Tel-Oren, *Filartiga*, and the Meaning of the Alien Tort Statute

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INTRODUCTION

Judge Robert Bork was one of the most influential legal thinkers of the twentieth century. His work as a scholar and a federal judge has had extraordinary influence in shaping the law. This influence is well known in the field of antitrust law, which Judge Bork transformed with the publication of *The Antitrust Paradox*.[1] But his influence has extended into many other areas as well, such as standing,[2] free speech,[3] and originalism.[4] One area that has received somewhat less attention is his interpretation of the Alien Tort Statute[5] (ATS). Although most commentators understandably focus on the importance of the Second Circuit's earlier opinion in *Filartiga v Pena-Irala*,[6] Judge Bork's opinion in *Tel-Oren v Libyan Arab Republic*[7] more accurately anticipated how the Supreme Court would ultimately interpret the statute.

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1 Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978). For works describing Bork's influence, see George L. Priest, *The Abiding Influence of* The Antitrust Paradox, 31 Harv J L & Pub Pol 455, 458 (2008); William E. Kovacic, The Antitrust Paradox *Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 Wayne L Rev 1413, 1444–45 (1990). Judge Bork also wrote an influential antitrust opinion as a judge. See *Rothery Storage & Van Co v Atlas Van Lines, Inc*, 792 F2d 210 (DC Cir 1986).

2 See *Allen v Wright*, 468 US 737, 750 (1984), quoting *Vander Jagt v O'Neill*, 699 F2d 1166, 1178–79 (DC Cir 1983) (Bork concurring); *Haitian Refugee Center v Gracey*, 809 F2d 794, 811–16 (DC Cir 1987).

3 See *Ollman v Evans*, 750 F2d 970, 993–1010 (DC Cir 1984) (en banc) (Bork concurring).

4 See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1 (1971).

5 Judiciary Act of 1789 § 9, ch 20, 1 Stat 73, 76–77, codified as amended at 28 USC § 1350.

6 630 F2d 876 (2d Cir 1980).

7 726 F2d 774 (DC Cir 1984).

The ATS was enacted by the First Congress as part of the Judiciary Act of 1789.[8] As enacted in 1789, the statute provided that "the district courts . . . shall [ ] have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[9] The statute was rarely invoked and fell into obscurity for almost two centuries. In 1980, however, the Second Circuit interpreted the statute in *Filartiga* to allow foreign citizens to sue other foreign citizens for violations of modern customary international law that occurred outside the United States.[10] Four years later, the DC Circuit in *Tel-Oren* rejected the Second Circuit's approach. In a per curiam opinion, the DC Circuit affirmed the dismissal of an ATS suit between aliens, but each member of the panel—Judges Harry Edwards, Robert Bork, and Roger Robb—issued a separate opinion to explain his reasons for doing so.[11]

Judge Bork's opinion stated that it was "guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations."[12] A similar emphasis on separation of powers was clearly evident in the Supreme Court's subsequent opinions in *Sosa v Alvarez-Machain*[13] and *Kiobel v Royal Dutch Petroleum Co.*[14] To understand these opinions, it is useful to examine the leading lower court opinions that preceded them. This examination reveals that the Supreme Court's approach has much more in common with Judge Bork's opinion in *Tel-Oren* than the Second Circuit's opinion in *Filartiga*.

I. THE SECOND CIRCUIT'S APPROACH IN *FILARTIGA*

Filartiga was a suit brought in federal court by citizens of Paraguay against another citizen of Paraguay for wrongfully causing their son's death in Paraguay by the use of torture.[15] The Second Circuit allowed the suit to proceed under the ATS because it concluded that "deliberate torture perpetrated under

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8 Judiciary Act of 1789 § 9, 1 Stat at 76–77.

9 Judiciary Act of 1789 § 9(c), 1 Stat at 76–77.

10 See *Filartiga*, 630 F2d at 884–89.

11 See *Tel-Oren*, 726 F2d at 775–98 (Edwards concurring); id at 798–823 (Bork concurring); id at 823–27 (Robb concurring).

12 Id at 799 (Bork concurring).

13 542 US 692 (2004).

14 133 S Ct 1659 (2013).

15 *Filartiga*, 630 F2d at 878, 889.

color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[16] According to the court, an alien may sue an alleged torturer found and served in the United States under the ATS because such a suit alleges a tort in violation of the law of nations within the meaning of the statute.[17] A suit between aliens, however, does not obviously fall within the limited subject matter jurisdiction of federal courts conferred by Article III. The Second Circuit answered this concern by stating that the law of nations "has always been part of the federal common law,"[18] and thus suits between aliens under the ATS arise under federal law for purposes of Article III. The court recognized that its "reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331." Nonetheless, the court preferred to base its decision on the ATS given the close coincidence between the subject matter of the statute and "the jurisdictional facts presented in this case."[19]

The Second Circuit's claim that the law of nations has always been part of federal common law was unsubstantiated and anachronistic. Federal common law is a modern development. It was not until the twentieth century that the Supreme Court recognized "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands."[20] To be sure, federal courts previously applied certain branches of the law of nations in the exercise of their Article III jurisdiction—particularly their admiralty and diversity jurisdiction.[21] At the Founding, the law of nations consisted of three major branches: the law merchant, the law maritime, and the law of state-state relations.[22] Federal

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16 Id at 878.

17 Id.

18 Id at 885.

19 *Filartiga*, 630 F2d at 887 & n 22 (attributing the "paucity of suits successfully maintained under [the Alien Tort Statute]" to the difficulty of establishing a violation of the law of nations, rather than a controversy over proper jurisdiction).

20 Richard H. Fallon Jr, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 607 (Foundation 6th ed 2009). See also Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Colum L Rev 731, 741 (2010) ("The modern conception of federal common law—judge-made law that binds both federal and state courts—simply did not exist circa 1788.").

21 See Anthony J. Bellia Jr and Bradford R. Clark, *The Federal Common Law of Nations*, 109 Colum L Rev 1, 39–40 (2009).

22 See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U Pa L Rev 1245, 1280–81 (1996).

courts applied the law merchant (or general commercial law) under the *Swift* doctrine in diversity cases.[23] Such law was never considered federal law, did not preempt contrary state law, and did not support arising-under jurisdiction.[24] That is why, in overruling the *Swift* doctrine, the Court in *Erie Railroad Co v Tompkins*[25] complained that the doctrine "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court."[26] If the law merchant had been federal common law, then it would have applied equally in federal and state court.

A second branch of the law of nations—the law maritime—was also long considered general rather than federal law. The law maritime was a body of customary law that traditionally governed matters on the high seas. In *American Insurance Co v Canter*,[27] the Marshall Court held that "[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States."[28] Rather, admiralty "cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."[29] In other words, federal courts exercising admiralty and maritime jurisdiction were applying general law rather than federal law. The Court's conception of general maritime law changed somewhat in *Southern Pacific Co v Jensen*,[30] in which the Court held that state law is preempted if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[31] Even this questionable ruling[32] does not support *Filartiga*'s assertion that the law of nations has always been considered federal common law and

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23 See *Swift v Tyson*, 41 US (16 Pet) 1, 18 (1842).

24 See Anthony J. Bellia Jr and Bradford R. Clark, *General Law in Federal Court*, 54 Wm & Mary L Rev 655, 660 (2013).

25 304 US 64 (1938).

26 Id at 74–75.

27 26 US (1 Pet) 511 (1828).

28 Id at 545.

29 Id at 545–46.

30 244 US 205 (1917).

31 Id at 216.

32 See Clark, 144 U Pa L Rev at 1354–60 (cited in note 22) (arguing that many modern rules governing private maritime cases are difficult to square with the constitutional structure). See also Ernest A. Young, *Preemption at Sea*, 67 Geo Wash L Rev 273, 328 (1999) (explaining that the Court's approach since *Jensen* is inconsistent with *Erie* and the constitutional structure).

thus supports arising-under jurisdiction. First, *Jensen* was decided in 1917 and was arguably the Court's first embrace of true federal common law. Second, *Canter* remains good law even after *Jensen*.[33] This means that although general maritime law may preempt contrary state law, it does not provide a basis for arising-under jurisdiction within the meaning of Article III.

The third branch of the law of nations—the law of state-state relations—was also routinely treated as general law rather than federal law, at least until the Supreme Court's decision in *Erie* in 1938. The law of state-state relations governed the rights and obligations of sovereign states vis-à-vis one another. The most important of these rights were known as "perfect rights," and their violation gave the offended nation just cause for retaliation (including war).[34] In recent work, Professor A.J. Bellia and I have argued that federal courts have applied the law of state-state relations since the Founding to the present, not as a form of federal common law implied from Article III, but as a means of upholding the precise allocation of war and foreign-relations powers to the political branches of the federal government set forth in Articles I and II.[35] The Supreme Court has yet to rule definitively on this question, and it is not clear that cases arising under the law of state-state relations support arising-under jurisdiction absent the incorporation of such law by the political branches in a statute or treaty.[36]

In light of this background, *Filartiga*'s statement that the law of nations "has always been part of the federal common law" is unsupportable.[37] Moreover, even if the First Congress understood the law of nations (or one or more of its three traditional branches) as federal common law, the Second Circuit never explained why that conclusion would justify interpreting the ATS's reference to "the law of nations" as including modern customary international law. When the ATS was adopted in 1789, the phrase "the law of nations" had a well-known meaning. It did

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[33] See, for example, *Paduano v Yamashita Kisen Kabushiki Kaisha*, 221 F2d 615, 618 (1955).

[34] Bellia and Clark, 109 Colum L Rev at 16–17 (cited in note 21).

[35] See Anthony J. Bellia Jr and Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 Va L Rev 729, 743–44 (2012).

[36] See *Bergman v De Sieyes*, 170 F2d 360, 361 (2d Cir 1948) ("Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here.")

[37] *Filartiga*, 630 F2d at 885.

not include modern norms of customary international law that restrict how nations or their officials may treat their own citizens in their own territory. To be sure, such restrictions are now part of modern international human rights law, but such restrictions were unknown to the law of nations. Indeed, the law of nations itself recognized territorial sovereignty and prohibited other nations from interfering with the conduct of nations within their own territory.[38] From this perspective, *Filartiga* was a well-meaning but anachronistic reading of the ATS.

II. JUDGE BORK'S APPROACH IN *TEL-OREN*

Four years after *Filartiga*, the DC Circuit in *Tel-Oren v Libyan Arab Republic* declined to apply the Second Circuit's approach.[39] Israeli citizens sued the Palestine Liberation Organization (PLO), Libya, and several other organizations, alleging that the defendants committed several torts in violation of the law of nations for their involvement in an armed attack on a civilian bus in Israel that killed and injured civilians. According to the plaintiffs, these torts included terrorism, torture, and genocide.[40] The DC Circuit affirmed the district court's dismissal of the complaint in a brief per curiam opinion, and all three judges wrote separate concurrences. Judge Harry Edwards was sympathetic to *Filartiga*'s approach to the ATS, but suggested that the statute allowed federal courts to hear only a limited number of cases alleging violations of established international law—such as genocide, slavery, and systematic racial discrimination.[41] In this case, Judge Edwards concluded that the PLO's actions against civilians did not rise to the level of a claim under the statute.[42] The other judges on the panel took even more restrictive approaches. Judge Roger Robb concluded that the dispute involved a nonjusticiable political question and that courts lacked judicially manageable standards to determine the international legal status of terrorism. In his view, courts should leave such politically sensitive issues to the executive branch for diplomatic resolution.[43]

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38 See Bellia and Clark, 109 Colum L Rev at 18 (cited at note 21).

39 *Tel-Oren*, 726 F2d at 811–13 (Bork concurring).

40 Id at 775.

41 See id at 781 (Edwards concurring).

42 See id at 781, 796 (Edwards concurring).

43 See *Tel-Oren*, 726 F2d at 826–27 (Robb concurring).

Judge Robert Bork concluded that the ATS was solely a jurisdictional statute that conferred no cause of action.[44] In the course of his opinion, Judge Bork made several important points that may have influenced the Supreme Court's subsequent interpretation of the ATS. First, he stressed that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."[45] He noted that the Second Circuit in *Filartiga* assumed without explanation that Congress's grant of jurisdiction also created a cause of action. He characterized that assumption as "fundamentally wrong and certain to produce pernicious results."[46] His conclusion was guided by general principles of separation of powers "that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the [United States]."[47]

Second, he stressed the constitutional separation of powers. In his view, "[t]he crucial element of the doctrine of separation of powers in this case is the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments.'"[48] In this case, if federal courts recognized an implied cause of action allowing Israelis to sue the defendants for terrorist activities, they would "raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations."[49] Moreover, Judge Bork believed that "[a]djudication of international disputes of this sort in federal courts, disputes over international violence occurring abroad, would be far more likely to exacerbate tensions with other nations than to promote peaceful relations."[50] For these reasons, he thought that separation of powers counseled judicial restraint.

Third, Judge Bork offered some speculative thoughts regarding the original meaning of the ATS. He began by rejecting

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44 See id at 820 (Bork concurring).

45 Id at 801 (Bork concurring).

46 Id (Bork concurring).

47 *Tel-Oren*, 726 F2d at 801 (Bork concurring). For the argument that there is no general doctrine of separation of powers untethered from specific provisions of the Constitution, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv L Rev 1939, 2004–05 (2011).

48 *Tel-Oren*, 726 F2d at 801 (Bork concurring), quoting *Oetjen v Central Leather Co*, 246 US 297, 302 (1918).

49 *Tel-Oren*, 726 F2d at 804 (Bork concurring).

50 Id at 816 (Bork concurring).

Filartiga's broad reading of the statute to authorize a cause of action whenever the plaintiff alleges a violation of international law. This reading was foreclosed, he argued, by the fact that it "would have to apply equally to actions brought to recover damages for torts committed in violation of treaties" because the ATS extends jurisdiction to suits for torts in violation of both treaties and the law of nations.[51] Allowing such suits under treaties "would render meaningless, for alien plaintiffs, the well-established rule that treaties that provide no cause of action cannot be sued on without (express or implied) federal law authorization."[52] *Filartiga*'s approach would also be "too sweeping" because it "would authorize tort suits for the vindication of any international legal right."[53] This approach would be inconsistent both with the limitations on individual enforcement inherent in international law itself and with the constitutional limits on the role of federal courts.[54]

In light of the foregoing, Judge Bork thought that courts should reject *Filartiga*'s broad reading of the ATS unless it could be shown that the First Congress intended that result when it enacted the statute. Judge Bork found no evidence to support that conclusion. As he put it, he had "discovered no direct evidence of what Congress had in mind when enacting the provision."[55] For this reason, he interpreted the statute (narrowly) in light of the Founders' goal of opening "federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."[56]

Although it was unnecessary to his decision, Judge Bork spent several pages speculating "what [the ATS] may have been enacted to accomplish, if only to meet the charge that my interpretation is not plausible because it would drain the statute of meaning."[57] He turned to Blackstone—"a writer certainly familiar to colonial lawyers"—and explained that Blackstone had identified three principal offenses against the law of nations incorporated by the municipal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[58]

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51 Id at 812 (Bork concurring).
52 Id (Bork concurring).
53 *Tel-Oren*, 726 F2d at 812 (Bork concurring).
54 See id (Bork concurring).
55 Id (Bork concurring).
56 Id (Bork concurring).
57 *Tel-Oren*, 726 F2d at 813 (Bork concurring).
58 Id (Bork concurring).

According to Judge Bork, "One might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations."[59] Judge Bork admitted that these thoughts as to the possible original intention underlying the ATS were "speculative," but he offered them "merely to show that the statute could have served a useful purpose even if the larger tasks assigned to it by *Filartiga* . . . are rejected."[60] Although Judge Bork's ideas about the original meaning of the ATS were speculative, the Supreme Court ultimately embraced them in two subsequent decisions.

III. THE SUPREME COURT'S APPROACH

The Supreme Court interpreted the ATS for the first time in 2004 in *Sosa v Alvarez-Machain*.[61] Alvarez (a Mexican doctor) sued Sosa (a Mexican national), other Mexican nationals, four United States Drug Enforcement Administration (DEA) agents, and the United States for kidnapping Alvarez in Mexico and bringing him to the United States to stand trial for the alleged torture and murder of a DEA agent in Mexico.[62] The district court dismissed the claims against the US defendants, leaving only a suit between aliens. The Supreme Court held that federal courts lacked jurisdiction to hear this claim under the ATS.[63] In the course of its opinion, the Court echoed each of the three major points made by Judge Bork in *Tel-Oren*.

The *Sosa* Court began by holding that "the statute is in terms only jurisdictional."[64] The Court characterized as "implausible" the plaintiff's argument that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law."[65] Rather, the text of the statute, its placement in the Judiciary Act, and "the distinction between jurisdiction and cause of action" known to the Founders all supported the conclusion that

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59 Id at 813–14 (Bork concurring).

60 Id at 815 (Bork concurring). My coauthor and I have recently offered our own understanding of the original meaning of the ATS. See Anthony J. Bellia Jr and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U Chi L Rev 445, 507–10 (2011).

61 See *Sosa*, 542 US at 712.

62 Id at 697–98.

63 See id at 712, 724–25.

64 Id at 712.

65 *Sosa*, 542 US at 713.

"the ATS is a jurisdictional statute creating no new causes of action."[66]

At the same time, the Court believed that federal courts could hear a limited number of claims that the First Congress might have had in mind when it enacted the ATS. According to the Court, the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[67] Like Judge Bork, the Court looked to Blackstone in order to identify the kinds of claims that the First Congress intended federal courts to hear under the ATS. According to the Court, "we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[68]

Nonetheless, the Court left open the possibility that federal courts have limited power to recognize new claims "based on the present-day law of nations" so long as they "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."[69] Although this formulation appears to be more expansive than Judge Bork's approach to the ATS, the Court offered five reasons "for judicial caution" that would limit the exercise of this power.[70] Many of these reasons echo the separation-of-powers concerns that Judge Bork recited in favor of judicial restraint regarding the ATS.

First, "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms."[71] Second, there has been "an equally significant rethinking of the role of the federal courts in making" common law since the Court's decision in *Erie*.[72] Third, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."[73] Fourth, "the potential implications for the foreign relations

66 Id at 713, 724.
67 Id at 724.
68 Id.
69 *Sosa*, 542 US at 724–25.
70 Id at 725–28.
71 Id at 725.
72 Id at 726, citing *Erie*, 304 US at 78 ("There is no federal general common law.").
73 *Sosa*, 542 US at 727.

of the United States of recognizing [new private causes of action for violating international law] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[74] Citing Judge Bork's *Tel-Oren* concurrence, the Court continued that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[75] Fifth, courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."[76] According to the Court, "[t]hese reasons argue for great caution in adapting the law of nations to private rights."[77]

Applying this cautious approach, the *Sosa* Court concluded that Alvarez's claim for arbitrary abduction and detention in Mexico did not qualify as a tort "in violation of the law of nations" within the meaning of the ATS.[78] Even assuming that Sosa was acting on behalf of a government,[79] the Court concluded "that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[80] The Court's approach construed the ATS narrowly but left the door "ajar" to recognition under the statute of "a narrow class of international [torts] today."[81] Without purporting to identify "the ultimate criteria for accepting a cause of action subject to jurisdiction under" the ATS, the Court was "persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less

74 Id.

75 Id at 727–28, citing *Tel-Oren*, 726 F2d 774, 813 (Bork concurring).

76 *Sosa*, 542 US at 728.

77 Id.

78 Id at 724, 738.

79 The Court noted that to establish a violation of international law, Alvarez would have had to "establish that Sosa was acting on behalf of a government when he made the arrest" and then show that the government in question, as a matter of state policy, practiced, encouraged, or condoned prolonged arbitrary detention. Id at 737.

80 *Sosa*, 542 US at 738.

81 Id at 729.

definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[82]

Following *Sosa*, some proponents of a broad interpretation of the ATS suggested that the Supreme Court had essentially embraced *Filartiga*'s interpretation of the ATS. According to Professor Ralph Steinhardt, "the Court endorsed the interpretation of the ATS adopted in *Filartiga* and its progeny" and "effectively put alien tort litigation where it was after *Filartiga*."[83] He based this assessment on the fact that the Court cited *Filartiga* "with approval" and held that "no additional statutory cause of action was necessary" to bring claims under the ATS.[84] This assessment overlooks the significant limits that the *Sosa* Court placed on ATS suits going forward. As noted, the Court agreed with Judge Bork's conclusion that the ATS is purely a jurisdictional statute creating no new causes of action. Like Judge Bork, the Court assumed that the First Congress believed that the common law would supply a cause of action for a limited number of claims under the statute. And, like Judge Bork, the Court assumed that the First Congress probably enacted the ATS to provide jurisdiction to hear claims for torts analogous to the three crimes against the law of nations identified by Blackstone.

To be sure, the *Sosa* Court seemed to suggest a slightly larger role for the ATS than Judge Bork envisioned—but the scope of this potential opening is not entirely clear. Judge Bork acknowledged that his "thoughts as to the possible original intention underlying [the ATS] are admittedly speculative, and those who enacted the law may well have had additional torts in mind."[85] The *Sosa* Court also suggested that the ATS may cover torts beyond the Blackstone crimes but declined to identify "the ultimate criteria for accepting a cause of action subject to jurisdiction under" the ATS.[86] Rather, it stated only that courts should not recognize private claims "for violations of any international law norm with less definite content and acceptance among civilized nations" than the Blackstone paradigms.[87] Commentators like Professor Steinhardt argue that *Sosa* endorsed

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82 Id at 732.

83 Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 Vand L Rev 2241, 2244 & n 5 (2004).

84 Id at 2245.

85 *Tel-Oren*, 726 F2d at 815 (Bork concurring).

86 *Sosa*, 542 US at 731–32.

87 Id at 732.

the approach taken by lower courts in cases like *Filartiga* because the *Sosa* opinion "cit[ed] Filartiga with approval."[88] This citation followed the Court's statement that its limited approach to judicial recognition of private claims "is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court."[89] Without more, however, this vague statement makes it difficult to predict how the Court would have actually decided these other cases. All one can say for certain is that *Sosa* denied relief and construed the ATS to be a jurisdictional statute that permitted adjudication of only a narrow class of claims under the law of nations.

The Supreme Court interpreted the ATS again in *Kiobel v Royal Dutch Petroleum Co*.[90] There, a group of Nigerian nationals (residing in the United States as legal residents) filed an ATS suit in federal court against certain Dutch, British, and Nigerian corporations, alleging that they aided and abetted the Nigerian government in committing various international human rights violations in Nigeria, including extrajudicial killings, crimes against humanity, and torture.[91] The Second Circuit held that federal courts lack subject matter jurisdiction under the ATS over claims against corporate defendants,[92] and the Supreme Court initially granted certiorari to decide that question.[93] After oral argument, however, the Court ordered the parties to brief and argue 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."[94]

After reargument, the Supreme Court applied the presumption against extraterritorial application of US law to affirm the Second Circuit's dismissal of the case.[95] The Court acknowledged

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88 Steinhardt, 57 Vand L Rev at 2250 (cited in note 83).

89 *Sosa*, 542 US at 732, citing *Filartiga*, 630 F2d at 890.

90 See *Kiobel*, 133 S Ct at 1662.

91 Id at 1662–63.

92 *Kiobel v Royal Dutch Petroleum Co*, 621 F3d 111, 120 (2d Cir 2010).

93 See Petition for Writ of Certiorari, *Kiobel v Royal Dutch Petroleum Co*, No 10-1491, *i (filed June 6 2011) (available on Westlaw at 2011 WL 2326721) (framing the question presented as "[w]hether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide . . . or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations"); *Kiobel v Royal Dutch Petroleum Co*, 132 S Ct 472, 472–73 (2011) (granting the petition for certiorari).

94 *Kiobel v Royal Dutch Petroleum Co*, 132 S Ct 1738, 1738 (2012).

95 *Kiobel*, 133 S Ct at 1664–65.

that the presumption ordinarily applies to discern whether an Act of Congress regulating conduct applies abroad, and reaffirmed *Sosa*'s conclusion that the ATS is "strictly jurisdictional" and thus "does not directly regulate conduct or afford relief."[96] Nonetheless, the Court concluded that "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS."[97] In particular, the Court noted that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS."[98] According to the Court, to rebut the presumption, the ATS would need to evince a clear indication of extraterritoriality, and the Court found no such indication in the text and history of the statute. The Court thought it "implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first," in the words of Justice Story, "to be the custos morum of the whole world."[99]

The Supreme Court's opinion in *Kiobel*—like its opinion in *Sosa*—has more in common with Judge Bork's opinion in *Tel-Oren* than the Second Circuit's opinion in *Filartiga*. The Court adhered to its position that the ATS is a jurisdictional statute creating no new causes of action. It also reiterated *Sosa*'s suggestion that, when the ATS was enacted, the First Congress was focused "on the 'three principal offenses against the law of nations' that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[100] Finally, the Court invoked separation of powers as a reason for narrowly construing a statute that could have a profound impact on the United States's relations with foreign nations. In applying the presumption against extraterritoriality and generally echoing Judge Bork's interpretation of the statute, the *Kiobel* Court arguably foreclosed lower court decisions like *Filartiga* in the future. *Kiobel* did not cite *Filartiga*, but the presumption that the Court applied presumably would have precluded adjudication of the claims at issue in *Filartiga* since

96 Id at 1664, quoting *Sosa*, 542 US at 713.

97 *Kiobel*, 133 S Ct at 1664.

98 Id.

99 Id at 1668.

100 Id at 1670, quoting *Sosa*, 542 US at 723–24.

they—like the claims in *Kiobel*—were brought by aliens against other aliens for conduct occurring outside the United States.[101]

CONCLUSION

Judge Bork's academic and judicial writings have profoundly influenced the law in many areas. Although he is best known for his contributions to antitrust law and constitutional interpretation, few have recognized the full measure of his contribution to our understanding of the role of international law in the US legal system. The Second Circuit's opinion in *Filartiga* has rightly received extensive attention.[102] It was the first decision in over two hundred years to use the ATS as a means of providing relief to one alien against another for conduct occurring outside the United States. To do so, it read the ATS quite broadly. Four years later, Judge Bork read the statute more narrowly and attempted to identify the expectations of the First Congress in enacting the ATS. His stated goal was to guard against judicial intrusion into the conduct of foreign relations by the political branches of the federal government. Although *Filartiga* has received more attention over the years, Judge Bork's approach in *Tel-Oren* better anticipated the path of the law, as evidenced by the Supreme Court's opinions in both *Sosa* and *Kiobel*.

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[101] The Court did not spell out in detail how the presumption against extraterritorial application of US law would apply in future ATS litigation. In *Kiobel*, the presumption applied because all relevant conduct occurred outside the United States. The Court added without elaboration that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S Ct at 1669. Justice Kennedy concurred in the Court's opinion, but added that "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation" in cases not covered by "the reasoning and holding of today's case." Id (Kennedy concurring).

[102] See, for example, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L J 2347, 2366–68 (1991); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815, 831–34 (1997) (criticizing the *Filartiga* court's reliance on pre-*Erie* precedents).