1-1-2016

Extraterritorial Application of the Alien Tort Statute After Kiobel

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Extraterritorial Application of The Alien Tort Statute After Kiobel

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This article explores when corporations can be held liable under the Alien Tort Statute for human rights abuses that are committed outside of the United States. The Alien Tort Statute grants the United States district courts jurisdiction for torts committed against foreigners in violation of the law of nations. While the Alien Tort Statute concerns international law, it does not indicate whether the district courts have jurisdiction over disputes that involve conduct outside of the United States.

In this article, I focus my analysis on the Supreme Court's 2013 decision in Kiobel v. Royal Dutch Petroleum Co. That case determined that the Alien Tort Statute only applies to "relevant conduct" in the United States. In so deciding, the Court evoked a statutory rule of interpretation called the presumption against extraterritoriality, which dictates that unless a federal statute indicates otherwise, it is to only be applied in the territorial jurisdiction of the United States.

This article addresses questions that arise from the application of the presumption against extraterritoriality to the Alien Tort Statute. For example, do federal courts have jurisdiction over claims in which conduct that does not constitute "relevant conduct" under the ATS takes place in the United States, but the international law violation (the "relevant conduct") takes place in a foreign country? Additionally, to what extent does it matter for purposes of ATS jurisdiction that a defendant is a United States corporation?

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In the final portion of this Article, I propose alternative ways to apply the presumption against extraterritoriality to the Alien Tort Statute. I base this analysis on the Supreme Court's decision in Morrison v. National Australia Bank.

I. INTRODUCTION

Over the past 35 years, following the Second Circuit's decision in *Filartiga v. Pena-Irala*,[1] victims of human rights abuse have invoked the federal Alien Tort Statute (ATS)[2] to seek redress for violations of international law. The ATS provides that "[t]he 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 of a treaty of the United States."[3] It was enacted by the First Congress in 1789.[4]

Human rights litigation under the ATS flourished after *Filartiga*.[5] Early post-*Filartiga* ATS cases involved wrongs committed by state officials or quasi-state actors.[6] But ATS litigation soon expanded to cover wrongs committed abroad by multinational corporations ("MNCs"). Major multinational corporations, including Unocal, Royal Dutch Petroleum, Pfizer, Del Monte, ExxonMobil, and others, found themselves subject to ATS suits for violating human rights in foreign countries.[7] Corporate defendants were accused of aiding and abetting states that arbitrarily detained and tortured aliens, practiced child slavery,[8] committed genocide,[9] or engaged in human experimentation without consent.[10] For example, in *Abdullahi*, plaintiffs alleged that Pfizer tested experimental antibiotics on Nigerian children without their knowledge.[11]

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

2 28 U.S.C. § 1350 (2012).

3 *Id.*

4 *Filartiga*, 630 F.2d at 878.

5 *See, e.g*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Forti v. Suarez-Mason, 627 F. Supp. 1531 (N.D. Cal. 1987); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

6 *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 205 (D.C. Cir. 1985) (suit against nine United States executive officials, including the former President Ronald Reagan); *Forti*, 644 F. Supp. at 708 (suit against Argentinian general); Abebe-Jira v. Negewo, 72 F.3d 844, 846 (11th Cir. 1996) (suit against former Ethiopian government official).

7 Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005); Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75 (D.C. Cir. 2014); *see generally* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO L.J. 2161 (2012); *see generally* Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227 (2011).

8 Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

9 *Doe*, 69 F. Supp. 3d at 75.

10 *Abdullahi*, 562 F.3d at 103.

11 *Id.*

Recent years, however, have seen two major developments that threaten to make corporate liability under the ATS a thing of the past. The first concerns whether corporations can have tort liability under international law. In 2010, the Second Circuit held that they cannot—precluding suits against corporations under the ATS.[12] The court reasoned that corporate liability for international law violations is not a common feature among the nations.[13] The Second Circuit also warned that because corporations are "often engines of their national economies," "rendering their assets into compensatory damages, punitive damages, and . . . legal fees" would provoke international conflict.[14] The Ninth Circuit rejected this view. That court explained that because many treaties hold corporations liable for their torts, "it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations of universally recognized principles of international law.'"[15] Other circuits have also rejected the Second Circuit's holding.[16]

The Supreme Court was poised to resolve this split in *Kiobel*, having granted *certiorari* on it.[17] Ultimately, however, the Court resolved the case on a different ground[18]—one that has created a second barrier to corporate liability under the ATS. In *Kiobel*, the Supreme Court ruled that the ATS is subject to the presumption against extraterritoriality.[19] Under this presumption, a federal statute only applies within the territorial jurisdiction of the United States, unless the statute indicates otherwise.[20] The presumption can be overcome, the Court held, only through a test that considers the location of defendants' conduct and the force with which plaintiffs' claims touch and concern the territory of the United States.[21] Thus, for now, most lower courts accept the possibility of corporate liability under the ATS, but all are bound by the Supreme

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12 *Kiobel*, 621 F.3d at 120.

13 *Id.* at 143.

14 Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 270 (2d Cir. 2011) (Jacobs, C.J., concurring).

15 Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011).

16 Sykes, *supra* note 7, at 2162-63 ("The second circuit . . . concluded that corporations cannot be held liable under the ATS, although the Seventh, Ninth, Eleventh, and D.C. Circuits disagree.").

17 Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum, Co., 132 S. Ct. 472 (2011) (No. 10-1491).

18 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2012); Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CALIF. L. REV. 1495, 1521 (2014) (explaining that after *Kiobel* it is still unclear what courts may hear cases against U.S. corporate defendants).

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

20 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

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

Court's determination that the presumption against extraterritoriality applies to the ATS.

Since 2013, lower courts have been left with the difficult task of interpreting the controlling language in the Court's opinion. How broadly or narrowly *Kiobel* is interpreted has major implications on corporate liability under the ATS. If corporations cannot be liable under the ATS, the United States may be silently communicating to the world that corporations may operate at the expense of foreign nationals.[22]

This article describes and analyzes the application of the *Kiobel* test in the lower courts. In the first section of this article, I provide information on the building blocks of my argument—the Alien Tort Statute, the Presumption against Extraterritoriality, and the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co*. In the following section, I analyze the *Kiobel* test and its application in the lower courts. I then address whether the test properly administers the presumption against extraterritoriality as it should apply in the context of the ATS. Finally, I propose an application of the presumption against extraterritoriality to the ATS that adopts the Supreme Court's holding in *Morrison v. National Australia Bank*.

II. THE ALIEN TORT STATUTE

In 1789, the first Congress enacted the Alien Tort Statute (ATS) in order to create a mechanism by which the United States could enforce the law of nations.[23] The ATS dictates that "[t]he 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."[24] For almost 200 years after its enactment, the ATS lay dormant—invoked twice in the 18th century, and only once more in the next 167 years.[25] With the Second Circuit's decision in *Filartiga v. Pena-Irala*, the ATS was finally revived after much rest.[26] In *Filartiga*,

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22 *See* Mujica v. AirScan Inc., 771 F.3d 580, 619 (9th Cir. 2014) ("Piracy and its modern-day equivalents, including torture and genocide, are of particular concern to the sovereign . . . because failure to [take action] . . . might render the sovereign 'an accomplice or abetter of [its] subject's crime, and draw[] upon [its] community the calamities of foreign war.'") (citing 4 W Blackstone, Commentaries on the Laws of England 68 (1769)).

23 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

24 28 U.S.C. § 1350 (2012).

25 Doe v. Exxon Mobil Corp., 654 F.3d 11, 18 (2011).

26 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004); Eugene Kontrovich, *Kiobel Surprise: Unexpected By Scholars But Consistent with International Trends*, 89 NOTRE DAME L. REV 1671, 1674 (2014) (explaining that modern ATS litigation began with *Filartiga*).

the Court upheld application of the ATS for two Paraguayan plaintiffs.[27] They claimed that the defendant, a Paraguayan police inspector, kidnapped and tortured their family member in Paraguay.[28] In coming to his conclusion, Judge Kaufman explained that the law of nations is a part of federal common law, and as such, torture committed against an alien, a violation of the law of nations, falls within the court's ATS jurisdiction.[29] *Filartiga* marked the ATS's entrance into "the modern internationalized human rights movement that began after World War II and flourished in the 1970's."[30] The opinion introduced a new way for the victims of human rights abuse to seek redress in federal court.[31]

Multinational corporations did not look favorably on this expansion of ATS litigation for obvious reasons.[32] Nor did many commentators. One called the expansion of ATS litigation to cover multinational corporations an "awakening monster"—posing a "nightmare scenario" that could have a "chilling impact" on foreign trade and investment and interfere with United States foreign relations.[33]

In 1984—just four years after *Filartiga*—Judge Robert Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*[34] casted doubt on the continuing viability of ATS actions against corporations. He argued that because human rights law was unknown in 1789, the ATS could not grant jurisdiction for claims alleging violations of contemporary human rights norms.[35] Other courts rejected this narrow

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27 *Filartiga*, 630 F.2d at 890.

28 *Id.* at 878.

29 *Id.* at 878, 885.

30 Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474 (2014).

31 *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

32 Ernest A. Young, *Universal Jurisdiction, The Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1054 (2015) ("By implicating large multinational corporations with substantial litigation budgets, the second wave of ATS litigation pulled in sophisticated defense counsel.").

33 GARY HUFBAUER & NICHOLAS MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (Inst. for Int'l Econ. ed., 2003); *see also* Stephens, *supra* note 30, at 1474 (remarking that some commentators warned that recognizing corporate liability within the ATS would have a devastating impact).

34 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring).

35 For commentary *see* Bradford R. Clark, *Tel-Oren, Filartiga, and the Meaning of the Alien Tort Statute*, 80 U. CHI. L. REV. DIALOGUE 177, 190 (arguing that the Supreme Court's opinion in *Sosa* and *Kiobel* has more in common with Bork's concurrence than it does with *Filartiga*); *but see* Julian Ku, John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 161 (2004) (recognizing that commentators have argued that suits alleging violations of customary

construction,[36] and Congress subsequently re-affirmed the availability of the federal courts to hear claims of human rights violations abroad with the enactment of the Torture Victim Protection Act of 1991.[37] In 2004, the Supreme Court ruled that the ATS does provide jurisdiction for violations of human rights norms that are "specific, universal, and obligatory."[38]

A. Congress' Purpose in Enacting the ATS

The first Congress' motivation behind enacting the ATS can never be precisely known.[39] Theories, however, share in common the idea that the statute was a "part of the protective armor designed to shield a young and vulnerable nation in a dangerous and unpredictable world."[40] But in other respects, there is sharp division. One belief is that states within the United States did not sufficiently appreciate the international consequences that could arise from torts committed against aliens, such as ambassadors, within United States territory.[41] If left unattended, such torts could threaten the United States' standing with other nations,[42] and ultimately lead to war.[43] Through this interpretation, Congress gave the federal courts jurisdiction over international law wrongs committed in the United States against foreigners as a protective measure. This was to

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international law do not require a separate cause of action, because the First Congress assumed that these violations could be brought under the general common law).

36 *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (holding that the *Filartiga* is more in line with principles of international law than Bork's approach in *Tel-Oren*); *see also* Xuncax v. Gramajo, 886 F. Supp. 162, 180 (D. Mass. 1995) (noting that Bork's view is more restrictive than the plain language of the ATS).

37 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (provides an independent cause of action for individuals in cases of torture or extrajudicial killings); *see* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1708 (holding that only natural persons can be liable under the TVPA, which is not necessarily true of the ATS).

38 Sosa v. Alvarez-Machain, 542 U.S. 692, 748 (2004).

39 *See* Burley, *supra* note 31, at 463.

40 *Id.* at 464.

41 *Id.* at 465; Stephens, *supra* note 30, at 1471 ("Prior to the adoption of the Constitution, the leaders of the Confederation's weak central government repeatedly expressed concern about their inability to enforce international obligations.").

42 *See* Burley, *supra* note 31, at 465.

43 *Sosa*, 542 U.S. at 715; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) ("There is evidence . . . that the intent of [the ATS] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis."); *see* Brief for Professors of International Law, Foreign Relations Law and Federal Jurisdiction as Amici Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., (No. 10-11491), 2012 WL 3276505, at *10.

be accomplished by giving the federal judiciary "cognizance of all causes in which the citizens of countries are concerned."[44]

A different view has much broader implications. By this view, the First Congress believed that addressing torts committed against foreigners was essential in order for the United States to become a fully functioning member of the international community.[45] In other words, it was the United States' international duty to entertain suits alleging offenses against citizens of other nations.[46] Indeed, under this approach, the United States could only become a nation among nations if it complied with the laws governing other sovereigns.[47]

B. Causes of Action Under the ATS

In *Sosa*, Justice Souter held that the ATS is a jurisdictional statute[48] that does not grant judges the power to "mold substantive law."[49] He further found that the drafters of the ATS recognized a modest number of international law violations as claims under federal law, over which the ATS was to provide jurisdiction.[50] In 1789 these claims included violation of safe conducts, infringement of the rights of ambassadors, and piracy.[51] Justice Souter reasoned that historical materials suggest that the statute was not a stillborn and was meant to have practical effect as soon as it came into existence.[52]

Justice Souter also decided that the ATS is not limited to claims that would have been recognized as international law violations in 1789. He held that a court is able to recognize a new cause of action under the ATS, if that violation "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[53] International violations are actionable under the ATS if

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44 Burley, *supra* note 31, at 465.
45 *Id.* at 484.
46 *Id.*
47 *Id.*
48 *Sosa*, 542 U.S. at 713 (holding that ATS is a jurisdictional state because it was placed in § 9 of the Judiciary Act, which was concerned with federal-court jurisdiction); *but see* Eugene Kontrovich, *Kiobel Surprise: Unexpected By Scholars But Consistent with International Trends*, 89 NOTRE DAME L. REV 1671, 1687 (2014) ("But the ATS as explicated in *Sosa* is not a garden-variety jurisdictional statute; rather, it is at once both jurisdictional and substantive in that it authorizes the creation of federal common law.").
49 *Id.*
50 *Id.* at 720.
51 *See id.* at 724.
52 *See id.* at 714; *id.* at 719 ("The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have practical effect.").
53 *Id.* at 725.

they "affect the relationship between states or between an individual and a foreign state . . . ."[54] The courts may look to a variety of sources[55] to determine which violations of the law of nations are sufficiently specific, universal, and obligatory to satisfy the *Sosa* requirements for adopting an ATS cause of action.[56]

Sosa itself held that a claim for "arbitrary detention" is too vague to be actionable.[57] In that case, a federal grand jury indicted Alvarez, a Mexican national, for the torture and murder of a DEA agent in Mexico.[58] The United States issued a warrant for his arrest, but the Mexican Government refused to cooperate.[59] In response, the DEA abducted and transported Alvarez to the United States.[60] Alvarez brought suit under the ATS against the DEA for arbitrarily detaining him.[61] The Court held that arbitrary detention was not a clear and universally recognized international law violation required for ATS jurisdiction.[62] Since then, lower courts have found claims for crimes against humanity, war crimes, genocide, torture, extrajudicial killings, forced disappearances of persons, and slavery,[63] to meet *Sosa's* test. Other courts have found claims for detention of a foreign national without being informed of availability of consular notification and access,[64] cross border parental-child abduction,[65] use of poisoned weapons,[66] terrorism[67], "the right to life,"[68] and "the right to health,"[69] to not meet *Sosa's* test.

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54 Mastafa v. Chevron Corp., 770 F.3d 170, 181 (2d Cir. 2014) ("Murder of one private party by another, universally proscribed by domestic law of all countries . . . is not actionable under the AT[S] . . . because the nations of the world have not demonstrated that this wrong is of mutual, and not merely several, concern.").

55 Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 316 (D. Mass. 2013) (finding that treaties, judicial decisions, and controlling legislative content of international law can be consulted in finding international law violations that furnish ATS jurisdiction).

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

57 *See id.* at 738.

58 *Id.* at 697.

59 *Id.* at 697-98.

60 *Id.* at 698.

61 *Id.*

62 *Id.* at 738.

63 Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

64 Mora v. New York, 524 F.3d 183, 208 (2d Cir. 2008).

65 Taveras v. Taveraz, 477 F.3d 767, 781 (6th Cir. 2007).

66 Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104, 119 (2d Cir. 2008).

67 In re Chiquita Brands Intern., Inc. Alien Tort Statute and S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1321 (S.D. Fla. 2011).

68 Flores v. S. Peru Copper Corp., 343 F.3d 140, 160 (2d Cir. 2003).

69 *Id.*

Significantly, the lower courts have found that aiding and abetting liability satisfy *Sosa's* requirement of definiteness and acceptance.[70] The recognition of aiding and abetting liability under the ATS has been paramount for human rights plaintiffs looking to hold MNCs liable for violations of international law. Corporations are often indirect contributors to alleged ATS violations.[71] In *Doe*, for example, Nestle USA was accused of providing assistance to Ivorian famers who used child slaves.[72] To establish aiding and abetting liability, many federal circuits require a showing that the defendant provided assistance to the principal "with the *purpose* of facilitating the commission of that crime."[73] Plaintiffs attempting to hold MNCs liable for their conduct have often failed on this ground.[74]

III. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Whenever Congress enacts law, it is presumed that the law only governs within the territorial jurisdiction of the United States.[75] Courts may, however, infer from a federal statute's text that the law's coverage extends beyond the territorial jurisdiction of the United States.[76] This

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70 *E.g.*, Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007); Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1078 (C.D. Cal. 2010); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008); Aziz v. Alcodac, Inc., 658 F.3d 388, 390 (4th Cir. 2011).

71 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013) (alleged that Royal Dutch Petroleum enlisted help of Nigerian Government to violently suppress protesting citizens); Doe v. Exxon Mobil Corp., 59 F. Supp. 3d 75, 83 (D.C. Cir. 2014) (alleged that Exxon Mobil, who hired Indonesian soldiers to guard a natural gas field, injured and killed plaintiffs).

72 *Doe*, 748 F. Supp. at 1064.

73 *In re Chiquita Brands Intern., Inc.*, 792 F. Supp. 2d at 1343 (emphasis added) (holding that in order to plead aiding and abetting liability, plaintiff must establish that defendant acted with the purpose or intent to assist in the violation); *Aziz*, 658 F.3d at 401 (holding that a purposeful mens rea is required for aiding and abetting liability); *contra* Doe v. Exxon Mobil Corp., 654 F.3d 11, 35 (D.C. Cir. 2011) (holding that mere knowledge will suffice for the mens rea of an aider and abettor); *see* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1161 (11th Cir. 2005) (holding that plaintiffs had to establish a knowledge mens).

74 *See, e.g.*, Mastafa v. Chevron Corp., 770 F.3d 170, 192 (2d Cir. 2014) (holding that there is no support that Chevron intended to aid and abet violations of the Saddam Hussein regime); *see also Aziz*, 658 F.3d at 401 (holding that conclusory allegations that defendant corporation purposefully placed Kromfax into commerce to manufacture chemical weapons is insufficient to meet the aiding and abetting mens rea requirement).

75 E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

76 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010) (finding that whether the presumption applies is a question of congressional intent).

rule of statutory interpretation serves to prevent "unintended clashes between our laws and those of other nations."[77]

In 1909, the Supreme Court delivered *American Banana Co. v. United Fruit Co.*, its seminal case on the presumption against extraterritoriality, before it was known as such.[78] United Fruit Co., a New Jersey corporate defendant, monopolized banana trade by buying its competitors' businesses.[79] American Banana Co., the plaintiff, owned a banana plantation in Panama.[80] During that time, Panama gave the Costa Rican government control over the area where plaintiff operated its banana plantation.[81] Plaintiff alleged that United Fruit Co. induced Costa Rican soldiers to seize plaintiff's banana plantation,[82] after which, plaintiff then brought suit in federal court under the Sherman Act to prevent defendant from participating in the banana market.[83] The Court ultimately declined to find jurisdiction under the Sherman Act because the conduct at issue took place outside of the United States.[84] It declared that "in case of doubt [a statute should be] confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is prima facie territorial."[85] Thus, the Court ruled that the Sherman Act did not apply extraterritoriality.[86]

Throughout the years, courts have applied the presumption against extraterritoriality to dismiss claims where conduct took place outside of the United States. In *Morrison*,[87] plaintiffs brought suit against National Australia Bank for allegedly committing securities fraud in violation of section 10b-5 of the Securities and Exchange Act of 1934.[88] The Court never proceeded to the merits of plaintiffs' securities fraud claim.[89] Rather, it ruled that the presumption against extraterritoriality applied to section 10b-5 of the Securities and Exchange Act because nothing in the text of 10b-5 indicated that the statute should have extraterritorial application.[90] Because the securities in question were traded exclusively

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77 *Arabian Am. Oil Co.*, 499 U.S. at 248.
78 Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).
79 *Id.* at 354.
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.* at 357.
84 *Id.* at 355.
85 *Id.* at 357 (internal quotation marks omitted).
86 *Id.*
87 *See infra* pp. 137-38.
88 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 250-51 (2010).
89 *Id.* at 273.
90 *Id.* at 262.

on the Australian Stock Exchange, and on other foreign exchanges, the Court found that the presumption barred plaintiffs' suit.[91]

Similarly, the *Foley Bros* court held that the presumption against extraterritoriality applied to the Eight Hour Law,[92] which dictated that workers with longer than eight hour shifts were entitled to a payment of not less than one-half times the standard pay rate.[93] In *Foley Bros*, defendants contracted to construct public works for the United States in Iraq and Iran.[94] Plaintiffs, who were laborers under the contract, worked more than eight hour days without overtime compensation.[95] Nonetheless, the Court held that because no language in the Eight Hour Law suggested that Congress intended for the law to apply extraterritorially, the Court could not hear a claim for violations that took place in Iraq and Iran.[96]

A. Applying the Presumption Against Extraterritoriality to the ATS

The presumption against extraterritoriality is intended to prevent "unintended clashes between our laws and those of other nations." [97] Indeed, the legislative and executive branches are thought to be better equipped to handle sensitive questions of international law.[98] These concerns are of particular importance in regards to the ATS, under which courts can craft private causes of actions based on international law violations that carry unknown foreign policy consequences.[99] When conduct occurs in the territory of a foreign sovereign, as it often does under the ATS, foreign policy concerns are magnified.[100] However, ATS claims that reach a foreign territory do not always implicate the same

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91 *Id.* at 273.
92 *See* Foley Bros v. Filardo, 336 U.S. 281, 285 (1949).
93 *Id.* at 283.
94 *Id.*
95 *Id.*
96 *Id.* at 285.
97 E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
98 John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 386 (2010).
99 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004).
100 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013); Amicus US 6 ("Modern litigation under the ATS has focused primarily on alleged law of nation violations committed within foreign countries.").

presumption.[101] For example, many cases will involve sovereigns that are either silently or openly in favor of the litigation.[102]

While the recognition of certain international law violations may create foreign policy consequences, failing to address those international law violations can create similar consequences.[103] That is particularly so when the international law violations are committed by United States citizens. In such cases, the application of the presumption can create the very international consequences the presumption seeks to avoid.[104] If the United States makes its courts unavailable for claims against its citizens, for actions taken within a foreign country, the United States may be sending the other nations a message of its acquiescence in the alleged violations.[105]

In *Kiobel*, the Court held that the presumption against extraterritoriality applies to the ATS because Congress gave no indication that it intended for the statute to have extraterritorial reach.[106] Justice Breyer, on the other hand, felt the presumption should not apply to the ATS.[107] He explained that "the ATS . . . was enacted with 'foreign matters' in mind."[108] In support of his position, Breyer noted the statute's reference to "'alien[s],' 'treat[ies],' and 'the law of nations,'"[109] and further argued that he ATS' purpose is to remedy violations of the law of nations that could otherwise lead to international consequences.[110]

The ATS concerns international law. The United States is formally committed to the application of international law, while recognizing that human rights violations are not purely domestic concerns of any

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101 Stephens, *supra* note 30, at 1540.

102 *Id.*; *see, e.g.*, In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1472 (9th Cir. 1994) ("This is evidenced by the Philippine government's agreement that that the suit against Marcos proceed.").

103 *See* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 323 (D. Mass. 2013) ("Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within that state's territory. 'If the court's decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible'") (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring)); *see also* Anthony J. Colangelo, *A United Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1024 (2011) ("[T]he presumption . . . may achieve precisely what it was designed to avoid: discord with foreign nations.").

104 *Id.*

105 *Id.*

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

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

108 *Id.* at 1672.

109 *Id.* (citing 28 U.S.C. § 1350 (2012)).

110 *Id.*

sovereign state.[111] One aspect of international human rights law is the concept of universal jurisdiction.[112] The Restatement of Foreign Relations Law provides that a State should have jurisdiction to punish certain international law violations even if the State lacks any territorial connection to the alleged offense or has any nationality links with the offender.[113] Piracy, genocide, and war crimes are a few offenses that fall under this definition.[114] Even though these violations are also actionable under the ATS, *Kiobel* ruled that the presumption against extraterritoriality applies to the statute.[115] As a result, the ATS does not grant jurisdiction on claims that are otherwise actionable under the principle of universal jurisdiction.

IV. THE *KIOBEL* TEST AND A CRITIQUE OF ITS APPLICATION IN THE LOWER COURTS

In 2013, the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* decided that the presumption against extraterritoriality applies to ATS claims.[116] *Kiobel* involved Nigerian nationals, residing in the United States, who filed suit against Dutch, British, and Nigerian corporations.[117] The plaintiffs alleged that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria.[118] Specifically, plaintiffs accused Royal Dutch Petroleum of enlisting the Nigerian Government to "violently suppress" citizens who protested the environmental effects of Royal Dutch Petroleum's oil exploration in Nigeria.[119] Chief Justice Roberts, writing for the majority, held, on the facts of the case, that "all the relevant conduct took place outside the United States."[120] He further declared that, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the

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111 *See* U.S DEPARTMENT OF STATE, *Human Rights*, (Nov. 11 2015), www.state.gov/j/drl/hr ("The United States seeks to [h]old governments accountable to their obligations under universal international human rights norms and international human rights instruments.").

112 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: UNIVERSAL JURISDICTION TO DEFINE AND PUNISH CERTAIN OFFENSES § 404 (1987).

113 *Id.*

114 *Id.*

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

116 *Id.*

117 *Id.* at 1662.

118 *Id.*

119 *Id.*

120 *Id. at* 1669.

presumption against extraterritorial application."[121] Roberts added that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[122]

Kiobel sets forth two inquiries to determine whether the presumption against extraterritoriality bars an ATS claim: (1) does all of the relevant conduct take place outside of the United States? [123] and (2) does the claim touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality? [124] These inquiries do not provide lower courts with an adequate framework for resolving complicated fact scenarios that often arise under the ATS.[125]

Consider the following hypotheticals. In each fact pattern, a coal mining company ("mining company") hires a criminal organization ("organization") to torture a coal mining labor union member ("union member"). The union member thereafter brings an ATS action against the company. The first hypothetical will show difficulties in applying the first part of the *Kiobel* inquiry. The second hypothetical will show difficulties in applying the second.

In the first hypothetical, the mining company, the organization, and the union member are from Colombia. The Colombian mining company hires the Colombian organization in the United States, where they plan the torture. The Colombian organization then commits the torture in Colombia.

Under the first hypothetical, some conduct takes places in the United States, while some conduct takes place abroad. The defendant hires the torturer in the United States, plans the torture in the United States, but executes the torture in Colombia. Under the first *Kiobel* inquiry, would hiring a torturer and planning with a torturer constitute "relevant conduct"? Assuming it does, the criminal organization still executed the torture outside of the United States. Is it enough that some of the "relevant conduct" takes place inside the United States, while the main conduct takes place abroad? How much relevant conduct needs to take place in the United States for ATS jurisdiction?

In the second hypothetical, the mining company and the organization are from the United States, while the union member is from Colombia. The United States mining company hires the United States organization

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121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1754 (2014) ("The *Kiobel* decision is complex and confusing, offering scant guidance as to how lower courts should proceed when claims touch and concern U.S. territory.").

in Colombia, where they plan the torture. The United States organization then tortures the Colombian union member in Colombia.

In the second hypothetical, all of the relevant conduct, including the hiring, the planning, and the torture takes place abroad, putting an end to the first inquiry. The defendant is a United States company that hired a United States criminal organization to torture a Colombian citizen. Does the fact that the defendant is a United States company, coupled with the fact that it hired a criminal organization from the United States, touch and concern the territory of the United States with sufficient force? What if the criminal organization was from Colombia and only the defendant was from the United States? Would that claim sufficiently touch and concern the United States? What if the union member was part of a United States labor union? Would that be enough force to displace the presumption?

Many of these questions regarding the operation of the two *Kiobel* inquiries are questions that the lower courts have attempted to answer. The following section will illustrate how the lower courts have dealt with some of these ambiguities.

There are a several types of United States contacts that can potentially render a claim domestic, and not extraterritorial, for purposes of the presumption against territoriality. These include: (1) the execution of a violation in the United States; (2) the planning of a violation in the United States; (3) the effects of a violation in the United States; and (4) the United States citizenship of a party to the violation. On one end, if the execution of a violation takes place in the United States, the claim is clearly domestic and the presumption will be no obstacle to jurisdiction. On the other hand, if the execution of the violation takes place outside of the United States, but a party to the claim is a United States citizen, or the effects of the claim are felt in the United States, the claim may be considered extraterritorial and barred under the presumption. Similarly, if the execution of a federal law violation occurs outside of the United States, but the planning of the execution of the violation takes place in the United States, it is unclear whether the claim is domestic or extraterritorial for the purposes of the presumption.

The *Kiobel* test looks to the location of "relevant conduct" to determine whether a claim is extraterritorial. This forecloses the possibility of finding a claim to be domestic when there exists simply United States effects or a United States citizen is a party to the claim, without there being United States conduct. Thus, under *Kiobel* a claim is only extraterritorial if it contains effects in the United States or if a United States citizen is involved. At this point, the presumption may only be overcome if the claim touches and concerns the United States territory with sufficient force.

A. Relationship Between the Two Kiobel Clauses

1. When to Proceed

Lower court decisions disagree as to when courts should proceed to the second *Kiobel* inquiry. The Second Circuit held that if none of the relevant conduct takes place within the United States, the court need not proceed to the second inquiry; the presumption against extraterritoriality, which is not easily overcome, bars plaintiff's ATS claim.[126] By this account, the only time the second inquiry would be triggered is if it is *not* the case that all the relevant conduct took place abroad. Only in such an instance would the second question be triggered, in which the courts would employ a "fact-based" inquiry to see if the claims "touch and concern" the United States with "sufficient force" to displace the presumption.[127]

The Fourth Circuit, on the other hand, determined that the two inquiries are always relevant.[128] It held that even if all the relevant conduct takes place abroad, the court should still consider the inquiry contemplated in the second part of the *Kiobel* test.[129] Thus, even if all relevant conduct took place abroad, the court needs to ask whether the "claims" of the plaintiff, "including the parties' identities and their relationship to the causes of action," touch and concern the United States with enough force to displace the presumption against extraterritoriality.[130]

There is reason to view the Fourth Circuit's approach as the better one. If the Second Circuit's approach were correct, there would have been no need for the Supreme Court to articulate part two of its test, based on the facts of *Kiobel*. In *Kiobel*, the Court said all the relevant conduct occurred abroad. If that were the end of the matter, it would be *dictum* for the *Kiobel* Court to have articulated circumstances under the second inquiry that would displace the presumption.[131] Admittedly, the

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126 Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013) (holding that *Kiobel* bars the plaintiffs' claims because the plaintiffs did not allege "any relevant conduct that occurred within the United States.").

127 *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 528 (4th Cir. 2014).

128 *See id.*

129 *Id.* at 528 ("However, the 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 the United States territory.").

130 *Id.* at 527.

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

Courts do occasionally give guidance to lower courts beyond the facts of the case.[132]

The disagreement, between the Second and the Fourth Circuits, is important for corporate liability. If the Second Circuit approach is correct, then ATS actions for human rights violations that take place abroad will be barred even if the defendant is an American multinational, so long as all the "relevant conduct" (whatever that may be) took place abroad. If the Fourth Circuit is correct, on the other hand, there might be room for arguing that the claims touch and concern the territory of the United States on account of the defendant corporation's United States nationality.

2. Conflation of the Clauses

The Second Circuit partially conflated parts one and two of the *Kiobel* test.[133] In *Mastafa*, the Second Circuit declared that in deciding whether the presumption against extraterritoriality bars a plaintiff's claim, "the first step is to determine whether the 'relevant' conduct . . . sufficiently 'touches and concerns' the territory of the United States . . . ."[134] In *Al Shimari*, the Fourth Circuit identically declared that "the presumption against extraterritorial application bars the exercise of subject matter jurisdiction over plaintiffs' ATS claims unless the 'relevant conduct' . . . 'touch[es] and concern[s]' the territory of the United States with sufficient force . . . ."[135]

Part two of the *Kiobel* test asks whether the "claims"—not the "relevant conduct"—touch and concern the United States.[136] In *Al Shimari*, the Fourth Circuit explained this distinction: "We also note that the Court broadly stated that the 'claims,' rather than the 'alleged tortious conduct,' must touch and concern United States territory with sufficient force."[137] The court then defined "claim" as the "aggregate of operative

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[132] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the mentally ill and felons are still forbidden from using guns, even though the mentally ill or felons were not involved in the case).

[133] Mastafa v. Chevron Corp., 770 F.3d 170, 186 (2d Cir. 2014) (holding that the first step is to determine whether the relevant conduct sufficiently touches and concerns the territory of the United States); *Al Shimari*, 758 F.3d at 527 (holding that "relevant conduct" frames the touch and concern inquiry).

[134] *Mastafa*, 770 F.3d at 186.

[135] *Al Shimari*, 758 F.3d at 528.

[136] *Kiobel*, 133 S. Ct. at 1669; Mujica v. AirScan Inc., 771 F.3d 580, 618 (9th Cir. 2014) (Zilly, J., concurring) ("In concluding that . . . plaintiffs must allege some 'conduct' within our borders, the majority misconstrues *Kiobel*'s 'touch and concern' test, which is focused on the connection between the ATS 'claims' and the United States.").

[137] *Al Shimari*, 758 F.3d at 527.

facts giving rise to a right enforceable by a court,"[138] and added that "claim" should include the parties' identities and their relationship to the causes of action.[139] By this reading, circumstances that can displace the presumption against extraterritoriality are broader than the defendant's "relevant conduct."[140] While "relevant conduct" is certainly one component of a plaintiff's "claim," (the aggregate of operative facts giving rise to an enforceable right) to be considered under the second inquiry, so is the defendant's status as a United States corporation, which does not fit into the narrower category of the defendant's "conduct."[141]

The plain language of *Kiobel* corresponds with the Fourth Circuit's approach that it is the "claims" that should touch and concern the United States, not just the "relevant conduct."[142] Properly understood, Justice Breyer's concurrence offers factors that can make up those "claims."[143] Breyer would find jurisdiction over an ATS claim where: (1) the alleged tort occurred on American Soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest.[144] Under Breyer's test, the fact that the defendant is an American national, or that the defendant's conduct substantially and adversely affects an important American interest, can make up the components of a claim that "touch and concern the United States [ ]with sufficient force . . . ."[145]

B. Kiobel Part One: "Relevant Conduct"

1. Restrictive Reading of "Relevant Conduct"

Under the first *Kiobel* inquiry, if a claim involves conduct that occurs both domestically and abroad, the "relevant" conduct must occur in the United States.[146] Otherwise, a plaintiff will be required to show, under part two, that the claim touches and concerns the United States with enough force in order to overcome the presumption.[147]

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138 *Id*. (citing BLACK'S LAW DICTIONARY 281 (9th ed. 2009)).
139 *Id*.
140 *See id.*
141 *See id.*
142 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).
143 *Id*. at 1671 (Breyer, J., concurring).
144 *Id.*
145 *See id.*
146 *See id.*
147 *Id.*

The lower courts have narrowly interpreted "relevant conduct" from the first *Kiobel* inquiry.[148] *Cardona*, an Eleventh Circuit case, is illustrative of the lower courts' narrow interpretation.[149] In that case, four-thousand Colombians brought suit against Chiquita, Inc., a United States corporation, for violating the ATS.[150] They alleged that Chiquita participated "in a campaign of torture and murder in Colombia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in [New Jersey]."[151] The plaintiffs' claimed that terrorists used these weapons to commit war crimes.[152] Upon review, the Eleventh Circuit decided that the presumption against extraterritorially defeated jurisdiction because all the tortious conduct took place outside of the United States.[153]

The court's holding reflects its position that under part one of *Kiobel*, relevant conduct is conduct that constitutes a violation of the law of nations under *Sosa*.[154] While the scope of "relevant conduct" under part one is unclear, it seems that if the *Kiobel* majority wanted only the location of defendant's international law violation to determine whether the presumption against extraterritoriality barred a claim, it would have avoided using a term as general as "relevant conduct," which seems to encompass more.[155]

The *Cardona* court ultimately found that approving weapon shipments to terrorist organizations did not qualify as a violation of the law of nations under *Sosa*.[156] As a result, plaintiffs' claims were subject to part two of the *Kiobel* test.[157] Under part two, the court, like the

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148 *See* Balintulo v. Daimler AG, 727 F.3d 174, 193 (2d Cir. 2013) (holding that the presumption bars claims where subsidiary companies facilitate an apartheid regime from U.S.); *see also* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) (holding that the presumption bars claims where a subsidiary of a Delaware corporation hire interrogators that participate in conduct that violates Geneva convention).

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

150 *Id.* at 1188.

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

152 *Id.* at 1194 (Martin, J., dissenting).

153 *Id.* at 1189 (noting that any tort in the case was committed outside of the United States).

154 *See id.* The Second and Ninth Circuits have similarly limited relevant conduct to tortious conduct. *See* Balintulo v. Daimler AG, 727 F.3d 174, 182 (holding that the presumption bars the claim because all of the violations of international law occurred abroad); *see also* Doe I v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 96 (D.C. 2014) (holding that ATS claims can go forward if some actionable conduct occurred in the United States).

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

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

157 *Id.*

Second circuit, misconstrued the *Kiobel* inquiry and decided that "[no] act constituting a tort in terms of the ATS touched and concerned the territory of the United States with any force."[158]

2. Overactive Presumption Against Extraterritoriality

As a result of the lower courts' restrictive interpretation of "relevant conduct," plaintiffs must establish that the defendant committed an international law violation on American soil.[159] This creates a high barrier to ATS jurisdiction.

To illustrate this point, imagine that Royal Dutch Petroleum provided financial assistance from the United States to an oppressive South African governmental regime that tortured and killed its citizens in exchange for access to South African petroleum reservoirs. In many jurisdictions, in order to prove that Royal Dutch Petroleum aided and abetted the regime (committed an international law violation), plaintiffs would have to show that Royal Dutch Petroleum provided financial assistance with the *purpose* of furthering the regime. If Royal Dutch Petroleum provided financial assistance only to gain access to petroleum, the corporation did not act with the *purpose* of furthering the regime, and did not aid and abet the government. And if plaintiffs were in a jurisdiction that proceeded to the second inquiry, they would have to plead that their claim touches and concerns the territory of the United States. If not, their claim would be barred by the presumption against extraterritoriality.

The jurisdictional threshold is lower in other statutory contexts. For section 10b-5 of the Securities and Exchange Act of 1934, if an investor purchases or sells securities on a United States stock exchange, the presumption against extraterritoriality would not bar the investor's claim, even where other conduct required for establishing the 10b-5 violations occurs abroad.[160] Although, the plaintiff does need to show that the entire violation occurred within the United States, as is the case within the context of the ATS.[161] For example, a company could defraud investors

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158 *Id.* It is the "claims" that should touch and concern the territory of the United States, which is broader than requiring a tort to touch and concern. *See* Mujica v. AirScan Inc., 771 F.3d 580, 618 (9th Cir. 2014) (Zilly, J., concurring).

159 *See, e.g.*, *Doe I*, 69 F. Supp. 3d at 96 (holding that an ATS claim can go forward if some actionable conduct occurred in the United States).

160 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 270-71 (2010). Under *Morrison*, as long as the purchase or sale of the security occurs in the United States, the Court has jurisdiction to hear the claim. *Id.* This is so even if the fraudulent conduct in connection with the purchase or sale of the security, such as releasing misleading statements, occurs outside of the United States. *See id.*

161 *See id.* at 267-68.

by reporting misleading figures about a company's financial health in Australia. As long as the securities were purchased or sold on an American stock exchange, the presumption against extraterritoriality would not bar a plaintiff's suit under section 10b-5 of the Securities and Exchange Act.

Similarly, the Court in *Continental Ore Co.* did not require plaintiffs to plead that a violation of the anti-trust laws occurred within the United States to attain jurisdiction.[162] In *Continental Ore Co.*, defendant corporations were accused of monopolizing the trade of vanadium products by selling them in Canada.[163] Despite the foreign location of defendant's conduct, the Court had jurisdiction to hear the claim.[164] The Court reasoned that the presumption against extraterritoriality did not apply because the sale of Vanadium products in Canada impacted trade within the United States.[165] Plaintiffs did not have to allege that every element, required to constitute violation of the law, occurred in the United States, as they do under the ATS.[166]

The presumption against extraterritoriality is less aggressive in connection with 10b-5 and the antitrust laws. However, for a plaintiff to avoid triggering the presumption against extraterritoriality under the ATS, he must establish that the defendant, on American soil, violated international law—not merely an element of that law.

C. Kiobel Part Two: Displacing the Presumption Against Extraterritoriality

1. Meaning of "Touch and Concern the Territory of the United States"

The second *Kiobel* inquiry uses language that has proven to be ineffective within the context of covenants and servitudes. "Touch and concern" originates from an old English decision concerning the law of covenants called Spencer's Case.[167] Spencer's Case held that for covenants to survive the transfer of land, they must "touch and concern"

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[162] *See* Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.").

[163] *Id.* at 692-93.

[164] *See id.* at 710.

[165] *See id.* at 706.

[166] *See id.* at 704.

[167] Spencer's Case, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583).

the land they run with.[168] For hundreds of years, courts and commentators have struggled defining the meaning of "touch and concern."[169] One court declared, "in truth, such a description or test . . . is too vague to be of much assistance."[170] In 1988, the American Law Institute removed the "touch and concern" language in the Restatement (Third) of Property: Servitudes.[171]

It is difficult to decipher what "touch and concern" means in relation to United States territory under *Kiobel*. On a basic level, touch means "to relate to" or "to have an influence on,"[172] and concern similarly means "to relate to" or "to affect or involve."[173]

Whether a claim touches and concerns the territory of the United States could turn on how a court defines "touch" and "concern."[174] To illustrate this point, imagine that certain Nigerian plaintiffs brought an ATS action against a Nigerian corporation for using Nigerian slaves. Imagine also that the slaves worked in a factory in Nigeria. It can be said that this ATS claim *relates* to the United States, because the Nigerian corporation engages in a practice that the United States is committed to ending. But because the suit involves foreigners working in foreign factories, the suit does not *involve* the United States. If this hypothetical court interpreted "touch and concern" to mean "involve," the plaintiffs could not bring their ATS claim.

It is also unclear what the *Kiobel* Court meant by "the territory of the United States."[175] Literally, territory of the United States could mean its physical territory. By this interpretation, plaintiffs' claims must touch and concern something that exists within the physical boundaries of the United States. For example, if ExxonMobil violated international law when it procured oil in Iran, and that oil was shipped into the physical territory of the United States, the claim "touched" the territory of the United States. Alternatively, touching and concerning United States territory could mean touching and concerning important interests of the United States. This approach would mirror the second prong of Justice Breyer's concurrence in *Kiobel*, in which he would find ATS jurisdiction where "the defendant's conduct substantially and adversely affects an

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168 A. Dan Tarlock, *Touch and Concern is Dead: Long Live the Doctrine*, 77 NEB. L. REV. 804, 805 (1998).

169 Neponsit Prop. Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 256 (N.Y. 1938).

170 *Id.*

171 RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.3(3) (2000).

172 MERRIAM-WEBSTER DICTIONARY 1247 (10th ed. 1993).

173 *Id.* at 238.

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

175 *Id.*

important American national interest."[176] Under this interests approach to interpreting the United States territory, even if ExxonMobil never transported oil into the physical territory of the United States, it could still touch and concern American interests if the lawful procurement of oil is sufficiently important to the United States. Because the *Kiobel* majority did not adopt Breyer's test, it is unlikely, however, that they would find the presumption displaced when claims merely touch and concern American interests.[177]

A court's interpretation of "touch and concern" and "territory of the United States" does not guarantee a particular result in any case. Ultimately, an ATS claim must "touch and concern" with "sufficient force."[178] Even if a court uses the broader "relate to" definition of "touch and concern," which could seemingly be satisfied by any set of facts, the *Kiobel* test allows the court to determine to what extent such claims would need to "relate to" the territory of the United States with the "sufficient force" requirement. The only guidance given by the Court as to how much "force" is required to displace the presumption is that the facts of *Kiobel* were insufficient.[179] Beyond that, courts are free to decide.

2. Corporate Citizenship Insufficient to Displace the Presumption Against Extraterritoriality

Kiobel offered the lower courts little guidance in determining, under part two of its test, what circumstances would have enough force to displace the presumption against extraterritoriality.[180] If, for example, ExxonMobil were to aid and abet war crimes in Ecuador, it is unclear what circumstances would allow a United States court to hear ATS claims against ExxonMobil.

The lower courts disagree about whether a defendant's status as a United States corporation can displace the presumption when the claim involves conduct that occurred on foreign territory. The Ninth and Eleventh Circuits held that a defendant's status as a United States corporation alone is insufficient to allow jurisdiction in such situations,[181] whereas the Fourth Circuit held that a corporation's United

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176 *See id.* at 1671 (Breyer, J., concurring).
177 *See id.* at 1669.
178 *Id.*
179 *Id.*
180 *Id.*
181 *See* Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014) ("[T]he Supreme Court has never suggested that a plaintiff can bring an action based solely on extraterritorial conduct *merely* because the defendant is a U.S. national."); *see* Cardona v. Chiquita Brands Int'l Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (extending the *Kiobel*

States citizenship is one factor that weighs in favor of jurisdiction.[182] The Fourth Circuit did not clarify whether United States citizenship was alone sufficient to displace the presumption.[183] The Second Circuit has taken the position that a defendant's status as a United States corporation is irrelevant under *Kiobel* and has no force in displacing the presumption when the "relevant conduct" takes place outside of the United States.[184] Under the Second Circuit's ruling, then, the fact that ExxonMobil is a United States corporation would not help victims of the war crimes, committed in Ecuador, bring an ATS action.

This decision to render insignificant a defendant-corporation's status as a United States corporation is flawed. The Second Circuit argued that because *Kiobel* ruled that "mere corporate presence" was insufficient to overcome the presumption against extraterritoriality, United States corporate citizenship too must be insufficient.[185] But *Kiobel*, in finding that "mere corporate presence" was insufficient, seemingly addressed the facts of *Kiobel*, where the defendants were Nigerian and Dutch corporations.[186] The Court did not rule on the question of United States corporate citizenship, because the *Kiobel* defendants were not United States corporations.[187] Indeed, the Supreme Court's holding was intentionally incomplete.[188] The status of United States corporations involve a stronger connection to the United States than a foreign corporation having presence in the United States. To treat citizenship and presence the same ignores this fact.

The Second Circuit further justified its marginalization of United States corporate citizenship by citing *Aramco*.[189] In that case, a United States citizen claimed that his United States corporate employer, Arabian

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principle that corporate presence is not enough to displace the presumption that corporate citizenship is not enough).

182 *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) (holding that the claims touched and concerned the United States with sufficient force, in part, because the defendant was a United States corporation).

183 *Id.*

184 See Mastafa v. Chevron Corp., 770 F.3d 170, 195 (2d Cir. 2014) (holding that the precedent establishes that the defendant's U.S. citizenship does not affect jurisdictional analysis).

185 *See id.* at 188.

186 *See* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1660 (2013).

187 *See id.*

188 *See id.* at 1669 (Alito, J., concurring) ("This formulation obviously leaves much unanswered."); *see also* Mujica, v. AirScan, Inc., 771 F.3d 580, 594 (9th Cir. 2014) ("Admittedly, *Kiobel* (quite purposely) did not enumerate the specific kinds of connections to the United States that could establish that ATS claims 'touch and concern' this country.").

189 *Mastafa*, 770 F.3d at 188 (citing E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 247 (1991)).

American Oil Company, violated Title VII of the Civil Rights Act.[190] The plaintiff alleged that Arabian American Oil Company's subsidiary transferred plaintiff from Houston to Saudi Arabia, where he was discriminated against on account of his race, religion, and national origin.[191] Despite the fact that Arabian American Oil Company was a United States corporation, *Aramco* held that the presumption against extraterritoriality barred plaintiff's claim, which involved discrimination in Saudi Arabia.[192]

Even though a defendant's United States nationality does not rebut the presumption against extraterritoriality within the context of Title VII of the Civil Rights Act, it does not mean that a defendant's United States nationality will not, within the context of the ATS.[193] In connection with the ATS, a defendant's United States citizenship is of particular concern—"the sovereign who refuses to cause a reparation to be made for the damages caused by his subject, or to punish the offender, or finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it."[194] Furthermore, "[i]n focusing on the ATS 'claims,' and not the underlying 'conduct,' the *Kiobel* Court carefully left open the door through which foreign victims of heinous acts by United States nationals could hold such individuals or corporate entities accountable."[195]

D. Irreconcilable Application of the Presumption Against Extraterritoriality

If a claim involves conduct that occurred on foreign territory, courts may still exercise jurisdiction if the claim has a sufficiently strong connection to the United States.[196] The stronger the domestic contacts of a claim, the less likely it is that the claim should be excluded by the

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190 *Arabian Am. Oil Co.*, 499 U.S. at 247.

191 *Id*.

192 *Id.* at 259.

193 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 266 (2010) (holding that the presumption against extraterritoriality will act differently depending on the focus of the statute at issue).

194 Brief for Professors of International Law, Foreign Relations Law and Federal Jurisdiction as Amici Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 379581, at *8-9 (quoting Emmerich de Vattel, who is thought to be the "Founders' leading authority on the law of nations").

195 Mujica v. AirScan Inc., 771 F.3d 580, 619 (9th Cir. 2014) (Zilly, J., concurring).

196 *See* Mastafa v. Chevron Corp., 770 F.3d 170, 182 (2d Cir. 2014) ("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.").

presumption.[197] A comparison of *Mastafa* and *Sexual Minorities Uganda* demonstrates how the *Kiobel* test has not always produced such congruent applications of the presumption against extraterritoriality.

In *Mastafa*, plaintiffs claimed that Chevron, a United States corporation, aided and abetted the Saddam Hussein regime in Iraq.[198] Plaintiffs were Iraqi women who were tortured by agents of the regime.[199] They alleged that Chevron aided and abetted the regime by purchasing oil in the United States from Iraq, and that funding from the purchase financed the human rights abuses.[200] Employing a "purpose" aiding and abetting standard,[201] the court found that Chevron did not purchase oil with the *purpose* of aiding the Saddam Hussein regime.[202] Accordingly, it found that no international law violation occurred in the United States, and that the claim was subject to, and barred by, the presumption against extraterritoriality.[203]

In *Sexual Minorities Uganda*, an American citizen allegedly assisted and encouraged the denial of fundamental rights to the lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in Uganda from the United States.[204] As in *Mastafa*, the *Sexual Minorities Uganda* court employed a purpose aiding and abetting liability standard. Because the plaintiff, Sexual Minorities Uganda, an LGBTI organization, pleaded that the American citizen acted with the *purpose* of aiding and abetting the persecution of sexual minorities, plaintiff's suit was not subject to the presumption against extraterritoriality, and the court could hear the merits.[205]

Circumstances that establish an international law violation in one set of facts and not in another do not necessarily reflect an increase in contacts with the United States.[206] A comparison of the United States' conduct in *Mastafa* and *Sexual Minorities Uganda* illustrate this point. In *Mastafa*, plaintiffs' alleged that "Chevron financed the sale of two million barrels of oil . . . for which Chevron 'facilitated' 'a surcharge payment of nearly half a million dollars be paid to the [Saddam Hussein]

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197 *See id.*
198 *Id.* at 175.
199 *Id.* at 174-75.
200 *Id.* at 175.
201 *Id.* at 192.
202 *Id.*
203 *See id.* at 185.
204 Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 312 (D. Mass. 2013).
205 *Id.* at 324.
206 *See id.* at 322 ("The Supreme Court has made clear that the presumption against extraterritorial application of a statute comes into play only where a defendant's conduct lacks sufficient connection to the United States."); *see Mastafa*, 770 F.3d at 182.

regime."[207] In *Sexual Minorities Uganda*, one citizen assisted an organization by formulating strategies to discriminate and persecute LBGTI communities.[208] The magnitude of Chevron's transaction, from which profits were recouped in the United States, necessarily involved more contacts with the United States than the citizen's assistance to persecute LBGTI communities. Chevron is a large United States corporation and many of the decisions with regard to the transaction must have been made "by [its] top stake holders."[209] Other Chevron employees, who were not themselves responsible for the decision, participated in facilitating the transaction.[210] This amount of people, in combination with the size of the transaction that lead to the regime payments, involved more of a connection with the United States than in *Sexual Minorities Uganda*—where one man assisted an organization to persecute sexual minorities. Yet, the latter meets the criteria for a violation of the laws of nations by meeting the elements of aiding and abetting liability, while Chevron's transaction does not. The result is that a transaction with enormous domestic contacts is barred by the presumption against extraterritoriality, and the other, which in comparison involves almost none, is not.[211]

V. RETHINKING *KIOBEL*

A. The Morrison "Focus" Test

In *Morrison*, Justice Scalia emphasized that the presumption against extraterritoriality changes based on the context of its application.[212] *Morrison* dealt with Australian investors who alleged that National Australia Bank committed securities fraud.[213] According to the complaint, National Australia Bank's mortgage servicing company, Homeslide Lending, manipulated certain financial models in Florida to make its shares appear more valuable.[214] Thereafter, Australian investors purchased National Australia Bank's fraudulently inflated shares on the Australian Stock exchange.[215]

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207 *Id.* at 190.
208 *Sexual Minorities Uganda*, 960 F. Supp. 2d at 312.
209 *Mastafa*, 770 F.3d at 182.
210 *See id.*
211 *See id.* at 185; *see Sexual Minorities Uganda*, 960 F. Supp. 2d at 324.
212 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 266 (2010).
213 *Id.* at 251.
214 *Id.* at 252.
215 *Id.*

Plaintiffs argued that because Florida was where the defendant manipulated its financial models, the defendant's conduct was not "extraterritorial," and the presumption against extraterritoriality did not deny the application of 10(b) to their claim.[216] The Supreme Court, however, declared that the location of purchases and sales of securities—not the location where the deception originated—governed the application of the presumption to plaintiffs' 10(b) claims.[217] In coming to its decision, the court cited *Aramco.*[218] In *Aramco*, the Court concluded that it was the location of employment, which was the focus of Title VII of the Civil Rights Act of 1964, that determined whether plaintiffs could bring their claim.[219]

The *Morrison* court, in quoting *Aramco*, adopted a "focus" test, which looks to the "objects of the statute's solicitude" to determine what kind of United States contacts can allow a claim to proceed despite the fact that some conduct took place on foreign soil.[220] Justice Scalia, applying the test, determined that the focus of section 10(b) is to punish deceptive conduct only "in connection with the purchase or sale of any security registered on a national securities exchange."[221] Because the actual security transaction in *Morrison* took place outside of the United States, Scalia ruled that the presumption barred plaintiffs' claim.[222]

B. Morrison Meets Kiobel

It is unclear whether *Kiobel* adopted *Morrison's* "focus" test. In *Doe*, a Ninth Circuit ATS case, the majority and concurrence disagreed on this matter.[223] The majority decided that *Kiobel's* "touch and concern" language replaced "focus" within the context of the ATS.[224] However, "touch and concern" is not mutually exclusive with "focus." "Touch and concern" addresses whether "claims" can displace the presumption against extraterritoriality.[225] "Focus" determines what types of United States contacts are necessary to displace the presumption.[226] The "focus"

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216 *Id.* at 266.
217 *Id.* at 268.
218 *Id.* at 266.
219 *Id.*
220 *See id.* at 267.
221 *Id.* at 266; *contra id.* at 284 (Stevens, J. dissenting) (claiming that it was the public interest in investor safety that was the actual object of the statute's solicitude).
222 *Id.* at 273.
223 *See* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014) (finding that *Kiobel* did not incorporate *Morrison's* focus test); *but see id.* at 1035 (Rawlinson, J., concurring) (finding that *Kiobel* did incorporate *Morrison's* focus test).
224 *Id.* at 1028.
225 *See* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1669 (2013).
226 *See Morrison*, 561 U.S. at 267.

test is narrower in that it looks to a specific type of contact.[227] "Touch and concern" looks to an entire claim.[228] *Morrison* can be read as providing substance to the *Kiobel* test. By this interpretation, the factors that "touch and concern the United States" with sufficient force are those that reflect the "focus" of the federal law at issue.[229]

Kiobel can be seen as incorporating *Morrison's* focus test. Under *Morrison*, a federal statute's "focus" should determine the types of United States contacts that are necessary for a claim to proceed when the claim involves conduct that took place on foreign soil.[230] After *Sosa*, aside from the violation of safe conducts, infringement of the rights of ambassadors and piracy, only "judge-inferred" causes of action can provide plaintiffs the basis for an ATS claim.[231] These causes of action, according to Justice Alito, are the ATS's "focus."[232] Because the *Kiobel* test, as interpreted by some of the lower courts, looks to whether these causes of action (the torts), took place in the United States, *Kiobel* may have silently incorporated a *Morrison* focus standard.

However, the ATS can also be seen as having a different focus. The focus of the ATS might be those motivating factors that encouraged Congress to enact the ATS in the first place.[233] This reading would look to a number of possible motivations for the ATS's enactment, including: (1) complying with the law of nations to prevent international conflict,[234] and (2) complying with the law of nations to become a fully functioning member of the international community.[235]

The ATS's focus can also be the focus of individual international law violations. Justice Alito declared that the ATS's focus is international law causes of action.[236] Instead of treating these violations as the "focus," the courts could look to the focus of each individual violation to determine what United States contacts are required for jurisdiction. In other words, courts would analyze the "focus of the focus." For example, treating a 10b-5 violation as the "focus" is different than treating the purchase and sale of securities, the focus of 10b-5, as the focus.

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227 *See id.*

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

229 *Doe I*, 766 F.3d at 1028 (finding that *Morrison* may help to define the touch and concern standard).

230 *See Morrison*, 561 U.S. at 267.

231 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

232 *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring); *see* Mastafa v. Chevron Corp., 770 F.3d 170, 186 (2d Cir. 2014) (finding that the ATS derives substantive meaning from judge-inferred causes of actions).

233 Burley, *supra* note 31.

234 *See id.* at 465.

235 *See id.* at 484.

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

Morrison and subsequent case law offer support to this position, because those cases analyze particular statutory schemes.[237] When the focus of a statute is another statute, it could be said that that both schemes require analysis.

C. The "Focus" of the ATS

Based on Justice Alito's determination about the "focus" of the ATS, *Kiobel* may have properly incorporated the "focus test."[238] However, courts and judges do not always agree on what the focus of a statute is.[239] Additionally, some courts have acknowledged that under *Morrison*, a statute may have multiple focuses.[240] Below are two alternative applications of *Morrison* to the ATS. The first is the congressional motivation approach, and the second is the "focus of the focus" approach.

1. Congressional Motivation

The "focus" of the ATS might be the purpose behind its enactment. If that purpose was to remedy torts, which, if left unattended, could threaten the United States' standing with other nations,[241] such torts would provide ATS jurisdiction. If that purpose was to become a fully functioning member of the international community,[242] addressing torts, which, if acted upon, demonstrated the United States' commitment to the international community, would provide ATS jurisdiction. Such a "focus" would direct courts to play a role in the international legal order and exercise universal jurisdiction as courts of international law.

2. Focus of the Focus

If the "focus" test is applied in a way that requires analysis of individual violations of international law, the test would produce different focuses depending on the violation at issue.[243] Accordingly, different types of United States contacts would dictate whether courts have ATS jurisdiction in claims that are based, in part, on conduct that

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237 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 262 (2010) (analyzing the text of § 10(b)).

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

239 *See* U.S. v. Chao Fan Xu, 706 F.3d 965, 975-76 (9th Cir. 2013) (explaining that while some courts believe RICO's focus is on enterprise, other courts believe it is on racketeering activity).

240 *Id.* (Le-Nature's, Inc. v. Krones, Inc., 2011 WL 2112533, at *3 n. 7 (W.D. Pa. May 26, 2011) (finding that RICO may have multiple focuses)).

241 Burley, *supra note* 31, at 465.

242 *Id.* at 475.

243 *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 266-67 (2010).

took place on foreign soil.[244] Below is an illustration of how crimes against humanity, a cause of action for ATS claims, would function under a "focus of the focus" analysis.

In order to plead a crime against humanity, the plaintiff must allege a "denial of fundamental rights," as well as "the intentional targeting of an identifiable group."[245] The attack must be "pursuant to or in furtherance of a State or organizational policy to commit such an attack."[246] *Kiobel*, as interpreted by some of the lower courts, requires ATS plaintiffs to allege that the international law violation took place in the United States in order to proceed with their claims that involve foreign conduct.[247] As illustrated by *Mujica* below, simply looking to the location where defendant committed the crime against humanity under *Kiobel* may not administer the presumption against extraterritoriality in a way that captures the "focus" of a crime against humanity—which appears to include committing the crimes to *further some policy*.[248]

Under a "focus of the focus" analysis, Courts would need to conduct an analysis of the crimes against humanity statute. Crimes against humanity, under the statute, are widespread attacks on a targeted group to further some policy.[249] If the attack is not executed "pursuant to or in furtherance of a State or organizational policy to commit such an attack," it would not constitute a crime against humanity.[250] The random extermination of a group of civilians, without direction, is not a crime against humanity.[251] Because the "policy" component of a crime against humanity is essential, there is good reason to include it in the violation's "focus" under the "focus of the focus" test.

Mujica illustrates that under *Morrison*, different focus determinations produce different jurisdictional results. In *Mujica*, the Ninth Circuit held that two United States corporations—Occidental Petroleum Corp. and AirScan, Inc.—could not be held liable under the ATS, in part, because the alleged crimes against humanity occurred outside of the United States.[252] There, plaintiffs, civilians from Santo Domingo, pleaded that Occidental Petroleum jointly owned an oil production facility and pipeline in Santo Domingo with the Colombian

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244 *See id.*
245 Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 317 (D. Mass. 2013).
246 Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
247 *See* Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013).
248 *See* Rome Statute, *supra* note 246.
249 *Id.*
250 *Id.*
251 *See id.*
252 Mujica v. AirScan Inc., 771 F.3d 580, 596 (9th Cir. 2014).

Government.[253] AirScan was employed by Occidental Petroleum to protect the facility and pipeline from "left-wing insurgents."[254] In order to secure the pipeline, the Colombian military carried out a raid in Santo Domingo.[255] The military received assistance from Occidental Petroleum and AirScan.[256] Occidental provided the military with a room to plan the raid, and AirScan piloted planes, paid for by Occidental Petroleum, in order to identify targets in Santo Domingo and determine where to deploy troops.[257] The Colombian Air Force, with the assistance of the United States corporations, dropped cluster bombs on a town in Santo Domingo.[258] Afterwards, the Colombian military entered the town and ransacked its homes.[259] The explosions destroyed homes, killed seventeen civilians, and injured twenty-five.[260] The Ninth Circuit decided that because the alleged crime against humanity took place in Santo Domingo, and not in the United States, the claim was barred on extraterritoriality grounds.[261] Additionally, the court declared that the only connection the defendants had to the United States was their status as Untied States corporations, and that, in itself, was not enough to displace the presumption.[262]

Mujica would have possibly turned out differently if the courts, operating under a "focus of the focus" test, decided that the focus of a crime against humanity is "an attack pursuant to a State or organizational policy." If the court decided so, United States contacts relevant to assessing ATS jurisdiction would include those contacts that are related to the motivating policy behind the attack. In *Mujica*, the policy behind the attack was financial—protecting a valuable asset.[263] Occidental Petroleum, located in Los Angeles, and AirScan, located in Florida, assisted the Colombian government to reap financial benefits, which resulted from the protection of a significant asset in Santo Domingo.[264] The financial benefit gained from the defendants' involvement in the raid would primarily flow to the corporations' headquarters in Los Angeles

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253 Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005).
254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.*
258 *Id.*
259 *Id.*
260 *Id.*
261 Mujica v. AirScan Inc., 771 F.3d 580, 596 (9th Cir. 2014).
262 *See id.* at 591.
263 *See Mujica*, 381 F. Supp. 2d at 1168.
264 *See id.*

and Florida.[265] Here, under a "focus of the focus" test, courts would consider contacts related to the underlying policy of the attack and find that those financial contacts flowed to recipients in the United States—specifically to Los Angeles and Florida corporations.[266] Accordingly, the contacts that would matter for the presumption would not be "extraterritorial," and plaintiffs would be able to proceed with their claim.

3. The Most Sensible "Focus" to Apply

It is unclear which "focus" of the ATS would provide for the best results. Indeed, the courts have pointed out that it is not always clear how *Morrison's* logic translates to other statutory schemes.[267]

It may be most sensible for the "focus" of the ATS to be international law violations. If this were the case, the *Kiobel* test would stay the same, as the location where the international law violation was committed would govern whether courts have ATS jurisdiction.

The "congressional motivation" approach presents difficulties. If the purpose of the ATS is to prevent international conflict, and courts had to determine which ATS claims pose such conflicts, judges would be forced to enter into "a delicate field of international relations," which Congress "alone has the facilities necessary to make fairly such an important policy decision . . . ."[268] Forcing judges to make decisions about which claims provoke international conflict would potentially conflict with the presumption against extraterritoriality's purpose to prevent "unintended clashes between our laws and the laws of other nations which could result in international discord."[269]

If the "focus" of the ATS is for the United States to become a fully functioning member of the international community, judges would inappropriately determine the extent of the United States' international involvement, against the separation of powers doctrine.[270] Moreover, judges are not equipped to decide the effects that a course of action will have on the United States' standing with the international community.[271]

The "focus of the focus" test also presents difficulties. Investigating the "focus" of each ATS cause of action would create confusion among the circuits, as judges would inevitably disagree as to what each

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265 *See id.*
266 *See id.*
267 U.S. v. Chao Fan Xu, 706 F.3d 965, 975 (9th Cir. 2013) (citing In re Toyota Motor Corp., 785 F. Sup. 2d 883, 914 (C.D. Cal. 2011)).
268 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).
269 *Id.* at 1661.
270 *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 531 (4th Cir. 2014).
271 *See Kiobel*, 133 S. Ct. at 1664.

particular violation's focus is. Indeed, in *Morrison* itself, the majority and concurrence disagreed as to the "focus" of section 10b-5 of the Securities and Exchange Act.[272] Each international law under the ATS would create the potential for the same kind of disagreement, and the United States courts would inconsistently apply the presumption against extraterritoriality.

Moreover, not all international law violations have a unified statutory scheme. For instance, with regards to crimes against humanity, the Rome Statute of the International Criminal Court (RSICC) and the International Criminal Tribunal for the former Yugoslavia (ICTY) are broader than the International Criminal Tribunal of Rwanda (ICTR).[273] The ICTR defines crimes against humanity as "a widespread or systematic attack . . . *on national, political, ethnic, racial, or religious grounds.*"[274] The RSICC and the ICTY allow prosecution for crimes against humanity when they are directed at "*any civilian population*."[275] When determining what the focus of an international law violation is under a "focus of the focus" approach, it would be difficult to decide which international statute to use, especially when the different statutes would lead judges to infer different focuses.

At the same time, because the ATS derives substantive significance from various international law violations, it may be ill-suited for a singular test, like *Kiobel*, that treats all violations the same.[276] Moreover, if international law violations are not individually examined, the ATS's "jurisdictional reach" will not always match its "underlying substantive grasp."[277]

VI. CONCLUSION

The *Kiobel* test presents many issues. The lower courts, for example, have provided conflicting and questionable applications of the presumption against extraterritoriality. The two *Kiobel* inquiries, as a result of their ambiguity, give lower courts the flexibility to use the

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[272] *Compare* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010) (holding that the focus of § 10(b) is the purchases and sales of securities) *with id.* at 284 (Stevens, J., concurring) (holding that the focus of § 10(b) is "the interest of investors").

[273] *Compare* Rome Statute, *supra* note 246, *and* International Criminal Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter Yugoslavia Statute], *with* Statute of the International Tribunal for Rwanda, art. 3, S.C. Res 955, U.N. Doc. S/RES/955 (Nov. 8 1994) [hereinafter Rwanda Statute].

[274] Rwanda Statute, *supra* note 273 (emphasis added).

[275] Rome Statute, *supra* note 246; Yugoslavia Statute, *supra* note 273 (emphasis added).

[276] *See Kiobel*, 133 S. Ct. at 1669.

[277] *Id.* at 1673. (Breyer, J., concurring).

presumption against extraterritoriality to deny claims brought against MNCs choosing to operate their businesses to the detriment of foreign nationals. This is troubling, especially in cases like *Mastafa*,[278] where a court can decide that the conduct of a *United States* corporation does not touch and concern territory of the *United States* with enough force. It is important that the Supreme Court provide more guidance on how to administer the presumption against extraterritoriality within the context of the ATS. This guidance should include an explanation of how *Morrison's* "focus" test will function in ATS cases.

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[278] *See* Mastafa v. Chevron Corp., 770 F.3d 170, 189 (2d Cir. 2014).