

THE ALIEN TORT STATUTE FROM THE PERSPECTIVE OF FEDERAL COURT PROCEDURE

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The Alien Tort Statute (ATS) has generated considerable controversy since its rebirth a little more than 30 years ago.¹ The Supreme Court did not give any guidance to the lower courts until two recent decisions. In 2004, the Court first took up the Statute in *Sosa v. Alvarez-Machain*,² in which it clarified the source of the governing law and explained the types of conduct that were actionable under the Statute. Then, in 2013, the Court in *Kiobel v. Royal Dutch Petroleum Co.*³ examined the need for some type of connection with the United States as a condition for suit under the Statute. While these cases made it more difficult to sue under the ATS, they also resolved some of the controversy over the Statute. Notwithstanding the guidance from the Court, the opinions themselves raise new issues and leave unresolved some of the other issues relevant to ATS litigation.

This Article will examine a number of procedural issues relevant to the Alien Tort Statute, focusing on what the Supreme Court has resolved and what remains open for future litigation. It will analyze the constitutional basis for the Statute and explain how the law of nations, as part of federal common law, established the decision rules for ATS litigation. Then it will examine the meaning of the territoriality limitation imposed by *Kiobel* in the context of the Court's established practice of interpreting jurisdictional statutes narrowly. After looking at the relevance of recent changes in personal jurisdiction law for ATS suits, the Article will examine statutes of limitations and tolling rules, forum non conveniens, exhaustion of

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1. See *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980). "Although the Alien Tort Statute has been in existence for over two hundred years, it was an insignificant source of federal court jurisdiction during most of its history. Before, 1980, jurisdiction had been upheld under this Statute in two reported cases, one in 1795 and the other in 1961." Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002).

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

3. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12, 133 S. Ct. 1659 (2013).

remedies, and comity. It will conclude with consideration of the issues that remain to be answered by future litigation under the Statute.

I. ATS AS JURISDICTIONAL STATUTE AND THE COMMON LAW'S INCORPORATION OF THE LAW OF NATIONS

Every first-year law student learns that federal courts are courts of limited jurisdiction. That statement is true today, but it had much more meaning at the time of the founding of the United States. In the late eighteenth century, state trial courts were viewed as the “courts of general jurisdiction” that would do most of the legwork for all kinds of litigation. The Framers of the Constitution could not agree on whether to create federal trial courts, with some delegates supporting only federal appellate jurisdiction in a supreme court and leaving all federal litigation to the state trial courts.⁴ The famous Madisonian Compromise left that decision to the first Congress. As a result, Article III of the Constitution, which created the federal courts, says that “[t]he judicial power of the United States, shall be vested in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish.”⁵

Congress took little time to resolve that compromise. In the first Judiciary Act (of 1789), it created federal trial courts but gave them limited jurisdiction. Since navigation along the coast and in interstate waters was so important to the economy of a unified country, the federal courts were given jurisdiction over admiralty matters. There were a few federal crimes created, so federal courts were given jurisdiction to hear them. The Framers were concerned about provincialism in the new States, made even more likely through the use of local juries, so Article III contained specific grants of jurisdiction in federal courts to try to minimize discrimination against out-of-staters.⁶ British creditors were worried that they would be unable to collect their debts in the aftermath of the Revolutionary War, so the Treaty of Peace ending the war contained a

4. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 7–9 (6th ed. 2009); Michael G. Collins, *Article III, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 58 & n.47; Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STANFORD L. REV. 895, 912 (1984).

5. U.S. CONST., art. III, § 1.

6. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, *supra* note 4, at 1356–57; John N. Drobak, *Credible Commitment in the United States: Substantive and Structural Limits on the Avoidance of Public Debt*, in *FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS* 247, 257–58 (John N. Drobak and John V.C. Nye eds., 1997).

provision requiring the federal government to assure impartial litigation of the rights of the British.⁷ As a result, Article III expressly authorized the federal courts to hear disputes between an alien and a citizen of a state (“alienage” jurisdiction). Also reflecting this concern for in-state bias, Article III contained a provision for diversity jurisdiction covering suits between citizens of different states. Both of these provisions led to the first Congress creating alienage and diversity jurisdiction in the federal trial courts. The first Judiciary Act did not, however, create jurisdiction in the federal trial courts for the entire scope of federal court jurisdiction listed in Article III. For example, federal trial court jurisdiction over cases involving federal statutes (federal question jurisdiction) did not exist until 1875; those types of cases were left to the state courts.⁸ The jurisdiction of the federal courts and its business was so light that the first Chief Justice, John Jay, resigned out of boredom to run for Congress.

It was in this era of tightly limited federal jurisdiction and concern for discrimination against out-siders that the Alien Tort Statute was born. Although there is some disagreement over the first Congress’s reasons for enacting the statute,⁹ the Supreme Court in *Sosa v. Alvarez-Machain*¹⁰ accepted the general consensus that Congress was responding to recent incidents involving affronts to foreign diplomats in the United States.¹¹

7. The Treaty of Peace, Sept. 3, 1783, art. IV, 8 Stat. 80, 82; See OLIVER W. HOLMES DEVISE HISTORY OF THE SUPREME COURT: ANTECEDENTS AND BEGINNINGS TO 1801 xx (Julius Goebel, Jr. ed., 1971); Patrick Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and the Brave New World for Erie and Klaxon*, 72 TEXAS L.REV. 72, 92–94 (1993).

8. There was a brief period when federal courts had federal question jurisdiction in the early 19th century. See Judiciary Act of 1801, § 11, 2 Stat. 89. Also known as the “Midnight Judges Act,” the Judiciary Act of 1801 was repealed by the Judiciary Act of 1802, 2 Stat. 156.

9. See, e.g., Bradley, *supra* note 1, at 637–45.

10. See *supra* note 2.

11. In 1784, a Frenchman verbally and physically assaulted French Consul General and Secretary of the French Legion Francis Barbe-Marbois in Philadelphia causing tension with France, which expressed displeasure over the Continental Congress’s inability to address the matter. The French Minister protested to the Continental Congress and threatened to leave unless there was an adequate remedy provided. The incident prompted Congress to draft a resolution asking the states to allow suits in tort for the violation of law of nations, but few states enacted such a provision, which was another example of states’ hostility towards foreigners. The Supreme Court of Pennsylvania eventually upheld the attacker’s conviction for violating the law of nations. See *supra* note 3, at 1666.

Another incident that has been connected to the creation of the ATS happened in 1787 when a New York police officer arrested a servant of the Dutch ambassador in the ambassador’s home, which was in violation of the diplomatic immunity attached to the property. The Dutch ambassador complained about the incident, which led the Secretary of Foreign Affairs to request that Mayor of New York, John Jay, have the police officer arrested. Jay wrote back to the Secretary with caution stating, “neither Congress nor our [state] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors.” The police officer eventually was convicted of a crime and sentenced to three months of imprisonment. *Id.* at 1666–67 (citing Bradley, *supra* note 1, at 641–42). See also U.S.

The Alien Tort Statute opened up a federal forum for these types of disputes between non-citizens.

The original version of the Statute gave the federal district courts “cognizance, concurrent with the courts of the several States, or the [federal] circuit courts, as the 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.”¹² If this statute were enacted today as a stand-alone provision, it would be interpreted as doing two things: creating a federal forum and also creating a federal cause of action. The cause of action would be a statutory tort based on a violation of the law of nations or a treaty. This interpretation would avoid the controversial questions that involve the extent of federal common law today in the aftermath of *Erie Railroad Co. v. Tompkins*¹³ because the cause of action would be a statutory one (based on the law of nations) rather than a common law one. However, in 1789, the law of nations was viewed as part of the common law applicable throughout the United States. It is well accepted that the clause created only jurisdiction in the federal courts and that the cause of action came from the common law and its incorporation of the law of nations.¹⁴ In *Sosa*, the Court quoted a commentator for the proposition that it would be “simply frivolous” to consider the ATS as creating a statutory cause of action.¹⁵ The late eighteenth century was a time when the common law created and defined most rights, as the age of statutory rights was decades away.¹⁶ In addition, the location of the initial ATS as a clause in a lengthy statute defining federal court jurisdiction of many types also supports the conclusion that it was only jurisdictional.¹⁷

If the Alien Tort Statute were used by an alien to sue another alien, the only clause in Article III of the Constitution that would allow federal court

DEPT’ OF STATE, THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 443 (1837); 34 J. OF THE CONTINENTAL CONGRESS 24–25 (Roscoe R. Hill ed., 1937) (Feb. 1, 1788).

12. Judiciary Act of 1789, ch. 20, §. 9, 1 Stat. 77 (1789).

13. 304 U.S. 64 (1938). See, e.g., *Sosa*, 542 U.S. at 739–46 (Scalia, J., concurring); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L L. 513 (2002).

14. *Sosa*, 542 U.S. at 713 (“The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature.”).

15. *Sosa*, 542 U.S. at 713 (quoting Castro, *The Federal Courts’ Protective Jurisdiction over Torts Committed in violation of the Law of Nations*, 18 CONN. L. REV. 467, 479–80 (1986)).

16. The first uniform laws in the United States were drafted at the turn of the 20th Century. The National Conference of Commissioners on Uniform State Laws created the Uniform Negotiable Instruments Act in 1896 and the Uniform Sales Act in 1906. See Amasa M. Eaton, *The Negotiable Instruments Law: Its History and Practical Operations*, 2 MICH. L. REV. 260 (1904).

17. See *supra* note 14.

jurisdiction is the “arising under” clause, which allows jurisdiction for suits arising under federal law.¹⁸ An ATS suit arises under federal law because the Statute provides for suits governed by federal common law since the law of nations was then and is now part of federal common law. If one were to interpret the Statute as invoking the law of nations directly rather than through federal common law, there would be no authorization for federal court jurisdiction under Article III. As the Statute is constitutional, it allows jurisdiction for a federal common law cause of action, based on the law of nations.¹⁹

Besides resolving the source of federal authority for the ATS, *Sosa* clarified the kinds of suits that were within ATS jurisdiction. Relying on Blackstone, the Court noted that three types of suits would have been within the law of nations in 1789: offenses against ambassadors, violations of safe conduct, and prize capture and piracy.²⁰ However, the Statute was not locked into only these three kinds of suits. The Court wrote:

We think it correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringements of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of section 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A. 2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law. Congress has not in any way amended section 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a

18. “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and all treaties made, or which shall be made, under their authority . . .” U.S. CONST. art. III, § 2, cl. 1. If an alien sued a U.S. citizen, alienage jurisdiction would be proper.

19. This analysis answers the question of “how to conceptualize the applicable law in ATS suits and, more specifically, whether courts apply international law directly or some form of U.S. common law that may or may not reflect international norms.” Anthony J. Colangelo, *Kiobel: Muddling the Distinction between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT’L L. 65, 65. Curtis Bradley has argued that the First Congress intended the Alien Tort Statute to permit suits by aliens against only U.S. citizens, which would fall within the alienage jurisdiction of Article III. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 591 (2002). Regardless of the original meaning, it well established today that the Statute allows suits by an alien against an alien.

20. *Sosa*, 542 U.S. at 715, 720, 724.

federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms we have recognized.²¹

Thus the Court left for another day the identification of new causes of action that are based on a norm that is universally accepted and defined with the requisite specificity, although it noted with approval the comment in *Filartiga* that the torturer is the modern-day equivalent of the pirate.²²

II. PRESUMPTION AGAINST EXTRATERRITORIALITY

Kiobel's contribution to our understanding of the Alien Tort Statute is its answer to the question of “[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”²³ Relying on a canon of statutory interpretation that creates a presumption against the extraterritorial application of a regulatory statute, the Court ruled that the claim in an ATS case must “touch and concern” the territory of the United States with “sufficient force to displace the presumption of extraterritorial applications.”²⁴ This holding surely troubles those who prefer that the federal courts provide remedies for atrocities that occur outside our territory.²⁵ Nonetheless, this limitation on the reach of the ATS is justified by a number of factors.

First, there is historical support for this conclusion. The two incidents that contributed to the enactment of the Act both occurred in the United States.²⁶ Plus, the two earliest cases applying the Act shortly after its enactment, involved events within the territory of the United States. One case concerned the wrongful seizure of slaves while in port in South Carolina,²⁷ while the other involved the wrongful seizure of a ship in U.S.

21. *Id.* at 724–25.

22. *Id.* at 732.

23. *Kiobel*, 133 S. Ct. at 1663.

24. *Id.* at 1669.

25. Since the decision in *Kiobel*, the Second Circuit Court of Appeals has applied the precedent to dismiss a long-running ATS case in *Balintulo, et al. v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013). One commentator concluded that “ATS litigation is thus transformed by *Kiobel*, but the ATS is by no means dead.” Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*, 12 CATO SUPREME CT. REV. 149, 183 (2012–13).

26. *See supra* note 5.

27. *Bolchos v. Darrel*, 3 F. Cas. 810 (D. S.C. 1795).

territorial waters that then docked in the port of Philadelphia.²⁸ The Court also noted an incident in which United States citizens participated in an attack on the British colony of Sierra Leone.²⁹ In response to a protest by the British Ambassador, the Attorney General rendered an opinion indicating that U.S. citizens who participated “in an attack taking place both on the high seas and on a foreign shore” could be sued under the ATS in a federal court for a tort. The Attorney General based the jurisdiction on the violation of a treaty between the United States and Great Britain.³⁰ Therefore the Act’s early history demonstrates that it was used for incidents occurring in the territory of the United States or incidents elsewhere involving U.S. citizens. As the Court wrote, “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.”³¹

The Court’s opinions in both *Sosa* and *Kiobel* express concerns about the federal courts infringing upon the sovereignty of other nations for political and practical reasons. As the Court instructed in *Kiobel*, it would prefer to avoid “diplomatic strife.”³² By relying on a presumption against extraterritoriality, the Court essentially deferred to Congress to expand the reach of the Alien Tort Statute. This type of restrained approach for the courts is consistent with the relative roles of the three branches of government. In addition, the territorial limitation on the reach of the ATS is consistent with the territorial limitations on the reach of U.S. regulatory laws.

In *Morrison v. National Australia Bank, Ltd.*,³³ a case relied on in *Kiobel*,³⁴ the Court applied the presumption against extraterritoriality in a suit brought by foreign investors against an Australian bank for securities fraud in foreign transactions. The plaintiffs sued the bank for alleged violations of U.S. securities laws for conduct that occurred as part of the mortgage fiasco that led to the financial crisis of 2008. The bank owned a mortgage-servicing company in Florida, which generated considerable income for the bank for a number of years. However, in 2001, the bank

28. *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Penn. 1793)

29. In 1794, a French fleet, led by an American slave trader with a grudge, plundered the British colony of Sierra Leone. The British sought resolution from the United States since an American led the attack. C. FYFE, *A HISTORY OF SIERRA LEONE* 59–61 (1962).

30. *Kiobel*, 133 S. Ct. at 1668.

31. *Id.* at 1668–69.

32. *Id.* at 1669.

33. 501 U.S. 247, 130 S. Ct. 2869 (2010).

34. *Kiobel*, 133 S. Ct. at 1661.

wrote down the value of the servicing company's assets by over \$2 billion, causing the price of the bank's Ordinary Shares, the Australian equivalent of common stock, to slump. The plaintiffs claimed that the bank had manipulated financial models in order to inflate the servicing company's assets to appear more valuable than they really were. The plaintiffs were Australian investors who had bought the Ordinary Shares before the write-down. The bank's Ordinary Shares are traded on the Australian Stock Exchange Limited and on other foreign exchanges, but not on any exchange in the United States. However, the bank's "American Depository Receipts" (which represent the right to receive a specific number of Ordinary Shares) are listed on the New York Stock Exchange.³⁵

Applying the presumption against extraterritorial application, the Court found no indication that SEC rule 10(b)(5), the basis of the plaintiffs' suit, was intended to reach conduct outside the United States. Nonetheless, the plaintiffs argued that their suit involved domestic application of the law because "Florida is where [the servicing company] and its senior executives engaged in the deceptive conduct of manipulating [the company's] financial models [and its senior executives] made misleading public statements there."³⁶ The Court's rejection of that argument is an important lesson for those trying to use the Alien Tort Statute.

The Court in *Kiobel* ended its opinion with this admonition:

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. ___ (slip op. at 17–24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.³⁷

Thus the facts and holding of *Morrison* are a useful lesson about the types of connections with the United States that may be present in a lawsuit but still not overcome the extraterritorial presumption.

35. *Morrison*, 130 S. Ct. at 2875–76.

36. *Id.* at 2883–84.

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

In rejecting the plaintiffs' argument on domestic application of the securities law in *Morrison*, the Court wrote:

[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption of extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case. The concurrence seems to imagine such a timid sentinel . . . but our cases are to the contrary. In [*EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991)], for example, the Title VII plaintiff had been hired in Houston, and was an American citizen . . . The Court concluded, however, that neither that territorial event nor that relationship was the “focus” of congressional concern, . . . but rather domestic employment . . .

Applying the same mode of analysis here, we think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct “in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.” . . . Those purchase-and-sale transactions are the objects of the statute’s solicitude. It is those transactions that the statute seeks to “regulate.”

. . . .

Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. This case involves no securities listed on a domestic exchange, and all aspects of the purchase complained of by those petitioners who still have live claims occurred outside the United States.³⁸

38. 130 S. Ct. at 2884, 2888 (citations omitted). In addition to the limits on the territorial reach of the securities and employment discrimination laws, the Supreme Court has limited the territorial reach of the Sherman Act. As international commerce expanded after World War II, the federal courts interpreted the Sherman Act to reach foreign firms that conspired abroad only when their actions affected U.S. commerce. *See, e.g.*, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Congress codified this “effects test” in the Foreign Trade Antitrust Improvement Act of 1982. In *F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155 (2004), the Court interpreted an ambiguous provision in the Act as to not permit a suit by a foreign firm injured overseas by foreign anticompetitive conduct even when the conduct would justify a suit for injuries suffered in the U.S. In

Both *Morrison* and *Arabian American Oil Co.* demonstrate that ATS plaintiffs will need to identify the “focus” of the litigation, i.e., where did the conduct occur that allegedly violates the law of nations? Ancillary connections with the United States are not relevant. In *Kiobel*, the defendants’ sale of their stock on the New York Stock Exchange and their operation of an office in New York used to explain their business to potential investors was not the conduct regulated by the law of nations.³⁹ That occurred in Nigeria.

Some commentators have criticized the Court’s reliance in *Kiobel* on a presumption against extraterritoriality that had been used for regulatory statutes, but not for jurisdictional ones. The Court acknowledged the pedigree of the presumption and explained its use for a jurisdictional statute as follows:

We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. The ATS, on the other hand, is “strictly jurisdictional.” It does not regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently defined norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.⁴⁰

It is important to remember that the Supreme Court has for over 200 years interpreted grants of jurisdiction narrowly. One well-known example is the requirement of complete diversity under 28 U.S.C. sec. 1332, even though identical words in Article III allow for minimal diversity. The Court prefers to defer to Congress on the reach of federal judicial power. Because the Alien Tort Act is merely a jurisdictional statute, not a statute creating substantive rights, it is difficult to criticize the Court for abdicating a role in punishing evil wrongdoers throughout the world. As with all jurisdictional statutes, it is up to Congress to expand the reach of the federal courts.

reaching this conclusion, the Court expressed concern for comity and for not interfering with a foreign nation’s ability to regulate its own commercial affairs.

39. *Kiobel*, 133 S. Ct. at 1677.

40. *Id.* at 5 (citations omitted).

III. PERSONAL JURISDICTION

Two recent personal jurisdiction opinions by the Supreme Court⁴¹ have made it extremely difficult to get personal jurisdiction over foreign defendants in typical ATS suits, in which foreign defendants are sued for events that occurred outside the United States. Prior to these decisions, personal jurisdiction could be obtained over a defendant doing “continuous and systematic” business in a state even if the cause of action had no connection whatsoever with the state,⁴² a type of personal jurisdiction referred to as “general” jurisdiction. The Court’s decision in *Goodyear Dunlop Tires Operations v. Brown*⁴³ limited general jurisdiction to those states in which the defendant was “essentially at home,” rather than to states in which the defendant did continuous and systematic business. We know from the opinion that a corporate defendant is at home, and so jurisdiction exists, in a state by which it is incorporated and the state where it has its principle place of business. Whether there are other states in which a corporate defendant is at home, such as the location of a foreign corporation’s only office in the United States, is an open question that will only be answered by later cases.⁴⁴

The Supreme Court recently supplied part of the answer to that question when it found a lack of personal jurisdiction in an ATS case in *Daimler AG v. Bauman*.⁴⁵ That case involved a suit by Argentine residents against DaimlerChrysler AG, a German corporation, in federal court in California for alleged human rights abuses that occurred in the 1970s while employed in Argentina by a subsidiary of DaimlerChrysler’s predecessor-in-interest. The complaint alleged that the Argentine subsidiary “collaborated with the Argentine government to kidnap, detain, torture, or kill [the plaintiffs] or their relatives during Argentina’s military regime of 1976 to 1983, known as the ‘Dirty War.’”⁴⁶ The plaintiffs alleged that this conduct violated both the ATS and the Torture Victims Protection Act of 1991. The 9th Circuit Court of Appeals upheld jurisdiction in California because an indirect subsidiary of

41. *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011).

42. John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court’s Decision in Goodyear Dunlop Tires and Nicaastro*, 90 WASH. U. L. REV. 1707, 1714–19 (2013).

43. 131 S. Ct. 2846 (2011).

44. See Drobak, *supra* note 42.

45. *Daimler AG v. Bauman*, 571 U.S. 20, 134 S. Ct. 746 (2014).

46. Petition for Writ of Certiorari, *DaimlerChrysler AG v. Bauman*, (No. 11-965) at 4 (internal quotations omitted).

DaimlerChrysler, which was incorporated in Delaware, distributes automobiles manufactured by DaimlerChrysler to dealerships in California.

The Circuit Court ruled that the subsidiary “acted as Daimler’s agent for jurisdictional purposes and then [attributed the subsidiary’s] California contacts to Daimler.”⁴⁷ In rejecting jurisdiction the Court wrote, “Even if we were to assume that [the subsidiary’s] contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler’s slim contacts with the State hardly render it at home there.”⁴⁸ Rejecting the plaintiff’s attempt to return to a pre-Goodyear standard of “substantial, continuous, and systematic course of business” in the forum state, the Court noted that neither Daimler nor its subsidiary “is incorporated in California, nor does either entity have its principal place of business there.”⁴⁹ Although that conclusion could have been the end of the opinion, the Court turned to its opinion in *Kiobel* in the last section of its opinion. Noting that the “transnational context of this dispute bears attention,” the Court emphasized that comity and consideration of “international rapport” cautioned against the assumption of an expansive general jurisdiction not shared by the other nations.⁵⁰

The limitations on personal jurisdiction in *Goodyear* and *Daimler* will make it impossible to bring some types of ATS suits in the United States. This jurisdictional barrier is a serious impediment because the holdings of *Goodyear* and *Daimler* apply to suits in state court as well, since the limits on personal jurisdiction stem from the due process clause. However, the types of ATS suits possible under Justice Breyer’s formulation in his concurrence may also satisfy personal jurisdiction requirements.⁵¹

IV. STATUTE OF LIMITATIONS AND TOLLING RULES

The ATS has no explicit statute of limitations. Between 1980 and 1991, courts looked to the statute of limitations for the closest analogous state torts.⁵² However, the enactment of the Torture Victim Protection Act (“TVPA”) in 1991 “provide[d] a closer analogy than available state

47. *Daimler*, 571 U.S. at ___, 134 S. Ct. at 758–59.

48. *Id.* at 759.

49. *Id.* at 750, 761.

50. *Id.* at 762–63.

51. See text accompanying *infra* note 66.

52. See *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 550 (D.D.C. 1981) (“Unless a limitation is specifically provided by federal statute or treaty, a federal court must look to the limitations period of the district in which it sits and apply the most analogous statute.”).

statutes, and . . . a significantly more appropriate vehicle for interstitial lawmaking.”⁵³ Every circuit to consider the issue since has applied the ten-year statute of limitation found in the TVPA to claims brought under the ATS.⁵⁴ In addition, for cases filed after the enactment of the TVPA but concerning activity occurring before 1991, courts have applied the ten-year statute of limitations retroactively.⁵⁵

In addition to providing an explicit statute of limitations, the legislative history of the TVPA contemplates the allowance of equitable tolling in appropriate circumstances.⁵⁶ “The TVPA ‘calls for consideration of all equitable tolling principles in calculating [the statute of limitations] period with a view towards giving justice to plaintiff’s rights.’”⁵⁷ Because the TVPA allows for equitable tolling, courts have been asked to decide whether the ATS provides the same protection. Courts have decided unanimously that it does.⁵⁸ The extraordinary circumstances required for

53. *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 118 (D.D.C. 2003) (quoting *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989)).

54. *See, e.g., Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1146 (E.D. Cal. 2004) (“Although there is no express limitation period prescribed by the [ATS], the Ninth Circuit has held the applicable limitations period to be the 10-year period set out in the TVPA.”); *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (“Like all courts that have decided this issue since the passage of the TVPA, we conclude that the ten-year limitations period applicable to claims under the TVPA likewise applies to claims made under the ATS.”).

55. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996) (finding retroactive application appropriate because “defendant had fair notice that torture was not a lawful act”); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005). A few critics have rejected the ten-year statute of limitations and relied on customary international law in determining that a statute of limitations should not be implemented. Scholarly critique of the ten-year statute of limitations is based on the same idea that if courts are looking to international customary law for guidelines on other parts of the ATS, then courts should also look to the time limitations used in international law. To fill in the absence of a statute of limitations in the ATS, courts can look to international tribunals, which provide precedent and guidelines for time limits in international law. Tribunals that exclude time limitations from their statutes include: Nuremberg, Tokyo, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and United Nations tribunals established for Cambodia and East Timor. Also, the European Court of Human Rights, and the Inter-American Court of Human Rights have expressly upheld that atrocity crimes have no statute of limitations. Alka Pradhan, *The Statute of Limitations for Alien Torts: A Reexamination After Kiobel*, 21 IND. INT’L & COMP. L. REV. 229 (2011). However, these tribunals adjudicate criminal violations, where there is a stronger motive to bring war criminals and others responsible for crimes against humanity to justice, which justifies forgoing a time limit.

56. *See* S. Rep. No. 102–249, at 10–11 (1991) (listing situations where equitable tolling would be appropriate, including when the “defendant was absent from the United States . . . [and] where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.”).

57. *Chavez*, 559 F.3d at 492 (quoting S. Rep. No. 102–249, at 10 (1991)).

58. *See, e.g., Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006) (allowing equitable tolling when delay caused by unavoidable extraordinary circumstances); *Cabello*, 402 F.3d at 1154–55 (“Our precedent has established that the TVPA’s and [ATS’s] statute of limitations can be equitably tolled.”);

equitable tolling are assessed on a case by case basis, but include “situations where the defendant misleads the plaintiff, allowing the statutory period to lapse; or when the plaintiff has no reasonable way of discovering the wrong perpetrated against her. . . .”⁵⁹ Extraordinary circumstances have also been found when the political climate of a country made the safe initiation of a law suit impossible, although the plaintiff is required to file the lawsuit within a reasonable time after the extraordinary circumstances are removed.⁶⁰

It is likely that courts will continue to look to the TVPA for the statute of limitations and tolling rules in ATS cases. That will also make it harder to litigate some ATS claims. For example, in *DaimlerChrysler*, the atrocities underlying the suit occurred in the 1970s. Statutes of limitations serve two purposes: providing repose for the parties so that they may go on with their lives without the worry of an overhanging dispute and helping with the accuracy of litigation since memories lapse and records are lost with too long of a delay. We may not want to provide repose to those who commit atrocities, but aiding accuracy of judicial fact-finding is important. So statutes of limitations, with tolling rules, need to be applied in ATS cases. In the United States, torts often have a two-year statute of limitations, while contract suits commonly have a twelve-year limit. In context, ten years, with a few additional years for tolling if justified by the circumstances, seems reasonable for ATS suits.

V. FORUM NON CONVENIENS, EXHAUSTION OF REMEDIES, AND COMITY

I believe that forum non conveniens should not be an issue in an ATS lawsuit. This common law doctrine should be displaced by a statute that deals with the choice of forum. For example, forum non conveniens is not granted by federal courts when another federal court is the more desirable forum. In that case, transfer to the other court is governed by the federal transfer statute, 28 U.S.C. section 1404. As a result, the federal law of forum non conveniens has become only a vehicle for dismissing lawsuits that should be tried in another country, not in another part of the United

Chavez, 559 F.3d at 492 (“[T]he justifications for the application of the doctrine of equitable tolling under the TVPA apply equally to claims brought under the ATS.”).

59. *Cabello*, 402 F.3d at 1154–55. In addition, courts usually require some evidence of deliberate misconduct to justify tolling the statutory period. *Id.* at 1155 (finding equitable tolling appropriate when plaintiffs, because of deliberate concealment by authorities, were unable to access proof of their claims).

60. *See Chavez*, 559 F.3d at 494; *Cabello*, 402 F.3d at 1156 (“[T]he plaintiff should act with due diligence and file his or her action in a timely fashion in order for equitable tolling to apply.”).

States.⁶¹ Congress has spoken about the desirability of permitting an ATS suit in the ATS statute itself, which should displace the common law doctrine of *forum non conveniens*. It is true that even though the alienage jurisdiction statute creates federal subject matter jurisdiction,⁶² courts nonetheless use *forum non conveniens* to dismiss those types of suits. However, the alienage jurisdiction state is a broad grant of jurisdiction that permits many different kinds of suits to be brought in federal court. On the other hand, the Alien Tort Statute is a narrow grant of federal court jurisdiction limited to civil actions “brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Given that Congress has opened the federal courts to this small set of cases, I think it would be inappropriate, perhaps even disrespectful of Congress, for a court to use *forum non conveniens* to avoid these kinds of cases.

Notwithstanding the above analysis, many courts have used *forum non conveniens* to dismiss ATS suits.⁶³ This appears to result from a concern over the litigation of issues with virtually no connection to the United States.⁶⁴ In addition, a concern for the sovereignty of countries with

61. See, e.g., *Piper Aircraft C. v. Reyno*, 454 U.S. 235 (1980).

62. 28 U.S.C. § 1332(a)(2) (2012).

63. See, e.g., *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 602 (E.D. Va. 2009); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) (“Such limitations as . . . the doctrine of *forum non conveniens* are available in § 1350 cases as in any other.”). Some plaintiffs have argued that even though the ATS does not negate the use of *forum non conveniens*, it is an important factor weighing heavily in keeping the case. See *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (“Since this action is brought pursuant to United States case law and statutes, namely the [ATS] and the [TVPA], this Court has an interest in having the issues of law presented decided by a United States court.”); *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 756 (S.D.N.Y. 2004) (finding although “the public interest in favor of domestic enforcement of federal laws is seldom determinative,” it is one factor to consider); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 339 (S.D.N.Y. 2003), overruled on other grounds by *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (“[Plaintiff’s] allegations include charges of genocide, war crimes, torture, and enslavement. These acts are universally condemned, and the United States has a strong interest in seeing violations of international law vindicated.”). The Second Circuit has held it reversible error for a district court to not consider these interests in analyzing *forum non conveniens* claims in ATS cases. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99–100 (2d Cir. 2000) (“We believe that, as a matter of law, in balancing the competing interests, the district court did not accord proper significance to . . . the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations.”); *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998) (mentioning “Congress’s intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations,” but leaving weighing of factors to district court on remand).

64. In many cases, courts could not find a strong enough federal interest in adjudicating disputes between foreign parties, based on conduct which occurred in foreign countries. See, e.g., *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002). Some courts also point out the importance of the *forum non conveniens* analysis for preventing United States courts

greater connections to the dispute and the parties has also played a role in the use of the doctrine. To me, the frequent use of *forum non conveniens* to dismiss ATS suits demonstrates a reluctance of federal judges to be involved with disputes that have so little connection with the United States. With the new territoriality requirement imposed on ATS suits by *Kiobel*, the doctrine of *forum non conveniens* is no longer necessary to assure adequate connections with the United States. The new territoriality requirement has taken the pressure off the courts to use *forum non conveniens* as a way to dismiss unrelated cases. It is appropriate that the Statute itself, and not *forum non conveniens*, should be the basis for the decision not to hear the suit.

The Court's opinion in *Sosa* indicated that exhaustion of remedies should play a role in ATS suits as appropriate. The Court wrote:

[T]he European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international tribunals. . . . We would certainly consider this requirement in an appropriate case.⁶⁵

Justice Breyer in his concurrence in *Kiobel* (which was joined by three other Justices) noted with approval this new requirement of exhaustion of remedies, which is viewed as “consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations.”⁶⁶ To the extent that considerations of comity become part of the analysis, one of the considerations in *forum non conveniens* has remained alive, albeit as a stand-alone issue.

Given the tenor of both *Sosa* and *Kiobel*, anyone bringing an ATS suit should be prepared to show an attempt to use the more appropriate tribunals or reasons for the impracticality of doing that.

from being “reduced to international courts of claims.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002) (quoting *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 394 (2d Cir. 1985)). *See also Saleh v. Titan Corp.*, 580 F.3d 1, 31 (D.C. Cir. 2009) (stating doctrine of *forum non conveniens* is tool “to ensure that a trial court neither asserts jurisdiction over a case that lacks a significant connection with the forum, nor applies the law of a state with no interest in the matter”).

65. *Sosa v. Alvarez-Machain*, 542 U.S. at 733 n.21.

66. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013). Prior to *Kiobel*, courts were split on whether to read an exhaustion requirement into the ATS. *Compare Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (“[T]he exhaustion requirement does not apply to the [ATS]”) with *Enahoro v. Abubaker*, 408 F.3d 877, 886 (7th Cir. 2005) (“It may be that a requirement for exhaustion is itself a basic principle of international law.”).

VI. ISSUES FOR THE FUTURE

A. *The Law of Nations as Federal General Common Law*

Sosa stands for the proposition that the federal common law incorporates the law of nations. This principle extends beyond the use of customary international law in the Alien Tort Statute, although considerable controversy exists over the extent to which federal courts should do this.⁶⁷

In his concurrence in *Sosa* (joined by the Chief Justice and Justice Thomas), Justice Scalia argued that *Erie* and its progeny ended federal *general* common law and so no longer could federal courts look to customary international law. Thus, the Alien Tort Statute died with the death of federal general common law.⁶⁸ The court rightly rejected this position in *Sosa*. I would like to add another reason for this rejection beyond what the Court wrote.

Erie involved two separate issues, one statutory and the other constitutional. Neither has any bearing on the incorporation of customary international law into federal common law, especially for the ATS. The statutory issue is the meaning of the Rules of Decision Act's mandate that "the laws of the several states . . . shall be regarded as rules of decisions in civil actions."⁶⁹ The determination in *Erie* that state law includes state common law has no bearing on an ATS claim, which does not involve state law. In addition, as the majority in *Sosa* pointed out, the Alien Tort Statute has remained essentially unchanged since its enactment in 1789. As the Court said,

The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of [ATS] jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.⁷⁰

67. See, e.g., Daniel J. Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 VA. J. INT'L L. 513 (2002).

68. *Sosa*, 542 U.S. at 739–42.

69. 28 U.S.C. § 1652.

70. *Sosa*, 542 U.S. at 730–31.

The constitutional aspect of *Erie* involved federalism and state sovereignty, which has nothing to do with the Alien Tort Statute. The court in *Erie* was troubled by the federal courts applying federal general common law to non-federal disputes in diversity cases. The court considered that to be a usurpation of state authority by the federal courts. When federal courts apply the law of nations as part of federal common law, they do not infringe upon state rights. As a result, my view is that *Erie* is not relevant to the use of customary international law by the federal courts.⁷¹

B. The Meaning of “Touch and Concern” and the Connections Necessary to Satisfy Kiobel

It is somewhat strange that the Court in *Kiobel* would borrow a term from property law to describe the connections with the U.S. necessary to displace the presumption against extraterritorial application. “Touch and concern” is a requirement needed to make covenants and equitable servitudes run with the land. From what I know about that requirement, I do not see any connection whatsoever between the property cases and the ATS. The running with the land cases are of no use in understanding the necessary ATS connections. Perhaps the Court used the term literally: aspects of the cause of action must “touch” the United States in some way *and* must also “concern” U.S. interests. However, to me, this does not add anything beyond a requirement that the cause of action must have a certain degree of connection with the United States. In some ways, it would be appropriate to view this touch and concern requirement as similar to the “minimum contacts” requirement for personal jurisdiction. Both are malleable terms that indicate the need for sufficient connections with the forum sovereign. It would also simplify the analysis because both the territoriality requirement and personal jurisdiction would be resolved the same way. Only time will tell, however, because we need to wait for new cases to flesh out the meaning of “touch and concern.” That leaves us with the job of lining up the cases that succeed and those that fail to achieve ATS jurisdiction and then comparing the kinds of contacts in both categories of cases. We do that already as a way to better understand the meaning of the minimum contacts requirement of personal jurisdiction, so

71. It may be that a situation could develop in a diversity case, not an ATS case, in which the federal view of the meaning of customary international law differs from the state’s view. I suspect that at worst, this would bring us back to a regime like that of *Swift*’s, in which different interpretations applied in state and federal court.

perhaps “touch and concern” will become the equivalent of minimum contacts for ATS suits.

I am persuaded by Justice Breyer’s formulation in his concurrence in *Kiobel*: “I would find jurisdiction under the statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”⁷² He has three other justices with him on that opinion. The first two categories of cases seem to me to be straightforward instances of touch and concern. The third category is broad and gives more discretion to the judges. However, the safe harbor cases seem to me to clearly touch and concern the territory of the United States, so I hope that he could easily find a fifth Justice to join this position when the case arises. Beyond the safe harbor sub-class of cases, it will take future lawsuits to flesh out the meaning of the third criteria.⁷³

C. Exhaustion of Remedies and Comity

Given the touch and concern requirement, the need to exhaust remedies will prove to be less important. I expect that once the touch and concern requirement is satisfied, the federal courts will be an appropriate place to litigate, minimizing the need to look for alternative forums. To the extent that it is relevant, courts could look to the exhaustion requirement in the Torture Victim Protection Act, just as they look to the statute of limitations in that act. The TVPA permits a court to decline to hear a case “if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”⁷⁴ The need to have adequate remedies will surely generate disputes over the adequacy of the alternative forum, like what transpires under a *forum non conveniens* motion for dismissal. There is also considerable discretion involved in the decision over whether alternative remedies have been exhausted. I think there is even great discretion involved in deciding

72. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013).

73. Even after the decision in *Daimler v. Bauman*, personal jurisdiction should not be a problem for the first two of Justice Breyer’s categories. Concerning the third category, personal jurisdiction will not be an issue in cases that deal with the capture in the United States of a “common enemy of mankind.” It might be a problem, however, for other types of ATS lawsuits that fit within his third category.

74. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(b), 106 Stat. 73 (1992).

whether a U.S. court should dismiss a lawsuit for the sake of comity with another country. This discretion makes the likelihood of a U.S. forum more unpredictable, raising the stakes for lawyers trying to decide among alternative courts and various litigation strategies.⁷⁵

VII. CONCLUSION

The limitations on the types of violations permitted by *Sosa* and the touch and concern requirement of *Kiobel* have together greatly limited the usefulness of the Alien Tort Statute for many types of cases brought over the past few decades. I will leave it up to the reader to judge whether that is good policy. Without a doubt, the Court has been hesitant to act without guidance from Congress. Perhaps some Congress in the not-too-distant future will tackle the problem of the proper scope of the Alien Tort Statute in a world very different from the one that existed in 1789.

75. For an example of the issues that can arise from an attempt to enforce a foreign judgment, see Christopher A. Whytock, *Some Cautionary Notes on the "Chevronization" of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467 (2013).