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## To Touch and Concern the United States with Sufficient Force: How American Due Process and Choice of Law Cases Inform the Reach of the Alien Tort Statute After *Kiobel*

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## NOTE

# TO TOUCH AND CONCERN THE UNITED STATES WITH SUFFICIENT FORCE: HOW AMERICAN DUE PROCESS AND CHOICE OF LAW CASES INFORM THE REACH OF THE ALIEN TORT STATUTE AFTER *KIOBEL*

*Karima Tawfik\**

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### INTRODUCTION

In *Kiobel v. Royal Dutch Petroleum Co.*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations in the United States District Court for the Southern District of New York under the Alien Tort Statute<sup>1</sup> (ATS), alleging that the corporations aided and

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1. 28 U.S.C. § 1350 (“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.”).

abetted the Nigerian government in violently suppressing demonstrators who were protesting the environmental effects of oil exploration.<sup>2</sup> In *Kiobel*, all nine Justices agreed on the narrow holding that in the case of a foreign defendant, foreign plaintiff, and where all relevant conduct took place outside the United States, the ATS does not provide relief for alleged violations of the law of nations.<sup>3</sup>

However, *Kiobel* was “careful to leave open a number of significant questions regarding the reach and interpretation” of the ATS.<sup>4</sup> One such question is if the ATS reaches tortious conduct that takes place outside the country when other factors link the case to the United States. This question is the subject of a new circuit split. In *Balintulo v. Daimler AG*, South African nationals brought a case under the ATS against local subsidiaries of Daimler, Ford, and IBM, all multi-national corporations incorporated in the United States, alleging that the subsidiaries aided and abetted the South African government in crimes of apartheid, including arbitrary arrest, detention, torture, and extrajudicial killing of family members.<sup>5</sup> The Second Circuit found the case to be precluded by *Kiobel*, noting that “[t]he opinion of the Supreme Court in *Kiobel* plainly bars common-law suits, like this one, alleging violations of customary international law based solely on conduct occurring abroad.”<sup>6</sup> Similarly, in a case where children of former union leaders who were allegedly murdered in Colombia sued Drummond Company, Inc., a closely-held corporation with its principal place of business in Birmingham, Alabama, and its subsidiary, Drummond Ltd., the Eleventh Circuit affirmed the lower court’s granting of summary judgment to defendants, holding that the presumption against extraterritorial application of the ATS applied.<sup>7</sup>

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2. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013) (often referred to as “*Kiobel II*” to differentiate it from the Supreme Court’s order on March 5, 2012 for reargument on the issue of the ATS’s extraterritoriality after hearing oral arguments on the separate issue of corporate liability under the ATS, an issue not discussed in this Note). See Lyle Denniston, *Kiobel to be expanded and reargued*, SCOTUSBLOG, (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>.

3. *Id.* at 1669. Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Kennedy filed a concurring opinion; Justice Alito filed a concurring opinion in which Justice Thomas joined; and Justice Breyer filed an opinion concurring in the judgment, but not in the opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined; see also *Doe v. Drummond Co.*, 782 F.3d 576, 585 (11th Cir. 2015) (discussing the “narrow holding of *Kiobel*”), *cert. denied*, 136 S. Ct. 1168 (2016).

4. *Id.* (Kennedy, J., concurring); see also *id.* at 1669–70 (Alito, J., concurring) (“This formulation obviously leaves much unanswered, and perhaps there is wisdom in the Court’s preference for this narrow approach.”); *id.* at 1673 (Breyer, J., concurring in the judgment) (“[A]s the Court uses its ‘presumption against extraterritorial application,’ it offers only limited help in deciding the question presented.”).

5. See *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013).

6. *Id.* at 182.

7. *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1235–36 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 410 (2015).

But in *Doe I v. Nestle*<sup>8</sup> and *Al Shimari v. CACI Premier Technology, Inc.*,<sup>9</sup> the Ninth and Fourth Circuits put forward opinions that indicate that the ATS may provide relief to claims even where the conduct or violation occurred abroad. In *Nestle*, the Ninth Circuit reversed the district court's dismissal of a claim brought by victims of child slavery in the Ivory Coast and remanded for further proceedings, noting that *Kiobel* "does not explain the nature of this [touch and concern] test, except to say that it is not met when an ATS plaintiff asserts a cause of action against a foreign corporation based solely on foreign conduct."<sup>10</sup> Similarly, in *Al Shimari*, where Iraqi nationals and former detainees at Abu Ghraib detention center in Iraq brought a case alleging abuse and torture against a military contractor headquartered in Virginia, the Fourth Circuit found that such a case could potentially be heard because it "manifest[s] a close connection to United States territory."<sup>11</sup>

The few articles that have examined the post-*Kiobel* case law argue that American courts should allow a more expansive reading of the ATS to ensure that the United States upholds its international legal obligations to provide victims access to judicial remedies,<sup>12</sup> and that such an approach is consistent with international jurisdictional norms.<sup>13</sup> However, these approaches alone may fall short of a persuasive solution for U.S. courts because in *Kiobel* the Supreme Court stated that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."<sup>14</sup> Because international human rights norms alone have not been sufficient to ensure that the scope of the ATS reaches victims of abuse when their cases have a clear nexus with the United States, international and domestic human rights lawyers alike should look to domestic due process and choice of law principles to demonstrate why the ATS provides a remedy for some violations of the law of nations that occur abroad.

This Note draws parallels to domestic due process and choice of law principles to ground the more expansive post-*Kiobel* reading of the ATS.

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8. 766 F.3d 1013 (9th Cir. 2014) [hereinafter *Nestle*].

9. 758 F.3d 516 (4th Cir. 2014).

10. *Nestle*, 766 F.3d at 1027–28. The Court remanded the case to allow the plaintiffs the opportunity to amend their complaint in light of *Kiobel* to allege that some of the activity underlying their ATS claim took place in the United States and stated that "we are unable to conclude that amendment would be futile because unlike the claims at issue in *Kiobel II*, the plaintiffs contend that part of the conduct underlying their claims occurred within the United States." *Id.* at 1028. See also Jennifer M. Green, *The Rule of Law at A Crossroad: Enforcing Corporate Responsibility in International Investment Through the Alien Tort Statute*, 35 U. PA. J. INT'L L. 1085, 1102 (2014).

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

12. See, e.g., Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 188 (2014).

13. See, e.g., Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kiobel's "Touch and Concern" Test*, 66 HASTINGS L.J. 443, 447–48 (2015).

14. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

While fully acknowledging that the question of the scope of the ATS addresses “the power of the courts to entertain cases concerned with a certain subject,”<sup>15</sup> an issue distinct from personal jurisdiction, which refers to a court’s power to bring a person into its adjudicative process, or choice of law, which refers to which law a court should apply,<sup>16</sup> this Note argues that many of the concerns animating the scope of the ATS can be addressed by domestic personal jurisdiction and choice of law cases. Grounding ATS argumentation in domestic jurisprudence rather than solely in international law obligations is important because the judicial concerns about the ATS mirror those apparent in ordinary personal jurisdiction and choice of law cases. In *Kiobel*, the Court pointed to two specific concerns: First, that a broad ATS will set the precedent for other countries to hale Americans into their courts<sup>17</sup> (a concern with overlaps to personal jurisdiction cases), and, second, that a broad ATS will precipitate “unintended clashes between our laws and those of other nations which could result in international discord”<sup>18</sup> (a concern with overlaps to choice of law cases).

This Note explores the post-*Kiobel* ATS cases and argues that the Fourth Circuit’s approach to considering claims that manifest a close connection to the United States as potentially entitling the plaintiff to relief under the ATS is preferable to approaches that categorically bar claims when the alleged conduct has occurred abroad. Part I describes the *Kiobel* decision in more depth and the subsequent ATS case law to outline the contours of recent circuit cases. Part II demonstrates how domestic personal jurisdiction and choice of law principles weigh in favor of a more expansive reading of the ATS, as adopted by the Fourth Circuit, and compares the ATS to other areas of law, including securities and antitrust law. Part III puts forward a three-part disjunctive test that courts could use to add more definition to the Fourth Circuit approach in determining if a claim touches and concerns the territory of the United States in a way that allows U.S. federal courts to consider it under the ATS: If (1) the defendant is a U.S. citizen or a U.S. corporate domiciliary; or (2) the defendant has conducted explicit planning or extensive activity in furtherance of the violation in the United States; or (3) the violation is clearly and manifestly orchestrated to target the United States, with the intent of harming the United States and its citizens, then the claim overcomes the ATS presumption against extraterritoriality.

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15. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–14 (2004); *see also Al Shimari*, 758 F.3d at 520 (“In this appeal, we consider whether a federal district court has subject matter jurisdiction to consider certain civil claims seeking damages against an American corporation . . . . The primary issue on appeal concerns whether the Alien Tort Statute . . . provides a jurisdictional basis for the plaintiffs’ alleged violations of international law, despite the presumption against extraterritorial application of acts of Congress.”).

16. *See Personal Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Choice of Law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

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

18. *Id.* (citing *EEOC v. Arabian American Oil, Co.*, 499 U.S. 244, 248 (1991)).

PART I. THE “TOUCH AND CONCERN” TEST AND POST-*KIOBEL* CASES  
UNDER THE ALIEN TORT STATUTE

A. *The Kiobel Enunciation of the “Touch and Concern” Test*

In *Kiobel*, the major question before the Supreme Court was whether the ATS extends to torts that have occurred abroad—in other words, if the ATS applies extraterritorially.<sup>19</sup> In a decision by Chief Justice Roberts, the Court held that the ATS does not extend to claims brought by foreign plaintiffs, against foreign defendants, for conduct abroad, relying primarily on the presumption against extraterritorial application of U.S. law, or that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>20</sup> The Court reiterated that the presumption against extraterritorial application of U.S. statutes reflects the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” because “Congress ordinarily legislates with respect to domestic, not foreign matters.”<sup>21</sup> The Court stated that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms”<sup>22</sup> and that an expansive reading of the ATS could lead to potential “unintended clashes between our laws and those of other nations which could result in international discord” and raise a “danger of unwarranted judicial interference in the conduct of foreign policy.”<sup>23</sup> Additionally, the Court noted that accepting the petitioners’ view “would imply that other nations . . . could hale our citizens into their courts.”<sup>24</sup> The decision ultimately held that on the facts at hand, “[A]ll the relevant conduct took place outside the United States. And 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.”<sup>25</sup>

This final “touch and concern” language requires further interpretation to determine what claims are sufficiently close to the United States to overcome the ATS presumption against extraterritoriality. As Justice Breyer noted in his concurrence of the judgment in *Kiobel*, the majority “makes clear” that a statutory claim might sometimes “touch and concern” the territory of the United States with sufficient force to displace the presumption, but the Court “leaves for another day the determination of

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19. The ATS, passed as part of the Judiciary Act of 1789, is a one-sentence statute providing 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.” 28 U.S.C. § 1350 (2012).

20. *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 248 (2010)).

21. *Id.* at 1672 (quoting *Morrison*, 561 U.S. at 255).

22. *Id.* at 1668.

23. *Id.* at 1664.

24. *Id.* at 1669.

25. *Id.*

just when the presumption against extraterritoriality might be ‘overcome.’”<sup>26</sup>

### B. *Categorical Bars Where Tortious Activity Occurred Abroad*

After the *Kiobel* decision, some lower courts dismissed plaintiff claims under the ATS if the tortious activity occurred abroad.<sup>27</sup> For example, in July 2013 in *Giraldo v. Drummond Co.*, the Northern District Court of Alabama dismissed a case in which plaintiffs alleged that the head of the Drummond mining company, headquartered in Birmingham, took actions that involved funding paramilitaries in Colombia who allegedly murdered union activists while providing security services against the FARC rebel group for Drummond’s rail line and facilities.<sup>28</sup> The court granted the defendants’ motions for summary judgment because “[p]laintiffs’ claims cannot withstand the seismic shift that *Kiobel* has caused on the legal landscape pertinent here.”<sup>29</sup> The court rejected the plaintiffs’ argument that because the Drummond CEO made the decision to provide material support to the paramilitary group at the company headquarters in Alabama—and thus within the United States, the ATS’s presumption against extraterritorial application had been overcome. Rather, the court held that if a complaint alleges activity in both foreign and domestic spheres, a U.S. statute can only be applied abroad if the event on which the statute focuses occurred in the United States. Under this reasoning, the Northern District Court of Alabama held that because “the ATS focuses on the torts of extrajudicial killings and war crimes” and these alleged injuries by Drummond occurred abroad, the claim was barred in U.S. courts.<sup>30</sup>

The Eleventh Circuit subsequently affirmed the decision stating, “Displacement of the presumption will be warranted if the claims have a U.S. focus and adequate relevant conduct occurs within the United States.”<sup>31</sup> Importantly, however, the court noted that “although we find that the U.S. citizenship and corporate status of Defendants, the U.S. interests implicated by Plaintiffs’ claims, and the U.S. conduct alleged are relevant in considering whether Plaintiffs’ claims have a U.S. focus . . . , we must con-

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26. *Id.* at 1673 (Breyer, J., concurring).

27. Green, *supra* note 10, at 1101.

28. *Giraldo v. Drummond Co.*, No. 09-CV-1041, 2013 WL 3873960 (N.D. Ala. July 25, 2013); *see also id.* at 1103.

29. *Giraldo*, 2013 WL 3873960, at \*3.

30. *Id.* at \*8 (employing the “focus” test of *Morrison*). *See Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010) (“[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”). The *Giraldo* court cited *Morrison* in support of its holding. “As *Morrison* succinctly stated, ‘the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved . . . .’” 2013 WL 3873960, at \*8.

31. *Doe v. Drummond Co.*, 782 F.3d 576, 592 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016).

clude that, in these circumstances, those factors are not sufficient to displace the presumption against extraterritoriality.”<sup>32</sup>

In August 2013, the Second Circuit issued a decision in *Balintulo v. Daimler AG*,<sup>33</sup> the case described in the Introduction concerning South African plaintiffs suing local subsidiaries of Daimler, Ford, and IBM for allegedly aiding and abetting the South African government in crimes of apartheid, which also espoused a type of “focus” inquiry. The South African claimants alleged that the subsidiaries of U.S.-incorporated multinational corporations sold “cars and computers to the South African government, thus facilitating the apartheid regime’s innumerable race-based depredations and injustices, including rape, torture, and extrajudicial killings.”<sup>34</sup> The plaintiffs argued that the defendants’ corporate citizenship in the United States was enough to meet the *Kiobel* threshold of claims that “touch and concern the territory of the United States” with “sufficient force” to displace the presumption against extraterritorial application.<sup>35</sup> The Second Circuit rejected the plaintiffs’ argument that corporate citizenship in the United States alone is enough to displace the *Kiobel* presumption, reasoning that *Kiobel* “focus[ed] solely on the location of the relevant ‘conduct’ or ‘violation.’”<sup>36</sup> The court stated that the *Kiobel* majority framed the question presented on the location of the relevant conduct or violation three times and “focused solely on the location of the relevant ‘conduct’ or ‘violation’ at least eight more times in other parts of its eight-page opinion.”<sup>37</sup> The court concluded that *Kiobel* expressly held that claims under the ATS cannot be brought for extraterritorial violations of the law of nations, and “in all cases, therefore, the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign.”<sup>38</sup>

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32. *Id.* at 600. The court appeared most swayed by the plaintiffs’ arguments that the defendants’ U.S.-based conduct distinguished their claims from that of the plaintiffs in *Kiobel*. However, the court stated that “our precedent indicates that the sufficiency question—whether the claims do so with ‘sufficient force’ or to the ‘degree necessary’ to warrant displacement—will only be answered in the affirmative if enough relevant conduct occurred within the United States.” *Id.* at 597. *See also* *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1236 (11th Cir. 2014) (“First, the extrajudicial killings and war crimes asserted . . . occurred in Colombia. Second, although the two Drummond entities, Adkins, and Tracy are United States nationals, the majority in *Kiobel* did not place significant weight on the defendants’ nationality; certainly none sufficient to warrant the extraterritorial application of the ATS to situations in which the alleged relevant conduct occurred abroad.”), *cert. denied*, 136 S. Ct. 410 (2015); *Cardona v. Chiquita Brands International, Inc.*, 760 F.3d 1185, 1191 (11th Cir. 2014) (“The torture, if the allegations are taken as true, occurred outside the territorial jurisdiction of the United States . . . . There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force.”), *cert. denied*, 135 S. Ct. 1842 (2015).

33. 727 F.3d 174 (2d Cir. 2013).

34. *Id.* at 180.

35. *Id.* at 189.

36. *Id.*

37. *Id.*

38. *Id.* at 192.



The Second Circuit affirmed its jurisprudence in *Mastafa v. Chevron Corp.* in October 2014, a case brought by five Iraqi nationals who alleged that defendants, including U.S.-based Chevron Corp., illicitly diverted money to the Saddam Hussein regime in violation of customary international law.<sup>39</sup> In *Mastafa*, the court stated, “We disagree with the contention that a defendant’s U.S. citizenship has any relevance to the jurisdictional analysis.”<sup>40</sup> However, the court did build upon its previous jurisprudence by determining that “domestic contacts” are key: “An evaluation of the presumption’s application to a particular case is essentially an inquiry into whether the domestic contacts are sufficient to avoid triggering the presumption at all.”<sup>41</sup> The court considered the plaintiffs’ allegations of oil purchases, financing of oil purchases, delivery of oil to another U.S. company, use of a New York escrow account, and New York-based financing arrangements to be relevant conduct that “‘touches and concerns’ the United States.”<sup>42</sup> The plaintiffs’ claims, however, failed on other grounds.<sup>43</sup>

*C. Reopening the Door to ATS Claims that Manifest a Close Connection to the United States*

Some courts have begun to develop a post-*Kiobel* jurisprudence that considers more than where the conduct or violation occurred in deciding if the claim touches and concerns the United States with sufficient force to displace the *Kiobel* presumption. In May 2013, a month after the Supreme Court handed down its decision in *Kiobel*, the District Court for the District of Columbia issued an opinion that found as a matter of first impression that the 1998 bombing outside the United States Embassy in Nairobi “touched and concerned” the United States with sufficient force to displace the presumption against extraterritorial application of the ATS.<sup>44</sup> The court stated that *Kiobel* “may have left open one, albeit narrow avenue for jurisdiction over acts that occurred outside the United States”<sup>45</sup> and that “[s]urely, if any circumstances were to fit the Court’s framework of ‘touching and concerning the United States with sufficient force,’ it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees.”<sup>46</sup> Judge Facciola reasoned:

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39. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 174 (2d Cir. 2014).

40. *Id.* at 189.

41. *Id.* at 182.

42. *Id.* at 195.

43. *Id.* at 195–196 (“The complaint fails plausibly to plead that defendants’ conduct related to aiding and abetting the alleged violations of customary international law was intentional, and accordingly, the conduct cannot state a claim for aiding and abetting liability under the ATS and thus cannot form the basis for our jurisdiction.”).

44. *Mwani v. Bin Laden and Al Qaeda*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013).

45. *Id.* at 4.

46. *Id.* at 5.

It is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here. Ample evidence has been presented for me to conclude that the events at issue in this case were directed at the United States government, with the intention of harming this country and its citizens. As noted by the D.C. Circuit, this attack was orchestrated “not only to kill both American and Kenyan employees inside the building, but to cause pain and sow terror in the embassy’s home country, the United States.”<sup>47</sup>

However, the court decided to immediately certify the issue to the Court of Appeals, explaining that such an approach was preferable to “proceeding to the complicated issue of choice of law and the fact-intensive task of issuing bellwether findings that will apply to over 500 plaintiffs,”<sup>48</sup> and ordered any further proceedings in the case be stayed.

Three months later, in *Sexual Minorities Uganda v. Scott Lively*,<sup>49</sup> where the defendant, a U.S. citizen, was found to have planned and managed a campaign to physically harm the LGBTI community in Uganda, the District Court of Massachusetts pointed to the defendant’s status as a U.S. citizen and the planning activities that occurred in the United States, and found that jurisdiction over the defendant in the case “fits comfortably” within the *Kiobel* limits.<sup>50</sup>

Then, in June 2014, the Fourth Circuit became the first circuit to use a “fact-based analysis”<sup>51</sup> to hold that the ATS reached an alleged tort that occurred on foreign soil. In *Al Shimari v. CACI Premier Technology, Inc.*, the Fourth Circuit held that the claim brought forward by former detainees of the Abu Ghraib detention center in Iraq against a Virginia-based military contractor for abuse and torture “touched and concerned” the territory of the United States with sufficient force. Among the alleged examples of mistreatment, the plaintiffs stated that they had been “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.”<sup>52</sup> According to the plaintiffs, perpetrators conducted the acts during the night shift to minimize the risk of detection by non-participants.<sup>53</sup> The Fourth Circuit overturned the district court’s ruling that

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47. *Id.* (quoting *Mwani v. Bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005)).

48. *Id.*

49. 960 F. Supp. 2d 304 (D. Mass. 2013).

50. *Id.* at 322.

51. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014).

52. *Id.* at 521 (alterations in original).

53. *Id.* at 521–22 (noting that investigations conducted by the Defense Department concluded that CACI interrogators directed or participated in some of the abuses, along with a number of military personnel, and citing Report of Maj. Gen. Taguba 48; Maj. Gen. George

the presumption against extraterritoriality barred the suit under the ATS, stating:

We conclude that the Supreme Court's decision in *Kiobel* does not foreclose the plaintiff's claims under the Alien Tort Statute, and that the district court erred in reaching a contrary conclusion. Upon applying the fact-based inquiry articulated by the Supreme Court in *Kiobel*, we hold that the plaintiff's claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the Alien Tort Statute.<sup>54</sup>

The *Al Shimari* court first noted that "the [Supreme] Court broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, 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."<sup>55</sup> The Fourth Circuit rejected the defendants' contention that the sole material consideration to determining whether the case could proceed under the ATS was the fact that the alleged torture occurred in Iraq and not in the United States, which the defendants argued would subject their claim to the same failed outcome as the plaintiff claims in *Kiobel*. Rather, the court stated, "[T]he clear implication of the Court's 'touch and concern' language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory."<sup>56</sup> The court continued by stating, "[I]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory."<sup>57</sup> Furthermore, the Fourth Circuit noted that Justice Alito's concurrence in *Kiobel* advocating a stronger presumption against extraterritorial application of U.S. law showed that the majority's take on the presumption against extraterritorial application could not have been a categorical bar against all claims where the tort occurs abroad, otherwise Justice Alito would have had no reason to write a concurring opinion.<sup>58</sup>

Applying this fact-based analysis to the case, the Fourth Circuit noted that the allegations of torture were committed by U.S. citizens, employed by an American corporation (CACI) whose corporate headquarters are

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R. Fay, Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 7-8, 84, 86-87, 89, 116-17, 132-35 (2004)).

54. *Id.* at 520. The Court remanded the case for findings on other grounds of this specific tort claim raised any nonjusticiable political questions relating to the war in Iraq.

55. *Id.* at 527 (quoting BLACK'S LAW DICTIONARY 281 (9th ed. 2009) that defines "claim" as the "aggregate of operative facts giving rise to a right enforceable by a court").

56. *Id.* at 528.

57. *Id.*

58. *Id.* at 527.

based in Fairfax County, Virginia.<sup>59</sup> The court also noted that “[t]he alleged torture [in Iraq] occurred at a military facility operated by United States government personnel.”<sup>60</sup> The employees who allegedly participated in the acts were hired by CACI in the United States to fulfill the terms of a contract between the United States Department of the Interior and CACI.<sup>61</sup> Last, the contract between the Department of Interior and CACI was issued by a government office in Arizona, and CACI was to collect payments by mailing invoices to government accounting offices in Colorado.<sup>62</sup> Weighing these factors, the *Al Shimari* court unanimously held that the plaintiffs’ claims touched and concerned the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS.<sup>63</sup>

In late 2014, the Ninth Circuit weighed in with its ATS jurisprudence when it issued two decisions, *Doe I v. Nestle USA, Inc.*<sup>64</sup> and *Mujica v. AirScan Inc.*<sup>65</sup> In *Nestle*, a class action brought by alleged former child slaves from the Ivory Coast against Nestle USA, Inc., Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa for allegedly aiding and abetting child slavery, the Ninth Circuit determined, in contrast to the Second Circuit, that the *Kiobel* “touch and concern” test is not a “focus” test.<sup>66</sup> The court remanded the case to allow plaintiffs to amend the complaint.<sup>67</sup> In *Mujica*, where Colombian citizens brought action against two U.S. corporations for alleged complicity in the Colombian military’s bombing of a village, the Ninth Circuit held that the plaintiffs only “speculate[d] that some of [the] conduct . . . could have occurred in the United States” and that such speculation was not an adequate basis on which to allow the plaintiffs’ claims to go forward.<sup>68</sup> The court, however, stated that U.S. citizenship may be “one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel*,” but that U.S. citi-

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59. *Id.* at 528–29 (“Here, the plaintiffs’ claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.”).

60. *Id.*

61. *Id.*

62. *Id.* at 529.

63. *Id.* at 530.

64. 766 F.3d 1013 (9th Cir. 2014).

65. 771 F.3d 580 (9th Cir. 2014).

66. 766 F.3d at 1028.

67. *Id.* at 1027–28 (“Rather than attempt to apply the amorphous touch and concern test on the record currently before us, we conclude that the plaintiffs should have the opportunity to amend their complaint . . . .”); see also Michael Congjiu & Stefan Marculewicz, *Supply Chain Management And The Alien Tort Claims Act*, LAW360, (Oct. 28, 2014, 11:28 AM), <http://www.law360.com/appellate/articles/590272>.

68. 771 F.3d at 592.

zanship without any U.S.-based conduct was insufficient to displace the presumption.<sup>69</sup>

The below section will discuss principles of domestic personal jurisdiction and choice of law jurisprudence to shed light on a workable test for the scope of the ATS in what has become, as demonstrated by the above, a “crowded legal landscape”<sup>70</sup> of approaches.

## PART II. THE ATS & AMERICAN JURISDICTION AND CHOICE OF LAW JURISPRUDENCE

The territorial concerns that animate the debate on how far the ATS reaches trace many of the same concerns that underlie domestic personal jurisdiction and choice of law cases. While this Note fully acknowledges that the question of what conduct a statute reaches is not synonymous with personal jurisdiction, which refers to a court’s power to bring a person into its adjudicative process,<sup>71</sup> or choice of law, which refers to what law the court should prescribe,<sup>72</sup> this Note uses personal jurisdiction and choice of law cases as a starting point to evaluate the scope of the ATS. Mapping these principles onto the debate over the reach of the ATS shows that an approach that considers factors beyond only where the injury occurred—such as the nationality of the defendant, the location and extent of the planning activity, or whether the United States was targeted—is preferable to bright-line territorial rules. Personal jurisdiction and choice of law cases also show that a categorical rule turning solely on the place of the violation may be an antiquated way to determine the extraterritorial reach of a statute in a given case.

### A. *Due Process & The Return to Parochial Territoriality Principles?*

The evolution of domestic personal jurisdiction cases shows that the due process concerns surrounding the ATS are not unique to this statute and supports providing a path for hearing some cases under the ATS even if the injury or violation occurred abroad. This section will seek to show how domestic due process cases support the Fourth Circuit’s statement that the “touch and concern” inquiry articulated in *Kiobel* requires “considering a broader range of facts than the location where the plaintiffs actually sustained their injuries.”<sup>73</sup>

In *Kiobel*, the Supreme Court voiced a concern about the due process implications of the ATS having a broad geographical reach. “[A]ccepting petitioners’ view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the

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69. *Id.* at 594 & n.9 (“We do not contend that this factor is irrelevant to the *Kiobel* inquiry; we merely hold that it is not dispositive of that inquiry.”).

70. *Doe v. Drummond Co.*, 782 F.3d 576, 592 (11th Cir. 2015).

71. *See Personal Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

72. *See Choice of Law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

73. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 529 (4th Cir. 2014).

world.”<sup>74</sup> However, this *Kiobel* language does not compel a strict territorial framework.

First, many of the cases arising under the ATS involve U.S. corporations or their subsidiaries, which makes the analysis easier under personal jurisdiction principles. From the earliest jurisdiction cases, courts have found that being domiciled in a given jurisdiction is sufficient for a court in that jurisdiction to hale the individual into court for the purposes of a personal judgment, under the rationale that the state which accords privileges and protections to a party also exacts responsibilities on that party.<sup>75</sup> Additionally, as the Eleventh Circuit recognized in *Doe v. Drummond Co.*, U.S. corporate status is “relevant” to the touch and concern test because “[i]f the defendants are U.S. citizens, some of the foreign policy concerns that the presumption against extraterritorial application is intended to reduce may be assuaged or inapplicable, since we would not be haling foreign nationals into U.S. courts to defend themselves.”<sup>76</sup>

Additionally, as the *Al Shimari* court noted, the Supreme Court in *Kiobel* broadly stated that “even where the *claims*”<sup>77</sup>—rather than the alleged tortious conduct—touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality, which suggests that courts should “consider . . . the parties’ identities and their relationship to the causes of action.”<sup>78</sup> This interpretation of the ATS would not deprive *Kiobel* of its force; this interpretation still stands in marked contrast with the pre-*Kiobel* ATS cases in which U.S. courts regularly heard cases on the merits even when the case had no connection to U.S. territory.

Second, personal jurisdictional principles weigh in favor of allowing the ATS to reach cases where the defendant, even if not a U.S. citizen or U.S. corporate domiciliary, has purposely availed itself of the benefits of business in the United States, and has used this presence in the United States to conduct explicit planning or extensive activity in furtherance of the international law violation. Personal jurisdiction principles also support the ATS reaching cases where the defendant has clearly and manifestly targeted the United States.

In 1945, when the Supreme Court handed down its decision in *International Shoe Co. v. Washington*, it ushered in a new era rejecting strict territorialism by holding that courts could hale defendants residing in other jurisdictions into courts so long as certain “minimum contacts” existed between the defendant’s activity and the state’s law such that the suit “does not offend traditional notions of fair play and substantial justice.”<sup>79</sup> The

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74. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

75. See generally *Milliken v. Meyer*, 311 U.S. 457 (1940).

76. *Doe v. Drummond Co.*, 782 F.3d 576, 595 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016).

77. *Kiobel*, 133 S. Ct. at 1669 (emphasis added).

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

79. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Supreme Court extended this principle in *Hanson v. Denckla* by holding that jurisdiction could be found when a party “purposely avails itself of the privileges of conducting activities with the forum State, thus invoking the benefits and protections of its laws.”<sup>80</sup> Thus, the *International Shoe Co.* case and its progeny rejected a strictly territorial approach to due process cases concerning foreigners.

Furthermore, in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, the Supreme Court indicated that the determination of the reasonableness of the exercise of jurisdiction over a foreign defendant depends on an evaluation of several factors, including the burden on the defendant.<sup>81</sup> The Court held that the “unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders,” but that “[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.”<sup>82</sup> This language demonstrates that the foreign nature of the defendant is not always dispositive as to whether a U.S. court has personal jurisdiction. The interests of providing a remedy for serious torts that have occurred abroad, but have been planned by an alien defendant in the United States, likely constitutes one such instance that justifies burdening the alien defendant.

In line with this reasoning, if the international law violation is clearly and manifestly orchestrated to harm the United States, the claim should be deemed to overcome the ATS presumption against extraterritoriality. For example, the case of *Mwani v. Bin Laden*,<sup>83</sup> the action brought against Usama Bin Laden and Al Qaeda on behalf of Kenyan victims of the 1998 bombing of the U.S. Embassy in Kenya, should be one that American courts can hear on the merits. The interest of the United States in obtaining a remedy for victims killed or injured in an attack clearly targeting the United States is great enough to overcome burdens placed on the defendants.

#### B. *Choice of Law with “Specific, Universal, and Obligatory” Crimes*

Domestic choice of law cases also support the Fourth Circuit’s approach in considering more than where the plaintiffs sustained injuries or where the violation occurred when determining whether a plaintiff’s claim has overcome the ATS’s presumption against extraterritoriality.

The Supreme Court in *Kiobel* highlighted the need for judicial caution when it comes to applying U.S. law in cases involving nationals of other countries. The Court pointed out that the presumption against extraterri-

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80. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

81. *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 113 (1987).

82. *Id.* at 114.

83. 947 F. Supp. 2d 1 (D.D.C. 2013).

torial application of U.S. law reflects the idea that “United States law governs domestically but does not rule the world.”<sup>84</sup> This presumption “serves to protect against unintended clashes between the laws of the United States and those of other nations which could result in international discord.”<sup>85</sup> The presumption is meant to provide “a stable background against which Congress can legislate with predictable effects.”<sup>86</sup>

However, the post-*Kiobel* opinions that have drawn a relatively strict line for all claims where the violation occurred abroad may be unnecessarily limiting the geographic reach of the ATS. For example, following the “focus” language of cases like *Giraldo*, the case concerning an Alabama company alleged to have aided and abetted Colombian rebels that found that the ATS “arises *only* if the event on which the statute *focuses* did not occur abroad,”<sup>87</sup> will likely unnecessarily sacrifice fairness for judicial clarity.

First, the results of the *Giraldo* “focus” language appear to mirror the flawed results of cases such as *Alabama Great Southern Railroad Co. v. Carroll*,<sup>88</sup> the emblematic case from 1892 that showed how strict territorial rules sacrifice fairness for clear line-drawing. In *Alabama Great Southern Railroad*, a freight train brakeman suffered crippling injuries after one of the links between two cars broke after the train passed out of Alabama into Mississippi. The Alabama Supreme Court held that the Mississippi negligence law unfavorable to the plaintiff—rather than a more pro-plaintiff Alabama law—applied, even though all evidence showed that the link was defective when it left the station in Alabama, the negligence of Alabama employees led to the link break, and that the employment relationship was centered in Alabama.<sup>89</sup>

The result of *Alabama Great Southern Railroad Co.*, where the court applied the law of the state where the last event necessary to make an actor liable for an alleged tort took place, rather than the law of the state that had the potential to shape conduct of resident railroad companies, demonstrates the arbitrary results of the traditional choice of law rules. These results eventually served as the impetus for the choice of law revolution in the 1950s.<sup>90</sup> The Second Restatement on the Conflict of

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84. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

85. *Id.* (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

86. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010).

87. *Giraldo v. Drummond Co.*, No. 09-CV-1041, 2013 WL 3873960, at \*9 (N.D. Ala. July 25, 2013).

88. 97 Ala. 126 (1892).

89. *See id.* at 127; *see also* James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 503–04 (2004).

90. Compare RESTATEMENT OF CONFLICT OF LAWS § 378–380 (1934) (stating that “the law of the place of wrong” determines legal injury, liability-creating conduct, standard of care, causation, and contributory negligence in tort cases) with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (“[T]he factors relevant to the choice of the applicable rule of law include the needs of the interstate and international systems, (b) the relevant policies of



Laws ultimately rejected the *lex loci* principle in favor of other factors it deemed relevant to the choice of the applicable rule of law, such as the protection of justified expectations of the parties.<sup>91</sup> A categorical territorial rule for the ATS that leaves little room for applying law that will incentivize better conduct on the part of defendants or effectuate the reasonable expectations of parties appears to run afoul of the lesson that courts learned in *Alabama Great Southern Railroad*.

Furthermore, as the Ninth Circuit explained in response to defendants' arguments in favor of a "focus" test in *Nestle*, such a test is likely not appropriate in the ATS context. In *Nestle*, defendants argued that the touch and concern test is substantially the same as the "focus" test set out in *Morrison v. National Australia Bank Ltd.*, the Supreme Court case that established that the presumption against extraterritorial application of U.S. law applies to the Securities Exchange Act.<sup>92</sup> Under the *Morrison* focus test, "courts first determine the 'focus of congressional concern' for a statute, and allow the statute to be applied to a course of conduct if the events coming within the statute's focus occurred domestically."<sup>93</sup> In *Nestle*, the Ninth Circuit stated that *Kiobel* "did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt."<sup>94</sup> Additionally, as the *Nestle* court pointed out, *Morrison* used the focus inquiry as a tool of statutory construction to determine the scope of the Securities Exchange Act<sup>95</sup> and that "[s]ince the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms."<sup>96</sup>

Also, unlike the securities context where "[t]he probability of incompatibility with the applicable laws of other countries is so obvious,"<sup>97</sup> the ATS's substantive law—customary international law—is, at least in theory, universally applicable, and thus presents a far lower risk of conflict of law problems with foreign nations. The very essence of the ATS is that it provides a cause of action for a violation of the law of nations, which has

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the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."); see, e.g., *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

91. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, *supra* note 90.

92. *Doe I v. Nestle*, 766 F.3d 1013, 1028 (9th Cir. 2014); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265 (2010).

93. *Id.* (quoting *Morrison*, 561 U.S. at 266) (internal quotations omitted in original).

94. *Id.*

95. See *Morrison*, 561 U.S. at 266 (finding that the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States").

96. *Nestle*, 766 F.3d at 1028.

97. *Morrison*, 561 U.S. at 269.

been defined as those crimes that are “specific, universal, and obligatory.”<sup>98</sup> As Charles Wright and Arthur Miller state, it is generally accepted that the ATS provides jurisdiction over cases “involving various forms of official or state sponsored torture, genocide, war crimes, crimes against humanity, as well as forced labor, servitude or slavery.”<sup>99</sup> Previous ATS cases have demonstrated just how high of a bar the violation needs to be to meet the customary international law threshold. For example, in the pre-*Kiobel* ATS case of *Flomo v. Firestone Natural Rubber Co.*, Judge Posner held that international practice did not lead to “a crisp rule” that employing child labor violates customary international law, and thus affirmed the lower court’s summary judgment for the defendants.<sup>100</sup>

Thus, unlike the Securities Exchange Act, where the substantive provisions may differ widely from securities statutes of other countries, the ATS prohibits only the most egregious crimes that are outlawed in the vast majority of States. As the *Al Shimari* court found, the ATS is a “jurisdictional vehicle provided under United States law” through which plaintiffs can enforce the law of nations. “[A]ny substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable.”<sup>101</sup> Under this Note’s proposed test, the ATS would still not provide relief for claims that fall below this high bar of universal illegality, such as a claim recently brought forward by Cameroonian customers of a power company and its Virginia parent corporation seeking relief for injuries resulting from the power company’s alleged provision of faulty and dangerous electrical supply.<sup>102</sup> In sum, the concern about U.S. law overstepping the laws of other countries is not as salient a concern in ATS litigation as in securities litigation, where the relevant statute is much more complex and particular.

In fact, the universality of crimes for which the ATS provides a remedy makes it a statute less likely to lead to conflicts of laws than other statutes, such as the Sherman Antitrust Act, which may apply extraterritorially if a plaintiff can prove actual harm occurred in the United States and that the conduct was sufficiently direct, substantial, and reasonably fore-

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98. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

99. 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE JURISDICTION* § 3661.2 (4th ed. 2014). However, it should be noted that the amount of damages recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorneys’ fees are recoverable, and other matters pointed out by the Supreme Court in *Morrison*, 561 U.S. at 269, would likely still differ among jurisdictions.

100. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1023, 1025 (7th Cir. 2011).

101. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014).

102. See generally *William v. AES Corp.*, 28 F. Supp. 3d 553 (E.D. Va. 2014) (holding that “[s]ubstandard power supply falls well outside the bounds of universally recognized norms of international law”).

seable with respect to the effect on United States commerce.<sup>103</sup> For example, recently, the Ninth Circuit upheld the convictions of a Taiwanese company in federal court of conspiracy to fix prices of liquid crystal display panels in violation of the Sherman Antitrust Act.<sup>104</sup> As one antitrust lawyer notes, “Indeed, for many U.S. and non-U.S. entities and individuals, U.S. antitrust policy now governs international conduct and is the norm.”<sup>105</sup> The juxtaposition of the ways in which the Sherman Antitrust Act has been interpreted by U.S. courts to apply extraterritorially despite the often resulting problematic foreign policy issues, as described by Justice Scalia in his dissent in a seminal antitrust case,<sup>106</sup> shows that the ramifications of applying the law of nations to acts that occur abroad but affect the United States may be overstated in the ATS context.

Some lower courts post-*Kiobel* have even concluded that to hold the defendant accountable in some ATS cases would prove beneficial in foreign policy. For example, in *Sexual Minorities Uganda*, the Court stated:

Indeed, the failure of the United States to make its courts available for claims against its citizens for actions taken within this country that injure persons abroad would itself create the potential for just the sort of foreign policy complications that the limitations on federal common law claims recognized under the ATS are aimed at avoiding.<sup>107</sup>

Similarly, it is unlikely that a civil trial in U.S. federal court of a U.S. corporation for alleged torture abroad against foreign nationals, such as the *Al Shimari* case, would lead to negative foreign policy consequences. If anything, dismissing the case rather than allowing it to proceed in court may create more of a foreign backlash to the seeming immunity of actors in cases of alleged abuse. In fact, both houses of Congress indicated that the United States should not tolerate such acts when it condemned the Abu Ghraib abuses, stating that those acts “contradict[ed] the policies, orders, and laws of the United States and the United States military,”<sup>108</sup> and

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103. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that if an entity can comply with both U.S. law and foreign law, then there is no true conflict and U.S. law can cover the extraterritorial conduct).

104. See *United States v. Hui Hsiung*, 758 F.3d 1074 (9th Cir. 2015).

105. Robert D. Paul, *Expanding Extraterritorial Application of U.S. Antitrust Laws: What Are the Borders?* (Fall 2003), [http://jp.whitecase.com/files/Publication/153c6fb0-dc49-4b59-acde-35498e810dc6/Presentation/PublicationAttachment/f1fb36e1-c1e6-4ae4-84a8-3ad6b0d082b3/article\\_practicum\\_autumn\\_2003.pdf](http://jp.whitecase.com/files/Publication/153c6fb0-dc49-4b59-acde-35498e810dc6/Presentation/PublicationAttachment/f1fb36e1-c1e6-4ae4-84a8-3ad6b0d082b3/article_practicum_autumn_2003.pdf).

106. See, e.g., *Hartford Fire Ins. Co.*, 509 U.S. at 820 (Scalia, J., dissenting) (“That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners.”).

107. 960 F. Supp. 2d 304, 322–23 (D. Mass. 2013).

108. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014) (alteration in original) (quoting H.R. Res. 627, 108th Cong. (2004)).

“urg[ing] that all individuals responsible for such despicable acts be held accountable.”<sup>109</sup>

Proponents of a more categorical territorial approach would point to the Second Circuit’s reasoning in *Balintulo* that case-specific arguments “miss the mark” because “the canon against extraterritorial application ‘is a presumption about a statute’s meaning’”<sup>110</sup> and that “[i]ts ‘wisdom,’ the Supreme Court has explained, is that, ‘[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.’”<sup>111</sup> However, this Note’s proposed three-part disjunctive test would provide the clarity to ensure that courts do not embark on burdensome multifactor tests to resolve if the ATS extends to the claim.

### C. *The ATS as a Chief Remedy for Grave Human Rights Abuses*

As *Sexual Minorities Uganda* indicated, for certain ATS cases, it is unlikely that there will be negative foreign policy ramifications to the U.S. hearing the case, and the suit itself may provide beneficial foreign policy outcomes. This is particularly true when examining the role of the ATS as a chief statute under which victims of human rights abuses may obtain a remedy.

There are currently no international tribunals by which corporations can be tried for acts considered grave crimes under international law. Thus, domestic law is often the only judicial recourse for victims of abuse by corporate entities. As Jennifer Green, counsel for amici curiae in support of plaintiffs in *Kiobel*, *Nestle*, *Giraldo*, and *Balintulo*, has stated:

[O]ne of the biggest challenges continues to be the enforcement of human rights standards—what penalties corporations pay when they violate the most fundamental human rights including the prohibitions against forced labor, torture, genocide, crimes against humanity and war crimes, and whether the victims of these abuses can receive any compensation. Effective accountability is critical for an international legal system that rewards law-abiding corporations, which then contributes to the deterrence of future violations.<sup>112</sup>

Other domestic statutes, such as the Torture Victim Protection Act (TVPA) are narrower than the ATS, and thus are not adequate substitutes for it. For example, the TVPA requires that an actor be operating “under actual or apparent authority, or color of law, of any foreign nation” for a

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109. *Id.* (alteration in original) (quoting S. Res. 356, 108th Cong. (2004)).

110. *Balintulo v. Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013) (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)).

111. *Id.* (alteration and emphasis supplied in *Balintulo*) (quoting *Morrison*, 561 U.S. at 261).

112. Green, *supra* note 10, at 1086.

plaintiff to bring a suit.<sup>113</sup> As the *Al Shimari* court noted, this requirement precludes suit by plaintiffs against U.S. contractors because the contractors are not acting under actual or apparent authority of any foreign nation. Furthermore, under the TVPA, the defendant must be a natural person and not a corporation.<sup>114</sup> The Supreme Court was also aware of the limitations of these other statutes when it articulated its “touch and concern” language in *Kiobel* as shown by Justice Kennedy’s concurrence that predicted that “[o]ther cases may arise with allegations of serious violations of international law principles protecting persons” that are “covered neither by the TVPA nor by the reasoning and holding of today’s case.”<sup>115</sup> Justice Kennedy noted that in such cases, “the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”<sup>116</sup>

Having a domestic remedy is important to incentivize actors with close ties to a jurisdiction, especially those domiciled in the jurisdiction, to operate in accordance with the most basic humanitarian norms. A number of cases against U.S. military contractors for alleged abuses in Iraq have survived defendants’ motions to dismiss and have settled.<sup>117</sup> The cases against U.S. contractors have highlighted these abuses and helped develop the norm that just because an actor is engaging abroad does not mean that abuse can be inflicted without recourse.<sup>118</sup> As Green notes, this evolving norm has contributed to added language promulgated by the Department of Defense for private security contractors stating, “Inappropriate use of force by contractor personnel authorized to accompany the United States Armed Forces may subject such personnel to United States or host nation prosecution and civil liability.”<sup>119</sup> The ATS functions to shape behavior, and a strict territorial rule would undermine its unique role in doing so.

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113. Torture Victim Protection Act (TVPA) of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2012)); see generally Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383 (2008).

114. See Doyle, *supra* note 13, at 478.

115. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring).

116. *Id.*

117. See Green, *supra* note 10, at 1091. Green points out that a series of cases that were brought against Blackwater for beatings and shootings settled in 2010. See also *In re XE Serv. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (denying motion to dismiss), and *Jarallah v. Xe*, No. 09-631, 2009 WL 1350958 (S.D. Cal. filed Mar. 27, 2009) (concerning a school-teacher allegedly killed by Xe-Blackwater shooters in Iraq; this case was transferred and consolidated with *In re XE Serv.*).

118. See Green, *supra* note 10, at 1091.

119. *Id.* at n.24; U.S. Dep’t. of Defense Instruction 3020.50, Change 1, Enclosure 3 at 8, Aug. 1, 2011, <http://www.dtic.mil/whs/directives/corres/pdf/302050p.pdf>.

PART III. DEFINING “TOUCH AND CONCERN” THROUGH A  
THREE-PART DISJUNCTIVE TEST

In light of the above personal jurisdiction and conflict of laws analysis, this Note proposes a three-part disjunctive test for determining when a claim touches and concerns the territory of the United States with sufficient force to displace the presumption against extraterritorial application. If (1) the defendant is a U.S. citizen or a U.S. corporate domiciliary; or (2) the defendant has conducted explicit planning or extensive activity in furtherance of the violation in the United States; or (3) the violation was clearly and manifestly orchestrated to target the United States, then the claim overcomes the presumption against extraterritoriality.

This test is needed to clarify the ambiguous holding of *Kiobel* about when the ATS can be applied. As the *Giraldo* court framed the question: “Is mere corporate presence in . . . the United States enough? The Supreme Court has answered that question—clearly not. What then is ‘enough’ such that the conduct in Colombia touches and concerns the United States with sufficient force? *Kiobel* has not given courts a road map for answering this question.”<sup>120</sup>

The first part of the proposed test calls for the ATS to extend to claims where the defendant is a U.S. national or a corporation domiciled in the United States. This prong is rooted in *Kiobel*’s use of the term “claim” in its touch and concern holding,<sup>121</sup> as discussed in Part II.A. This prong also seeks to advance humanitarian aims and encourage good behavior among U.S. entities. U.S. law has an important role to play in ensuring a basic minimum standard of treatment when its nationals operate abroad—a role that Congress has already expressed in its passage of the Foreign Corrupt Practices Act,<sup>122</sup> TVPA,<sup>123</sup> and Dodd-Frank Wall Street Reform and Consumer Protection Act’s conflict minerals provision.<sup>124</sup> For example, despite the National Association of Manufacturers and United States Chambers of Commerce pointing to the billions of dollars in lost profits to U.S. manufacturers as a result of the Dodd-Frank provision on disclosure

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120. *Giraldo v. Drummond Co.*, No. 09-CV-1041, 2013 WL 3873960, at \*5 (N.D. Ala. July 25, 2013).

121. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

122. 15 U.S.C. § 78dd-1 (prohibiting any corporation that has securities registered under the Securities Exchange Act or is required to file reports under the Act from paying foreign officials to secure an improper advantage or influence any act or decision of the government).

123. Torture Victim Protection Act (TVPA) of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2012)).

124. Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub.L. 111-203, § 1502 (2010) (requiring the Securities Exchange Commission to promulgate regulations requiring annual disclosure of any conflict minerals required for the functionality of a product manufactured by such person originating in the Democratic Republic of the Congo or an adjoining country and describing the measures taken to exercise due diligence on the source and chain of custody of those materials); see also *FACT SHEET: Disclosing the Use of Conflict Minerals*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/News/Article/Detail/Article/1365171562058> (last visited Aug. 1, 2016).

of conflict minerals,<sup>125</sup> the Securities Exchange Commission has continued to issue regulations for disclosure to reduce the human rights implications of procuring minerals from the Democratic Republic of the Congo. In doing so, it has cited humanitarian concerns.<sup>126</sup> Similar humanitarian concerns of preventing war crimes, crimes against humanity, and torture should prompt the extraterritorial application of the ATS when the defendant is a U.S. national or corporate domiciliary.

Furthermore, allowing ATS suits when the defendant is a U.S. citizen or corporate domiciliary is in line with U.S. due process jurisprudence that takes as a given that U.S. citizens are subject to the jurisdictional reach of a U.S. statute, and thus does not contradict the *Kiobel* concerns about haling foreigners into U.S. courts. At the same time, this prong is responsive to the Supreme Court's language that the "presumption against extraterritorial application" would be a "craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved"<sup>127</sup> because, under this prong, the ATS would only reach defendants that are corporations domiciled in the United States (meaning those with their place of incorporation or principal place of business in the United States)<sup>128</sup> and U.S. citizens. Corporations with mere presence or officers in the United States would not qualify under this prong, as that would likely be too expansive of a read to be faithful to the *Kiobel* decision that the claim touch and concern the United States "with sufficient force"<sup>129</sup> to rebut the presumption against extraterritorial application of the ATS.

Therefore, under this prong, the ATS presumption against extraterritoriality would be overcome in the *Balintulo* suit against Daimler, Ford, and IBM; the *Al Shimari* suit against CACI Premier Technology; the suit against Nestle; and the suits against Drummond Co. because they all name defendants incorporated in the United States. Similarly, the ATS would reach the defendant of *Sexual Minorities Uganda* because of his American citizenship. The ATS would not extend to cases involving individuals merely passing through the United States, such as the Nigerian defendants at issue in *Kiobel*.

The second prong of the proposed disjunctive test is that if the defendant, including non-U.S. citizens and corporations domiciled outside the United States, has conducted explicit planning or extensive activity in furtherance of the international violation while in the United States, then the

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125. Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 *FORDHAM L. REV.* 1315, 1333–35 (2012).

126. See *FACT SHEET: Disclosing the Use of Conflict Minerals*, *supra* note 124 ("Congress enacted Section 1502 of the Act because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis.").

127. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010).

128. This prong is also responsive to *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), which defined a corporate domiciliary as a corporation with its place of incorporation or principal place of business in the United States.

129. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

claim overcomes the ATS presumption. This prong is consistent with the reasoning that animates U.S. purposeful avilment doctrine: when a defendant avails itself of the privileges of conducting activities with the United States, thus invoking the benefits and protections of its laws, it should be subject to a U.S. law that incentivizes conduct and protects justified expectations of parties. The recent cases from the Second and Eleventh Circuits appear to support such a prong. The *Mastafa* court's use of "domestic contacts" analysis where it determined that plaintiffs' allegations of domestic oil purchases, financing of oil purchases, and delivery of oil purchases were enough to satisfy the "touch and concern" language demonstrates that courts may be converging around a broader read of what conduct is relevant for overcoming the extraterritoriality presumption.<sup>130</sup> And the Eleventh Circuit entertained the argument that the appropriate "relevant conduct" inquiry of *Kiobel*<sup>131</sup> may include planning activity in the United States when it said: "Assuming, without deciding, that the 'relevant conduct' inquiry extends to the place of decision-making—as opposed to the site of the actual 'extrajudicial killing'—the allegations . . . still fall short of the minimum factual predicate warranting the extraterritorial application of the ATS."<sup>132</sup>

The third prong of this Note's proposed test is if the international violation was clearly and manifestly directed at the United States, with the intent of harming the United States and its citizens, then foreign plaintiffs injured should be able to bring the case under the ATS. This prong adopts the reasoning of the District Court for the District of Columbia in *Mwani* when it rejected defendants' motion to dismiss and stated that *Kiobel* had left open a narrow avenue for jurisdiction over acts that occurred outside the United States.<sup>133</sup>

This three-part disjunctive test differs from other recent suggestions on how to define "touch and concern." For example, one scholar has proposed a six-part balancing test, which would include the location of the alleged violation, the location of other alleged relevant conduct, the nationality of the defendant, the demands of international comity, the likelihood that denial of the ATS could result in the United States harboring a human rights violator, and any other American national interest that supports recognition of ATS jurisdiction.<sup>134</sup> A multi-pronged balancing approach to determining what actions touch and concern the United States would perhaps lead to incongruent results depending on how much weight a given court places on each of the proposed factors.

Furthermore, the Supreme Court has explicitly shown its preference for clearer lines, as opposed to multi-pronged balancing tests, when it comes to deciding the extraterritorial application of American statutes. In

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130. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188, 195 (2d Cir. 2014).

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

132. *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1236 (11th Cir. 2014).

133. *Mwani v. Bin Laden and Al Qaeda*, 947 F. Supp. 2d 1, 4 (D.D.C. 2013).

134. Doyle, *supra* note 13, at 467–68.



the antitrust arena, for example, the Supreme Court in *Hartford Fire Ins. Co. v. California* rejected the Ninth Circuit's longstanding multi-pronged balancing test to determine application of the Sherman Antitrust Statute to actions abroad.<sup>135</sup> The three-part disjunctive test that this Note proposes is predictable and clear, while also being fair to victims of grave human rights abuses.

#### CONCLUSION

With the increasing interchange of people and corporations across borders, U.S. jurisprudence on the ATS requires delineating a clear, but just, test under which victims of specific, universal, and obligatory international violations may obtain a remedy in the post-*Kiobel* era. This Note has put forward a three-part disjunctive test that would allow the ATS to extend to claims where (1) the defendant is a U.S. citizen or U.S.-domiciled corporation; or (2) the defendant has conducted explicit planning or extensive activity in furtherance of the international violation in the United States; or (3) the violation was clearly and manifestly targeted at the United States, with the intent of harming the United States and its citizens.

While the days of United States corporate involvement in the crimes of apartheid in South Africa are over, the potential for abuse abroad in other contexts is not. For example, in the wake of the 2014 Africa Summit hosted by the United States in Washington, D.C., U.S. companies pledged fourteen billion dollars of investment and commercial trade in Africa.<sup>136</sup> The increased exposure of U.S. corporations abroad requires a sufficient framework for ensuring compliance with basic human rights norms. Victims of crimes that are orchestrated in the United States or that target the United States should also have redress. In the post-*Kiobel* era, the ATS still has a unique role to play in providing one of the only forms of recourse for grave human rights violations that occur outside territorial borders.

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135. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (rejecting a multi-pronged test articulated in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976)).

136. Margaret Talev, *Obama Wins \$14 Billion in Pledges for Africa Investments*, BLOOMBERG BUSINESS (Aug. 5, 2014, 7:53 AM), <http://www.bloomberg.com/news/articles/2014-08-05/obama-wins-14-billion-in-pledges-for-africa-investments>.