

October 2018

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### Recommended Citation

Candra Connelly, *The Alien Tort Statute: “An Avant-Garde Tool for Human Rights” or a Camouflaged Curse?*, 87 U. Cin. L. Rev. 203 (2018)

Available at: <https://scholarship.law.uc.edu/uclr/vol87/iss1/6>

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## THE ALIEN TORT STATUTE: “AN AVANT-GARDE TOOL FOR HUMAN RIGHTS” OR A CAMOFLAGED CURSE?

*Candra Connelly*

### I. INTRODUCTION

The Alien Tort Statute<sup>1</sup> (“ATS”) was enacted into federal law in 1789 and confers courts of federal jurisdiction the ability to hear lawsuits filed by non-US citizens for torts committed in violation of international law:<sup>2</sup> “[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.”<sup>3</sup> Prior to the enactment of ATS, “a nation became responsible under the law of nations for injuries that its citizens inflicted on aliens if it failed to provide adequate means of redress . . . .”<sup>4</sup> Over the last half-century, claims brought under the ATS have involved violations of international law stemming from murder and torture to the funding of international terror regimes.<sup>5</sup> However, what was meant to provide aliens with redress has, over the last decade or so, left everyone questioning the power of the Act and the correct method of its application. *Adhikari v. Kellogg Brown & Root* is the latest case that has left the legal community scratching its head as it absorbs the Fifth Circuit’s decision on how to apply the ATS.<sup>6</sup> In the Fifth Circuit’s January 2017 decision, the court outright rejected the Fourth Circuit’s analysis in *Al Shimari v. CACI Premium Tech., Inc.*<sup>7</sup> when it came to the statute’s extraterritorial application and these two circuits are not the only ones at odds when it comes to a permissible application.<sup>8</sup>

The Alien Tort Statute has already had its day in the Supreme Court, but it looks as if the Court may be seeing it again shortly, as circuit courts around the country look to the Supreme Court for clarification. This article will address the most recent circuit split, considering the

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1. *The Alien Tort Statute*, THE CTR. FOR JUST. & ACCOUNTABILITY (2016), <http://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/>.

2. *Id.*

3. 28 U.S.C. §1350 (1948).

4. Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 450 (2011).

5. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *See also Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014). The Supreme Court addressed ATS claims for the first time in *Sosa*, when a Mexican national brought an ATS claim after DEA agents had kidnapped him in Mexico and brought him to the U.S. to stand trial for the murder of a DEA agent.

6. 845 F.3d 184 (5th Cir. 2017).

7. 758 F.3d 516 (4th Cir. 2014).

8. Numerous other circuits are also conflicted when it comes to applying aspects of case law to ATS claims.

Fifth and Fourth Circuit's extraterritorial applications of the ATS. It will conclude that the Fourth Circuit has the more viable interpretation of the statute itself, and ultimately state what the test should look like going forward. Part II of this article will provide background knowledge of the cases that have stumped the circuits in this jurisdictional application process. Part III will address the issues, break down the best possible application of the statute and its extraterritorial component, and provide insight into what an application of the ATS may look like going forward. Lastly part IV will provide closing thoughts regarding what we may see shortly from the Supreme Court.

## II. BACKGROUND

### A. *ATS and the Presumption Against Extraterritoriality*

Enacted in 1789, the general connotation was that the Alien Tort Statute would serve as a jurisdictional bridge for non-US citizens to bring a cause of action against those residing in the U.S. who violated various aspects of international law, specifically involving implications of human rights.<sup>9</sup> Under the ATS, for a cause of action to be viable against an individual, that individual must live in or frequently visit the U.S.<sup>10</sup> This ATS requirement cannot be deduced from the statute, but it has been applied in over a decade's worth of common law, and is not usually a topic of discussion in an ATS case because it is not typically disputed.

The ATS was a generally unnoticed and underutilized portion of federal law until around 1980, when a Paraguayan doctor and his daughter filed suit under the ATS against a former Paraguayan police officer living in New York City.<sup>11</sup> The suit was for allegedly kidnapping and torturing members of their family in retaliation for their family's opposition to the Paraguayan government.<sup>12</sup> The Second Circuit ultimately observed that torture violates international law and thus a valid claim existed for these facts under the ATS.<sup>13</sup>

From the moment that the Second Circuit enunciated the types of claims viable under the ATS, plaintiffs began to place an increased sense of reliance on the statute, especially when it came to seeking

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9. *The Alien Tort Statute*, *supra* note 1.

10. *Id.*

11. *Filartiga v. Peña- Irala*, 630 F.2d 876 (2nd Cir. 1980)

12. Amy Howe, *An Introduction to the Alien Tort Statute and corporate liability: In Plain English*, SCOTUS blog (July 24, 2017), <http://www.scotusblog.com/2017/07/introduction-alien-tort-statute-corporate-liability-plain-english/>. See *Filartiga v. Peña- Irala*, 630 F.2d 876 (2nd Cir. 1980).

13. *Id.*

redress from human rights violations occurring overseas. Judge Henry Friendly went on to describe the ATS as a “‘kind of legal Lohengrin,’ after a mythical German knight who arrives in a boat pulled by swans, because ‘no one seems to know whence it came.’”<sup>14</sup>

After numerous successful cases were brought under the ATS, many of which resulted from conduct occurring overseas, defendants began to push back. Chief Justice John Roberts referred to plaintiffs evoking the ATS as attempting to make the U.S. the “‘moral custodian’ of the world.”<sup>15</sup> As a result of this analogy, in 2004 the Supreme Court indicated that the kinds of claims that were to be viable under the ATS going forward were to be relatively limited.<sup>16</sup> While the ATS was originally used to remedy international wrongs, the Supreme Court further clarified that the ATS is only a statute that confers jurisdiction to federal courts to hear cases alleging international human rights violation and that it is *not* a tool that provides a cause of action for specific alleged wrongdoings.<sup>17</sup>

#### i. Going Forward

Along with the Court’s interpretation that the ATS only provides jurisdiction for claims to be brought in U.S. federal courts, a test to whether those claims should go forward was also enunciated. It was found that ATS claims should only proceed if they are widely accepted as violations of international norms or violations of international law that are paradigms to causes of action that existed under international law<sup>18</sup> at the time of ATS’s enactment.<sup>19</sup>

“[T]he determination whether a norm is sufficiently definite [or a widely accepted violation of international law] to support a cause of action . . . involve[s] an element of judgment about what the practical consequences of ‘allowing litigants to rely on that norm’” are.<sup>20</sup> When it comes to deciding whether a violation is a paradigm to a cause of action that existed at ATS enactment, a court should be in tune with the norm and what remedy that cause of action provides.<sup>21</sup>

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14. *Id.*

15. *Id.*

16. *Sosa*, 542 U.S. at 720.

17. *Howe*, *supra* note 12.

18. Violation of safe conducts, infringement of rights of ambassadors, and piracy. *See Sosa*, 542 U.S. at 715.

19. *Al Shimari*, 758 F.3d at 525.

20. *Howe*, *supra* note 12.

21. *Id.*

### ii. The Presumption Against Extraterritoriality

The presumption that a statute does not have an extraterritorial application is a “longstanding principal of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”<sup>22</sup> This idea is based upon the notion that “Congress ordinarily legislates with respect to domestic, not foreign matters.”<sup>23</sup> In other words, if a statute is to be applied extraterritorially, Congress must give clear indication that the specific statute is intended to have an extraterritorial reach.

The purpose of the presumption is that it “serves to protect against unintended clashes between our laws and those of nations which could result in international discord.”<sup>24</sup> While the stated purpose may seem legitimate, case law suggests that not all exceptions are clear, specifically regarding statutes enacted by Congress that reference international matters and conduct. The presumption against extraterritoriality has been at the core of numerous landmark Supreme Court decisions within the twenty-first century and is crucial to a correct application of the ATS.<sup>25</sup>

### iii. An Extraterritorial Debate

The Supreme Court has been asked numerous times in the last decade to provide a viable, non-ambiguous interpretation of the ATS’s extraterritorial application. Other statutes that implicate questions of international law have had the same difficulty in finding a correct test to ensure that the statute applies extraterritorially.<sup>26</sup> *Adhikari*’s outright rejection of *Al Shimari*’s application of the ATS is the perfect example to indicate that the Supreme Court has yet to enunciate a bright line application of the rule.

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22. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

23. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). See also *Smith v. United States*, 507 U.S. 197, 204 (1993).

24. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013) (quoting *EEOC*, 499 U.S. at 248 (1991)).

25. See generally *Morrison*, 561 U.S. 247 (2010); *Kiobel*, 569 U.S. 108 (2013); *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090 (2016).

26. See §10(b) of the Securities Exchange Act of 1934 and portions of the Racketeer Influenced and Corrupt Organizations Act.

*a. Morrison v. Nat'l Aust. Bank Ltd.:<sup>27</sup> the Supreme Court's Initial Guidance on the Presumption*

In 1998, National Australian Bank ("National") acquired Homeside Lending, Inc., an American Company.<sup>28</sup> Three years later, National announced that it would incur a \$450 million write-down for inaccurately calculating the fees that Homeside would generate for servicing mortgages.<sup>29</sup> As a result of the write-down, stock prices dropped.<sup>30</sup> Later the same year, National again announced that they had inaccurately calculated, this time leading to a \$1.75 billion write-down and a further drop in stock price.<sup>31</sup> This lawsuit was brought as result of that loss by three plaintiffs representing a class of non-American purchasers of National stock.<sup>32</sup>

The district court found that it lacked subject matter jurisdiction over the non-American purchasers because the acts that occurred in the U.S. were "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."<sup>33</sup> The Second Circuit affirmed the finding that the acts performed in the U.S. did not "'compris[e] the heart of the alleged fraud."<sup>34</sup> In other words, if the fraud itself had occurred in the U.S., rather than just the plan to carry out the acts, and those acts were the specific acts leading to losses for foreign investors, proper jurisdiction may have existed. "[T]he focus of the [Securities] Exchange Act [of 1934] is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."<sup>35</sup> With this particular set of facts, the court concluded that the issuance of fraudulent statements from National's headquarters in Australia were more central to the fraud than the manipulation of the financial statements in the U.S., thus the focus of the statute and the location where the conduct occurred never intersected, failing to displace the presumption.<sup>36</sup>

On a writ of certiorari, the Supreme Court noted that the question to be decided was "whether §10(b) of the Securities Exchange Act provided a cause of action to foreign plaintiffs suing for misconduct in

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27. 561 U.S. 247.

28. *Id.* at 251.

29. *Id.* at 252.

30. *Id.*

31. *Id.*

32. *Id.* at 253.

33. *Morrison*, 561 U.S. at 253 (quoting *In re National Australia Bank Securities Litig.*, No. 03 Civ. 6537 (BSJ), 2006 U.S. Dist. LEXIS 94162 at \*8 (Oct. 25, 2006)).

34. *Id.*, (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167 (2d. Cir. 2008)).

35. *Id.* at 266.

36. *Id.* at 268-73.

connection with securities traded on foreign exchanges.”<sup>37</sup>

The Supreme Court found that the Second Circuit had exercised the presumption against extraterritoriality from the jurisprudence of §10(b) and replaced it with the inquiry as to whether it would be reasonable<sup>38</sup> to apply a statute to different factual scenarios.<sup>39</sup> Essentially the Second Circuit had established two tests: the “effects test” of whether the wrongful conduct had a substantial effect in the U.S. or upon U.S. citizens; and the “conduct test” of whether the wrongful conduct occurred in the U.S. The Second Circuit explained that these two tests should not separate from one another on the ground that a combination of the two gives a better picture as to whether there is sufficient U.S. involvement to justify jurisdiction.<sup>40</sup>

The main issue with the Second Circuit’s long time and widely accepted test is that it can be interpreted to mean that Congressional silence leaves this issue open to interpretation by courts or that Congress was satisfied with this interpretation.<sup>41</sup> This line of thinking, while allowing courts to construe statutes liberally, could also provide many detrimental effects. In response, the Supreme Court found that “rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”<sup>42</sup> In this situation, §10(b) contained nothing to suggest that an extraterritorial application was applicable, and thus the court would not infer it.<sup>43</sup> The Supreme Court further announced the creation of a transactional test, applicable to defining the reach of §10(b) of the Securities Exchange Act.<sup>44</sup> Under this test, the provision would only extend to “transactions in securities listed on domestic exchanges . . . and domestic transactions in other securities,” thereby confining the reach to the statutory text.<sup>45</sup> While the transactional test was to cover §10(b) matters, the Court adopted the “focus” test as the method of establishing whether there was an extraterritorial application.

In his concurrence, Justice Stevens claimed the majority “impermissibly narrowed the inquiry in evaluating whether the statute applies abroad.”<sup>46</sup> He insisted that the Second Circuit refined its tests overtime, with tacit approval from Congress, the Commissioner, and

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37. *Id.* at 250-51.

38. and therefore, exemplifying Congressional intent.

39. *Morrison*, 561 U.S. at 257.

40. *Id.* at 257-58.

41. *Id.* at 261.

42. *Id.*

43. *Id.* at 262.

44. *Morrison*, 561 U.S. at 274.

45. *Id.*

46. *Id.* at 265 (J. Stevens concurring).

sister circuits, and that “[t]he longstanding acceptance by the courts, coupled with Congress’ failure to reject [its] reasonable interpretation of the workings of §10(b) . . . argues significantly in favor of acceptance of the [Second Circuit] rule by this court.”<sup>47</sup> He argued that the majority sought to transfer the presumption from a flexible rule to a clear statement of law and that simply is not a correct application.<sup>48</sup>

*b. Adding to Extraterritoriality: Kiobel v. Royal Dutch Petro Co.*<sup>49</sup>

In 2013, the Supreme Court took *Kiobel v. Royal Dutch Petro. Co.* under advisement after the Second Circuit dismissed the complaint based on an assumption that corporations cannot be held liable under the ATS because “the law of nations does not recognize corporate liability.”<sup>50</sup> In *Kiobel*, Nigerian nationals sued Dutch, British, and Nigerian corporations, alleging that they aided and abetted the Nigerian military in committing international law violations. Specifically, petitioners argued that they, or their relatives, were killed, tortured, unlawfully detained, deprived of their property, and forced into exile by the Nigerian government, and that the respondents were complicit in these acts of violence and international injustice.<sup>51</sup> The Supreme Court agreed to issue a writ of certiorari; not to decide whether corporations were susceptible to ATS claims, but instead to decide whether claims consisting of conduct that primarily occurred abroad can be brought under the statute.<sup>52</sup>

In Chief Justice Robert’s opinion, he found “that the principals underlying the general presumption that U.S. law does not apply outside of the United States extend[s] fully to the ATS.”<sup>53</sup> In making this statement, the Chief Justice reinforced the principal that statutes ordinarily do not apply extraterritorially without explicit Congressional intent. While concluding that the presumption against extraterritoriality barred this specific ATS claim because all relevant conduct took place outside of the U.S., the court stated that even if the claims were to “touch and concern” the U.S. with sufficient force, the mere presence of a corporation was not sufficient to overcome the threshold.<sup>54</sup> The court

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47. *Id.* at 278 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975)).

48. *Id.*

49. *Kiobel*, 569 U.S. 108 (2013).

50. *Id.* at 114.

51. *Id.* at 113-14.

52. Howe, *supra* note 12.

53. *Id.*

54. *Kiobel*, 569 U.S. at 125.



thus created an exception<sup>55</sup> by enunciating that ATS can create jurisdiction when “claims touch and concern<sup>56</sup> the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”<sup>57</sup> While articulating the exception, the court failed to provide a workable way for the lower courts to apply this “test.”<sup>58</sup>

*c. A Final Take? RJR Nabisco v. European Cmty.*<sup>59</sup>

The Supreme Court’s decision in *Kiobel* left the legal community wondering which test governs the extraterritorial analysis, the “focus” test<sup>60</sup> or the “touch and concern” test.<sup>61</sup> The Supreme Court stated in *RJR Nabisco* that “. . . for ATS claims, ‘[i]f the conduct relevant to the statute’s [ATS’s] focus occurred in the United States, then the case involves a *permissible* domestic application even if other conduct occurred abroad.’”<sup>62</sup> In other words, if the relevant conduct<sup>63</sup> occurred in a foreign country, the case involves an impermissible extraterritorial application, regardless of conduct that occurred in the U.S., ultimately resulting in a claim that is categorically barred.<sup>64</sup> The relevant conduct must intersect with the focus of the statute in question for there to be a cognizable extraterritorial application of the statute without an explicit showing of Congressional intent. Meaning, the “focus” test and the “touch and concern” test are, for ATS extraterritorial purposes, the *same* test.<sup>65</sup>

The European Community<sup>66</sup> and twenty-six of its member states originally brought suit against RJR Nabisco (RJR) in the Eastern District of New York in 2000,<sup>67</sup> alleging that RJR directed, managed, and controlled a global money laundering enterprise in violation of the Racketeer Influenced and Corrupt Organizations (“RICO”) statute.<sup>68</sup>

55. *Id.* at 124-25.

56. Becomes known in future cases as the “touch and concern” language.

57. 569 U.S. at 124-25.

58. The “touch and concern” language is a key point in many extraterritorial analyses.

59. 136 S. Ct. 2090.

60. As enunciated in *Morrison*.

61. As stated in *Kiobel*.

62. 136 S.Ct. at 2101.

63. Relevant conduct is conduct that occurred in violation of part of some international law.

64. 136 S. Ct. at 2101.

65. *Clarifying Kiobel’s “Touch and Concern Test”*, 130 Harv. L. Rev. 1902, 1911-12 (2017).

66. Formally the European Economic Community (“EEC”), a regional organization aimed at bringing about economic integration in its member states. EEC was renamed European Community upon the formation of the European Union and is not incorporated.

67. 136 S. Ct. at 2098.

68. *Id.*

This violation allegedly occurred as a result of Columbian and Russian criminal organizations importing illegal drugs into European countries, selling them, and laundering money back to the organizations’ home countries.<sup>69</sup> The money from selling the illegal drugs was then used to pay for large shipments of RJR cigarettes to Europe.<sup>70</sup>

The district court dismissed the action based on the presumption against extraterritoriality.<sup>71</sup> The Second Circuit reversed and held that claims under RICO can apply extraterritorially when a RICO claim is in violation of a predicate statute that Congress clearly intended to have an extraterritorial application.<sup>72</sup>

Justice Alito stated that sections of RICO have an extraterritorial application to rebut the presumption, which is expressed by clear indication from Congress in predicate statutes.<sup>73</sup> Sections of the RICO text specifically define certain racketeering offenses as ones that occur outside of the U.S., thereby displacing the presumption.<sup>74</sup> However, according to the Court, not all foreign enterprises qualify to rebut the presumption in these instances.<sup>75</sup> The enterprise must directly affect commerce involving the U.S. in order for this part of RICO to apply.<sup>76</sup> If RICO does apply, in order for the lawsuit to proceed, a plaintiff must allege domestic injury.<sup>77</sup> In this case, all alleged injuries by plaintiffs were suffered abroad and thus the Court found that the district court correctly dismissed the case.<sup>78</sup> While an impermissible application of ATS was found in this case, *RJR* provided the Supreme Court with an opportunity to clarify what exactly the test is for conducting an extraterritorial analysis and provided an opportunity to reiterate that *Morrison*’s focus test still governs.<sup>79</sup>

Accordingly, the Court stated that in evaluating whether a claim involves a permissible extraterritorial application, a court must first look at whether the presumption has been rebutted by clear and affirmative indication<sup>80</sup> that the statute applies extraterritorially, and second, if there

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69. *Id.*

70. *Id.*

71. *Id.* at 2099.

72. *RJR Nabisco*, 136 S. Ct. at 2102.

73. *Id.*

74. *Id.* at 2101.

75. *Id.* at 2105.

76. *Id.* at 2094.

77. *RJR Nabisco*, 136 S. Ct. at 2095.

78. *Id.* at 2111.

79. Perlette Jura & Dylan Mefford, *Extraterritoriality: The ATS in Focus*, LAW360 (Oct. 25, 2016), <https://www.law360.com/articles/855264/extraterritoriality-the-ats-in-focus>.

80. Clear and affirmative evidence could be direct, written authorization with the statute, authorizing an extraterritorial application.

is no such indication, a court must ask whether the claim involves a domestic application of the statute's focus.<sup>81</sup> Essentially, if the conduct that is relevant to the statute's focus occurs on U.S. soil, an allowable domestic application of the statute exists, even if other conduct occurred abroad. Alternatively, if all of the conduct occurred abroad, a court does not even have to consider the statute's focus before dismissing the case.<sup>82</sup>

*B. No Clear Consensus: Recent Split Over Extraterritorial Application of ATS*

i. *Al Shimari v. CACI Premium Technology*

The Fourth Circuit has heard this case four times since 2008<sup>83</sup> and there is no indication that a final decision is forthcoming, without an eventual ruling from the Supreme Court.<sup>84</sup> Originally filed in 2008, the Center for Constitutional Rights brought suit on behalf of four Iraqi torture victims against CACI International Inc. and CACI Premium Technology, two U.S. based government contractors.<sup>85</sup> The complaint alleged that the defendants' directed and participated in illegal conduct, including torture, at the Abu Ghraib prison in Iraq, where they were hired by the U.S. to provide interrogation services.<sup>86</sup> Numerous issues arose during this case, including issues of proper jurisdiction and questions of justiciability.<sup>87</sup> While originally dismissed on remand after the release of the *Kiobel* decision, due to all incidents alleged occurring in Iraq, dismissal was later overturned.<sup>88</sup>

On the Fourth Circuit's third hearing of the case,<sup>89</sup> it interpreted that the Supreme Court's broadly stated usage of the word "claims"<sup>90</sup> allowed the court jurisdiction.<sup>91</sup> It interpreted the word "claim" to have the meaning given by Black's Law Dictionary, as the "aggregate of

81. Jura, *supra* note 80.

82. *Id.*

83. 658 F.3d 413 (4th Cir. 2011); 679 F.3d 205 (4th Cir. 2012); 758 F.3d 516 (4th Cir. 2014); 840 F.3d 147 (4th Cir. 2016).

84. Most recently, the defense filed a renewed motion to dismiss, which was denied from the bench on September 22, 2017.

85. *Al Shimari v. CACI et al.*, CTR. FOR CONST. RTS. (Sept. 26, 2017), <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>.

86. 658 F.3d at 415-417.

87. See all 4 of the Fourth Circuit opinions in this case [listed above].

88. 758 F.3d at 520.

89. *Id.* at 516.

90. As discussed in *Kiobel*.

91. 758 F.3d at 527.

operative facts giving rise to a right enforceable by a court."<sup>92</sup> Under this rationale, the broad definition of the word "'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force," suggesting that in application, courts must consider all facts that give rise to an ATS claim, including the parties' identities and their relationship to the cause of action.<sup>93</sup> In essence, this court read the "touch and concern" language to contemplate a fact-based analysis to determine whether particular ATS claims displace the presumption.<sup>94</sup>

In his *Kiobel* concurrence, Justice Breyer stated that this particular reading would allow for jurisdiction for torts occurring on American soil, when the defendant is an American national, or if the defendant's conduct substantially and adversely affects an important American interest.<sup>95</sup> This particular set of examples was likely used as part of the Fourth Circuit's consideration when determining how broad the test should be and how far it should stretch its interpretation of the word "claims."

The presumption against extraterritoriality, under this court's analysis, is not a categorical bar, but a fact-based analysis to determine whether courts may exercise jurisdiction over ATS claims.<sup>96</sup> Under these circumstances, the plaintiffs' claims were found to "touch and concern" the U.S. with sufficient force to displace the presumption against an extraterritorial application of ATS.<sup>97</sup> "The plaintiffs' claims reflected extensive 'relevant conduct' in the U.S., contrasted to the 'mere presence' of foreign corporations, that was insufficient to confer jurisdiction in *Kiobel*" because all relevant conduct occurred abroad.<sup>98</sup> The torture committed in this instance was by U.S. citizens, whom were employed by a U.S. corporation, and the torture alleged occurred at a military base, operated by U.S. personnel.<sup>99</sup> Allegations further insisted that CACI managers in the U.S. gave at least tacit approval to the acts of torture, attempted to cover it up, and implicitly encouraged the conduct.<sup>100</sup> The Fourth Circuit further found that Congress, through enactment of numerous other statutes, attempted to provide aliens with access to U.S. courts in order to hold U.S. citizens accountable for acts

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92. *Id.* (quoting Black's Law Dictionary 281 (9th ed. 2009)).

93. *Id.*

94. *Id.*

95. 133 U.S. at 127 (J. Breyer concurring).

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

97. *Id.*

98. *Id.* at 528.

99. *Id.* at 528-31.

100. *Id.* at 530-31.

committed abroad.<sup>101</sup>

On the latest remand, it was supposed to be determined whether or not this case presented a nonjusticiable political question<sup>102</sup> because of potential entanglement between the judicial and executive branches.<sup>103</sup> The district court concluded that because a nonjusticiable political question was inherent in this case, due to the military's direct control over interrogation operations at Abu Ghraib, the adjudication of the plaintiffs' claims required the court to improperly question sensitive military judgments. As a result, "the court lacked any judicially manageable standards to resolve the plaintiff's claims."<sup>104</sup> Again on appeal, the Fourth Circuit found that the district court erred when it failed to determine whether the military *actually* exercised control over any of CACI's conduct alleged in the complaint.<sup>105</sup> The conduct by CACI employees that was unlawful when committed was found by the Fourth Circuit to be justiciable, regardless of whether that conduct occurred under military control.<sup>106</sup> Furthermore, "the fact that a military contractor was acting pursuant to 'orders of the military does not, in and of itself, insulate the claim from judicial review.'"<sup>107</sup>

#### ii. *Adhikari v. Kellogg Brown & Root*<sup>108</sup>

On January 3, 2017, the Fifth Circuit released the *Adhikari* decision, stating that the claims asserted against a U.S. defense contractor, for injuries incurred on Iraqi soil, were not cognizable under ATS because they were barred by the presumption against extraterritoriality.<sup>109</sup> The complaint alleged that twelve Nepali men were kidnapped and murdered by Iraqi insurgents while traveling through Iraq to work for a subcontractor on a U.S. government contract with Kellogg Brown & Root (KBR).<sup>110</sup> The decedents' survivors brought suit against KBR for human rights violations under the ATS, Trafficking Victims Protections, and Reauthorization Act (TVPRA), alleging that KBR had been

101. *Al Shimari*, 758 F.3d at 530-31.

102. While there is an inherent question as to whether ATS claims can and do present an issue of justiciability, that issue is well beyond the purview of this paper.

103. 840 F.3d at 151.

104. *Id.*

105. *Id.*

106. *Id.*

107. 758 F.3d at 533.

108. 845 F.3d 184 (5th Cir. 2017).

109. Steptoe & Johnson LLP, "Fifth Circuit Rules on Extraterritoriality of ATS Claims, Creating Circuit Split," Lexology (Jan. 6, 2017), <https://www.lexology.com/library/detail.aspx?g=2fedb2e3-a8bc-4b11-a8a2-b7e14aa2423b>.

110. 845 F.3d at 190-91.

involved in a human trafficking scheme that forced the decedents into Iraq where they were later murdered.<sup>111</sup> The district court originally granted summary judgment for the defendants, holding that the presumption barred plaintiff’s claims.<sup>112</sup>

On appeal, plaintiffs argued that *Kiobel*’s “touch and concern” language permitted their claims because the contract in question was issued and directed from the U.S., as well as supported by the U.S. military.<sup>113</sup> In making these claims, plaintiffs relied on the Fourth Circuit’s 2014 decision in *Al Shimari*.<sup>114</sup> The Fifth Circuit disagreed with plaintiffs’ reading of the statute, holding that *Kiobel*’s extraterritorial application and the “touch and concern” language required courts to analyze the “focus” of the statute at issue.<sup>115</sup> If the conduct that the complaint alleged had a direct relation to the statute, then the statute may have an extraterritorial application.<sup>116</sup> The Court moved on to pinpoint the focus of the ATS and determined that “the focus is conduct that violates international law.”<sup>117</sup> The conduct alleged in the complaint that violated international law occurred in Iraq and thus the presumption barred jurisdiction, regardless of the fact that a U.S. government contractor was involved and personnel in the U.S. were aware of this trafficking scheme.

By reaching this conclusion, the Fifth Circuit enunciated its interpretation on the statute’s presumption against extraterritoriality. First, the court must look at whether the presumption has been rebutted.<sup>118</sup> For these situations, rebutted means that there has been clear, affirmative indication that a statute applies extraterritorially. If no clear, affirmative indication of extraterritorial application exists, the court must look to the statute’s focus.<sup>119</sup> Step two’s “focus” inquiry stems from the Supreme Court’s decision in *Morrison*. “[W]hether the presumption bars a claim is not always ‘self-evidently dispositive’ because cases will often have at least some ‘contact with the territory of the United States.’”<sup>120</sup> For that reason, the inquiry cannot stop at step one. The Fifth Circuit’s extraterritorial application therefore aligns with the Supreme Court’s *RJR* test.<sup>121</sup>

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111. *Id.* at 190.

112. *Id.*

113. *Id.* at 195.

114. *Id.* at 199.

115. *Adhikari*, 840 F.3d at 199- 200.

116. *Id.* at 192.

117. *Id.* at 197.

118. *Id.* at 192.

119. *Id.*

120. *Adhikari*, 840 F.3d at 192.

121. *Id.*

The Fifth Circuit enunciated the previously spoken rule that the ATS conveys jurisdiction for a “modest number of international law violations” that are carved out of federal common law.<sup>122</sup> In order for an ATS claim “to be cognizable, a plaintiff’s claim must be stated ‘with the requisite definite content and acceptance among civilized nations.’”<sup>123</sup>

The Fifth Circuit’s adoption of this ATS approach completely contradicts the approach that the Fourth Circuit adopted in *Al Shimari*. The Fifth Circuit observed that the Fourth Circuit considered that “the claims,” rather than the alleged tortious conduct, must “touch and concern” the U.S. with sufficient force.<sup>124</sup> This approach suggests that courts must consider all facts that give rise to an ATS claim.<sup>125</sup> The plaintiffs urged that a fact-specific analysis that looks at the “totality of [their] claim’s connection to the U.S. territory and the national interest” is necessary under *Kiobel*.<sup>126</sup> Plaintiffs also sought leave to amend their complaint in order to assert aiding and abetting claiming, in attempt to satisfy *Al Shimari*, but the court denied their request to amend, stating that *Al Shimari* is not the test.<sup>127</sup> The Fifth Circuit sided with KBR in determining that *Morrison*’s “focus test” still governs an ATS claims extraterritorial application and that no evidence was presented here to rebut the presumption.<sup>128</sup>

### III. DISCUSSION

#### *A. The Fourth Circuit’s Approach as a More Viable Interpretation*

As first stated above, the Fourth and Fifth Circuits are completely at odds when it comes to a correct application of the ATS’s extraterritorial component. With no legislative history to suggest which circuit’s interpretation should control,<sup>129</sup> the decision to give one interpretation more credibility over the other has essentially come down to a process of deduction and potentially even preference.

When evaluating an ATS issue and viability of a claim, courts appear to often be stuck on what exactly is sufficient to displace the presumption and courts even seem confused as to whether the “focus”

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122. *Id.* (quoting *Sosa*, 542 U.S. at 794).

123. *Id.* (quoting *Kiobel*, 133 U.S. at 1663).

124. *Id.* at 193.

125. *Adhikari*, 840 F.3d at 194.

126. *Id.*

127. *Id.* at 199.

128. *Id.* at 194.

129. Daniel Rubin, Student Project: Aline Tort Statute: Legislative History: Home, Pace Law School Library Research Guides (Oct. 29, 2017), <http://libraryguides.law.pace.edu/c.php?g=452982&p=3107679>.

test, “touch and concern” test, a combination of the two, or neither controls. The *Morrison* court used the congressional focus of a statute as the sole test, but that test was communicated differently in *Kiobel*.<sup>130</sup> The Fifth Circuit in *Adhikari* adopted the “focus” test as a two-part method of analyzing ATS claims, as adopted by the Supreme Court in *RJR*, eventually concluding that the focus of the ATS and the conduct that occurs in the U.S. must correlate. If the focus and the conduct intersect, a claim is sufficient to “touch and concern” the U.S. with sufficient force to displace the presumption and the ATS claim may proceed. The Fifth Circuit’s *Adhikari* decision is a complete contradiction to the Fourth Circuit’s determination that the focus of the state is only one of the many factors that should be analyzed when determining whether an ATS claim may proceed in a U.S. federal court.

The Fourth Circuit’s adoption of a multi-factor test<sup>131</sup> should govern all current and future ATS analyses because it more closely resembles a textual reading of the statute and it stays true to the statute’s intended purpose. The purpose, which has been stated time and time again, is to provide a method of redress for those that have been the victims of violations of the laws of nations. Nowhere does the statute read that the conduct must take place in the U.S. In fact, that line of reasoning would leave many victims without a remedy and would thus go directly against the statutes stated purpose.

A purely textual reading of the statute requires only “three elements to be present: (1) a claim must be made by aliens; (2) it must be a tort; and (3) the tort must be in violation of the law of nations or treaties of the U.S.”<sup>132</sup> Many courts have inferred that the presumption bars a claim if conduct occurred overseas from: (1) the language of the statute; (2) Congress’ job to legislate domestically; (3) their ability to write into legislation that statute applies extraterritorially; and (4) their failure to do so in the ATS. This is an incorrect reading because Congress, in 1789, chose to write this statute with broad language and more recently, the Supreme Court in *Kiobel*, chose to use the word “claims” instead of using “tortious conduct.”

It is also likely that Congress did not specify an extraterritorial application of ATS within the statute because it did not think that it had to. The mention of the law of nations should be sufficient to infer an extraterritorial application. In fact, Justice Breyer<sup>133</sup> would allow

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130. Described as the focus test in *Morrison* but referred to as the touch and concern test in *Kiobel*.

131. Although they never do state that factors to be considered, only that the focus is one viable option.

132. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 548 (1981).

133. In his *Kiobel* concurrence, joined by Justice’s Ginsberg, Sotomayer, and Kagan.



jurisdiction whenever: (1) the alleged tort occurs on American soil; (2) when the defendant is an American national; or (3) when the defendant's conduct substantially and adversely affects an important American national interest.<sup>134</sup> While *Kiobel* disallows jurisdiction on the ground that mere corporate presence is allegedly not sufficient to bring an ATS claim, any direction or call made by a U.S. corporation on U.S. soil should suffice to kick-start a cause of action under the ATS. The literal meaning of "touch and concern" implies that each of these three scenarios is enough to displace the presumption. If Congress intended the focus of a statute or the claims made to "touch and concern" the U.S. with sufficient force to displace the presumption, they would have either written the statute more narrowly, or provided legislative history to indicate that is how the ATS is meant to be applied.

The presumption against extraterritoriality can be described as a rather recent canon of statutory interpretation. It was born into civil procedure in the 1909 *American Banana Co. v. United Fruit Co.* case, when the court stated, "[a]ll legislation is prima facie territorial."<sup>135</sup> It is probable that the Supreme Court was unaware of what a discord those six words of dicta would cause over a century later. Even though it has been over one hundred years since the first discussion of the presumption, it can still be said to be a relatively recent phenomenon due to the relatively slow progression of the legal system.

The Supreme Court has no business applying this relatively recent phenomenon to statute that existed almost a century and a half before it. In other words, it is inappropriate to apply a canon of statutory construction, born in 1909, to a statute that has been in existence since 1789. The argument that if Congress intended the statute to apply extraterritorially, they would have explicitly included it, becomes essentially illegitimate when considering that members of Congress, who wrote the ATS, were unaware of how the legal system would interpret this statute centuries later. It is only fair to interpret the ATS as having an extraterritorial aspect because it mentions, on its face, the law of nations. That alone should be enough to indicate that those in 1789 meant for it to apply extraterritorially. Going against the statute's stated purpose and its textual reading, both in existence of centuries, to apply a canon of construction that did not come into existence until over one hundred years later, a canon that effectively has the power to negate the statute, is an improper interpretation of the law.

By reading the presumption into each and every statute that Congress does not specifically state applies abroad, the court is creating too many

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134. *Kiobel*, 569 U.S. at 127.

135. 213 U.S. 347, 357 (1909).

bright line rules that may often go against the exact purpose of a statute. Furthermore, stating that the focus of the statute is the sole consideration in determining whether the presumption is displaced, makes the line even brighter. This cannot be a correct application because a statute can be read to have many foci. Then, the issue becomes: which focus governs? When determining the answer, legislative history should indicate the priority of a statute's adoption. When that is not available, it is inappropriate to allude to a narrow application, something which both the Supreme Court and numerous circuit courts have done in the past.

The Supreme Court, in its three most recent cases addressing a statute's extraterritorial application, contradicts itself numerous times when it discusses explicit displacement of the presumption and the conduct and focus of a statute. Dissenting in part in *Adhikari*, Judge Graves stated:

“[t]he majority then reasons that the ‘ATS “focus” analysis’ involves examining “the conduct alleged to constitute violations of the law of nations, and the location of that conduct.”<sup>136</sup>I have no issue with this broad proposition; however, it is not simple matter to apply it to a case, such as this one, where the alleged conduct is comprised of several constituent actions that are part of an overall course of conduct constituting a violation of the law of nations.”<sup>137</sup>

If the court only looks to one factor, its determined “focus” of a statute, it is doing a disservice to those seeking to utilize the statute to remedy an international wrong. By looking only at what it declares the “focus” to be, and thus likely only look at one specific act, the court is turning a blind eye to all other claims in front of it, all of which are likely stemming from multiple and potentially even separate events.

In his *Morrison* concurrence, Justice Breyer stated that with the ATS language adopted, “Congress invited an expansive role for judicial elaboration when it crafted such an open-ended statute in 1934.”<sup>138</sup> While Justice Breyer concurred in judgment, he disagreed with the majorities turning of the presumption from a flexible rule into more of a clear statement of law.<sup>139</sup> In his discussion of the presumption, he referenced *EEOC v. Arabian American Oil Co. (Aramco)*,<sup>140</sup> where Justice Rehnquist stated “Congress’ awareness of the need to make a

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136. *Adhikari*, 845 F.3d at 208 (quoting *Mastafa*, 770 F.3d at 185).

137. *Id.*

138. 561 U.S. at 276.

139. *Id.* at 278.

140. *EEOC*, 499 U.S. 244 at 258.

clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of the statute.”<sup>141</sup> Justice Marshall vigorously disagreed with that statement, arguing that “. . . this canon is *not* a ‘clear statement’ rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will.”<sup>142</sup>

From *Aramco*, Justice Breyer deduces that “. . . our cases both before and after *Aramco* make perfectly clear that the Court continues to give effect to ‘all available evidence about the meaning’ of a provision when considering its extraterritorial application, lest we defy congress’ will.”<sup>143</sup> He concludes that the presumption can be useful as a theory of congressional purpose, a tool for managing international conflict, a background norm, a tiebreaker, but it does NOT relieve courts of the duty to give statutes the most faithful reading possible.<sup>144</sup> This statement indicates that he believes the presumption to be one of many pieces in analyzing extraterritorial applicability. While Congress’ purpose is to legislate domestically, that should not be a sole or even a strong reason for concluding that the ATS does not apply extraterritorially, especially where there is explicit mention of international law within the statutory text, and absolutely no mention or indication that the statute does not apply to conduct that has taken place out of the U.S. Reading “the law of nations” to apply only to activity occurring inside of the U.S. is, in itself, contradictory.

### *B. The Lone Dissenter*

Judge Graves dissent<sup>145</sup> in *Adhikari* touches on numerous factors that point to why a bright line rule regarding the ATS needs to be established. Graves believes that the majority “adopts an unnecessarily restrictive view as to the meaning of *Kiobel*’s ‘touch and concern’ language by engaging in a formalistic application of *Morrison*’s focus test.”<sup>146</sup> He believes that the plaintiffs stated a cause of action, with claims that “touch and concern” the U.S. with sufficient force, thus allowing a for viable ATS claim to be brought.<sup>147</sup> The alleged violations related specifically to conduct being directed from the U.S., attempts to

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141. 561 U.S. at 278.

142. *Id.* at 279.

143. *Id.*

144. *Id.* at 280.

145. Judge Graves dissented in part, concurred in part. His concurrence was only in relation to non-ATS claims.

146. 845 F.3d at 208 (J. Graves dissent).

147. *Id.*

U.S. personnel to cover that conduct up, and also allegations that the defendant and other U.S. corporations were directly benefiting from the international law violations.<sup>148</sup> He further goes on to state that "the majority's application of the 'focus' test belies the *actual* focus of the ATS and is inconsistent with the Supreme Court's ATS jurisprudence."<sup>149</sup>

Judge Graves' recitation that the Fifth Circuit's application the ATS, both generally and extraterritorially, belies what the statute was meant to accomplish in 1789, is refreshing. While voicing that he thinks the majority got it wrong, he perhaps takes his analysis too far by stating that the Fifth Circuit's analysis in "inconsistent with the Supreme Court's ATS jurisprudence." It is difficult for the Fifth Circuit's entire ATS opinion to be inconsistent with the Supreme Court, when the Supreme Court itself has contradicted itself numerous times over the last decade, each new opinion adding a layer to the ATS analysis that does not always make logical sense. However, while Judge Graves may have exaggerated a bit, he correctly states that the Fifth Circuit got its analysis wrong, specifically when it decided whether the claims stated, "touch and concern" the U.S. with sufficient force to displace the presumption.

Judge Graves backs his assertions by looking at the political climate prior to ATS enactment, proving that the ATS was and is not meant to only apply to a narrow set of situations, operated by a bright line rule.<sup>150</sup> He reiterates the concern for foreign relations and cites to *Kiobel's* language that the purpose of the ATS was to address "violations of the law of nations, admitting of a judicial remedy and, at the same time, threatening serious consequences in international affairs."<sup>151</sup> "Prior to the enactment of the ATS, Congress was frustrated by the federal government's incapacity to vindicate rights under the law of nations."<sup>152</sup> Congress' annoyance with the lack of enforcement power prior to the ATS's enactment would not lead them to legislate narrowly. If anything, this attitude would have led them to desire a broad reading of the statute, likely a reason why instead of going into detail, they left the statute to simply state: "the law of nations."

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148. *Id.* at 216-17.

149. *Id.* at 208.

150. Congress' desire to put legislation in place allowing them to deal with international issues was intensified by the Marbois incident, May 1784. *See* *Respublica v. De Longchamps*, 1 U.S. 111 (1784). Discussed in 542 U.S. 692.

151. 845 F.3d at 210.

152. *Id.*

*C. A Limitation of the Fourth Circuit's Analysis*

While a multi-factor test to decide an extraterritorial application of ATS should be the correct analysis for a claim, this test cannot go without limitation. A major concern that comes with applying the ATS broadly is the issue of the U.S. having too much police power. If the U.S. is able to bring those from abroad to the U.S. to try them for international wrongs against other foreign individuals, controversy might ignite.

As a result, it would be most beneficial for foreign citizens to be able to state a cause of action under the ATS for crimes committed in violation of international law by U.S. citizens or U.S. based corporations. ATS should be used as an avenue for the U.S. to hold these citizens and corporations accountable for violations of the laws of nations occurring in the U.S. and abroad. If a U.S. citizen or corporation violates the law of nations in another country, either by funneling money to an organization, person, or operation or by providing personnel to carry out or instruct others to carry out a violation, they should not have to be extradited to that country to be held accountable for their actions. Those, or their family members, who have suffered the violation should be able to choose a forum when seeking a remedy, and the ATS should be the vehicle for it.

If the situation is reversed and a U.S. citizen is the victim of a violation of the law of nations, the line becomes more blurred. One possible method of redress would be attempting to bring suit abroad, if possible, to avoid any conflict of laws. If there is no available remedy, a U.S. citizen, suffering from a violation of the law of nations committed abroad, should seek an application of the ATS. In the event that a court would allow a case such as this to proceed, there would need to be some sort of procedure in place to attempt to avoid conflicting laws, and to ultimately prevent forum shopping and other potential issues.

While some sort of limitation is necessary on ATS cases, this limitation should be decided on a case by case basis.<sup>153</sup> It is impossible to foresee all potential issues that may arise in allowing a broad application of the ATS, but the fear alone should not foreclose plaintiffs from bringing suit under the statute.

*D. Al Shimari Satisfies RJR's Test*

Regardless of whether the Fourth Circuit takes a unique approach to the extraterritorial component of the ATS by applying a multi-factor

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153. Potentially in an analogous fashion to a *forum non conveniens* issue. See *Piper v. Reno*, 454 U.S. 235 (1981).

test, the Fourth Circuit still has a case that is, or should be read, to be compliant with the test last enunciated by the Supreme Court in *RJR*.

As previously stated it can be said that ATS displaces the presumption against extraterritoriality by explicitly mentioning in a statute “the law of nations” or a similar variation. However, even if a court were to disagree, the court is forced to move to step two of the *RJR* test, which looks at what activity occurred domestically and the extent necessary to allow a case to proceed. Employment and orders were both directed from the U.S. The fact that the orders and funds were coming from the U.S. in this scenario should be sufficient to permissibly apply the ATS. Even if the torture itself was not occurring in the U.S., the orders themselves were being directed by U.S. officials, in the U.S. While the language of ATS is broad, so is the language of *RJR*’s enunciated test. A permissible application of the second part of the test can and should be read to encompass any activity stemming from or relating to the alleged tortious conduct. The same analysis should be conducted in *Adhikari*, and it should come out the same way. In short, application of the *RJR* test in both *Adhikari* and *Al Shimari* should lead to a finding of a permissible extraterritorial application of ATS.

#### E. An ATS Analysis Going Forward

While the Supreme Court has spoken on the presumption against extraterritoriality generally, and also specifically in terms of the ATS, there has still been a clear disagreement on what the test is and how it should be applied. Though the Supreme Court declined to hear *Adhikari*, it granted certiorari to *Jesner v Arab Bank*<sup>154</sup> to determine whether corporations may be held liable under the ATS. The Supreme Court’s April 2018 decision, however, failed to provide the clarity needed for the judiciary to more accurately apply the ATS going forward.<sup>155</sup> *Jesner* provided an opportunity for the Supreme Court to clarify whether the focus of the statute is essentially the only inquiry into whether an ATS claim can successfully be brought, or whether a multi-factor analysis is more appropriate, with potential factors including: substantial connections to the U.S., headquarters based in the U.S., etcetera. A multi-faceted analysis is a more viable option to consider whether a claim sufficiently “touch[es] and concern[s]” the U.S. However, the Supreme Court failed to contemplate a parallel analysis in *Jesner*.

In *Jesner*, petitioners argued that the Arab Bank provided financial services to various terrorist groups, thus allowing for attacks to occur in

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154. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2015).

155. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386 (2018).

foreign nations.<sup>156</sup> In a 5-4 decision, Justice Kennedy, writing for the majority, focused the opinion on a history of the ATS and the Court's decision in *Sosa*, before ultimately concluding that the judiciary lacked the power to find corporate liability within the ATS. Instead, the majority, again, stated that it is not within the judiciary's purview to clarify the scope of the ATS, but rather that the task lies with Congress.<sup>157</sup> Justice Sotomayor, joined by Justices Ginsberg, Breyer, and Kagan, dissented, stating that "[t]he text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort law claims for law-of-nations violations may be brought against corporations under the ATS."<sup>158</sup> The dissenting Justices correctly realized the danger of failing to recognize corporate liability in human rights violations cases. Not only would recognizing corporate liability in human rights violations cases benefit survivors and their beneficiaries, but by holding banks and corporations liable for their actions, those banks and corporations are likely to increase the policing of their customers and are more likely to catch anything out of the ordinary, before it is too late, in fear of being scolded and/or fined by the U.S. government. Should the Supreme Court fail to continue to clarify the application of the ATS, confusion will continue to spread. With the increased amount of terrorism occurring through the world, it is important that the Supreme Court come up with a clear answer or even a viable test for those that have been victims of violations of the law of nations, occurring outside of the U.S. by U.S. citizens or corporations. If the Supreme Court voices that the focus of the statute is not the sole test, many more potential doors open for victims and their families. Rather than continuing to look at the legislature, the Supreme Court should join Justice Sotomayor's dissent, revisit the ATS's application, and deliver a viable analysis.

The Supreme Court's finding that corporations cannot be held liable under the ATS, is not the end-all-be-all of ATS claims. The Supreme Court's failure to recognize corporate liability in the ATS context does not serve as a categorical bar to individuals seeking redress, rather such individuals must jump over more hurdles to bring suit. While corporate liability does not exist directly under the ATS, potential litigation is not foreclosed because the officers and employees of the corporations can still be held accountable for their actions in an individual or employment related capacity, making indemnification the probable result.

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156. *In re Arab Bank*, 808 F.3d at 149.

157. *Jesner*, 138 S.Ct. at 1402.

158. *Id.* at 1419 (Sotomayor, J. dissenting).

#### IV. CONCLUSION

Going forward, it would be wise for the Supreme Court to clarify the test, not only for applying the ATS generally, but for analyzing extraterritoriality.<sup>159</sup> While a multi-factor test is the right path to follow, it is important to be wary of any potential conflicts of law and the risks associated with the U.S. over policing international law or the law of nations—making it important that the Court implement a limitation. While it is necessary for the Supreme Court to enunciate a bright line rule when it comes to the extraterritorial application of the ATS, the rule itself should not be a bright line.

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159. One that should be aligned with the Fourth Circuit's interpretation to yield the statute's intended results.