

Aligning Global Justice and International Law a Philosophical Analysis of the Consequences of the 2013 U.S. Supreme Court Decision That Limits the Application of the Alien Tort Statute

Rajesh Sampath¹

Abstract

This paper presents a philosophical critique of the 2013 Supreme Court decision that limits the application of the Alien Tort Statute (ATS). On April 17th 2013, the U.S. Supreme Court decided in *Kiobel vs. Royal Dutch Petroleum Co.* on an issue that could impact the future of international human rights litigation: the nation's highest court concurred with the U.S. Court of Appeals for the Second Circuit by arguing that corporations cannot be held liable for torts violations under international law. This decision limits the ability of ATS to prosecute alleged human rights violations in foreign countries unless a commanding connection to the U.S. can be established. This paper argues that due to certain circumscriptions in the legal reasoning that underpinned the Supreme Court decision, the chances for global distributive justice based on the protection of global human rights is severely curtailed particularly in the absence of truly global judiciary systems of tort law. The paper concludes with general theoretical reflections on the intersection of ethics, rights, law and development and why that is significant for our understanding of contemporary global justice.

Introduction

The Supreme Court met on Oct. 1st, 2012 to hear arguments regarding the Alien Tort Statute. The statute contains an important set of issues with potential consequences for global ethics and human rights.

The ATS raises intriguing questions about duty-bearers and responsibility for human rights violations that occur across borders and involving actors whose identities are multinational.

¹ PhD, March 24th, 2014.

The specific issue prior to this 2012 gathering was whether citizens of countries outside the U.S. can sue non-American corporations, like Royal Dutch Shell, within U.S. courts for activities deemed as violations of international law (such as torture, human trafficking, or wrongful, indefinite detention) that occur in territories outside the U.S. However the broader issue points to fundamental philosophical questions about the nature of global justice in general.

A subtended ethical issue involves the idea of global justice and transnational notions of the protection of individual rights beyond the reach of one's nation, government and system of law. If the Alien Tort Statute could be upheld in U.S. courts, then how are we supposed to do global ethics and global justice anew if corporations as legal persons can be held accountable for violating foreign peoples' basic rights? The law delimits what is permissible and what actions can be taken against others, not what actions *should* be taken. Hence the purpose of this investigation is to examine the critical assumptions in legal reasoning of the Supreme Court, and not the normative content that could justify a moral argument about the validity of a statute. The paper does not ask whether the ATS is inherently good, but whether the decision in *Kiobel* circumscribes possibilities for global justice and compensation for harm under conditions of rational and reasonable deliberation. One could ask a reasonable question that concerns many conscientious citizens today: what new types of enforcement can be codified if corporations could be successfully prosecuted for rights-violations stemming from illegal activities, particularly in developing countries with weak states and judiciaries. Can corporations be held accountable for activities in a global economy in which international law is highly circumspect with regard to its power to contain and constrain such conspicuous activities? An idea of global justice would demand answers to these questions. However, the momentum for global justice abated as the upholding of substantial corporate liability did not come to pass. On April 17th, 2013, the U.S. Supreme Court concurred with the U.S. Court of Appeals for the Second Circuit, which held that corporations cannot be held liable for torts violations in international law under the Alien Tort Statute.²

² *Kiobel v. Royal Dutch Petroleum Co.*, 10 US 1491 (2d Cir. 2013).

Facts of the Case

The facts of *Kiobel* are as follows. The plaintiffs were Nigerian nationals residing in the U.S. They filed suit in a federal court alleging that Dutch, British and Nigerian corporations “aided and abetted” the Nigerian government in committing rights violations under international law.³ Shell Petroleum Development Company of Nigeria, Ltd. (SPDC) is an incorporated and Nigeria-based subsidiary of the Dutch holding company, Royal Dutch Petroleum. The complaint stated that when residents of a certain region in Nigeria, namely Ogoniland, initiated peaceful protests against foreign oil exploration and its damaging environmental effects, the respondents (SPDC) mobilized the Nigerian government to suppress the protests with extreme violence including torture, rape, looting of property and murder. The petitioners further claimed that the company provided the Nigerian military and police forces with resources, such as food and transportation. After these alleged atrocities were committed in the early 1990s, the petitioners relocated to the U.S. and received political asylum where they are currently legal residents in the state of New York.

They filed suit in the U.S. District Court of the Southern District of New York claiming jurisdiction under the Alien Tort Statute. They sought damages for the alleged, aforementioned atrocities. Among the allegations of international law violations were: “(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”⁴ The first, fifth, sixth and seventh claims were not considered by the District Court, which said that the facts associated with them did not constitute violations of international law.⁵ The respondents removed for dismissal of the other claims, but was denied by the District court. In deciding an appeal, the Second Circuit dismissed the whole complaint stating that international law does not acknowledge corporate liability.⁶

³ 569 U.S. 2 (2013).

⁴ 569 U.S. 2 (2013).

⁵ 569 U.S. 2 (2013).

⁶ 621 F. 3d 111 (2010).

The U.S. Supreme Court decided to review the Second Circuits decision and added the following question: "whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."⁷ The Supreme Court affirmed the judgment of the Second Circuit Court.⁸

Thesis

This paper will analyze the U.S. Supreme Court decision on the Second Circuit's hearing of *Kiobel vs. Royal Dutch Petroleum Co.*⁹ I will deconstruct its reasoning to offer an alternative view of why economic justice can be realized through the support of ATS's scope of jurisdiction: a cause of action can be brought against corporations and there are rational arguments to ground this cause. Furthermore, corporations as legal entities can be held liable under U.S. law for foreigners' rights violations that take place outside the sovereign territory of the U.S. if the ATS is reinterpreted and upheld to fulfill such a purpose.¹⁰ As part of the paper, I will situate this analysis within a broader sociological and philosophical analysis of the values of the U.S.'s system of justice when it comes to the tradeoffs of promoting international human rights advocacy at the expense of realizing true international economic justice for developing countries. Many peoples of developing countries do not have access to international legal instruments to address socio-economic displacements, inequalities, and disenfranchisements that ensue from the activities of multinational corporations, such as mining or natural resource extraction.

⁷ 565 U.S. ___ (2012) referenced in 569 3 (2013). (How do I cite that SC within *Kiobel*?)

⁸ 569 U.S. 3 (2013).

⁹ The paper will limit itself to a reading of the Syllabus because there is plenty there to critically analyze; it is a distillation of the entire framework of arguments made in the entire decision; and there is a clear linkage of previous Supreme Court decisions that have to be carefully dissected to see how the *Kiobel* decision comes together; and it is quick synthetic picture of the whole through a series of statement and arguments each of which deserves philosophical elaboration.

¹⁰ The Alien Tort Statute allows for civil remedies and not criminal prosecution in respect of the principle of non-interference of sovereign nations. It maintains the principle that peoples everywhere have universal rights to be free from certain gross violations (torture and the arbitrary taking of life under conditions of peace and not war) and that they should have recourse to a court of justice when violated but only in terms of civil remedies. This is particularly the case if they have no access to remediation and adjudication within their own countries. Although there are international courts, namely the International Criminal Court, with a body of international justices to judge criminal violations against humanity, such as genocide, and although there are regional courts that can mediate disputes between parties outside the region, such as the European Court of Human Rights, there is no international court whose sole purpose is to adjudicate matters that would fall under the ATS. This is precisely what is being argued for and against in *Kiobel*.

Of course counter-arguments to these perspectives have to be weighed too. There are reasons why the Court limited the reach of ATS. One is due to unwarranted consequences that would create disharmony among sovereign nations, which often maintain the principles of self-determination and autonomy based on non-interference.¹¹ Another issue points to the nebulous nature of extraterritorial jurisdiction: courts in general are disempowered when a practical application of the law is not feasible because the statute does not clarify when and where extraterritorial jurisdiction can manifest itself.¹² One simple question is what gives one country's legal system the transnational power to hold accountable individual and institutional activities that take place abroad affecting citizens from other countries. Indeed moral and cosmopolitan arguments would try to answer this question with an affirmative justification for enforcing substantial corporate liability.¹³

However, the question in this paper will not take a cosmopolitan approach. At stake is not an argument for or against the validity of 'universal jurisdiction'—whether a domestic law of a specific country can apply everywhere. Inversely it is not about whether an international legal violation (such as human trafficking) can be ignored within the country where it occurred in which victims seek reparations because the norms and rules that shape international law do not have to be applied within the context of domestic law in the name of sovereignty and autonomy. The issue is whether a legal cause can be defined when it comes to the correlation between a specific act by a multinational corporation and a violation of a basic human right (destruction of life) recognized under international law even though there may be no settlement within international norms to frame issues pertaining to extraterritoriality.

¹¹ *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248.

¹² *Morrison v. National Australia Bank Ltd.* 561 U.S. ___, ___.

¹³ For more on the debates on ethics, rights and cosmopolitan arguments for global justice, see Dean Chatterjee, ed., *The Ethics of Assistance* (Cambridge: Cambridge University Press, 2004). Thomas Pogge for example argues that poverty is violation of human rights and those who benefit unfairly from the rules of global economic institutions and trade have moral responsibility for such violations. However, ways to redress such injustices are not so clear given the 'interactive and institutional complexity' involved in the multiplicity of intersecting forces that actually cause global poverty. See his contribution in the aforementioned anthology and his *Freedom From Poverty as a Human Right: Who owes what to the very poor?*, ed. Thomas Pogge (Oxford: Oxford University Press, 2007). Also see *World Poverty and Human Rights*, 2nd Ed. (Polity: Cambridge, 2008). Pogge develops a well-known moral argument based on the negative duty of all us to stop continuing to cause harm when participating in the global economic system. He does not develop a full-blown legal theory to defend the human right to be free from (extreme) poverty that leads to premature death and, according to him, is entirely 'foreseeable and avoidable.'

Text

To probe this issue let us turn to the text of *Kiobel*. The assumption of ATS is that foreigners can bring a civil action within U.S. district courts for torts only when they are shown to violate the “law of nations” or a treaty of the U.S.¹⁴ Whether these courts have extraterritorial reach to determine corporate liability is what the U.S. Supreme Court sets out to decide. Ultimately for the Court, we know that the answer is no. But how did the Court arrive at the decision and what critical questions does such a conclusion raise for future prospects of global justice? The underlying conviction is that “the law of nations does not recognize corporate liability.”¹⁵

This is the first basic statement in the Syllabus of *Kiobel*, which means eventually the Court will conclude that US courts cannot hear actions under ATS regarding alleged violations of the “law of nations” based on an idea of corporate liability. Something about international law as understood by the system of nation-states under which corporations work but over which they are not severely restricted remains ambiguous in the Court’s decision.¹⁶ The issue before is how to deconstruct that ambiguity. What does the decision occlude in its assumptions as it metes out its arguments leading to the conclusion of non-recognition of corporate liability? Is the “law of nations” so abstract, empty and broad to which no specific act by a corporation can cross our morally intuitive threshold of acceptable behavior and therefore rise to the level of generality as to warrant a judgment about liability for the act? Or is the question one that points to the inherently defensive structures built into corporations as legal entities in our current global (capitalist) economic system?

¹⁴569 U.S. 1 (2013). ATS is restricted to civil actions only as the actual text asserts: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350. For example one can sue for damages and request monetary compensation. It raises the intriguing question of how one nation can punish another without recourse to war or invasion-whether justified or not.

¹⁵ 569 1 (2013). From the Syllabus. (How do I cite that? The Syllabus has a page 1 but then so does the Opinion.)

¹⁶ One can contrast that with the long attempt in the twentieth century to determine how individuals and corporations can be held liable for causing harm within the domain of domestic tort law. Benjamin C. Zipursky states, “In a number of different domains of tort law in the twentieth century, judges, lawyers, legislators, and academics engaged in a debate over whether companies or individuals should be held strictly liable for the injuries they cause.” See Benjamin Z. Zipursky “Philosophy of Tort Law” in Martin P. Golding and William A. Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 2005), p. 122.

Is there something in the nature of corporations as a new institutional phenomenon in history that makes it difficult to assign legal responsibility for their actions when they are not directly tied to gross human rights violation but are no less culpable for their occurrence? Unlike individual dictators, who can be prosecuted for war crimes, or nation-states on which sanctions can be imposed, corporations seem anonymous, even to the point of invisibility. The answer to these questions become apparent in the reading of the text of the decision.

Kiobel requires an exhaustive scholarly treatment in its own right.¹⁷ Fields germane for the analysis span international human rights law to international law in general that affects commerce and corporate defense. Procedurally the issue of 'extraterritoriality' is not entirely separate from substantive questions about global justice and how that is understood by philosophical ethicists and political-economists. Indeed one can ask whether one nation's courts have the right to regulate the economic and commercial activities of a global system if there are no other mechanisms to redress allegations of violations that flow from the consequences of such activities in the form of human rights violations. According to the Syllabus, the justices of the Court delimit the original historical intent of the ATS, which was born in 1789, and subsequent Supreme Court interpretations of its scope and jurisdiction. The twists and turns in the Syllabus are ripe for further critical analysis. It takes us to the heart of the contemporary Court (in the early 21st century) and its unstated assumptions and carefully guarded ideological commitments. In reading the text we see how and why the interpretation of this little-known statute must be severely delimited within the self-enclosed realm of legal reasoning.

¹⁷ In a longer work, I would like to draw out the consequences of the Supreme Court decision in *Kiobel* for examining moral and legal arguments for the right to development/poverty eradication from the standpoint of global justice frameworks. Ultimately, the question is how we instantiate new global judiciary systems to hold duty-bearers accountable, such as corporations, multilateral institutions, and nation-states, for the protection of basic human rights. Often times the violations of human rights occur as consequences of other events that may not intend to cause harm, namely activities and decisions made in what appears to be an infinitely complex, globally integrated economy that is accelerating at ever increasing rates. And then throw in cyberspace and ecommerce, which is calling into question traditional theories of identity, agency and causality with the production of new types of inequality and exclusion. For more on these topics, see Manuel Castells, *The Rise of the Network Society- The Information Age: Economy, Society, and Culture*, Vol. 1, 2nd Ed. (Oxford: Blackwell Publishing, 2010).

Such diminution of the statute's applicability is achieved precisely by distancing our contemporary responsibilities for international rights violations by way of enforcing domestic laws in an international context from the antiquated and hence now irrelevant concerns of the historical past from which the statute arose.

A new justification is made within the realm of legal reasoning, one that can be found in the interstices and crevices that are already apparent in the fissures opened by the Syllabus of the *Kiobel* decision.

The first question to ask is under what conditions, circumstances and contexts can U.S. courts acknowledge causes of action under ATS, "for violations of the law of nations occurring within the territory of a sovereign other than the United States."¹⁸ What constitutes the cause of action that gives the court the jurisdiction to hear the case is so fundamental to the procedural mechanisms that our courts cherish: courts constantly guard themselves from arbitrariness and wanton display of power, which goes against the very grain of what justice means in a legal sense. This is why it is very important to be extremely cautious of a.) What constitutes a cause of action requiring the law to intervene in a private matter between two parties and b.) Can a court recognize such a cause of action and from what conditions, circumstances or contexts does the cause emerge, which can be reasonably and rationally discerned. What is difficult to determine is how a cause arises, particularly from an activity that occurs in another foreign, sovereign territory. From an empirical standpoint, reality may be simple: an obvious rights violation of some kind took place in country X. But from a legal standpoint, the matter is more complex. At stake is the very notion of jurisdiction. In other words, one must examine the legitimacy of both the court's reach and the cause of action being put forward.

The justices of the Court are quick to mount their arguments and buttress their interpretations to show why the historical intent of ATS is so far removed from what we imagine as the potential for the statute to be applied to today's international and global social, political, and economic complexity. When it comes to global commerce today and the multiplicity of institutions involved, including nation-states and modern transnational and multinational corporations, the complexity of trade and the rules and regulations by which it occurs would dwarf conditions and circumstances that gave birth to the statute in 1789.

¹⁸ 569 U.S. 1 (2013)- from the Syllabus (how do I cite that?)

The “presumption against extraterritoriality” today is warranted precisely because today’s global system and the interaction of causes and effects in the behaviors and relations of a multiplicity of actors and institutions cannot be reduced to individual claims that seek to substantiate a single cause of action under the statute. In this context the law is very stingy when it comes to converting claims into actionable causes.

The respondents in *Kiobel*, namely the Dutch, British and Nigerian corporations, argued that the claim by the petitioners, the Nigerian nationals who filed suit in the U.S. District Court, does not correlate to a legal cause of action. ATS cannot reach the alleged conduct that took place in Nigeria in which the petitioners alleged that the ‘law of nations’ was violated. The justices of the Court draw upon *Morrison v. National Australia Bank Ltd.*, 561 U.S. ___ in corroborating the presumption against extraterritoriality: “when a statute gives no clear indication of an extraterritorial application, it has none.”¹⁹ This allows the Court to focus on the inherent mechanics and anatomy of the statute itself, namely the ATS, and not the alleged violation of the ‘law of nations’ in a foreign sovereign that the petitioners are attempting to bring forward as a cause of action within a U.S. Court.

There are so many reasons why the jurisdiction of our nation’s courts must be so severely circumscribed when it comes to extending jurisdiction to activities that occur in an international context. The Congressional and Executive branches within the U.S. Government is responsible for foreign policy and hence maintaining peaceful relations with foreign sovereign and autonomous nations.²⁰ According to the Court’s interpretation of the original intent of the legislators who formed the ATS under the Judiciary Act of 1789, there was no anticipation by the Congress of that time for causes of action to be initiated under the statute.²¹

¹⁹ *Morrison v. National Australia Bank Ltd.* 561 U.S. ___, ___. Quoted in 569 U.S. 2 (2013)- (How do I cite that SC within *Kiobel*?)

²⁰ 569 U.S. 2 (2013).

²¹ The text of the Syllabus reads: “Prominent contemporary examples...—immediately before and after passage of ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.” 569 U.S. 2 (2013)- from the Syllabus- (How do I cite that?)

If a U.S. court were to entertain a cause of action under the ATS about activities that took place in a foreign territory, the unnecessary confusion it may cause in the realm of foreign policymaking poses a greater risk of imperial reach than the laborious attempt to correlate a claim alleging a rights violation (under the 'law of nations') with a legal cause of action that can be heard on U.S. soil. In further cementing the presumption against extraterritoriality, the Court relies heavily on *Sosa v. Alvarez-Machain*, 542 U.S., to show why federal courts' abilities' to hear a cause of action for "alleged violations of international law norms" is so extremely curtailed.²²

Within the presumption against extraterritoriality, or the notion that our federal courts have a difficult time hearing causes of action under ATS, are even deeper arguments made in the opening Syllabus that takes us to the heart of the issues that are subtended in this paper's thesis. Why is it so difficult to link a claim with a cause of action when it comes to correlating corporate activities with human rights violations in the absence of international legal norms that says when extraterritoriality is legitimate? That is the global justice question. To maintain peace, cooperation, tolerance and respect within the international system of nation-states, one must respect the sovereignty, autonomy and independence of other foreign nations. If you will, that is like the 'Magna Carta' of international relations norms. This requires that one severely delimit any claim to the right to judge activities that occur within the territories of those foreign sovereign nations under the apparatus of one's federal laws. There are no laws to execute justice without some moral compulsion, morals are formed by norms of what is acceptable and what is not, and norms are varied from culture to culture, context to context and in many cases nation to nation.

The real distinction upon which the Court's argument hinges boils down to two key objectives that the decision tries to achieve. The two together however constitute a nucleus that underpins the Court's inherent need to limit the scope of U.S. judicial power on the world stage. The Syllabus concludes with the statement: "Finally there is no indication that the ATS was passed to make the United States a uniquely hospitable form for the enforcement of international norms."²³

²²*Sosa v. Alvarez-Machain*, 542 U.S., at 732. Pp. 3-6. Quoted in 569 U.S. 2 (2013)- (How do I cite that SC within Kiobel?)

²³ 569 U.S. 3 (2013).

The original intent of the drafters of the statute, so the Court argues, did not harbor any imperial ambitions to extend U.S. law to judge activities in foreign territories, and this dovetails nicely with the idea of courts not having any undue influence in foreign policy which is the business of states' leaders and elected representatives.²⁴ The modern interpretation of this intent is that the U.S. *today* should not have any unique vantage and advantageous perspective to judge international disputes by interpreting international law one-sidedly: that is from the perspective of U.S. federal courts trying to apply its own federal statutes one of which is the ATS. The Court's skepticism of substituting the U.S. for a global governance system of justice could not be more apparent.²⁵

One does not want to speculate why the Court is so ready to circumscribe U.S. judicial power on a global scale. Could it be that the U.S. does not want to be judged by other foreign courts with regard to its activities here or in foreign territories? Imagine another country's corporate activities that harm our citizens in our territory with suspected ties to our own government who are complicit in repressing violently the protests against those activities. And the relatives of those citizens attempt to take up a legal cause of action in a foreign country's judicial system against that corporation's activities that took place within our sovereign borders. This is so unimaginable that it is not even worth entertaining as a possibility. Or perhaps the U.S.—as a great champion of political and civil rights that descend from the liberal, constitutional democratic traditions of the West—cannot admit to being the same world power whose multinational corporations are complicit with the creation of unfair social and economic conditions that led to the types of peaceful protest against corporate exploitations we saw in the petitioners relatives' who were killed in Nigeria? The hypotheticals begin to pile up upon closer scrutiny. But one objective of the Court is clear, the U.S. is not going to occupy some special place in the world to adjudicate global injustices and try to enforce international norms when they become laws.

²⁴ This makes sense given the fact that one of the key principles that sparked the American revolution was the fundamental moral and political disgust with imperial tyranny and its attempt to control and regulate affairs of the colonies from afar.

²⁵ Contrast that with the International Criminal Court, which was founded primarily to hear cases about genocide and the criminal actions of dictators against their own peoples, including 'crimes against humanity' even when in office. But this is about criminal violations of the worst kinds, not tort law or remedies for harms caused individuals or corporations that fall short of criminal activity.

It is not the intent of this paper to try and over-determine the Court's reasoning by attempting to show how it is caught in a deeper ideological web of neo-imperial domination that some may accuse the U.S. of wielding, particularly after the end of the Cold War. Indeed many anti-globalists would argue that where the U.S. shirks its actual responsibility by not intervening in many places where human rights are violated, it is more than enthusiastic to cross borders and wield international influence for the benefit of its multinational corporations and the foreign policy objectives they support. But this is not the path of critical analysis that this paper will go down. Rather, we can stick with the internal structures and movements within the peculiar legal reasoning offered in the *Kiobel* decision to understand how the justification for the presumption against extraterritoriality is substantiated. We can raise questions as to the moral efficacy of that justification and what the consequences are for our understanding of a delimited sense of global justice from the standpoint of an effective legal framework. For such a framework has the authentic responsibility to interpret statutes and previous Court decisions while trying to understand the original intent of the Constitution.

But like any system of justice, it has the responsibility to uphold and interpret that law to correct wrongs based on a minimal set of moral thresholds to which humanity can agree. For such thresholds and agreements evolve and change over time.

Returning to the *Kiobel* decision, the justices of the Court seem to agree that *Sosa* carries the crucial distinction upon which the entire presumption against extraterritoriality hangs. The state:

The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has the authority to recognize a cause of action under U.S. law to enforce a norm of international law.²⁶

It is the key distinction made here that will allow for further examination of all the points raised thus far. After that this paper will conclude with an alternative set of reflections that goes against the grain of reasoning offered in the *Kiobel* decision. Here in this quoted passage the distinction could not be clearer.

²⁶ 569 U.S. 2 (2013)

The issue is not jurisdiction that attempts to establish a natural or intuitive relation of the location of the court, which is obviously in the U.S., and international or foreign law that would stipulate that the alleged activities of the corporations were in fact human rights violations, or caused activities that led to human rights violations. One really has to struggle to articulate principles of justice that would show why and how some foreign or international laws that recognize corporate liability can be binding in another country that does not recognize a cause of action under the statute to reach activities occurring abroad for which corporations are liable. This creates a great strain or 'clash' of laws as the Court's Syllabus argues.²⁷ What is interesting here in this key passage that justifies the Court's ultimate decision that favors the presumption against extraterritoriality is the inverse of the first statement. The real issue for the Court—at least in *Sosa*—is whether a U.S. federal court can apply U.S. law to "enforce a norm of international law."²⁸ Either direction one takes, namely the court generating a cause of action recognized by international law or international law norms being enforced by a cause of action under U.S. law, is untenable. We come full circle to the strategic and necessary delimitation of the ATS to the point where it becomes virtually impossible for it to be applied to contemporary events in the global political-economy.

Here we can draw some conclusions about the trajectory that was just traversed in the pivotal moments of argumentation offered in the *Kiobel* decision. But this time let us work backwards beginning with the petitioners' claim about a multinational corporation's subsidiary in a certain country, namely Nigeria, who allegedly "aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria."²⁹ If we start there and try to understand the situation from principles of fairness and global economic justice, then perhaps we can begin to question the assumptions underpinning the legal reasoning in the *Kiobel* decision, which rides primarily on the presumption of extraterritoriality. To rehearse some of those arguments, no substantial connection to the U.S. can be established given these events and actors in Nigeria. The original intent of the ATS' congressional framers, according to the Court, was so severely delimited as to account for only a few possible activities that were pertinent to late eighteenth century, nascent America, such as maritime piracy, but no longer issues today.

²⁷ 569 U.S. 2 (2013).

²⁸ 569 U.S. 2 (2013).

²⁹ 569 U.S. 2 (2013).

Trying to impose U.S. law for activities occurring abroad that do not involve agents or actors from the U.S. is one thing; but trying to impose a statute, which paradoxically allows for foreign claimants to bring a cause of action in a U.S. court for activities occurring in a foreign sovereign raises the real tension in *Kiobel* and its reliance on *Sosa*: that is no one wants to deal with the ensuing “clash” and “international discord” of applying one country’s federal laws to norms of international law or using international laws to justify causes of action in one country’s courts.³⁰ When it comes to international tort law that tries to remedy gross violations of human rights under the law of nations the world as we know it today lives in a judicial vacuum. The chain of causes that leads back to who is ultimately responsible for the alleged violations listed by the claimants (extrajudicial killing, violence and torture, crimes against humanity, rights to life and security and destruction of property, etc.) leads us to a dark and murky world. Hopefully the reader will not infer from the following concluding reflections that the critical remarks indicate any accusation or attack on what the principles of the U.S. Supreme court stands for. Quite frankly the object of criticism is not the Court itself but the lack of creativity in the global order to imagine global judiciary institutions to handle the issues raised in the *Kiobel* decision precisely when the U.S.

Supreme Court rightfully argues against the U.S. occupying a ‘unique’ position to enforce international law. Truly, then, the U.S.’s laws cannot speak for the world’s laws and vice-versa. The natural question then becomes what entity can provide for that role?

This paper tried to argue that the assumptions and mechanics of legal reasoning in the *Kiobel* decision had to lead to a severe delimitation of the application of the Alien Tort Statute (ATS) because of the overriding presumption against extraterritoriality. In other words, U.S. Courts cannot bring a cause of action to remedy damages from activities occurring in the territory of a foreign sovereign while the law of nations does not acknowledge corporate liability. The historical intent that gave birth to the ATS cannot really be applied in our complex, global economic system for remedies in international tort law. For the Court a slippery slope would follow if courts made decisions that could impact foreign policy and thus destabilize the international norms that favor non-interference in the principles of autonomy and sovereignty of nation-states.

³⁰ 569 U.S. 2 (201)

The reasonableness and rationality of these propositions seem hard to dispute. The values and norms of delimiting the US role in hearing causes of action from abroad seem morally sensible. But if that were the case, then why does the ATS continue to exist? A whole statute cannot continue to justify its existence for the miniscule possibility of an eighteenth century phenomenon, say piracy, which occurs today but elsewhere and not near U.S. borders.

My argument is not that we ask why the ATS should continue to exist but how can its original spirit be transformed to fit the requirements of global justice today. This indeed would require a departure from the substance and content of the ATS as interpreted in the *Kiobel* decision. And this requires a philosophical act that transcends the intellectual jurisdiction so to speak of the Supreme Court and the function it plays in our system of government. What is needed today is a massive recreation of the scope and content of the ATS to fit the needs of all those who may have claims for causes of action in a global economy that creates exclusion and inequality as it much as it creates wealth and industry. We admit that is not the function of the judiciary but necessitates political and legislative will. And this precisely is what is lacking in our global system of nation-states and hence why principles of global justice have yet to be defined, let alone actualized in the enforcement of norms of international laws.