

jurisdiction. In a one-paragraph concurrence, Justice Kennedy (the fifth vote for the majority) observed:

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. . . . Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act¹⁷] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.¹⁸

Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, concurred in the dismissal of the case but disputed the majority's reliance on the presumption against extraterritoriality.

Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.¹⁹

Justice Alito, joined by Justice Thomas, noted that the Court's formulation "obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach."²⁰ For these justices, an ATS action "will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies [*Sosa v. Alvarez-Machain*'s²¹] requirements of definiteness and acceptance among civilized nations."²²

United States Recognizes Syrian Opposition as "Legitimate Representative of the Syrian People," Will Provide Small Arms and Ammunition to Opposition Forces

The civil war in Syria grinds on; it has resulted in 93,000 deaths,¹ more than 1.6 million refugees, and 6.8 million persons requiring humanitarian assistance.² In the face of the protracted conflict, the United States has increased its political and tangible support to some of the forces opposing the regime of Syrian President Bashar al-Assad.

¹⁷ [Editor's note: 28 U.S.C. §1350 note (2012).]

¹⁸ *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring).

¹⁹ *Id.* at 1671 (Breyer, J., concurring).

²⁰ *Id.* at 1669–70 (Alito, J., concurring).

²¹ [Editor's note: 542 U.S. 692 (2004).]

²² *Kiobel*, 133 S.Ct. at 1670 (Alito, J., concurring).

¹ David Jolly, *Death Toll in Syrian Civil War Near 93,000*, *U.N. Says*, N.Y. TIMES, June 14, 2013, at A6; Loveday Morris, *U.N.: Syria Death Toll Tops 90,000*, WASH. POST, June 14, 2013, at A12.

² U.S. Dep't of State Press Release No. 2013/0768, U.S. Government Assistance to Syria (June 19, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/06/210899.htm>; see John R. Crook, *Contemporary Practice of the United States*, 106 AJIL 643, 650, 652 (2012).

In a television interview in December 2012, President Barack Obama stated that “[w]e’ve made a decision that the Syrian Opposition Coalition is now inclusive enough, is reflective and representative enough of the Syrian population that we consider them the legitimate representative of the Syrian people in opposition to the Assad regime.”³ However, the Obama administration has proceeded cautiously. Until recently, it had resisted calls, including by some prominent Republican members of Congress,⁴ to provide arms to selected opposition forces, establish no-fly zones,⁵ or otherwise become more directly involved in the conflict.⁶

The policy calculus has been complicated by the increasing prominence of some radical Islamist groups among the opposition forces⁷ and by reports of the use of chemical weapons by the Syrian government.⁸ Following an intensive analysis of available evidence, U.S. intelligence officials concluded with “high confidence” in June 2013 that Syrian government forces have used chemical agents, including the nerve agent sarin, “on a small scale” on multiple occasions.⁹ An excerpt from U.S. Deputy National Security Adviser Ben Rhodes’s statement announcing this conclusion follows:

Following a deliberative review, our intelligence community assesses that the Assad regime has used chemical weapons, including the nerve agent sarin, on a small scale against the opposition multiple times in the last year. Our intelligence community has high confidence in that assessment given multiple, independent streams of information. The intelligence community estimates that 100 to 150 people have died from detected chemical weapons attacks in Syria to date; however, casualty data is likely incomplete. While the lethality of these attacks makes up only a small portion of the catastrophic loss of life in Syria, which now stands at more than 90,000 deaths, the use of chemical weapons violates international norms and crosses clear red lines that have existed within the international community for decades. We believe that the Assad regime maintains control of these weapons. We have no reliable, corroborated reporting to indicate that the opposition in Syria has acquired or used chemical weapons.¹⁰

³ *Obama Recognizes Syrian Opposition Group*, ABC NEWS, Dec. 11, 2012, at <http://abcnews.go.com/Politics/OTUS/exclusive-president-obama-recognizes-syrian-opposition-group/story?id=17936599#.UZp6gJUYIRI>; Mark Landler & Michael R. Gordon, *Obama Says U.S. Will Recognize Syrian Rebels*, N.Y. TIMES, Dec. 11, 2012, at <http://www.nytimes.com/2012/12/12/us/obama-says-us-will-recognize-syrian-rebels.html>.

⁴ Sheryl Gay Stolberg, *Republicans Warn of Inaction on Syria*, N.Y. TIMES, Apr. 29, 2013, at A5.

⁵ David E. Sanger, *Israeli Attacks on Syria Fuel Debate over U.S.-Led Airstrikes*, N.Y. TIMES, May 6, 2013, at A9.

⁶ Mark Landler & Eric Schmitt, *White House Sticks to Cautious Path on Syria*, N.Y. TIMES, May 7, 2013, at A1.

⁷ Karen DeYoung, *U.S. Pledges \$250 Million in Nonlethal Aid to Syrian Rebel Group*, WASH. POST, Apr. 21, 2013, at A17; Anne Barnard, *Syria Campaigns to Persuade U.S. to Change Sides*, N.Y. TIMES, Apr. 25, 2013, at A1.

⁸ David E. Sanger & Jodi Rudoren, *Israel Says It Has Proof That Syrian Government Used Chemical Weapons*, N.Y. TIMES, Apr. 24, 2013, at A6; Mark Landler, *U.S. Sees No Conclusive Evidence of Chemical Arms Use by Syria*, N.Y. TIMES, Apr. 25, 2013, at A10; Craig Whitlock, *Hagel Says Israel Was Silent on Syria Findings*, WASH. POST, Apr. 25, 2013, at A7; Mark Landler & Eric Schmitt, *White House Says Syria Has Used Chemical Arms*, N.Y. TIMES, Apr. 26, 2013, at A1; Anne Gearan & Craig Whitlock, *Sarin Use in Syria Feared*, WASH. POST, Apr. 26, 2013, at A1; Ernesto Londoño & Joby Warrick, *U.S. Sifts Evidence of Syrian Sarin Use*, WASH. POST, Apr. 26, 2013, at A9; Anne Gearan & Colum Lynch, *Obama Seeks ‘Strong’ Proof of Sarin Use*, WASH. POST, Apr. 27, 2013, at A6.

⁹ Kareem Fahim, *Still More Questions Than Answers on Nerve Gas in Syria*, N.Y. TIMES, June 11, 2013, at A7.

¹⁰ White House Press Release, Statement by Deputy National Security Advisor for Strategic Communications Ben Rhodes on Syrian Chemical Weapons Use (June 13, 2013), at <http://www.whitehouse.gov/the-press-office/2013/06/13/statement-deputy-national-security-advisor-strategic-communications-ben->

UN Secretary-General Ban Ki-moon and Russian President Vladimir Putin questioned whether the evidence was sufficient to prove Syrian forces' use of chemical weapons,¹¹ and Syrian President Bashar al-Assad disputed the U.S. claim.¹²

The White House announcement regarding Syria's chemical weapons use coincided with a decision by President Obama to provide small arms and ammunition to the rebel forces' Supreme Military Council.¹³ The promised support stops short of the rebels' calls for heavier antitank and antiaircraft weapons, as well as calls by some in Congress for the United States to bomb Syrian fields, impose a no-fly zone, or otherwise become more substantially involved in the conflict.¹⁴

Obama's decision follows earlier U.S. steps aimed at supporting the rebel forces that stopped short of providing lethal weapons. In late February 2013, Secretary of State John Kerry announced that the United States would provide food and medical supplies to opposition military forces.¹⁵ In March 2013, Kerry endorsed several Middle Eastern nations' efforts to provide weapons to Syrian opposition groups.¹⁶ In late April 2013, he announced that the United States was doubling the amount of "nonlethal" assistance provided to the Syrian opposition, including body armor and communications gear for opposition fighters.¹⁷ An excerpt from a U.S. Department of State press release on Kerry's April announcement follows:

The new non-lethal assistance underscores the United States' firm support for a political solution to the crisis in Syria and for the opposition's advancement of an inclusive, tolerant vision for a post-Assad Syria. . . .

The United States will . . . use a portion of this non-lethal assistance to implement President Obama's directive to provide an expanded range of support to the Supreme Military Council (SMC). We intend to expand this new support beyond military food rations and medical kits to include other types of non-lethal supplies, which would be determined in collaboration with SMC leadership.¹⁸

¹¹ Colum Lynch, *At U.N., Caution on Chemical-Weapons Claims*, WASH. POST, June 15, 2013, at http://www.washingtonpost.com/world/national-security/us-claims-of-chemical-weapons-against-syrian-rebels-meet-caution-at-un/2013/06/14/a736df6e-d524-11e2-a73e-826d299ff459_story.html.

¹² Zeina Karam, *Arming Rebels Will Hurt E.U., Assad Says*, WASH. POST, June 18, 2013, at A10.

¹³ Mark Mazzetti, Michael R. Gordon & Mark Landler, *U.S. Is Said to Plan to Send Weapons to Syrian Rebels*, N.Y. TIMES, June 14, 2013, at A1; Karen DeYoung & Anne Gearan, *U.S. to Scale Up Military Support for Syrian Rebels*, WASH. POST, June 14, 2013, at A1; Peter Baker, *Heavy Pressure Led to Decision on Syrian Arms*, N.Y. TIMES, June 15, 2013, at A1; Karen DeYoung, Anne Gearan & Scott Wilson, *Decision Made Before Chemical Arms Finding*, WASH. POST, June 15, 2013, at A1; Greg Miller & Joby Warrick, *Hidden Bases to Convey Arms*, WASH. POST, June 15, 2013, at A1.

¹⁴ Liz Sly & Loveday Morris, *Syria Rebels Cool to U.S. Arms Offer*, WASH. POST, June 15, 2013, at A7.

¹⁵ Anne Gearan & Karen DeYoung, *U.S. Pledges Food and Medicine to Syrian Rebels*, WASH. POST, Mar. 1, 2013, at A7.

¹⁶ Michael R. Gordon, *Kerry Says U.S. Backs Mideast Efforts to Arm Syrian Rebels*, N.Y. TIMES, Mar. 6, 2013, at A7.

¹⁷ Karen DeYoung, *U.S. to Expedite New Aid to Syrian Rebels*, WASH. POST, Apr. 22, 2013, at A9.

¹⁸ U.S. Dep't of State Press Release 2013/0453, Secretary Kerry Announces Doubling of U.S. Non-lethal Assistance to the Syrian Opposition and New Humanitarian Aid for the Syrian Crisis (Apr. 20, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/04/207810.htm>.

A June 2013 Department of State press release summarizes U.S. actions related to the conflict. Excerpts follow:

The United States is providing nearly \$815 million in humanitarian assistance to help those affected by the conflict. In addition, the United States has committed \$250 million in non-lethal transition support to the Syrian opposition. This assistance will help local opposition councils and civil society groups provide essential services to their communities, extend the rule of law, and enhance stability inside liberated areas of Syria. President Obama has also authorized the expansion of our assistance to the Supreme Military Council (SMC). The expansion of this assistance is aimed at strengthening the effectiveness of the SMC to defend themselves against a repressive regime. Our efforts are also helping to coordinate the provision of assistance by the United States and other partners and allies.

Diplomatic Support

. . . .

International efforts to find a diplomatic solution to the Syria crisis have been based on the Geneva Communiqué agreed to by the United Nations Security Council permanent members and key regional and multilateral partners on June 30, 2012. It outlined a political solution to the Syrian conflict through the establishment of a transitional governing body, formed by mutual consent of the regime and the opposition, with full executive powers, including control over all government institutions.

. . . .

Humanitarian Assistance

. . . During the G-8 summit, President Obama announced over \$300 million in additional humanitarian assistance for the Syrian crisis, bringing total U.S. humanitarian assistance for those affected by the violence in Syria to nearly \$815 million. U.S. assistance is providing emergency medical care and medical supplies, childhood immunizations, food, clean water, and relief supplies to those affected by the crisis, as well supporting refugees and host communities in the neighboring countries.

Within Syria, U.S. humanitarian aid is reaching 3.2 million people in all 14 of the country's governorates on the basis of need and regardless of political affiliation. It is often not branded as U.S. assistance in order to ensure the safety of aid recipients and humanitarian aid providers as well as to guard against aid distribution being blocked while en route. The United States is committed to using all channels to reach affected populations throughout the country

Assistance to the Syrian Opposition

The United States is acting in partnership with the international community to assist the Syrian opposition as it works toward building a post-Assad Syria. The U.S. has committed to providing \$250 million in non-lethal transition assistance for the Syrian opposition.

This assistance supports the Syrian opposition's ability to both strengthen its operations and help local councils and communities in liberated areas procure and expand the delivery of basic goods and essential services. . . . The United States is also delivering halal food rations and medical kits from U.S. government stocks to the Syrian opposition, including the SMC. In addition to expanding existing lines of support, the U.S. will consult with opposition groups and the SMC to determine their most urgent assistance needs.

President Obama has also authorized the expansion of our assistance to the Supreme Military Council (SMC). The expansion of this assistance is aimed at strengthening the effectiveness of the SMC to defend themselves against a repressive regime. Our efforts are also helping to coordinate the provision of assistance by the United States and other partners and allies.

....

Over 6,000 major pieces of equipment, including communications and computer equipment, as well as generators and medical supplies, have been provided to support civilian Syrian opposition groups, civil society activists, and citizen journalists.

Support to civil society groups and local councils includes efforts to train, equip, and build the capacity of nearly 1,500 grassroots activists, including women and youth, from over 100 opposition councils and organizations from around the country

....

Additional Support for the Syrian People

. . . To help Syrians begin to rebuild, the Treasury Department's Office of Foreign Assets Control (OFAC) issued a Statement of Licensing Policy inviting U.S. persons to apply to OFAC for specific licenses that would enable them to participate in certain economic activities in Syria. The OFAC statement focuses on applications by U.S. persons seeking to engage in oil-related transactions that benefit the Syrian Coalition, or its supporters, and transactions involving Syria's agricultural and telecommunications sectors. OFAC also amended Syria General License 11 to authorize the exportation of services and funds transfers in support of not-for-profit activities to preserve and protect cultural heritage sites in Syria. . . .

In addition, pursuant to a new limited waiver of the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, the Department of Commerce is authorized to process license applications for the export and re-export of certain commodities, software, and technology for the benefit of the Syrian people, including but not limited to those related to: water supply and sanitation; agricultural production and food processing; power generation; oil and gas production; construction and engineering; transportation; and educational infrastructure. . . .

The United States continues to engage Syrians directly, offering academic advising to young people hoping to study in the United States and opportunities to participate in academic exchanges and other outreach programs. The State Department is also working with a range of Syrian, American, and international partners to protect Syria's rich cultural heritage—including archaeological sites, historic buildings, monuments, and collections of objects—and to halt the trade of looted Syrian cultural property in international antiquities markets.¹⁹

¹⁹ U.S. Dep't of State Press Release No. 2013/0768, U.S. Government Assistance to Syria (June 19, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/06/210899.htm>.