *Daimler AG v. Bauman*, No. 11-965, 134 S. Ct. 746, 187 L. Ed. 2d 624, 2014 U.S. LEXIS 644 (2014). A number of lower courts have denied jurisdiction following *Kiobel*. Steve Nickelsburg, *A Continuing Trend To Define Scope Of Kiobel*, LAW360, NEW YORK (Jan. 16, 2014, 12:48 AM), <http://www.law360.com/articles/500958/a-continuing-trend-to-define-scope-of-kiobel>.

<sup>76</sup> Cf. Joe Sexton, *Reviving Kitty Genovese Case, and Its Passions*, N.Y. TIMES (July 25, 1995) <http://www.nytimes.com/1995/07/25/nyregion/reviving-kitty-genovese-case-and-its-passions.html>