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How Concerned Should We Be? The Conundrum of *Kiobel's* Touch and Concern Test and Corporate Liability Under the Alien Tort Statute

"American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court."[1]

I. INTRODUCTION

The interpretation and application of the Alien Tort Statute (ATS) has challenged federal courts for the last two decades in the twentieth century.[2] The ATS, a single sentence within the Judiciary Act of 1789, provides United States federal courts with original jurisdiction over "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."[3] Following a lengthy dormant period, federal courts resurrected the ATS in the 1980s to grant federal jurisdiction over international human rights claims where both the plaintiff and defendant are of foreign origin.[4] In the late twentieth and early twenty-first centuries, however, courts have struggled to find a consistent approach to adjudicating claims brought against multinational corporate defendants.[5] As ATS jurisprudence has

1. Sosa v. Alvarez-Machain, 542 U.S. 692, 751 (2004) (Scalia, J., concurring in part and concurring in the judgment).

2. *See infra* Part II (describing courts' difficulties interpreting ATS).

3. *See* 28 U.S.C § 1350 (2012) (outlining district courts' broad jurisdiction under ATS).

4. *See Sosa*, 542 U.S. at 724-25 (describing birth of modern ATS); Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After* Kiobel, MICH. B.J., Nov. 2013, at 45 (describing timeline of modern international human rights litigation under ATS).

5. *Compare* Ali v. Rumsfeld, 649 F.3d 762, 777 (D.C. Cir. 2011) (rejecting notion viewing law of nations incorporated into U.S. domestic law), Saleh v. Titan Corp., 580 F.3d 1, 14-15 (D.C. Cir. 2009) (holding ATS claims against corporation failed for lack of international norm violation), *and* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-08 (D.C. Cir. 1985) (finding no international norm violation in case of executive officials funding Nicaraguan rebels), *with* Krishanti v. Rajaratnam, No. 2:09-cv-05395, 2014 WL 1669873, at

evolved, courts have largely narrowed its application, reducing foreign plaintiffs' abilities to have their claims adjudicated in American federal courts.[6]

Scholars generally refer to the various periods of modern ATS interpretation as "generations."[7] The first generation of ATS claims in the modern era began with the Second Circuit's liberal interpretation of ATS boundaries in *Filartiga v. Pena-Irala*.[8] Plaintiffs predominantly brought these cases against state actors, who they alleged violated international law.[9] Following these initial suits, questions regarding their efficacy persisted.[10] A second generation of litigation ensued in the mid-1990s, consisting primarily of allegations against multinational corporations.[11] During this time, claims against multinational corporations proliferated, and the United States Supreme Court issued its first decision on the ATS in *Sosa*.[12] While the *Sosa* opinion focused the ATS application only to a narrow class of international norms, the Court left it up to lower federal courts to flesh out a meaningful test, resulting in conflicting ATS

*10 (D.N.J. Apr. 28, 2014) (holding ATS applicable where plaintiffs sued defendants for actions occurring in United States), *and* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 324 (D. Mass. 2013) (finding ATS applicable because defendant resident of United States aided prosecution overseas). In *Lively*, the court took a particularly expansive view of touch and concern in exercising jurisdiction over an ATS claim. *See Lively*, 960 F. Supp. 2d, at 322. Before the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) doubts persisted over the Court's ability to address lower courts' various complexities. *See* 133 S. Ct. 1659 (2013); Brittany J. Shugart, Note, *Relieving the Vigilant Doorkeeper: Legislative Revision of the Alien Tort Statute in the Wake of Judicial Lawmaking*, 22 S. CAL. REV. L. & SOC. JUST. 91, 95 (2012) (highlighting *Kiobel*'s significant precedential value).

6. *See* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) (refusing to proceed with foreign plaintiffs' cases for "lack of respect" it showed executive branch); Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (holding dismissal proper because it interferes with U.S. foreign policy). The Supreme Court in *Sosa v. Alvarez-Machain* cautioned, using an oft-quoted metaphor, that while courts left the "door . . . ajar" to recognizing other causes of action under the ATS in the future, they should subject such claims to "vigilant doorkeeping." *See* 542 U.S. at 729.

7. *See* Fox & Goze, *supra* note 4, at 45 (describing stages of ATS "generations").

8. *See* 630 F.2d 876 (2d Cir. 1980) (holding U.S. federal court had original jurisdiction over claim between two foreign nationals under ATS). Scholars believe the *Filartiga* decision spawned a new way of looking at the ATS, and inspired a new wave of human rights litigation. *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 718 (2012) (highlighting impact and importance of *Filartiga* decision).

9. *See* Fox & Goze, *supra* note 4, at 45 (describing theme of first generation cases); *see also* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW HISTORY AND ANALYSIS 151-77 (2009) (describing torts requiring showing of state action under ATS).

10. *See* Childress, *supra* note 8, at 718-20 (describing law review articles and cases debating efficiency of ATS). Even in cases where courts decided ATS claims in favor of plaintiffs, judgments would often not attach to foreign government officials. *See id.* at 719. ATS claims brought against state actors were frequently subject to immunity and personal jurisdiction problems. *See id.* at 718-19.

11. *See, e.g.*, Fox & Goze, *supra* note 4, at 45 (describing plaintiffs' claims during mid-1990s shift in ATS litigation, focusing on multinational corporate defendants); Jennifer M. Green, *The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment Through the Alien Tort Statute*, 35 U. PA. J. INT'L L. 1085, 1088-90 (2014) (outlining litigation against corporate defendants introduced in mid-1990s); Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, The Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 5 (2007) (noting ATS evolved to allow claims against corporations).

12. Sosa v. Alvarez-Machain, 542 U.S. 692, 751 (2004); *see also* Green, *supra* note 11, at 1093 (identifying Supreme Court's first discussion of ATS in *Sosa*).

interpretations.[13]

Courts appear to have entered a third generation of ATS jurisprudence following the Supreme Court's 2013 decision in *Kiobel*.[14] Within the *Kiobel* decision, the Court decreed that the presumption against extraterritoriality should be applied to all ATS claims, holding that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[15] Since the *Kiobel* decision, two general lines of interpretation have emerged among the lower federal courts.[16] While some courts have heeded the Court's caution against an overactive judiciary interfering with the domains of Congress and the executive branch, others have strived to retain the spirit of *Filartiga* and, as a result, have created an increasingly complex line of interpretation.[17]

This Note will trace the history of the modern use of the ATS with a focus towards the development of its use against multinational corporations.[18] It will discuss the difficulty courts have faced in limiting the ATS to specific torts, as well as the difficulties courts have faced in applying the ATS in response to the restrictive territorial test outlined in *Kiobel*.[19] This Note will also argue that a broad and inclusive "touch-and-concern" test to displace the presumption against extraterritoriality creates more problems than it solves.[20] Instead, this Note suggests that such boundaries are best determined by new legislation aimed specifically at the modern day, multinational corporations.[21]

13. *Compare* Enahoro v. Abubakar, 408 F.3d 877, 884-86 (7th Cir. 2005) (holding torture and extrajudicial killings not actionable under ATS), *with* Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1250 (11th Cir. 2005) (holding torture actionable under ATS). The Supreme Court's opinion in *Sosa* left several questions undecided. *See* Fox & Goze, *supra* note 4, at 45. Among the questions *Sosa* left unanswered was "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20.

14. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (holding ATS not applicable to violations occurring outside of United States).

15. *See id*. (describing threshold plaintiff must meet to allege claim successfully under ATS). In *Kiobel*, the Court stressed the importance of the presumption against extraterritoriality and the dangers of ignoring such a presumption. *See id.* at 1664; *see also* Fox & Goze, *supra* note 4, at 46 (summarizing Court's holding in *Kiobel*).

16. *Compare* Al Shimari v. CACI Premier Tech., Inc. (*Al Shimari II*), 758 F.3d 516, 530-31 (4th Cir. 2014) (holding corporate citizenship significantly impacts touch and concern test from *Kiobel*), *with* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (holding corporate citizenship irrelevant for touch and concern test), *and* Balintulo v. Daimler AG, 727 F.3d 174, 192-93 (2d Cir. 2013) (holding corporate citizenship not considered under touch and concern test).

17. *See* Al Shimari v. CACI Int'l, Inc. (*Al Shimari I*), 951 F. Supp. 2d 857, 867-68 (E.D. Va. 2013) (outlining varying interpretations of ATS analysis) *vacated and remanded sub nom, Al Shimari II*, 758 F.3d 516 (4th Cir. 2014).

18. *See infra* Part II.

19. *See infra* Part II.B.

20. *See infra* Part III.

21. *See id*.

II. HISTORY

The ATS is a unique statute not only in the United States, but also across the global community.[22] Justice Breyer, in his concurring opinion in *Kiobel*, aptly distilled what some would assume is the modern primary purpose of the ATS: "to provide compensation for those injured by today's pirates."[23] The proliferation of its use against multinational corporations, however, has created novel challenges.[24] Courts assessing these challenges in a post-*Kiobel* generation of litigation have applied varying approaches to determine the role of the federal judiciary in hearing these unique claims.[25] At the same time, Congress has not taken legislative action to clarify when the ATS holds multinational corporations liable.[26]

A. Modern Interpretation of the ATS: From Filartiga *to* Sosa

The Second Circuit's decision in *Filartiga* marked the beginning of the first generation of modern ATS application and redefining the statute as an effective weapon for international human rights standards.[27] In *Filartiga*, the plaintiffs—a Paraguayan doctor and his daughter who was then living in the United States—sued the former inspector general of police of Ascuncion, Paraguay (Americo Norberto Pena-Irala) for wrongful death and violating international law of human rights and the law of nations.[28] The Second Circuit

22. *See* Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J. 443, 446-47 (2015) (considering ATS one-of-a-kind statute in its application to international human rights cases). Even as the Supreme Court in *Kiobel* has limited the ATS: "What remains is the only statute of its kind in the country (and, indeed, the world) because it has the potential to provide an 'alien' with a civil remedy from a U.S. court based upon a variety of customary international law violations committed by a foreign national and occurring in the territory of a sovereign other than the United States." *Id.*

23. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1673 (2013) (Breyer, J., concurring) (considering jurisdictional norms in light of statute's ultimate general purpose).

24. *See* Green, *supra* note 11, at 1089-90 (stating ATS claims against corporations highly contested and face numerous hurdles).

25. *See infra* Part II.C (describing different interpretations of ATS among federal appeals courts).

26. *See* Shugart, *supra* note 5, at 92 (lamenting Congress left ATS interpretation to judicial interpretation). Some have argued that "[t]he wisdom of imposing human rights obligations upon private enterprises, what duties should be imposed, and to what degree parent corporations should be held accountable for the actions of their subsidiaries are issues that should be debated in Congress." Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 167 (2007).

27. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878, 885, 887 (2d Cir. 1980) (outlining ATS utilization to uphold human rights standards). Legal scholars nearly unanimously agree that the Second Circuit's decision in *Filartiga* paved the way for future international human rights litigation under the ATS, and countless sources have documented this conclusion. *See, e.g.*, BETH STEPHENS, ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS xxii (2d ed. 2008) (outlining *Filartiga* doctrine); Childress, *supra* note 8, at 712-13 (describing impact of *Filartiga* on human rights litigation); Kurtis A. Kemper, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350)—Tort in Violation of Law of Nations or Treaty of United States*, 64 A.L.R. FED. 2D 417 (2012) (stating ATS given new life by decision in *Filartiga*).

28. *See Filartiga*, 630 F.2d at 878-79 (describing history of parties' relationships).

held that international law undeniably condemns state-sponsored torture and that the ATS provided subject matter jurisdiction for the plaintiffs' alleged claims.[29] In reaching its conclusion, the court reasoned it should employ contemporary standards to determine and interpret customary international law norms, and that international law standards concern the relationship between a nation and its citizens.[30] The court rooted the constitutionality of the ATS in Article III of the U.S. Constitution.[31] The court reasoned that it was clear "in this modern age[,] a state's treatment of its own citizens is a matter of international concern."[32] The *Filartiga* decision thus became the basis for nearly two decades of human rights claims in the federal courts.[33]

The principles *Filartiga* established enabled many foreign plaintiffs to bring federal lawsuits alleging human rights abuses.[34] *Tel-Oren v. Libyan Arab Republic*[35] was the first major case to grapple with *Filartiga*'s precedent, and its three divergent concurring opinions highlighted the complexity of the conflicting analysis of the ATS as of 1984.[36] The cases following *Tel-Oren* struggled to agree upon the scope and depth of the ATS.[37] Courts also predictably faced choice of law issues, specifically whether the law of the place of injury, federal common law, or international law, provided the cause of action.[38] As ATS analysis evolved, courts eventually came to recognize that

29. *See id*. at 880 (holding acts of torture by state officials violate established norms of international law).

30. *See id*. at 880-85 (demonstrating court's agreement with plaintiffs' arguments).

31. *See id*. at 885-86 (considering "whether First Congress acted constitutionally in vesting jurisdiction over 'foreign suits'") (citation omitted). The Second Circuit based its opinion in *Filartiga* in part on the conclusion that "[t]he law of nations forms an integral part of the [federal] common law . . . [and in] the eighteenth century, it was taken for granted on both sides of the Atlantic." *Id*. at 886. While the plaintiffs urged the court to consider the ATS within Congress's power to define offenses under the law of nations, the court declined such a reading, and instead concluded that it is sufficient to construe the ATS as simply opening federal courts for adjudication of rights already recognized under international law. *See id.* at 887.

32. *See Filartiga*, 630 F.2d at 881.

33. *See* Childress, *supra* note 8, at 718 (describing long-lasting significance of *Filartiga* decision); Fox & Goze, *supra* note 4, at 45 (describing influx of international human rights litigation after *Filartiga*).

34. *See, e.g.*, HENNER, *supra* note 9, at 7-8 (detailing number of cases following *Filartiga*); Childress, *supra* note 8, at 718 (noting significance of approximately 170 cases brought under ATS since *Filartiga*); *see also* Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT'L L. REV. 447, 464 (2013) (describing eagerness of academics and judges to address ATS in response to *Filartiga*).

35. 726 F.2d 774 (D.C. Cir. 1984).

36. *See id*. at 775 (dismissing claims under ATS for lack of subject matter jurisdiction); *see also* Bhatia, *supra* note 34, at 465-68 (discussing three opinions of *Tel-Oren* court). Judge Bork's opinion garnered the most attention out of the three concurring opinions, and was the first published opinion to argue that the ATS is a purely jurisdictional statute. *See Tel-Oren*, 726 F.2d at 798-99 (Bork, J., concurring); *see also* Bhatia, *supra* note 34, at 465-66 (demonstrating Judge Bork's concerns surrounding considering ATS "cause-of-action" statute).

37. *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (alluding to cases and commentaries demonstrating ATS's obscurity); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) (labeling ATS obscure and conceivably meant to cover only private acts); HENNER, *supra* note 9, at 68 (describing conflicts of interpretation following *Tel-Oren*).

38. *See* Childress, *supra* note 8, at 718-19 (providing overview of common issues challenging courts

courts may utilize the ATS to hold private individuals, in addition to state actors, liable for certain crimes.[39]

The Second Circuit again blazed a new trail in ATS jurisprudence with its holding in *Kadic v. Karadzic*.[40] The court in *Kadic* established that modern human rights violations (such as torture; genocide; and cruel, inhuman, and degrading treatment) could be prosecuted under the ATS against private individuals, thus opening the door for claims against multinational corporations.[41] The post-*Kadic* claims against multinational corporations under the ATS followed a fact formulaic pattern of plaintiffs—often from developing countries—alleging that a private individual or corporation conspired with or aided local governments or regimes in human rights violations.[42]

In particular, *Doe v. Unocal*[43] is one example of a post-*Kadic* case where the court permitted plaintiffs' claims alleging human rights violations under the ATS against a multinational corporation.[44] In *Unocal*, the plaintiffs alleged that the Myanmar military committed forced labor, rape, torture, and murder while providing security for an oil pipeline project in rural Myanmar that was partially owned and managed by Unocal; the plaintiffs sued under the ATS to

following *Tel-Oren*). Most courts at the time of *Filartiga* namely faced questions surrounding personal jurisdiction and potential immunity of defendants. *See* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 276 (2009). When faced with choice of law issues, courts typically had to decide between applying the "law of the place of injury (i.e. foreign law), federal common law, or international" common law. *See* Childress, *supra* note 8, at 718.

39. *See* Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (holding private actors liable for violations of international law).

40. *See id*. (holding private actors, in addition to state actors, liable under ATS).

41. *See* STEPHENS, s*upra* note 27, at 15 (stating *Kadic* held ATS grants jurisdiction over private actors); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 70 (2008) (declaring *Kadic* foundational case on nonstate actor liability under ATS). *Kadic* granted ATS jurisdiction over private actors who either commit international law violations that do not require state action, as well as jurisdiction over private actors who act in concert with state officials. *See Kadic*, 70 F.3d at 236; *see also* STEPHENS, *supra* note 27, at 15.

42. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 (2d Cir. 2000) (stating allegations of torture allowable under ATS due to precedent set in *Kadic*); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1117-18, 1157, 1159 (E.D. Cal. 2004) (finding officer in private paramilitary group in El Salvador liable under ATS for assassination); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (opining private entities using slave labor likely liable under post-*Kadic* case law).

43. 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

44. *See id.* at 883-84, 897-98 (stating plaintiffs' claims and denying motion to dismiss); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1312 (C.D. Cal. 2000) (granting defendants' motion for summary judgment), *vacated*, 403 F.3d 708 (9th Cir. 2005); Doe I v. Unocal Corp., 395 F.3d 932, 962-963 (9th Cir. 2002) (reversing summary judgment and remanding for trial); Doe I v. Unocal Corp., 395 F.3d 978, 978-979 (9th Cir. 2003) (ordering case reheard en banc); Doe I v. Unocal Corp., 403 F.3d 708, 708 (9th Cir. 2005) (granting parties' stipulated motion to dismiss and denying all appeals). Before an argument of the rehearing en banc, "the parties announced a settlement and dismissed all claims." *See* STEPHENS, *supra* note 27, at 15 n.66. The parties did not disclose details of the settlement. *See* Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES (Dec. 14, 2004), http://www.nytimes.com/2004/12/14/business/unocal-settles-rights-suit-in-mya nmar.html?_r=0.

hold Unocal liable for these international law violations.[45] As the *Unocal* case progressed, some commentators expected the result would produce the first significant decision holding a corporate entity liable for human rights violations.[46]

Ultimately, *Unocal* settled out of court in 2004, and while lauded as a victory for human rights advocates, the settlement left significant questions unanswered regarding the applicability of international law.[47] Moreover, despite the victory in *Unocal*, litigation against other corporations has largely been unsuccessful.[48] Such lack of success led to further questioning and hypothesizing as to future corporate liability under the ATS.[49] The desire for clarity on this issue far preceded the Supreme Court's first review of the ATS

45. *See Unocal*, 395 F.3d at 937-42 (describing facts of case). Myanmar is a foreign state that the United States has not designated a state sponsor of terrorism; therefore, Myanmar is immune from suit in U.S. courts unless a claim comes within an exception to the Foreign Sovereign Immunities Act (FSIA). *See* 28 U.S.C. §§ 1330, 1602-11 (2012); *Unocal*, 395 F.3d at 956-57 (describing Myanmar's immune status and FSIA).

46. *See* STEPHENS, *supra* note 27, at 310 & n.6 (stating procedural history and anticipated outcome of *Unocal* litigation).

47. *See* HENNER, *supra* note 9, at 78-79 (explaining disagreement among justices making up majority 2002 *Unocal* opinion). In *Unocal*, there was significant disagreement between the two judge majority and Judge Reinhardt with respect to questions involving the applicability of international law and the relevance of the doctrine of jus cogens; however, these disagreements did not affect the case's ultimate result. *See id.* At the time of the *Unocal* settlement in 2004, plaintiffs' claims for joint venture and agency (aiding and abetting) were still "pending on appeal in the Ninth Circuit." *See* STEPHENS, *supra* note 27, at 319 (describing lack of early development on indirect theories of liability in corporate ATS claims). Courts eventually found aiding and abetting liability through venture and agency to be viable theories under the ATS at the motion to dismiss stage, but these issues remain contentious. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 267-68 (2d Cir. 2009); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 316-18 (2d Cir. 2007); *see also* Joe Lodico, Note, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute*, 30 J.L. & COM. 117, 130 (2011).

48. *See, e.g.*, HENNER, *supra* note 9, at 79 (noting only four of thirty-eight claims against corporations survived motions to dismiss before 2004); Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel, 102 CAL. L. REV. 1495, 1523 (2014) (stating only handful of successful cases in modern ATS litigation); Keith A. Petty, *Who Watches the Watchmen? "Vigilant Doorkeeping," The Alien Tort Statute, and Possible Reform*, 31 LOY. L.A. INT'L & COMP. L. REV. 183, 203 (2009) (highlighting lack of success under aiding and abetting liability). In the four years following *Unocal*, only two cases proceeded to trial. *See* Romero v. Drummond Co. Inc., 552 F.3d 1303, 1324 (11th Cir. 2008) (affirming judgment in favor of defendant regarding ATS claims); Bowoto v. Chevron Corp., 621 F.3d 1116, 1123 (9th Cir. 2010) (affirming dismissal of plaintiffs' ATS claims).

49. *See* John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate Related Human Rights Abuse*, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (citing plethora of industry sectors where human rights abuses exist); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 366-67 (2011) (stating first claims brought against corporations weak in reasoning); Mara Theophila, Note, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After* Kiobel v. Royal Dutch Petroleum Co., 79 FORDHAM L. REV. 2859, 2877-79 (2011) (noting applying either U.S. or international law dictates corporate liability in varying manner). Additionally, Chiquita, once an American corporation, is now a subsidiary of two Brazilian firms. *See* Bill Chappell, *Chiquita Fruit Company is Bought by Two Brazilian Firms*, NPR (Oct. 27, 2014), http://www.npr.org/blogs/thetwo-way/2014/10/27/359334087/chiquita-fruit-company-is-bought-by-brazilian-firms.

in 2004.[50]

B. Test Developments by the Supreme Court

The Supreme Court weighed in on the modern application of the ATS for the first time in 2004 in *Sosa* and while the opinion validated the Second Circuit's approach in *Filartiga*, the Court stopped short of addressing allegations involving corporate defendants.[51] In *Sosa*, plaintiff Alvarez-Machain brought claims under the ATS against Sosa, who assisted Drug Enforcement Administration officials in his abduction.[52] Justice Souter, writing for the majority, sought to reign in the ATS application by heavily basing the opinion on the statute framer's original intent.[53]

1. Sosa *and the Attempt to Limit the ATS to Specific Classes of Torts*

The majority opinion in *Sosa* drew two inferences from the history of the ATS, which were that the first Congress expected the ATS to be effective and useful immediately upon its drafting, and for the ATS to be effective only for a small number of claims.[54] The majority limited those claims to torts falling within Blackstone's three primary offenses: safe conduct violation, infringements upon ambassadors' rights, and piracy.[55] Furthermore, while the Court found that no development since the ATS's drafting "categorically precluded federal courts from recognizing a claim under the law of nations as an element of [federal] common law," judicial restraint was paramount.[56]

In terms of judicial restraint, the Court discussed five critical reasons courts should consider whether to recognize a new cause of action under the ATS: "the prevailing view of the common law has changed since 1789"; "there has been a rethinking of the role of the federal courts" in creating common law; private causes of action are considered most suitable for the legislative branch; there are possible "collateral consequences of making international rules

50. *See* HENNER, s*upra* note 9, at 79 (stating "more and more cases brought" before Court finally addressed *Sosa* in 2004).

51. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (considering, but not answering, whether ATS liability extends to corporations).

52. *See id.* at 697-98 (presenting facts of case); Louise Weinberg, *What We Don't Talk about When We Talk about Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1478-79 (2014) (relating *Filartiga* reasoning to apply to *Sosa*).

53. *See* Stephens, *supra* note 11, at 16 (recognizing Souter's majority opinion relied on framer's intent and statutory history).

54. *See Sosa*, 542 U.S. at 719-20 (describing limited number of claims actionable under ATS); Stephens, *supra* note 11, at 16 (noting courts allow "modest set" of claims based on congressional intent). The court in *Sosa* opined that the legislative focus under the ATS appeared to concern "offenses against ambassadors . . . violations of safe conduct[,] . . . and individual actions arising out of prize captures and piracy." *See Sosa*, 542 U.S. at 720.

55. *See Sosa*, 542 U.S. at 694 (describing the majority's limitations on the ATS).

56. *See id.* at 724-25 (urging courts to use judicial restraint in evaluating claims based on contemporary, civilized norms).

privately actionable"; and there has been no congressional mandate authorizing the courts to seek out new causes of action.[57] Some read Souter's opinion to allow lower courts too much freedom in interpreting the ATS.[58] Justice Scalia summed up the inadequacy of the attempt to restrain lower federal courts in his concurring opinion, noting that "the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again."[59]

The majority opinion, despite its shortcomings, solidified the ATS as a jurisdictional statute and succeeded in limiting what claims could be recognized under the ATS.[60] Following *Sosa*, the *Filartiga*-type cases involving alien plaintiffs asserting claims against foreign governments tapered off, while lawsuits against multinational corporations persisted, eventually leading the Supreme Court to again address the ATS in 2013 in *Kiobel*.[61]

2. Kiobel *and the Restrictive Territorial Test*

In *Kiobel*, the Supreme Court considered Nigerian nationals' tort claims against British, Dutch, and Nigerian corporations for actions that allegedly took place in Nigeria.[62] The Court ultimately addressed whether conduct occurring in a foreign sovereign is actionable under the ATS.[63] The Court initially sought to address whether the cause of action relied on in *Filartiga* included suits against corporate defendants.[64] During that discussion, Justice Alito presented the question to the Court that would ultimately be addressed in the majority opinion: "[W]hat business does a case like [this] have in the courts of the United States?"[65]

Chief Justice Roberts set out to answer Justice Alito's question in the majority opinion, stating that such claims involving "foreign plaintiffs, foreign defendants, and a foreign atrocity" had at best, very limited business in U.S.

57. *See* Stephens, *supra* note 11, at 17-18.

58. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 739 (Scalia, J., concurring) (stating majority holding leaves judiciary with tasks too cumbersome).

59. *Id*. at 750.

60. *See* HENNER, *supra* note 9, at 84 (stating heightened requirement set by majority ensured fewer torts brought under ATS).

61. *See* Fox & Goze, *supra* note 4, at 45 (describing proliferation of lawsuits brought against corporations, inducing Supreme Court review in *Kiobel*).

62. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013) (describing petitioners' claims alleging corporations assisted Nigerian government in violating law of nations).

63. *See id.* at 1664 (stating ultimate question of *Kiobel* concerned conduct on foreign soil).

64. *See* Weinberg, *supra* note 52, at 1483-84 (describing first arguments presented). The plaintiffs based their claims in part on theories of aiding and abetting, and whether or not they could hold corporate defendants liable. *See* Transcript of Oral Argument, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 628670, at *13.

65. *See* Transcript of Oral Argument, *supra* note 64, at *11.

courts.[66] The Court unanimously agreed that the ATS was subject to the canon of statutory interpretation known as the presumption against extraterritoriality, and that a corporation's presence in the United States was not sufficient to dispel this presumption.[67] Under the Court's interpretation, the alleged tort must occur in a U.S. territory.[68] When plaintiffs' claims "touch and concern" U.S. territory, they must sufficiently dispel the presumption against extraterritorial application.[69] Following the *Kiobel* opinion and the establishment of this new "restrictive territorial" test, some legal scholars argued that the decision may have doomed future claims against U.S. and foreign corporations.[70]

Before *Kiobel*, no court applied the presumption against extraterritoriality in a similar context.[71] As such, Justice Roberts dedicated a large portion of the majority opinion to explaining why the presumption against extraterritoriality applies to cases brought under the ATS, and underscored the importance of the doctrine in preventing conflicts between the United States and foreign sovereigns that might result from the application of U.S. statutes to conduct occuring abroad.[72]

Shortly before *Kiobel*, the Court applied the presumption against the extraterritoriality doctrine in *Morrison v. National Australia Bank, Ltd.*,[73] where the Court determined that the doctrine limited the application of the Securities Exchange Act of 1934.[74] Historically, the Court applied the

66. *See* Weinberg, *supra* note 52, at 1485-86 (summarizing Court's holding and presumption against extraterritoriality).

67. *See Kiobel*, 133 S. Ct. at 1669 (holding "presumption against extraterritoriality applies").

68. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1668-69 (2013).

69. *See id*. at 1669 (describing necessary level of contact with United States to satisfy ATS inquiry).

70. *See* Fox & Goze, *supra* note 4, at 47 (concluding many future claims against corporations likely face "doom"); Robyn Hagan Cain, *'Presumption Against Extraterritoriality' Bars Alien Tort Claim*, FINDLAW (Apr. 17, 2013), http://blogs.findlaw.com/supreme_court/2013/04/presumption-against-extraterritoriality-bars-alien-tort-claim.html [http://perma.cc/X4AF-MTQW] (stating future victims of overseas abuse likely stuck in foreign courts).

71. *See Kiobel*, 133 S. Ct. at 1664 (stating usual facts where presumption against extraterritoriality doctrine applies). The majority opinion in *Kiobel* admits the presumption against extraterritoriality usually applies to statutory regulation. *See id.*

72. *See id*. at 1669 (highlighting foreign policy risks surrounding extraterritoriality doctrine). Notably, the presumption against extraterritorial application of U.S. laws protects against situations where a conflict between the laws of the United States and the laws of another nation could result in an international relations crisis. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 268-69 (1991). To run interference in an international matter, the Supreme Court has held that Congress must clearly express its intention because only Congress can undertake such an important policy decision. *See* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

73. 561 U.S. 247 (2010).

74. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (reiterating *Morrison* conclusion); *Morrison*, 561 U.S. at 265 (holding presumption against extraterritoriality applies to Securities Exchange Act); Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co*.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 606 (2013) (describing Court's reasoning in applying presumption against extraterritoriality from *Morrison*).

presumption in cases where Congress gave no clear indication of extraterritorial application, and, as Justice Breyer pointed out in his concurring opinion, the ATS seems to have at least some indication that Congress meant for it to apply abroad.[75] Justice Roberts highlighted three reasons to rebut the argument against the presumption barring extraterritorial application in *Kiobel*.[76] First, the Supreme Court reaffirmed in *Kiobel* as it held in *Sosa* that the ATS was a purely jurisdictional statute.[77] Second, tortious conduct against aliens in violation of international law can occur within U.S. territory.[78] Lastly, the potential foreign policy consequences are less pronounced for piracy, a listed cause of action under the ATS, because the violation occurs at sea rather than within the territorial jurisdiction of another sovereign.[79]

C. How Lower Federal Courts Have Applied the Kiobel *Restrictive Territorial Test*

At the time of this Note's publication, several lower federal courts, in addition to three circuit courts, have tested the Court's restrictive territorial approach following the *Kiobel* decision.[80] In particular, the Eleventh Circuit in *Cardona v. Chiquita Brands International Inc.*[81] applied the extraterritorial test outlined in *Kiobel*, and concluded that plaintiffs may only assert claims under

75. *See Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring) (describing congressional intent for ATS application). "In applying the ATS to acts 'occurring within the territory of a[nother] sovereign,' I would assume that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp." *See id*. (citations omitted).

76. *See* Wuerth, *supra* note 74, at 606-07 (summarizing Justice Robert's majority opinion in *Kiobel*).

77. *See id*. at 606.

78. *See id*. at 607.

79. *See id*.

80. *See, e.g.*, Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1187 (11th Cir. 2014) (dismissing plaintiff's complaint against U.S. corporation alleging human rights abuses); *Al Shimari II*, at 520 (holding plaintiffs' claims touched and concerned U.S. territory sufficiently to rebut presumption against extraterritoriality); Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 57 (2d Cir. 2014) (explaining ATS claims unsupported because "'all . . . relevant conduct' . . . occurred in Bangladesh"); Balintulo v. Daimler AG, 727 F.3d 174, 192, 194 (2d Cir. 2013) (holding dismissal of all ATS claims in district court warranted because all conduct occurred abroad); *Al Shimari I*, at 858 (holding plaintiffs' extraterritorial claims dismissed for lack of jurisdiction), *vacated and remanded sub nom*, *Al Shimari II*, 758 F.3d 516 (4th Cir. 2014); Mwangi v. Bush, No. 5:12-373-KKC, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013) (holding claims barred under all dimensions of ATS); Ahmed-Al-Khalifa v. Salvation Army, No. 3:13cv289-WS, 2013 WL 2432947, at *3 (N.D. Fla. June 3, 2013) (holding unlawful humanitarian aid denial does not touch and concern United States under ATS); Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (concluding foreign embassy bombing sufficiently touched and concerned United States to provide ATS jurisdiction); Muntslag v. D'Ieteren, S.A., No. 12-cv-07038 (TPG), 2013 WL 2150686, at *2 (S.D.N.Y. May 17, 2013) (stating claims under ATS dismissed in part because alleged events occurred outside United States). In *Sarei v. Rio Tinto*, the Ninth Circuit affirmed the dismissal of claims brought by former and current residents of Papua New Guinea against a British corporation for crimes against humanity; all alleged crimes occurred in Papua New Guinea. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 818 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 722 F.3d 1109 (2013) (dismissing claims under ATS for lack of jurisdiction).

81. 760 F.3d 1185 (11th Cir. 2014).

the ATS against an American corporation if the alleged tort occurred on United States soil.[82] Under this narrow interpretation, the court concluded that no distinction should be made between U.S. corporations and foreign corporations for claims under the ATS.[83] They declared that, while noble, the goal of prohibiting torture in foreign countries is best left to the legislature or executive branch's foreign policy regulation.[84] Some have criticized the *Cardona* opinion for failing to provide an in-depth interpretation of the "touch and concern" test outlined in *Kiobel*.[85]

The Fourth Circuit Court, however, took a different approach than both the Eleventh and Second Circuits in interpreting the restrictive territorial test outlined in *Kiobel*.[86] In *Al Shimari II*[87] the plaintiffs alleged that during CACI Premier Technology, Inc.'s (CACI) performance of a military contract, it committed and endorsed torture and war crimes when conducting interrogations at the Abu Ghraib prison in Iraq.[88] The district court concluded that it had no ATS jurisdiction because the alleged violations of international law occurred exclusively in Iraq.[89]

The Fourth Circuit Court of Appeals overturned the district court's decision, focusing on the notion that a court considering claims under the ATS must weigh all the facts that give rise to the claim, with particular consideration of the parties' and their "relationship to the causes of action."[90] In *Al Shimari II*,

82. *See id*. at 1194-95 (Martin, J., dissenting) (describing strict interpretation of ATS jurisdiction). The court's decision in *Cardona* was not unanimous, which highlights the struggle courts have interpreting the ATS post *Kiobel*. *See id.* at 1195. The dissent argued that the court should have held that it had jurisdiction to hear the plaintiffs' claims under the ATS because Chiquita Brands International (Chiquita) was a corporation headquartered and incorporated in the United States, and the plaintiffs alleged that Chiquita participated in a "campaign of torture and murder" from offices within the United States. *See id*. at 1192. Judge Martin argued that the ATS claims sufficiently touched and concerned the United States, and that Chiquita had more than a "mere" corporate presence in the United States. *See id*.

83. *See id.* at 1189 (majority opinion) (holding distinction between foreign and domestic corporations irrelevant); *see also Balintulo*, 727 F.3d at 191-92 (holding if relevant conduct occurred abroad, matter dismissed under *Kiobel*). The court in *Balintulo v. Daimler AG* rejected the idea that United States corporate citizenship is enough to support a claim under the ATS. *See* 727 F.3d at 189.

84. *See Cardona*, 760 F.3d at 1191-92 (stating respectable goals should not expand court's jurisdiction).

85. *See* Doyle, *supra* note 22, at 456 (criticizing court's analysis in in *Cardona* based on *Kiobel*). "Without attempting to define 'relevant conduct,' opine on the contours of the 'touch and concern' test, or even discuss the plaintiffs' allegations of Chiquita's domestic conduct, the court dismissed the case, stating: 'All the relevant conduct in our case took place outside the United States.'" *Id*. (citing *Cardona*, 760 F.3d at 1189).

86. *See Al Shimari II*, 758 F.3d at 528 (4th Cir. 2014) (noting fact-based analysis necessary to analyze ATS jurisdiction).

87. 758 F.3d 516 (4th Cir. 2014).

88. *See id*. at 521-23 (outlining plaintiffs' claims against corporate defendants).

89. *See Al Shimari I*, 951 F. Supp. 2d at 874 (dismissing plaintiffs' initial complaint for lack of proper subject matter jurisdiction under ATS), *vacated and remanded sub nom*, *Al Shimari II*, 758 F.3d 516 (4th Cir. 2014).

90. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (analyzing meaning of "claim" within contexts of facts presented). *Al Shimari II* acknowledged the *Kiobel* court's notion that that the "claim, rather than the alleged tortious conduct, must touch and concern" the United States. *See Al Shimari II*, 758 F.3d at 527. A claim is the "aggregate of operative facts giving rise to a right enforceable by a court." *Id.*

the court noted that American citizens who were employed by an American corporation committed the alleged claims, and managers in the United States took action to cover up the alleged abuses.[91] Unlike the Eleventh Circuit in *Cardona*, the Fourth Circuit concluded that under any ATS inquiry, courts must consider a broader range of facts than simply the location of the relevant conduct.[92] The court seemed to suggest plaintiffs reached the touch and concern override to the presumption against extraterritoriality.[93]

III. ANALYSIS

Courts' ability to employ the ATS against multinational corporate entities developed out of justified concerns that federal courts should grant restitution for victims of corporate-sponsored international human rights violations.[94] The ATS should continue to be available to foreign plaintiffs seeking to hold corporations accountable for human rights violations because no statute replicates its effect.[95] As multinational corporations spread their reach across the globe, the fear that human rights abuses will follow is particularly acute.[96] Unsurprisingly, given the recent state of affairs in international human rights offenses related to big business, ATS litigation against corporations has blossomed in the last two decades.[97]

(citing BLACK'S LAW DICTIONARY (9th ed. 2009)).

91. *See Al Shimari II*, 758 F.3d at 528-29 (grappling with whether claims constituted substantial U.S. ties). In contrast to the instant case where CACI's corporate headquarters were located in the United States, the court noted that in *Kiobel*, the only connections the defendants had with the United States were their New York Stock Exchange listings and New York City public relations office. *See id*. at 528.

92. *See id*. at 529-31 (listing factors court considered in finding jurisdiction under ATS). The court in *Al Shimari II* noted that, in addition to considering the restrictive territorial test outlined in *Kiobel*, specific claims alleging torture do not present a threat of "unwarranted judicial interference" with foreign policy. *Id.* at 530 (citation omitted).

93. *See id*. at 528 (describing specifics of when claims touch and concern United States). *Al Shimari II* pronounced that when the touch and concern analysis involves a contract between a U.S. corporation and the government, courts require a "more nuanced analysis" to determine whether the party rebutted the presumption. *See id.* Further elaborating, and perhaps commenting on *Kiobel*, the Fourth Circuit stated, "[I]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory." *See id.*

94. *See, e.g.*, STEPHENS, *supra* note 27, at 15 (describing use of ATS post *Kadic*); Weinberg, *supra* note 52, at 1477-78 (explaining *Filartiga* decision's significance for international human rights law); Wuerth, *supra* note 74, at 601 (considering ATS main engine for transnational human rights litigation in United States); *see also* Doyle, *supra* note 22, at 449 (portraying backdrop underlying modern ATS claims laid).

95. *See* Doyle, *supra* note 22, at 449 (considering *Kiobel's* implications on global events happening in business and international human rights). In a report prepared for the U.N. Secretary General a Harvard Law Professor, John Ruggie, drafted guiding principles on business and human rights. *See id.* Professor Ruggie noted that the ATS importantly affords human rights victims with "Access to Remedy" by providing these victims with a means of vindication. *See id.*

96. *See* John Ruggie, *supra* note 49 (describing scope of corporate human rights violations). Over 250 firms worldwide in both the private and public sector have been accused of human rights abuses. *See id*.

97. *See* Theophila, *supra* note 49, at 2876 (describing increase in ATS litigation against corporations following *Unocal* decision). Multinational corporations are targets for plaintiffs because of potential large

Whether such litigation has been successful in curbing human rights abuse abroad remains unclear at best.[98] Early hopes that the ATS may have been an effective tool against abuses by multinational corporations have gone largely unrealized.[99] In addition, courts have again found themselves on unsure footing, trying to interpret vague judicial and congressional intent following *Kiobel*.[100] It has become increasingly difficult for plaintiffs to secure proper jurisdiction over multinational corporations that allegedly have committed human rights abuses.[101] In response, judges and legal scholars simultaneously call for judicial restraint, jurisdictional clarity, and broadening exceptions to the rule.[102] Heeding these calls has encouraged federal courts to frequently limit ATS application, while at the same time, finding ever-increasing ways to apply exceptions.[103]

In *Al Shimari II*, as well as in *Lively*, the court pushes the envelope of the touch and concern test to a new height of complexity.[104] The court's analysis

settlements these plaintiffs may obtain. *See id.*

98. *See* Petty, *supra* note 48, at 203-04 (stating ATS claims against multinational corporation sometimes based on disfavored "aiding and abetting" premise); *see also* Childress, *supra* note 8, at 725 (noting "dim chances" for plaintiff success in bringing ATS claims against multinational corporations). Surprisingly, foreign plaintiffs often persist in filing ATS claims under diversity jurisdiction rather than under state or foreign law where they may find more success. *See* Childress, *supra* note 8, at 724-25.

99. *See* Altholz, *supra* note 48, at 1522-23 (noting since *Filartiga*, less than "two-dozen . . . cases involving fewer than twenty-five perpetrators have been successful").

100. *Compare* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191-92 (11th Cir. 2014) (majority opinion) (noting ATS precedent urges judicial restraint, and reputable goals cannot expand action), *with Cardona*, 760 F.3d at 1195 (Martin, J., dissenting) (opining *Kiobel* does not impede holding American corporation accountable for decades-long terror campaign).

101. *See, e.g.*, STEPHENS, *supra* note 27, at 5 (commenting on struggle for courts to apply unusual statute); Ku, *supra* note 49, at 353 (stating ATS, applied to corporations, rests on shaky, if not illusory, footing); Shugart, *supra* note 5, at 92 (considering case law "muddled" when complex jurisdictional questions arise).

102. *Compare* Doyle, supra note 22, at 467 (stating ATS precedent leads intuitively towards "broader touch and concern test"), *with* Ku, *supra* note 49, at 363 (observing Supreme Court justices agree ATS should apply in narrow set of instances).

103. *See, e.g.*, STEPHENS, *supra* note 11, at 16 (stating in *Sosa*, Court concluded ATS should apply to only modest set of torts); Childress, *supra* note 8, at 728-32 (noting lessening of ATS litigation due to judicial process); Weinberg, *supra* note 52, at 1472 (stating *Kiobel* disallows cases similar in fact pattern to *Filartiga*). Courts have narrowed ATS application not only by interpreting international law carefully, but also by employing domestic procedural devices that limit the application of international law in domestic courts. *See* Childress, *supra* note 8, at 728. Depending on the circuit, courts have narrowed the ATS in a variety of ways, including imposing "exhaustion-of-remedy" requirements, applying the forum non-conveniens doctrine, heightening pleading standards, and dealing with justiciability issues. *See id.* at 728-31. The late Justice Scalia's prediction in *Sosa*, that the Court "wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again," indeed came to fruition. Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment).

104. *See* Doyle, *supra* note 22, at 461-62 (stating courts in *Al Shimari II* and *Lively* considered multiple factors left available by *Kiobel*). The courts in *Al Shimari II* and *Lively* determined that multiple factors may satisfy the touch and concern test outlined in *Kiobel*. *See Al Shimari II*, 758 F.3d at 528 (noting necessity of fact-intensive analysis for ATS claims); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 324 (D. Mass. 2013) (justifying broad touch and concern finding based on defendant's U.S. ties).

in *Al Shimari II* relies on factors, such as corporate citizenship and location of relevant aiding and abetting conduct.[105] As the Supreme Court has already outlined, Congress alone should have direct power to determine national priorities and interests.[106]

The idea that courts can achieve consistent results by picking and choosing from the differing approaches in *Kiobel*, *Cardona*, *and Al Shimari II*, works against the struggle to provide clarity to plaintiffs and defendants.[107] In the spirit of simplifying ATS application, as the majority of courts have done with respect to multinational corporate liability post *Kiobel*, it is arguably more important to draw lines around what a court cannot include in a touch and concern analysis, rather than what it should include.[108] The current approach encourages judges to be wary of burdening the ATS with unnecessary new approaches that may have unforeseen consequences.[109] This approach aligns with the Second and Eleventh Circuit's post-*Kiobel* opinions.[110]

As the majority of post-*Kiobel* cases have already proscribed, corporate citizenship is one factor courts should exclude in a touch and concern analysis.[111] While *Kiobel* may have been unclear in certain aspects, it was not unclear on this point.[112] In the context of using the ATS against a multinational corporation, courts should similarly bar questions of aiding and abetting from a

105. *Compare* Doyle, *supra* note 22, at 462 (describing courts discussion in *Al Shimari II* of corporate citizenship in ATS claims), *with Cardona*, 760 F.3d at 1189-90 (stating corporate presence analysis inappropriate), *and* Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 47-48, 54 (2d Cir. 2014) (utilizing precedent to declare ATS liability not held against corporations).

106. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (describing need for statute more specific than ATS to hold corporations accountable for mere presence); *Sosa*, 542 U.S. at 727 (implying legislature better equipped to handle ATS claims, and stressing need for restrained judiciary).

107. *See* Doyle, *supra* note 22, at 463 (stating discussion of post-*Kiobel* cases highlights lack of clarity in applying ATS tests).

108. *See id.* at 445 (noting complexity and vague nature of touch and concern test); *see also* Altholz, *supra* note 48, at 1521 (stating it remains unclear who court can hold liable under law of nations after *Kiobel*).

109. *See, e.g.*, *Cardona*, 760 F.3d at 1191 (holding creation of new test may touch on foreign policy concerns inappropriate for judicial interference); Balintulo v. Daimler AG, 727 F.3d 174, 187-88 (2d Cir. 2013) (declining to undertake judicial interference posing serious threat to balance of power between governmental branches); *Kiobel*, 133 S. Ct. at 1668-69 (implying allowance of broader factor analysis under ATS creates uncertain outcome). In *Balintulo*, the court noted that the U.S. government "filed a statement of interest on October 30, 2003, articulating its position that 'continued adjudication of [these] matters risks potentially serious adverse consequences for significant interests of the United States.'" *Balintulo*, 727 F.3d. at 188 (citation omitted). The above cases reflect Justice Story's opinion on the ATS as outlined in *Kiobel*: "No nation has ever yet pretended to be the custos morum of the whole world . . . ." *Kiobel*, 133 S. Ct. at 1668 (citing United States v. The La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)).

110. *See* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014) (describing extraterritorial conduct stops in inquiry under ATS); *Balintulo*, 727 F.3d at 187-88 (articulating concerns further inquiry would violate separation of powers prohibit jurisdiction).

111. *See Kiobel*, 133 S. Ct. at 1669 (demonstrating weight majority opinion afforded to corporate presence).

112. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (holding explicitly on corporate presence); Doyle, *supra* note 22, at 456 (highlighting aspects of *Kiobel* opinion lacking clarity).

touch and concern analysis.[113] While courts have allowed claims based on aiding and abetting or vicarious liability in the past, the current trend is for courts to disfavor these grounds in relation to touch and concern tests.[114]

While advocates of broader interpretations may deem the above restrictions too narrow to properly hold corporations alleged to have committed human rights abuses liable, the benefit of such restrictions clearly draws lines as to what requires further congressional action.[115] Should the broader ATS application be allowed to remain, congressional lawmakers will have less incentive to step in and provide clearer and more succinct guidance.[116] Furthermore, scholars continue to espouse this solution as ideal, even in the post-*Kiobel* world.[117] Perhaps now, more than at any other point in the ATS's history, the timing is right for legislative amendment.[118] New legislation is needed to protect the sanctity of the law of nations and hold multinational corporations, especially those incorporated in the United States, accountable for human rights abuses.[119] Instead of relying on an opaque sentence drafted two hundred years ago and revived in stumbling measures, the legal system requires legislation cutting to the core of the issue.[120]

IV. CONCLUSION

The ATS plays an integral role in enforcing international human rights standards, and the Supreme Court has facilitated its refinement since its rebirth in the modern era. Clarity, however, has been elusive for federal courts seeking

113. *See* Keitner, *supra* note 41, at 69-70 & nn.33-34 (discussing cases where courts found alleging corporate aiding and abetting fails *Sosa* standard); Theophila, *supra* note 49, at 2872 (describing lack of federal court clarity or consensus on accomplice liability under ATS).

114. *Compare* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (recognizing aiding and abetting viable theory under ATS where plaintiff can prove purpose), *and* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (holding plaintiff may plead theory of aiding and abetting under the ATS), *with Balintulo*, 727 at 192 (holding claims of aiding and abetting not factored in touch and concern analysis).

115. *Compare* Doyle, supra note 22, at 467 (arguing ATS ineffective if touch and concern analysis too prohibitive), *with* Ku, *supra* note 49, at 363 (observing Supreme Court justices agree ATS should apply in narrow set of instances).

116. *See, e.g.*, Dhooge, *supra* note 26, at 166 (inferring Court's continued failure to provide clarity should inspire congressional action); Petty, *supra* note 48, at 185 (stating Congress best suited to resolve scope of ATS claims); Shugart, *supra* note 5, at 130-31 (stating level of uncertainty surrounding ATS calls Congress to act).

117. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 718-19 (2004) (describing lack of consensus in understanding congressional intent behind ATS); Dhooge, supra note 26, at 123 (arguing only congressional intervention can resolve uncertainties surrounding ATS).

118. *See* Shugart, *supra* note 5, at 92 (arguing contemporary need for congressional intervention after courts recent attempts to revive ATS).

119. *See id.* (considering new legislation only means to resolve judicial shortcomings).

120. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (inviting Congress to create statute more specific than ATS to clarify significance of corporate presence); *Sosa*, 542 U.S. at 731 (welcoming congressional ATS guidance to resolve conflicts of interpretation); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (reiterating Kiobel's invitation to Congress to provide further statutory amendment to ATS).

to consistently interpret the ATS. Fashioning new tests to protect plaintiffs' rights to sue under the ATS is tempting, but ultimately ill-advised. Continued judicial intrusion and attempts to draw increasingly blurred borders will only further complicate ATS analysis.

Lower federal courts' application of the presumption against extraterritoriality to the ATS, and *Kiobel's* touch and concern test intended to rebut the presumption, have contributed to the confusion resulting from that judicial rule-making. Despite consistent and pervasive caution against unrestrained judicial action, some continue to argue for a solution defined by a broad interpretation of selective excerpts from Supreme Court opinions addressing the ATS. Such interpretations are misplaced.

The timing is ripe for new legislation clarifying the application of the ATS. Current disagreement on corporate liability under the ATS and how, when, or why courts should apply a "touch and concern" test, are unlikely to be decisively resolved by further judicial lawmaking. Until Congress supplies further clarification, courts would be well advised to determine what facts a "touch and concern" test may not consider, rather than add new considerations as they improvise on an already highly contentious basis for jurisdiction.

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