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THE ALIEN TORT STATUTE AND CORPORATE LIABILITY: REBUTTING THE EXTRATERRITORIAL PRESUMPTION POST-*KIOBEL*

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INTRODUCTION

On April 11, 2001, the United Self-Defense Forces of Columbia (AUC), a right wing paramilitary group, went on a killing spree throughout the Naya region in western Columbia, using guns, machetes, and chainsaws to kill thirty-two people.[1] Evidence of such brutal violence, coupled with funding from regional drug cartels, led the U.S. State Department to classify the AUC as a terrorist organization in 2005.[2] However, drug money was not the AUC's only source of revenue. In 2007, Chiquita Brands International, best known for their bananas, admitted to paying out nearly $2 million directly to the AUC in areas near Chiquita owned banana plantations where the AUC exercised control.[3] As a result, Chiquita paid fines totaling $25 million dollars and served five years of corporate probation because of payment to the AUC.[4] When Columbian citizens sought damages from Chiquita in 2012, related to AUC violence in the early 2000s, they sought damages in the Southern District of Florida under a statute dating back to 1789: the Alien Tort Statute.[5]

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1. THE SAGE ENCYCLOPEDIA OF TERRORISM 610 (C. Gus Martin ed., 2d ed. 2011).

2. Nat'l Consortium for the Study of Terrorism and Responses to Terrorism, *Terrorist Organization Profile: United Self-Defense Forces of Columbia (AUC)*, START.UMD.EDU, http://www.start.umd.edu/tops/terrorist_organization_profile.asp?id=126 (last visited Mar. 3, 2016).

3. Kevin Bohn, *Chiquita: $25M Fine for Terror Payments*, CNN, http://www.cnn.com/2007/BUSINESS/09/11/chiquita.terrorism (last updated Sept. 11, 2007, 11:21 PM).

4. *Id.*

5. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1187 (11th Cir. 2014).

This Note focuses on corporate liability for companies with U.S. citizenship under the Alien Tort Statute (ATS). Part I discusses the history of the ATS through its revitalization in *Filartiga v. Pena-Irala*[6] in 1980.[7] Part II discusses the rise of litigation under the ATS from 1980 until the reach of the ATS was restricted by the United States Supreme Court in *Sosa v. Alvarez-Machain*[8] and *Kiobel v. Royal Dutch Petroleum*[9] in 2013.[10] Part III outlines how circuit courts have dealt with corporate liability under the ATS since 2013's *Kiobel* decision.[11] Part IV offers a proposal for interpreting the language of *Kiobel* and offers a concise set of factors for district courts to use in determining when to properly exercise jurisdiction over a claim brought by aliens against U.S. corporations for allegations of torts committed abroad.[12]

I. BACKGROUND

The Judiciary Act of 1789 enacted the ATS to prevent a U.S. citizen's tort from implicating the U.S. as a sovereign nation in an international conflict.[13] In the late eighteenth century, a country that failed to redress a citizen's tort was held responsible for the citizen's tort.[14] The ATS provides in its entirety, "The district courts shall

6. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

7. *See* discussion *infra* Part I. The ATS stood "largely dormant" for almost two centuries after its enactment in 1789. Doe v. Exxon Mobil Corp., 654 F.3d 11, 18 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013). Only two district courts invoked jurisdiction during that two-century period. *See* Adra v. Clift, 195 F. Supp. 857, 859 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607).

8. Sosa v. Alvarez-Machain, 542 U.S. 692, 697–98 (2004).

9. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). For a general discussion of the history of the ATS through the Supreme Court's seminal decisions in *Sosa* and *Kiobel* see Michael D. Ramsey, *Returning the Alien Tort Statute to Obscurity*, 52 COLUM. J. TRANSNAT'L L. 67 (2013); *see also* Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT'L. L. REV. 447, 469–77 (2013).

10. *See* discussion *infra* Part II.

11. *See* discussion *infra* Part III. For a critical analysis on the first *Kiobel* opinion out of the Second Circuit—before the Supreme Court's 2013 ruling on *Kiobel* (Kiobel II)—see Matthew E. Danforth, Note, *Corporate Civil Liability Under the Alien Tort Statute: Exploring its Possibility and Jurisdictional Limitations*, 44 CORNELL INT'L L.J. 659 (2011).

12. *See* discussion *infra* Part IV.

13. Bhatia, *supra* note 9, at 453–54.

14. *Id.*; *see also* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L.

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."[15] Although the Statute is only thirty-five words, much judicial and academic ink has come from its interpretation.[16] The ATS was largely dormant from its enactment in 1789 until *Filartiga v. Pena-Irala* in 1980.[17] *Filartiga* involved a suit in the Eastern District of New York between aliens for events that took place entirely in Paraguay.[18] The grant of jurisdiction to hear the case in *Filartiga* paved the way for the ATS as a vehicle for aliens to bring lawsuits in U.S. district courts. Typically, these suits alleged human rights violations in the developing world, which violated the "law of nations."[19]

REV. 830, 847–48 (2006). Professor Lee details how the ATS was enacted to provide redress for common law torts committed by private actors—including aliens—with a United States sovereign nexus. *Id.* at 830. Professor Lee draws on provisions of the 1789 Judiciary Act, the 1790 Crimes Acts, Article III of the Constitution, and the Supreme Court decision *Sosa v. Alvarez-Machain*, to reason that the ATS was enacted to allow aliens to sue in federal district court to prevent the U.S. from potentially getting dragged into conflicts with other countries whose citizens are the victims of a U.S. citizen's torts. *Id.* The importance of finding the statutory meaning at the time of enactment becomes important in light of the Supreme Court's first ruling on the ATS in *Sosa v. Alvarez-Machain*, where the Court looked to the intent of the framers and the statutory meaning at the time of enactment to determine whether a claim is valid under the ATS. *Id.* at 833.

15. 28 U.S.C. § 1350 (2012). For a discussion on the history surrounding the enactment of the ATS see Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011). The ATS was enacted in part in response to the state's failure to uphold the rights of British creditors under the Paris Peace Treaty 1783 and the state's failure to redress acts of violence by citizens against British subjects. *Id.* at 466. On a larger scale, the ATS was designed to avoid U.S. responsibility for its citizens' law of nations violations. *Id.* at 469–70.

16. *See, e.g.*, Tel-Oren v. Libyan Arab Repub., 726 F.2d 774, 812–16 (D.C. Cir. 1984) (Bork, J., concurring); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Ann-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Robert C. Thompson et al., *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841 (2009).

17. Only two suits involved the ATS in the nearly two-century span between 1789 and 1989. *See* Adra v. Clift, 195 F. Supp. 857, 859 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607).

18. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The suit in *Filartiga* involved one Paraguay national bringing an action against another, while both were in the U.S., alleging that the defendant, the former Inspector General of police in Paraguay, tortured and killed the son of the plaintiff in Paraguay because of the plaintiff's political affiliation. *Id.* Reversing the decision of the district court, the Second Circuit held the Plaintiff's claim for arbitrary detention did constitute a tort in violation of the laws of nations within the meaning of the statute. *Id.*at 884.

19. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013) (a class action on behalf of Nigerians alleging Shell aided and abetted the Nigerian government in violating the law of

Although litigation under the ATS began in the 1980s, the U.S. Supreme Court did not hear an ATS case until *Sosa v. Alvarez-Machain* in 2004.[20] *Sosa* involved a Mexican national's suit against Drug Enforcement Administration (DEA) officials and a Mexican national who aided the DEA in bringing the plaintiff to Texas, against his will, for a criminal trial.[21] In *Sosa,* the Court clarified that the ATS was not only a jurisdictional statute, but also provided a cause of action based on violations of international norms that are "specific, universal, and obligatory."[22] The Court also instructed lower courts to account for practical considerations when exercising jurisdiction over international claims because of the potential for disputes with other nations and conflicts of law, considerations often

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nations by suppressing opposition to oil exploration and drilling in the Ogoni Niger River Delta); Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (plaintiffs were fifteen Indonesian villagers complaining that Defendant Exxon's security forces committed murder, torture, sexual assault, battery, and false imprisonment in violation of the ATS in the U.S. and Indonesia), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 256, 261 (2d Cir. 2009) (Sudanese nationals complaining that Defendant aided and abetted the Sudanese government in committing genocide by financing arms and military operations to suppress a movement to nationalize oil production).

20. Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004); *see also* Bhatia, *supra* note 9, at 469 (explaining that although the statute existed for 215 years the Supreme Court did not address it until 2004). The Supreme Court was forced to deal with the question of whether the ATS was a purely jurisdictional statute or actually a new cause of action. *Sosa*, 542 U.S. at 697, 712. The Court held that the Statute was not only a jurisdictional statute, but also a new cause of action under the "law of nations." *Id.* at 712. The majority reasoned that if the statute was purely jurisdictional, it would have been "stillborn" at birth, given the fact that there was otherwise no secondary statute authorizing a cause of action. *Id.* at 714. The majority recognized that actions that would violate the "law of nations" in 1789 include piracy, actions against ambassadors, and violations of safe conduct. *Id.* at 715. The Court not only looked to the history of the law of nations, but also provided for potential new causes of action as long as courts "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized." *Id.* at 725.

21. *Sosa*, 542 U.S. at 698. The criminal suit brought by the DEA was eventually dismissed and Sosa brought charges against both the DEA and Alvarez, a Mexican national, under the ATS. *Id.*

22. *Id.* at 732. The Court explained that these specifically defined and widely accepted "international norms" must also involve practical considerations with "an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732–33. Further, these causes of action must reflect the "historical paradigms" that were familiar at the time of the ATS's enactment. *Id.* at 732. Historical paradigms included behavior that would violate the law of nations in 1789: piracy, actions against ambassadors, and violations of safe conduct. *Id.* at 694. Causes of action that fit within historical paradigms was the first category for a cause of action under the ATS. *Id.* at 732. The second cause of action under the ATS involved the violation of current international law, requiring (1) heightened specificity in pleading and (2) widespread international acceptance. *Id.* at 732; *see also* Bhatia, *supra* note 9, at 471.

left to the other branches of government under the political question doctrine.[23] Thus, in order to state a claim post-*Sosa*, a plaintiff must state a violation of an international norm that is "specific, universal, and obligatory," and do so in a way that does not violate the political question doctrine.[24]

In light of this fact-driven inquiry, lower courts struggled to determine what actions violated a "specific, universal, and obligatory" international norm, and comported with the practical considerations outlined in *Sosa*.[25] Furthermore, the Court in *Sosa* failed to clarify the scope of corporate liability, if any, under the ATS.[26] Following *Sosa,* the Seventh, Ninth, and Eleventh circuits all held that corporations could be held liable under the ATS.[27] However, the Second and D.C. circuits held that corporations were not liable under the ATS because the "law of nations"[28] is applicable only to states and men, not juridical persons such as corporations.[29]

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23. *Sosa*, 542 U.S. at 727 ("The potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretions of the Legislative and Executive Branches in managing foreign affairs.").

24. *See generally* Baker v. Carr, 369 U.S. 186 (1962) (establishing the modern political question doctrine).

25. *Sosa*, 542 U.S. at 732. Justice Breyer, joined by Justice Ginsburg, addressed some of the practical concerns in a concurring opinion, noting that "[t]oday international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior." *Id.* at 762 (Breyer, J., concurring).

26. *Compare* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010) (declining to hold corporations liable under the ATS) *aff'd*, 133 S. Ct. 1659 (2013), *with* Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (allowing corporate liability under the statute), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

27. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 765 (9th Cir. 2011) (en banc), *vacated*, 133 S. Ct. 1995 (2013); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

28. *See* 28 U.S.C. § 1350 (2012) ("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). Under the "law of nations," corporations are not held liable for human rights violations, as opposed to individuals or state actors. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010) ("Customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations."), *aff'd*, 133 S. Ct. 1659 (2013). The Second Circuit based their holding on the international jurisprudence post-Nuremberg trials that held states and individual men as chargeable with human rights violations, but not juridical persons such as corporations. *Id.* at 119, 125–32 (citing The Rome Statute of the International Criminal Court art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M. 1002, 1016; The Nuremberg Trial (United States v. Goering), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946); and 1 OPPENHEIM'S INTERNATIONAL LAW § 33, 119 (Sir Robert

In 2013, the U.S. Supreme Court again addressed the ATS in *Kiobel v. Royal Dutch Petroleum*, but still did not address corporate liability under the statute.[30] *Kiobel* involved a claim by Nigerian nationals against a Dutch corporation for events that took place in Africa.[31] With the concern for potential conflicts of law in mind, the Court limited the reach of the ATS, holding that "[t]he presumption against extraterritoriality applies to claims under the ATS . . . ."[32] In other words, the ATS presumably does not apply to events that take place outside of U.S. territory. Plaintiffs can overcome this presumption, however, when "claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[33] What constitutes "sufficient force" to rebut the extraterritorial presumption is still unclear.[34] Concerning corporations, the Court stated, "[c]orporations are often present in many countries, and it would reach too far to say that [a] mere *corporate presence* suffices" to displace the presumption against extraterritorial application.[35] Although the Court

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Jennings & Sir Arthur Watts eds., 9th ed. 1996)).

29. *Exxon Mobil Corp.*, 654 F.3d at 83; *Kiobel*, 621 F.3d at 120 (holding a corporation was not liable because looking at the jurisprudence of international law, notably the trials at Nuremberg, "offenses against the law of nations (*i.e.*, customary international law) for violations of human rights can be charged against States and against individual men and women but not against but not against juridical persons such as corporations"). Judge Leval concurred in judgment in *Kiobel*, but disagreed with the denial of corporate liability, reasoning that although corporations were not subjects under International law, they nonetheless had obligations, and were bound to them. *Kiobel*, 621 F.3d at 179–80 (Leval, J., concurring).

30. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662, 1669 (2013).

31. *Id.* at 1662. More specifically, *Kiobel* involved a suit filed by several exiled Nigerians living in the U.S. in 2002 against Shell Oil and its various subsidiaries. *Id.* The complaint alleged various human rights violations in connection with Nigerian military forces who in the mid-1990s were responsible for violently suppressing the Movement for the Survival of the Ogoni People, a popular movement seeking to prevent oil pollution in the region. *Id.* at 1662–63. For an overview of the conflict itself see Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L. J. 261, 264–71 (1997).

32. *Kiobel*, 133 S. Ct. at 1669. The Court noted that this presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1664 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

33. *Id.* at 1669.

34. *See, e.g.*, Bhatia, *supra* note 9, at 477 (explaining how "*Kiobel* raised as many new questions as it answered").

35. *Kiobel*, 133 S. Ct. at 1669 (emphasis added). The Court reasoned that if the statute was meant to more liberally exercise jurisdiction over extraterritorial action, then it is up to Congress to enact a statute that is more specific than the ATS. *Id.* Although the Court does not lay out specific factors that would

narrowed the ATS in *Kiobel*, it did not clarify what factors, in addition to corporate presence, constitute sufficient force to rebut the presumption against extraterritorial application and hear the case.[36]

Since the *Kiobel* decision in April of 2013, circuit courts look to different factors to analyze what is sufficient force to displace the presumption against extraterritoriality for corporations.[37] Only three months after *Kiobel*, the Second Circuit held that where plaintiffs fail to allege that any relevant conduct takes place in the U.S., *Kiobel* categorically bars all claims under the ATS.[38] If the conduct occurs abroad, foreign plaintiffs can never sufficiently overcome the presumption against extraterritoriality, even if the defendant is an American citizen or corporation.[39]

The Eleventh Circuit further limited the ATS in July of 2014, holding that even when the defendant is a U.S. corporation, and part of the relevant conduct alleged by aliens took place *in* the U.S.,

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overcome the presumption against extraterritoriality, Justice Alito alluded to a heightened standard, "[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* at 1670 (Alito, J., concurring) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010)). Justice Alito further proposed that the defendant's domestic conduct itself must violate an international law norm. *Id.*

36. In a concurring opinion, Justice Kennedy noted that the Court in *Kiobel* left "significant questions regarding the reach and interpretation of the Alien Tort Statute" unanswered, which "may require some further elaboration and explanation." *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

37. *Compare* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (holding plaintiffs did not state a valid ATS claim for allegations of torture and murder in Colombia, but financed and overseen by a U.S. corporation), *with* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (holding plaintiffs did state a valid ATS claim for allegations of torture in Iraq, but financed and overseen by a U.S. corporation).

38. Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013). The plaintiffs in *Balintulo* argued that whether the relevant conduct occurred abroad is only one factor of a multi-factor test, and that the ATS reaches extraterritorial conduct when the actor is an American citizen, in this case a corporate citizen. *Id.* The Second Circuit disagreed, "The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.*; *see also* Chowdhury v. WorldTel Bangl. Holding, Ltd., 746 F.3d 42, 54 (2d Cir. 2014) (dismissing plaintiffs' ATS claim against defendant corporation because all of the alleged conduct took place in Bangladesh).

39. For a discussion on viable alternatives in light of these ATS restrictions, see Roger P. Alford, *Human Rights after* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089 (2014). Given the jurisdictional hurdle under the ATS, some have offered alternatives to the statute under the theory of transnational tort litigation. Transnational tort litigation consists of pleading a human rights violation as a traditional domestic or foreign tort violation, where there is no presumption of extraterritoriality. *Id.* at 1095 n.13. In this context, courts apply tort laws based on traditional choice of law models, many of which are already in use in the context of international terrorism. *Id.*

jurisdiction under the ATS is still improper.[40] In *Cardona v. Chiquita Brands International*, the Eleventh Circuit noted that because the complaint did not state that any torture occurred on U.S. territory, the presumption against extraterritoriality barred an ATS claim.[41] However, the plaintiffs in *Cardona* also alleged that Chiquita corporate officers oversaw and financed the alleged conduct from their corporate headquarters, in the U.S., for the purpose of carrying out the conduct abroad.[42] In a lengthy dissent, Judge Beverly Martin noted that in stark contrast to *Kiobel*, the plaintiffs in *Cardona* were not seeking to hold the defendant vicariously liable for actions of its agents or subsidiaries, nor were the plaintiffs alleging tortious conduct that took place *exclusively* on foreign soil.[43] Judge Martin reasoned that because of these two important factual distinctions, the claims here were properly stated under the ATS.[44] In addressing Judge Martin's dissent, the majority reasoned that because there were no allegations that torture occurred on U.S. territory, the claims were barred under *Kiobel*.[45]

The Fourth Circuit took a more liberal view of jurisdiction in *Al Shimari v. CACI Premier Technology*.[46] In *Al Shimari*, four Iraqi

40. *Cardona*, 760 F.3d at 1189.

41. *Id.* at 1189–90.

42. *Id.* at 1192 (Martin, J., dissenting).

43. *Id.* at 1194 (Martin, J., dissenting). Judge Martin further supports her reasoning with the legislative history of the ATS, namely the concern of the framers that the U.S. would "fail to meet the expectations of the international community were we to allow U.S. citizens to travel to foreign shores and commit violations of the law of nations with impunity." *Id.* at 1193 (Martin, J., dissenting) (citing Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)). Judge Martin draws further on several historical references to support her statutory interpretation, citing Emmerich de Vattel, a Swiss legal philosopher from the eighteenth century: "A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally to deliver him up, makes himself in a way an accessory to the deed and *becomes responsible for it*." *Id.* at 1193 (Martin, J., dissenting) (quoting EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS bk. II, ch. VI § 77 (1758) (Charles G. Fenwick trans., 1916) (emphasis added)). It is precisely this responsibility for the actions of a citizen that Judge Martin argues the founders were attempting to avoid, and exactly the same kind of conduct that was at issue in the case. *Id.* at 1194 (Martin, J., dissenting).

44. *Id.* at 1195 (Martin, J., dissenting).

45. *Id.* at 1191. The majority further states as dicta that although allowing U.S. citizens to travel abroad and violate international law with impunity may raise international diplomatic concerns, such concerns are vested in the purview of the executive and legislative branch, in managing foreign affairs and in legislating laws to deal with such concerns. *Id.*

46. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014).

citizens brought a claim for torture, in violation of international law, against a U.S. defense contractor stemming from the Abu Ghraib prison scandal.[47] The defendants in *Al Shimari* made the exact same argument as the Eleventh Circuit majority in *Cardona*: the plaintiffs alleged only conduct that occurred outside of U.S. territory, so their claims should be dismissed under *Kiobel*.[48] The Fourth Circuit disagreed, reasoning that a "more nuanced analysis" of all factors is required, rather than a bright-line rule.[49] The Fourth Circuit found jurisdiction by broadly interpreting whether "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 . . . .'"[50] Unlike the relevant conduct in *Kiobel*, which only touched the U.S. with "mere corporate presence," the plaintiffs here alleged substantial ties with the U.S., including the performance of a contract with the federal government.[51] The Fourth Circuit explicitly rejected a bright-line rule that conduct, which occurs exclusively abroad, bars an ATS claim *per se*.[52] The Fourth Circuit cited four important factors in rebutting the extraterritorial presumption: (1) the U.S. citizenship of the corporate defendant, (2) the U.S. citizenship of the corporation's employees involved in the conduct, and (3) a contract between the defendant and the U.S. government.[53] The Fourth Circuit's approach to an ATS claim, and in accordance with *Kiobel*, is directly at odds with how the Eleventh Circuit interpreted a nearly identical fact pattern.[54] Reconciling these

47. *Id.* at 521.

48. *Id.* at 520.

49. *Id.* at 528.

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

51. *Id.* at 528.

52. *Al Shimari*, 758 F.3d at 528. "[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." *Id.*

53. *Id.* at 530. The Court disposed of the practical considerations regarding conflict of laws and foreign policy implications because the defendant was a corporate citizen of the U.S. *Id.* (citing Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322–24 (D. Mass. 2013)) (reasoning *Kiobel* does not bar claims against an American citizen, for practical reasons at least, because a foreign national is not dragged into U.S. courts).

54. *Compare* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (holding plaintiffs did not state a valid ATS claim for allegations of torture and murder in Colombia when injuries were financed and overseen by a U.S. corporation), *with Al Shimari*, 758 F.3d at 530–31 (holding plaintiffs did state a valid ATS claim for allegations of torture in Iraq when injuries were

approaches, and determining the most important factors that "rebut the presumption of extraterritoriality," is vital for district courts ruling, plaintiffs seeking recovery, and general counsel for any company with an international reach. This Note offers such a proposal.

II. ANALYSIS

The key question in determining corporate liability under the ATS is whether conduct that is a violation of the law of nations sufficiently touches and concerns the U.S. to rebut the presumption against extraterritoriality.[55] Courts generally look to four factors to determine if conduct sufficiently touches and concerns the U.S. to rebut the extraterritorial presumption: (1) the nature and place of the conduct itself, (2) the citizenship of the corporate defendant, (3) the connection between the conduct and tort-feasor, and (4) the political question doctrine.[56] Some courts view the nature and place of the acts themselves as the dispositive factor in exercising jurisdiction.[57] Others view all the factors together, comprising different prongs of a multi-factor test.[58] Determining how these factors relate is the scope of this analysis.[59]

A. The Conduct Itself

Undoubtedly, the conduct itself is the most important factor of analysis, and for some courts is alone determinative.[60] Conduct sufficient to state a claim must (1) be a violation of the law of nations and (2) have a sufficient connection with the United States.[61] The

financed and overseen by a U.S. corporation).

55. *See supra* notes 32–33.

56. *Al Shimari*, 758 F.3d at 530–31.

57. *See, e.g.*, *Cardona*, 760 F.3d at 1189; Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013).

58. *See, e.g.*, *Al Shimari*, 758 F.3d at 533.

59. *See* discussion *infra* Part II.A–C.

60. *See, e.g.*, *Balintulo*, 727 F.3d at 190 (holding that even if a defendant is a corporate citizen, "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*").

61. *Al Shimari*, 758 F.3d at 527 (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013)).

second element, a sufficient U.S. connection, ultimately determines whether the presumption against extraterritoriality is overcome.[62]

1. Relevant Conduct and Acts Must Violate the Laws of Nations

Under the ATS, the acts themselves must be "in violation of the law of nations or a treaty of the United States."[63] Traditionally, torture, genocide, mass rape, and extrajudicial killings are specifically defined norms of international character, which are sufficient to constitute a violation of the law of nations.[64]

The primary issue regarding corporate liability under the law of nations is that not all actors are liable for the same acts.[65] For example, international law holds state and individual actors liable for torture while corporations are exempt.[66] The Supreme Court noted, however, that international law imposes only *substantive* obligations,[67] including genocide, torture, and extrajudicial killings.[68] Individual nations decide *how* to enforce these substantive obligations under *domestic* theories of liability.[69] Although *Sosa* suggests that international law governs who may be liable for substantive violations, discussing differences between states and people,[70] customary international law only establishes norms of conduct, not the available remedies for violations of that conduct.[71]

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62. *Al Shimari*, 758 F.3d at 529.

63. 28 U.S.C. § 1350 (2012).

64. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 267 (2d Cir. 2007). To determine customary international law that is a violation of the laws of nations, courts look to law identified by the International Court of Justice and international conventions. *Id.* Any claim based upon the present day law of nations must rest on a norm of international character that is accepted by the civilized world and defined with a specificity comparable to the feature of recognized eighteenth-century paradigms. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

65. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014).

66. Saleh v. Titan Corp., 580 F.3d 1, 15 (D.C. Cir. 2009) ("Although torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors.").

67. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422–23 (1964).

68. *See supra* note 64.

69. *See Banco Nacional de Cuba*, 376 U.S. at 422–23; *see also* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2011).

70. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) ("A related consideration [to determining whether there is a viable cause of action under the ATS] 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.").

71. Doe v. Exxon Mobil Corp., 654 F.3d 11, 42 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir.

The Supreme Court held that although international law provides no cause of action to sue corporations, common law does.[72] The law of nations does not create a cause of action, but norms, that when violated, provide a cause of action under common law.[73] Accordingly, federal courts must determine corporate liability "for the tortious conduct of their agents by reference to federal common law governing tort remedies."[74]

2. The Connection Between the Violations and the Corporate Defendant

Corporations are traditionally liable under common law for the tortious conduct of their agents under *respondeat superior*.[75] Corporate liability through agency was an accepted principle of tort law by the time of the ATS's enactment in 1789.[76] The historical context of corporate liability through agency is vital given the Court's requirement in *Sosa* that an ATS suit must harmonize with an international violation that carried liability at the time of the statute's enactment.[77]

Accordingly, plaintiffs typically sue for the actions of corporate subsidiaries, or individual employees, in ATS litigation under the agency theory of *respondeat superior*.[78] Corporations can be liable

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2013). "[T]he ATS provides federal jurisdiction where the conduct at issue fits a norm qualifying under *Sosa* implies that for purposes of affording a remedy, if any, the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit." *Id.*

72. *Id.* ("[T]he fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS. There is no right to sue under the law of nations; no right to sue natural persons, juridical entities, or states.").

73. *In re* S. Afr. Apartheid Litig., 15 F. Supp. 3d 454, 463 (S.D.N.Y. 2014). In interpreting a proper cause of action under the ATS, Judge Scheindlin stated, "By passing the ATS, Congress created an action in tort for violations of the law of nations." *Id.*

74. *Id.* (internal quotations omitted) (quoting Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013)).

75. *See Exxon Mobil Corp.*, 654 F.3d at 48, 54 (citing Mayor of Lynn v. Turner, (1774) 98 Eng. Rep. 980 (K.B.); Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & Rawle 6 (Pa. 1818)).

76. *Id.* at 47.

77. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). "Federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the [historical] paradigms familiar when § 1350 was enacted." *Id.* at 694.

78. *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762, 774 (D.C. Cir. 2011) (allowing claims against the U.S.

for the actions of their agents or subsidiaries if they have knowledge that their dealings facilitated a violation of the law of nations, even if the companies did not intend for their agents, or their actions, to have that effect.[79] Further, corporations are liable for the actions of those who they have an exclusive relationship with, or who they exert economic advantage over, although such actors are not agents in the traditional sense.[80]

a. The Citizenship of the Corporate Defendant—Irrelevant in the Second and Eleventh Circuits

In light of *Kiobel*, corporate presence, even if substantial, is not alone sufficient to displace the presumption against extraterritoriality.[81] Even in cases where the defendant corporation is a citizen of the U.S., and not merely present, courts have found U.S. citizenship insufficient to rebut the presumption against extraterritoriality.[82] Notably, the Eleventh Circuit, in *Cardona v. Chiquita Brands International*, found that even where a defendant corporation is a U.S. citizen, if the plaintiff does not allege violations of international law occurred within the U.S., jurisdiction is improper.[83] However, the Eleventh Circuit in *Cardona* heightened

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for the actions of military personal under respondeat superior because the officers were acting within the scope of their employment, even though their conduct was criminal in nature and only incidentally authorized by the employer); *In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 274 (S.D.N.Y. 2009) (allowing a suit to proceed under agency theory of respondeat superior under which a corporation was held liable for the actions of its South African subsidiaries).

79. *See, e.g.*, *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d at 259–62 (holding that IBM, Ford, and Daimler could be liable for actions of South African subsidiaries based only on the *knowledge* that the sales of their goods to the South African government helped facilitate apartheid in South Africa, even if the Company did not *intend* in selling the goods to facilitate that effect).

80. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1017, 1022 (9th Cir. 2014). In *Nestle*, the Ninth Circuit held defendants may be liable for the acts of their unaffiliated cocoa farms on the Ivory Coast based on "exclusive buyer/seller relationships" and the defendants' "economic leverage" over the farms based on the defendants' sizeable market share. *Id.* at 1017. The defendants in *Nestle* also had knowledge about Slave labor that existed at these farms based on firsthand visits and reports issued by domestic and international organizations. *Id.*

81. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.").

82. *See* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014); *see also* Balintulo v. Daimler AG, 727 F.3d 174, 189–90 (2d Cir. 2013).

83. *Cardona*, 760 F.3d at 1191.

the presumption against extraterritoriality further than the Supreme Court required in *Kiobel*.[84]

The plaintiffs in *Cardona* alleged a violation of the law of nations that occurred *on* U.S. soil when Chiquita allegedly organized and financed the acts of torture *from* U.S. soil that eventually occurred in Columbia.[85] The Eleventh Circuit was not persuaded that the presumption against extraterritoriality was overcome even though the defendant was a U.S. citizen and some of the alleged conduct occurred on U.S. soil.[86] The most important factor for the Eleventh Circuit was that the torture *itself* occurred aboard, even though that torture was allegedly organized and financed from U.S. soil.[87] The missing territorial connection between the wrongful conduct and the U.S. was the pivotal factor for the court.[88] Judge Martin's dissent in *Cardona* advocated for a broader reading of touch and concern, stating that claims sufficiently touch and concern the territory of the U.S. if the defendant aids and abets extraterritorial torts from the U.S., even if the torts themselves did not occur domestically.[89]

The Eleventh Circuit further clarified *Cardona*'s heightened standard in *Baloco v. Drummond*.[90] Similar to *Cardona*, *Baloco* involved a suit by aliens against a U.S. company.[91] The important

84. *Id.* (holding ATS does not apply even where a corporation is a U.S. citizen, reasoning that U.S. citizenship does not matter if the alleged conduct took place on foreign soil).

85. *Id.* at 1192 (Martin, J., dissenting). In dissenting, Judge Martin importantly pointed out that unlike the plaintiffs in *Kiobel*, the complaint alleged that "Chiquita participated in a campaign of torture and murder in Columbia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in the territory of the United States." *Id.* Further, these acts were not only carried out with the *knowledge* that torture was occurring, but for the *purpose* of furthering the torture. *Id.* at 1194. For these reasons, Judge Martin distinguished *Cardona* from *Kiobel*, and concluded the claims touched and concern the territory of the U.S. to exercise jurisdiction. *Id.* At 1195.

86. *Id.* at 1191.

87. *Id.*

88. Jaramillo v. Naranjo, No. 10-21951-CIV, 2014 WL 4898210, at *7 (S.D. Fla. Sept. 30, 2014) (discussing the importance of a territorial link between extraterritorial conduct and the U.S. in *Cardona*).

89. *Cardona*, 760 F.3d. at 1194–95 (Martin, J., dissenting). Judge Martin cites to numerous circuit and district court decisions. *See, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014); Krishanti v. Rajaratnam, No. 2:09-cv-05395, 2015 WL 1669873, at *10 (D.N.J. Apr. 28, 2014); Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013); Sexual Minorities of Uganda v. Lively, 960 F. Supp. 2d 304, 323–24 (D. Mass. 2013).

90. Baloco v. Drummond Co., 767 F.3d 1229, 1237–38 (11th Cir. 2014).

91. *Id.* at 1233.

distinction for the court in *Baloco* was that violations of the law of nations merely originated, but did not occur in the U.S., and thus were insufficient to displace the presumption against extraterritoriality.[92] The Eleventh Circuit drew guidance from the Supreme Court's 2010 decision, *Morrison v. National Australia Bank*,[93] which discussed the presumption against extraterritoriality in relation to the Securities and Exchange Act of 1934.[94] The Supreme Court in *Morrison* stated that the foreign conduct inquiry turns on "where the transaction that is the *focus* of the statute at issue occurred."[95] The ATS, unlike the Securities and Exchange Act of 1934, does not focus on where a transaction occurs, but on what types of conduct occur, regardless of location.[96] The Eleventh Circuit, using this reasoning, concluded that because the plaintiff's claims "are not focused within the United States," the violations touched and concerned the United States, but still lacked sufficient force to displace the presumption against extraterritoriality.[97]

The Second Circuit, took a similarly restrictive, but more bright-line approach to the issue: "if all the relevant conduct occurred aboard, that is simply the end of the matter under *Kiobel*."[98] Thus, the importance of the extraterritorial inquiry for both the Second and Eleventh Circuits turns entirely on the connection between the relevant conduct and the U.S. territory, not the citizenship of the corporate defendant. In these jurisdictions, it seems likely that if an individual can allege that some relevant conduct took place in the U.S., which is a violation of the Laws of Nations on U.S. soil, only then is an ATS claim proper.

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92. *Id.* at 1237 ("The fact that deceptive conduct originated in the United States did not defeat the presumption against extraterritorial application.").

93. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

94. *Baloco*, 767 F.3d at 1236–37.

95. *Id.* at 1237. In *Morrison*, the focus of the statute was the place where the securities were purchased and sold. *Morrison*, 561 U.S. at 267. The focus of a statute, according to the Court in *Morrison*, is the source of Congressional concern in enacting the statute. *Id.*

96. *Baloco*, 767 F.3d at 1237.

97. *Id.* at 1238.

98. Balintulo v. Daimler AG, 727 F.3d 174, 190 (2d Cir. 2013); *see also* Chowdhury v. WorldTel Bangl. Holding, Ltd., 746 F.3d 42, 49–50 (2d Cir. 2014) (overturning a jury verdict under the ATS holding that because all relevant conduct occurred in Bangladesh, the plaintiff's ATS claim should have been barred by the district court judge).

*b. The Fourth and Ninth Circuits Take a Different Approach Post-*Kiobel

Along with Judge Martin's dissent in *Cardona*, the Fourth and Ninth Circuits stand in sharp contrast to the Second and Eleventh Circuits interpretations of *Kiobel*. The Ninth Circuit, in *Doe v. Nestle USA*, reaffirmed "a norm-by-norm analysis of corporate liability" under the ATS.[99] In *Doe*, the defendants allegedly visited the actual sites of child slavery on the Ivory Coast several times a year for training and quality control of their cocoa farms.[100] Further, the defendants lobbied against congressional efforts to curb child slavery, although no child slavery actually took place in the United States.[101] The defendants in *Doe* argued for the court to use the "focus" test in determining if conduct rebuts the presumption against extraterritoriality.[102] This test was adopted by the Eleventh Circuit in *Baloco* and explained by the Supreme Court in *Morrison*.[103] The focus test involves an inquiry into the connection between the territorial events or relationships of the ATS and the United States.[104] This inquiry centers on what relevant conduct the statute seeks to forbid or regulate (the focus) and the physical location where that conduct took place (the connection).[105]

The Ninth Circuit rejected the "focus" test for three reasons. First, the Ninth Circuit reasoned that the Court in *Kiobel* specifically used the language "touch and concern" rather than "focus," two similar, but distinguishable, jurisdictional tests for extraterritorial conduct.[106] Second, Justice Alito and Kennedy both noted that the opinion in *Kiobel* left "much unanswered" in determining what sufficiently touched and concerned the U.S.[107] Third, the court noted that the

99. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1021 (9th Cir. 2014).
100. *Id.* at 1017.
101. *Id.*
102. *Id.* at 1028.
103. *Id.*
104. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).
105. *Id.*
106. *Nestle*, 766 F.3d at 1028.
107. *Id.* at 1027–28 (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Alito, J., concurring); *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring)).

focus test relies on congressional intent and cannot be applied to ATS claims, which are claims based substantively on international norms rather than statute.[108] The focus test in *Morrison* relies on a statutory claim based on a statutory cause of action.[109] Although the court in *Doe* declined to define "touch and concern," it held that when *a part* of the conduct underlying the claims occurred within the U.S., a viable claim is possible.[110]

In *Al-Shimari v. CACI Premier Technology*, the Fourth Circuit found that torture allegations, although occurring exclusively in Iraq, sufficiently rebutted the presumption based on four key factors: (1) the defendant was a U.S. corporation, (2) the tort-feasors themselves were U.S. citizens, (3) the contract and planning for the entire business operation was executed in the U.S., and (4) oversight and approval of tortious conduct from U.S. soil.[111]

The Second and Eleventh Circuit's ATS standards under *Balintulo* and *Cardona*, respectively, destroy the ATS by requiring the same allegations that would make up a typical common law tort claim.[112] Under this standard, tortious acts themselves must occur against foreign nationals, on U.S. soil. This heightened standard would render the ATS redundant in light of common law tort remedies.[113] A foreign national could simply bring a cause of action for common law torts through diversity jurisdiction, without needing the ATS at all.[114] Most importantly, such a reading of the ATS in light of *Kiobel* effectively disarms the statute as a viable cause of action, and

108. *Id.* at 1028.

109. *Morrison*, 561 U.S. at 267.

110. *Nestle*, 766 F.3d at 1028 ("Moreover, it would be imprudent to attempt to apply and refine the touch and concern test where the pleadings before us make no attempt to explain what *portion* of the conduct underlying the plaintiffs[']s claims took place within the United States.") (emphasis added).

111. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014).

112. *See, e.g.*, Cole v. Turner, 6 Mod. 149 (1704) (the seminal case establishing common law assault and battery); *see also* Wallace v. Rosen, 765 N.E.2d 192, 196 (Ind. Ct. App. 2002) (outlining intent element of battery).

113. 28 U.S.C. § 1350 (2012).

114. 28 U.S.C. § 1332 (2012). An alien may easily bring a suit under diversity jurisdiction against a U.S. corporation as longs as the amount in controversy is greater than $75,000. *Id.* Further, "[a]ll fifty states have some form of statutory action for the recovery of the wrongful death of another." VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 591 (Robert C. Clark et al. eds., 12th ed. 2010)

destroys its statutory purpose in providing a venue for foreign nationals to bring suits against U.S. citizens for torts committed abroad.[115]

B. Practical Considerations: The Wild-Card Factor

ATS suits create particular "risks of adverse foreign policy consequences" requiring courts to exercise caution in "impinging on the discretion of the [l]egislative and [e]xecutive [b]ranches in managing foreign affairs."[116] These considerations require a district court to look to policy implications, not only precedential guidance, in hearing a claim under the ATS.[117] Specifically, there is concern about the policy consequences of making a certain cause of action generally available to all potential plaintiffs.[118] Courts have not specifically enumerated what kinds of practical considerations are most important, but such policy decisions more aptly fall within the individual judgment of the district courts.[119] The general goal, however, is to avoid "unintended clashes between our laws and those of other nations which could result in international discord."[120] In avoiding these unintended clashes, the Supreme Court suggested looking to the legislature for guidance before expansion of the ATS.[121]

115. *See* 28 U.S.C. § 1350 (2012); *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring) (stating ATS is in part designed to prevent the "United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind" (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004))).

116. *Sosa*, 542 U.S. at 727–28.

117. *Id.* at 732–33. The Court explicitly stated in *Sosa* that determining if an international norm is sufficiently definite to support a cause of action must involve practical judgment about the "consequences of making that cause available to litigants in the federal courts." *Id.* (quoting Hilao v. Estate of Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994)).

118. *Id.* at 732–33.

119. *Id.*

120. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)).

121. *Sosa*, 542 U.S. at 726.

C. Reconciliation and the Road Forward

The key to a proper suit by an alien against a U.S. corporation under the ATS should require three factors: (1) U.S. corporate citizenship, (2) tortious conduct controlled or directly financed from U.S. soil, and (3) tortious conduct that is a clear violation of international law pursuant to the International Criminal Court (ICC).[122] These three factors accomplish several goals, and follow Justice Breyer's concurrence in *Kiobel*.[123] First, U.S. citizenship ensures that clashes between conflicts of laws do not occur under the foreign policy concerns enumerated by the Court in *Sosa*.[124] Second, evidence of financing or oversight from the U.S. connects the conduct to U.S. territory far greater than "mere corporate presence" found by a company's incidental domestic business.[125] Additionally, direct financing and oversight fits soundly within agency theory, or aiding and abetting, which establishes corporate liability under common law agency.[126] Finally, utilizing the enumerated violations of international law from the ICC is a simple and objective way to determine when a substantive violation of the "law of nations" occurs.[127]

122. *See, e.g.*, Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1025 (9th Cir. 2014); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014).

123. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring). The minority's concurrence asserted that if the "defendant's conduct substantially and adversely affect[ed] an important American national interest" jurisdiction is proper. *Id.* This factor by the minority treads dangerously close to judicial activism the Court warned of in *Sosa*. *Sosa*, 542 U.S. at 726.

124. *Sosa*, 542 U.S. at 725–28. In *Al Shimari*, the Fourth Circuit reasoned that because the defendant companies were U.S. citizens, "[t]his case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens." *Al Shimari*, 758 F.3d at 530 (citing Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322–24 (D. Mass. 2013)).

125. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1192, 1194 (11th Cir. 2014) (Martin, J., dissenting) (allegations that tortious conduct was approved "from their offices in the United States" was sufficient to state a claim that connected the U.S. territory to extraterritorial conduct).

126. *See Nestle*, 654 F.3d at 57.

127. *See Sosa*, 542 U.S. at 725.

III. PROPOSAL

Courts seek to interpret statutes so every clause and word of a statute, if possible, is given effect.[128] To require allegations of tortious conduct occur on U.S. soil, as the Second and Eleventh Circuits do, reads the ATS in a way that gives no effect to the Statute.[129] This reading makes the ATS redundant with common law, which already provides aliens a tort cause of action for typical international law violations in federal courts through diversity jurisdiction.[130] International law violations such as torture, extrajudicial killing, and other law of nations violations, if actually committed on U.S. soil, are clear common law tort claims with no need to invoke the ATS.[131] Justice Breyer's concurrence in *Kiobel* noted that an important function of the ATS is to prevent the U.S. from becoming a "safe harbor" from a common enemy of humankind.[132] Under the heightened territorial nexus required by the Second and Eleventh Circuits, the judicial branch has essentially overturned the ATS by requiring plaintiffs to show a heightened territorial connection.[133] As the Supreme Court recognized in *Sosa*, the ATS gives aliens a remedy for torts committed abroad by a U.S. national.[134]

One of the earliest examples of an incident the ATS was designed to cover was a 1794 incident involving several American citizens who "joined in a French attack on the British colony of Sierra Leone, in violation of the United States' official position of neutrality with respect to France and Britain."[135] In response to the incident,

128. United States v. Menasche, 348 U.S. 528, 538–39 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

129. *See* discussion *supra* Part II.C.

130. *See* discussion *supra* Part II.C.

131. *See* Ramsey, *supra* note 9, at 69 (arguing that "because federal diversity jurisdiction has no territorial limit, aliens can sue U.S. citizens in federal court for foreign conduct (including conduct which violates international law) as long as they meet diversity jurisdiction's amount-in-controversy requirement") (citing 28 U.S.C. § 1332 (2006)).

132. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring).

133. *See* discussion *supra* Part II.C.

134. *See id.*

135. Mujica v. AirScan Inc., 771 F.3d 580, 596 (9th Cir. 2014) (citing Breach of Neutrality, 1 U.S. Op. Att'y Gen. 57 (1795)).

Attorney General William Bradford stated, "'there can be no doubt that the *company* or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States,' pursuant to the ATS."[136] In addressing this opinion, the Ninth Circuit stated that General Bradford's opinion was "too slender a reed" to support an ATS claim based *only* on citizenship.[137] Although the Supreme Court found the Bradford opinion to defy a clear reading and alone failed to rebut the presumption against extraterritoriality, they hinted at oral argument, that the case would be different if the defendant corporation Shell was a U.S. citizen, rather than Dutch citizen.[138]

Some scholars argue in light of *Kiobel*, and the circuit court decisions discussed *supra*, that the ATS is functionally dead.[139] They argue that alien plaintiffs should bring suit under a theory of "transnational tort litigation," rather than the ATS, because there is no presumption against extraterritoriality.[140] In that context, courts apply state or foreign tort laws based on traditional choice-of-law principles.[141] Although transnational tort litigation may serve as a viable alternative for plaintiffs, it ignores the bigger issue—the destruction of a statutory cause of action by the judicial branch.[142] Even worse, the judicial branch has not destroyed a statutory scheme that is an antiquated relic of the eighteenth century, but part of a larger statutory scheme that was expanded in 1991 as the Torture Victim Protection Act (TVPA), which aimed to prevent human rights abuses abroad by giving plaintiffs access to U.S. courts.[143]

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136. *Id.* (emphasis added).

137. *Id.*

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

139. *See* discussion *supra* Part II; *see also* Alford*, supra* note 39, at 1099.

140. Alford*, supra* note 39, at 1091. Professor Alford urges plaintiffs to reframe human rights violations, previously brought under the ATS, as transnational torts because common law tort claims have no extraterritorial presumption. *Id.*

141. *Id.*

142. *See* discussion *supra* Part II.C.

143. *See* 28 U.S.C. § 1350(2) (2014). The TVPA is a statute enacted in March of 1992 that gives a civil cause of action in the United States against individuals who commit torture or extrajudicial killings while acting "under actual or apparent authority, or color of law, of any foreign nation." *Id.* Plaintiffs often state a cause of action under the TVPA in addition to an ATS claim. *See, e.g.*, Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014).

In order to salvage the ATS, while recognizing the sensitive nature of foreign policy concerns in ATS cases, district courts should look to three factors in determining a viable cause of action under the ATS.[144] First, the violation, or primary conduct, must have been overseen or financed in part from the U.S.[145] Second, the defendant must be a U.S. citizen.[146] Third, the relevant extraterritorial conduct must be a clear violation of the ICC's Rome Statute.[147]

A. The Violation of International Law is Overseen or Financed in Part from the U.S.

District courts should require plaintiffs to allege that a U.S. corporation either (1) aided and abetted, or (2) conspired to commit a violation of the Laws of Nations while *on* or *from* U.S. territory in order to rebut the presumption against extraterritoriality.[148] Aiding and abetting violations of the Laws of Nations is recognized, even in circuits least receptive to ATS litigation, as an accepted theory of corporate liability.[149]

When a U.S. corporation actually aids and abets, or is involved in a conspiracy to commit a violation of the law of nations, courts should be less concerned about potential foreign policy implications of projecting U.S. law onto conduct in a foreign country. Foreign policy implications are a concern for district courts because of the dangers of imposing U.S. law onto the actions of a foreign jurisdiction.[150] These dangers include conflicts of laws and diplomatic concerns typically reserved for the executive.[151] This

144. *See* discussion *supra* Part II.E.

145. *See* discussion *infra* Part III.A.

146. *See* discussion *infra* Part III.B.

147. *See* discussion *infra* Part III.C.

148. Int'l Crim. Ct. (ICC), *Rome Statute*, pt. 3, art. 25, § 3(c), ICC, Doc. A/CONF. 183/9 (July, 17, 1998), http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

149. Mastafa v. Chevron Corp., 770 F.3d 170, 179 (2d Cir. 2014).

150. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1667 (2013). "[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, and therefore carries less direct foreign policy consequences." *Id.*

151. *Id.* at 1669.

foreign policy concern was one of the primary concerns for the Supreme Court in *Kiobel*.[152] Holding companies liable for aiding and abetting, or a conspiracy that occurs on U.S. soil, alleviates this concern because these suits do not impose U.S. law on foreign conduct in a foreign jurisdiction.[153] Rather, holding U.S. corporations accountable for the actions of planning, financing, and oversight that takes place in the U.S. means that U.S. law reaches only as far as the corners of the U.S. corporate office.[154] Although the international violations themselves took place on foreign soil, the corporations are liable for aiding and abetting those actions, or conspiring to commit those acts directly on U.S. soil, not for the acts themselves.[155]

Even courts that have used the "focus" test, rather than the "touch and concern" fact-based test, are satisfied under this territorial connection.[156] The focus of the conduct under the ATS is a violation of the law of nations.[157] The actual violation is the focus of that law, and under the focus test, that violation must have a sufficient physical nexus to the U.S.[158] According to the ICC and pursuant to the Rome Statute, it is a violation of international law if an individual aids, abets or otherwise assists "[f]or the purpose of facilitating the commission of such a crime . . . including *providing the means* for its commission."[159]

This conduct reflects the importance of direct financing originating in the U.S. to the commission of the relevant conduct, a decisive factor for the Fourth Circuit in rebutting the presumption against

152. *Id.* at 1664.

153. Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations* Ad Hoc *Tribunals*, 21 HARV. HUM. RTS. J. 241, 250 (2008) (reasoning that the offense of aiding and abetting in the scope of liability is different in liability as a direct perpetrator in that "one can be held liable for aiding and abetting genocide, even if one does not share the specific genocidal intent of the principal perpetrator").

154. *See id.*

155. *See id.*

156. *See id.*

157. *See* 28 U.S.C. § 1350 (2012).

158. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1018 (9th Cir. 2014). *See also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266–67 (applying the focus test in the context of the Securities Exchange Act).

159. Int'l Crim. Ct. (ICC), *Rome Statute*, pt. 3, art. 25, § 3(c), ICC, Doc. A/CONF. 183/9 (July, 17, 1998), http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

extraterritoriality in *Al-Shimari v. CACI Premier Technology*.[160] In *Al-Shimari*, the Fourth Circuit drew an important distinction in the contractual relationship executed in the United States for the execution of the relevant conduct abroad.[161] The execution of the contract for security services in *Al-Shimari* was decisive in rebutting the presumption because it directly provided financing, even if not showing a purpose or intent to commit international violations.[162] Similarly, conduct of aiding and abetting, or conspiring, that directly finances or aids the commission of those violations serves the very same purpose as a contract.[163] It directly gives resources to the commission of those international violations, even though one step removed from the relevant conduct itself.[164]

B. The Defendant Must be a U.S. Citizen

The ATS aims to prevent the U.S. from becoming a "safe harbor" for a common enemy of humankind by requiring that a corporate defendant be a U.S. citizen.[165] The potential for adjudication in alternative forums for foreign corporate defendants and availability of extradition of foreign natural persons also helps alleviate the "safe harbor" concern.[166]

In requiring a defendant to hold U.S. citizenship, district courts can avoid implicating the political question doctrine and other foreign policy concerns surrounding an ATS claim.[167] U.S. citizens, whether corporate or personal, implicitly accept the rules and laws of the jurisdiction where they reside.[168] Unlike a corporation merely traded

160. *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014).

161. *Id.*

162. *See id.*

163. United States v. Hodorowicz, 105 F.2d 218, 220 (7th Cir. 1939) ("[A]ny one who *assists* in the commission of a crime may be charged directly with the commission of the crime." (emphasis added)).

164. *See id.*

165. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring).

166. *Id.* Justice Breyer suggested that principles such as "exhaustion, *forum non conveniens*, and comity" were potential safeguards to unnecessary ATS litigation or other concerns about the correct forum. *Id.*

167. *See supra* notes 23–24.

168. *See* Yates v. Bridge Trading Co., 844 S.W.2d 56, 61 (Mo. Ct. App. 1992) (holding the doctrine of internal affairs "provides that the law of the state of incorporation should be applied to settle disputes affecting the . . . structure or . . . administration of a corporation").

on a U.S. stock exchange or doing business in the U.S., a corporate citizen of the U.S. accepts U.S. law and jurisdiction by voluntarily choosing to live or incorporate domestically.[169]

A primary concern for the Supreme Court in *Kiobel* was the availability of alternative forums that were fair and ripe for adjudication:[170] the Netherlands, where the corporate defendant Shell was domiciled, and Nigeria, where the relevant conduct took place.[171] When a corporation is a U.S. citizen, concerns regarding the sufficiency of an alternative forum or *forum non conveniens* are less likely in play.[172]

Therefore, if a defendant is actually a U.S. citizen two important concerns are addressed. First, foreign policy concerns from bringing a foreign company into U.S. court for foreign actions are minimized because a U.S. company has accepted the governing laws and principles of the U.S. based upon their choice to be domiciled domestically.[173] Second, forum selection concerns, such as *forum non conveniens*, are reduced.[174]

C. Clear International Violation Based on the International Criminal Court's Rome Statute

The ATS requires relevant conduct that is "committed in violation of the law of nations or a treaty of the United States."[175] This element clearly identifies what relevant extraterritorial conduct is necessary to state a valid claim under the ATS.[176] Courts have traditionally held that crimes such as torture, extrajudicial killing, and slavery were sufficient violations of international norms, but have not agreed on a unifying standard or body of law to look to in making this

169. *See id.*
170. *Kiobel*, 133 S. Ct. at 1676.
171. *Id.*
172. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
173. *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (illustrating how the Fourth Circuit narrowed the four factors from *Kiobel v. Royal Dutch Petroleum Co.* down to the two factors from *Taylor v. Kellogg Brown & Brown Services* to arrive at the conclusion that although the injury occurred abroad, it did not violate the ATS).
174. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
175. 28 U.S.C. § 1350 (2012).
176. *See id.*

determination.[177] The ICC is the first and only treaty based international court that addresses the most serious violations of international law.[178]

The ICC is governed by the Rome Statute, which enumerates international violations and their requisite elements.[179] Given the wide international support for the ICC, the Rome Statute provides a clear choice for district courts to determine whether the extraterritorial conduct itself is a sufficient violation of the Laws of Nations.[180] Furthermore, circuit courts already rely on the ICC and the Rome Statute, although not solely on it.[181] Utilizing the Rome Statute rather than a wide-ranging historical analysis gives district courts a predictable, bright-line rule for determining if the relevant extraterritorial conduct is actually a violation of the law of nations.

CONCLUSION

In 1980, the Alien Tort Statute underwent a remarkable rebirth in *Filartiga v. Pena-Irala*.[182] However, in 2013, *Kiobel v. Royal Dutch Petroleum* limited its jurisdictional reach.[183] The Court attempted to limit the use of the ATS to extraterritorial conduct by applying the presumption against extraterritorial conduct to the statute.[184] This presumption, however, has raised many questions about what U.S.

177. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980); *see also supra* note 64, at 267. "The Supreme Court has enumerated the appropriate sources of international law. The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga*, 630 F.2d at 880.

178. *About the Court*, INT'L CRIM. CT. (ICC), http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Mar. 2, 2016).

179. *Id.*

180. *Id.*

181. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 275–76 (2d Cir. 2007). The Second Circuit stated that the Rome Statute is a particularly useful tool in discerning international law because it is currently signed by 139 countries and ratified by 105, "including most of the mature democracies in the world . . . [i]t may therefore be taken by and large . . . as constituting an authoritative expression of the legal views of a great number of States." *Id.* (internal quotations omitted).

182. *See* discussion *supra* Part II.

183. See discussion supra Part II.

184. See discussion supra Part II.

contacts are sufficient to exercise jurisdiction.[185] In light of current ATS litigation, it is important to balance judicial caution with hearing ATS claims that have an attenuated U.S. link with equal concern for destroying a statutory cause of action.[186] District courts can safely balance these competing concerns by requiring a showing of (1) allegations of aiding and abetting through financing from the U.S., (2) U.S. citizenship of the defendant, and (3) a clear violation of the ICC's Rome Statute.

185. *See* discussion *supra* Part III.
186. *See* discussion *supra* Part III.