6-1-2018

The politics of the Kiobel decision: The United States Supreme Court narrowing of jurisdiction under the Alien Tort Statute

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A Thesis Submitted to the

Department of Law

In partial fulfillment of the requirements for

The LLM degree in International & Comparative Law

By

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May 2018

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ACKNOWLEDGEMENTS

I would not have completed thesis without the support I received from many different people, and I wish to offer them my sincerest thanks. First and foremost, I am deeply grateful to my advisor, Dr. Usha Natarajan, for her assistance throughout the thesis process. Her constant support and advice allowed me to write the best possible version of this thesis. I would also like to thank my readers, Dr. Jason Beckett and Dr. Thomas Skouteris, for insightful feedback on my thesis and for their guidance throughout the LLM program. I am also grateful to Dr. Hani Sayed for his help in preparing the prospectus for this thesis. I would especially like to thank Professor Diana Van Bogaert for her constant support, advice, and friendship throughout my time at AUC.

I am deeply thankful to my family for their support during my graduate studies, particularly my parents and my sister, Brenna, who were there whenever I needed a sounding board. Special appreciation is owed to my roommates, Elena Habersky and Teba Fatli, who spent the last two years (willing or unwillingly) discussing international law with me. I am also grateful to Zerrin Holle, Hannah Grigg, and Jana Moss for their friendship and support during the thesis writing process. I would also like to thank my friends from the Law Department, Amira Hetaba, Ali Moussa, and Mohamed Kouta for reading and providing feedback on drafts of this thesis and for making my time at AUC a truly memorable experience. Lastly, I would like to thank all of the girls in Procrastinators Anonymous: Amna, Bianca, Jessie, Nasteha, Sidonia, and Yien. Our Wednesday accountability meetings, despite being full of anxiety and stress, kept me on track and provided endless laughter and some of my fondest memories. I learned as much from the conversations I had with all of you over the last three years as I did in any class, and I treasure our friendships- which I know will endure long after we have graduated from AUC.

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Supervised by Professor Usha Natarajan

ABSTRACT

This thesis examines the United States' Supreme Court's decision in the *Kiobel* case and argues the decision unjustly and unreasonably favored the interests of corporations over human rights. In doing so, the Court significantly narrowed the scope of the Alien Tort Statute in a manner which allowed the Court to distance itself from and obscure the inescapable political costs of the *Kiobel* decision. The Court does so by focusing on technical jurisdictional questions instead of the thorny issue of corporate responsibility for human rights abuses committed or encouraged in the pursuit of profit. Even on the jurisdictional and technical legal questions, the Court is selective, inconsistent, and contradictory in how it applies legal reasoning. This thesis analyzes both the Court's legal inconsistencies and the politics of its decision.

In the early twenty-first century, plaintiffs successfully established jurisdiction under the Alien Tort Statute in the U.S. federal court system and won damages against corporations for extraterritorial human rights abuses. The *Kiobel* plaintiffs, former residents of the Ogoniland region of Nigeria, filed a case against the Royal Dutch Petroleum Company and the U.K.'s Shell Trade and Transportation Company for aiding and abetting human rights violations and environmental destruction committed by the Nigerian government. I begin by discussing the evolution of Alien Tort jurisprudence in the U.S. and the facts of the *Kiobel* case. Then, I assemble my conceptual framework drawing on the relationship between law and politics, specifically as it plays out in international law. Next, I explain the Court's decision in *Kiobel*. I demonstrate the legal inconsistencies in the decision, followed by a discussion of the larger political issues impacting the decision. I chose this structure not because I view the legal and political questions as distinct, but because I believe this structure best highlights the impact of the unspoken political considerations on the legal decisions made in *Kiobel*.

TABLE OF CONTENTS

I. Introduction

Since the end of World War II, the international community has focused considerable attention on the concept of human rights. While there are valid critiques of the international human rights project,[1] states and international organizations have invested considerable effort in advancing this project through codifying international human rights law (IHRL). One prevalent challenge for IHRL is enforceability. There are limited avenues available to pursue remedies for violations of IHRL, and judicial victories often offer merely symbolic victories. In 1980, the United States Second Circuit Court of Appeals' decision in the *Filartiga* case raised the possibility of opening the U.S. federal judicial system for the enforcement of rights already existing under international law through the U.S. Alien Tort Statute of 1789.[2] This could provide certain victims of serious breaches of IHRL a legal forum to seek financial compensation.[3]

The Alien Tort Statute (ATS), alternatively referred to as the Alien Tort Claims Act, was included in Section 9 of the First Judiciary Act of 1789 and initially gave cognizance to "the 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."[4] The text was slightly amended during the 1948 revision of the Judicial Code to: "[T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty."[5] The ATS is a jurisdictional statute which provides federal courts jurisdiction to hear tort cases between aliens arising from breaches of treaties or customary international law (CIL). A tort is a civil wrong caused by a wrongful act or a non-contractual infringement on another's rights which creates liability.[6] The ATS creates a channel for awarding compensation for civil wrongs, and ATS jurisprudence relies heavily on the common law understanding of transitory torts. As Blum and Steinhardt explain, the doctrine of transitory torts holds that "the tortfeasor's wrongful acts create an obligation which follows him across national boundaries".[7] In this regard, the ATS is not concerned with assigning criminal or state responsibility for breaches of international law. It

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[1] I will detail these critiques in Chapter I.C.
[2] *Filartiga v Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980). [Hereinafter *Filartiga*]
[3] In Chapter V, I will discuss the legal parameters of tortuous breaches of international law.
[4] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.
[5] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006).
[6] *Oxford English Dictionary* (2 ed. 2017).
[7] Jeffery Blum & Ralph Steinhardt, *Federal Jurisdiction over International Human Rights Law: The Alien Torts Claim Act after Filartiga v. Pena-Irala*, 22 Har. Int'l L.J. 53, 87-97 (1981)

does not propose the U.S. federal court system assume the role of human rights monitoring mechanism or criminal tribunal. Instead, it is narrowly applicable to awarding compensation to aliens for torts committed in violation of treaty law or CIL.

There is scarce information about the intent of the ATS drafters, and few cases attempted to establish jurisdiction under the ATS between 1789 and 1980.[8] This changed after the *Filartiga* decision, and a number of IHRL cases were successfully brought under the ATS during the 1980s and 1990s. Simultaneously lauded as the solution to the unenforceability of IHRL,[9] and condemned as dangerous jurisdictional overreach,[10] there is no shortage of literature weighing the pros and cons of adjudicating IHRL under the ATS. While early cases primarily addressed human rights violations committed by individuals, cases have increasingly sought redress for the tortuous actions of corporations.[11] However, recent judicial decisions have limited the Statute's scope in a manner which precludes courts from hearing most of these cases and calls into question the ATS' applicability outside the narrowest circumstances. The U.S. Supreme Court's decision in *Kiobel v Dutch Petroleum Co*[12] is the most recent example of this trend.

The *Kiobel* case reflected a change in litigation strategy. Since the start of the twenty-first century, cases under the ATS have sought redress for alleged tortuous breaches of IHRL involving multinational corporations. This includes breaches allegedly committed by international corporations and cases where corporations are alleged to have aided and abetted states or other actors in violating IHRL to protect their investment. These cases were often settled outside of court, resulting in little appellate oversight and conflicting jurisprudence. In *Kiobel*, members of the Ogoni community whose human rights were violated by the Nigerian government and community members' descendants sued the Royal Dutch Petroleum Company and Shell Transport and Trading Company. The alleged violations occurred during these two

[8] *Jansen v. The Brigantine Vrow Christina Magdalena*, 3 U.S. 133 (1795) (D.S.C. 1794) [shipping dispute]; *Bolchos v. Darrel,* 3 F. Cas. 810 (No. 1,607) (DC SC 1795); & *Adra v. Clift* 195 F. Supp. 857 (D. Md. 1961) [custody dispute].
[9] *Id*; *see e.g.* Burke, Coliver, De la Vega, & Rosenbaum, *Application of International Human Rights Law in State and Federal Court*, 18 Tex. Int'l L. J. 291, 321 (1983).
[10] *See* Farooq Hassan, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 Int'l & Comp. L. Q. 250, 258 (1983); Curtis Bradley, *Universal Jurisdiction and US Law*, 2001 U. Chi. Legal F. 323, 350 (2001).
[11] In cases where the plaintiff is an American national, the defendant is an American corporation, or the alleged tortuous action occurred in the United States, there are other applicable domestic laws. However, the ATS is the primary legal channel for cases involving alien plaintiffs.
[12] *Kiobel v. Royal Dutch Petroleum Co*, 113 S. Ct. 1659 (2013). [Hereinafter *Kiobel*]. This refers to the majority opinion authored by Justice Roberts.

companies' joint development project with Shell Petroleum Development Company of Nigeria. Notably, this case addressed the corporations' role in the Nigerian government's conduct and the destruction of the Ogoni peoples' land during petroleum and natural gas extraction.

The Supreme Court unanimously ruled that ATS did not establish jurisdiction for such a case, though the legal reasoning between the majority and minority opinion differed significantly. The majority opinion, written by Justice Roberts, concluded that the ATS, as a jurisdictional statute, does not dispel the presumption against extraterritorial application of substantive laws.[13] The majority opinion also left in place the Second Circuit Court's decision that the conduct of transnational corporations did not fall within ATS jurisdiction. The Second Circuit Court's decision contradicted previous ATS jurisprudence and drastically limited jurisdiction. By leaving this decision in place, the Supreme Court allowed for a significant legal change without itself directly addressing the central question of whether tortuous acts committed by international corporations fall within the scope of the ATS. In this manner, the Supreme Court judgment focuses on technical jurisdictional issues and at times avoids directly addressing some of the more controversial legal questions. Despite efforts to distance itself from politics, this decision is one with inescapably high political stakes and has produced detrimental consequences.

I argue that the Supreme Court's decision in *Kiobel* was flawed because the political costs unjustly and unreasonably favor corporations over human rights. Specifically, I argue that the Court evades taking responsibility for such a costly decision by hiding behind jurisdictional and technical legal questions and not directly engaging with the inescapable political stakes involved. Additionally, even on the jurisdictional and technical legal questions, the Court is selective, inconsistent, and contradictory in how it applies legal reasoning, including its own precedents. As a result, the Court significantly narrowed ATS jurisdiction in a manner which obscured the political ramifications of its decision and favored corporate actors.

The *Kiobel* decision is not unique in its attempt to separate dry legal issues from the larger political questions. Rather, courts often distinguish legal decisions from political choices, reinforcing a narrative which obscures the politics of law. However, courts and judges are political actors and their decisions dictate the invisible rules which control the distribution of

[13] *Id*

resources. The Court's decision in *Kiobel* provides an illustrative example of how the focus on technical issues, such as jurisdiction, obscures a decision's high political cost. In each of Chapters III, IV and V, I begin by explaining the Court's decision in *Kiobel*. I then demonstrate the legal inconsistencies in the decision, followed by a discussion of the larger political issues impacting the decision. I use this structure not because I view the legal and political questions as distinct, but because I believe it best highlights the impact of the unspoken political considerations on the legal discourse used in *Kiobel*. It would be impossible to correctly assess the legal questions and understand the legal inconsistencies without the larger political discussion that follows, particularly the ramifications of the *Kiobel* decisions for victims of human rights abuse who wish to bring cases under the ATS.

The Court's reconceptualization of jurisdiction under the ATS significantly alters the types of cases which can be brought under the Statute in a manner which appears apolitical. Prior to *Kiobel*, plaintiffs regularly brought cases against international corporations for human rights violations committed in breach of the law of nations. The corporations often settled these cases outside of court before trial, providing the victims with financial compensation. More importantly, there is credible evidence that corporations altered their behavior because of the possibility of litigation under the ATS.[14] While I agree it is necessary to provide some limitations for ATS litigation, I am critical of the *Kiobel* approach: An approach which appears to erect procedural barriers to cases against corporations on the basis of legal reasoning alone without discussing and engaging with the politics of where this line is drawn. Analyzing how the Supreme Court justified the *Kiobel* decision and obscured the political considerations and ramifications of its judgment is a useful tool for understanding the legal form and the consequences of its putative separation of law and politics. In *Kiobel,* the Court altered the jurisdictional scope of the ATS, precluding most extraterritorial cases, and leaving in place the Second Circuit Court's decision that cases against international corporations do not fall within the scope of the ATS. As a result, an avenue for human rights violations' redress has been all but closed off in manner which does not acknowledge the political stakes involved.

I argue that the Supreme Court's decision in *Kiobel* is legally inconsistent and politically unsound. In Chapter II, I begin with an overview of relevant ATS jurisprudence in Section II.A

[14] *Abdullahi v. Pfizer, Inc.* 562 F. 3d 163 (3d. Cir. 2009). [hereinafter *Pfizer*]

In Section II.B, I present the facts of the *Kiobel* case and its procedural history. Section II.C addresses my methodology. In Chapter III, I discuss the Supreme Court's choice to raise the question of extraterritoriality *sua sponte* instead of addressing the question of corporate liability central to the Second Circuit Court's decision. Section III.A presents the majority opinion's statements about raising the presumption against extraterritoriality *sua sponte*. In Section III.B, I discuss the legal inconsistencies with the decision to raise the presumption against extraterritoriality without addressing the Second Circuit Court's key question on corporate liability. Section III.C argues the Supreme Court made a political choice to introduce the presumption against extraterritoriality and not confirm or vacate the Second Circuit Court's decision, thus erecting two procedural barriers for potential ATS plaintiffs. Chapter IV addresses how the Court analyzes jurisdiction under the ATS in *Kiobel* and its reliance on the presumption against extraterritoriality. In Section IV.A, I present the sections of the majority and minority's opinions related to the presumption against extraterritoriality. In Subsection IV.B, I illustrate how the Court's decision to elucidate the content of "the law of nations" contradicts the Court's decision in *Sosa* and previous courts understandings of foreign policy implications arising out of ATS cases. In Section IV.C I argue the majority's application of the presumption against extraterritoriality obscures its choice to preclude politically inconvenient developments in contemporary CIL. In Chapter V, I focus on the undefined "touch and concern…with significant force" for extraterritorial breaches of IHRL adopted by the Court.[15] Section V.A. presents the thresholds of linkage to the U.S. needed to for ATS jurisdiction outlined in the majority and minority opinion. Section V.B notes that this approach fails situate *Kiobel* in light of previous courts decisions, primarily the *Filartiga* decision which has served as the cornerstone of ATS jurisprudence for over thirty years. In Section V.C, I focus on the majority's threshold and how it further insulates corporations from liability for the human rights abuses they commit. In the final Chapter, I conclude with an explanation of how the *Kiobel* decision continues a global trend of privileging international corporations at the expense of victims of human rights abuses. The Supreme Court's subsequent decision in *Jesner v. Arab Bank* precluded corporate liability under the ATS further immunizing corporations.

[15] *Supra* note 12 at 1669.

II. Background

Before analyzing the *Kiobel* decision, I begin with a discussion of the relevant background information on the emergence of ATS jurisprudence, the factual and procedural history of the *Kiobel* case, and my methodology. The *Kiobel* decision is not the first judgment to roll back jurisdiction under the ATS. The first Section describes how Supreme Court and appellate courts have systematically limited the cases adjudicated under the ATS, a necessary exercise due to the Statute's vague wording and limited preparatory works. The second Section focuses on the history of the *Kiobel* decision, beginning with the political situation in Nigeria and the relationship between the defendants and the alleged IHRL violations; before proceeding to the case's procedural history. Finally, I lay out my conceptual framework to analyze the legal inconsistencies and politics of the *Kiobel* decision. The observation that law and politics are intertwined but often treated as though they were distinct is not new, and I use existing literature to understand how this phenomenon manifests in *Kiobel* and the resulting consequences. The nature and indeterminacy of the legal form renders it possible to reach a variety of decisions in any given case. Yet, in actuality, decisions have progressively insulated international corporations from the human rights abuses they perpetrate or encourage.

A. History of Alien Tort Jurisprudence

The Alien Tort Statute was incorporated into Section 9 of the First Judiciary Act of 1789, and drafters' intentions for its inclusion are the subject of considerable modern debate. For the first two hundred years, the ATS received little attention because few cases established federal jurisdiction under it.[16] However, in 1979, the Center for Constitutional Rights brought a case on behalf of Honduran nationals, Dolly and Joel Filartiga, against fellow Honduran, Pena-Irala for tortuous acts committed outside the U.S. The case, which was filed in the New York District Court, alleged that Pena-Irala had tortured and killed the plaintiff's descendent, Joelito Filartiga, in violation of "the law of nations."[17] The District Court initially dismissed the claim on the grounds that, while the prohibition against torture may be CIL, precedent dictated that

[16] There were a few exceptions*: Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) [admiralty law]; *Jansen v. The Brigantine Vrow Christina Magdalena*, 3 U.S. 133 (1795) (D.S.C. 1794) [shipping dispute]; *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) [maritime dispute over slave ship]; *Dreyfus v. von Flick*, 534 F.2d. 24 (2d Cir.) cert. denied [property expropriation].

[17] *Supra* note 2 at 890.

international law only governed the relationship between states. The Court acknowledged the strength of the plaintiff's case but believed that precedent set by *Dreyfus v. von Flick*'s precluded the court from hearing cases related to a state's treatment of its nationals.[18]

On appeal, the Second Circuit Court issued a landmark ruling, allowing the case to be heard under the ATS. The Court examined the Universal Declaration of Human Rights, subsequent U.N. General Assembly resolutions, and U.S. foreign policy statements and concluded "international law confers fundamental rights on all people vis-à-vis their own government"[19]. It read the ATS as opening the federal judicial system for the enforcement of rights already in existence under international law, such as the right to freedom from torture.[20] This decision inspired a subsequent chain of cases seeking damages for international torts arising from violations of IHRL and eventually expanded the range of defendants. It also required the judiciary to delineate limitations on which cases fell within the scope of the ATS, a process which involved various and sometimes inconsistent judgments from appellate courts.

Though some scholars initially feared the U.S. district court system would become a hub for international human rights cases,[21] the ATS' scope was subsequently narrowed in three distinct ways. First, the courts defined the ATS as statutory in nature, rather than as a law which could establish a cause of action. In *Tel-Oren v. Libyan Arabic Republic*,[22] the Court of Appeals for the District of Columbia unanimously dismissed the case brought against Libya and the Palestinian Liberation Organization by Israeli survivors of a 1978 terrorist attack. Judges' reasoning for their decision differed,[23] with one judge focusing on differentiating the ATS as a jurisdictional statute rather than a cause of action. As the ATS itself could not be breached, he found the plaintiff must establish the content of the "law of nations" to prove subject matter jurisdiction,[24] thus making this a substantive element of establishing the court's jurisdiction over the dispute rather than part of the merits assessment. This approach was adopted by other appellate courts and confirmed by

[18] *Filartiga v. Pena-Irala* 577 F. Supp. 860 (1984).
[19] *Supra* note 2 at 885.
[20] *Id* at 888-890.
[21] *Supra* note 10.
[22] *Hanoch Tel-Oren v. Libyan Arabic Republic*, 517 F. Supp. 542, 544 (D.C.C. 1981).
[23] Judge Bork's decision to dismiss the case centered on this interpretation of the ATS. Judge Edwards disagreed but vacated the claim on the grounds that while the law of nations prohibits torture, it does not extend liability/responsibility to non-state actors. Judge Robb did not address this question because he dismissed the case on the grounds it would violate the separation of powers doctrine.
[24] *Supra* note 22 at 799.

the Supreme Court in the *Sosa* case. Second, Congress enacted the Torture Victim Protection Act (TVPA), which allowed individuals to bring civil suits against their individual torturers in U.S. federal court, thus creating a *lex specialis* for cases such as *Filartiga*.[25] The TVPA provides the courts with a congressional grant to adjudicate matters which impact U.S. foreign policy and includes a ten year statute of limitations and obligation to exhaust local remedies before filing a case, which are not included in the ATS. While the majority of courts recognize that the ATS and TVPA are not mutually exclusive, the Seventh Circuit Court decided the TVPA precludes torture and extrajudicial killing cases under the ATS.[26] The courts have also imported to the ATS the obligation to exhaust local remedies.[27] Third, the Supreme Court affirmed that the Foreign Sovereign Immunities Act precluded ATS litigation against states in *Argentine Republic v. Amerada Hess Shipping Corporation*.[28] Thus, the ATS only confers jurisdiction for cases against a state agent, not the state itself. These subsequent decisions "cast doubt on its [*Filartiga*'s] continued validity as precedent in all but the narrowest of circumstances."[29] That is to say, while the ATS only covers cases involving a tort committed in violation of international treaty or CIL, courts have further narrowed its applicability.

In 2006, the Supreme Court imposed additional barriers on potential ATS plaintiffs in its landmark decision in *Sosa v. Alvarez Machain*. The case was highly political and touched on issues related to the U.S. war on drugs, the conduct of the Drug Enforcement Agency (DEA), Mexican-American relations, and cross-border migration. In 1985, DEA agent Enrique Camarena-Salazar was kidnapped, tortured, and murdered by members of a Mexican drug cartel, allegedly including Humberto Alvarez-Machain. When the Mexican government refused to extradite Alvarez-Machain, the DEA commissioned several Mexican nationals, including defendant Jose Francisco Sosa, to kidnap Alvarez-Machain and take him to the United States to

[25] Under the TVPA, nationals or non-nations may bring a case against an individual who, while acting in the capacity of a foreign state, engaged in acts of torture or extrajudicial killing. It does not allow an individual to bring a civil suit against a state or corporate actor. This was reaffirmed by the Supreme Court's decision in *Mohamad v. Palestinian Authority* 132 S. Ct. 1702 (2012).

[26] *Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005).

[27] Ekaterina Apostolova, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 Berkeley J. Int'l L. 640, 652 (2010).

[28] *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 US 428 (1989).

[29] Karen Holt, *Filartiga v. Pena-Irala After Ten Years: Major Breakthrough or Legal* Oddity 20 Ga. J. Int'l & Comp. L. 543, 569 (1990).

stand trial.[30] Alvarez-Machain was ultimately found not guilty of crimes committed in relation to the murder of the DEA agent and filed civil suits against the United States and the aliens who kidnapped him under the ATS, TVPA and the Federal Torts Claims Act in the U.S. District Court for the Central District of California.[31] Alvarez-Machain argued the kidnapping amounted to arbitrary detention and that the prohibition against arbitrary detention had crystalized as CIL. The District Court issued a summary judgment and $25,000 in damages under the ATS, and their decision was affirmed on appeal by the Ninth Circuit Court. The case appeared before the Supreme Court in 2004, and was the Court's first ATS decision in the twenty-first century.

The Supreme Court's decision in *Sosa* narrowed the ATS in three distinct ways. First, it affirmed the ATS was jurisdictional in nature and does not provide a cause of action.[32] Plaintiffs can only establish jurisdiction under the ATS if they can identify an international law that was breached. Second, it "raise[d] a new question . . . about the interaction between the ATS at the time of its enactment and the ambient law of the era."[33] As a result, they differentiate between the threshold for when an international norm becomes binding CIL and when such law is domestically enforceable under the ATS. This creates a requirement for additional specificity in the latter case.[34] Third, the Court reoriented its approach to ascertaining the existence of a CIL. Instead of the *Filartiga* approach, which drew heavily on international conventions, U.N. General Assembly Resolutions, and statements made by state leaders, the *Sosa* decision dismissed these sources in favor of a strict assessment of actual state practice. While acknowledging that state practice may evidence the existence of CIL but may also occur in violation of CIL, the Court assessed examples of state practices of arbitrary detention as evidence that the prohibition of arbitrary detention was not CIL. They held that state practices of arbitrary detention carried more weight than the prohibition against arbitrary detention enshrined in the United Nations Declaration on Human Rights and the International Convention on Civil and Political Rights.[35]

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[30] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [hereinafter *Sosa*].
[31] For the purpose of this thesis, I will only address the Supreme Court's decision on issues pertaining to the ATS. However, the Court dismissed the case in its entirety.
[32] *Supra* note 30 at 714.
[33] *Id* at 740.
[34] Curtis Bradley, Jack Goldsmith, & David Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Har. L. Rev. 869, 936 (2007).
[35] *Supra* note 30 at 734, 736.

The *Sosa* decision created a new threshold for defining the content of the law of nations for the purposes of the ATS, which limited the types of cases for which the ATS provided jurisdiction.

As the window for filing ATS seemingly narrowed, litigation began to focus on corporate defendants who had the ability to pay compensation and damages, instead of individuals who were largely former government officials with more limited resources.[36] The filed cases attempted to hold corporations liable for human rights abuses and environmental destruction arising out of joint venture projects or for actions undertaken to protect their investments.[37] The cases have relied heavily on the principles of liability for aiding and abetting and transitory torts,[38] to attempt to prove that corporations' conduct amounted to breaches of CIL. In *Doe v. Unocal Corp*, the Ninth Circuit Court found that a corporation may be subject to an ATS suit for aiding and abetting,[39] while *Khulumani v. Barclay* outlined the circumstances in which an individual could be found liable in this regard. This liability could be established when the individual provides practical assistance to the principle actor, which has a substantial effect on the crime and does so with the intent to perpetrate the crime.[40] The decision relied heavily on the Rome Statute of the International Criminal Court's definition of intent.[41] However, the *Khulumani* decision only considered the actions of natural persons, and did not engage with corporate liability. Following the Second Circuit Court's decision in *Khulumani*, scholars debated whether CIL included corporate liability,[42] and the potential impact of ATS litigation against corporate entities under IHRL. Ultimately, the Supreme Court answered this debate in *Jesner* and held that corporate liability did not fall within the scope of the ATS.

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[36] *Supra* note 10.

[37] Beth Van Schaak, *Unfulfilled Promises: The Human Rights Class Action*, 2003 U. Chi. Legal F. 279, 352 (2003).Plaintiffs have argued environmental destruction violates a number of human rights obligations, including (but not limited to) the right an environment and the right to life.

[38] Defined by the Supreme Court in *Kiobel* as the principle that the character of a tort allowed it to be enforced across jurisdictions, lest the tortfeasor escape penalty by fleeing to another jurisdiction. *Supra* note 12 at 1666.

[39] *Doe I v. Unocal Corp.*395 F.3d 932 (9th Cir. 2000). The Ninth Circuit Court dismissed the case on factual grounds, but left the door open for future ATS litigations against corporations for aid and abetting.

[40] *Khulumani v. Barclay Nat'l Bank Ltd* 504 F. 3d 260 (2d Cir. 2007).

[41] The Court cites Article 25 of the Rome Statute of the Criminal Court (1998). It found Article 25 reflects an international consensus on the standard for intent needed to establish individual liability for aiding and abetting despite the U.S. refusal to ratify the Rome Statute.

[42] Matthew Danforth, *Corporate Civil Liability under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*," 44 Cornell Int'l L. J. 659, 691 (2011).

Despite the lack of judicial consensus, several plaintiffs won cases against corporate actors, and more secured out of court settlements from corporations that were hoping to avoid the publicity associated with a trial or the risk of even more costly verdicts. In *Licea v. Curacao Drydock Co.*, Cuban plaintiffs received a judgment of $80 million in damages as a result of Curacao Drydock Corporation's use of forced labor.[43] Bangladeshi torture survivors also secured a judgment for financial compensation from the Worldtel Bangladesh Holding Ltd after the corporation employed Bangladeshi police officers to torture the plaintiffs.[44] The decision was vacated following the *Kiobel* decision because the alleged human rights violations occurred outside the United States. In addition to these decisions, a number of transnational corporations settled cases prior to judgment. Pfizer, a U.S. based pharmaceutical company, settled three cases stemming from its nonconsensual testing of the experimental meningitis drug Trovan during an outbreak in Nigeria.[45] Out of court settlements were also agreed upon in *Doe v. Unocal*[46]and *Doe I v. Gap, Inc*.[47] This trend is not unique to the U.S., and plaintiffs filed cases against in the Netherlands against Total, S.A. (a French oil firm which allegedly cooperated with the Myanmar government in human rights abuses) and Shell Petroleum (for environmental damage in Nigeria).[48] There is evidence that the proliferation of IHRL cases versus corporations was seen by corporations as concerning and influenced their behaviors According to Baxter, multinational corporations adopted voluntary codes of conduct including IHRL riders in an effort to prevent ATS litigation.[49] It was at this time that Nigerian plaintiffs in the *Kiobel* case filed a suit against the Royal Dutch Petroleum Company and British Shell Transport and Trading Company.

[43] *Licea v. Curacao Drydock Co*., 584 F. Supp. 2d 1355 (S.D.Fla. 2008).
[44] *Chowdhury v. Worldtel Bangladesh Holding, Ltd*., et al., 588 F. Supp.2d 375 (E.D.N.Y. 2008) (Aug. 2009). [The case was overturned following *Kiobel*].
[45] *Supra* note 14; Judith Chomsky, *Will the Real ATS Please Stand Up*, 33 Suffolk Tansnat'l L. Rev. 461, 474 (2010).
[46] *Doe v. Unocal*, 248 F. 3d 915 (9th Cir. 2001) [human rights violations perpetrated during the construction of Yadana gas line in Myanmar].
[47] *Doe I v. Gap, Inc.* No. CV-01-0031, 2001 WL 1842389, at *1 (D. N. Mar. I. Nov. 26, 2001) [violations of labor rights in Saipan].
[48] *Supra* note 45.
[49] Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L. J. 807, 830 (2006).

B. *Kiobel* Case

B.1. Facts

The Supreme Court issued a landmark decision in the *Kiobel* case, radically altering the jurisdictional understanding of the ATS and calling into question the Statute's overall applicability. The nexus of the *Kiobel* case lies in the relationship between the Netherland's Royal Dutch Petroleum Company (RDPC), the British Shell Transport and Trading Company (STTC), and the violent tactics the Nigerian government used to suppress the Ogonis' dissent towards its economic policies. The case arose out of an ongoing conflict between the Ogoni people of Nigeria and the state-owned Shell Petroleum Development Company of Nigeria, which is a subsidiary of the two defendants. The Ogoni peoples opposed Nigerian government policies which caused economic exploitation, political marginalization, and environmental destruction. The Nigerian police and military's abuses towards the Ogoni people are well documented,[50] and include extrajudicial killings, rape, torture, arbitrary detention, and property destruction. Many Ogonis were killed or displaced internally, but a small number received refugee status and were resettled to the U.S. In 2006, twelve of these former residents of Ogoni sued RDPC and STCC for their complicity in numerous violations of IHRL: extrajudicial killings, arbitrary detention, torture, forced exile, crimes against humanity, property destruction, and violations of the right to life, liberty, security, and association.[51] The case was filed in New York District Court before an appeal to the Second Circuit Court, and subsequent hearing before the Supreme Court.

Since decolonization, the Nigerian government has officially advocated for a decentralized federation, but in actuality power and control of resource allocation is centralized in the hands of northern military elites. The top-down approach to governance marginalized numerous ethnic and tribal minorities, including the Ogoni. The Ogoni's situation was further compounded by the land they own in the oil-rich Niger delta.[52] The extraction process has ravaged the Ogonis' land and destroyed traditional means of livelihood ever since the discovery of petroleum and natural gas in their region. The results of oil and gas extraction were financially lucrative to the Nigerian state and the international companies which owned Shell Nigeria. During the early 1990s, over

[50] Amnesty Int'l, *Nigeria: Petroleum, Pollution, and Poverty in the Niger Delta* 11 (2009).
[51] *Kiobel v. Royal Dutch Petroleum Co.* 621 F. 3d 111 (2d. Cir. 2010).
[52] Claude Welch Jr. *The Ogoni and Self-Determination: Increasing Violence in Nigeria*, 33 J. Modern Afr. Stud. 635, 650 (1995).

90% of the Nigerian state's foreign-exchange earnings came from oil and gas-related sales and royalties.[53] While certain sectors of Nigerian society benefited economically from the Shell Petroleum Company of Nigeria's presence in the Niger delta, the company largely excluded the Ogoni from its labor force, and the region lacked basic infrastructure and access to sanitation or health services.[54] Extraction was lucrative for the transnational corporations involved in the project. Shell Nigeria's parent companies, Royal Dutch Petroleum Company and Shell Trade and Transportation Company, gained sizeable profits for their shareholders.[55] Thus, both had a vested interest in preventing local resistance to the economic status quo in the Niger Delta.

The continued economic marginalization, environmental destruction, and lack of political representation spurred Ogoni resistance to the Nigerian government's economic policies. The most influential group, the Movement for the Survival of Ogoni People (MSOP), is alternately characterized as a movement for political self-determination, a movement of local resistance to foreign economic exploitation, or a movement for economic self-determination.[56] Others argue that the Ogoni identity is a by-product of colonial disruption of local rule, or a seemingly ethnic mobilization cloaking a government-elite struggle for control of oil revenues.[57] Despite the difficulties in categorizing this multifaceted resistance movement, the MSOP was successful in building solidarity across ethnic and class lines and garnering international attention. In 1990, MSOP initiated protests against the Shell Petroleum Company of Nigeria and demanded compensation for damage caused to their environment. Subsequently, the Nigerian government responded to the company's calls for assistance and brutally attacked villages, destroyed homes, and raped and killed numerous residents.[58] Following this crackdown, government memos were released which linked their use of force with the need to ensure "smooth economic conditions to commence."[59] In 1995, after violence at a Constitutional Assembly led to the deaths of four Ogoni elders, the Nigerian government arrested, tortured, and executed without a fair trial nine leading members of the MSOP. These incidents were part of a longer campaign of state-

[53] *Supra* note 50.
[54] Cyril Obi. *Globalisation and Local Resistance: The Case of the Ogoni versus Shell*, 2 New Pol. Econ. 137, 148 (1997).
[55] *Supra* note 52.
[56] *Supra* note 54.
[57] V. Adefemi Isumonah. *The Making of the Ogoni Ethnic Group*, 74 Africa: J. Int'l. Af. Institute 433, 453 (2004).
[58] *Supra* note 52 at 123.
[59] *Supra* note 50.

sponsored violence directed at the Ogoni people, which killed, raped, and displaced hundreds of thousands.[60] Unlike the majority of state-sanctioned violence perpetrated to appease transnational actors, the Ogoni peoples' campaigns managed to attract international attention after the 1995 execution of the "Ogoni 9." One of the executed leaders was Dr. Barinem Kiobel, whose descendants joined the Center for Constitutional Rights and EarthRights International to bring the case against RDPC and STTC under the ATS. His descendants expressed hope that the ATS would provide a forum to seek financial redress from the transnational corporations which owned Nigerian Shell Petroleum.[61]

International law plays a role in constructing the nature of this dispute, the parties to the conflict, and the relationship between them. As described in my thesis, it in many ways continues to legitimize much of the economic and environmental exploitation inflicted by the Nigerian government and transnational corporations. Today, sporadic clashes between the Ogoni and the Nigerian state infrequently occur. However, it is important to note that while the active conflict in Ogoniland has subsided, competition for control of the vast oil reserves still plagues Nigeria and Shell Petroleum Company of Nigeria's extraction and exploitation continues to damage the environment. There are nearly two million internally displaced Nigerian nationals,[62] and the state and its corporate partners continue to violate IHRL in order to quell dissent over economic policies and environmental destruction.[63] As Nigerian military and political elites battle for control of the state's lucrative natural resources, transnational corporations profit despite, or arguably because of, the suffering of Nigerian nationals.

B.2. Procedural History

The New York District Court initially dismissed the allegations of forced exile, crimes against humanity, property destruction, and violations of the right to life, liberty, security, and extrajudicial killing, as they lacked a sufficient definition to be considered violations of the law of nations, and thus create subject matter jurisdiction.[64] To make this decision, it relied heavily

[60] Tyler Banks, *Corporate Liability under the Alien Tort Statute: The Second Circuit's Misstep Around the General Principles of International Law in Kiobel v. Royal Dutch Petroleum Co.* 26 Emory L. J. 227, 281 (2012).
[61] *Supra* note 53.
[62] UN High Commissioner for Refugees. *Nigeria Factsheet* (2016).
[63] *Supra* note 51.
[64] *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006). The district court relied on the "specific, universal, and obligatory" set by the Supreme Court in *Sosa v. Alvarez-Machain* and determined the

on the Supreme Court's decision in *Sosa*, which ordered a limited reading of the "law of nations."[65] However, the District Court upheld the prohibition of torture, right to assembly, and prohibition against arbitrary detention as a having sufficient foundation.[66] The Second Circuit Court focused on the question of whether the ATS applied to corporate defendants and dismissed the case on the grounds that corporate liability for internationally wrongful acts is not a sufficiently recognized norm in international law.[67] Its decision, which attracted considerable attention, was at odds with some previous appellate jurisprudence on corporate liability.[68] Following this decision, the Supreme Court issued a writ of certiorari to hear the case. After oral arguments on corporate liability in international law, the Court made the unusual decision to raise the presumption against extraterritoriality *sua sponte* and rehear oral arguments. The Court unanimously ruled that the plaintiffs in *Kiobel* lacked standing. The justices' reasoning differed as to the nature of relationship between tortuous action and the U.S. that was needed to establish jurisdiction. This decision significantly narrowed the scope of the ATS and caused numerous cases to be dismissed or overturned by lower courts. The constitutive elements of this decision and the political factors at play will further detailed Chapters III, IV and V.

C. Conceptual Framework

I have one overall argument and two sub-arguments. I argue that the Supreme Court's decision in *Kiobel* unjustly favors the interests of transnational corporations over human rights. First, I argue that the manner in which the Supreme Court decided *Kiobel* allowed the judges to distance themselves from the decision's political ramifications. The Court evades taking responsibility for such a costly decision by hiding behind jurisdictional and technical legal questions and not directly engaging with the inescapable political stakes involved in such a decision. It framed its decision as dealing with dry and technical jurisdictional issues rather than the question of corporate responsibility for human rights violations committed in pursuit of profit. Second, I

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content of each human rights obligation lacked specificity, and therefore could not constitute the corpus of the "law of nations."

[65] *Supra* note 30. The Court held the right to freedom from arbitrary arrest did not amount to customary international law. They stated that the Universal Declaration was a non-binding instrument and the U.S. signed and ratified the International Convention on Civil and Political Rights on the premise the treaty was not self-executing. This reasoning differs from the approach in *Filartiga* and will be discussed further in the Chapter IV.

[66] *Id*.

[67] *Supra* note 51.

[68] *See, Supra* note 39, *Supra* note 40, & *Supra* note 43.

argue that even on the jurisdictional and technical legal questions, the Court is selective, inconsistent, and contradictory in how it applies legal reasoning including its own precedents. The reason for these legal inconsistencies is the Court's unwillingness to engage with its own politics. To analyze the legal inconsistencies and the political challenges of *Kiobel*, my conceptual framework draws on theories of ATS jurisprudence, legal realism, critical legal studies, and third world approaches to international law (TWAIL) scholarship.

To make this overall argument and the two sub-arguments, my conceptual framework involves situating the *Kiobel* case within the larger body of ATS cases to show the flaws in the legal reasoning in the Supreme Court's decision and how they contradict precedent. This is done in the Subjection C.1. It is also necessary to position this thesis within the larger narrative of the artificial law-versus-politics divide. Jurists and legal theorists have spent centuries grappling with the nature and consequences of this distinction. While their approaches and intentions may differ from each other, and indeed from my own intent, many of these scholars have created a helpful lens through which I understand the consequences of the Court's decision in *Kiobel*. Thus, in Subsections C.2 and C.3, I assemble my conceptual framework drawing from the available literature on the interplay between law and politics. I use this approach to underscore the extent to which law can obscure the role of politics. In Subsection C.2, I draw from literature on the relationship between law and politics generally, and Subsection C.3, I draw from literature focusing specifically on how law as politics is manifested in international law.

C.1. Tracing the Evolution of the Alien Tort Statute

To address the legal inconsistencies within the *Kiobel* decision, I examine the legal reasoning in previous ATS cases. Using *Kiobel* as a starting point, I analyze the larger chain of ATS cases which began with *Filartiga* and the gradual narrowing of the statute's jurisdiction. This gradual narrowing accelerated at the start of the twenty-first century, and the *Kiobel* decision is an example of this phenomenon. I adopt Thomas Lee's classification of the life of ATS into three distinct phases: its birth and relative uselessness from 1783-1980, its role as an international human rights enforcement mechanism during the height of *Pax Americana* (1980-2000), and its applicability post-*Kiobel*.[69] This evolutionary narrative is also the structure of Holt and Van

[69] Thomas Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations,* 89 Notre Dame L. Rev. 1645, 1670 (2013-2014).

Schaak's pieces,[70] which focus on the time period between 1980 and 1995 but divide the narrative less categorically. Viewing ATS litigation as a single evolving entity presents the "story" of ATS cases before *Kiobel* and how that decision does or does not fit with previous decisions. I start with *Kiobel* decision and contrast it with the reasoning in earlier ATS decisions, identifying the legal inconsistencies that led to a gradual narrowing of ATS jurisdiction. This framework is central to understanding the legal inconsistencies in the *Kiobel* decision, and thus my first sub-argument, but insufficient to address the politics of the decision. In Subsection II.C.2, I discuss the relationship between law and politics generally and how legal rules dictate the allocation of power and coercion in society.

C.2. Understanding the Relationship between Law and Politics

The existence of a relationship between law and politics is not controversial but the exact nature and consequences of the relationship continue to be the subject of examination and debate. Law is defined as "a rule of conduct or action prescribed or formally recognized as binding by a controlling authority."[71] The creation, interpretation, and enforcement of a law is inherently political, and considerable academic attention is paid to the politics of this process. Traditionally, judicial decisions are often viewed as distinctly apolitical and neutral; the judge pronounces the "right" answer based on deducing and applying the relevant law.[72] This approach obscures the relationship between politics and judicial decision in a manner which creates an artificial separation between the realms of legal and political. It also fails to address the role of power and violence inherent to legal systems. This thesis analyzes the political choices inherent to the legal form and how these choices' impact distribution of resources in the context of *Kiobel*.

In the 1920s, Robert Hale explored the connection between power and coercion and presented an economic analysis of law as the distribution of coercion and freedom backed by the threat of force.[73] He explains that "the channels into which industry shall flow, then, as well as the apportionment of the communities' wealth, depend on coercive agreements."[74] In the case of torts, Hale emphasizes that judicial edicts determine which damaging actions create a tortuous

[70] *Supra* note 29 & 38.
[71] *Merriam Webster Dictionary*, 2016.
[72] Richard Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1109 (1975).
[73] Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 494 (1923).
[74] *Id* at 493.

cause of action and which are considered *damnum absque injuria*.[75] This contradicts the traditional U.S. definition of *prima facie* torts as "intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact, damage another person's property or trade, is actionable if done without just cause or excuse."[76] Specifically, he highlights the dichotomy between this traditional understanding of torts and the reality that judges consider damage caused in the interest of competition as worth the cost.[77] Since the majority of economic damage is justifiable as competition, it falls into the category of *damnum absque injuria* for which no remedy is needed. In the absence of an alternative legal avenue for redress, the Supreme Court's decision in *Kiobel* considered as *damnum absque injuria* tortuous violations of IHRL committed outside of the U.S. Hale's work underscores the manner in which judicial decisions create the invisible rules which govern the allotment of resources and capital among social classes to create a constant state of class struggle.

In the late twentieth century, Duncan Kennedy expanded this analysis in two distinct ways. First, he observed that law's influence on the distribution of wealth extends beyond social class and proposed it also determines the distribution of wealth along racial and gendered lines. Since the outcome of joint economic production is the result of coercion (rather than free choice, as contended by conservative economic rhetoric), legal rules compel adherence to the state's preferred distribution of coercion. In his view, judges are central players in this process because they decide the legality or illegality of specific acts. Thus, the delineation between a political legislative body and an apolitical judiciary are false.[78] During the 1960s and 1970s, "liberal reformers"[79] in the judiciary radically reimagined legal ground rules to improve the standing of Black and female Americans. Kennedy notes that this simultaneously drew attention to the judiciary's powerful political capacity and obscured its impact on the structuring of class inequality. Among the illustrative examples he provides is the disparate impact of capital movement laws and subsequent deindustrialization on urban Black males, thus highlighting that apparently neutral or unrelated decisions are still central to resource distribution. In the context

[75] Robert Hale, *Prima Facie Torts, Combination, and Non-Feasance,* 46 Colum. L. Rev. 196, 218 (1946).
[76] Bowen, L. J., in Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q. B. D.598, 613 (1889) as cited in *Id*. at 196. Hale begins his analysis of torts with this quote as the *de facto* definition.
[77] *Supra* note 75.
[78] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!* 4 J. Leg. Stud. 327, 366 (1990).
[79] *Id* at 342.

of the *Kiobel* case, his theory would call into question the invisible rules which already divide access to capital and the impact such a decision has on access to redistributive methods and monetary redress. His approach expands Hale's analysis and illustrates its applicability beyond social class to issues of race, gender, and other vectors, depicting how judicial decisions, and indeed law as a whole, play an important part in structuring distribution of power and wealth in society. In Subsection II.C.3, I analyze how the specific history and structure of international law has impacted ATS litigation, particularly the role of corporations in ATS

C.3. Understanding the Relationship between International Law and Politics

The relationship between law and politics is also central to understanding the international legal order and its impact on ATS adjudication in the U.S. The politics of international law should not be viewed in isolation from the larger discourse on law and politics. As in domestic law, international law was largely written by elites with their own interests in mind, and judicial decisions still require adjudicators make a political decision on how to apply otherwise indeterminate law.[80] These decisions, as in domestic law, structure the distribution of resources and bargaining power among peoples and states. However, the particular structure and history of international law raises additional issues. The politics of international law not only impact how U.S. courts have defined the content of the "law of nations," but how ATS litigation figures into the larger international human rights movement.

One of the key critiques of international law is a lack of internal coherence, which results partly from the belief that Enlightenment ideals could organize international society similar to its uses domestically. Koskenniemi states that despite interest in a uniform Rule of Law capable of resolving disputes,

> [s]ocial conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested - political - principles to justify outcomes to international disputes.[81]

[80] I use "elite" here to refer to both the politically powerful individuals who represent their countries at the international level and the dominate countries whose voices carry more (if not undue) weight on global governance. The latter I discuss in detail in subsequent paragraphs. For an illustration of the former, *See* Sonia Harris-Short, *Listening to the 'Other?' The Convention on the Rights of the Child*, 2 Melbourne J. Int'l. L. (2001) at 10-12.

[81] Marrti Koskenniemi, *The Politics of International Law*, 1 EJIL 4, 32 (1990).

In explaining why international law cannot escape politics, he identifies its need to be simultaneously concrete and normative. Without the former, the international law project strays towards the realm of natural law, while the latter is required to differentiate law from a simple extension of power politics. This dichotomy reflects the two critiques lodged against international law: It is too political because it depends on state practice or it is too political because it relies on contested ideals.[82] He points to reliance on *opinio juris* to differentiate the content of CIL from a mere codification of state action while at the same time determining *opinio juris* through consistent state practice, as a reoccurring pattern in legal arguments.[83] Koskenniemi illustrates how this circularity of legal arguments ultimately results in indeterminacy, and his analysis of this processes as it relates to CIL describes the processes adopted by U.S. courts in previous ATS cases. Specifically, it illustrates the Supreme Court's attempts to elucidate the content of the law of nations in *Kiobel*, which I discuss in Chapter IV. Legal indeterminacy provides judges with considerable leeway in determining the applicable law. This lends itself to the types of inconsistent legal reasoning and politically problematic decisions as apparent in *Kiobel*.

One of the ways the politics of international law has manifested itself is in the creation of institutional biases. David Kennedy notes that the field of international law has become fragmented in a manner similar to domestic law.[84] He points to the perceived divergence between public international law (a field rife with political questions related to violence, transition, and criminality) and private international law (a domain which shuns politics in favor of technical and commercial expertise). In a case such as *Kiobel*, this divide unduly divorces Nigeria's political instability and state-sanctioned human rights abuses from the economic rules governing the extraction of its resources and relationship with transnational corporations. One of the ramifications of this fragmentation and institutionalization of norms is the emergence of competing institutions and specializations. Koskenniemi focuses on the structural biases in these institutions regimes; the favored actors, proposed solutions, and hierarchy of norms reflects the institution's politics.[85] This is another process which impacts ATS litigation, as district and appellate courts have sought to derive an understanding of corporate liability from (among

[82] Koskenniemi terms these poles "apologies" and "utopia."
[83] *Supra* note 81.
[84] David Kennedy, *The Political Economy of Centers and Peripheries*, 25 Leiden J. Int'l. L. 7, 36 (2013).
[85] Marrti Koskenniemi, *The Politics of International Law-20 Years Later*, 20 EJIL 7, 19 (2011).

others) international criminal law, international environmental law, private international law, and international human rights law. The institutionalization and structural biases caused by fragmentation create another level of politics imbedded in the international law project.

While the legal form, whether domestic or international, is radically indeterminate, there are clear patterns in the groups it marginalizes. Theoretically, it would be possible for judges to reach divergent decisions as the result of this indeterminacy. However, decisions regularly disadvantage marginalized groups: women, peoples of the global South, working classes, people of color, Indigenous peoples, and so on. The marginalization is the result of both the invisible rules governing the distribution of resources, as discussed in the previous subsection, and institutional bias as created by law. The *Kiobel* decision reflects the structural violence embedded in the international legal system and the trend of increasing protection for multinational corporations at the expense of human rights. The critiques of international law generally, and IHRL specifically, advanced by TWAIL scholars provides a framework for analyzing the manner in which this occurs.

The question of corporate liability in international law occurs within the larger context of the history of international law and the progress narrative often superimposed on its development, which obscures the discipline's actual evolution. Antony Anghie's *Imperialism, Sovereignty, and the Making of International Law* sets out to trace international law's relationship to the colonial and imperial projects with which it intertwines and in many cases justifies. In the introduction to the book, he proposes that colonialism shaped the foundation of international law, and questions what this means for post-colonial states' engagement with global governance.[86] His emphasis, which is shared by other TWAIL scholars, is on evaluating the rules of international law through the lived experience of those most impacted, namely peoples in the Third World, developing world, or global South.[87] Since the 1600s, imperialist policies have been justified through a civilization narrative, which allows the conqueror (states in the global North) to portray its actions as in the best interest of the conquered (peoples of the global South). This approach is apparent in the discourse surrounding temporally and geographically diverse projects, including the League of Nation's Mandate System, seventeenth century trading companies, and

[86] Antony Anghie, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005).
[87] Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 2 Chinese JIL 77, 103 (2003)

contemporary international institutions.[88] While a detailed analysis of this history falls outside the scope of this research, the twenty-first century manifestation of the civilizing mission, the international human rights and development project, is central to situating the *Kiobel* decision.

When discussing the threat of neocolonialism facing the Third World, B.S. Chimni identifies the "internationalization of human rights"[89] and the growing complexity of jurisdiction as key vehicles through which this process is occurring. Both critiques of the twenty-first century world order directly pertain to ATS litigation in the U.S. and raise questions which speak to directly to concerns general concerns about the Statute[90] and its impact on the global South.[91] Chimni is not alone in his critique of the IHRL project, which has been lambasted as a dangerous erosion of national sovereignty,[92] a non-inclusive Western construct,[93] and a confining hegemonic discourse.[94] David Kennedy notes that IHRL language is used to justify bombings, regime change, and life without parole prison sentences.[95] Within the TWAIL movement, particular attention is paid to how the language of IHRL has been co-opted by and grown alongside of today's iteration of the "civilizing movement": international development. Among numerous critiques of the human rights-development narrative, Anghie raises the way it obscures the structural and systemic nature of suffering in the Third World.[96] It places the blame on Third World governments for failing to secure their nationals' rights, thereby localizing the problem while turning a blind eye to what Susan Marks refers to as the "planned misery" of the international system.[97] Chimni also focuses on the manner in which the language of "law" and

[88] *Supra* note 86.
[89] B.S. Chimni, *Third World Approaches to International Law: A Manifesto in,* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION 47, 73 (A. Anghie, B. Chimni, K. Mickelson, O. Okaford eds. 2003) at 55.
[90] For a larger discussion on the broad range of concerns *See*: AnneMarie Slaughter & David Bosco, *Plaintiff* Diplomacy, 79 Foreign Affairs 102, 116 (2000); Bradford Clark & Anthonly Bellia, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 552 (2011); Curtis Bradley, *Universal Jurisdiction and US Law*, 2001 U. Chi. Legal F. 323, 350 (2001).
[91] Farooq Hassan, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 Int'l & Comp. L. Q. 250, 258 (1983)
[92] Jack Donnelly, *State Sovereignty and International Human Rights* 28 Ethics and Int'l. Aff. 225, 238 (2014) at 225. Donnelly presents an overview of scholars whose work focuses on IHRL's diminishing impact on state sovereignty.
[93] *See, e.g.* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights* 42 Harv. Int'l. L. J. 201, 245 (2002); Walter Mignolo, *Who Speaks for the "Human" in Human Rights?* 5 Hispanic Issues Online, 7, 24 (2009).
[94] David Kennedy, *International Human Rights Movement: Part of the Problem*, 15 Harv. Hum. Rts. J. 101, 126 (2002).
[95] *Supra* note 85.
[96] *Supra* note 86.
[97] Susan Marks, *Human Rights and the Bottom Billion*, 1 Eur. H.R. L. Rev. 37, 49 (2009).

"rights" legitimizes the development narrative as part of a global march to progress despite neo-liberal reforms that structurally favor the North.[98] However, the current litigation strategy in ATS cases has the potential to somewhat upend this narrative within IHRL. Foreign sovereigns are immune from ATS jurisdiction pursuant to the Foreign Sovereigns Immunity Act of 1976,[99] and current ATS cases attempt to hold multinational corporations accountable for violations of IHRL, the majority of which are occurring in the global South. In *Kiobel*, the Supreme Court could have opened the U.S. federal court system to cases against multinational corporations, thus partially remedying one of the chief critiques of the IHRL movement, its fixation on the governments of the global South. Instead, it privileged the interests of capital and multinational corporations, an aspect of their judgment I will further explore in Chapters III and IV.

Finally, Chimni addresses the issue of complex jurisdictions and "the intersection of jurisdictions which gives rise to multiple (or concurrent) and extra-territorial jurisdiction".[100] This reflects Kennedy and Koskenniemi's observations about the fragmentation of law and subsequent proliferation of institutional oversight bodies.[101] In ATS jurisprudence, multiple or concurrent jurisdiction has been raised as an issue of *forum non conveniens* and it has been alleged that the U.S. federal court system was not the appropriate forum for specific cases. In *Kiobel*, the Dutch and British governments (where the defendant corporations are incorporated) submitted an *amicus curiae* brief supporting corporate liability for human rights violations but arguing there were more appropriate legal forums for the case.[102] While the Supreme Court did not address this argument in the *Kiobel* decision, it is a recurring argument defendants employ to oppose ATS jurisdiction. Chimni's concern about extraterritorial jurisdiction is that powerful states establish laws with an extraterritorial reach, a privilege that weaker states cannot effectively share. Anne Marie Slaughter and David Bosco expressed their fears that prolific ATS litigation could have create "super courts" ready to govern the political affairs of other states.[103] However, the ATS concerns itself with civil liability, not attributing criminal or state responsibility. In the *Kiobel*

[98] *Supra* note 89.
[99] *Supra* note 28. The Supreme Court resolved this issue in its 1989 decision in *Argentine Republic v. Amerada Hess Shipping Corporation* available at *Supra* note 28.
[100] *Supra* note 89 at 57.
[101] *Supra* notes 84 & 85.
[102] Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland in support of neither party, No. 10-1491 (2011).
[103] *Supra* note 90.

case, there was no intention of interfering in the political affairs of the Nigerian government or the states where Royal Dutch Petroleum Co. or Shell Transport & Trading Company are incorporated. Rather, the plaintiffs sought financial redress for civil wrongs committed by multinational corporations that had a relationship with the U.S.

The *Kiobel* case raises a number of issues which directly link to the TWAIL critiques I have just discussed. There is little doubt that previous ATS litigation assisted in promoting the largely unquestioned image of human rights as progress and prior cases involved U.S. courts adjudicating on extraterritorial events. However, I think the ATS has the potential to partially alter the rules which govern the system, and act as a redistributive conduit. It also has the potential to reframe the IHRL narrative by focusing also on the corporations who profit from human rights abuses instead of on governments in the global South. There is almost always some link between the U.S. and the corporate defendant. In *Kiobel*, both companies trade on the New York Stock Exchange, and also benefited from the international development and governance policies enacted by institutions with a structural bias favoring the U.S. TWAIL scholarship on international law generally and IHRL specifically is helpful for situating *Kiobel* in a larger legal system once used to legitimize colonialism and now protecting the interest of corporations over the lives of peoples, particularly those in the global South.

The purpose of this thesis is to explore the legal inconsistencies and politics of the *Kiobel* decision. I find the manner in which the judges obscured the political considerations behind legal arguments about jurisdiction to be particularly troubling. Combining Robert Hale and Duncan Kennedy's analysis of the judiciary's role in dictating the distribution of coercion, and thus economic resources, with prevailing critique on the history and structure of international law, creates a helpful theoretical starting point for my thesis. I also draw heavily on the theorists' shared understanding that law's potential for obscuring the political is systemic and routine; in this regard I view *Kiobel* as an example rather than an aberrant occurrence. While I think it desirable to provide some legal limitations to litigation under the ATS, I use above described theoretical framework to criticize the approach taken in *Kiobel*, one which appears to erect procedural barriers to cases against corporate entities without acknowledging the prevailing politics. I find analyzing the how the Supreme Court justified the *Kiobel* decision and silenced

the political considerations and ramifications of its judgment a useful tool for understanding the costs of failing to acknowledge the political consequences of judicial decisions.

The following three Chapters analyze the main legal questions the Supreme Court addressed in the *Kiobel* decision. Chapter III discusses the Court's decision to raise the question of extraterritoriality *sua sponte*. Chapter IV addresses extraterritorial jurisdiction under the ATS and its incompatibility with Court precedent and international norms. Chapter V focuses on the new "touch and concern with significant force"[104] threshold established by the majority. Each Chapter begins with a discussion of the relevant aspects of the majority and minority opinions in Section A. Section B examines the legal inconsistencies in the opinions and their relationship to previous precedent. Section C focuses on the implicit political considerations and ramifications not addressed by the Court. I separate the legal inconsistencies from the political considerations purely for analytical purposes, to demonstrate that it is impossible to understand the reasons for *Kiobel*'s legal inconsistencies discussed in Section B without examining the political stakes as analyzed in Section C.

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[104] *Supra* note 12 at 1669

III. Decision to Raise Extraterritoriality *Sua Sponte*

In its *Kiobel* decision, the Second Circuit Court noted that due to the rapid proliferation of ATS litigations since 1980, the high percentage of pretrial settlements, and the statute's linguistic ambiguity "there remain[s] a number of unresolved issues lurking in our ATS jurisprudence."[105] To the Second Circuit Court, the *Kiobel* arguments proposed the unresolved issue of whether jurisdiction conferred by the ATS extended to corporate actors. After an extensive discussion on trends within international criminal law, the Second Circuit Court found no "sufficiently definite" norm of international law permitting corporate liability for violations if IHRL.[106] The decision was controversial, and the concurring opinion penned by Judge Leval aggressively questioned the majority's reasoning,[107] while the Seventh Circuit Court's contemporaneous decision in *Flomo v. Firestone* reached the opposite conclusion.[108] Seeking to resolve this uncertainty, the Supreme Court responded to the *Kiobel* plaintiff's petition for *certiorari* in October 2011.[109]

After a week of oral arguments pertaining to whether the ATS granted jurisdiction to corporations, the Court requested supplementary arguments on whether the ATS' jurisdiction extended to actions which occurred extraterritorially. I argue that by adjudicating the issue of extraterritoriality, rather than the question of corporate liability addressed by the appellate court, the Supreme Court erected dual procedural barriers to ATS litigation in a manner which oriented attention to jurisdiction rather than politics. In Section A, I begin by describing the Supreme Court's decision to raise the issue of extraterritoriality *sua sponte*. I analyze the result of the decision, namely whether the Second Circuit Court's decision in *Kiobel* remains binding precedent in Section B. In Section C, I shed light on this approach's political ramifications and how it denies jurisdiction to two distinct set of plaintiffs.

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[105] *Supra* note 51 at 117.
[106] The Court adopts the language of the *Sosa* decision in conferring ATS jurisdiction only on norms which were sufficiently definite to support this jurisdiction. *Supra* note 55 at 732-733.
[107] Judge Leval concurred with the decision to dismiss the case on procedural grounds. 643 F.3d 1013 (2d. Cir. 2011), Leval concurring opinion.
[108] *Id.*
[109] 132 S.Ct. 472, 181 L.Ed.2d 292 (2011)

A. Content of the Supreme Court's Decision

The initial arguments presented to the Supreme Court addressed the central question decided in the Second Circuit's decision: does ATS jurisdiction extend to corporations? On March 6, 2012 the Court requested supplemental briefings, and it held arguments on the question of extraterritoriality in October 2012. The majority opinion was authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, Kennedy, and Alito.[110] Justice Kennedy authored a brief concurring opinion,[111] as did Justices Alito and Thomas.[112] Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, wrote an agreement concurring in judgment but differing in reasoning.[113] The majority's opinion does not set out to explain its choice to address the question of extraterritoriality instead of corporate liability. The majority mentions the Court's request for supplementary arguments in passing when presenting the case history.[114] The majority's only acknowledgement that the initial question presented to the Court was that of corporate liability is a passing reference to corporations. Justice Roberts writes that "mere corporate presence" in the U.S. does not suffice to dispel the presumption against extraterritoriality.[115] Absent from this statement is any indication as to whether the majority understood the ATS as conferring jurisdiction on a corporation to begin with. Neither the Alito nor Kennedy concurring opinions address the question of corporate liability or the decision to raise the presumption against extraterritorial application of domestic law *sua sponte*.[116] Their opinions solely engage with the parameters of extraterritoriality as discussed further in Chapter IV.

The minority opinion paid marginally more attention to the question of corporate liability. The decision, written by Justice Breyer, held that the ATS drafters intended for the statute to address cases "touching and concerning" the U.S. but reads this mandate more broadly than the majority. They found that preventing the country from becoming a "safe harbor… for the common enemy of mankind",[117] including human rights abusers, was inferable from the text of the Statute. The minority opinion appears more hospitable to addressing corporate liability under the ATS but

[110] *Supra* note 12.
[111] *Kiobel v. Royal Dutch Petroleum Co.* 596 U.S. 1659 (2013). Kennedy, A. concurring.
[112] *Kiobel v. Royal Dutch Petroleum Co.* 596 U.S. 1659 (2013). Alito, A. concurring.
[113] *Kiobel v. Royal Dutch Petroleum Co.* 596 U.S. 1659 (2013). Breyer, S. concurring.
[114] *Id.*
[115] *Supra* note 12 at 1669.
[116] *Supra* note 112 & *Supra* note 113.
[117] *Supra* note 113 at 1674.

does not directly engage with this question either. The *Kiobel* decision affirmed the Second Circuit Court's decision but did not explicitly endorse or refute its legal reasoning. By raising the presumption against the extraterritoriality *sua sponte*, the Supreme Court decided *Kiobel* without directly confronting the thorny question of corporate liability.

B. Legal Inconsistencies

B. 1. Misuse of *Sua Sponte*

The Supreme Court's decision to raise a separate legal issue *sua sponte* is not without precedent, and this thesis does not propose to argue the parameters under which the Court should exercise this right. The Supreme Court's rules provide leeway for it to choose which cases are heard and which arguments are addressed.[118] Vestall explains "[T]he general rule is that litigants control the factual milieu of the controversy, [but] there are expectations and occasionally the appellate courts can and will go beyond the record presented."[119] The practice allows appellate courts to clarify the specific issues raised by parties. However, argument discretion can enable politically unaccountable appellate courts to determine policy. This concern led scholars to urge courts to only raise issues *sua sponte* in cases where the court would be otherwise equally divided or to remedy a legal error in a previous cases' judgment.[120] From the beginning, the Supreme Court justices' line of questions in the initial *Kiobel* hearing indicated they did not believe the ATS should create jurisdiction in this case. Subsequently, they seized on an argument presented in an *amici curiae* brief delivered in support of the defendant.[121] The argument in the brief centered on the presumption against extraterritoriality, which the majority adopted as the applicable law. The Supreme Court's choice to raise extraterritoriality *sua sponte* determined the trajectory of arguments in a highly political decision and relied on an argument presented in an *amici curiae* brief, rather than the Second Circuit Court's decision. Understanding the political factors which influenced this decision, namely the motivations of the brief's six corporate authors and inner-Court politics is key to appreciating *Kiobel*'s impact on the rules governing ATS cases

[118] Sup. CT. R. 51.1 allows the Supreme Court to request a rehearing on a decided case if the Court is evenly divided or was reconstituted. The ability to request a rehiring after the completion of oral arguments but prior to rendering a decision is not explicitly stated.
[119] Allan Vestal, *Sua Sponte Consideration in Appellate Review*, 27 Ford. L. Rev. 477, 512 (1954).
[120] Rosemary Krimble, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policy-Making* 65 Chi.-Kent L. Rev. 919, 946 (1999).
[121] Paul Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions* 52 Colum. J. Trnsnat'l. L. 28, 52 (2013).

B.2. Relation to Second Circuit Court's Decision

The manner in which the Court decided *Kiobel* left open whether the Second Circuit Court's initial decision created binding precedent. The Supreme Court's decision reached the same conclusion: the ATS did not establish jurisdiction for the *Kiobel* case. However, its legal reasoning addressed the presumption against extraterritoriality as opposed to the corporate liability for acts violating the law of nations. Therefore, lower courts struggled over whether to interpret the Supreme Court's *Kiobel* decision as endorsing or rebutting the Second Circuit Court's decision. Appellate decisions delivered by the Second Circuit Court and the Ninth Circuit Court after *Kiobel* indicated a split understanding on how the final judgment impacts corporate liability.[122] In *Licci v. Lebanese Canadian Bank*,[123] the Second Circuit Court affirmed the District Court for Southern New Jersey's decision to dismiss the case. It reasoned that "while imposing civil liability on individuals for torts that qualify under the ATS, [its decision in *Kiobel*] immunizes corporations from liability."[124] However, the Ninth Circuit Court held that the Supreme Court's *Kiobel* decision implicitly rebutted this approach in *Doe v. Nestle USA*.[125] It read the Supreme Court's edict that "mere corporate presence" in the U.S. fails to establish ATS jurisdiction as indicating corporations may be liable if their actions dispel the presumption against extraterritoriality. While the Supreme Court's judgment in *Jesner v. Arab Bank* rectified this divergence,[126] its previous decision not to directly engage the question of corporate liability in *Kiobel* caused confusion among lower courts.

C. Political Considerations

The manner in which the Supreme Court adjudicated the *Kiobel* case raises four distinct political issues not addressed in the judgment. First, the Court decided to raise extraterritorial jurisdiction *sua sponte*, succumbing to inner-court politics. Second, the Court does not address the political motivations of the corporations whose brief first raised the question of extraterritoriality. Six transnational corporations, Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, GlaxoSmithKline, and the Proctor & Gamble Company,

[122] Marco Basile, *Nine Months Later: Kiobel in the Lower Courts*, AJIL Unbound (2014).
[123] No. 15-1580 (2d. Cir. 2016).
[124] *Id* at 30.
[125] No. 10-56739 (9th. Cir. 2013).
[126] 584 U.S. __ (2018).

authored a brief supporting the defendant.[127] Most were previous or current defendants in ATS litigation, and they had considerable interest in preventing ATS suits encompassing breaches of the law of nations which occurred abroad. Third, by not discussing the Second Circuit Court's decision precluding corporate liability from the scope of the ATS, the Supreme Court created two procedural barriers for ATS plaintiffs without answering the question of corporate liability. Finally, this approach obscured the political questions associated with the Second Circuit Court's approach to *Kiobel*, namely the reliance on corporate liability trends in international criminal law as opposed to other regimes of international law. Together, these political choices altered the distribution of bargaining power between plaintiffs and defendants in ATS suits in favor of the corporate actors.

C.1. Decision to Hear *Sua Sponte* Argument

As discussed above, appellate courts are granted leeway to raise legal issues not initially presented by parties to a case. However, this is not intended to recast the judiciary as a legislative body with the ability to dictate policy. To ensure separation of powers, courts should not raise questions *sua sponte* to make policy decisions.[128] The Supreme Court has outlined a two-pronged test for when issues should be raised *sua sponte*: "where a proper resolution is beyond any doubt or where injustice may otherwise result."[129] The *Kiobel* case does not fulfill these criteria. While the Court agreed the defendants' conduct was too far removed from the United States to fall within the scope of the ATS, opinions differed as to the applicable law. The minority concurrence adopted a more case-by-case approach than the majority, which rejected the applicability of the presumption against extraterritoriality as the applicable law. The executive branch's *amicus curiae* brief cautioned against a sweeping limitation of ATS jurisdiction and supported the ATS' capacity for establishing jurisdiction over corporations in cases with stronger ties to the U.S.[130] There was not consensus that the presumption against extraterritoriality was the applicable law, which falls short of the "beyond any doubt" threshold the Supreme Court had

[127] Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, GlaxoSmithKline PLC, and the Procter & Gamble Company as Amici Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012).
[128] *Supra* note at 119.
[129] *Singleton v. Wuff*, 48 U.S. 106 (1978) at 121.
[130] David Sloss, *Kiobel and Extraterritoriality: A Rule without a Rational* 28 Md. J. Int'l. L. 241, 255 (2013).

previously outlined.[131] Furthermore, the argument raised *sua sponte* did not protect against injustice. The defendants provided the Court numerous grounds for dismissing the case, including the argument accepted by the Second Circuit Court.[132] During the initial hearing, the defendants' arguments focused on corporate liability, providing the Supreme Court with an opportunity to redress any potential injustice in the defendants' favor. The Court's decision to raise arguments *sua sponte* is questionable because there was not consensus that the presumption against extraterritoriality was the applicable law, and there were other lines of argument raised by the parties which could have been pursued.

One possible reason why the Court raised extraterritoriality *sua sponte* is inner-court politics.[133] In the *Sosa* case, Justice Kennedy joined the majority opinion which "brought the ATS into the twenty-first century",[134] and primarily focused on the content of the modern law of nations. His concurring opinion in *Kiobel* indicated that he conceptualized the scope of the ATS more broadly than other justices in the majority.[135] The extraterritoriality argument, which only included cursory mention of the law of nations, may have provided a line of argument which allowed Justice Kennedy to reconcile his approach with the rest of the majority.[136] However, the Court's decision in *Kiobel* did not engage with the reason it changed the legal issues at stake and leaves the door open for speculation as its intention. By raising the question of extraterritoriality *sua sponte*, the Court effectively altered the scope of the ATS in a manner that was not introduced by either party and arguably allowed the Court to act in a policy-making capacity.

[131] *Supra* at 129.

[132] Another potential line of argument presented during the first set of pleadings included an analogous reading of the Torture Victims Prevention Act.

[133] *Supra* note 118.

[134] *Id* at 40. He joined Justices Rehnquist, Stevens, O'Connor, Scalia, Souter, and Thomas in the majority opinion.

[135] *Supra* note 114.

[136] The Alito-Clarence concurrence indicates their narrower approach. *Supra* note 115.

Justice Scalia's concurrence in *Sosa*, which was joined by Justices Rehnquist and Thomas, advocated for a narrower reading of the ATS which would prevent federal courts from creating "new federal common law of international human rights." 542 U.S. 692 (2004). Scalia, A. concurring

C.2. Origins of the Extraterritoriality Argument

The second political consideration is the source of the presumption against extraterritoriality argument the Court raised *sua sponte*. As discussed above, the argument was submitted to the Court in an *amicus curiae* brief authored by six transnational corporations.[137] By their nature, *amici curiae* briefs reflect the interests of their authors. These six corporations had a vested interest in limiting the territorial scope of the ATS when authoring the brief in support of the defendants that raised the question of extraterritoriality.[138] The initial *amicus curiae* brief expressed concern that an expanded interpretation of the ATS scope would unduly impact U.S. corporations by creating a cause of action for human rights violations in foreign countries.[139] The reason for the corporations' concerns is readily apparent: most were current or former defendants in ATS litigation. At the time, Chevron had recently defended itself against an ATS suit in the United States District Court for Northern California for its conduct in Nigeria. The case's plaintiffs alleged Chevron aided and abetted the Nigerian government in violations of the law of nations with regards to equipment sold to Lagos. This equipment was then used by the Nigerian government to quell Ogoni dissent to the same resource extraction project as discussed in *Kiobel*.[140] Furthermore, Chevron is a transnational corporation with major investments in oil extraction projects in over 180 countries. This includes states with a history of human rights abuses and environmental damage after decades of resource extraction.

While the majority refers to Chevron as the brief's author, it is not the only one of the six corporations embroiled in ATS litigation.[141] ATS cases have been prepared against Ford Motor Company for aiding and abetting labor abuses in China.[142] Similar concerns have been raised regarding Proctor and Gamble, due to its extensive business ties with Chinese development projects.[143] Dole Food Corporation is among the fifty-seven companies charged hiring the United Self Defense Forces of Columbia (AUC), which the U.S. State Department listed as a terrorist

[137] *Supra* note 131.
[138] Pleadings record at 3.
[139] *Supra* note 127.
[140] *Bowtow et al. v. Chevron Corporation et al.* No. 09-15641 (9th Cir. 2010).
[141] *Supra* note 12.
[142] Gary Haufbauer & Nicholas Mitrokostas, AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789 (Institute for International Economics, eds. 2003).
[143] Joel Slawotsky, *Liability for Defective Chinese Products under the Alien Torts Claims Act*, 7 Wash. U. Glob. Stud. L. Rev. 519, 541 (2008).

organization, to quell labor protests and secure factories.[144] There is currently a case pending against Dole in California state court for hiring AUC militias for private security services which resulted in deaths and property destruction.[145] The final corporation involved in the brief was the Dow Chemical Company. In 2008, the Second Circuit Court upheld the dismissal of an ATS case filed against Dow for harm caused by the defoliant Agent Orange during the Vietnam War.[146] Chevron and its associates presented the Court with a liability line of argument that promoted their interests in two ways. First, it limited the vast majority of ATS cases, which address tortuous actions committed extraterritorially. Second, it limits cases without directly deciding whether the ATS establishes jurisdiction for corporate defendants.[147] The Court does not acknowledge the likelihood that Chevron and its co-authors' position is impacted by their desire for their actions abroad not to fall within the scope of the ATS. The benefits of the *Kiobel* decision for corporate defendants are readily apparent. Months after the *Kiobel* decision, the Eleventh Circuit Court dismissed an ATS case against Chiquita Brands International which alleged the U.S.-based corporation for providing financial support to AUC militias.[148] The *Kiobel* precedent immediately resulted in lower court decisions which dismissed cases against corporations for alleged violations of the law of nations occurring abroad.

C.3. Engagement with the Second Circuit Court's Decision

The subject matter of the Supreme Court's *Kiobel* decision differed significantly from the Second Circuit Court appellate decision. As discussed in the previous section, both courts dismissed *Kiobel* but differed in their rationale. The Supreme Court's approach, which centered on the presumption against extraterritoriality, is detailed in Chapters IV and V. The Second Circuit Court's decision focused on corporate liability in international law. It drew a sharp distinction between the principle of corporate liability for tortuous action under domestic law and under international law, stating that the existence of the domestic principle is insufficient to prove the existence of a norm in international law.[149] The Second Circuit Court's opinion relied heavily on international criminal law, beginning with the Nuremberg trials' emphasis on

[144] Adriaan Alsema, *Coco Cola Facing Terrorism Support Charges in Columbia*, Columbia Report (2016).
[145] *Mendoza Gomez et al. v. Dole Food Company, Inc*., CA2/5, B242400 (Cal. Ct. App. 2013)
[146] *Vietnamese Association for Victims of Agent Orange v. Dow Chemical Company*, 05-1953 (2d. Cir. 2008).
[147] Jens David Ohlin, THE ASSAULT ON INTERNATIONAL LAW (Oxford University Press, 2014).
[148] *Cardona, et al v. Chiquita, et al*. No. 12-14898 (11th Cir. 2014).
[149] *Supra* note at 51.

individual responsibility for certain human rights abuses.[150] They trace the individual responsibility approach through the development of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The opinion emphasized the debate over corporate criminal responsibility during the drafting of the Rome Statute of the International Criminal Court, which culminated in a decision to attribute criminal responsibility only to natural persons.[151] This approach raises two major questions about corporate liability that were not addressed by the U.S. Supreme Court and thus continue to create confusion and contradictory decisions across lower courts.

First, the Second Circuit Court's majority opinion approached the question of corporate liability through the lens of criminal responsibility. As discussed in Chapter II, the ATS is a statute providing federal courts with jurisdiction over tortuous actions between aliens. In that regard, it does not seek to attribute individual criminal responsibility or state responsibility for breaches of international law. The applicability of the international criminal law regime to the ATS was contested by scholars in the aftermath of that decision. Engle examines the difference between criminal responsibility and private liability in international law before assessing that the Second Circuit Court had applied the incorrect legal regime.[152] Other scholars argue that there is a general trend in the politics of international law, which has largely avoided determining the existence of a doctrine of corporate liability for breaches of IHRL.[153] Even within international criminal law, corporate liability is a more complex issue than the Second Circuit Court portrays it. While the Rome Statues and the statues of the ICTY and ICTR exclude corporate defendants, recent decisions by the Special Tribunal for Lebanon have expanded jurisdiction to corporate defendants.[154] The Second Circuit Court's selective examination of corporate liability in international law is left unchallenged by the Supreme Court in *Kiobel*.

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[150] Specific attention is paid to the cases involving the I.G. Farben corporation, which constructed and profited from Auschwitz. While 24 executives were charged with a variety of war crimes, the corporation itself was not listed as a defendant.

[151] *Supra* note 51.

[152] Eric Engle, *Kiobel v. Royal Dutch Petroleum Co.: Corporate Liability under the Alien Tort Statute*, 34 Hous. J. Int'l L. 499, 518 (2012).

[153] Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 Notre Dame L. Rev. 1671, 1694 (2013-2014).

[154] Nadia Bernaz, *Corporate Criminal Liability under International Law: The New TV S.A.L and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon* 13 J. Int'l. Crim. L. 313, 330 (2015) at 315-316. The Appeals Panel found jurisdiction for legal persons [in this case corporations] for the offense of defamation.

Second, the *Kiobel* decision illustrates how legal indeterminacy may operate in international law. As Kennedy and Koskenniemi discussed,[155] the fragmentation of international law gives rise to competing regimes and institutions. This provided the Second Circuit Court with considerable leeway to select the applicable law. As discussed above, ATS does not assign criminal responsibility to corporations or their executives. Rather, it questions whether corporations benefitted from the damage they cause or the damage caused by their partner organizations and subsidiaries. When viewed through this lens, there are other fields of law, such as international environmental law, better suited to answer the questions posed in *Kiobel*.[156] However, the Second Circuit Court's decision does not justify its choice to seek answers from the field of international criminal law. If the Supreme Court had explicitly vacated the Second Circuit Court's decision, this line of reasoning would have been ruled incorrect. Likewise, if the Supreme Court had confirmed the judgment, it would have provided additional information clarifying the choice of applicable law. Instead, the manner in which the Supreme Court decided *Kiobel* left this judgment in place as precedent, while not discussing the central issue it raised, leaving in place an additional barrier to plaintiffs seeking redress from corporations.

In *Jesner*,[157] the Supreme Court acknowledged that their decision in *Kiobel* had not addressed the question of corporate liability.

C.4. Procedural Barriers

The decision to raise extraterritoriality *sua sponte* and the lack of engagement with the Second Circuit Court's decision exemplifies both the indeterminacy of law and how this indeterminacy is used to further the interests of the powerful. In *Kiobel*, it serves to protect transnational corporations from financial liability for the human rights violations they encourage or commit. The manner in which the Supreme Court decided *Kiobel* highlights the indeterminacy of the legal form. The case brought before the Court addressed the question of corporate liability as CIL, however the Court's decision focused on a completely distinct legal question. This is possible because of the elasticity of law and the lack of a singular rule applicable for each decision. In Lee's categorization of ATS jurisprudence, the impact of judicial decisions on the

[155] *Supra* note 81 & 84.
[156] This question is further discussed in Chapter IV.
[157] *Supra* note 126.

scope of the ATS is apparent.[158] Since 1789, the text of the Statute itself has remained relatively consistent, but its applicability and viability has been altered by judicial decisions. These decisions primarily favored a cautious approach, thus limiting the number of plaintiffs who would receive redress from ATS cases. In 1990, Karen Holt questioned whether the *Filartiga* decision was as momentous as people initially asserted because with each judicial decision the scope of the ATS narrowed.[159] The viability of the ATS itself was questioned after the *Sosa* decision and again after *Kiobel*.[160] This reflects the narrowing of the ATS in a manner which "appears to favor corporate defendants over human rights victims".[161] Despite initial hopes that the *Kiobel* would at least apply to U.S.-based corporations,[162] lower courts read the decision in a way that further insulates corporate actors.

The manner in which the Supreme Court handled the indeterminacy in *Kiobel* impacts the distribution of power between corporations and human rights victims, usually peoples from the global South. The question in *Kiobel*, as in the majority of ATS cases, centers on establishing jurisdiction, not on the merits of the case itself. Robert Hale's work discusses *damnum absque injuria*, damage which is considered legally tolerable, and the invisible rules which control the allocation of power and resources.[163] The judicial decision on issues of jurisdiction in *Kiobel* effectively altered the previous of power allocation in favor of corporations. Subsequent decisions, relying on the Supreme Court and the Second Circuit Court's *Kiobel* precedent, have vacated prior settlements and dismissed current cases against foreign and American-based corporations and their executives. Because the Supreme Court failed to address the Second Circuit Court's decision, cases were vacated or dismissed if the violation of the law of nations was extraterritorial (discussed further in Chapter IV), and if the defendant is a corporation (discussed further in Chapter V). In both cases, the injuries inflicted on the plaintiffs by international corporations are *damnum absque injuria*: tolerated, if only because there is no

[158] *Supra* note 69.
[159] *Supra* note 29.
[160] *See, e.g.* James Boeving *Half-full…Or Completely Empty?: Environmental Alien Torts Claims Post Sosa v. Alvarez-Machain* 18 Geo. Envt. L. Rev. 109, 148 (2005); Steven Schneebaum, *The Paquete Habana Sails On: International Law in U.S. Courts after Sosa*, 19 Emory Int'l L. Rev. 81, 102, (2005) at 96 [The author ultimately concludes that the ATS survived *Sosa* but presents an overview of the counter-narrative] & Joseph Rome, *RIP ATS? How Much of the Alien Tort Statute Survives the Supreme Court's Decision in Kiobel?* N.Y.U. J. Int'l. L & Pol. (2013).
[161] Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy* 107 AJIL 829, 834 (2013) at 829.
[162] *Id.*
[163] *Supra* note at 75.

forum for redress. Rather than serve as a potential avenue for peoples in the global South whose human rights are violated by corporations to obtain compensation, the *Kiobel* decision created additional procedural barriers for prospective plaintiffs. As described by Judge Leval of the Second Circuit Court in his concurring opinion in *Kiobel*, it "leaves corporations immune from suit and free to retain profits earned" through acts of genocide, slavery, war crimes, and torture.[164] Equally troubling, the Court does so without acknowledging the political stakes involved, engaging with them, and taking responsibility for the consequences of their decision.

In this Chapter, I provide an overview of the process whereby the Supreme Court came to decide *Kiobel* based on the presumption against extraterritoriality it raised *sua sponte*. An *amicus curiae* brief submitted by six transnational corporations encouraged the Court to limit the scope of the ATS in order to insulate corporations from litigation. The Court then made the decision to deviate from the normal course of arguments and pursue *sua sponte* the question of extraterritoriality mentioned in the corporate brief. In the *Kiobel* decision, the Court did not explicitly state whether the Second Circuit Court's decision that the ATS did not establish jurisdiction for corporate actors is binding precedent, leading to differing interpretations across appellate courts. Effectively, *Kiobel* erected two hurdles for ATS plaintiffs, while obscuring the political stakes of the decision. The next Chapter analyzes the Court's justification for narrowing ATS jurisdiction for extraterritorial human rights violations.

[164] *Kiobel v. Royal Dutch Petroleum*, 621 F. 3d 111 (2d. Cir. 2010). Leval J., concurring opinion.

IV. Presumption against Extraterritoriality

On March 5, 2012, the U.S. Supreme Court requested the parties to *Kiobel* submit supplementary briefs on the presumption against extraterritoriality. Parties argued about whether and when courts can recognize a cause of action for a violation of the law of nations that occurred wholly in the territory of another sovereign state.[165] The doctrine of presumption against extraterritoriality limits the applicability of U.S. law to acts occurring abroad. The majority opinion relied entirely on this doctrine and stated that nothing in the text or history of the ATS rebutted this presumption.[166] The Alito-Thomas concurring opinion[167] and the Kennedy[168] concurring opinion agreed with the majority's argument but differed on whether the presumption could be dispelled.[169] The minority opinion[170] reached the same conclusion as the majority and held that the ATS did not establish jurisdiction in *Kiobel*. However, it did not view the presumption against extraterritoriality as the applicable law. The minority approached the question through the lens of foreign policy and advanced a seemingly broader view of the ATS than the majority. However, it also limited the applicability of the ATS for violations of the law of nations which occur outside of U.S. territory.

In Section A, I present the Court's analysis of the doctrine of presumption against extraterritorial application of domestic law. First, I discuss the majority opinion and draw on the tensions between the Alito-Thomas and Kennedy concurrences in Subsection A.1. Then I describe the differing line of argument put forth by the minority in Subsection A.2. In Section B, I examine the legal inconsistencies in the majority opinion, chiefly an understanding of the crime of piracy which is at odds with the *Sosa* precedent and U.S. foreign policy interests. In Section C, I argue that domestic and international political considerations gave rise to the legal inconsistencies. This in turn has altered the balance of power in favor of ATS defendants, particularly corporations.

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[165] *Order in Pending Case*, 565 U.S. (2012).
[166] *Supra* note 12.
[167] *Supra* note 112.
[168] *Supra* note 111.
[169] I will discuss the thresholds they propose in Chapter V.
[170] *Supra* note 113.

A. Content of the Court's Decision

A.1. Majority Opinion

The majority opinion, authored by Justice Roberts and joined by Justices Kennedy, Alito, Thomas, and Scalia, outlined the canon on statutory interpretation on the presumption against extraterritorial application of domestic law. This doctrine is derived from prior judicial decisions. It is typically invoked when deciding whether an Act of Congress continues to govern conduct abroad.[171] In *Morrison v. National Bank of Australia*, the Supreme Court defined the presumption against extraterritoriality, stating that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[172] The Court has outlined the tripartite purpose of the presumption against extraterritoriality. First, it minimizes the number of cases decided by U.S. courts that have overarching implication on foreign policy, as foreign policy is the executive branch's purview.[173] Second, it prevents U.S. domestic laws from conflicting with other states' laws and potentially creating international disputes.[174] Third, it reflects the "presumption that United States law governs domestically but does not rule the world."[175] Traditionally, the doctrine of presumption against extraterritoriality was invoked in cases concerning the conduct of U.S. nationals or corporations abroad. However, in *Kiobel* the Court considered the principles underlying the doctrine applicable despite the jurisdictional nature of the ATS. Though the ATS does not create an independent cause of action, it carries significant foreign policy implications.[176] Thus, the majority opinion treated the ATS as analogous with Acts of Congress

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[171] *Supra* note 12.

[172] 561 U.S. at 247 (2010) at 253.

[173] *Benz v. Compania Naviera Hidalgo*, S.A., 353 U.S. 138, 147 (1957). The Supreme Court found that the Labor Management Act of 1947 did not apply outside U.S. territorial waters.

[174] *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248 (1991). Finding that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially to regulate the employment practices of U.S. corporations employing U.S. workers abroad.

[175] *Microsoft Corp. v. At&T Corp.,* 550 U.S.437 (2007). The Court decided United States patent law, specifically Section 27(f) of the Patent Act of 1984 does not apply extraterritorially. Changing economic practices may propel further development on software distribution, but this falls within the purview of the legislature.

[176] The executive branch's responsibility for foreign affairs was the subject of numerous cases before the Supreme Court. The most notable are" *Haig v. Agee* 453 U.S. 280 (1981) & *Department of Navy v. Egan* 484 U.S. 518 (1980). For further discussion *See, Introduction* to THE CONSTITUTION AND THE CONDUCT OF U.S FOREIGN POLICY (David Adler & Larry Georges eds., 1996) at 1, 6 & H. Jefferson Powell, *The President's Authority over Foreign Affairs* 67 Geo. Wash. L. Rev. 527, 576 (1999).

which, when applied abroad, may impact foreign policy.[177] In this manner, the majority established the relevance of the doctrine of presumption against extraterritoriality.

Having justified the presumption against extraterritoriality, the majority then countered the plaintiff's claims that the "text, history, and purpose of the ATS" rebut the presumption against extraterritoriality.[178] They addressed each issue in turn. Textually, the majority focused two points related to the drafters' word choice. First, they discussed the phrase "any civil action" and whether it implies acceptance of torts committed abroad.[179] However, they cite previous decisions,[180] which found the use of such generic terms fails to dispel the presumption against extraterritoriality. Second, they examined the drafters' choice of the term "tort", and its relationship to the common law doctrine of transitory torts. The majority spent little time addressing this question because they dismissed the doctrine of transitory torts as irrelevant to the question raised in *Kiobel*.[181] For them, the question of the character of a tort is immaterial to establishing jurisdiction under the ATS because it is solely a jurisdictional statute. The majority did not reconcile the inconsistencies in its legal reasoning. First, it applied the presumption against extraterritoriality to the ATS despite its jurisdictional nature because it bore enough similarities to a statute creating a cause of action. In the next section of the decision, the majority dismissed the applicability of the transitory torts doctrine because a transitory tort would create a cause of action. This reasoning is internally incoherent but allowed the majority to dismiss the doctrine of transitory torts with just a cursory examination.

The majority's analysis of the history and purpose of the ATS was more extensive and intertwined the two concepts. Drawing on the historical survey of late eighteenth century international law chronicled in the *Sosa* decision,[182] they elucidate three principal offenses constituting violations of the law of nations at the time: violations of safe conduct, assault on the person of ambassadors, and piracy. These violations were first identified in the *Blackstone*

[177] *Supra* note 12.
[178] *Id* at 1666.
[179] *Supra* note 5.
[180] *Supra* note 12. The Court cites its decisions in *Small v. United States*, 544 U. S. 385, 388 (2005) & *Foley Bros., Inc. v. Filardo*, 336 U. S. 281, 287 (1949) at 1666.
[181] *Id*
[182] *Supra* note 30 at 723, 724. The content of law of nations will be discussed further in Chapter V.

Commentaries[183] and subsequently relied upon in both *Kiobel*[184] and *Sosa*.[185] The opinion states that violations of safe conduct and the assault on the person of ambassadors are, by their nature, offenses which can only occur domestically. It notes the 1784 attack on the French Minister Plenipotentiary and the 1787 incurrence into the home of the Dutch Ambassador as the impetus behind the drafting of the ATS.[186] They linked the combination of historic events contemporaneous to the drafting of the ATS and the first two violations of the law of nations in the eighteenth century, finding extraterritorial application unnecessary for enforcement.

The third violation of the law of nations identified by Blackstone,[187] piracy, was more challenging for the majority. They conceded that piracy primarily occurred on the high seas, an area traditionally considered by courts to be outside U.S. territory. The presumption against the extraterritorial application of U.S. laws on the high seas was a factor in a previous ATS case, *Argentine Republic v. Amerada Hess Shipping*. In that case, the Supreme Court found a provision of the Foreign Sovereign Immunities Act inapplicable because the action in question occurred on the high seas.[188] However, the *Kiobel* majority proposed that crimes of piracy constituted a "cause unto themselves" for two reasons.[189] First, pirates operate outside the territory of and without any sovereign's consent. This minimizes the risk of foreign policy consequences.[190] Second, Blackstone made a similar comment, albeit in a different context. He claimed pirates "were fair game … a category unto themselves",[191] and thus subject to the jurisdiction of any state which captured them. While Blackstone's statement appears to support extraterritorial jurisdiction for the crime of piracy, the *Kiobel* majority uses the statement to support the idea that an undefined, specialized regime governed the crime of piracy. The majority held that the ATS' applicability to the crime of piracy represents a legal anomaly insufficient to rebut the doctrine of the presumption against extraterritoriality.

[183] 4 W. Blackstone. COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).
[184] *Supra* note 12 at 1667.
[185] *Supra* note 30 at 715.
[186] *Supra* note 12 at 1667.
[187] *Supra* note 181.
[188] *Supra* note 28.
[189] *Supra* note 12 at 1668.
[190] *Id*.
[191] *Id* at 1678.

The final element of the majority opinion addressed the intentions of the ATS drafters, and the legal question which gave rise to disagreement within the majority. The majority agreed that the drafters of the Judiciary Act of 1789 did not intend to make the U.S. uniquely hospitable to the enforcement of international law.[192] The ATS was likely included to provide federal jurisdiction in light of the previous injury to foreign ambassadors rather than with an intention to provide oversight over international norms for two reasons. First, the opinion noted the relative weakness of the U.S. in the late eighteenth century. The U.S. would have lacked the military or diplomatic power to enforce international norms or have its international laws penetrate the territory of other sovereigns. The majority further relies on an 1822 Massachusetts court judgment, which explicitly states that the U.S. did not intend to become uniquely hospitable for adjudicating international norms.[193] The Alito and Thomas concurrence,[194] and the Kennedy concurrence,[195] depict the range of views within the majority opinion. Both rely on the presumption against extraterritoriality, but the latter questions whether this presumption is absolute. Kennedy concedes that certain extraterritorial cases may fall within the scope of the ATS, leaving the door open for potentially broader interpretations in the future.

A.2. Minority Opinion

The concurring minority opinion, which was authored by Justice Breyer and joined by Justices Ginsberg, Sotomayor, and Kagan, agreed with the majority's conclusion but not their reasoning. The minority did not find the presumption against the extraterritoriality applicable to the ATS. They endorsed an approach that draws heavily on foreign relations law and outlined three categories of cases which should fall under ATS jurisdiction: when the alleged tort occurred on U.S. territory, when the defendant is a U.S. national, or when the "defendant's conduct substantially and adversely affects an important American national interest."[196] The opinion highlights that one important national interest is ensuring the U.S. does not provide safe refuge for the "common enemy of mankind."[197] It proposes a wider of reading of the ATS's scope than

[192] *Id.*
[193] *Supra* note 12 at 1668. The full quote reads: "No nation has ever yet pretended to be the *custos morum* of the whole world." The Court cites *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (CC. Mass. 1822).
[194] *Supra* note 112.
[195] *Supra* note 111.
[196] *Supra* note 113 at 1684.
[197] *Id* at 1685.

the majority, clearly envisioning some extraterritorial applicability but certainly not envisioning universal jurisdiction. In *Kiobel*, they agreed that the link between RDPC and STTC and the U.S. was too tenuous to substantially and adversely impact U.S. interests.

The minority contested the majority's decision to impose the presumption against extraterritoriality on the ATS, which they found to be at odds with the Court's previous decision in *Sosa*. Central to that decision was the definition of the ATS as jurisdictional in nature, establishing a mechanism for obtaining permanent redress for violations of a finite number of international norms.[198] Since the presumption against extraterritoriality applies to actions occurring abroad, not questions of jurisdiction, the minority rejected it as the applicable law governing the ATS. The minority noted the majority's awkward attempt to situate their decision with the crime of piracy. Both opinions acknowledged piracy was considered a breach of the law of nations when the ATS was drafted.[199] While the majority emphasizes that the crime of piracy occurs on high seas, it ignores the reality that the actual criminal actions committed by pirates, be it murder or robbery, occur on board the ships they seek to claim. The minority focuses on the well-established principle of international maritime law that a ship falls within the jurisdiction of the state whose flag it flies.[200] Thus, they held that the ATS was enacted in reaction to the existence of both domestic and extraterritorial crimes that give rise to tortuous injury. After establishing the drafters intended the ATS to apply extraterritorially, the minority focuses on the necessary link between the alleged tortuous action and U.S. interests. I discuss their proposed threshold in Chapter V.

B. Legal Inconsistencies

The *Kiobel* decision contained a number of legal inconsistencies, which are most evident in the majority opinion. The minority drew attention to some of these inconsistencies, particularly regarding the majority's inability to reconcile its decision with historic maritime law or previous ATS precedent. In Subsection B.1, I focus on the majority's definition of piracy, which is at odds with the international norm and domestic precedent. In the Subsection B.2, I discuss how the majority's reliance on the presumption against extraterritoriality relies on a specific

[198] *Supra* note 30.
[199] *Supra* note 12 at 1667 & *Supra* note 115 at 1672.
[200] *Supra* note 15 at 1673.

understanding of "U.S. interests" and ignores how lower courts had grappled weighed competing U.S. interests in decades-worth of ATS jurisprudence. However, the majority does not explicitly overturn these cases, leaving it the responsibility of lower courts to balance this contraction. Legally, the *Kiobel* approach raises more questions than it answers.

B.1. Piracy and the Law of Nations

The *Kiobel* majority supported their decision to apply the presumption against extraterritoriality to the ATS despite its jurisdictional nature. They did so by claiming that the three eighteenth century violations law of nations envisioned by the drafters of the ATS were not extraterritorial. As a result, they reasoned that drafters intended the ATS to only establish jurisdiction for tortuous acts committed in the U.S. However, this contradicts the Court's own previous decision in *Sosa*,[201] which interpreted the ATS as establishing redress for victims of piracy. Defining the content of the law of nations as applicable to the ATS was a central tenant of the *Sosa* decision. Before *Sosa*, there was considerable academic debate on the applicability of CIL as a source of law federal common law and the process for ascertaining the existence of such CIL.[202] The *Sosa* majority held that the ATS drafters intended the Statute apply to a narrow range of actions akin to violations of the eighteenth-century law of nations.[203] Both the Blackstone commentaries and the *Sosa* decision held that piracy was considered a violation of the law of nations when the ATS was drafted,[204] which implies an extraterritorial intent for the Statute. The majority focused on the fact that piracy occurred on the high seas as opposed to within the territory of another sovereign. As the minority noted,[205] this approached ignored that the actual crimes committed by the pirates occurred aboard ships, which operate under the jurisdiction of the sovereign whose flag they fly. Thus the crime of piracy occurs within the territory of another sovereign, not on the high seas.

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[201] Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Act* 107 AJIL 13, 26 (2013).
[202] *See*, *Supra* note 34, Ralph Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez Machain and the Future of International Human Rights Claims in U.S. Court* 57 Vand. L. Rev. 2241, 2261 (2004); John Bellinger III, *Enforcing Human Rights in the U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 Vand. J. Transnat'l. L. 1, 14 (2010).
[203] *Supra* note 181 & *Supra* note 30 at 722.
[204] *Supra* note 17
[205] *Supra* note 113 at 1673.

The principle attributing a vessel's nationality to the flag-state is a well-defined norm of international law and was affirmed by the Permanent Court of International Justice in the *Lotus* case. The Court stated that "a ship on the high seas is assimilated to the territory of the State the flag of which it flies."[206] This principle is codified in Article 92 of the United Nations Convention on the Law of the Sea,[207] and the Supreme Court considers this Article part of CIL.[208] This principle was also the subject of numerous domestic court cases cited by the minority.[209] For example, in the early nineteenth century, the Supreme Court stated that a crime committed within the jurisdiction of a state and a crime committed onboard a state's vessel were of the same nature.[210] Thus foreign policy considerations and the domestic legislation of other sovereigns impacts piracy despite the majority's assertion otherwise. The majority's failure to discuss the nature of piracy as occurring in another sovereign's territorial jurisdiction undercuts their claims that the ATS drafters intended to confer jurisdiction solely for domestic acts.

B.2. Understanding of U.S. Foreign Policy

The *Kiobel* decision also selectively discussed the foreign policy considerations associated with ATS jurisdiction. This factors into all four concurring opinions but is particularly central to the majority opinion, which begins with a selective reiteration of a particular narrative of U.S. history. The majority viewed the U.S. in the eighteenth century as lacking the power to enforce international law norms abroad.[211] They assumed Congress would have enacted legislation more specific than the ATS if Congress intended the Statute apply extraterritorially.[212] The *Kiobel* majority repeatedly states that the Court should not infringe on the congressional and executive branches' purview, yet it proceeds to claim it speaks on behalf of the eighteenth century Congress. This inconsistency is not addressed in the decision, but the majority's choice to adopt

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[206] *Lotus case [France v. Turkey]* (1927) P.C.I.J. Ser. A. No. 10 at 25.
[207] Convention on the Law of the Sea, Dec. 10 1982, 18333 U.N.T.S. 397 (entered into force on Nov. 1 1994). The United States signed but not ratified the 1994 Agreement relating to the implementation of Part IV of the United Nations Convention on the Law of the Sea (1996). It is not party to the treaty itself due to persistent objections to Part IV. However, Article 92 is nearly identical to Article 6 of the Geneva Convention on the High Seas, which the U.S. has signed and ratified.
[208] Clive Schofield and Ian Townsend-Gault, *Time for the United States to Join the Party? Prospects for US Ratification of the United Nations Convention on the Law of the Sea* 8 International Zeitschrift 1,6 (2012).
[209] *Supra* note 115.
[210] *United States v. Furlong*, 5 Wheat. 184, 197 (1820) as cited at *Supra* note 115 at 1673.
[211] *Supra* note 12 at 1669.
[212] *Id.*

this historic line of reasoning is a political choice. The *Sosa* majority held that the ATS was not enacted with the intent that subsequent legislatures needed to enact more specific legislation. It was created with practical effect in mind.[213] This contradicts the majority's assertion that Congress would have needed to enact more specific legislation to cover torts committed abroad. Another narrative claims that, as a relatively weak nation, the U.S. would have placed additional emphasis on compliance with international norms, particularly the prohibition of piracy, to protect itself from more powerful nations.[214] There is a considerable body of evidence that the ATS was drafted primarily to address international concerns not domestic considerations.[215] The minority found evidence the ATS drafters intended the statute to have a certain degree of extraterritorial reach,[216] thus casting some doubt on the majority's assumptions. It is possible, if not probable, that the drafters of the ATS intended the Statute to have considerable extraterritorial reach, as they hoped to provide financial recourse for violations of international law, rather than extraterritorial enforcement. Again, the majority presents as fact what is really a selective and disputed history of the ATS and the intent of its drafters.

The majority invokes the presumption against extraterritoriality on the grounds that it protects against unjust judicial interference in foreign affairs.[217] This fails to address how lower courts had previously balanced foreign policy considerations in their decisions. Since *Filartiga*, courts have weighed U.S. foreign policy interests as articulated by the executive branch and other states' interests through the "political questions doctrine".[218] In *Sosa*, the majority advocated for weighing on a case-by-case basis foreign policy concerns when a case is brought under the ATS. It did not bar courts from hearing politically contentious cases.[219] For example, lower courts have dismissed cases involving corporate support for Israeli occupation of Palestine because of the foreign policy implications.[220] The Second Circuit Court also dismissed the ATS case against

[213] *Supra* note 30 at 719.
[214] Jay Stewart, *The Status of Law of Nations in Early American Law* 42. Vand. L. Rev. 819, 839 (1989).
[215] *Supra* note 129.
[216] *Supra* note 113 at 1672.
[217] *Supra* note 12 at 1665.
[218] As defined by the Supreme Court, the political question doctrine compels U.S. courts to exercise caution when deciding a case with foreign policy implications, as that is the purview of the Executive and Legislative branches of government. *Supra* note 12 & *Supra* note 30.
[219] *Supra* note 30 at 728.
[220]Barbara Harlow, *My Name Is Caterpillar: Corrie et al. v. Caterpillar Inc.* 37 Biography 225, 245 (2014).

Dow Chemical for producing Agent Orange under the political questions doctrine.[221] Prior to *Kiobel*, courts assessed the foreign policy ramifications of ATS jurisprudence on a case-by-case basis. One manner in which courts balanced foreign policy considerations is considering the *amici curiae* briefs submitted by defendants' governments. The Second Circuit Court's decision in *Balintulo*[222] focused on the South African government's position. In the initial stages of the case, South Africa submitted an *amicus curiae* brief opposing the plaintiff's case, because it could impede the domestic reconciliation process and destabilize U.S.-South African relations. However, South Africa officially changed its stance in 2013, triggering judicial reconsideration largely because the foreign policy considerations had changed. While extraterritorial actions may create friction between the U.S. judicial and executive branches or between the U.S. and defendants' states, a blanket ban on such cases is unnecessary to respect the separation of powers because it is possible to weigh these considerations on a case-by-case basis.

There is also related concern that the international community viewed the ATS with suspicion,[223] particularly in light of the U.S. aversion to other extraterritorial judicial mechanisms, such as the International Criminal Court. However, this is not always the case. As discussed above, the South African government considered the U.S. federal court system an appropriate forum for civil redress. The *amici curiae* briefs submitted by the U.K. and Dutch governments did not call into question the validity of the ATS, its extraterritorial applicability, or the possibility of corporate liability under the ATS. In their view, the *Kiobel* defendants simply lacked sufficient ties to the U.S. and the case could better be pursued through domestic legal channels. They believed the ATS should create jurisdiction for other extraterritorial cases, provided there was a closer link between the defendant and the U.S.[224] Though the majority in *Kiobel* presents the foreign policy consequences of ATS litigation as central to invoking the presumption against extraterritoriality, the majority does not acknowledge that courts have weighed these consequences against the need to redress IHRL violations for decades. The majority neglects to justify this switch from a case-by-case balancing of foreign policy considerations to a blanket ban against extraterritoriality.

[221] *Supra* note 149.
[222] *Balintulo v. Daimler* 727 F. 3d. 174 (2013).
[223] *Supra* note 198 at 9, 10.
[224] *Supra* note 104.

C. Political Considerations

In this Section I argue that the Supreme Court's decision in *Kiobel* failed to engage with the political questions surrounding the case and the ramifications of its decision. In Subsection C.1, I discuss the domestic politics associated with the presumption against extraterritoriality and the interests privileged by the Court's decision. In Subsection C.2., I analyze extraterritoriality in international law and how various regimes of international law attempt to address the question. Despite the Court's failure to explicitly acknowledge these political considerations, I argue *Kiobel* is best understood as part of a trend within international law to immunize corporations from legal accountability for breaches IHRL and environmental law they perpetrate or encourage. This, in turn, reflects a conscious decision to privilege capital at the expense of human rights.

C.1. Domestic Politics of Extraterritoriality

The question of extraterritoriality is central both to establishing the parameters of the ATS and to adjudicating violations of IHRL at the state level. Regarding the parameters of the ATS, there is concern that adjudicating human rights through the U.S court system impinges on other country's sovereignty, particularly those in the global South.[225] Another concern is whether the ATS represents an unconstitutional judicial overreach that endangers U.S. foreign policy.[226] This school of thought argues that it is Congress or the executive branch, not a court, which should decide the content of the "law of nations", given its political sensitivities and impact on U.S. foreign policy. These debates are alluded to by the Supreme Court's decision in *Kiobel* but are not directly discussed by a Court, which assumes as given the need for a narrow scope for litigation under the ATS.

The majority does not concern itself with impinging on the sovereignty of other states. As it stands now, the ATS neither creates unlimited jurisdiction, nor does it offer redress for all imaginable IHRL breaches perpetrated anywhere. Jurisprudence trends towards severely limiting

[225] *Supra* note 10 & *Supra* note 91.
[226] *Supra* note 91; *See, e.g.* Donald Kochan, *No Longer Little Known but a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 Chap. L. Rev. 103, 134 (2005).

the cases which fall under the ATS, not toward expanding jurisdiction.[227] However, the majority briefly mentions concerns that other states will enact legislation similar to the ATS and "hale [sic] our [U.S.] citizens into their courts for alleged violations of the law of nations occurring in the United States or anywhere else in the world."[228] Underlying this statement is the assumption that such a sequence of events would be a negative trend in international law. Relying on this assumption, the Court ignores the counterargument that expanding the scope of the ATS, and indeed other countries enacting similar legislation, could ameliorate one of the chief criticisms of IHRL. As previously discussed, TWAIL scholars have criticized IHRL when confined only to allegations against those in the global South,[229] ignoring violations by those in the North. In *Kiobel*, the plaintiffs did not seek redress from the Nigerian government or those employed by the state to quell descent in Ogoniland. Instead, they brought a case against the corporations which profited, directly or indirectly, from the IHRL violations committed by the Nigerian state; and whose corporate interests necessitated the violations.[230]

This approach could reorient the IHRL discourse towards multinational corporations and shareholders whose create wealth through the suffering of others and destruction of the natural environment, beginning with opening the U.S. federal court system to cases against corporations. If other states followed suit, there would be increased adherence to IHRL, because corporate executives would fear being hauled into a foreign court and the financial risks. In any case, the Court's assumption that limiting ATS jurisprudence will prevent other states from enacting similar legislation does not follow. More importantly, absent from the decision is a fuller discussion or assessment of what constitutes U.S. interests. While multinational corporations may support this approach,[231] it does not follow that it is in the best interests of the U.S., and other viewpoints including the importance of protecting human rights, also merit consideration.

[227] This concern's validity decreased at the start of the 21st century. However, the case law since then indicates courts are attempting to limit jurisdiction under ATS, rather than expand it.
[228] *Supra* note 12 at 1669.
[229] *Supra* note 86 & 89.
[230] *Supra* note 51.
[231] *Supra* note 126.

C.2. International Politics of Extraterritoriality

At the international level, the question of extraterritorial jurisdiction remains contested. The majority opinion in *Kiobel* asserted that no country has tried to act as *custos morum*, the world's morality police.[232] This approach ignores developments in international criminal law, international environmental law, and private international law which embrace certain forms of extraterritoriality. The minority opinion in *Kiobel* discusses extraterritoriality in international criminal law,[233] while scholars have developed other lines of argument focused on environmental and private international law. The fragmentation and indeterminacy of international law allows the *Kiobel* majority to selectively engage with extraterritoriality. This in turn allows the majority to categorically assert that the ATS could not have intended to establish extraterritorial jurisdiction without a thorough discussion of international law.

The minority opinion challenged the majority's understanding of extraterritoriality with regards to IHRL and international criminal law.[234] Where the majority found historic and contemporary international consensus opposing extraterritorial jurisdiction, the minority opinion approached the situation differently. Beginning with piracy in the eighteenth century, states have acknowledged that certain acts are so heinous, their perpetrators are viewed as the common enemy of mankind. Historically, states were under an obligation not to provide safe harbor to these *hostis humani generis* and prosecute their crimes.[235] The minority opinion cites *Filartiga* and *Sosa* as precedent while arguing that certain IHRL violators,[236] such as the torturer, the committer of genocide, and the slave trader, are the modern equivalent of the pirate. In their brief survey of extraterritoriality in treaty and in international practice, the minority supports their assertion that extraterritorial jurisdiction for certain IHRL violations was commonplace. The opinion noted that the U.S. had signed and ratified many international conventions that included the obligation to find and prosecute perpetrators of serious crimes.[237] When examining state

[232] *Supra* note 12 at 1668.
[233] *Supra* note 113 at 1676.
[234] *Id*.
[235] *Id.* The Court cites the *Blackstone Commentaries*. *Supra* note 179 at 71.
[236] *Supra* note 2 at 890 & *Supra* note 30 at 724-725.
[237] The Court cites Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 (ratified by the U.S. in 1975); Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation of 1973 (ratified by the U.S. in 1973); Convention for the Suppression of Unlawful Seizure of Aircrafts of 1970 (ratified by the U.S. in 1971); International Convention for the

practice, the minority observed that a growing number of countries established "universal" jurisdiction for perpetrators of genocide or agents of torture,[238] including imposing civil awards during criminal proceedings.

The minority approach is consistent with more comprehensive studies on universal criminal jurisdiction. In a 2012 survey of universal jurisdiction and domestic legislation, Amnesty International found that 147 countries had enacted some form of legislation to create universal jurisdiction for war crimes or crimes against humanity.[239] While the ATS, as a jurisdictional civil law statute, does not seek to impose criminal responsibility, its defendants stand accused of the same violations of IHRL. By enacting the TVPA, the U.S. Congress acknowledged that redress for torture victims and descendants of victims of extrajudicial killings should be available even in cases where the acts were committed extraterritorially between aliens.[240] It follows that the ATS could provide a similar redress for other violations of IHRL with a similar character, including those which would give rise to universal criminal jurisdiction. The *Kiobel* minority examined the regimes of IHRL and international criminal law and observed the existence of certain extraterritorial jurisdictional norms not addressed by the majority.

Neither opinion glances beyond the field of IHRL to other fields of international laws' engagement with extraterritorial jurisdiction. In many ways, this reflects the false divide between the fields of and within branches international law discussed in Kennedy's work.[241] One potentially relevant regime left undiscussed is international environmental law. There have been numerous attempts to bring cases involving environmental damage under the ATS,[242] although none have been successful. The *Kiobel* plaintiffs initially argued the destruction of their

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Protection of All Persons from Forced Disappearance of 2006 (the U.S. has neither signed nor ratified this treaty); Convention against Torture and Other Cruel and Inhuman Treatment of Punishment of 1984 (ratified by the U.S. in 1994).

[238] *Supra* note 115 at 1668. The opinion draws attention to the *amici curiae* brief submitted by the British and Dutch governments which expressed their acceptance of U.S. jurisdiction in certain ATS cases but explaining their concerns about *Kiobel*.

[239] Amnesty Int'l. UNIVERSAL JURSIDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD (2012) at 15.

[240] 106 Stat. 73 (1991).

[241] *Supra* note 84.

[242] For an incomplete list *See, Amlon Metals, Inc. v. FMC Corp.* 775 F. Supp. 668 (S.D.N.Y 1991) [regarding Amlon's shipping of hazardous waste to the U.K.]; *Beanal v. Freeport-McMoran, Inc.*969 F. Supp. 362 (E.D. La. 1997) [concerning allegations of cultural genocide and environmental damages perpetrated by the defendant in Indonesia]; & *Flores v. Southern Peru Copper Corp.* 253 F. Supp. 2d. 510, 514 (S.D.N.Y. 2002) [concerning pollution caused by the defendant's copper mine in Peru].

environment violated their right to life, but the District Court found the right to life lacked the specificity required of CIL and dismissed the charge.[243] However, liability for transnational pollution is an already established principle of international law.[244] The principle that the polluter pays for damage meets the "specific, universal, and obligatory" criteria the *Sosa* decision established for assessing CIL.[245] This norm was applied by numerous international judicial bodies and arguably could be a cause of action for ATS litigation.[246] The environmental law regime would be more hospitable for plaintiffs if courts use the principle that "the polluter pay" for damages. International environmental law is also more decisive on the question of multinational corporations' conduct and is aware environmental damage is usually caused by private actors.[247] This would be useful for answering the question of corporate liability left unaddressed by the *Kiobel* majority, because the polluter pays principle focuses on causality. Addressing the questions raised by the ATS through international environmental law would provide an understanding of liability for extraterritorial damages and corporate liability which favors the plaintiffs' interests.

The majority borrowed the presumption against extraterritoriality from laws that create causes of action, rather than laws that establish jurisdiction.[248] To do this, the majority relied primarily on cases involving U.S. securities and employment law.[249] However, the Court did not consider private international law on corporate liability for torts.[250] Additionally, the decision of corporations to enact voluntary IHRL codes of conduct,[251] the work of the United Nations and

[243] *Supra* note 64.
[244] *See,* Kathleen Jawger, *Environmental Claims under the Alien Tort* Statute, 28 Berkeley J. Int'l. L 519, 536 (2010); Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim against Multinational Corporations* 34 Golden Gate U. Envtl. L. J. 745, 795 (2004)at 736.
[245] *Supra* note 30 at 748.
[246] *Supra* note 250. Abadie cites the *Trail Smelter* case (United States v. Canada), 3 UNRIAA 1905, 1952 (1938) & *Lac Lanoux* arbitration (France v. Spain), UNRIAA 281 (1957), and *Nuclear Test Case (Australia v. France)* ICJ 258 (1974), Judge de Castro, dissenting opinion.
[247]*International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky, Jutta Brunne, & Ellen Hey, eds. 2012) at 6.
[248] *Supra* note 12 at 1664-1665.
[249] *Supra* note 170, *Supra* note 171, *Supra* note 172, *Supra* note 173.
[250] Tyler Banks, *Corporate Liability under the Alien Tort Statute: The Second Circuit's Misstep Around the General Principles of International Law in Kiobel v. Royal Dutch Petroleum Co.* 26 Emory L. J. 227, 281 (2012).
[251] *Supra* note 49.

nongovernmental organizations,[252] and the European Union[253] have all indicated the increasing importance of corporate responsibility in private law. In advocating for better, more humane business practices, the United Nations Commission on Human Rights referred to the extraterritorial application of domestic legislation as one possible avenue to pursue.[254] While this likely falls short of CIL, *Kiobel* did not consider these principles or developments. As a result, both the majority and minority opinions skirt relevant developments in international law more hospitable to ATS jurisprudence. Damage occurring extraterritorially becomes relegated to *damnum absque injuria*.

The majority approach in *Kiobel* relied on the presumption against extraterritorial application for domestic legislation, which is not normally applicable to purely jurisdictional statutes. Their line of argument relied on a specific historic understanding of the drafting of the ATS, an understanding of the crime of piracy inconsistent with domestic precedent and international law, and a lack of engagement with previous ATS precedent. In doing so, the majority privileged the interests of multinational corporations without addressing the concerns raised by Judge Leval and other supporters of the ATS, namely whether immunizing corporate conduct abroad was in U.S. interests. The decision did not take into account the manner in which previous courts had reconciled U.S. foreign policy interests and the interests of victims of human rights violations. It also failed to address developments in international criminal, environmental, and private law, all fields with a growing acceptance of extraterritorial jurisdiction in certain circumstances. This approach considerably narrowed the Statute's jurisdictional reach, but did not prohibit all extraterritorial applicability. In Chapter V, I examine majority and minority thresholds for establishing the necessary nexus with the U.S. to bring an ATS claim. I argue that these thresholds lack clear criteria but have consistently been decided in favor of the defendants.

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[252] *See* U.N High Commissioner for Human Rights*, The Corporate Responsibility to Protect Human Rights: An Interpretive Guide* HR/Pub/12/02 (2012) & Amnesty Int'l. *Corporations* (2017).
See, Claire Methven O'Brien & Sumithra Dhanarajan, *The Corporate Responsibility to Protect Human Rights: A Status Review* 29 Accounting, Auditing, & Accountability Journal 542, 567 (2016).
[253] COM (2011) 681 as cited by Geert Van Calster, *The Role of Private International Law in Corporate Social Responsibility* 3 Erasmus L. Rev. 125, 133 (2014).
[254] United Nations Office for Human Rights*, Guiding Principles on Businesses and Human Rights: Implementing the United Nations "Protect, Respect & Remedy" Framework*, HR/PUB/11/04 (2011) at iv.

V. Threshold of Link to the United States

In Chapter V, I discuss the link between extraterritorial actions and the U.S. that is needed to establish jurisdiction under the ATS. The majority and minority opinions advocated for different thresholds, and there was a clear disagreement even within the majority. However, both approaches held that the ATS applied only in cases where the cause of action occurred in the U.S. or significantly impacted U.S. interests. All agreed that *Kiobel* did not sufficiently impact U.S. interests. Despite the Court's agreement on *Kiobel*, the process of defining the threshold needed to dispel the presumption against extraterritoriality is not easy. The majority spent little time discussing why *Kiobel* failed to overcome the presumption, and its passing reference to the insufficiency of "mere corporate presence"[255] provides little guidance. However, it did not categorically declare all extraterritorial actions outside the scope of the ATS. Courts since *Kiobel* have interpreted the threshold in different ways, the majority of which favored the corporate defendant. Nearly always, the impact of the threshold is borne by plaintiffs, but the threshold's ambiguity offers hope that the Court could adopt a more pro-plaintiff approach at a later date.

In Section A, I present the Supreme Court's arguments on the nexus between the U.S. and the extraterritorial tortuous action needed bring a case under ATS. Subsection A.1 discusses the majority's "touch and concern with significant force" threshold. In subsection A.2, I examine the divisions within the majority based on the concurring opinions submitted by Justices Alito and Thomas and Justice Kennedy. In Section A.3, I analyze the minority's approach and the three-pronged test it imagines. Section B assesses whether there are legal inconsistencies. Subsection B.1 discusses the *Kiobel* threshold's relationship with previous ATS jurisprudence involving extraterritorial violations of IHRL. In Subsection B.2, I look at the ambiguous wording of the threshold and the differing approaches lower courts have employed when applying the "touch and concern with significant force" threshold.[256] In Section C, I discuss the political questions and ramifications of this approach. Subsection C.1. argues that this threshold is consistent with the Court's approach in *Sosa*, creating new thresholds to decrease ATS litigation. In Subsection C.2, I present the ramifications of the Supreme Court's decision in *Kiobel* in terms of cases dismissed and awards vacated.

[255] *Supra* note 12 at 1669.
[256] *Id.*

A. Content of the Supreme Court's Decision

A.1 Majority Opinion

After presenting its argument in favor of the presumption against extraterritoriality, the majority turned toward the necessary relationship between an alleged tortuous action and the U.S. It presents its threshold in the final paragraph of the decision, which reads

> 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. 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.[257]

This paragraph implies that conduct occurring in the U.S. would be approached differently, but that the extraterritorial *Kiobel* conduct was not in this category. This approach provides a caveat to earlier sections of the judgment which appeared prepared to preclude any extraterritorial actions from the scope of the ATS. The majority states that the presumption against extraterritoriality could be overcome if the acts touch and concern U.S. territory with sufficient force. However, the Court does not indicate what it means by "touch and concern" or "significant force," leaving them open for interpretation. It is clear that corporate presence alone is insufficient to overcome the presumption against extraterritoriality.[258] It is also clear that sufficient ties to the U.S. may give rise to jurisdiction under the ATS. In the absence of criteria for assessing this threshold, lower courts and academics are left to speculate as to the majority's intentions and whether the facts of a specific case meet the threshold. Part of the ambiguity surrounding the *Kiobel* majority's threshold may be explained by the divergence within the majority and the differing threshold adopted by the minority.

[257] *Id* at 1669.
[258] *Id*.

A.2. Concurrent Majority Opinions

Three justices who joined the Roberts-authored majority opinion submitted concurring opinions clarifying their stances on the decision's final paragraph. The Alito and Thomas concurrence,[259] and the Kennedy concurrence,[260] underscore the divergent views within the majority as to the relationship between extraterritorial tortuous acts and the U.S. The former held that the presumption against extraterritoriality renders all actions undertaken abroad inadmissible for establishing ATS jurisdiction. The opinion indicates they believed the ATS establishes a cause of action only in cases where the tortuous breach of the law of nations occurs on U.S. territory.[261] The domestic action itself must amount to a violation of an international law norm meeting the *Sosa* standard of specificity and universality. According to their approach, any actions which occur on foreign territory, regardless of the actor's relationship to the U.S., would fall outside the scope of the ATS. It also appears that Justices Thomas and Alito would consider allegations that a U.S.-based corporation aided and abetted extraterritorial IHRL violations or provided material assistance to those who committed the actions insufficient to dispel the presumption against extraterritoriality. In such cases, or in cases where the decision-making process occurs in U.S. territory, Alito and Thomas focus on the location of the actions. If a U.S-based corporation decided to engage in or encourage acts of torture abroad in violation of the law of nations, the presumption against extraterritoriality would still apply. The Alito-Thomas approach narrowly reads the ATS as applicable only for breaches of international law committed domestically.

Justice Kennedy's brief concurring opinion adopted a different approach. Kennedy began by specifying a desire to further develop the relationship between extraterritoriality and the ATS, He emphasized that the majority's decision is sufficiently vague to allow for this development of ATS jurisprudence. He hypothesized that a case involving serious violations of international law dissimilar to the facts of *Kiobel* and not covered by TVPA would require additional examination as to the correct application of the presumption against extraterritoriality.[262] This formulation is important for two reasons. First, he considers that Congress granted the federal courts jurisdiction to redress many of the worst violations of IHRL when they enacted the TVPA. This

[259] *Supra* note 112at 1670.
[260] *Supra* note 111 at 1669
[261] *Supra* note 112 1670.
[262] *Supra* note 111 1669.

is the closest a member of the *Kiobel* majority comes to addressing the chain of ATS jurisprudence that previously addressed extraterritorial torture cases. As discussed in Chapter II, courts have conceptualized the relationship between the TVPA and the ATS differently,[263] and Justice Kennedy appears to be of the school that views the TVPA as *lex specialis* for cases involving torture committed outside the U.S. Second, he leaves the door open for a case in which a violation of the law of nations committed outside the U.S. could dispel the presumption against extraterritoriality. In this regard, he does not view the majority's decision as a blanket ban on ATS cases concerning extraterritorial conduct. Rather, he appears to take a very situational approach: Just because the facts in the *Kiobel* case lacked sufficient ties to the U.S., does not mean every case involving extraterritorial conduct will also lack these ties. In this regard, his concurrence endorsed the majority's application of the presumption against extraterritoriality to the ATS, but shares the minority's belief that, in certain circumstances, extraterritorial human rights violations could impact the U.S. enough that the ATS should establish jurisdiction without running afoul of the *Kiobel* precedent.

A.3. Minority Opinion

In proposing their own approach to limiting the scope of the ATS, the minority underscored the need to acknowledge that certain extraterritorial violations of the law of nations adversely impact U.S. interests. As discussed in Chapter IV, the opinion posited a three-pronged test for jurisdiction under the ATS: cases when the defendant was a U.S. national, when the alleged tortuous action occurred within U.S. territory, or when the defendant's conduct substantially and adversely affects an important U.S. national interest. The minority went on to clarify that one U.S. interest is to avoid becoming a safe harbor, free from criminal responsibility and civil liability, for persons who violate certain basic international norms.[264] They draw on the *hostis humanis generis* analogy employed by the Second Circuit Court in *Filartiga*,[265]and the Supreme Court in *Sosa*,[266] to underscore that it is in U.S. interests to ensure persons who commit certain breaches of IHRL are punished even if those actions occur extraterritorially.[267] Under the ATS, the punishment is monetary damages as opposed to criminal penalty, but the victims receive

[263] *Supra* note at 27.
[264] *Supra* note 113 at 1671.
[265] *Supra* note 2 at 890.
[266] *Supra* note 30 at 732.
[267] Here the minority chose not to explicitly differentiate between legal or natural persons.

some form of redress. Despite the minority's lengthy discussion of this three-pronged understanding of the ATS, two questions remain. First, does the court consider that U.S.-based corporations have nationality for the purpose of the ATS? Second, in the case of a tort committed by an alien outside the U.S., what is the threshold for "substantially and adversely affects an important American national interest" as envisioned by the minority?[268] Their analysis of the events in *Kiobel* provides some guidance but not enough to determine their criteria's threshold.

In *Kiobel*, the minority found the relationship between the defendants and the U.S. too remote to justify ATS jurisdiction. In the eyes of these Justices, the defendants' connection the U.S. was minimal. STTC maintained a New York office for the purpose of meeting clients and RDPC and STTC traded their stock on the New York Stock Exchange. The minority further distinguished between allegations that a defendant had engaged in acts of torture or genocide and allegations defendants had assisted foreign nationals in committing these acts.[269] The latter, as in *Kiobel*, would not fall within the scope of the ATS because it insufficiently impacts U.S. interests. Importantly, the minority appears to consider that case in which a foreign defendant committed, rather than aided and abetted, certain IHRL violations abroad, could fall within the jurisdictional scope of the ATS. The minority in *Kiobel* ultimately reached the same conclusion as the majority and dismissed the case, but it understood the ATS to establish jurisdiction for a wider range of extraterritorial violations of the law of nations.

B. Legal Inconsistencies

B.1. *Kiobel* and Previous ATS Jurisprudence

The *Kiobel* majority does not reconcile its "touch and concern with significant force" threshold with previous ATS jurisprudence. The parameters of the ATS have been entirely dictated by jurisprudence, and the Second Circuit Court's 1981 decision in *Filartiga* serves as the cornerstone of this jurisprudence. The Supreme Court is not bound by the Second Circuit Court's decision in *Filartiga*, but prior ATS cases decided by the Supreme Court have reconciled themselves with this landmark decision. While the majority aligned its decision with the *Sosa*

[268] *Supra* note 113 at 1678.
[269] *Id.*

precedent, [270] it says little about the body of ATS cases which came before *Sosa*. This is a marked departure from prior Supreme Court decisions and from the *Kiobel* minority's approach. In first ATS case decided by the Supreme Court, *Argentine Republic v. Amerada Hess Shipping Corporation*,[271] the opinion delivered by Chief Justice Rehnquist began with a short discussion of the ATS. Though the Court decided *Amerada Hess* in favor of the defendant, they referred explicitly to *Filartiga* as a guiding principle in ATS decisions. Similarly, the majority's approach in *Sosa*,[272] penned by Justice Souter, invested considerable time aligning this decision with the Second Circuit Court's decision in *Filartiga*. By drawing comparisons between the eighteenth century pirate and the modern day torturer, Souter reconciled the *Sosa* decision with *Filartiga* despite narrowing the scope of the ATS. The *Kiobel* minority also reconciled their three-pronged understanding of what cases should be heard under the ATS. Like the *Sosa* majority, they relied on the pirate-torturer analogy and held that certain violations of the law of nations are grave enough to give rise to extraterritorial jurisdiction under the ATS.[273] The *Kiobel* minority states that "Sosa referred to [the *Filartiga* decision] positively,"[274] and takes time to situate their decision with *Filartiga*. The majority in *Kiobel*, however, does not address how *Filartiga* and its descendants should be understood in light of *Kiobel*'s threshold on extraterritoriality.

Factually, there are a number of similarities between *Filartiga* and *Kiobel*, as both appear to address "foreign-cubed" situations. Legal analysts often borrow the term "foreign-cubed" or "foreign-squared" from international securities law, in large part because it is the field where the presumption against extraterritoriality is most often applied. The Supreme Court defines the term foreign-cubed as "transnational [securities] lawsuits involving claims against foreign defendants by foreign investors trading in foreign markets."[275] With relation to the ATS, it is used to describe cases in which foreign plaintiffs bring a case against foreign defendants for an act committed outside the U.S. It is difficult to align the facts of *Filartiga* with the newly instated presumption against extraterritoriality. The tortuous violations of international law in that case, namely the torture and extrajudicial killing of Joelito Filartiga, were undertaken by a foreign

[270] *Supra* note 12 at 1665.
[271] *Supra* note 28 at 433.
[272] *Supra* note 30 at 731.
[273] *Supra* note 113 at 1671.
[274] *Id* at 1675.
[275] *See, Supra* at 166 & Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Law* 43 U.C. Davis L. Rev. 1071, 1134 (2010).

national inside another sovereign's territory. According to the legal argument adopted by the *Kiobel* majority, a tortuous violation of the law of nations which occurs outside of U.S. territory must "touch and concern U.S. territory with significant force"[276] in order to dispel the presumption against extraterritoriality. It appears unlikely that a case such as *Filartiga*, in which the torture and killing of a foreign national occurred abroad at the hands of a fellow countryperson, would create a more significant linkage than the ones between the *Kiobel* plaintiffs and defendants.[277] Without guidance as to whether or not *Filartiga* and other ATS jurisprudence were decided correctly, lower courts and academics are left to speculate on how to handle foreign-cubed cases.

The minority, as well as legal scholars, have attempted to ascertain the validity of the *Filartiga* and subsequent cases which rely on it. The minority constructed a line of argument which drew a comparison between the pirates of the eighteenth century and the contemporary torturer, an approach previously used in *Filartiga* and *Sosa*.[278] The pirate and its contemporary equivalent are *hostis humanis generis*, the enemy of all humankind, and thus it is sufficiently in the U.S. interest to not provide safe haven to such individuals. The *Kiobel* minority endorsed the *Filartiga* decision that the ATS established jurisdiction for foreign-cubed tortuous actions committed by human beings while differentiating it from the facts of *Kiobel*. They distinguish between the allegations against the defendant in *Filartiga*, direct engagement in acts of torture and extrajudicial killing, and the defendants in *Kiobel*, corporations alleged to have aided another foreign entity engage in acts of torture and genocide.[279] Only in the former case do the defendant's actions impact a significant enough U.S. interest to fall within the scope of the ATS. In this manner, the minority retains the *Filartiga* precedent while differentiating its substantive legal question from that of *Kiobel*.

Scholars have questioned how to reconcile the majority's decision in *Kiobel* with *Filartiga* and its descendants. Organizations which regularly represent ATS plaintiffs, such as the Central for

[276] *Supra* note 12 at 1669.
[277] Gregory Fox & Yunjoo Gooze, *International Human Rights Litigation after Kiobel* 92 Mich. J Int'l. L. 44, 47 (2013).
[278] *Supra* note 113 at 1671.
[279] *Id* at 1678.

Constitutional Rights and Amnesty International,[280] correctly deplore *Kiobel* as a marked point of departure from thirty years of cases which relied on *Filartiga* as precedent. Conversely, those that promote a narrow scope for the ATS may critique the majority for not directly overruling *Filartiga*, leaving room for future Supreme Courts to align *Kiobel* with previous decisions.[281] As the Seventh Circuit Court noted,[282] no court had previously dismissed an ATS case based on the presumption against extraterritoriality. In this regard, the majority's choice not to explain the relationship between its "touch and concern with significant force" threshold in *Kiobel* and the decades of jurisprudence involving foreign-cubed cases is perplexing. However, by not directly engaging with *Filartiga*, the majority leaves open the possibility that under certain circumstances, foreign-cubed cases would meet the threshold. This is a positive development for potential ATS plaintiffs. If the majority had adopted the approach in Alito and Thomas' concurrence, cases such as *Filartiga* would categorically no longer fall within the scope of the ATS. However, the other seven justices' refusal to endorse this approach implies that foreign-cubed cases do at times meet the "touch and concern with significant force" threshold. The majority's choice not to explain how *Kiobel* is situated with regard to previous ATS jurisprudence, particularly *Filartiga*, is a marked departure from how the Court previously approached ATS cases. While this has caused confusion, this is significantly better for ATS plaintiffs than if the majority had explicitly overruled *Filartiga* and allowed no exceptions to the presumption against extraterritoriality.

B.2. Threshold of Link to United States

This Subsection discusses the content of majority and minority thresholds of nexus to the U.S. needed to establish jurisdiction under the ATS. The two thresholds differ but both create uncertainty about the ATS scope, because neither threshold is clearly defined. The majority opinion ends with a statement that the alleged violations of IHRL in *Kiobel* do not touch and concern the U.S. with significant force to dispel the presumption against extraterritoriality.[283]

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[280] Center for Constitutional Rights, *Kiobel Decision: Supreme Court Limits US Courts' Ability to Use Human Rights Law to Address Human Rights Abuses Committed Abroad* (Apr. 17, 2013) & Amnesty International, *US: Supreme Court Ruling on Shell in the Niger Delta Severely Limits Access to Justice in Human Rights Cases* (Apr. 17, 2013).
[281] Ralph Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for A Short Drink* 107 AJIL 841, 845 (2013).
[282] *Supra* note 108 at 1025.
[283] *Supra* note 12 at 1669.

However, they do not define the content of that threshold beyond asserting that "mere corporate presence" was insufficient.[284] The ambiguity of what the majority would a significant enough relationship to the U.S. to overcome the presumption against extraterritoriality has been the subject of academic debate.[285] Clegg goes as far as claiming ""no one knows how to understand or apply" the *Kiobel* decision.[286] Despite the potential for confusion, the threshold's lack of concreteness has its benefits for ATS plaintiffs for two reasons. First, the Kennedy concurrence indicates that this ambiguity is intentional to leave the door ajar for future elaboration.[287] This is a positive development because a future Court could potentially embrace a more expansive scope for the ATS. Second, it rejects Alito and Thomas' concurrence that categorically bans litigation under the ATS if the tortuous acts occurred outside the U.S.[288] While Alito and Thomas provided clear content for the "touch and concern with significant force" threshold, it would have been disastrous for potential ATS plaintiffs and further emboldened corporations. The ambiguity of the majority's threshold leaves lower courts considerable maneuvering room for determining how this threshold applies and allows hope that, in the future, the Supreme Court will change its approach. However, lower courts have, for the most part, been consistent in applying the threshold in favor of the defendant.

Prior to the Court's decision, the Second Circuit Court's Judge Leval warned of the dangers of allowing corporations to retain profits earned through violations of IHRL.[289] While Judge Leval observed this danger with regard to declaring corporate liability outside the scope of the ATS, his fears are equally relevant to the application of the majority's threshold. Indeed, post-*Kiobel* jurisprudence seems inclined to permit corporate human rights violations if committed abroad. According to the discussion of post-*Kiobel* cases compiled by Basile,[290] courts have mostly applied the "touch and concern with significant force" threshold in favor of the defendants. While a comprehensive survey of post-*Kiobel* jurisprudence falls outside the scope of this thesis, I want to illustrate the how the threshold has benefited ATS defendants with a few examples. In

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[284] *Id.*

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[286] Bryan Clegg, *After Kiobel: An Essential Step to Displacing the Presumption against Extraterritoriality* 67 SMU L. Rev. 373, 400 (2014) at 373.

[287] *Supra* note 111 at 1669.

[288] *Supra* note 112 at 1670.

[289] *Supra* note 110.

[290] *Supra* note 125.

Balintulo,[291] the Second Circuit Court dismissed a case against Ford Motor Company executives because the alleged tortuous action occurred abroad. They justified this decision even though the defendants were U.S. nationals by relying on an understanding of *Kiobel* which precluded from the scope of the ATS all extraterritorial conduct. Similarly, in *Adhikri v. Kellogg, Brown & Root*,[292] the Fifth Circuit Court considered the alleged complicity of U.S. nationals in extraterritorial human rights abuses insufficient to dispel the presumption against extraterritoriality. However, there have been a few exceptions in which lower courts have embraced the threshold's ambiguity and decided in favor of the plaintiffs. In *Ahmed v. Magan*,[293] a district court found that the extraterritorial actions of a U.S. permanent resident fulfilled the "touch and concern" threshold. In *Al Shimari v. CACI*,[294] the Fourth Circuit Court ruled that the corporate defender had significant enough ties to the U.S. to dispel the presumption against extraterritoriality. While it is challenging for plaintiffs to overcome *Kiobel*'s "touch and concern with significant force" threshold, its ambiguity has allowed for a few lower court to favor plaintiffs.

The minority in *Kiobel* created its own threshold for the relationship needed between a defendant and the U.S. under the ATS, which was less ambiguous and wider in scope. The Breyer opinion outlined three situations for which the ATS would establish jurisdiction.[295] None of the three situations are clear cut, and the minority also leaves room for interpretation. They appear to share Justice Kennedy's belief that a more case-by-case approach is needed for ATS cases, as opposed to Alito and Thomas' desires for a clear and narrow rule. The first situation, if the tortuous action occurs on U.S. soil, raises questions as to whether corporate executives based in the U.S. could be held liable for the decision to commit tortuous actions abroad. The second situation is a case in which the defendant is a U.S. national. This raises questions about legal versus natural

[291] *Supra* note 220.This case joined numerous ATS cases related to allegations of corporate aiding and abetting the apartheid government in South Africa. Allegations included work place discrimination which mirrored and enhanced the impact of apartheid, sale of police/military vehicles used by the apartheid government to commit acts of torture and extrajudicial killings, and union suppression.
[292] No. 15-20225(5th Cir. 2017). The case was brought on behalf of the defendants of 12 Nepali migrant workers promised employment in the Jordanian hospitality industry. Instead the Jordan-based Daoud company attempted to smuggle the men to the American military base of Al Asad in Northern Iraq, where they would be forced to work for Kellogg, Brown & Root. During transportation to Iraq, the men were kidnapped and murdered by an Iraqi insurgent group. The case was brought by descendants of the murdered men, Adihkri et al.
[293] No. 2:10-cv-00342 Dist. Court S.D. Ohio (2013).
[294] 758 F. 3d. 516 (4th Cir. 2014). This case will be discussed in further detail in Section C.3.
[295] *Supra* note 113 at 1671.

personhood: Whether the conduct of a U.S.-based corporation, as in the previously discussed *Balintulo* case,[296] could be equated with the actions of U.S. national is debatable. The third situation is the least clear. The Breyer opinion explicitly stated that U.S. interests included not becoming a safe haven for torturers, perpetrators of genocide, or the like.[297] From their analysis of *Filartiga*, the minority considered it to be a key U.S. interest to provide a judicial forum to hear claims against foreign nationals apprehended in the U.S. and accused of committing acts of torture abroad. Yet the minority does not give jurisdiction to plaintiffs suing foreign corporations for aiding and abetting a foreign government's acts of torture. Neither the presence of an office on U.S. territory, nor presence on the New York Stock Exchange, creates a close enough link to the U.S. for the conduct of a foreign corporation to sufficiently impact a key U.S. interest. I can only speculate as to the decisions that may have followed if the minority had succeeded in deciding *Kiobel*. Despite some ambiguity, their threshold has a clearer content and envisions a wider scope for the ATS that the majority, so this would likely have resulted in more decisions favoring the plaintiff.

The *Kiobel* decision is sometimes criticized for its failure to engage with previous ATS jurisprudence, particularly the *Filartiga* decision, and for not articulating the substantive content of its "touch and concern with significant force" threshold. The minority concurrence spends time highlighting these potential inconsistencies and proposes a different approach. Theoretically, the majority's choice not to explain how the presumption against extraterritoriality would impact foreign-cubed cases such as *Filartiga* and its undefined threshold could have resulted in confusion at the lower court level. In actuality, lower courts have consistently applied the *Kiobel* precedent cautiously in a manner which favors defendants. However, there are exceptions in which courts have allowed jurisdiction under the ATS for extraterritorial conduct which they deemed to have a significant connection to the U.S. In this regard, the majority's ambiguity benefits plaintiffs and prevents the sweeping ban on extraterritorial cases envisioned by Thomas and Alito. The door is open for a future Court to endorse an approach which prioritizes human rights over corporate interests, but the *Kiobel* precedent will remain a significant barrier for ATS plaintiffs. In Section C, I asses the political costs of the "touch and concern with significant force" threshold in terms of how it portrays the relationship between the

[296] *Supra* note 227.
[297] *Supra* note 113 at 1671.

Kiobel defendants and the U.S., and I consider the experiences of plaintiffs following the decision.

C. Political Considerations

I argue that the *Kiobel* majority's choice not to situate their decision in relation with previous ATS jurisprudence and the unclear threshold it advances is a result of political considerations. It is clear from the Court's unanimous decision to uphold the Second Circuit Court's dismissal that all the Justices agreed that the ATS should not establish jurisdiction for cases without a certain type of link to the U.S. They did not want ATS jurisdiction to extend to all alleged human rights abuses perpetrated or encouraged by corporations abroad. It is also clear from the decision that there is considerable disagreement between the Justices as to what the link to the U.S. should be. The one bright spot in the *Kiobel* decision is that, on Justice Kennedy's insistence, the majority did not categorically close the door on all extraterritorial actions or on all corporate defendants. However, *Kiobel* still inflicted considerable political costs on ATS plaintiffs, and radically altered the balance of power in favor of corporations. In Subsection C.1, I argue the *Kiobel* decision is best understood in light of the *Sosa* decision, as one in a strand of judicial decisions aiming to narrow the scope of the ATS. Ultimately, the greatest political issue with *Kiobel* is its ramifications for ATS plaintiffs. Since the case was decided, ATS defendants have invoked the *Kiobel* precedent to claim the U.S. federal court system does not have jurisdiction over their case. More often than not, defendants have emerged victorious, with cases either dismissed or vacated. In subsection C.3, I discuss the pattern of lower court decisions after *Kiobel*, which illustrate how judges have further altered the distribution of power against plaintiffs' interests.

C.1. Understanding *Kiobel* through *Sosa*

As discussed in Chapter II, Lee and Van Schaak classify ATS jurisprudence into three distinct phases.[298] The first phase spans the nearly two centuries between its drafting in 1789 and *Filartiga*. The second phase encompasses the three decades of relatively successful and expansive jurisprudence between 1980 and the late 2000s. The final phase begins with *Kiobel* and the limitations it imposes. I argue that this third phase, one characterized by judicial

[298] *Supra* note 70 & *Supra* note 38.

narrowing of the ATS scope, began in 2004 when the Supreme Court decided *Sosa*.[299] As discussed in Chapter II, the *Sosa* case involved highly contentious political issues and the Supreme Court weighed into ATS jurisprudence for the first time in decades. A full analysis of the legal inconsistencies and political considerations in *Sosa* falls outside the scope of this thesis. However, it is the Court's approach to ascertaining the content of the law of nations in *Sosa* that foreshadowed *Kiobel*'s ambiguous "touch and concern" threshold. In the *Sosa* era of ATS jurisprudence, creating such thresholds is the primary way the Supreme Court narrows the Statute's applicability.

The *Sosa* majority required that any court adjudicating an ATS claim rely only on principles of CIL that could be defined with comparable specificity to the norms of eighteenth century international law.[300] They relied on the doctrine of the separation of powers, stating that Congress had not given the judiciary license to recognize new or debatable norms of CIL. Thus, the Court is obligated to only apply norms which are "specific, universal, and obligatory."[301] Their subsequent analysis of whether the right to freedom from arbitrary detention fulfilled these criteria relied nearly entirely on state practice. Ultimately, the Court found that the right to freedom from arbitrary detention was an international aspiration but not a specific or universal norm.[302] This pronouncement received considerable academic attention for two reasons.[303] First, the *Sosa* process for determining whether a norm amounted to CIL placed less emphasis on IHRL treaties, resolutions, and government statements than the *Filartiga* approach had done.[304] Second, the content of the "specific, universal, and obligatory" threshold led to confusion. Did it only refer to norms of CIL considered *jus cogens*?[305] Was the standard for determining the

[299] *Supra* note 30 at 732.
[300] *Id* at 725.
[301] *Id* at 732.
[302] *Id* at 735. The Supreme Court dismisses the plaintiff's argument based on the Article 9 of the Universal Declaration of Human Rights of 1948 (on the grounds it was a nonbinding U.N. General Assembly resolution) and Article 9 of the International Covenant on Civil and Political Rights (on the grounds the U.S. decision to ratify the treaty was because of the treaty's not self-executing nature.
[303] *Supra* note 34. For examples of the post-Sosa discourse on CIL in the U.S. judicial system *See,* William Dodge, *After Sosa: The Future of Customary International Law in the United States* 17 Willamette J. Int'l. L. & Disp. Res. 29, 48 (2009) & Christiana Ochoa, *Towards a Cosmopolitan Understanding Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez Machain* 74 U. Cin. L. Rev. 105, 145 (2005).
[304] *Supra* note 2 at 882.
[305] Pamela Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens As a Limitation on Enforcement*, 22 Wis. Int'l. L J. 245, 272 (2009).

modern content of the law of nations higher than determining CIL in general?[306] As with the "touch and concern" threshold invoked by the *Kiobel* majority, *Sosa*'s threshold for determining the content of the law of nations "raises as many questions as answers".[307] And, as with *Kiobel*, the discourse following the case centered on whether the Court applied the law correctly, rather than political considerations impacting the decision.

As discussed in subsection B.2, there are advantages to the manner in which the Court tempered the presumption against extraterritoriality with the "touch and concern with significant force" threshold.[308] This leaves lower courts maneuvering space to interpret certain extrajudicial actions as impacting the U.S. to a degree that warrants jurisdiction under the ATS. Lower courts had the opportunity to interpret *Kiobel* in a way which better served the interests of plaintiffs. While "mere corporate presence" was explicitly ruled as insufficient,[309] subsequent cases involved defendants with closer links to the U.S. than the *Kiobel* defendants. Without a clear definition for the content of the "touch and concern with significant force" threshold,[310] broader interpretations are possible. For example, courts could have considered the U.S. interest in not providing safe haven for the torturer or genocide perpetrator, as advocated for by the *Kiobel* minority.[311] Or courts could have considered the U.S. interest in its nationals and corporations not engaging in violations of IHRL abroad, for legal and ethical reasons as well as in the interest of U.S. foreign policy. In the vast majority of the cases, lower courts act cautiously and rely upon a conservative reading of *Kiobel*. In ATS cases, this has consistently insulated corporations from the potential consequences of their actions abroad.

As with post-*Sosa* decisions regarding the content of the law of nations, lower courts' adopted as a starting point that the Supreme Court intended to narrow the Statute's applicability in all but the most exceptional cases. While lower courts have consistently invoked the *Kiobel* precedent in favor of defendants, Circuit Courts are divided on how significant the connection between the

[306] Christiana Ochoa, *Towards a Cosmopolitan Understanding Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez Machain* 74 U. Cin. L. Rev. 105, 145 (2005).
[307] *Supra* note 284 at 22.
[308] *Supra* note 12.
[309] *Id.*
[310] *Clarifying Kiobel's "Touch and Concern" Test* 130 Harv. L. Rev. 1902, 1923 (2017) at 1902.
[311] *Supra* note 113 at 1671.

U.S. and the alleged tortuous action needs to be. In *Adhikari*[312]and *Balintulo,*[313] the Fifth Circuit Court and Second Circuit Court adopted the Alito-Thomas concurrence's approach and focused only on the location of the alleged torts. The roles played by U.S. nationals in each case were not considered sufficient to dispel the presumption against extraterritoriality. This approach ignores *Kiobel*'s intentional ambiguity and the possibility that extraterritorial actions could fall within the scope of the ATS. Even courts which adopted a lower criterion for the "touch and concern with significant force" threshold applied it narrowly. In *Doe v. Drummond,*[314] the Eleventh Circuit Court acknowledged that the nationality of the defendant and relationship between domestic conduct and acts committed abroad should be considered. However, it did so while denying the plaintiff's case on the grounds that while the defendant was a U.S. national, domestic decision-making for tortuous acts committed abroad did not meet this threshold. As lower courts apply the *Kiobel* precedent, there is a risk that these decisions will not take into account the intentional ambiguity included in the majority opinion

C.2. Ramifications for Plaintiffs

It is impossible to fully assess the political costs of the *Kiobel* decision because an unknown number of ATS cases were never filed due to the barriers erected by the decision. It is estimated that attorneys have prepared thousands of ATS cases against the Ford Corporation alone, but are waiting to file until courts decide the question of corporate liability.[315] Anyone of those cases could have resulted in a multimillion dollar award for the plaintiff or been settled out of court before judgment, as was happening before the *Kiobel* decision. In addition to the potential financial gains, these plaintiffs have yet to receive their day in court and their allegations have not been publicized. However, it is possible to assess the financial ramifications on the *Kiobel* plaintiffs and those involved in cases where lower courts subsequently vacated damages awarded prior to *Kiobel*. In cases where lower courts vacated previous judgments awarding financial damages, corporations have avoided paying millions of dollars previously awarded to plaintiffs.

The political ramifications of the *Kiobel* decision are most obvious when considering what the plaintiffs in this case have been through. Esther Kiobel and her ten fellow plaintiffs initially filed

[312] *Supra* at 290.
[313] *Supra* at 220.
[314] *Doe v. Drummond Co*., 782 F.3d 576, 592 (11th Cir. 2015) (cert. denied, 136 S. Ct. 1168 (2016).
[315] *Supra* note 141.

their case in 2004. First, the case against Shell Petroleum Development Company of Nigeria was dismissed under the Foreign Sovereign Immunity Act of 1976.[316] Of their initial seven allegations against RDPC and STTC, four were dismissed by the Southern District Court for New York in 2006 based on the *Sosa* definition of the law of nations.[317] On appeal, the Second Circuit Court dismissed the entirety of their case.[318] At this point, the Court told the *Kiobel* defendants there would be no financial redress, regardless of the strength of their case, because CIL provided no recourse for human rights abuses perpetrated by corporations. The Supreme Court's decision also held that the damaged RDPC and STTC inflicted upon the plaintiffs was *damnum absque injuria*. Since the violations of human rights law occurred in Nigeria, there would be no avenue for redress available in the U.S. The Supreme Court is the final judicial authority in the U.S. Given the impossibility of redress in the Nigerian courts, the *Kiobel* plaintiffs will never receive financial compensation for injury suffered. No damages were awarded for the death of Esther Kiobel's husband and the descendants of the ten other plaintiffs. Worse, corporate practices which engage in or encourage human rights abuses and environmental destruction continue with impunity in Nigeria, in many cases emboldened by the *Kiobel* decision.

In the past, ATS litigations pressed RDPC to provide redress to Nigerian nationals whose human rights were violated by its conduct. In a case settled prior to the *Kiobel* decision, RDPC provided financial redress for its actions in Ogoniland. In 2009, RDPC settled a case brought under the ATS by descendants of Ken Saro-Wiwa, an Ogoni activist murdered at the same time as Dr. Barinem Kiobel.[319] The case, which alleged similar violations of the law of nations as *Kiobel*, moved through the U.S. federal court system more rapidly than *Kiobel*.[320] On the eve of trial, RDPC reached a settlement with the plaintiffs in which it paid $15.5 million in damages for its complicity in Saro-Wiwa's death, established the Kiisi trust for the peoples of Ogoniland,[321] and

[316] Edwin Fountain, Meir Feder, Shay Dvoretzky & James Gauch, *Recent Developments in Suits against Foreign Governments and Corporations Doing Business Abroad*, Jones Day 1, 5 (2013).
[317] *Supra* note 64. Refer to Chapter 2.C. for the full case history.
[318] *Supra* note 52.
[319] Center for Constitutional Rights, *Wiwa et al. v. Royal Dutch Petroleum Co.* (2009).

[320] Christine Kauffman, *Case Profile: Shell Lawsuit (Re: Nigeria*) 24 University of Zurich (2009).
[321] The trust is governed by independent trustees from TrustAfrica for use on women's empowerment, adult literacy, and educational initiatives. *See,* TrustAfrica, *The Kiisi Fund to Benefit the Ogoni People* (2017) available at: http://trustafrica.org/en/programme/philanthropy-advisory-services/kiisi-trust-fund

paid a portion of the plaintiffs' court fees.[322] This was the type of financial compensation available to ATS plaintiffs prior to the Supreme Court's decision in *Kiobel*. Owing to *Kiobel*'s institution of the presumption against extraterritoriality, it is unlikely corporations such as RDPC will have such an incentive to settle similar cases in the future. The *Kiobel* decision erected a barrier to ATS jurisprudence which had previously propelled corporations to reach a financial settlement with plaintiffs.

The *Kiobel* decision also provided defendants with grounds to appeal verdicts in which awards were previously ordered. In these cases, courts originally decided in the plaintiffs' favor and ordered corporations to pay damages. However, since the corporation committed the tortuous actions abroad, they now argue these judgments run contrary to the *Kiobel* precedent. The most notable example of this is the Second Circuit Court's decision in *Chowdhury v. Worldtel Bangladesh Holding*. A jury trial awarded $1.5 million in damages from Worldtel Bangladesh because the corporation commissioned a Bangladeshi police officer to torture the plaintiffs.[323] The same amount of damages was also assessed against the individual police officer who committed the acts of torture. However, the Second Circuit Court vacated the judgment against Worldtel because it was contrary to the *Kiobel* precedent.[324]

An analysis of all lower court decisions post-*Kiobel* falls outside the scope this research, but nearly all of the cases decided favor the defendant. As discussed in Sections IV.C and V.B, lower courts have invoked *Kiobel* as precedent for immunizing foreign corporations,[325] domestic corporations operating abroad,[326] and corporate executives with U.S. nationality.[327] There are few bright spots for plaintiffs seeking redress against corporations for violations of IHRL, whether the corporation is U.S.-based or international. The most notable positive example is *Al Shimari v. CACI*, which concerns Iraqi detainees in Abu Ghraib prison.[328] The defendant is a U.S.-based corporation contracted by the government to handle interrogations at the prison and allegedly committed war crimes and acts of torture. The Fourth Circuit Court reinstated the case

[322] *Supra* note 327.
[323] *Supra* note 44.
[324] *Chowdhury v. WORLDTEL BANGLADESH Ltd.* 746 F. 3d. 42 (2d. Cir. 2014).
[325] *Supra* note 123.
[326] *Supra* note 220.
[327] *Supra* note 286.
[328] 758 F. 3d. 516 (4th Cir. 2014).

after adopting a "fact-based approach" and finding the case touched and concerned the U.S. sufficiently to dispel the presumption against extraterritoriality.[329] A resolution to the case is still pending. Despite this case's outcome, the *Kiobel* decision resulted in numerous dismissals of ATS cases, undoubtedly costing some plaintiffs financial redress and access to justice. The "touch and concern" threshold altered the balance of power in favor of multinational corporations, depriving plaintiffs of their only hope for compensation and emboldening corporations through rendering them unaccountable for human rights violations.

[329] *Id* at 520.

VI. Conclusion

This thesis argues that the U.S. Supreme Court's decision in *Kiobel* is flawed because its results unjustly and unreasonably favor corporate defendants. Additionally, the Court does not explain its departure from previous ATS cases and its inconsistency with international legal norms. The decision's poor politics and legal inadequacies result from the Court's unwillingness to explicitly engage with the political ramifications of its decision. Explicit engagement with the important political stakes of this decision may have resulted in a more just decision. If not, at the very least, it would have eliminated some of the legal inconsistencies and revealed the politics of the court and the law. *Kiobel* privileges the interests of transnational corporations at the expense of the individuals whose human rights corporations violate in pursuit of profit. It is primarily persons from the global South who use the ATS as a means of redress for tortuous violations of IHRL, and the *Kiobel* decision is best understood in light of a global system which facilitates the extraction of resources from the South regardless of the cost. The *Kiobel* approach significantly narrowed the scope of the ATS in a manner that allowed the Court to distance itself from the unjust politics involved in the decision.

Chapter II outlines the history of ATS jurisprudence and its evolution from a forgotten Statute to an important tool for human rights advancement. Since 2000, the majority of cases brought under the ATS have involved individuals from the global South seeking redress from multinational corporations alleged to either have perpetrated violations of IHRL or aided and abetted those who committed these violations outside of U.S. territory. This shift in litigation marked a new era for ATS jurisprudence, but U.S. courts subsequently narrowed the scope of the Statute. In 2006, Esther Kiobel brought her case against Royal Dutch Petroleum Company and Shell Trade and Transportation Company for aiding and abetting violations of the law of nations committed by the Nigerian government at the corporations' behest. Ultimately, the Nigerian government's desire to quell opposition to these companies' extraction process resulted in the execution of her husband. In 2013, the U.S. Supreme Court dismissed *Kiobel* with a decision that centered on technical questions of jurisdiction. Through this approach, the Court obscured its own politics and distances itself from the unjust consequences of its decisions. This is not unique to the *Kiobel* case; rather it is a byproduct of the indeterminacy of the legal form. In this case, the

Kiobel decision has drastically altered the balance of power between corporations and peoples of the global South, removing one of the few forums for financial redress for violations of IHRL.

Chapters III, IV, and V discuss the Court's decision in *Kiobel*, its legal inconsistencies, and the politics of the judgment. Chapter III addresses the majority's decision to raise the question of extraterritoriality *sua sponte*. line of argument. The Court originally heard argument regarding the Second Circuit Court's decision, which addressed whether the ATS established jurisdiction for corporate defendants. However, the Court raised the question of the presumption against extraterritoriality *sua sponte*. This allowed the Court to sidestep the issue of corporate liability for tortuous breaches of the law of nations and focus on the defendants' relationship to the U.S. Absent from their decision was an acknowledgement that it was six corporations involved in ATS litigation that first presented the Court with this line of argument. Chapter IV discusses the legal content of the doctrine of presumption against extraterritoriality and its applicability to ATS jurisprudence. The doctrine traditionally applied to legislation regulating actions committed abroad, while the ATS is strictly jurisdictional. To justify the presumption against extraterritoriality's applicability to the ATS, the majority opinion employs a legally inconsistent analysis of the crime of piracy and dismisses previous courts' handling of foreign policy considerations arising under the ATS. Chapter V focuses on the link between defendants and the U.S. required by the Court. The majority chose not to explain how their decision in *Kiobel* fit with prior cases involving extraterritorial violations of IHRL. Since the majority provided little insight as to what actions would meet "touch and concern with significant force" threshold to overcome the presumption against extraterritoriality, it is left to lower courts to interpret the threshold. By and large, the lower courts' decisions have favored corporate defendants. As a result, plaintiffs and potential future plaintiffs have lost one of their few opportunities for getting compensation and corporate actors are emboldened by diminishing accountability for human rights violations. However, the majority's inclusion of this "touch and concern with significant force" threshold leaves space for further interpretation, potentially allowing a future court to adopt a more pro-plaintiff approach.

It has been left to courts to delineate the parameter of the ATS because text of the ATS is ambiguous and open-ended and little is known about the intent of its drafters. Cases under the ATS tend to have foreign policy implications because often both the plaintiff and the defendant

are aliens, and previous cases often addressed actions which occurred outside U.S. territory. There is also concern that the U.S. would overextend its jurisdiction and interfere in the internal affairs of other sovereigns. However, ATS litigation during the twenty-first century has focused on the actions of transnational corporations, and this litigation is one of the only avenues for victims of corporate human rights violations to seek compensation. I argue that this is a positive development for three reasons. First, it partially remedies the unenforceability of IHRL by awarding damages that corporations can afford to pay and yet are large enough to act as a deterrent. Plaintiffs have successfully won judgments or settled cases and received remedy. Corporations were concerned enough about the amounts levied to mount a concerned legal and political pushback against these types of cases, and were ultimately rewarded with success with the *Kiobel* decision. Second, it reorients the IHRL discourse and focuses also on the role of corporations rather than only governments in the global South. This partially acknowledges that the root causes of many IHRL violations, including violations of rights related to environmental integrity, are often in the interests of global capital as well as ruling elites in the global South and thus plaintiffs are unlikely to find redress in their countries of origin. Finally, it draws attention to the human rights abuses committed or encouraged by international corporations. Too often stories of human rights abuse victims are never heard, but ATS provides a public platform. In many cases, fear of the publicity associated with ATS trials pressured corporations to reach pretrial settlements and alter behavior. However, the *Kiobel* decision drastically narrowed the scope of the ATS.

The Supreme Court now has an opportunity to rectify its failings in *Kiobel*. It recently concluded oral arguments in *Jesner v. Arab Bank* and is expected to finally decide whether corporate defendants are permitted under the ATS.[330] Legal scholars heavily criticized the Court's last two decisions on the ATS, *Sosa* and *Kiobel*, [331] for legal inconsistencies and for empowering corporations rather than the individuals they exploit. It is possible that the Court will pursue a different approach with regards to the ATS this time around, one which balances the need for limitations to ATS litigation with the need for corporate accountability for extraterritorial actions undertaken to maximize profit in violation of human rights. Such an approach, including an explicit acknowledgment of the political stakes, could cement the U.S. federal court system as an

[330] 808 F. 3d. 114 (2d. Cir. 2014).
[331] *Supra* note 30 & *Supra* note 12.

avenue for redress and alter the balance of power in favor of plaintiffs. Alternatively, the Court may instead completely close the door on corporate liability under the ATS. This would further cement the interests of powerful transnational corporations at the expense of human rights. If the Court sides with the corporations without explicitly addressing the politics of that choice, its decision will likely contain the same legal inconsistencies as *Kiobel*. More importantly, it will produce the same devastating effect, further emboldening corporate actors to exploit people for profit.