Corporate Liability Abroad Under the Alien Tort Statute

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I. INTRODUCTION TO THE ATS AND THE *KIOBEL* CASE

Modern transnational corporations hold a uniquely powerful position today. While a U.S. corporation's operations in the United States unquestionably remain subject to U.S. law, whether it can be held liable for facilitation of or complicity in violating U.S. or international law in operations abroad is less clear. A number of noteworthy Alien Tort Statute (ATS) cases against transnational corporations were filed in the past fifteen years. High profile corporations such as Caterpillar,[1] Exxon,[2] Pfizer,[3] Shell,[4] Unocal,[5] and Chiquita[6] have been sued under the ATS for their alleged complicity in human rights violations committed in foreign countries, and yet, the answer to whether corporations can be held liable for such abuses remains elusive. Recent decisions in the Supreme Court only confuse the question further.[7]

In April 2013, the Supreme Court released a unanimous decision in *Kiobel v. Royal Dutch Petroleum* finding that the ATS does not apply extraterritorially. The Court, however, intentionally left open several issues, and while the decision was unanimous, Justices Breyer, Sotomayor, Kagan, and Ginsburg joined in a concurrence in which they agreed with the ultimate result but disagreed with the reasoning behind it. Several cases have wrestled with the same issues since *Kiobel*; most interestingly, a Fourth Circuit case—*Al Shimari v. CACI*—which held the ATS was not presumptively barred from

1. *See* Corrie v. Caterpillar, Inc., 503 F.3d 974, 976–77 (9th Cir. 2007) (addressing a case where Palestinian plaintiffs sued Caterpillar, Inc. "when the Israeli Defense Forces . . . demolished homes in the Palestinian Territories using bulldozers manufactured by Caterpillar, Inc.").

2. *See* Doe. v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (addressing a case where the plaintiffs, citizens and residents of Indonesia, sued Exxon asserting violations of the ATS "based on alleged human rights abuses committed in Indonesia by Indonesian military personnel hired by [Exxon] to provide security"), *vacated*, 527 App'x. 7 (D.C. Cir. 2013).

3. *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168 (2d Cir. 2009) (addressing a case where Nigerian children and their guardians sued Pfizer under the ATS alleging "Pfizer violated [international] . . . law prohibiting involuntary medical experimentation on humans [by testing] an experimental antibiotic on children in Nigeria, including [the plaintiffs], without their consent or knowledge").

4. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (2013) (addressing a case where Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations under the ATS, alleging that those corporations "aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria").

5. *See* Doe v. Unocal Corp., 248 F.3d 915, 920 (9th Cir. 2001) (addressing a case in which Burmese citizens brought a class action under the ATS against Unocal Corp., a U.S. oil corporation, alleging that Unocal used "violence and intimidation to relocate whole villages [in Burma] and force farmers living in the area . . . to work on the pipeline," resulting in "death of family members, assault, rape and other torture, forced labor, and the loss of their homes").

6. *See In re* Chiquita Brands Int'l., Inc. Alien Tort Statute and S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1305–06 (S.D. Fla. 2011) (addressing a case where plaintiffs, citizens and residents of Colombia, sued Chiquita Brands International, Inc. under the ATS "for terrorism; material support to terrorist organizations; torture; extrajudicial killing; war crimes; crimes against humanity; inhuman or degrading treatment; violation of the rights to life, liberty and security of person and peaceful assembly and association; and consistent pattern of gross violations of human rights").

7. *See id.* (holding that the ATS could be used for human rights violations); *Kiobel*, 133 S. Ct. at 1659; Sosa v. Alvarez-Machain, 542 U.S. 692, 693–96 (2004); *Doe*, 248 F.3d at 920; *Doe*, 654 F.3d at 15; Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014) (holding that Iraqi plaintiffs' claims against CACI, a military contractor, alleging torture and abuse during detention at Abu Ghraib prison "touched and concerned" the territory of the United States with sufficient force to rebut the presumption against extraterritorial application of the ATS).

extraterritorial application.[8] This Note analyzes the confusing standards set by *Kiobel*, *Al Shimari*, and other circuit court cases attempting to apply the Supreme Court's holding in *Kiobel* to litigation involving corporations involved in human rights abuses committed outside of U.S. territory.

This Note argues that the Fourth Circuit correctly based its holding on the interpretation that the ATS could provide jurisdiction in certain circumstances, and that Congress expressly intended to provide aliens access to U.S. courts and to hold American citizens (and therefore corporations) accountable for acts of torture committed abroad. This Note ultimately recommends that the preferable rule would combine the Fourth Circuit's holding in *Al Shimari* with Justice Breyer's suggestions in his *Kiobel* concurrence. Such a rule would allow a U.S. court to hold a corporation liable for conduct abroad under the ATS if certain conditions were met.

II. BACKGROUND

A. Historical Background to the Alien Tort Statute

The U.S. Congress passed the ATS as part of the Judiciary Act of 1789.[9] The ATS provides that "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."[10] The ATS has been infrequently invoked since its inception.[11] As a result, its modern application is not well understood. A judge once described it as a "legal Lohengrin . . . no one seems to know whence it came."[12]

1. Congressional Intent Behind the ATS

The Supreme Court in *Kiobel*[13] and the Fourth Circuit in *Al Shimari*[14] both gave

8. *See generally* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014).

9. *Kiobel*, 133 S. Ct. at 1663; JENNIFER K. ELSEA, CONG. RES. SERV., RL32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 1 (2003) [hereinafter ELSEA, CONG. RES. SERV., RL32118].

10. 28 U.S.C § 1350 (2015).

11. *Kiobel*, 133 S. Ct. at 1663; *see also* Moxon v. The Fanny, 17 F. Cas. 942, 948 (No. 9,895) (D. Pa. 1793) (holding that American courts cannot give redress to the owners of a British ship captured by a French ship in U.S. territory because redress is delegated to the executive department); Bolchos v. Darrel, 3 F. Cas. 810, 810 (No. 1,607) (D. S.C. 1795) (stating that "the 9th section of the [J]udiciary [A]ct of [C]ongress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States"); O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908) (implying an unlawful seizure of alien's property in a foreign country by a U.S. officer would come within the jurisdiction of the ATS); Khedivial Line, S.A.E. v. Seafarers Int'l Union, 278 F.2d 49, 52 (2d Cir. 1960) (per curiam) (refusing to apply the ATS where no treaty between the United States and the United Arab Republic existed, nor precedent indicating the law of nations accorded an unrestricted right of access to harbors by vessels of all nations).

12. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (quoting ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

13. *Kiobel*, 133 S. Ct. at 1664 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)) (stating "[f]or us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed").

14. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (holding that the ATS claims at hand displace the presumption against extraterritorial application based on four factors and "the expressed intent of Congress, through enactment of the [Torture Victims Protection Act] and 18 U.S.C. § 2340A,

significant consideration to congressional intent behind the ATS. The majority of scholars believe the inclusion of the ATS in the Judiciary Act of 1789 was an attempt by the Framers "to give the federal government supremacy over foreign affairs and avoid international conflict."[15] However, an intelligent discussion of congressional intent is particularly difficult considering that the ATS went virtually unapplied for almost 200 years after its enactment.[16] Despite the efforts of many renowned scholars to glean Congress's intent, ultimately, many have described it as an impossible task.[17] Without delving into detail, several theories explain possible congressional motivations behind the ATS, including protection of foreign diplomats,[18] denial of justice,[19] fulfillment of state responsibility,[20] and universal jurisdiction.[21]

2. Executive Branch Interpretation of the ATS

Each recent executive administration has interpreted the ATS differently, which further confuses the standard permitting its extraterritorial application. The Carter Administration construed the statute broadly, advocating for the Second Circuit's 1980

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to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad").

15. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 8; *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 465 (1989) (stating "[v]irtually every commentator on the [ATS] has tied it to the Framers' desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens").

16. *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004) (stating "[b]etween 1789 and 1980, the law was used no more than twenty-one times, and only two courts had upheld jurisdiction under the statute"); *see also* Adra v. Clift, 195 F. Supp. 857, 866 (D. Md. 1961) (holding the plaintiff's action would be sustainable under the ATS); *Bolchos*, 3 F. Cas. at 810 (stating "the 9th section of the [J]udiciary [A]ct of [C]ongress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States"); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985) (describing 21 cases in which the ATS was cited prior to 1980).

17. *See* Burley, *supra* note 15, at 463 ("[D]efinitive proof of the intended purpose and scope of the Alien Tort Statute is impossible."). What may be more relevant is a discussion of the Framers' understanding of the law of nations and their conception of international duty, see *id.* at 464 (stating "[m]ore interesting . . . [is] the Framers' understanding of the law of nations and their general attitude toward compliance with the obligations it imposed"), but that discussion is outside the scope of this Note.

18. Some scholars interpret the ATS as a method of protecting the rights of foreign ambassadors. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 8; *see also* William R. Casto, *The Federal Courts Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 483 (1986) ("In the eighteenth century, the most obvious case for a remedy was the infringement of the rights of ambassadors.").

19. *See* ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 10 (describing the theory that state courts deciding cases involving aliens might render biased decisions against the non-American party, thus giving foreign citizens grounds to complain they were denied the opportunity to seek redress in U.S. courts and possibly giving them grounds to declare war or otherwise seek diplomatic redress).

20. *See id.* (describing the theory that the ATS was designed to provide remedies for foreign citizens injured by U.S. citizens "in ways that would implicate the responsibility of the United States for a breach of a treaty or violation of customary international law").

21. *See id.* at 10–11 (describing a theory that some crimes are so offensive that they are universally concerning); *see also* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 95 (2001) (stating the theory of universal jurisdiction is based on the concept of allowing any state to punish actors considered to be "enemies of all humanity").

decision in *Filartiga v. Pena-Irala*[22] to apply the ATS to certain human rights abuses committed abroad.[23] The Reagan Administration took a narrow view and interpreted the statute's application as limited to cases in which the defendant was a U.S. entity, but excluding the United States itself.[24] The Reagan State Department went as far as filing an amicus brief asking a circuit court to affirm dismissal of a suit against Argentina based on Argentina's sovereign immunity.[25] The Clinton Administration took a broader view, encouraging courts to apply the ATS to particular non-state actors; however, it did not interpret the ATS as a waiver of sovereign immunity.[26] The Bush Administration moved toward a narrow view of the ATS, contending ATS jurisdiction "has been manipulated to serve as an illegitimate venue for 'aliens to bring human rights claims in U.S. courts, even when the disputes are wholly between foreign nationals . . . often with no connection whatsoever with the [United States].'"[27]

Faced with an increasing number of cases in which the defendant is not an individual but a corporation, the Obama Administration has moved for significant restrictions on the application of the ATS. In an amicus brief for *Kiobel v. Royal Dutch Petroleum*[28] the administration urged that the Supreme Court "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a country that allegedly aided and abetted the foreign sovereign's conduct."[29] In this same brief, however, it tempered the breadth of its argument by continuing:

> [T]he court need not decide whether a cause of action should be created in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of a foreign sovereign occurred outside its territory, or where the conduct by others occurred within the U[nited] S[tates] or on the high seas.[30]

Thus the Obama Administration left open the question of whether a defendant U.S. corporation can be held liable for conduct occurring abroad.

Despite conceding that the defendants in *Kiobel* had sufficient contacts with the United States to establish personal jurisdiction, the Obama Administration went on to argue that because the defendants were not "exclusively present" in the United States, other

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22. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (holding that while the ATS does not grant new rights to aliens, it opens federal courts for adjudication of the rights already recognized by international law).

23. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 21; *see also* Burley, *supra* note 15, at 463 (describing the Carter administration's filing of an amicus brief advocating for jurisdiction under the ATS).

24. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 21.

25. *Id.* at 22. *See generally* Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986), *rev'd*, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

26. ELSEA, CONG. RESEARCH SERV., RL32118, *supra* note 2, at 22.

27. *Id.*; Stephanie Carnes, *Embodying Exceptionalism: The Bush Administration, Human Rights Legislation, and The Alien Tort Claims Act*, 5 BSIS J. INT'L STUDIES 1, 18 (2008).

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

29. Brief for the United States as Supplemental Amicus Curiae Supporting Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), at 21, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_affirmanceamcuusa.authcheckdam.pdf; Sarah A. Altschuller, *Obama Administration Calls for Significant Restrictions on the Application of the Alien Tort Statute*, CORP. SOC. RESPONSIBILITY & L. (June 18, 2012), http://www.csrandthelaw.com/2012/06/18/obama-administration-calls-for-significant-restrictions-on-the-application-of-the-alien-tort-statute/.

30. Altschuller, *supra* note 29.

forums such as the defendants' principal place of business or country of incorporation would "provide 'more appropriate means of redress.'"[31] Notably, the Department of State did not sign onto this brief, which was written and submitted by the Department of Justice. Instead, the Department of State signed an amicus brief filed in the same case in which the Obama Administration argued that corporations are proper defendants in ATS cases.[32]

B. Recent Development in Case Law

1980 marked the beginning of a trend where it became clear that the ATS could be used to assert jurisdiction in federal court. This development began with the Second Circuit's decision in *Filartiga v. Pena-Irala*,[33] which arguably "opened the door" for aliens using the ATS to assert jurisdiction in federal court for human rights violations.[34] The Second Circuit held that deliberate torture perpetrated under the color of official authority violates "universally accepted" norms of international law of human rights regardless of the nationality of the parties; thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the ATS provides federal jurisdiction.[35] Since then, human rights advocates and plaintiffs' lawyers have used the ATS to assert jurisdiction in numerous cases.[36] In 2004, the Supreme Court endorsed the same rule in *Sosa v. Alvarez-Machain*[37] finding the ATS could be used to hold violators responsible for violations of human rights such as genocide, slavery, and torture. While the holdings of *Sosa* and *Filartiga* give human rights advocates enthusiasm about the ATS' potential to support international human rights claims, others are skeptical, warning it could result in federal courts being overwhelmed with foreign cases and be potentially detrimental to U.S. foreign policy interests.[38] These skeptics are particularly concerned with the rise in litigation against U.S. corporations operating abroad which stand "accused of complicity in human rights abuses committed by the governments of their host countries."[39]

1. Filartiga *and Subsequent Case Law*

Filartiga was a landmark case in which the Second Circuit upheld federal jurisdiction under the ATS for the first time in many years. The court described state torture as a

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31. *Id.*; Brief for the United States, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) at 20, http://www.csrandthelaw.com/uploads/file/Kiobel-US-supp-amicus.pdf.

32. Altschuller, *supra* note 29.

33. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (finding jurisdiction authorized under the ATS in a case involving torture and wrongful death at the hands of a foreign official in a foreign country).

34. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 1.

35. *Filartiga*, 630 F.2d at 880.

36. *Id.*

37. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 719–20 (2004) (stating "Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. . . . Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations"); Alexandra Bradley, *Corporate Liability Under the Alien Tort Statute: Federal Common Law as the Standard for Third Party Liability*, HUM. RTS. BRIEF, 2009, at 13.

38. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 1.

39. *Id.*

violation of modern international law and held that the ATS could be applied between aliens whenever courts had personal jurisdiction over the defendant.[40] The Second Circuit combined several doctrines in its holding, including the legal fiction of the transitory tort, which holds that "liability for personal injury torts follows the tortfeasor across international boundaries."[41] The court also stressed that federal courts "should interpret international law as it has evolved and exists at the time of the case."[42]

The outcome of *Filartiga* brought hope to many human rights lawyers, who believed its holding would open doors for vindication of human rights violations committed abroad;[43] however, subsequent case law indicated that other circuits viewed the potential applications of the ATS more conservatively. In 1987, the Second Circuit again found that the ATS gave jurisdiction over an action against the sovereign State of Argentina in *Amerada Hess Shipping Corp.*,[44] but the Supreme Court unanimously reversed the decision in 1989, holding that suits against foreign sovereigns are exclusively governed by the Foreign Sovereign Immunities Act (FSIA).[45] Despite the Supreme Court's holding in *Amerada Hess Shipping Corp.*, a California district court noted in 1987 that "'[t]here appears to be a growing consensus that [the ATS] provides a cause of action for certain 'international common law torts,'"[46] primarily where a torture victim sued the torturer in a court where the torturer was within the personal jurisdiction of that court.

2. The Supreme Court's Decision in Sosa v. Alvarez-Machain *Allowed a Claim for Relief Through the ATS Where Certain Conditions Are Met*

In *Sosa*, a Mexican national acquitted of murder after being abducted and transported to the United States to face prosecution sued the United States and the Drug Enforcement Agency (DEA) alleging that the abduction violated his civil rights.[47] Petitioner Sosa argued, as did the United States in his support, that there was no relief under the ATS because "the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action."[48] The Court agreed that the ATS was strictly jurisdictional, but tempered the agreement by asserting that at the time Congress enacted the ATS, jurisdiction enabled federal courts to hear a limited number of claims "defined by the law of nations."[49] The Court held that "to recognize a violation of the law of nations sufficient to trigger the ATS's jurisdictional grant, it must 'rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features

40. Burley, *supra* note 15, at 461.

41. ELSEA, CONG. RES. SERV., RL32118, *supra* note 2, at 13.

42. *Id.* at 13–14.

43. Karen E. Holt, Filartiga v. Pena-Irala *After Ten Years: Major Breakthrough or Legal Oddity?*, 20 GA. J. OF INT'L & COMP. L. 543, 547 (1990).

44. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 431 (2d Cir. 1987).

45. Burley, *supra* note 15, at 462; Amerada Hess Shipping Corp. v. Argentine Republic, 109 S. Ct. 683, 689 (1989).

46. *See* Burley, *supra* note 15, at 462 (quoting Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (addressing an action wherein two Argentine torture victims sued a former Argentine general)).

47. Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).

48. *Id.* at 712.

49. *Id.*

of the 18th-century paradigms we have recognized.'"[50]

Justice Scalia was unhappy with the *Sosa* majority and asserted in his concurrence that events after Congress enacted the ATS, particularly *Erie Railroad Co. v. Tompkins*,[51] closed the figurative door to creation of law under the "auspices of a jurisdictional grant."[52] The majority responded to this argument by stating that "considerations persuade us that the judicial power [to recognize violations of the law of nations] should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[53]

Regardless, the *Sosa* Court made it clear that the ATS in no way grants power to mold substantive law but serves only as a jurisdictional statute "in the sense of addressing the power of the courts to entertain cases concerned with a certain subject."[54] Despite its strictly jurisdictional nature, the *Sosa* Court did not believe the ATS to be "stillborn."[55] Rather, the Court agreed with the *amici* professors of federal jurisdiction and legal history, who argued that once Congress had promulgated the ATS, federal courts could entertain claims under it because "torts in violation of the law of nations would have been recognized within the common law of the time."[56] Despite giving lower courts some guidance on establishing jurisdiction under the ATS, the Court also implied some uncertainty as to whether international jurisdiction extends to individuals or corporations. The Court stated in a footnote that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[57]

C. The Presumption Against Extraterritoriality

To understand the ATS and its role in international law, it is essential to understand the foundation of extraterritoriality. Extraterritorial application of a law is "nothing more than the application of a nation's domestic law in an international context."[58] Such application of domestic law is commonly known as "prescriptive jurisdiction."[59] Historically speaking, although this has changed significantly in the past 30 years, extraterritoriality was thought to apply only in limited circumstances, primarily when the United States' sovereignty or security was threatened.[60] The Supreme Court previously stated that absent an explicit provision to the contrary, "Congress legislates against the backdrop of the presumption against extraterritoriality."[61] Regardless of the specific

50. Tyler G. Banks, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in* Kiobel v. Royal Dutch Petroleum Co., 26 EMORY INT'L L. REV. 228, 233 (2012).

51. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 64 (1938).

52. Banks, *supra* note 50, at 233.

53. *Sosa*, 542 U.S. at 729; Banks, *supra* note 50, at 234.

54. *Sosa*, 542 U.S. at 714.

55. *Id.* at 695.

56. *Id.* (citing Brief for Vikram Amar et al. as *Amici Curiae*).

57. *Id.* at 732 n.20.

58. Jason Jarvis, *New Paradigm for the Alien Tort Statute under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 694 (2003); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 404 (AM. LAW INST. 1987).

59. *Id.*

60. *Id.*; *see also* 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 113–47 (Charles G. Fenwick trans., 1758).

61. DE VATTEL, *supra* note 60, at 699; *see* Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499

method used to determine applicability of the ATS, it is well accepted that "every state remains free to adopt principles of extraterritorial jurisdiction that it regards as best and most suitable, provided such jurisdiction does not overstep the limits of international law."[62]

D. Kiobel v. Royal Dutch Petroleum *and* Al Shimari v. CACI Premier Tech., Inc.

Among the plethora of recent cases discussing the ATS's potential application to corporate complicity in human rights abuses committed abroad stand two cases of extreme significance: *Kiobel v. Royal Dutch Petroleum*[63] and *Al Shimari v. CACI Premier Tech., Inc.*[64] *Kiobel* presented the major question of whether the presumption against extraterritoriality applies to claims under the ATS. The Supreme Court held that it does apply, primarily because of "the danger of unwarranted judicial interference in the conduct of foreign policy."[65] *Al Shimari* presented the same question, but the Fourth Circuit held the plaintiffs' claims "touch[ed] and concern[ed]" the territory of the United States with sufficient force to rebut the presumption against extraterritorial application of the ATS.[66]

The central difference between the two cases is that in *Kiobel*, the Supreme Court addressed claims regarding foreign corporations complicit in human rights abuses inflicted abroad against now-residents of the United States, versus *Al Shimari*, where plaintiffs' claims reflected extensive "relevant conduct" in U.S. territory.[67] The *Al Shimari* court attempted to use the standard set by the Supreme Court in *Kiobel*, but "consider[ed] a broader range of facts than the location where the plaintiffs actually sustained their injuries."[68] Importantly, although the court conceded the importance of being wary of international discord "resulting from 'unintended clashes between our laws and those of other nations,'" it concluded the ATS claim was not barred by the presumption against extraterritoriality.[69] The plaintiffs could bring the claim because they sought to enforce "the customary law of nations through a jurisdictional vehicle provided under United States law, the ATS, rather than a federal statute that itself details conduct to be regulated or enforced."[70]

III. ANALYSIS

A. The Kiobel *Decision Was Correct for the Wrong Reasons*

In *Kiobel*, Nigerian nationals residing in the United States filed suit in federal court against certain Dutch, British, and Nigerian corporations under the ATS. The petitioners alleged the corporations "aided and abetted" the Nigerian government in committing

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U.S. 244, 248 (1991) (finding Title VII of the Civil Rights Act inapplicable extraterritorially).

62. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 3 (1992).

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

64. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 516 (4th Cir. 2014).

65. *Kiobel*, 133 S. Ct. at 1664.

66. *Al Shimari*, 758 F.3d at 528.

67. *See id.* ("The plaintiffs' claims reflect extensive 'relevant conduct' in United States territory, in contrast to the 'mere presence' of foreign corporations that was deemed insufficient in *Kiobel*.").

68. *Id.* at 529.

69. *Id.* at 530.

70. *Id.*

violations of the law of nations in Nigeria.[71] The complaint alleged "throughout the early 1990's . . . Nigerian military and police forces attacked [petitioners'] villages, beating, raping, killing and arresting residents and destroying or looting property."[72] The complaint further alleged respondents "aided and abetted[73] these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks."[74] Following these alleged atrocities, the petitioners moved to the United States, where they were granted political asylum and now reside as legal residents.[75] The U.S. District Court for the Southern District of New York dismissed the case in part, and the court certified an order for interlocutory appeal.[76] The parties cross-appealed, and the Court of Appeals for the Second Circuit dismissed the entire complaint.[77] The Supreme Court granted certiorari.

The Supreme Court held the ATS did not apply to petitioners' claims. Although it may have reached the right result, its rationale was not persuasive, and it should be reconsidered for the following reasons: (1) the ATS was written with piracy in mind, and applying U.S. law to pirates typically involves applying law to actions taking place within the jurisdiction of another sovereign; (2) international jurisdictional norms indicate that a nation may apply its law to conduct in foreign jurisdictions, and many foreign nations hold their corporations responsible for conduct committed abroad; (3) Congress has not sought to limit the ATS's jurisdictional or substantive reach but has enacted other statutes allowing the United States to prosecute foreign persons who injure foreign victims abroad; and (4) the Court's decision in *Sosa v. Alvarez-Machain*[78] indicates the presumption against extraterritoriality is not a categorical bar to ATS application abroad and has strongly influenced district courts, including the Fourth Circuit in *Al Shimari*.

1. "Who are today's pirates?"

When Congress passed the ATS, it identified "three principle offenses against the law of nations" as described by William Blackstone in Volume 4 of *Commentaries on the Laws of England*—violation of safe conducts, infringement of the rights of ambassadors, and piracy.[79] While the first two offenses invoke no extraterritorial application, the piracy

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

72. *Id.*

73. The "aiding and abetting" liability approach has "led to confusion and conflict in the courts over the specific standards for corporate aiding and abetting liability." Banks, *supra* note 50, at 231. "In *Doe I. v. Unocal Corp.*, 'one of the most learned discussions of aiding and abetting liability under the ATS,' the Ninth Circuit judges were split on the definition and source of law for the aiding and abetting claims." *Id.* at 231–32. The majority ultimately held that international law supplied the applicable legal standard. *Id.*; *see also* Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) (stating that "all torts alleged in the present case are *jus cogens* violations and, thereby, violations of the law of nations").

74. *Kiobel*, 133 S. Ct. at 1662–63.

75. *Id.* at 1663.

76. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006) *aff'd in part, rev'd in part*, 621 F.3d 111 (2d Cir. 2010).

77. *Kiobel*, 621 F.3d 111, 149 (2d Cir. 2010).

78. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (finding the district court could hear the claim under the ATS).

79. *Kiobel*, 133 S. Ct. at 1666; 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).

offense does. The *Kiobel* Court conceded the Supreme Court "has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application."[80] Eventually, however, the Court found the piracy offense did not override the presumption against extraterritoriality because "[a]pplying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign."[81] Importantly, the Court emphasized that pirates were "fair game wherever found" because they did not operate within any particular jurisdiction.[82]

Justice Breyer, in his concurrence, agreed the ATS did not apply to petitioners' claims but disagreed that it did not apply because of the presumption of extraterritoriality. Primarily, Justice Breyer disagreed with the majority's view on piracy.[83] Asking the reader "[w]ho are today's pirates?" he argued the majority could not "wish this piracy example away" simply by emphasizing that piracy takes place on water, as opposed to land.[84] Justice Breyer argued the crimes associated with piracy—namely, robbery and murder—do not actually take place in water, but on a ship, and a ship is like land in that it "falls within the jurisdiction of the nation whose flag it flies."[85]

Following Justice Breyer's line of thinking, the fact that a ship constitutes a foreign jurisdiction means it constitutes a foreign territory as contemplated by the ATS. The ATS was specifically written to apply to "foreign matters."[86] As Justice Breyer emphasizes,[87] the ATS's text "refers explicitly to 'alien[s],' 'treat[ies],' and 'the law of nations.'"[88] The ATS's purpose was to address "violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs."[89] Furthermore, Breyer argues the majority lends itself to his view on piracy when it asserts pirates were "fair game wherever found."[90] Indeed, he argues, "that is the point."[91]

Because the ATS clearly applies to piracy claims and piracy occurs in foreign territory due to laws regarding a "flag state," the presumption of extraterritoriality does not properly function as a categorical bar in *Kiobel*. The majority in *Kiobel*, therefore, should not have dismissed the argument that the ATS applied to the situation at hand due to the presumption

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80. *Kiobel*, 133 S. Ct. at 1667.

81. *Id.*

82. *Id.*

83. *Id.* at 1671.

84. *Id.* at 1671–72 (Breyer, J., concurring).

85. *See Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963)) (describing "the law of the flag state" as "ordinarily govern[ing] the internal affairs of a ship"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 502, Comment *d* ("[F]lag state has jurisdiction to prescribe with respect to any activity aboard the ship"); United States v. Palmer, 16 U.S. 610, 632 (1818); (stating that piracy is an "offenc[e] [sic] against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are"); United States v. Furlong, 18 U.S. 184, 197 (1820) (describing a crime committed "within the jurisdiction" of a foreign state as being "the same thing" as a crime committed "in the vessel of another nation").

86. *See* 27 U.S.C. § 1350 (1948) (stating "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*") (emphasis added).

87. *Id.*

88. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring).

89. *Id.*

90. *Id.*

91. *Id.*

against extraterritoriality. The ATS should apply because the piracy offense indicates ATS jurisdiction *does* apply to foreign territory, and Congress was clearly contemplating foreign territory when it wrote the statute.

2. International Jurisdictional Norms and Consistency with Other Nations

Because the ATS explicitly refers to "alien[s]," "treat[ies]," and "the law of nations,"[92] courts should look to international jurisdictional norms to determine the statute's jurisdictional scope.[93] The Restatement (Third) of Foreign Relations Law provides valuable information in this regard.[94] Section 402 of the Restatement posits that:

> subject to [section] 403's "reasonableness" requirement, a nation may apply its law . . . not only (1) to the "conduct" that "takes place [or to persons or things] within its territory" but also (2) to the "activities, interests, status, or relations of its nationals outside as well as within its territory," (3) to "conduct outside its territory that has or is intended to have substantial effect within its territory," and (4) to certain "conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests."[95]

Finally, section 404 of the Restatement posits a "state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and equivalent conduct.[96] These sections of the Restatement clearly indicate a nation may apply its law to conduct occurring outside its territory as long as the action affects its territory in certain substantial ways. Many other nations hold their corporations responsible for conduct committed abroad, strengthening the theory that it is an international jurisdictional norm to apply national law to conduct taking place outside of a nation's territory. This theory indicates the United States remains an outlier in developed countries in holding the presumption against extraterritoriality bars ATS claims.[97]

3. Congress Has Not Indicated That Its Intent in Enacting the ATS Was To Deprive District Courts of Jurisdiction Over Crimes Occurring Abroad

Despite the *Kiobel* majority's assertion to the contrary, Congress has shown an intent to give courts subject matter jurisdiction over claims arising in a foreign territory through

92. 27 U.S.C. § 1350.

93. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring).

94. *Id.*

95. *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1988).

96. *Kiobel*, 133 S. Ct. at 1673; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1988).

97. *See Kiobel*, 133 S. Ct. at 1675–76 (Breyer, J., concurring) (citing Brief for Government of the Kingdom of the Netherlands et al. as *Amici Curia* 19–23 (citing *inter alia* Guerrero v. Monterrico Metals PLC [2009] EWHC (QB) 2475 (Eng.))) (attacking conduct of U.K. companies in the State of Peru); Lubbe v. Cape PLC [2000] UKHL 41 (Eng.) (attacking conduct of U.K. companies in South Africa); Rb. Gravenhage [Court of the Hague], 30 December 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Orugo/Royal Dutch Shell PLC) (Neth.) (attacking conduct of Dutch respondent in Nigeria); Brief for European Commission as Amicus Curiae Support of Neither Party, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1676 (2013) (No. 10-1491), at 11 (stating that "[i]t is 'uncontroversial' that the United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law").

the enactment of several other statutes which specifically authorize such jurisdiction. These statutes include section 2340A(b)(2), which gives federal jurisdiction over the prosecution of torturers where an offender "outside the United States commits or attempts to commit torture" and "the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender."[98] Section 1091(e)(2)(D) specifically authorizes genocide prosecution where "regardless of where the offense is committed, the alleged offender is . . . present in the United States."[99] The Torture Victim Protection Act, codified in a note following the ATS, authorizes a private right of action for individuals harmed by an act of torture or extrajudicial killing committed "under actual or apparent authority, or color of law, of any foreign nation."[100] Finally, a Senate report written in 1991 indicated the purpose of the Torture Victim Protection Act was to "make sure that torturers and death squads will no longer have a safe haven in the United States"[101] by "providing a civil cause of action in U.S. courts for torture committed abroad."[102]

4. The Law of Nations

The ATS clearly states its jurisdiction over violations of the law of nations, and the Supreme Court has affirmed for two centuries that the domestic law of the United States recognizes the law of nations.[103] The *Sosa* Court wrote that at the time the ATS was written, the law of nations was primarily comprised of two principle elements, the first being "the general norms governing the behavior of national states with each other."[104] This element "occupied the executive and legislative domains, not the judicial,"[105] therefore it is the second element with which this Note is concerned.

The second element of the law of nations is that it consists of a body of judge-made law regulating the conduct of individuals in foreign territory.[106] Blackstone described this element as being entrenched in "mercantile questions," which in a more modern context speaks to the behavior of U.S. corporations conducting business abroad.[107] The *Sosa* Court, pulling from Blackstone's description of what qualified as a "mercantile question,"[108]

98. 18 U.S.C. § 2340A(b)(2) (2001).

99. 18 U.S.C. § 1091(e)(2)(D) (2009).

100. 28 U.S.C. § 1350 (1948).

101. *Id.*

102. S. REP. NO. 102-249, at 3–4 (1991).

103. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004); *see, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."); The Nereide, 12 U.S. 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land."); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (recognizing that international disputes affecting foreign policy is one of the "narrow areas" where "federal common law" continues to exist).

104. *Sosa*, 542 U.S. at 714.

105. *Id.*

106. *Id.* at 715.

107. *Id.*; 4 WILLIAM BLACKSTONE, COMMENTARIES *67.

108. *Sosa*, 542 U.S. at 715 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *67) ("The law of nations . . . was implicated 'in mercantile questions, such as bills of exchange and the like; in all marine cases, relating to freight, average, demurrage, insurances, bottomry . . . [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills.").

described the merchant as "requir[ing] its own transnational regulation."[109]

Most importantly, the *Sosa* Court held the history of the ATS supports two propositions, the first being that:

> Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature . . . . There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.[110]

The second proposition espoused by the *Sosa* Court is that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[111] Finally, the Court summed up its view on the ATS's jurisdictional reach by stating "[the ATS] 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."[112]

Ultimately, the Court held that if a court were to recognize private claims under federal common law for violations of an international law norm, it must only do so within the "paradigms familiar when [the ATS] was enacted"—those being violations of safe conducts, infringement of the rights of ambassadors, and piracy.[113] Lower courts preceding the *Sosa* opinion followed this paradigm and the *Sosa* Court has agreed with their holdings.[114]

The importance of the *Sosa* opinion is that both before and after the Supreme Court issued its ruling, courts have consistently rejected the concept that the ATS is categorically barred from extraterritorial application.[115] Therefore, in holding that the ATS is categorically barred from application to conduct abroad by the presumption against extraterritoriality, the *Kiobel* Court defies precedent and confounds the status of the ATS, particularly in regard to whether the ATS applies to corporate conduct in foreign territory. Most recently, the ATS was addressed in a corporate context in the Fourth Circuit.

5. Al Shimari v. CACI Premier Technology, Inc.

The facts leading up to the initiation of *Al Shimari* were well-publicized and

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109. *Id.* at 715.

110. *Id.* at 719.

111. *Id.* at 720.

112. *Id.*

113. *Sosa*, 542 U.S. at 732.

114. *Id.*; *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[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"); Tel-Oren v. Libyan Arab Rep., 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that the ATS's reach could be defined by "a handful of heinous actions—each of which violates definable, universal, and obligatory norms").

115. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1675 (Breyer, J., concurring in the judgment) (noting continual rejection of an extraterritorial bar); *see* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011) ("No court to our knowledge has ever held that [the ATS] doesn't apply extraterritorially."); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747 (9th Cir. 2011), cert. granted, *vacated by* 133 S. Ct. 1995 (2013) in light of *Kiobel* ("We therefore conclude that the ATS is not limited to conduct occurring within the United States."); Doe v. Exxon Mobil Corp., 654 F.3d 11, 20 (D.C. Cir. 2013), *vacated by* 527 Fed.Appx. 7 (D.C. Cir. 2013) in light of *Kiobel* (stating that "that there is no extraterritoriality bar").

controversial.[116] Four Iraqi citizens sued CACI Premier Technology, Inc., an American corporation and military contractor, under the ATS, alleging the plaintiffs were abused and tortured during their detention at Abu Ghraib prison in Iraq, where they were held as suspected enemy combatants.[117] Among many allegations, the plaintiffs described being:

> "repeatedly beaten," "shot in the leg," "repeatedly shot in the head with a taser gun," "subjected to mock execution," "threatened with unleashed dogs," "stripped naked," "kept in a cage," "beaten on [the] genitals with a stick," "forcibly subjected to sexual acts," and "forced to watch" the "rape[][of] a female detainee."[118]

The Fourth Circuit gave a much more balanced, contextual view of where the ATS should be applied to conduct abroad, and importantly, decided the *Kiobel* Court's holding does not categorically bar cases which "manifest a close connection to United States territory."[119] The court largely focused on two phrases in *Kiobel*. The first is 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."[120] Additionally, the Fourth Circuit noted it is "crucial" to recognize the Supreme Court's distinction in *Kiobel* that "all relevant conduct took place outside the United States."[121] The Fourth Circuit also noted the *Kiobel* Court's assertion that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[122]

The *Al Shimari* court faced the question, then, of whether or not an American corporation which has not only been complicit in, but directly participated in torture in foreign territory, can be held liable for such conduct in the United States under U.S. law. Stating the Supreme Court's choice of terminology in *Kiobel* "was not happenstance," the Fourth Circuit interpreted the Court's holding in *Kiobel* as "suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action."[123] Thus, the court eliminated the notion that the presumption against extraterritoriality serves as a categorical bar of ATS claims applying to conduct in foreign territory. Rather, the Fourth Circuit reasoned, a "fact-based analysis is required . . . to determine whether courts may exercise jurisdiction over certain ATS claims."[124] Finally, the court held the ATS was applicable in the case at hand, stating "[t]he

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116. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (describing "systematic and illegal abuse of detainees"); Rebecca Leung, *Abuse at Abu Ghraib*, CBS NEWS (May 5, 2004), http://www.cbsnews.com/news/abuse-at-abu-ghraib/ (describing "sadistic, blatant, and wanton criminal abuses" of Iraqis by American soldiers); *US Court Revives Lawsuit Against Abu Ghraib Security Contractors*, AL JAZEERA AMERICA (June 30, 2014), http://america.aljazeera.com/articles/2014/6/30/us-court-reviveslawsuitagainstabughraibdefensecontractors.html (stating the Al Shimari decision "has the potential to expand legal liability for contractors who work with and undertake sensitive tasks on behalf of U.S. troops outside the country").

117. Al Shimari v. CACI Premier Tech., 758 F.3d 516, 516 (4th Cir. 2014).

118. *Id.* at 521.

119. *Id.* at 528.

120. *Id.* at 527; *Kiobel*, 133 S. Ct. at 1669.

121. *Al Shimari*, 758 F.3d at 527.

122. *Id.*

123. *Id.* (citing BLACK'S LAW DICTIONARY 281 (9th ed. 2009)) ("defining 'claim' as the 'aggregate of operative facts giving rise to a right enforceable by a court'").

124. *Id.* at 528.

presumption against extraterritorial application bars the exercise of subject matter jurisdiction over the plaintiffs' ATS claims unless the 'relevant conduct' alleged in the claims 'touch[es] and concern[s] the territory of the United States with sufficient force to displace the presumption.'"[125]

6. Comparing Al Shimari *with* Kiobel

The *Al Shimari* court considered nine factors to be essentially different than the *Kiobel* case, leading to its conclusion that the plaintiffs' claims under the ATS "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application. These factors included that: (1) CACI is an American corporation; (2) the alleged acts of torture were committed by U.S. citizens; (3) CACI has its headquarters in Virginia; (4) the torture occurred at a military facility operated by U.S. government personnel; (5) Congress had expressed intent through enactment of the Torture Victims Protection Act (TVPA) and section 2340A to provide aliens access to U.S. courts and to hold citizens of the United States accountable for acts of torture committed abroad; (6) CACI's contract was issued by a government office in Arizona; (7) the interrogators were required to obtain security clearances from the U.S. Department of Defense; (8) CACI collected payments by mailing invoices to government accounting offices in Colorado; and (9) CACI's managers allegedly were allegedly aware of the misconduct, attempted to cover it up, and implicitly encouraged it.[126] These considerations differ substantially from the facts in *Kiobel*, where (1) all the atrocities occurred in Nigeria; (2) none of the conduct alleged in the complaint occurred within the territory of the United States; (3) none of the defendants had engaged in any activities in the United States that appeared relevant to the claimed tortious acts that occurred in Nigeria; and (4) the only connections to U.S. territory consisted of the foreign corporate defendants' listings on the New York Stock Exchange and their affiliation with a public relations office in New York City.[127]

The Fourth Circuit's reading of *Kiobel* indicates corporations can be held liable for conduct abroad, provided the conduct "touches and concerns" and has substantial ties to U.S. territory.[128] Its reasoning is similar to Justice Breyer's recommendation in his *Kiobel* concurrence. Justice Breyer would apply the ATS 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, including an interest in preventing the United States from becoming a safe harbor for a torturer or "other common enemy of mankind."[129] All of Justice Breyer's suggested factors are met in the *Al Shimari* analysis. This means that despite the *Kiobel* Court's apparently broad holding, the ATS is *not* categorically barred from application to conduct occurring in foreign territory.

IV. RECOMMENDATION

As the *Sosa* Court explained, Congress did not pass the ATS with the intention to

125. *Id.* (quoting *Kiobel*, 133 S. Ct. at 1669).
126. *Al Shimari*, 758 F.3d at 530–31.
127. *Kiobel*, 133 S. Ct. at 1662–63.
128. *Al Shimari*, 758 F.3d at 530.
129. *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

"leave it lying fallow indefinitely,"[130] but rather, "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[131] The *Kiobel* Court was correct when it stated corporations are present in too many countries for presence abroad to be the only requirement for corporate liability.[132] The *Al Shimari* court, however, correctly interpreted the *Kiobel* holding as not directly validating, but not denying the concept that courts must individually examine cases in which a party asserts an ATS claim and consider all of the facts and their relationship to the causes of action. The doctrine of the presumption against extraterritoriality should not categorically bar ATS claims applying to corporate conduct abroad. In evaluating whether a corporation can be held liable for its behavior abroad, courts should use a combination of Justice Breyer's analysis in his *Kiobel* concurrence and the Fourth Circuit's test used to hold CACI liable for its participation in human rights abuses at Abu Ghraib.

The *Kiobel* Court provided a vague test: the presumption against extraterritoriality bars the exercise of subject matter jurisdiction over a plaintiff's ATS claim unless the relevant conduct alleged in the claims "touch[es] and concern[s] the territory of the United States . . . with sufficient force to displace the presumption."[133] This vague test leaves corporations and ATS claimants unclear as to what qualifies as "touching and concerning" the United States with "sufficient force." Where the *Kiobel* Court gave little guidance, the *Al Shimari* court shines a light.

The ideal rule would combine the Fourth Circuit's holding with Justice Breyer's suggestions in his *Kiobel* concurrence. This combination would require that for a U.S. court to hold a corporation liable for conduct abroad if several conditions are met.[134] First, the defendant corporation should be an American corporation.[135] Second, the illegal conduct should be directly committed by American citizens.[136] Third, the corporation should have its headquarters or principal place of business[137] located in the United States.[138] Fourth,

130. Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004).

131. *Id.* at 720.

132. *Al Shimari*, 758 F.3d at 527.

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

134. One of the Fourth Circuit's considerations—that the managers of the corporation were aware of the misconduct, attempted to cover it up, and implicitly encouraged it—is deliberately left off of this list. It is a corporation's duty to have in place an information and reporting system reasonably designed to provide to the senior management and to the board of directors timely, accurate information sufficient to allow the management and the board, within their respective scopes, to reach "informed business judgments" concerning the corporation's compliance with the law. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (holding a board of directors met responsibilities to monitor the operation of Caremark International despite employees entering into several illegal contracts).

135. *See Al Shimari*, 758 F.3d at 528 (reasoning that "the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation . . . which has corporate headquarters located in . . . Virginia").

136. *Id.*

137. The Supreme Court recently interpreted the statutory phrase "principal place of business" as "the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the . . . corporation's 'nerve center' . . . [I]n practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings . . . ." Hertz Corp. v. Friend, 599 U.S. 77, 92–93 (2010).

138. *Al Shimari*, 758 F.3d at 528.

the illegal conduct should take place on territory controlled by the corporation.[139] Fifth, personal jurisdiction should be obtainable over the corporation. Finally, the corporation's conduct should substantially and adversely affect an important American interest, including an interest in preventing the United States from becoming a safe harbor for a torturer or "other common enemy of mankind."[140]

This test will ensure that while an American corporation operating abroad will not be held unnecessarily liable for abuses in which it was not directly or substantially involved, the corporation remains responsible for ensuring its operations abroad remain legal. The test would also dispel any belief that the rules do not apply simply because conduct is not taking place in United States territory. This will discourage holdings like the original district court holding in *Al Shimari*, when the court granted CACI's motion to dismiss purely on the basis that it lacked subject matter jurisdiction because the abuse took place outside of United States territory.[141] The district court relied almost completely on its interpretation of *Kiobel*, stating "[a]s *Kiobel* explained, absent congressional action, the ATS cannot provide jurisdiction for alleged violations of the law of nations where the alleged conduct occurred in territories outside the United States."[142] The district court never reached the question of whether or not CACI's activities in Iraq sufficiently "touched and concerned" the territory of the United States to overcome the presumption against extraterritoriality.[143] Its holding exemplifies why the Supreme Court's holding in *Kiobel* is confusing and difficult to apply. It exemplifies why a specific set of qualifications should be set, indicating when the presumption against extraterritoriality can be overcome through the ATS, using both Justice Breyer's concurrent interpretation in *Kiobel* and the Fourth Circuit's clear outline in *Al Shimari*.

Opponents of corporate liability under the ATS argue corporations will stop investing in developing countries if they are held liable under the ATS. Critics argue this would stifle trade and potentially offset "any liberalization gained by the current trade-negotiation round of the World Trade Organization (WTO), the Doha Development Round."[144] The proponents of this argument believe "the ultimate losers will be millions of impoverished people denied an opportunity to participate in global markets."[145] This line of reasoning is baseless.[146] The history of corporate liability clearly shows requiring corporations to act in a socially responsible manner does not discourage investment.[147] Furthermore, the scope

139. *See id.* (reasoning that "[t]he alleged torture occurred at a military facility operated by United States government personnel").

140. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)) (internal quotations omitted) ("[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.").

141. Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 865 (E.D. Va 2013), *rev'd*, 758 F.3d 516 (4th Cir. 2014).

142. *Id.*

143. *Id.* at 866.

144. Bradley, *supra* note 37, at 15.

145. *Id.* (quoting GARY CLYDE HUFBAUER & NICHOLAD K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 2 (2003)).

146. *Id.*

147. *See* Bradley, *supra* note 37, at 16 (stating "history clearly demonstrates that requirements that corporations act in a socially responsible manner will not discourage investment. The same will be true under the ATS").

of the ATS is limited to egregious violations of human rights rising to the level of "customary international law," and most societies would willingly sacrifice some foreign investment for the safety of their citizens.[148] This is particularly true taking into consideration the gravity of the human rights offenses which the ATS can address are severe enough to be considered violations of international law.[149]

V. CONCLUSION

The ATS is a timeworn statute that has rarely been applied since its enactment, making it difficult to interpret and apply in a modern context. The Supreme Court's decision in *Kiobel* did nothing to make the standard for its application more clear. By contradicting its own precedents set in *Filartiga* and *Sosa*, it confounded the lower courts and left the question open as to under what circumstances a U.S. corporation can be held liable for human rights abuses committed abroad in which it either directly participates or in which it is complicit. The question is not whether a U.S. corporation should be held liable for such abuses—most citizens would agree a corporation is not suddenly free to do as it wishes because it is operating outside of U.S. territory—but what legal tools exist to enforce domestic law in foreign territory for protection of human rights. The ATS is such a legal tool. Despite its almost ancient origins, Congress clearly wrote and intended the ATS to be a tool to enforce domestic law abroad. As long as a strict test ensures U.S. interests are sufficiently involved in a given situation, corporate liability under the ATS should not be categorically barred by the presumption against extraterritoriality.

148. *Id.*

149. *See id.* ("The Supreme Court limited the scope of the ATS to violations of human rights that rise to the level of being accepted as customary international law. Such violations include . . . torture . . . [a crime] for which any society would gladly forfeit a few foreign direct investment dollars to eradicate. . . . [T]he positive correlation between political stability and foreign investment is widely known.").