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INTRODUCTION

Modern human rights violations are often inextricably intertwined with failed states. Although collapsed or delegitimized countries do not have a monopoly on horrific violations, they certainly contribute disproportionately.[1] For example, South Sudan, 2014's most fragile country according to the Fund for Peace,[2] is currently trapped in a violent civil war.[3] Citizens of South Sudan have been victims of gruesome massacres, torture, and other war crimes.[4] Militants on both sides of the conflict have targeted civilians.[5] Further, much of the violence against civilians appears to have been ethnically motivated.[6] Unfortunately, because of the lack of legitimate legal infrastructure, these victims have essentially no chance of obtaining justice through domestic institutions.[7] As such, their best hope of obtaining any kind of remedy lies with the international community. For several decades, the Alien Tort Statute (ATS) has served as one of the most promising pathways for foreign plaintiffs to bring tort claims alleging foreign human rights violations in U.S. courts.[8]

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1. *See* Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL'Y, Winter 1992–93, at 3, 8, 18–20.

2. THE FUND FOR PEACE, FRAGILE STATES INDEX 2014, at 4 (2014), *available at* http://library.fundforpeace.org/library/cfsir1423-fragilestatesindex2014-06d.pdf [https://perma.cc/9PEG-TJJW]. The Index ranks states based on a variety of indicators: demographic pressures, refugees, uneven economic development, group grievance, human flight and brain drain, poverty and economic decline, state legitimacy, public services, human rights and rule of law, security apparatus, factionalized elites, and external intervention. *Id.* at 10.

3. *Id.* at 16.

4. HUMAN RIGHTS WATCH, SOUTH SUDAN'S NEW WAR 23, 81–83 (2014), *available at* http://www.hrw.org/sites/default/files/reports/southsudan0814_ForUpload.pdf [https://perma.cc/B9HV-WSD5].

5. *See, e.g.*, *id.* at 57–61, 82; UNITED NATIONS MISSION IN THE REPUBLIC OF SOUTH SUDAN, UNITED NATIONS, CONFLICT IN SOUTH SUDAN: A HUMAN RIGHTS REPORT 17 (2014), *available at* http://unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf [https://perma.cc/3U8C-E3GB].

6. *See, e.g.*, UNITED NATIONS MISSION IN THE REPUBLIC OF SOUTH SUDAN, UNITED NATIONS, *supra* note 5, at 17.

7. *See* HUMAN RIGHTS WATCH, *supra* note 4, at 86–89.

8. *See generally* BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Martinus Nijhoff 2d ed. 2008) (1996).

However, the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co*.[9] has made obtaining redress for human rights violations in U.S. federal courts much more difficult.[10] The Supreme Court originally granted certiorari in *Kiobel* to examine whether corporations could be held liable under the ATS.[11] Nevertheless, the Court ultimately held that the ATS is presumed to not apply extraterritorially,[12] dramatically limiting potential uses of the statute to provide remedies for transnational human rights violations. In coming to this conclusion, the Court delved deeply into Congress's intent in passing the ATS.[13] The Court found only three settings where Congress intended the ATS to apply: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[14] Surprisingly, the Court did not explicitly rule on the original question of whether corporations can be held liable under the ATS.[15] Rather, the majority opinion included a terse paragraph explaining that, in order to overcome the presumption against extraterritorial application, the claims must "touch and concern" the United States with "sufficient force."[16]

What constitutes "sufficient force" remains largely unclear. Prior to *Kiobel*, there was disagreement over whether "foreign-cubed" actions—actions arising in a foreign territory among two foreign parties—should be allowed. Many commentators believe that *Kiobel* was a "death knell for transnational human rights actions in U.S. federal courts."[17] "Foreign-cubed" actions were seemingly rejected by the Court, and even the efficacy of "foreign-squared" actions—where one of the parties involved is American or the harm occurred on U.S. soil—has been questioned by some commentators.[18]

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9. 133 S. Ct. 1659 (2013).

10. Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, AM. SOC'Y OF INT'L L.: ASIL INSIGHTS (Apr. 18, 2013), http://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign [https://perma.cc/49W7-GTK2].

11. Anton Metlitsky, *The Alien Tort Statute, Separation of Powers, and the Limits of Federal-Common-Law Causes of Action*, 52 COLUM. J. TRANSNAT'L L. 53, 63 (2013).

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

13. *Id.* at 1665.

14. *Id.* at 1666.

15. Joel Slawotsky, *Are Financial Institutions Liable for Financial Crime Under the Alien Tort Statute?*, 15 U. PA. J. BUS. L. 957, 960 n.10 (2013). However, at least one court has claimed implicit acceptance of the idea of corporate liability under the ATS exists in the *Kiobel* decision. *See In re* S. African Apartheid Litig., 15 F. Supp. 3d 454, 460 (S.D.N.Y. 2014).

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

17. Matteo M. Winkler, *What Remains of the Alien Tort Statute After* Kiobel*?*, 39 N.C. J. INT'L L. & COM. REG. 171, 172 (2013); *see also* JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 196 (2013); Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1472 (2014); Roger Alford, Kiobel *Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013, 5:48 PM), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/ [https://perma.cc/2ZQ3-BC73].

18. *See, e.g.*, Donald Childress, Kiobel *Commentary: An ATS Answer with Many Questions (and the Possibility of a Brave New World of Transnational Litigation)*,

This Note will ultimately argue that, despite the expansive language in *Kiobel*, the Court's reasoning does not necessarily foreclose all "foreign-cubed" claims. Suits alleging human rights violations originating from conduct that took place in failed states avoid the concerns the Court emphasized in *Kiobel*. The Court should allow jurisdiction for human rights offenses in failed states, despite their "foreign-cubed" nature, because the already existing rationale for allowing jurisdiction for international piracy offenses is highly analogous.

Part I of this Note explores the ATS jurisprudence leading up to and including *Kiobel*. Besides exploring the tensions and policy interests courts are grappling with, Part I also summarizes the various opinions in *Kiobel*. Part II investigates the concept of piracy as understood in ATS jurisprudence and argues that the concept can be analogized to human rights violations in failed states. Part III explains why extending jurisdiction to human rights claims in failed states avoids both the comity and foreign policy concerns the Court emphasized in *Kiobel*. Finally, Part IV details the strong interests the United States has in allowing jurisdiction in this limited context and discusses the efficacy of the ATS as a means of redress.

I. THE HISTORICAL AND JURISPRUDENTIAL CONTEXT OF THE *KIOBEL* DECISION

The ATS was passed in 1789 as part of the Judiciary Act.[19] The statute reads, in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [20] Because the statute is so short and opaque, it presents many conceptual and interpretational problems.[21] The lack of any specified geographical nexus for jurisdiction[22] and the omission of any explicit causes of action are particularly noteworthy.[23] Unfortunately, the statute's legislative history also yields little clarity.[24] There does not appear to be any record of congressional debates over the bill.[25] Further, or perhaps because of the statute's vagueness, the ATS has lain largely

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SCOTUSBLOG (Apr. 18, 2013, 5:03 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/ [https://perma.cc/5GPN-JCLQ]. *But see* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014) (finding that *Kiobel* did not foreclose jurisdiction over claims against private military contractors from the United States by Iraqi nationals alleging that they were tortured while imprisoned by U.S. forces); Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/ [https://perma.cc/6UR2-4EUP].

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

20. 28 U.S.C. § 1350 (2012).

21. *See* Winkler, *supra* note 17, at 174–75 (citing Andrew J. Wilson, *Beyond* Unocal*: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 43 (Olivier De Schutter ed., 2006)).

22. *Id.* at 175.

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

24. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) ("[N]o one seems to know whence [the ATS] came.").

25. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J.,

unused for most of its lifetime. In fact, prior to the modern rebirth of the ATS in the latter half of the twentieth century, the statute had only been invoked in three cases, none of which discussed the ATS or its implications in any great depth.[26] These early cases mostly involved "piracy or war prize actions."[27]

A. The Rediscovery of the ATS

Despite the ATS's uneventful history, the statute blossomed into prominence with the Second Circuit's decision in *Filartiga v. Pena-Irala*.[28] Notably, *Filartiga* involved a "foreign-cubed" action: a Paraguayan citizen sued a Paraguayan official for torture that occurred in Paraguay.[29] The Second Circuit's decision emphasized the international community's uniform agreement that torture violates the law of nations in finding that the ATS provided jurisdiction.[30] As the court explained: "[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[31]

Filartiga introduced the ATS as a premier mechanism for providing redress for international human rights violations.[32] Post-*Filartiga*, but pre-*Kiobel*, many courts had no qualms with applying the ATS extraterritorially.[33] Further, in *Kadic v. Karadzic*, the Second Circuit held that the ATS could be used to bring suits against nonstate actors, rather than merely persons acting under color of state law.[34] In short, the Second Circuit was leading the charge to revitalize the ATS for a new, globalizing world.

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concurring).

26. *See* O'Reilly de Camara v. Brooke, 209 U.S. 45, 52 (1908) (finding potential jurisdiction under the ATS, but holding that the actions being complained of had been ratified by the executive, congressional, and treaty-making powers, so no tort occurred); Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (finding that the statute provided jurisdiction for a claim involving a treaty of the United States); Moxon v. The Fanny, 17 F. Cas. 942, 948 (D. Pa. 1793) (holding that the statute did not apply to the suit based on an act of piracy because the action was not for a tort only).

27. Ivan Poullaos, Note, *The Nature of the Beast: Using the Alien Tort Claims Act To Combat International Human Rights Violations*, 80 WASH. U. L.Q. 327, 333 (2002).

28. 630 F.2d 876 (2d Cir. 1980).

29. *Id.* at 878.

30. *Id.* at 881.

31. *Id.* at 890.

32. Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.: *The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L. L. 601, 601 (2013).

33. *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011) (finding jurisdiction existed for a claim brought by Liberian plaintiffs against a U.S. company for hazardous child labor which the company utilized in Liberia); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (finding jurisdiction existed for a claim brought by Indonesian plaintiffs against a U.S. company for conduct which occurred in Indonesia); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (finding jurisdiction existed for a claim brought by Bosnian plaintiffs against a Bosnian defendant for a genocidal campaign allegedly carried out in Bosnia).

34. *Kadic*, 70 F.3d at 239.

In *Sosa v. Alvarez–Machain*, the Supreme Court addressed the ATS's renaissance.[35] *Sosa* involved an action brought partially under the ATS by a plaintiff alleging that U.S. Drug Enforcement Administration agents hired Mexican nationals to kidnap the plaintiff and bring him to the United States where he could be arrested and tried for crimes.[36] In attempting to make sense of the newly popularized ATS, Justice Breyer's majority opinion explained that there were three recognized violations of the law of nations at the time the ATS was passed: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[37] The Court rejected the idea that the ATS was passed without having an enforceable purpose, but reasoned that the purpose appeared to be limited to the three aforementioned violations of the law of nations.[38] In short, the majority held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[39]

The *Sosa* majority also addressed the foreign policy implications of adopting an unrestrained interpretation of the ATS, foreshadowing a prominent theme in *Kiobel*. The opinion emphasized the Court's wariness to open the door for federal courts to "consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits."[40] In short, *Sosa* limited the potential universe of ATS claims, but clearly left the door open for suits brought alleging human rights violations that were sufficiently analogous to the historical violations of the law of nations.

After *Sosa*, courts and commentators were left to debate which, if any, modern day human rights violations were sufficiently specific and subject to universal condemnation to fall under the ATS. Of the three original contexts for the ATS's application the Court mentioned, piracy is the most comparable to modern human rights concerns.[41] Justice Breyer's concurring opinion in *Sosa* reflected this understanding by implying that piracy represents the benchmark for modern applications of the ATS.[42]

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35. 542 U.S. 692 (2004).

36. *Id.* at 697–98.

37. *Id.* at 715.

38. *Id.* at 719–20.

39. *Id.* at 725. The Court further held that the requirements of universality and specificity were not met in the case before them. *Id.* The Court also took care to clarify that universality and specificity were not necessarily the only requirements. *Id.* at 732–33. One other potential limiting principle the Court highlighted was exhaustion: a requirement that the claimant had exhausted all available remedies in the domestic court system. *Id.* at 733 n.21.

40. *Id.* at 727.

41. Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 132 (2004). Additionally, the *Sosa* opinion cited two piracy cases as historical examples of ATS application. *Sosa*, 542 U.S. at 720. Previous ATS cases were almost entirely focused on piracy or war prize actions. *See supra* notes 26–27 and accompanying text.

42. *Sosa*, 542 U.S. at 760–62 (Breyer, J., concurring).

Despite the Supreme Court's obvious desire in *Sosa* to contain the ATS, the decision also seems to manifest an understanding that the growing consensus in the international community over the wrongfulness of certain actions deserves, if nothing else, attention.[43] Considering the growth and development of the modern conception of human rights over the past few decades, perhaps this is unsurprising.[44] As globalization draws the world together and transforms the way that human rights are perceived and articulated, the international community's collaboration becomes increasingly integral to addressing violations.[45]

B. The Supreme Court Reexamines the ATS in Kiobel

If *Filartiga*[46] marked the beginning of a new age of ATS litigation, *Kiobel*[47] seems to represent a dramatic shift in the treatment of the ATS. In retrospect, perhaps the change in course was predictable. The Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*[48] was openly hostile to extraterritorial claims, albeit in the antitrust context.[49] Two years later, in 2012, *Kiobel* arrived at the Supreme Court. Like *Filartiga*, *Kiobel* involved a "foreign-cubed" case. The plaintiffs in *Kiobel* were Nigerian citizens who alleged that the Royal Dutch Petroleum Company had aided Nigerian officials in conducting a reign of terror against individuals protesting the environmental consequences of the defendant's oil production activities.[50] Initially, the Supreme Court heard arguments on whether corporations could be held liable under the ATS.[51] However, the Court immediately requested additional briefing and argument on the issue of whether the ATS should grant jurisdiction for torts arising from conduct which occurred in foreign nations.[52] In its eventual decision, the Court held that the ATS was subject to a presumption against extraterritorial application and that the presumption had not been overcome in the present case.[53] Although the justices disagreed about the specific reasoning, all agreed on the ultimate outcome.[54]

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43. *See id.* at 729–30, 732–38.

44. *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY, 179–80 (2010).

45. *See* Allison Brysk, *Introduction* to GLOBALIZATION AND HUMAN RIGHTS 1, 2–4 (Allison Brysk ed., 2002).

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

47. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

48. 561 U.S. 247 (2010).

49. In *Morrison*, the Court refused to allow foreign plaintiffs to sue foreign and American defendants for alleged misconduct involving misrepresentations made about the value of certain mortgage-servicing rights. *Id.* at 251–52. The Court emphasized that a federal antitrust statute should be presumed not to apply extraterritorially and rejected the Second Circuit's more liberal test for application of the statute. *Id.* at 255, 261. Rather, the Court reasoned, because the security involved was not listed on an American stock exchange, and all aspects of the purchases occurred outside the United States, the statute did not apply. *Id.* at 273.

50. *Kiobel*, 133 S. Ct. at 1662.

51. Winkler, *supra* note 17, at 183.

52. *Id.*

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

54. *Id.* at 1669–70.

Chief Justice Roberts wrote the Court's opinion.[55] The opinion quoted *Morrison*'s language to establish that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[56] The presumption was justified as a means to avoid international discord stemming from foreign policy complications that extraterritorial application might create.[57] The opinion referenced *Sosa* repeatedly to support the idea that applications of the ATS must be constrained so as to limit infringement on foreign policy decisions made by the other branches.[58] According to Roberts, the "danger of unwarranted judicial interference in the conduct of foreign policy" is "all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign."[59]

After establishing the presumption's existence, Roberts's opinion focused on whether the "text, history, and purposes of the ATS" provide a clear indication of extraterritoriality.[60] Here, Roberts followed the *Sosa* Court in pointing out the three principal offenses against the law of nations that existed at the passage of the ATS.[61] The Chief Justice argued that violations of safe conducts and infringements on the rights of ambassadors are not necessarily extraterritorial offenses and thus provide no basis to rebut the presumption against extraterritoriality.[62]

Piracy, however, is the classic example of a nonterritorial offense. Roberts recognized this, even admitting that the high seas are generally treated the same as foreign jurisdictions when applying a presumption against extraterritorial application.[63] However, he distinguished piracy from other extraterritorial conduct by explaining that allowing jurisdiction for piracy "does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences."[64] Because pirates operated outside of recognized jurisdictions, they were fair game for every nation and, perhaps, a *sui generis* category for jurisdictional purposes.[65] After emphasizing that the ATS was passed to avoid diplomatic strife,[66]

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55. *Id.* at 1662. Justices Scalia, Kennedy, Thomas, and Alito joined. As outlined below, Justice Kennedy wrote a separate concurrence. Justice Alito also wrote a separate concurrence, joined by Justice Thomas, explaining that he would have gone even further than the Court's opinion: bar ATS actions unless the "domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." *Id.* at 1670 (Alito, J., concurring).

56. *Id.* at 1664 (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010)).

57. *Id.*

58. *Id.* at 1664–65.

59. *Id.*

60. *Id.* at 1665.

61. *Id.* at 1666.

62. *Id.*

63. *Id.* at 1667.

64. *Id.*

65. *Id.* Indeed, Justice Roberts is not alone in believing that piracy is afforded universal jurisdiction for unique reasons. *See* Kontorovich, *supra* note 41, at 153–56.

66. Apparently, prior to the ATS's passage, there was a controversy involving a French official who was insulted and physically threatened by another French citizen in Philadelphia. Although it appears the offender was brought to justice, the French official requested that Congress pass a statute protecting the rights of foreign officials on U.S. soil. *See* Curtis A.

Roberts asserted that providing a cause of action for conduct occurring in another sovereign's territory would generate exactly that kind of strife.[67]

The opinion's concluding paragraph is terse and indeterminate. After reminding the reader that all the conduct alleged in the case was foreign, Roberts asserted that "where the claims touch and concern the territory of the United States, they must do so with sufficient force" to rebut the presumption.[68] Other than holding that "mere corporate presence" is not enough,[69] the opinion provides no other explanation for when, if ever, the presumption would be rebutted.

In his concurrence, Justice Kennedy attempted to downplay the scope of the Court's decision and the reach of its reasoning.[70] After recognizing that "a number of significant questions" remain unanswered, Kennedy hints that the application of the presumption against extraterritorial application might be different in cases involving serious violations of international law principles not covered by the "reasoning and holding of [the] case."[71]

Justice Breyer's concurrence provides a broader, more nuanced perspective on how the presumption against extraterritoriality might be rebutted.[72] Rather than creating a presumption against extraterritorial application, Breyer would find jurisdiction when

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[73]

Breyer framed his concurrence around the Court's rationale in *Sosa*. First, he reiterated the *Sosa* Court's finding that only claims alleging violations of international norms of universal acceptance and specificity equivalent to the three original violations of the law of nations could be brought under the ATS.[74] Then, presumably in response to Roberts's clear concern about disrupting foreign policy and comity, Breyer contended that additional requirements of exhaustion of domestic remedies and respect for the sovereign rights of other nations might apply.[75]

According to Breyer, however, the real question guiding application of the ATS is: "Who are today's pirates?"[76] He argued that the Court's opinion was premised on the belief that Congress normally legislates regarding domestic matters, but asserted

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Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 638–41 (2002) (arguing, however, that this incident was not the "genesis of the Alien Tort Statute").

67. *Kiobel*, 133 S. Ct. at 1666–69.
68. *Id.* at 1669.
69. *Id.*
70. *Id.* at 1669 (Kennedy, J., concurring).
71. *Id.*
72. The concurrence was joined by Justices Ginsburg, Sotomayor, and Kagan.
73. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).
74. *Id.*
75. *Id.*
76. *Id.*

that the ATS *was* enacted with foreign conduct in mind—specifically, piracy.[77] Breyer challenged Roberts's attempt to distinguish piracy from modern human rights violations by pointing out that, despite piracy's nexus to the high seas, international law treats ships like small, sovereign slices of their homeland.[78] In other words, piracy prosecutions did involve applying U.S. law to conduct occurring within the sovereign jurisdiction of another state. Further, although Roberts claimed that allowing jurisdiction for piracy resulted in less danger of interfering with U.S. foreign policy than allowing jurisdiction for conduct occurring on land, Breyer gave several examples of piracy's impact on foreign relations.[79] In answer to his own question, Breyer concludes that "today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are 'fair game' where they are found."[80]

C. Reconciling Kiobel *with* Sosa, Filartiga, *and the Modern, Globalizing World*

The *Kiobel* decision leaves much unresolved.[81] It uses sweeping language in creating a presumption against application of the ATS that will undoubtedly bar claims in many, if not most, circumstances. However, the decision is perhaps more interesting for what it leaves unaddressed. First, the decision completely ignores the original issue on appeal—whether corporations are subject to liability under the ATS.[82] Further, the barebones "touch and concern" paragraph gives little indication of whether suits involving either domestic conduct or one domestic party—the aforementioned "foreign-squared" suits[83]—might still be valid. Seemingly, *Kiobel* does *not* mean that all extraterritorial claims are barred as a matter of course—Justices Alito and Thomas alone appeared to suggest that interpretation in their concurrence.[84] Justice Breyer's three-pronged approach[85] would seem to encompass some extraterritorial actions, and several commentators have made persuasive arguments for the inclusion of "foreign-squared" ATS actions.[86] This Note will argue that the United States has a

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77. *Id.* at 1672 ("[A]t least one of the three kinds of activities that we found to fall within the statute's scope, namely piracy, normally takes place abroad." (citation omitted)).

78. *Id.*

79. *Id.* Specifically, Breyer mentioned the "Barbary Pirates, the War of 1812, the sinking of the *Lusitania*, and the Lockerbie bombing." *Id.*

80. *Id.*

81. *See generally* Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695, 1703–04 (2014) (noting that the decision failed to offer "conclusive guidance" for cases involving, for example, "U.S. nationals as defendants, conduct within the jurisdiction or control of the United States or performed under contract with the U.S. government").

82. *See supra* note 15 and accompanying text.

83. *See supra* note 18 and accompanying text.

84. *See Kiobel*, 133 S. Ct. at 1669–70 (Alito, J., concurring); Steinhardt, *supra* note 81, at 1705.

85. *See supra* note 73 and accompanying text.

86. *See* Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014); Winkler, *supra* note 17, at 187–88; Alex S. Moe, Note, *A Test by Any Other Name: The Influence of Justice Breyer's Concurrence in* Kiobel v. Royal Dutch Petroleum Co., 46 LOY. U. CHI. L.J. 225, 286–87 (2014).

strong enough interest in allowing jurisdiction for claims arising in failed state contexts to overcome the Court's wariness in *Kiobel*.

Secondly, the *Kiobel* decision does not explicitly discuss *Sosa*'s or *Filartiga*'s continued vitality. Roberts's[87] and Breyer's[88] opinions in *Kiobel* both cite *Sosa* approvingly. Alito's opinion would have applied the *Sosa* test *only* to domestic conduct.[89] However, the refusal of the other seven Justices to adopt the rationale advanced by Justices Alito and Thomas is telling—the obvious implication is that some foreign cases would be acceptable.[90] Because this issue was not directly addressed by any of the opinions, drawing definite conclusions is risky. However, at the very least, it is possible to read the "touch and concern" language as encompassing both *Sosa* and *Filartiga*.[91] Despite the "foreign-cubed" fact patterns in both cases, they arguably "touched and concerned" the United States to a sufficient extent for jurisdiction.[92] Finally, the "touch and concern" paragraph can, and perhaps should, be read as dicta. Kennedy's concurrence—representing the crucial fifth vote for Roberts's opinion—was careful to emphasize the narrow holding of *Kiobel* and the possibility of different outcomes under other circumstances.[93] Despite the majority opinion's sweeping language, there is ultimately little substance to guide future applications of the ATS. Certainly, the presumption against extraterritoriality and comity and foreign policy concerns highlighted by the Court will control in future cases. However, as this Note will explore in the next several Parts, that presumption and those concerns should be rebutted in certain circumstances.

Finally, the reasoning in all four opinions issued by the *Kiobel* Court framed the issue around conceptions of sovereignty and territoriality, ideas which increasingly carry different meaning and relevance than they did even as little as fifty years ago.[94] Creative thinking is necessary to navigate this new world—one simultaneously made smaller yet more complex by globalization.[95] The world can no longer be conceptualized as an intricate puzzle filled with interlocking jurisdictions.[96] Rather, transnational problems, relationships, and solutions are multifaceted, requiring different levels and varieties of legal actors to work together. Trusting in the traditional nation-state system to resolve the challenges posed by the globalizing world, as the Court in *Kiobel* appeared to do, is problematic. Parts III and IV of this Note will point out the inadequacy of traditional foreign policy and comity approaches when applied to the failed-state context, thus demonstrating the

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87. *See Kiobel*, 133 S. Ct. at 1663–65.

88. *See id.* at 1671 (Breyer, J., concurring).

89. *Id.* at 1670 (Alito, J., concurring).

90. Steinhardt, *supra* note 81, at 1705.

91. Cassel, *supra* note 86, at 1784.

92. *Id.* Of course, jurisdiction was ultimately not found in *Sosa*, but that holding was based on the lack of universality and specificity of the claim, not extraterritorial application. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

93. *See supra* text accompanying notes 70–71. *See also* Cassel, *supra* note 86, at 1787.

94. *See* Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 2–3 (2005).

95. Alfred C. Aman, Jr., Hinskey Hills Lectures, Sailing to Globantium, 3–4 (Spring 2014) (unpublished manuscript) (on file with the Indiana Law Journal).

96. *Id.*

inapplicability of the *Kiobel* Court's primary concerns that led to applying the presumption against extraterritoriality.[97]

II. ANALOGIZING PIRACY TO MODERN HUMAN RIGHTS VIOLATIONS IN FAILED STATES

There was a basic consensus among the Justices in *Kiobel* that piracy was originally, and remains, a proper context for the application of the ATS. The Court's treatment of piracy in *Kiobel* was largely superficial—acknowledging that piracy was a recognized violation of the law of nations at the time the ATS was passed. But piracy was the only universal jurisdiction crime recognized by common law and the law of nations.[98] Exploring why, exactly, piracy was treated differently than other kinds of crimes in the eighteenth century will provide context and guidance for situations where the newly created presumption against extraterritorial application should be rebutted. Specifically, the harms and jurisdictional problems caused by human rights violations in failed states bear many similarities to those caused by piracy.

A. Piracy as Understood at the Time of the ATS's Passage

There was universal jurisdiction over piracy under the early law of nations.[99] Although piracy's heinous, universally condemned nature is the reason commonly given for universal jurisdiction,[100] a better explanation focuses on the characteristics and impact of the activity.[101] Piracy receives universal jurisdiction and condemnation because of "its otherwise jurisdictionless nature, its threat to international commerce, and the difficulty of policing it."[102] Professor Kontorovich has offered a nuanced perspective on why piracy attained universal jurisdiction status, identifying six characteristics of piracy that would need to be met for ATS jurisdiction to exist in other contexts.[103]

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97. Although exploring them is beyond the scope of this Note, the basic disconnect between the state-centric, top-down sovereignty rationale in *Kiobel* and the rapidly changing world is applicable to many other contexts as well, including antitrust efforts and labor rights.

98. Kontorovich, *supra* note 41, at 114.

99. 4 WILLIAM BLACKSTONE, COMMENTARIES *71.

100. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 185–86 (2004).

101. Kontorovich, *supra* note 41, at 138. If heinousness is the only requirement, then a potentially unlimited number of crimes could be subject to universal jurisdiction. Further, it is unclear that piracy is really that heinous. Is "robbery at sea," as piracy has been described, more heinous than a garden-variety murder in Chicago? *See* Kontorovich, *supra* note 100, at 191, 205–07. Heinousness, of course, is certainly not a reason to disallow jurisdiction—it is just not a sufficient reason by itself.

102. Recent Case, 127 HARV. L. REV. 1244, 1249 (2014) (citing United States v. Ali, 718 F.3d 929, 940 (D.C. Cir. 2013)).

103. Kontorovich, *supra* note 41, at 114–15.

First, piracy was universally condemned by all nations.[104] This requirement, also made explicit in *Sosa*,[105] is the most commonly identified. Second, piracy was narrowly defined.[106] This requirement was also read into ATS jurisprudence in *Sosa*, articulated there as "specificity."[107] Third, piracy occurred on the high seas, outside traditional jurisdictional nexuses.[108] The limitations of traditional jurisdictional constructs necessitate universal jurisdiction.[109] Traditional jurisdiction's inadequacy is not necessarily limited to the high seas. For example, in *United States v. Ali*, the District of Columbia Circuit affirmed universal jurisdiction over piracy when the defendant's alleged actions were "limited to acts he committed on land and in territorial waters—not upon the high seas."[110] Notably, *Ali* was decided post-*Kiobel*. Fourth, pirates were private actors—their actions did not represent official decisions by a sovereign nation.[111] Because official action is political action, providing universal jurisdiction only for pirates acting privately avoided foreign policy and comity concerns.[112] Fifth, pirates were a global externality, posing an economic and security threat to many nations.[113] Piracy threatened international commerce and navigation, things which all seafaring nations had a vested interest in protecting.[114] Finally, piracy was subject to the same punishment in all jurisdictions—death.[115]

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104. *Id.* at 139.

105. Sosa v. Alvarez-Machain, 542 U.S. 692, 725, 732 (2004).

106. Kontorovich, *supra* note 41, at 139–40.

107. *Sosa*, 542 U.S. at 725.

108. Kontorovich, *supra* note 41, at 152.

109. *Id.* at 152–53; *see also* United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) ("Such vessels are 'international pariahs.' By attempting to shrug the yoke of any nation's authority, they subject themselves to the jurisdiction of all nations '*solely* as a consequence of the vessel's status as stateless.'" (emphasis in original) (citations omitted) (quoting United States v. Marino-Garcia, 679 F.2d 1373, 1382–83 (11th Cir. 1982))).

110. 718 F.3d 929, 932 (D.C. Cir. 2013). The defendant was being charged criminally under a theory of aiding and abetting piracy, but the court still found that it would be "self-defeating" to limit liability to conduct occurring on the high seas. *Id.* at 940. As the court explained, the "high seas language refers to the very feature of piracy that makes it such a threat: that it exists outside the reach of any territorial authority, rendering it both notoriously difficult to police and inimical to international commerce." *Id.*

111. Kontorovich, *supra* note 41, at 145–51.

112. *See id.* at 146–47.

113. *Id.* at 152–53.

114. *Id.* at 153.

115. *Id.* at 142–46. The key concerns here are forum shopping and double-jeopardy. *Id.* at 143. However, piracy is still a universal jurisdiction offense, yet there is no longer uniformity in penalties for piracy. *See generally* Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime* (Northwestern University School of Law, Faculty Working Papers, Paper No. 211, 2012), *available at* http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1210&context=facultyworkingpapers [https://perma.cc/P5JB-D5SU]. Thus, this characteristic seems an inapposite requirement for modern applications of the ATS.

B. Human Rights Violations in Failed States Create the Same Concerns as Piracy

In *Kiobel*, the Court made clear that the heinous nature of human rights violations, when committed outside of the United States, does not ordinarily and by itself justify jurisdiction.[116] However, when the reasons for providing universal jurisdiction over piracy are compared to those present in the failed state context,[117] the similarities are sufficient to rebut the presumption against extraterritorial application of the ATS.

First, the two requirements for jurisdiction articulated in *Sosa* do not necessarily bar claims originating in failed states. Although *Sosa*'s requirements of universal condemnation and specificity weeded out some ATS claims, many were still brought and found to be within the federal courts' jurisdiction.[118] Further, failed states are particularly susceptible to human rights violations, especially egregious violations that would meet the *Sosa* requirements.[119]

Like pirate vessels, failed states do not fit naturally into normal conceptions of sovereignty and jurisdiction. Unlike a strong, fully functioning state, failed states cannot exercise sovereign power over their territory.[120] The government's legitimacy is minimal, infrastructure is failing, and conflict is constant.[121] South Sudan has been consumed by civil war since December 2013.[122] The conflict has ravaged infrastructure, and the government has failed to demonstrate either the capacity or the desire to protect its vulnerable citizens.[123] Such states lack the ability to honor international obligations or even engage in diplomatic relations with other states in a coherent way.[124] Thus, the failed state can be described as a mere "international legal person without any substance to back its claim to statehood."[125] Like the high seas, the territory which the failed state nominally controls is a jurisdictional dead zone. Although, speaking in technical terms, that territory might still represent a legal entity, the territory does not remain a legal jurisdiction for practical purposes. Legitimate litigation or lawmaking from within is unfeasible. Piracy prosecutions have no jurisdictional barriers because no single authority can police the high seas. This same problem exists in failed states. Thus, as with piracy, the realities of the situation necessitate universal jurisdiction.

Further, neither failed states nor piracy involves a legitimate actor making official decisions. Rather, failed states involve the collapse of a government. Nonstate actors dominate the territory because the government is no longer capable of offering

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116. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663–65 (2013).

117. *See infra* notes 144–50 and accompanying text for a definition of failed state.

118. Steinhardt, *supra* note 81, at 1700.

119. *See generally* Neil A. Englehart, *State Capacity, State Failure, and Human Rights*, 46 J. OF PEACE RES. 163 (2009).

120. John Yoo, *Fixing Failed States*, 99 CALIF. L. REV. 95, 100 (2011).

121. *Id.*

122. HUMAN RIGHTS WATCH, WORLD REPORT 2015, 495 (2015), *available at* http://www.hrw.org/sites/default/files/reports/wr2015_web.pdf [https://perma.cc/8FCM-JQJ6].

123. *Id.* at 500.

124. GM Ferreira, *Good Governance and the Failed State*, 41 COMP. & INT'L L.J. OF S. AFR., 428, 435–36 (2008).

125. *Id.* at 436.

protection.[126] Self-proclaimed warlords, former government officials, and petty criminals all prey on the population.[127] For example, South Sudan is currently torn between two ethnic factions, one supporting South Sudan's president, and the other supporting a former deputy of his.[128] As with piracy, human rights violations in failed states involve rogue actors preying on victims of opportunity. Further, providing jurisdiction in the failed state context would largely avoid the foreign policy and comity concerns on which the *Kiobel* Court was so fixated.[129] Because the violations do not involve official action by a sovereign state, the potential for political embarrassment or controversy when providing jurisdiction to hear ATS claims is greatly reduced.

Finally, the costs and harms imposed by human rights violations in failed states impact many nations—they are a global externality. First, failed states are breeding grounds for terrorist organizations, human trafficking, and smuggling of all varieties.[130] Each of those activities has a clear and direct impact on the greater international community. Unchecked human rights abuses also result in floods of refugees to surrounding states.[131] Since the beginning of South Sudan's civil war, over 500,000 refugees have fled the country.[132] Within South Sudan, another 1.5 million individuals have been displaced.[133] Additionally, internal conflict and lawlessness in a failed state can destabilize the surrounding region—violent radicals might spread from the collapsed state to other states, ethnic conflict might draw in related ethnic groups in other states, or surrounding states might feel the need to increase their armament.[134] Further, the developed community occasionally feels morally compelled to intervene in areas where massive, sustained human rights violations have proceeded unchecked.[135] As already established, failed states are exceedingly likely to serve as the backdrop for this kind of conduct.[136] Surely, then, the international community has an interest in providing redress for these claims without needing to actually put humanitarian forces on the ground. Finally, and perhaps most importantly, failed states—and especially those failed states gripped by violence—impose significant economic costs on neighboring states.[137] Just like

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126. Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators*, *in* STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 5–6 (Robert I. Rotberg ed., 2003).

127. *Id.*

128. HUMAN RIGHTS WATCH, *supra* note 122, at 495.

129. *See infra* Part III.

130. Yoo, *supra* note 120, at 107.

131. *Id.*

132. U.S. AGENCY FOR INT'L DEV., SOUTH SUDAN – CRISIS: FACT SHEET #5 (2015), *available at* http://www.usaid.gov/sites/default/files/documents/1866/south_sudan_ce_fs05_02-27-2015.pdf [https://perma.cc/2SCR-JWKK].

133. *Id.*

134. Yoo, *supra* note 120, at 107–08.

135. Wayne Sandholtz, *Humanitarian Intervention*, *in* GLOBALIZATION AND HUMAN RIGHTS, *supra* note 45, at 201, 211–12.

136. *See supra* text accompanying note 119.

137. Lisa Chauvet, Paul Collier & Anke Hoeffler, *The Cost of Failing States and the Limits to Sovereignty* (United Nations Univ. World Inst. for Dev. Econ. Research, Research Paper No. 2007/30, 2007), *available at* http://www.diw.de/documents/dokumentenarchiv/17

piracy imposed significant economic and security costs on all seafaring nations, human rights violations in failed states are a global externality.[138]

In summary, the same reasons for creating universal jurisdiction for piracy apply to human rights violations in failed states. The ATS provides jurisdiction for piracy not only because of the heinousness of the crime, but more importantly because the conduct cannot be adequately deterred otherwise. All nations have a vested interest in stopping the conduct, but no one nation can do so alone. Likewise, human rights abuses in failed states—at least those that are specific and heinous enough to receive universal condemnation—cannot be rectified by reliance on traditional jurisdictional concepts. The cost of these violations, both for the victims and the international community, is extremely high. Further, by definition, these abuses occur in a place where effective, legitimate governance is no longer occurring. The failed states cannot be expected to provide adequate redress. Thus, conduct occurring in failed states is one circumstance where the *Kiobel* presumption against extraterritorial application should be rebutted.

III. PROVIDING JURISDICTION FOR HUMAN RIGHTS OFFENSES IN FAILED STATES AVOIDS THE COMITY AND FOREIGN POLICY CONCERNS THE COURT EMPHASIZED IN *KIOBEL*

Although the majority in *Kiobel* attempted to distinguish piracy from modern human rights offenses, the majority's reasoning in doing so was focused more on the foreign policy and state sovereignty implications of providing jurisdiction for extraterritorial conduct under the ATS.[139] Certainly, unfettered ATS jurisdiction

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/diw_01.c.346922.de/chauvet_conflict_gecc.pdf [https://perma.cc/9K7X-6KKE] (estimating that the annual cost to neighbors of failed states is approximately $237 billion).

138. In this context, a failed state can be conceptualized as a kind of "commons": like the public field which offers potentially free grazing, the failed state offers potential for increased economic growth and security for other states. *See infra* Subpart IV.A (detailing potential benefits to the global order, and the United States specifically, which intervention in failed states could produce). The analogy extends further: a "tragedy of the commons" occurs when the self-interested ranchers overgraze the public field and destroy it; similarly, self-interested states want to reinforce and comply with sovereignty norms because those norms usually help produce political stability and economic growth, the same public goods the international community wants from the failed state. However, refusal to intervene in the failed state only exacerbates the economic and political externalities imposed by failed states. *See infra* text accompanying notes 186–96 for a discussion of these externalities. In this way, the international community's blind reliance on sovereignty norms actually produces the opposite effect as intended: instead of undergirding the economic and political order, it undermines it. Thus, a "tragedy of the commons," in a sense, occurs: the self-interested actions (or, here, inaction) of the potential beneficiaries results in the loss of those potential benefits. However, when some attempt is made to govern the commons, like extending ATS jurisdiction, the international community will benefit, despite the potential weakening of sovereignty norms. *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968).

139. *See supra* Part I.B.

could result in awkward diplomatic situations.[140] Expanding ATS jurisdiction could create a precedent whereby U.S. citizens and officials were sued in foreign courts, perhaps to make a political point.[141] More specifically, the Supreme Court was concerned with comity—a rule of construction that "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations" so as to ensure harmony between "potentially conflicting laws."[142] However, as will be demonstrated, the implications and dangers of expanding ATS jurisdiction in the failed state context are limited.

To this point, this Note has discussed common characteristics of failed states and piracy.[143] However, if the deciding factor for whether ATS jurisdiction exists is to be whether the conduct occurred in a failed state, a working definition of what a failed state is must be advanced.[144] Because the *Kiobel* Court focused on traditional concepts of comity, sovereignty, and foreign relations, the ability of a state to fulfill those traditional state functions is most relevant.[145] First, the state's government must be incapable of fulfilling its international obligations.[146] Even though the state might still technically exist as a legal entity, it must lack the ability to operate as a nation-state in the international community.[147] Second, the state must be unable to ensure access to basic public services like public order, civil liberties, and, especially, an impartial, functioning legal system.[148] Of course, if the state is itself complicit in the ongoing human rights violations, then it cannot provide a fair justice system.[149] Finally, the state must have lost legitimacy domestically—whether from lack of representativeness in the government, other groups claiming authority to govern, corruption, or simple ineffectiveness.[150]

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140. Cassel, *supra* note 86, at 1790.

141. *Id.* at 1791.

142. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–65 (2004).

143. *See supra* Part II.

144. Unfortunately, there is no consensus on the precise definition of a failed state. Yoo, *supra* note 120, at 100. Although there might be broad agreement on whether the most dysfunctional states have failed, there is plenty of room for subjective judgment at the margins.

145. Nuanced definitions of "failed state" often focus more on the collapse of the social contract with its citizens: economic decline, grossly inadequate public services, unresolved group grievances, failure to respond to systemic challenges, and the like. *See, e.g.*, THE FUND FOR PEACE, *supra* note 2, at 10; Jean-Germain Gros, *Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti*, 17 THIRD WORLD Q. 455, 456 (1996).

146. Thomas D. Grant, *Partition of Failed States: Impediments and Impulses*, 11 IND. J. GLOBAL LEGAL STUD., Summer 2004, at 51, 52. Examples of international obligations that failed states would be unable to fulfill include treaty obligations and redress or prevention of violations of international law by government actors and agencies. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

147. Grant, *supra* note 146, at 52.

148. *See* THE FUND FOR PEACE, *supra* note 2, at 10 (encompassed in the "Public Services" and "Human Rights and Rule of Law" categories).

149. Weinberg, *supra* note 17, at 1495 ("Our own basic civil rights law proceeds on the theory that courts at the place of a governmental violation of human rights are not trustworthy enforcers of the human rights of their own residents.").

150. *See* THE FUND FOR PEACE, *supra* note 2, at 10 (encompassed in the "State Legitimacy"

This working definition of a failed state provides an opportunity to determine whether extending ATS jurisdiction to conduct originating in such states would implicate the comity and foreign policy concerns identified by the *Kiobel* Court. The next two subparts demonstrate that extending ATS jurisdiction in this limited context would avoid the problems feared by the Court.

A. Comity and Failed States

When dealing with a failed state, comity is an inappropriate consideration. Failed states, by definition, do not possess sovereign interests in the sense that a strong, functional state does.[151] Further, failed states are unable to provide adequate legal remedies for domestic human rights violations. Thus, extending jurisdiction for abuses occurring in failed states not only avoids comity concerns, but also is necessary for any suitable remedy to occur.

The Court's emphasis on the need for comity stems from its adherence to traditional norms of sovereignty—the nation-state as a self-sufficient, autonomous whole.[152] There is serious debate over whether that conception of the world is, or ever has been, truly accurate, especially once globalization's impact is considered.[153] And sovereignty does not exist in failed states.[154] Failed states have, at best, a barely functioning state apparatus.[155] There is no central authority and the government, if one still exists, has no monopoly on the legitimate use of force.[156] Further, lawmaking, if it occurs at all, is done by fiat, with scarcely a pretense of legitimate procedure.[157] Thus, allowing jurisdiction under the ATS would not undermine the principle of comity—the failed state does not possess the institutional coherence or legitimacy to meet traditional conceptions of sovereignty.

Additionally, the international community will occasionally intervene in failed states to "halt large-scale human rights abuses."[158] When armed intervention occurs in a failed state, the "sensitive sovereignty issue" is skirted, at least partially.[159] As Professor Sandholtz asserts, "In the post-Cold War era, there is an emerging sense

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category); *see also* Stefan Mair, *A New Approach: The Need To Focus on Failing States*, 29 HARV. INT'L REV., Winter 2008, at 52, 52.

151. *See supra* notes 146–47 and accompanying text.

152. *See* Philip Liste, *Transnational Human Rights Litigation and Territorialised Knowledge:* Kiobel *and the 'Politics of Space,'* 5 TRANSNAT'L LEGAL THEORY 1, 14–18 (2014).

153. *See generally* Richard L. Brinkman & June E. Brinkman, *Globalization and the Nation-State: Dead or Alive*, 42 J. ECON. ISSUES 425 (2008); Sylvia Walby, *The Myth of the Nation-State: Theorizing Society and Polities in a Global Era*, 37 SOCIOLOGY 529 (2003).

154. Anthony Vinci, *Anarchy, Failed States, and Armed Groups: Reconsidering Conventional Analysis*, 52 INT'L STUD. Q. 295, 298–99 (2008); *see also* Sandholtz, *supra* note 135, at 221 ("Governments are able at least partially to skirt the sensitive sovereignty issue in cases where intervention was carried out in states without a functioning government in control of its territory . . . .").

155. Ferreira, *supra* note 124, at 432–34.

156. *Id.*

157. *See* Rotberg, *supra* note 126, at 6–7.

158. Sandholtz, *supra* note 135, at 208.

159. *Id.* at 221.

that when states engage in gross, systematic, or large-scale human rights abuses, they thereby forfeit or suspend their status as sovereign equals in interstate society."[160] Surely, if failed states are lacking in sovereignty enough to justify actual on-the-ground intervention, then allowing ATS jurisdiction would not violate comity. Allowing private actors to bring civil actions in U.S. courts would appear to be cheaper and potentially more effective than physical intervention.[161]

Secondly, failed states do not possess the means to provide legitimate domestic legal remedies. In cases involving extraterritorial conduct, judges commonly wonder why the case is not being brought where the cause of action originated.[162] However, obtaining legal redress in a failed state is not possible. When the local government has lost its monopoly on the use of force and governmental institutions are corrupt and grossly dysfunctional,[163] the legal system, insofar as it exists, is completely illegitimate.[164] Often, ATS plaintiffs will have attempted to bring domestic claims but cannot receive a fair hearing. In fact, this occurred in *Filartiga*.[165] In other words, victims in failed states that file a claim in the jurisdiction where the cause of action originated do not have any real expectation of justice.

Further, the principle of exhaustion could serve as a limiting principle, ensuring that ATS suits could not be brought by those who have an adequate domestic legal remedy. The *Sosa* Court referenced this idea in a footnote.[166] In addition to the two explicit requirements the Court created for ATS jurisdiction,[167] plaintiffs might also be required to show they "exhausted any remedies available in the domestic legal system."[168] Beyond that open-ended footnote in *Sosa*, the Supreme Court has not addressed the exhaustion issue in the ATS context. However, a number

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160. *Id.* at 208.

161. *See infra* Part IV.B.

162. *See, e.g.*, Transcripts of Oral Arguments, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10–1491); Transcript of Oral Argument, Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010) (No. 08–1191). Justice Alito wondered what connection the conduct in *Kiobel* had to the United States. Transcript of Feb. 28, 2012, Oral Argument at 7, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10–1491). Justice Kennedy voiced similar concerns during the second round of arguments in *Kiobel*. Transcript of Oct. 1, 2012, Oral Argument at 4, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10–1491). Similarly, Justice Ginsburg observed in *Morrison* oral arguments that the case had "'Australia' written all over it." Transcript of Oral Argument at 7, Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010) (No. 08–1191).

163. Ferreira, *supra* note 124, at 432–36.

164. *See supra* note 148–49 and accompanying text.

165. After the plaintiff filed a criminal action in Paraguayan courts, his attorney was arrested and threatened with death. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The attorney was later disbarred, allegedly without just cause. *Id.* At the trial, a son of one of the defendant's companions confessed to the murder, arguing it was a crime of passion. *Id.* The plaintiffs alleged they had evidence which refuted that claim. *Id.* Regardless, the man who confessed was never charged or convicted of any crime. *Id.* More importantly, the plaintiffs had received no resolution from Paraguayan courts when the *Filartiga* decision was issued, four years after the Paraguayan action was originally filed. *Id.*

166. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

167. *See supra* note 39 and accompanying text.

168. *Sosa*, 542 U.S. at 733 n.21.

of lower courts have considered whether exhaustion should be a requirement, with courts divided over the correct approach.[169] The wisdom of imposing an exhaustion requirement is beyond the scope of this Note. However, exhaustion could certainly serve as a safeguard—allowing ATS jurisdiction only when the domestic legal system is too illegitimate to provide a remedy.[170]

B. The Foreign Policy Dangers of Extending Jurisdiction Have Been Exaggerated

In *Kiobel*, the justices also seemed concerned with the foreign policy implications of extending jurisdiction.[171] Because human rights abuses involve so many political undertones, the Court was afraid that extending jurisdiction would interfere with the foreign policy agendas of the executive or legislature.[172] However, this concern, especially when considered in the failed state context, has been overblown.

First, the atrocities that would be the subject of ATS suits are, by definition, universally outlawed and reviled. *Sosa* clearly eliminated all ATS suits which might be brought alleging conduct that is not recognized as a human rights violation.[173] Controversial conduct, if not recognized as a human rights violation by the international community's consensus, would not be eligible under the ATS. No state, failed or otherwise, is likely to have an "atrocity-favoring law."[174] Further, the United States has an interest in affirming and upholding its commitment to human rights, especially the particularly egregious variety to which the ATS is limited.[175] As U.S. Solicitor General Verrilli articulated to the Court during the *Kiobel* arguments: the United States has "interests in ensuring that our Nation's foreign relations commitments to the rule of law and human rights are not eroded."[176] When jurisdiction is limited only to conduct over which there is no dispute of wrongness, and the executive branch itself is arguing for increased jurisdiction, foreign policy concerns are minimal.

Second, because failed states are not engaging with the international community on a meaningful level, the risk of foreign policy blowback is minimal. As already established, failed states are legal entities in theory only—they do not possess the institutional integrity or consistency to interact with the international community and take on international obligations.[177] As such, ATS suits are unlikely to disrupt

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169. For a general summary of the cases and arguments involved, see Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555, 564–69 (2010).

170. The exhaustion requirement contains a futility exception. *Id.* at 556. Thus, litigants who would "face violent retaliation or even death for attempting to seek redress for their harms in the local courts" would be protected. *Id.* at 557.

171. *See supra* text accompanying notes 56–59.

172. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (citing *Sosa*, 542 U.S. at 727).

173. *See supra* note 39 and accompanying text.

174. Weinberg, *supra* note 17, at 1527.

175. *Id.* at 1529–30.

176. Transcript of Oct. 1, 2012, Oral Argument at 43–44, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10–1491).

177. *See supra* notes 146–47 and accompanying text.

delicate negotiations between the United States and the failed state. There would be no sovereign entity able to object to the exercise of jurisdiction in any coherent way. The fact that providing jurisdiction for conduct occurring in functioning states would provoke an international disturbance does not justify forbidding jurisdiction where the foreign state does not—or cannot—object.[178] Additionally, ATS suits involve a civil suit brought by a private party. ATS suits do not constitute an official U.S. action or judgment about the parties or territory where the suit originated.

Finally, there is no evidence that expanding the ATS jurisdiction, especially in this limited setting, would result in retaliatory legislation or litigation. Although Chief Justice Roberts appeared concerned with the possibility of retaliatory civil actions against Americans,[179] there is no evidence that such actions would be taken. In fact, although *Filartiga* was decided in 1980, the Chief Justice was unable to provide a single example of retaliation.[180] Likely, no persuasive example exists.[181] Rather, it seems the opposite is true: the international community perceives potential jurisdiction under the ATS as admirable—an approach to be adopted.[182] Such a view is further supported by the fact that the U.S. government argued for a broader conception of ATS jurisdiction in *Kiobel*.[183] Finally, because failed states are unlikely to possess the capability to coherently object to jurisdiction or engage in retaliation, this concern is even more inapplicable.

IV. THE UNITED STATES' INTEREST IN PROVIDING A MECHANISM FOR ADDRESSING THESE VIOLATIONS

In contrast to the minimal comity and foreign policy concerns that extending jurisdiction to failed states would raise, the United States has strong interests in providing redress for the egregious human rights violations covered by the ATS. The Unites States has a strong, recognized interest in human rights accountability worldwide.[184] Likewise, victims of gross human rights abuses have a recognized right to access remedies[185]—an interest which has received little attention in this debate. Those interests, however, are both relatively abstract. Extending ATS jurisdiction to the failed state context would deliver more tangible benefits as well.

A. Providing Jurisdiction Would Align with U.S. Interests.

Human rights abuses in failed states are a global externality. As already established, failed states are breeding grounds for terrorism and illegal trade.[186] Sudan's history of supporting terrorist organizations is long, predating South Sudan's

178. Cassel, *supra* note 86, at 1794–95.
179. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).
180. Weinberg, *supra* note 17, at 1491.
181. *Id.* at 1497.
182. *Id.* at 1502.
183. *Id.*
184. *See supra* text accompanying note 175; *see also* Cassel, *supra* note 86, at 1791.
185. Cassel, *supra* note 86, at 1791.
186. *See supra* text accompanying note 130.

secession.[187] The conflict in South Sudan has also resulted in increased elephant poaching, illegal gold mining and smuggling, and arms smuggling.[188] When the political and institutional infrastructure of a state collapses, rogue actors thrive.[189] This fact—the security threat posed by failed states—is often the justification given for on-the-ground intervention.[190] Certainly, then, allowing victims of human rights abuses to bring suit in U.S. courts would be justified, if only as a more cost-effective alternative. Failed states also impose significant financial costs on the rest of the international community.[191] The more the state is in turmoil, and the more its citizens are experiencing major human rights abuses, the greater the cost to the rest of the world.[192] Further, the United States has an interest in developing the failed state economically, if only as a market for U.S. goods and services.[193] Because globalization is tying the world's markets together, all economic voids impact the United States,[194] and human rights violations are a major contributor to creating those voids.[195] Law and order are a prerequisite for economic growth, and it would be wise to "extend the rule of law to those luckless places" that "struggle against violence," like failed states.[196]

Additionally, the United States has a strong, demonstrated commitment to rule of law and human rights. As previously mentioned, the U.S. Solicitor General highlighted this interest during the *Kiobel* arguments.[197] In his concurrence, Justice Breyer also emphasized this interest.[198] Further, the United States has codified its intention to "promote and encourage increased respect for human rights and

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187. Jonathan Schanzer, *Pariah State: Examining Sudan's Support for Terrorism*, DEFEND DEMOCRACY (July 5, 2012), http://www.defenddemocracy.org/media-hit/pariah-state-examining-sudans-support-for-terrorism/ [https://perma.cc/G5JP-KXUY].

188. Keith Somerville, *What Is Driving the Demise of the African Elephant?*, POLITICSWEB (Dec. 11, 2014), http://www.politicsweb.co.za/news-and-analysis/what-is-driving-the-demise-of-the-african-elephant [https://perma.cc/9T8R-PNQ6]; *South Sudan Loses over $200m a Year from Gold Smuggling*, SUDAN TRIB. (July 29, 2013), http://www.sudantribune.com/spip.php?article47474 [https://perma.cc/5BEB-DWW9]; Judith Van Der Merwe, *The Crime-Terror Continuum: The Case of Africa*, ABERFOYLE INT'L SECURITY (Jan. 2, 2014), http://www.aberfoylesecurity.com/?p=778 [https://perma.cc/L7GH-A5XD].

189. Vinci, *supra* note 154, at 299.

190. Sandholtz, *supra* note 135, at 212.

191. *See* Chauvet et al., *supra* note 137, at 12–13 ("[F]ailing states are costly primarily because they inflict externalities on others.").

192. *See id.* at 10–11.

193. *See* Ellen L. Frost, *Economic Globalization: Stability or Conflict?*, *in* STRATEGIC ASSESSMENT 1999: PRIORITIES FOR A TURBULENT WORLD 19, 22 (Hans Binnendijk et al. eds., 1999).

194. *See id.* at 32.

195. *See* Chauvet et al., *supra* note 137, at 3–9.

196. Weinberg, *supra* note 17, at 1490–91.

197. *See supra* text accompanying note 176.

198. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring) (arguing that "we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest").

fundamental freedoms throughout the world."[199] For the last forty years, presidential administrations have confirmed the United States' commitment to human rights.[200]

Finally, expanding the ATS would increase U.S. soft power. Soft power—the United States' "ability to attract others by the legitimacy of U.S. policies and the values that underlie them"[201]—is an integral part of the United States' status as a world power.[202] Furthermore, soft power must be cultivated and developed intentionally.[203] According to Professor Weinberg, "American alien tort litigation surely advances America's moral standing and authority in the world."[204] Providing victims of horrific crimes an avenue to air their grievances and achieve justice fits naturally with American ideals and is likely to be met with admiration and imitation internationally.[205]

B. Providing Jurisdiction Would Strengthen Protection of Human Rights in Failed States

Of course, even if the United States has strong interests in deterring human rights abuses and providing redress for those that have occurred, extending jurisdiction is useless unless it would further those interests. One might object: What good would a verdict in favor of the victims do? Even if the hopes of collecting damages are small, however, extending jurisdiction is still worthwhile.

First, expanding the ATS to cover the failed state context would strengthen international human rights norms. Merely by existing, the ATS expresses condemnation of acts that are particularly egregious.[206] Victims in failed states are among the most marginalized of all human rights victims.[207] Because they have no domestic recourse, and likely lack the resources or institutions to organize and gain political attention, they are often without a forum to voice their grievances.[208] The ATS provides a forum. Merely by shedding light on groups that might otherwise languish in the shadows, the ATS legitimizes and vindicates the victims.

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199. 22 U.S.C § 2304(a)(1) (2012).

200. Cassel, *supra* note 86, at 1796.

201. Joseph S. Nye, Jr., *The Decline of America's Soft Power: Why Washington Should Worry*, FOREIGN AFF. MAY–JUNE 2004, at 16, 16.

202. *See id.* at 16.

203. *See generally id.* at 18–19.

204. Weinberg, *supra* note 17, at 1504.

205. *Id.* at 1502, 1504.

206. William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577, 1593 (2014).

207. *See* Charles W. Brower II, Note, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of* Sosa v. Alvarez-Machain, 26 WHITTIER L. REV. 929, 950 (2005). The *Kiobel* decision only serves to further disenfranchise persecuted minorities. *See* Ivana Isailovic, *Reframing the* Kiobel *Case: Political Recognition and State Jurisdiction*, 38 SUFFOLK TRANSNAT'L L. REV. 1, 7 (2015) ("The decision thereby entrenches processes of socio-economic marginalization. . . . This is because the territoriality principle essentializes the foreign state identity and leads to represent the nation-state as a culturally and politically homogenous community.").

208. *See* Brower, *supra* note 207, at 950.

Further, litigation is an effective method for ending human rights abuses. Because human rights abuse victims are generally disenfranchised, attempts to gain redress through political solutions often go nowhere.[209] Consequently, allowing private parties, with the aid of nongovernmental organizations, to bring private civil suits against abusers have been, comparatively, quite effective.[210] First of all, the ATS places the power to bring suit in the victim's hands. Instead of waiting and hoping that outside governments will take notice and act to stop the violations, the victims are empowered to take action themselves.[211] ATS suits expose human rights abusers, often serving as a public, legal record that the violation occurred.[212] Additionally, they challenge the culture of impunity which often exists in failed states, provide survivors with a forum for speaking out, deter future abuses,[213] and ensure that the United States will not give safe haven to human rights abusers.[214] At the very least, upon entry of a judgment in favor of a plaintiff, the defendant's freedom to enter the United States is severely limited because the defendant's assets could be seized by a court.[215]

C. Anatomy of an ATS Suit

Thus far, this Note has focused on the threshold issue in ATS cases: jurisdiction. If the suit cannot be properly brought in U.S. courts, then the inquiry goes no further. However, the hurdles for ATS plaintiffs do not end once jurisdiction is established. Because an ATS suit, especially one involving foreign parties and conduct originating in a failed state, is different from typical domestic tort law suits, one might wonder about the mechanics of the action: Who brings the suit? What is the cause of action? What kind of remedies might result?[216] Although robust answers to these questions are far beyond the scope of this Note, providing a brief outline of the contours of an ATS suit is helpful. Courts have struggled over these issues, but many ATS suits have been successfully litigated regardless.[217]

ATS actions originate when a plaintiff decides to bring suit in a U.S. court. Although victims of human rights violations often decide to bring suit without prompting, international human rights organizations often seek out and work with victims—offering advice and resources—to find plaintiffs for ATS suits.[218] The ATS is solely a jurisdictional statute, so it does not provide a cause of action.[219] However,

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209. Poullaos, *supra* note 27, at 354–55.

210. Brower, *supra* note 207, at 949.

211. Poullaos, *supra* note 27, at 355.

212. *The Alien Tort Statute*, CENTER FOR JUST. & ACCOUNTABILITY, http://www.cja.org/article.php?id=435 [https://perma.cc/3C6C-AWZE].

213. *Id.*

214. A concern that Justice Breyer emphasized in *Kiobel*. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring).

215. Poullaos, *supra* note 27, at 354.

216. Of course, the chances of actually receiving monetary remedies are small. Yet, plaintiffs might have persuasive reasons for bringing suit regardless. *See supra* Part IV.B.

217. *See* STEPHENS ET AL., *supra* note 8, at 439.

218. *Id.* at 441–43, 496.

219. William R. Casto, *The ATS Cause of Action Is* Sui Generis, 89 NOTRE DAME L.

courts have recognized a number of violations of the law of nations that meet *Sosa*'s requirements of universal condemnation and specificity.[220] In order to properly establish personal jurisdiction, a party will often have to wait to serve the defendant until the defendant appears in the United States.[221] Because of this, even the threat of a suit can constrain the freedom of a potential defendant to travel, resulting in a small victory for victims. Successful ATS actions result in monetary damage awards,[222] although the suits create other benefits as well.[223] Although satisfying all these procedural barriers might be challenging for actions originating in failed states, it can be done.[224] Extending ATS jurisdiction to include actions originating in failed states would *not* be a futile gesture.

Take, as the setting for a hypothetical ATS suit, a multinational corporation with a presence in a state that has collapsed around the company.[225] Should that corporation engage in conduct that violates the *Sosa* requirements—basically the *erga omnes* and *jus cogens* offenses[226]—no local authorities would be in a position, even if they wanted, to provide a remedy. In that case, under extended ATS jurisdiction, nongovernmental organizations could work with victims to bring claims in U.S. courts.[227] Because of its international presence, serving the company would be relatively straightforward, as would obtaining a monetary remedy, should the suit be successful.[228] Victims would receive compensation and vindication, the company

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REV. 1545, 1548 (2014).

220. *See* Jacques Delisle, *Damages Remedies for Infringements of Human Rights Under U.S. Law*, 62 AM. J. COMP. L. (SUPP.) 457, 462–63 (2014), for a list. Recognized causes of action exist for summary execution, genocide, war crimes, slavery, systematic rape, and others. *Id.* Conceptually, the *Sosa* Court's requirements for ATS causes of action are very similar to the principles of *jus cogens* and *erga omnes*. *See* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, L. & CONTEMP. PROBS., Autumn 1996, at 63, 68–74. Because certain kinds of human rights violations "threaten the peace and security of humankind and . . . shock the conscience of humanity," all states have an obligation to provide redress for those violations. *Id.* at 69, 74.

221. STEPHENS ET AL., *supra* note 8, at 458.

222. *Id.* at 523–28.

223. *See supra* Part IV.B.

224. *See generally* STEPHENS ET AL., *supra* note 8, at 439–539; *see also* United States v. Ali, 718 F.3d 929, 933 (D.C. Cir. 2013) (a criminal defendant in a piracy action tricked into coming to the United States from Somalia, resulting in his prosecution).

225. This is not an unreasonable hypothetical. *See* Louis Turner, *The (A)political Multinational: State-Firm Rivalry Revisited*, *in* THE FUTURE OF THE MULTINATIONAL COMPANY 6–7 (Julian Birkinshaw et al. eds., 2003).

226. *See* David Weissbrodt, *Corporations Can Be Liable Under the Alien Tort Statute*, POINTOFLAW, (Mar. 5, 2012, 8:11 AM), http://www.pointoflaw.com/feature/archives/2012/03/corporations-can-be-liable-under-the-alien-tort-statute.php [https://perma.cc/7FYX-CS7E]; *supra* note 220. *Jus cogens* refers to the idea that some crimes are so universally reviled as to achieve a special legal status internationally. Bassiouni, *supra* note 220, at 67–68. All states have an obligation to prosecute or extradite violators of *jus cogens* principles. *Id.* at 72–74. That obligation is known as *erga omnes*. *Id.*

227. *See supra* text accompanying note 218.

228. *See supra* text accompanying notes 221–23.

would be penalized for its actions and motivated to stabilize troubled states in which it has holdings, and the international human rights framework would be strengthened.

D. Statutory Reform as an Alternative to Jurisprudential Reform

Although this Note has focused on the Court's reasoning in *Kiobel* and suggested a situation where the reasons and concerns for applying a presumption against extraterritorial application should be rebutted, the reasons to provide ATS jurisdiction in the failed state context are strong enough to justify legislative action. After *Filartiga*, Congress passed the Torture Victim Protection Act, which provides a federal cause of action for victims of torture or extrajudicial killings.[229] That Act's legislative history demonstrated Congress's intent to endorse and broaden the *Filartiga* holding.[230] In *Kiobel*'s wake, Congress should once again weigh in, this time amending the ATS to exempt actions originating from conduct in failed states from the presumption against extraterritorial application. Rather than using the term "failed state," which is subject to various definitions, Congress should focus on the inadequacy of domestic remedies. If a state's political and legal infrastructure is too dysfunctional to provide a fair hearing, the United States' interests in providing a forum outweigh the concerns behind the presumption against extraterritoriality.

CONCLUSION

According to many commentators, the *Kiobel* decision sounded the death knell for ATS human rights litigation.[231] If that proves to be the case, it would be troubling. The United States has strong interests in providing a forum and means of redress for foreign victims of egregious human rights abuses. Even if a suit does not directly impact the United States, the United States is hardly a disinterested bystander.

In *Kiobel*, the Justices raised concerns about sovereignty and foreign policy. The analysis in *Kiobel* was very territorial—premised on the traditional idea that nation-states are sovereign actors, each autonomous and self-sufficient. However, globalization is rendering that conception of the international order outdated. Even if the nation-state is still the predominant entity in the international system, it cannot be used to describe all territories.

This Note has argued that the failed state is one such example. Because failed states lack the institutional structure or legitimacy to fulfill traditional conceptions of sovereignty, and are too ineffective to coherently engage in foreign policy, the primary concerns identified in *Kiobel* are inapposite. Further, victims in failed states are both numerous and very likely to lack legitimate options for redress. Thus, reformation of the ATS is needed, and it could be achieved either through the judiciary or the legislature. Extending ATS jurisdiction to encompass conduct originating in failed states would serve U.S. interests, avoid foreign policy or comity complications, and vindicate disenfranchised victims.

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229. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 27 U.S.C. § 1350 (2012)).

230. Brower, *supra* note 207, at 947.

231. *See supra* notes 17–18 and accompanying text.