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Aliens Among Us: Factors to Determine Whether Corporations Should Face Prosecution in U.S. Courts for their Actions Overseas

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INTRODUCTION

In the spring of 1960, thousands of people gathered outside a police station in the town of Sharpeville, South Africa.[1] The majority of individuals in the crowd were protesting the government's mandate that all black South Africans carry a "passbook," a government issued form of identification.[2] According to the police reports, protestors began to throw stones at officers in an attempt to force their way into the police station.[3] The police opened fire on the protestors in response, and when the firing ceased approximately two minutes later, 69 people were dead.[4] Instances such as the massacre in Sharpeville were not uncommon in apartheid[5] South Africa.[6]

In 2002, a number of apartheid victims brought suit in the United States District Court for the Southern District of New York, alleging both direct and secondary tort liability for violations of international law.[7] Interestingly, the claimants did not seek to hold the South African government, policemen, or other perpetrators of violence liable.[8] Instead, the claimants sued, among others, International Business Machines Corporation ("IBM") and Ford Motor Company—two U.S. corporations conducting business in South Africa.[9] The United States Second Circuit

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1. *See Sharpeville Massacre, 21 March 1960*, S. AFR. HIST. ONLINE, http://www.sahistory.org.za/topic/sharpeville-massacre-21-march-1960 [https://perma.cc/5PBJ-5C3K] (last updated Jun. 21, 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. In the late 1940s, the South African Government instituted a separation of the races, beginning with classification and anti-miscegenation laws. These actions proceeded to geographic segregation. Subsequently, the Bantu Authorities Act of 1951 created "homelands." Black South Africans were forcibly removed to the homelands the Act created and were then stripped of their South African citizenship. This system of separation is known as "apartheid." *See generally South Africa Profile – Timeline*, BBC, http://www.bbc.com/news/world-africa-14094918 [https://perma.cc/4XQD-YNS9] (last updated Jun. 25, 2015).

6. *See States of Emergency in South Africa: The 1960s and 1980s*, S. AFR. HIST. ONLINE, http://www.sahistory.org.za/topic/state-emergency-south-africa-1960-and-1980s [https://perma.cc/66RD-PDMT] (last updated Oct. 10, 2013).

7. *See In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 243 (S.D.N.Y. 2009).

8. *See id.*

9. *Id*. The plaintiffs alleged that IBM trained South African government employees to use IBM hardware and software to create identity materials, such as

Court of Appeals heard the plaintiffs' plea for relief almost 15 years after suit was originally filed.[10] The court was tasked with determining whether United States federal courts have jurisdiction over international matters under 28 U.S.C. § 1350, commonly referred to as the Alien Tort Statute ("ATS").[11]

The ATS is a jurisdictional provision, providing in full, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[12] The First Congress in 1789 enacted this statute, not long after the ratification of the Constitution, but the ATS has largely lain dormant for almost two centuries.[13] Beginning in the 1980s, however, the Supreme Court breathed new life into the ATS,[14] eventually waking the proverbial sleeping giant. Courts have subsequently used this 33-word, one-sentence statute to hold individuals and corporations liable for their actions overseas that concern issues such as the apartheid in South Africa,[15] child slavery in the Ivory Coast,[16] and the torture of individuals in Iraq.[17] The implications of the statute as applied to international business activities were likely unimaginable to the members of the First Congress who enacted the statute in the 18th century.

Courts and corporations need clear guidance for when such matters can be adjudicated in the United States. U.S. corporations are increasingly conducting business overseas,[18] which could mean that U.S. corporate activity affects more non-citizens and that the ATS will be increasingly utilized as a form of redress for foreign nationals. This potential increase

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those that were the subject of protest in Sharpeville. The allegations against Ford were that it assisted the South African government in obtaining vehicles that were used to aid in the persecution of the plaintiffs. *See id*.

10. *See* Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015).

11. 28 U.S.C. § 1350 (2012).

12. *Id.*

13. 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE JURISDICTION AND RELATED MATTERS § 3661.1 (4th ed. 2016).

14. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

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

16. *See, e.g.*, Doe I v. Nestlé USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

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

18. *See U.S. Companies Using International Expansion to Drive Growth and Profitability*, BUS. WIRE (Aug. 13, 2013, 11:42 AM), http://www.businesswire.com/news/home/20130813006035/en/U.S.-Companies-International-Expansion-Drive-Growth-Profitability#.Vg1DpXpViko [https://perma.cc/AWN4-8M6P] (stating that in a recent survey of 161 company executives, two-thirds expect international markets to be among their company's top priorities over the next three years).

in ATS litigation magnifies the need for the courts to have a uniform and identified approach for when the ATS can be used as a means for jurisdiction. Not only do potential plaintiffs need to be informed about whether and when they may seek the benefit of U.S. courts as a venue for redress, but potential defendants also need to be informed about when they might be forced to defend against liability actions in the United States. Non-citizen plaintiffs might have several reasons for bringing a claim in federal district court under the ATS as opposed to another tribunal. Foreign claimants might view the federal courts as being more fair than the courts in their home countries because of the independent judiciary and favorable procedural rules found in the U.S.[19] Furthermore, access to any court in a particular claimant's home country might be extremely difficult.[20] Additionally, ATS defendant corporations, without clear guidelines as to when they might face liability for actions taken abroad, are forced to conduct their business with uncertainty.

Unfortunately, neither the United States Congress nor the Supreme Court has given definitive direction as to when a claim is justiciable under the ATS, and more importantly, as to when a corporation can be sued in the U.S. for actions committed in a foreign nation. In a recent landmark case, *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court held that the federal district courts do not have jurisdiction to hear claims against corporations for actions occurring wholly outside the United States.[21] Nevertheless, the Court issued a perplexing statement in dicta: "[E]ven 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."[22] Although indirectly stated, this language suggests that actions that "touch and concern" the United States with sufficient force are justiciable before the federal courts. However, the

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19. *See, e.g.*, Joseph T. McLaughlin & Justin H. Bell, *New Limitations on the Exercise of Jurisdiction Under the Alien Tort Statute*, SN066 ALI-ABA 199, 201 (2008) (noting that in particular, the ATS has become a popular tool of foreign litigants seeking access to the sympathetic juries and streamlined class-action mechanisms of U.S. courts).

20. *See* Chris DeLaubenfels, Note, *The Problem with the Duty to Adjudicate: How Mediations Can Promote International Human Rights*, 46 N.Y.U. J. INT'L L. & POL. 541, 545–46 (2014) (citing U.S. INST. FOR PEACE & U.S. ARMY PEACEKEEPING AND STABILITY OPERATIONS INST., GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION 7–86 (2009) (arguing that no access to justice exists when citizens fear the system and the justice system is inaccessible or incomprehensible)).

21. 133 S. Ct. 1659 (2013).

22. *Id.* at 1669.

Court's failure to provide guidelines for the touch and concern doctrine has led to disparity among the United States Circuit Courts of Appeals.

The disparity among the circuits evidences the need for a solution that will create uniformity in the application of the touch and concern doctrine. Part I of this Comment provides a brief introduction to the history and scope of the ATS. Part II examines the unresolved issue of corporate liability under the ATS by exploring the holdings of seminal cases. Part III proposes three factors that courts should utilize in determining whether a claim sufficiently "touches and concerns" the United States: first, the citizenship of the defendant; second, the location of the conduct; and third, the nature of the alleged violation. Utilization of these factors will provide corporations with greater certainty regarding their liability for business conducted overseas and provide clarity to a statute that has been engulfed by ambiguity since its inception.

I. HISTORY AND SCOPE OF THE ALIEN TORT STATUTE

Pursuant to the ATS, United States district courts have original jurisdiction over any civil action brought by an alien, for a tort only, committed in violation of the law of nations or a treaty of the United States.[23] Dissecting this short statute suggests that a complaint under the ATS must allege three elements: first, that the plaintiff is an alien; second, that the plaintiff is suing for a tort; and third, that the tort was committed in violation of the law of nations or a treaty of the United States.[24] On its face, therefore, the ATS could mistakenly be perceived as an uncomplicated statute with a simple application.

A. Origins of the ATS

The ATS has a complex history and *raison d'être* and is continually the subject of contrasting interpretation and implementation. Indeed, the ATS has been described as a "legal Lohengrin"[25] with an unclear origin, even though it has existed since the First Congress enacted it in 1789.[26]

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23. 28 U.S.C. § 1350 (2012).

24. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Estate of Amergi v. Palestinian Auth., 611 F.3d 1350 (11th Cir. 2010).

25. Lohengrin is the hero of Richard Wagner's opera of the same name. Lohengrin is depicted as a knight of the Holy Grail and refuses to reveal, even to his wife, the mystery of his origins. BRIAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 532 (2d ed. 2001).

26. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

Commentators have suggested that the statute is rooted in the following federal powers: the grant of federal question jurisdiction under Article III of the U.S. Constitution, the authority of the courts to interpret treaties, and the national government's power over international relations.[27] The "most basic original goal" of the statute was to enable federal courts to hear cases affecting foreign relations to the exclusion of state courts.[28] However, the intended practical effect of the statute, particularly with respect to corporations, is a matter still open to interpretation.

Courts continue to wrestle with the determination of what causes of action should be recognized under a claim involving the ATS.[29] The ATS is a purely jurisdictional statute that by itself does not create a statutory cause of action for aliens. It was meant to have immediate practical effect from the moment it became law, by providing the basis for district courts to exercise jurisdiction over a modest number of causes of action recognized under the law of nations, such as offenses against ambassadors, violations of safe conduct, and possibly for piracy.[30] Although these three causes of action have largely been recognized as providing jurisdiction, no definitive answer exists as to what type of claim would provide jurisdiction under the present-day law of nations.[31]

B. Scope of the ATS

Understanding the jurisdictional reach of the ATS is imperative to forming a determination as to corporate liability under the statute. To furnish jurisdiction, the ATS provides that a potential alien claimant needs to allege a tort committed in violation of the law of nations,[32] also called "customary international law," or a treaty of the United States, generally including war crimes and crimes against humanity.[33] Although traditional

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27. WRIGHT ET AL., *supra* note 13, § 3661.1.

28. John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1006 (S.D. Ind. 2007) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 714–19 (2004)).

29. *See Sosa*, 542 U.S. at 720, 724–25.

30. *Id.*

31. *See, e.g.*, *id.*

32. *See, e.g.*, Louis Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 3*, 76 AM. J. INT'L L. 653, 655 (1982) (noting that an international law is violated for the commission of genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; or consistent patterns of gross violations of internationally recognized human rights).

33. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

causes of action providing for jurisdiction appear somewhat settled, determining what causes of action can provide jurisdiction under present-day international law requires an exploration of jurisprudence and the role of custom in developing international law.

1. Jurisdictional Reach of the ATS According to Sosa v. Alvarez-Machain

In *Sosa v. Alvarez-Machain*, the Supreme Court attempted not only to clarify the jurisdictional reach of the ATS, but also to explain how the statute applies to current issues that its drafters perhaps did not envision.[34] The Court found that the ATS provides jurisdiction only when the violation alleged is sufficiently definite and historically rooted in the context of international law norms.[35] Additionally, even when a colorable claim for a violation of an international law norm is sufficiently set forth, the cause of action must be among one of the modest number of international law violations that carry the potential for personal liability traditionally recognized under the ATS.[36] Subsequent courts referred to this analysis as a two-step test: first, the court must determine whether there was a violation of a recognized crime against humanity committed by the defendant; subsequently, if there was such a violation, the court must determine whether the crime falls within the restricted group of claims for which the ATS furnishes jurisdiction.[37]

To determine which violations Congress intended to furnish with jurisdiction, the Court looked to the legislative intent of the drafters and to Blackstone's Commentaries.[38] These sources disclosed three relevant violations: offenses against ambassadors, violations of safe conduct, and piracy.[39] However, the Court recognized that jurisdiction under the ATS is not so rigid and limited as to preclude federal courts from recognizing torts beyond the three that the First Congress contemplated because major developments in international law have occurred since the ATS was enacted.[40] Nevertheless, expansion of the ATS through the recognition of torts beyond the three offenses initially contemplated should be subject to limitations.

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34. *Sosa*, 542 U.S. at 714.
35. *Id.*
36. *Id.*
37. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 315–16 (D. Mass. 2013).
38. *See Sosa*, 542 U.S. at 719–20.
39. *See id.* at 720.
40. *See id.* at 724–25.

2. Contemporary Crimes Recognized as Violating International Norms

The Court in *Sosa* made clear that the expansion of the ATS is strictly limited to those acts that violate a norm of international character that is accepted by the "civilized world" and is defined specifically enough to compare to one of the three international law violations that carried the potential for personal liability when the statute was enacted.[41] Under this rule, courts have held that the following crimes constitute a violation of an international norm, thereby providing jurisdiction under the ATS: slavery,[42] discrimination or persecution,[43] and official torture.[44]

In addition to these violations, the scope of the original three violations articulated in *Sosa*[45]—offenses against ambassadors, violations of safe conduct, and piracy—has evolved and developed. For example, piracy

41. Offenses against ambassadors, violations of safe conduct, and piracy. *See id.*

42. *See* Doe I v. Nestlé USA, Inc., 766 F.3d 1013 (9th Cir. 2014). Three former child slaves, who were forced to harvest cocoa in the Ivory Coast, brought a class action against the multinational companies that controlled production of Ivorian cocoa, alleging that the companies were liable under the ATS for aiding and abetting child slavery in the Ivory Coast. The court, reversing the district court's decision, held that the prohibition against slavery was a universal norm of international law that supported a claim under the ATS, and that the plaintiffs sufficiently pleaded the required *mens rea* for aiding and abetting. The case was remanded to allow the plaintiffs to amend their petition in light of the decision in *Kiobel*, to prove that Nestlé USA's conduct sufficiently "touched and concerned" the United States.

43. *See* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013). The court determined that persecution of sexual minorities was a crime against humanity. The defendant allegedly aided and abetted this persecution from the United States. For persecution to reach the level of a crime against humanity, it typically must involve more than the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute of the International Criminal Court art. 7(2)(g), Jul. 17, 1998, 2187 U.N.T.S 38544. The persecution must also have been proved to be "part of a widespread or systematic attack" to qualify as a crime against humanity.

44. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 884–87 (2d Cir. 1980). Citizens of Paraguay brought action against another citizen of Paraguay for allegedly causing the death of their son through torture. The United States District Court for the Eastern District of New York dismissed the action for lack of subject matter jurisdiction. The Court of Appeals reversed, holding that deliberate torture violates international law of human rights regardless of the nationalities of the parties, thus providing jurisdiction under the ATS.

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

might typically be associated with individuals with a peg leg or an eye patch roaming the high seas while unlawfully boarding and pillaging innocent vessels.[46] However, the United States Ninth Circuit Court of Appeals recently held that a whale conservation group's actions, which included ramming, threatening, and throwing acid onto alleged whale hunters' ships, constituted piracy, even though the group believed it was engaged in a noble purpose.[47] As a result, jurisdiction under the ATS has been expanded to include more than just the original three violations of international law the First Congress envisioned, despite the Court's admonition in *Sosa*[48] to strictly limit the expansion of jurisdiction under the ATS.

3. The Role of Custom

Custom plays an important role in developing what constitutes an international norm under *Sosa*'s two-step analysis. Customary practices rise to the level of international law under certain circumstances. Generally, a customary practice becomes a binding norm of international law if it is a common and consistent practice that nations follow because they feel a sense of legal obligation.[49] Nations must adhere to the practice because they believe international law requires it, not simply "because they think it is a good idea, or politically useful, or otherwise desirable."[50] The notion that custom can occupy such a role in the law is not new. In *The Paquete Habana* from 1900, the Supreme Court acknowledged that "international law is part of our law and must be ascertained and administered by the courts of justice."[51] The administration of international law, the Court explained, might involve considering the customs and usages of other "civilized nations" and the work of commentators and jurists.[52]

Comprehending the type of activity for which a corporation might face liability when doing business overseas is in the corporation's best interest.

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46. *See* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 725 F.3d 940, 942 (9th Cir. 2013).

47. *See id.*

48. *See Sosa*, 542 U.S. at 724–25.

49. WRIGHT ET AL., *supra* note 13, § 3661.1 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987)); *see also* U.S. v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012) (stating the process by which courts ought to derive customary international law from state practice and *opinio juris*).

50. *Bellaizac-Hurtado*, 700 F.3d at 1252.

51. The Paquete Habana, 175 U.S. 677, 700 (1900).

52. *Id*.

An understanding of the role of custom in shaping international law as well as an acknowledgment of what crimes constitute a violation cognizable under the ATS is fundamental in assessing liability under the statute. Such an understanding enables defendants to better predict violations and conduct their businesses with certainty. However, the level of activity necessary to trigger the application of the statute is unclear at best.

II. CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

Questions concerning liability for actions carried out overseas are not unique to present-day corporations. As the ATS increasingly became the focus of non-citizens' claims[53] following *Filartiga v. Pena-Irala*,[54] questions arose as to whether and when a corporation can be haled into a federal district court for torts the corporation allegedly committed overseas. This case served as a catalyst for the discussion of corporate liability under the ATS.

A. Tensions Between the Circuits Prior to the Second Circuit's Decision in Kiobel

After *Filartiga v. Pena-Irala*,[55] it was not uncommon for a corporation to be haled into federal district court under the ATS. For example, in a Ninth Circuit case, Burmese nationals brought an action under the ATS against a U.S. oil company for allegedly aiding in the killing, torturing, and illegal detention of individuals in furtherance of a project to lay pipeline in Burma.[56] Similarly, the Eleventh Circuit recognized that private individuals and corporations were subject to liability under the ATS for actions committed in Colombia.[57] In this case, Colombian nationals sued a United States soft drinks licensor, Coca-Cola, and its

53. *See, e.g.*, McLaughlin & Bell, *supra* note 19, at 204. In the decades following *Filartiga*, the ATS gained popularity as a tool for pursuing high-profile human and labor rights cases against individuals, governmental agents, and corporations.

54. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

55. *Id*.

56. Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 334 (C.D. Cal. 1997).

57. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009), *abrogated by* Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

Colombian subsidiary for collaborating with paramilitary forces to murder and torture the nationals.[58]

Courts have justified corporate liability under the ATS by looking to the historical placement of liability and jurisprudence, both domestic and international. The United States District Court for the Southern District of New York recognized that historically, states—and to a lesser extent, individuals—have been held liable for crimes under international law.[59] The court in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* went further, stating that considerable international and United States precedent "indicates that corporations may also be held liable under international law, at least for gross human rights violations."[60]

Although the Second Circuit has not unequivocally held that corporations are potentially liable for violations of the law of nations, it has considered numerous cases[61] in which plaintiffs sued corporations under the ATS for alleged breaches of international law. In each of these cases, the Second Circuit acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility.[62] This precedent from the Second Circuit indicates that actions under the ATS against corporations for substantial violations of international law can be viewed as "the norm rather than the exception."[63] Courts have further expanded this precedent, such that the general consensus is that corporations should not be immune from tort liability under the ATS.[64]

In addition to the apparent jurisprudential consensus that corporations can face liability under the ATS, scholars have emphasized and even urged expansion of the precedent to other areas of the law. One commentator suggested that, under ATS precedent, human rights laws should also extend to private corporations despite significant confusion and the lack

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58. *Id.* at 1263 (alleging the corporation had collaborated with Colombian paramilitary forces to murder and torture them).

59. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 318 (S.D.N.Y. 2003).

60. *Id*. at 319.

61. *See, e.g.*, Aguinda v. Texaco, Inc.*,*303 F.3d 470 (2d Cir. 2002); Bigio v. Coca–Cola Co.*,* 239 F.3d 440 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co.*,* 226 F.3d 88 (2d Cir. 2000); Jota v. Texaco Inc.*,* 157 F.3d 153 (2d Cir. 1998).

62. *See Presbyterian Church of Sudan*, 244 F. Supp. 2d at 313.

63. *See id*. at 319.

64. *See, e.g.*, *In re* Agent Orange Product Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (finding that defendants presented no policy reason why corporations should be uniquely exempt from tort liability under the ATS, and no court has presented one either).

of extensive early attention to private corporate liability for human rights deprivations.[65] Another commentator went so far as to urge expansion of corporate liability under the ATS for certain corporations' actions that cause massive environmental degradation.[66] As court decisions and scholarly opinions evidence, before *Kiobel v. Royal Dutch Petroleum Co.*,[67] subjecting corporations to liability under the ATS for violations of international law perpetrated in a foreign nation was not uncommon. However, this trend came to an abrupt halt in *Kiobel*.

B. The Second Circuit's Clear Answer

Kiobel provided an opportunity for the Second Circuit to address definitively the issue of corporate liability under the ATS. If the general consensus had been that the ATS provided for jurisdiction over corporate defendants, the Second Circuit deviated from that consensus in *Kiobel.*[68] The case appeared not only to limit, but also to preclude the finding of jurisdiction against a corporation under the ATS.

1. Facts and Procedural History

Nigerian nationals residing in the United States filed suit in federal district court under the ATS, alleging that the defendants—certain Dutch, British, and Nigerian corporations engaged in oil exploration—aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.[69] Specifically, the plaintiffs claimed the corporations aided and abetted extrajudicial killings; crimes against humanity; torture or cruel, inhuman, and degrading treatment; arbitrary arrest and detention; violations of the rights to life, liberty, security, and association; forced exile; and property destruction.[70] The district court dismissed a number of the plaintiffs' claims, but denied the defendants' motion to dismiss with respect to aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment.[71]

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65. Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802–03 (2002).

66. *See* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 621 (2000).

67. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

68. *Id*.

69. *Id*. at 117.

70. *Id*. at 123.

71. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 464–67 (S.D.N.Y. 2006).

Additionally, the district court certified its order for interlocutory appeal to the Second Circuit.[72] This dismissal provided the Second Circuit with the opportunity to address corporate liability under the ATS.

2. Corporate Liability

The Second Circuit found that corporate liability is not a rule of customary international law because corporate liability is not recognized as a "specific, universal, and obligatory norm."[73] In the court's view, "imposing liability on corporations for violations of customary international law ha[d] not attained a discernable, much less universal, acceptance among nations."[74] This view, however, was not shared unanimously.

In contrast with the majority's opinion, Judge Leval's concurrence renounced a complete bar to corporate liability under the ATS, believing the lack of liability deals a substantial blow to international law and its undertaking to protect fundamental human rights.[75] Judge Leval expressed that despite any support in either the precedents or the scholarship of international law, the majority still believed that corporations are not subject to international law.[76] To Judge Leval, such a position affords violators of fundamental human rights the freedom to retain any profits so earned without liability to their victims.[77] Despite Judge Leval's concurrence, the majority's limitation on corporate liability appeared to provide a definitive answer under the ATS. No such clear answer existed, however. Instead, confusion ensued after *Kiobel* because the Second Circuit's statements regarding corporate liability were merely dicta. Further, opportunities to decide corporate liability under the ATS did not present themselves to the other circuits.

3. Subsequent Decisions

After the Second Circuit's decision in *Kiobel*, lower district courts remained divided on the issue of corporate liability under the ATS. Some decisions seemed to affirm the *Kiobel* majority's reasoning and holding, while others followed the principles that the concurring opinion

72. *Id.* at 468.
73. *Kiobel*, 621 F.3d at 136.
74. *Id*. at 145.
75. *Id*. at 149–50 (Leval, J., concurring).
76. *Id*.
77. *Id*.

articulated.[78] In *Kaplan v. Jazeera*, the United States District Court for the Southern District of New York expressly relied on *Kiobel* to hold that the court did not have subject matter jurisdiction over the plaintiffs' claim because the plaintiffs were seeking to hold the defendant corporation liable for war crimes and violations of the law of nations under the ATS.[79] Similarly, in *In re Motors Liquidation Co.*, the United States Bankruptcy Court for the Southern District of New York held that United States courts do not have subject matter jurisdiction to adjudicate cases brought under the ATS when the allegations are against a corporation.[80] *In re Motors* involved a contested matter in which the plaintiffs, who were residents of South Africa, claimed to be victims of the apartheid system, which the defendant corporations had allegedly aided and abetted.[81] The court stated that it was bound by the Second Circuit's holding in *Kiobel* to find that corporate liability had not attained a discernable acceptance among nations and thus could not form the basis of jurisdiction under the ATS.[82]

In contrast, the United States District Court for the Northern District of Illinois in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank* agreed with the concurring opinion in *Kiobel*.[83] The court found "a sufficient legal basis to hold corporations liable under the ATS for genocide."[84] The court also found that "recognition of the humanitarian objectives of the law of nations makes it unlikely that this body of law intend[ed] to exempt corporations from its prohibitions or to provide a substantial financial incentive[85] to violate the most fundamental of human rights."[86] Various other courts have also taken the position that the ATS does not preclude

78. *Compare* Kaplan v. Jazeera, No. 10 CIV. 5298, 2011 WL 2314783, at *8 (S.D.N.Y. June 7, 2011), *with* Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, 807 F. Supp. 2d 689 (N.D. Ill. 2011).

79. *Kaplan*, 2011 WL 2314783, at *8.

80. *In re* Motors Liquidation Co., 447 B.R. 150, 169 (Bankr. S.D.N.Y. 2011).

81. *Id*.

82. *Id*. *See also* Viera v. Eli Lilly & Co., No. 1:09–CV–0495–RLY–DML, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010) (holding that the ATS does not provide federal court jurisdiction over claims based on a corporation's voluntary actions).

83. *Holocaust Victims*, 807 F. Supp. 2d at 689*; see also* Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d 111 (2d Cir. 2010).

84. *Holocaust Victims*, 807 F. Supp. 2d. at 694.

85. If a corporation would not face liability for actions it conducted wholly in another country, that corporation might be financially incentivized, for example, to carry out operations in a country with no child labor laws. *Id*. at 695 (citing *Kiobel*, 621 F. 3d at 159).

86. *Id*.

corporate liability.[87] The continued disparity among the courts, even after the decision in *Kiobel*, made the issue of corporate liability ripe for the Supreme Court's review. The opportunity for certiorari appeared when the petitioners in *Kiobel* appealed to the nation's highest court for redress.[88]

C. The Supreme Court's Decision in Kiobel

A definitive answer to the question of corporate liability under the ATS seemed promising when the Supreme Court granted certiorari.[89] The Court ordered supplemental briefing on whether and under what circumstances courts may recognize a cause of action under the ATS against corporations for violations of the law of nations occurring within the territory of a sovereign other than the United States.[90] Ultimately, *Kiobel* has added to the growing list of cases that have failed to definitively address the issue of corporate liability.

1. Presumption Against Extraterritoriality

The Court began its analysis by clarifying that the question at issue was not whether the plaintiffs stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.[91] The defendants argued that claims under the ATS do not reach conduct occurring in foreign countries, relying primarily on a canon of statutory interpretation known as the "presumption against extraterritorial application."[92] This canon provides that "'when a statute gives no clear indication of an extraterritorial application, it has none,' and reflects the 'presumption that United States law governs domestically but does not rule the world.'"[93] This longstanding principle of U.S. law articulates that Congressional legislation applies only within the territorial jurisdiction of the United States unless a contrary intent appears.[94]

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87. *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

88. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011).

89. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

90. *Id*.

91. *Id*. at 1664.

92. *Id*.

93. *Id.* (first quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010); and then quoting Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746, 1758 (2007)).

94. *See* William S. Dodge, *Understanding the Presumption Against Extrater ritoriality*, 16 BERKELEY J. INT'L L. 85, 124 (1998).

The presumption serves to protect against unintended conflict between the laws of the United States and those of other nations, which could result in international discord.[95] The Supreme Court in *Kiobel* highlighted this policy and stated that the danger of unwarranted judicial interference in foreign policy is magnified in the context of the ATS because the courts, rather than the lawmakers, shape important policy decisions.[96] The Court found that the presumption against extraterritoriality applied to the ATS in general and to the plaintiffs' case for redress in particular.[97] This presumption operated as a bar to the plaintiffs' cause of action[98] because all of the alleged wrongs that the plaintiffs had suffered occurred outside the United States.[99]

While the majority discussed the application of the presumption against extraterritoriality, Justice Breyer's concurrence, which Justices Ginsburg, Sotomayor, and Kagan joined, offered a contrasting viewpoint. The concurrence stated that the Court's utilization of the presumption against extraterritorial application offers limited help in addressing the question before the Court.[100] This question was under what circumstances the ATS would allow a court to recognize a cause of action for violations of the law of nations occurring within the territory of a country other than the United States.[101] The concurrence recognized that the presumption against extraterritoriality does not preclude a finding of liability for foreign actions.[102] Rather, the question still remains open as to what circumstances the ATS will furnish jurisdiction over claims that involve a defendant's actions in a foreign nation.

2. Corporate Liability

Notwithstanding the Supreme Court's holding in *Kiobel* that the plaintiffs could not sue the corporate defendants in U.S. court, the majority went further and stated, "On these facts, all the relevant conduct took place

95. EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991). *See also* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322–23 (D. Mass. 2013) (stating that the presumption against extraterritoriality is based in large part on foreign policy concerns that tend to arise when domestic statutes are applied to foreign nationals engaging in conduct in foreign countries).

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

97. *Id*. at 1665.

98. *Id*. at 1669.

99. *Id*.

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

101. *Id*. at 1672–73.

102. *Id*.

outside the United States. And even where the claims *touch and concern* the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[103] This perplexing statement suggests that an unconditional bar to corporate liability under the ATS does not exist. One commentator noted that the dicta in the majority opinion can be read in one of two ways: either the opinion limits the scope of the holding to cases involving no conduct within the United States that contributes to human rights abuses overseas, or it suggests that a case with different facts might be justiciable for foreign conduct involving the abuse of human rights.[104]

The Supreme Court did not directly preclude corporations from liability under the ATS as the Second Circuit had done;[105] rather, the Court limited the statute's reach by finding that federal courts lack jurisdiction to hear cases against corporations for actions occurring wholly outside the United States. Thus, the presumption against extraterritorial application is arguably rebuttable when claims touch and concern the territory of the United States.[106] The majority, however, offered no explanation as to the meaning of "touch and concern" or as to the level of contact needed to rebut the presumption against extraterritoriality.

D. Confusion After the Supreme Court's Decision in Kiobel

As Justice Kennedy recognized, the Court left "open a number of significant questions regarding the reach and interpretation" of the ATS.[107] The Court's failure to answer definitively whether corporations may face liability under the ATS has again led to disparity among U.S. circuit courts.

In *Al Shimari v. CACI Premier Technology, Inc.*, the Fourth Circuit found that the plaintiffs could sue U.S. companies for the defendant's actions committed in the Abu Ghraib prison in Iraq.[108] In contrast, in

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103. *Id.* at 1669 (majority opinion) (emphasis added) (citing Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883–88 (2010)).

104. Ross J. Corbett, Kiobel*,* Bauman*, and the Presumption Against the Extraterritorial Application of the Alien Tort Statute*, 13 NW. U.J. INT'L HUM. RTS. 50, 9 (2015).

105. *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

106. For a discussion of the "touch and concern" doctrine see Alex S. Moe, *A Test by Any Other Name: The Influence of Justice Breyer's Concurrence in* Kiobel v. Royal Dutch Petroleum Co., 46 LOY. U. CHI. L.J. 225, 286 (2014).

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

108. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014). Four Iraqi citizens brought an action against a U.S. military contractor, alleging

Cardona v. Chiquita Brands International, Inc., the Eleventh Circuit found that the defendant could not be sued in federal court over allegations that it supported Colombian paramilitary forces that tortured and killed banana plantation workers, union members, and social activists in Colombia.[109] Similarly, in *Balintulo v. Daimler AG*, South Africans sued a foreign corporation, Daimler AG, and two U.S. corporations, IBM and Ford, for alleged complicity in apartheid.[110] The Second Circuit dismissed the touch and concern language in the Supreme Court's decision in *Kiobel* as mere dicta and dismissed the plaintiffs' suit under the presumption against extraterritoriality.[111]

As the circuit split regarding corporate liability evidences,[112] whether and at what point a corporation engages in conduct that touches and concerns the United States, thereby conferring jurisdiction over the claim to the federal district courts, is still unclear.

III. PROPOSED FACTORS COURTS SHOULD USE TO DETERMINE THE MEANING OF "TOUCH AND CONCERN"

Because of the confusion among federal courts, both plaintiffs and defendant corporations need guidance to determine what type of conduct touches and concerns the United States and to rebut the presumption against extraterritoriality and confer jurisdiction under the ATS. The courts should adopt the following factors to guide this primary determination: the citizenship of the defendant; the location of the conduct; and the nature of the alleged violation. Each factor constitutes an independently sufficient basis for overcoming the presumption against extraterritoriality. If the defendant is a citizen of the United States, if the alleged wrongful conduct occurred in the United States, or if the alleged wrong is a violation of the law of nations in which the United States has a distinct interest, the conduct will touch and concern the United States with sufficient force to rebut the presumption against extraterritoriality.

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that the plaintiffs were abused and tortured during their detention at Abu Ghraib prison in Iraq as suspected enemy combatants.

109. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015), *cert. denied sub nom.* Does 1–144 v. Chiquita Brands Int'l, Inc., 135 S. Ct. 1853 (2015).

110. *In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 243 (S.D.N.Y. 2009).

111. Balintulo v. Daimler AG, 727 F.3d 174, 190 (2d Cir. 2013) (denying petition for writ of mandamus). The panel appeared to interpret the "touch and concern" language as addressing only the situation in which some conduct occurs abroad and some in the United States. *See* discussion *infra* Part III.B.

112. *See, e.g.*, Doe I v. Nestlé USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

A. Citizenship of the Defendant

The status of a defendant as a United States citizen should lead to a finding that the plaintiff's claims touch and concern the United States with sufficient force to overcome the presumption against extraterritoriality. Where a defendant corporation is a U.S. citizen, foreign relations are less likely to be affected, procedural complications are reduced, and a corporation's activity will more likely be found to touch and concern the United States. Federal jurisprudence, international law, and scholarly commentary uniformly support this consideration in determining jurisdiction under the ATS.

Numerous courts have agreed that the citizenship of a corporate defendant is a relevant factor to consider and one that could distinguish a case from the Supreme Court's ruling in *Kiobel*. In *Du Daobin v. Cisco Systems, Inc.*, the defendant, Cisco, was a U.S. company with offices throughout the United States, including Maryland, where the case was brought.[113] This situation is in contrast to the defendants in *Kiobel*, which were foreign corporations.[114] The court assumed that the presumption against extraterritoriality did not bar the case after the Supreme Court's decision in *Kiobel* because the defendants were domiciled in the United States.[115]

Furthermore, when the defendant is a United States citizen as opposed to a foreign citizen, the potentially complicated issue of haling foreign citizens into United States courts to adjudicate issues of liability diminishes. For example, in *Sexual Minorities Uganda v. Lively*, the court emphasized that the defendant, Lively, was a U.S. citizen, unlike the British and Dutch corporations in *Kiobel*.[116] The court found that the Supreme Court's holding in *Kiobel* did not bar the ATS claims against a U.S. citizen in part because a foreign national was not being haled into an unfamiliar court to defend himself.[117]

Even in circuits that apply the presumption against extraterritoriality, the dissenting opinions suggest that in future cases the courts might find that corporate citizenship displaces the presumption.[118] Judge Martin's

113. Du Daobin v. Cisco Sys., Inc., 2 F. Supp. 3d 717 (D. Md. 2014).

114. *Id*. at 728.

115. *Id*.

116. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 321 (D. Mass. 2013).

117. *Id*. at 322–24. *See also* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) (finding that the case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens).

118. *See, e.g.*, Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1192–93 (11th Cir. 2014) (Martin, J., dissenting), *cert. denied*, 135 S. Ct. 1842 (2015), *cert.*

dissent in *Cardona* explains that the Supreme Court's decision in *Kiobel* offers little guidance as to what kinds of domestic connections overcome the presumption against extraterritoriality.[119] Judge Martin saw the *Cardona* case as overcoming the presumption of extraterritoriality because, among other reasons, the primary defendant, Chiquita, was a corporation headquartered and incorporated within the United States.[120] Judge Martin concluded that the plaintiff's claims touched and concerned the territory of the United States because the plaintiff alleged a U.S. citizen's violation of international law.[121] Equally, the court in *Balintulo v. Daimler AG* did not address whether the defendant's U.S. citizenship was enough to rebut the presumption against extraterritoriality,[122] but the court's language indicated that corporate presence in the United States weighs in favor of displacing the presumption.[123]

International law also supports the consideration of the defendant's citizenship under the ATS analysis. Under the Restatement of Foreign Relations Law, every nation has the authority to regulate the conduct of its own citizens, regardless of whether the conduct of those citizens occurs inside or outside that nation's borders.[124] Furthermore, other developed nations such as Switzerland, the United Kingdom, and Holland take the approach that extraterritorial torts should be disallowed except for claims asserted against their own nationals.[125] Even the foreign governments that urged the Supreme Court in *Kiobel* to dismiss the claims against the foreign corporations acknowledged in amicus briefs that a claim under the

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denied sub nom. Does 1–144 v. Chiquita Brands Int'l, Inc., 135 S. Ct. 1853 (2015); Balintulo v. Daimler AG, 727 F.3d 174, 190 (2d Cir. 2013).

119. *Cardona*, 760 F.3d at 1192–93 (Martin, J., dissenting).

120. *Id*.

121. *Id.*

122. *See generally Balintulo*, 727 F.3d 174.

123. Recent Case, Balintulo v. Daimler AG, *727 F.3d 174 (2d Cir. 2013)*, 127 HARV. L. REV. 1493, 1498 (2014) (stating, "the Court's language signifies that corporate presence is an issue of weight rather than relevance for the purposes of the 'touch and concern' test, thereby leaving the door open for corporate nationality to displace the presumption").

124. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (AM. LAW INST. 1987) ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory . . . .").

125. *See Cardona*, 760 F.3d at 1192–93 (Martin, J., dissenting) (citing Brief for Gov't of the Kingdom of the Netherlands et al. at 18–23, 21 n.32, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2010) (No. 10-1491), 2012 WL 2312825).

ATS would have a "sufficiently close connection" with the United States if the defendants were United States citizens.[126]

Last, legal commentators have also noted that citizenship might be an important factor in determining corporate liability under the ATS. In an appraisal issued just one day after the Supreme Court's ruling in *Kiobel*, one commentator, Oona Hathaway,[127] observed that the decision allowed for "foreign squared" cases to be heard in U.S. courts.[128] "Foreign squared" cases are those in which the alleged harm occurred on U.S. soil or either the plaintiff or defendant is a U.S. citizen.[129] Hathaway concluded that "the end result of the Supreme Court's decision . . . may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations."[130] The status of an alleged violator of international law as a U.S. corporation will likely be the focus in a plaintiff's argument that a specific case touches and concerns the United States.[131] United States corporations are far more likely to satisfy the touch and concern requirement with sufficient force to rebut the presumption against extraterritoriality because their headquarters and key personnel are more likely to be located in the United States.[132]

Although the Supreme Court in *Kiobel* noted that corporations often have a presence in many countries, and corporate presence alone does not serve to overcome the presumption against extraterritoriality,[133] *Kiobel* involved foreign, rather than United States, citizens. American corporations have more than a mere corporate presence in the United States by virtue of their incorporation in the United States and because they receive the benefits and protection of U.S. laws. The distinction between mere corporate presence and incorporation was the exact argument the plaintiffs set forth

126. *See id*. at 1193.

127. Founder and Director of the Center for Global Legal Challenges at Yale Law School. *See Oona A. Hathaway*, YALE L. SCH., https://www.law.yale.edu/oona-hathaway [https://perma.cc/Z97L-CZ84] (last visited Sept. 23, 2016).

128. Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/ [perma.cc/X35B-C8QM].

129. *Id*.

130. *Id*.

131. Anupam Chander, *Unshackling Foreign Corporations:* Kiobel's *Unexpected Legacy*, 107 AM. J. INT'L L. 829, 830 (2013).

132. *Id*.

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

in *Cardona*.[134] The dissenting Judge Martin agreed, noting that the defendants had more than a mere corporate presence because they were incorporated in the United States, providing a crucial difference between their case and *Kiobel*.[135]

While some courts have stated that U.S. citizenship is irrelevant to the jurisdictional analysis under the ATS, such an argument is not persuasive. For example, in *Mastafa v. Chevron Corp*., the Second Circuit disagreed with the contention that a defendant's U.S. citizenship is relevant to the jurisdictional analysis, believing instead that the full "focus" of the ATS analysis is on the defendant's conduct.[136] As the Eleventh Circuit has recognized, however, the Supreme Court has not completely excluded the significance of U.S. citizenship. Particularly, the Eleventh Circuit specified that *Kiobel* did not concern U.S. citizens, and therefore the opinion did not reach the merits of the touch and concern analysis.[137] Additionally, the court keenly observed that *Kiobel*, which did address corporate presence within the U.S., indirectly supports the proposition that citizenship or corporate status might in fact be relevant to whether a claim touches and concerns the territory of the United States.[138] The Eleventh Circuit noted that after analyzing the facts of the case, the Court in *Kiobel* simply determined that "mere corporate presence" was inadequate.[139]

The principles articulated under federal jurisprudence, international law, and legal commentary make clear that a corporate defendant's United States citizenship is, at a minimum, relevant to the jurisdictional analysis under the ATS. Furthermore, a corporate defendant's status as a United States citizen is sufficient to overcome the presumption against extraterritoriality. Although the citizenship of the defendant can be a dispositive factor, it is not the only factor that will rebut the presumption.

B. Location of the Conduct

If part or all of a corporation's allegedly tortious conduct occurred within the United States rather than wholly in a foreign nation, the corporation's actions might touch and concern the United States with sufficient force to overcome the presumption against extraterritoriality.

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134. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1192–93 (11th Cir. 2014) (Martin, J., dissenting), *cert. denied*, 135 S. Ct. 1842 (2015), *cert. denied sub nom.* Does 1–144 v. Chiquita Brands Int'l, Inc., 135 S. Ct. 1853 (2015).

135. *Id.* at 1192–93.

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

137. Doe v. Drummond Co., 782 F.3d 576, 594 (11th Cir. 2015).

138. *Id*.

139. *Id*.

Similar to the citizenship factor, this factor finds sufficient support under federal jurisprudence. Moreover, significant foreign policy concerns buttress the need of the courts to consider conduct occurring within the United States when deciding whether jurisdiction under the ATS is present.

1. Specific Personal Jurisdiction

An analogy to specific personal jurisdiction lends support to the proposition that conduct that occurs within the United States should provide jurisdiction under the ATS. [140] In interpreting the Due Process Clause, the United States Supreme Court has recognized a distinction between two types of personal jurisdiction: "general" and "specific."[141] A state exercises "specific" personal jurisdiction over a defendant when the cause of action arises out of the defendant's contact with the state.[142] Although the Supreme Court has addressed relatively few cases regarding the ATS, the Court has frequently addressed the issue of specific personal jurisdiction.

One example of specific personal jurisdiction is *International Shoe Co. v. State of Washington*, which involved a corporation that sent salespersons into the state of Washington to solicit sales of shoes.[143] The company had no other contacts with the state.[144] The Supreme Court held that the salespersons' contacts with Washington were sufficient for the state to exercise jurisdiction over the corporation, as well as to collect taxes from it.[145] The Court noted that to the extent a corporation exercises the privilege of conducting activities within a state, the corporation enjoys the benefits and protection of the laws of that state.[146] Therefore, the exercise of that privilege may give rise to certain obligations,[147] which require the corporation to respond

140. For a further analysis of specific personal jurisdiction see 36 C.J.S. *Federal Courts* § 34 (2012).

141. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414–15 (1984).

142. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudi cate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966).

143. *See* Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement, 66 S. Ct. 154, 157 (1945). The salespersons resided in Washington, their principal activities were confined to that state, and their compensation was based on the amount of their sales in that state. The corporation provided its salespersons with a line of samples, which they displayed to prospective purchasers. On occasion the salespersons rented rooms for exhibiting samples in business buildings. The company reimbursed the cost of such rentals.

144. *Id.*

145. *Id.* at 160–61.

146. *Id.* at 160.

147. *Id.*

to a suit brought in that jurisdiction.[148] Enforcing such obligations cannot be said to be excessive.[149]

A court's exercise of specific jurisdiction over a defendant corporation can be analogized to a corporation being haled into federal district court in the United States under the ATS for allegedly wrongful conduct committed in the United States in violation of the law of nations or United States treaties. The forum state in a specific jurisdiction analysis is similar to the United States in an ATS jurisdictional analysis. As the defendant in *International Shoe* was found to be subject to jurisdiction in Washington,[150] a corporation that voluntarily and intentionally acts in the United States in furtherance of a violation of the law of nations abroad should be subject to the jurisdiction of the United States. When a corporation engages in conduct in the United States, jurisdiction is proper even though the harm is felt abroad. A finding of jurisdiction rests on the principle that subjecting a corporation that carries out conduct in the United States to the jurisdiction of a federal district court is not unreasonable.[151] Further, jurisprudential support exists for finding jurisdiction over a corporate defendant under the ATS when that defendant has engaged in tortious acts in the United States, even if the harm was felt in a foreign nation.

2. Sufficient Conduct Under the ATS

In *Kiobel*, the Supreme Court framed its analysis as focusing solely on the location of the relevant "conduct" or "violation."[152] In *Balintulo v. Daimler AG*, the Second Circuit clarified that the phrase "relevant conduct," as used in *Kiobel* for the touch and concern analysis, referred to the conduct constituting the alleged offenses under the law of nations.[153] Thus, in conducting its extraterritoriality analysis, the court in *Balintulo* looked solely to the site of the alleged violations of customary international law.[154] If the site of these violations was the United States, the court agreed that the conduct should be sufficient to touch and concern the United States, thus

148. *Id*.
149. *Id.*
150. *Id.* at 161.
151. This finding of jurisdiction also provides support for the above factor, "Citizenship of the Defendant." *See supra* Part III.A.
152. Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013) (quoting Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665–69 (2013)).
153. *Id*. at 189–90.
154. *Id.*

overcoming the presumption against extraterritoriality.[155] Numerous courts have applied this reasoning.

In *Sexual Minorities Uganda v. Lively*, the court distinguished its case from *Kiobel* because the plaintiff's complaint alleged that the defendant's tortious acts took place to a substantial degree within the United States.[156] The court reasoned that the plaintiff should not be denied a claim under the ATS, even though the impact of the defendant's conduct was felt in Uganda.[157] The plaintiff claimed the defendant planned and managed a campaign of repression in Uganda from the United States.[158] The court analogized this conduct to a terrorist who designs and manufactures a bomb in the United States, which he then mails to Uganda with the intent for it to explode there.[159] That the harmful effects of wrongful conduct are felt in a foreign nation is simply insufficient to preclude a finding that the presumption against extraterritoriality is rebutted when conduct relevant to the tort occurs in the United States. Further, the court stated that the Supreme Court's holding in *Kiobel* is limited in scope—the presumption against the extraterritorial application bars suit under the ATS only when a defendant's conduct lacks sufficient connection to the United States.[160]

In *Krishanti v. Rajaratnam*,[161] the defendants attempted to focus on all of the harm to the plaintiffs occurring in Sri Lanka to deny the United States court jurisdiction under the ATS. The court, however, found that the defendants' argument would stand only if the plaintiffs were suing the defendants for their actions in Sri Lanka.[162] The defendants' actions were in fact committed in the United States.[163] The actions included the hosting of meetings and fundraisers in the United States to raise funds to commit

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155. *Id.*

156. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 321 (D. Mass. 2013). *See also* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1194 (11th Cir. 2014) (Martin, J., dissenting) ("[P]laintiffs here do not seek to hold Chiquita liable for any of its conduct on foreign soil. Critically, the plaintiffs instead have alleged that Chiquita's corporate officers reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations *from their offices in the United States*."), *cert. denied*, 135 S. Ct. 1842 (2015), *cert. denied sub nom.* Does 1–144 v. Chiquita Brands Int'l, Inc., 135 S. Ct. 1853 (2015).

157. *See Sexual Minorities*, 960 F. Supp. 2d at 321–22.

158. *Id.* at 309–10.

159. *Id.* at 321–22.

160. *See id.* at 321–22. *See also* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010); Pasquantino v. United States, 125 S. Ct. 1766 (2005).

161. Krishanti v. Rajaratnam, No. 2:09-CV-05395(JLL)(JAD), 2014 WL 1669873 at *1 (D.N.J. Apr. 28, 2014).

162. *Id.* at *10.

163. *Id*.

human rights violations in Sri Lanka, creating United States corporations to contribute money to organizations supporting the violations in Sri Lanka, and bribing United States officials to remove a terrorist organization from the Foreign Terrorist Organization list.[164] Because the defendants' actions occurred in the United States, the court found jurisdiction was proper under the ATS.[165] The Eleventh and Second Circuits also agree that the location of the conduct is significant to the analysis.[166]

Foreign policy concerns also support holding corporate defendants liable when the corporation's wrongful conduct occurs on U.S. soil. The "most basic original goal"[167] of the ATS is to allow federal courts to hear cases affecting foreign relations and to keep these matters outside the state courts' purview.[168] If the United States were to make its courts unavailable

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164. *Id.*

165. *Id.* at *10–11.

166. *See* Doe v. Drummond Co., 782 F.3d 576, 592 (11th Cir. 2015) (stating that in weighing the pertinent facts, the site of the conduct alleged is relevant and carries significant weight); Mastafa v. Chevron Corp., 770 F.3d 170, 191 (2d Cir. 2014) (finding that domestic conduct "touched and concerned" the United States with sufficient force to displace the presumption against extraterritoriality and to establish jurisdiction under the ATS). The defendants carried out multiple actions in the United States, including domestic purchases and financing transactions and numerous New York-based payments and "financing arrangements" through a New York bank account. *Id*. *See also* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (finding that presumption was displaced in part because CACI's managers in the United States gave tacit approval to the acts of torture, attempted to cover up the misconduct, and encouraged it); Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (holding that a terrorist attack that was plotted in part within the United States and directed at a United States Embassy and its employees displaced the presumption); Du Daobin v. Cisco Sys., Inc., 2 F. Supp. 3d 717, 728 (D.Md. 2014) (observing that *Kiobel* might be distinguishable because "Cisco is an American company" and because plaintiffs alleged that Cisco's actions "took place predominantly, if not entirely, within the United States").

167. John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1006 (S.D. Ind. 2007) (citing Sosa v. Alvarez–Machain, 542 U.S. 692, 715–19 (2004)).

168. WRIGHT ET AL., *supra* note 13, § 3661.1. The Continental Congress faced this problem several years before the ratification of the Constitution during the Marbois incident, which involved an alleged incident of assault and battery against a French diplomat in Philadelphia. The French government complained about the treatment of the French minister by the state courts, but the state judiciary was unapologetic. Congress instructed the national Secretary of Foreign Affairs to apologize to the French and to explain "the nature of a federal union" and that the "young Nation" needed "many allowances." By enacting the ATS shortly after the ratification of the new Constitution, the First Congress acted to

for claims against persons acting in the U.S. who cause injury to people or groups overseas, the U.S. would "itself create the potential for just the sort of foreign policy complications that the limitations on federal common law claims recognized under the ATS are aimed at avoiding."[169] Indeed, under the law of nations, nations have a responsibility to make courts accessible for claims that foreign claimants bring against individuals who are citizens of that nation or who are within the nation's borders.[170]

The location of the wrongful conduct is significant in formulating a decision about whether the conduct touches and concerns the United States with sufficient force to overcome the presumption against extraterritoriality. If the alleged conduct occurred within the United States, the presumption will likely be overcome, notwithstanding that the effects of the conduct materialize in a foreign country. Additionally, even when the location of the conduct is unclear, or the conduct does not occur in the United States, jurisdiction might be found under the substantive law governing a particular alleged violation.

C. The Nature of the Alleged Violation

To establish subject matter jurisdiction under the ATS, a plaintiff's allegation of a violation of the law of nations in which the United States has a distinct interest should be sufficient. This last factor finds support under the concept of universal jurisdiction, which is the legislative intent underlying the creation of the ATS and which is conformable to the Supreme Court's ruling in *Kiobel*.

All civilized nations have a duty to eliminate violations of the law of nations, which are interpreted in reference to international customary

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ensure that the federal government could address such sensitive cases in its own courts. *See* Sosa v. Alvarez–Machain, 542 U.S. 692 (2004); Respublica v. De Longchamps, 1 U.S. 111 (1784); *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 515–22 (1986) (detailing the Framers' concern to establish federal jurisdiction over cases with potential implications for foreign affairs).

169. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322–23 (D. Mass. 2013).

170. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J. concurring) (stating that if the court's decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to the alien's home state), *cert. denied*, 470 U.S. 1003 (1985).

law.[171] Despite being relatively limited in scope,[172] the doctrine of universal jurisdiction allows a nation to prosecute offenses to which it has no connection at all. Jurisdiction is based solely on the heinous nature of the alleged conduct.[173] According to the doctrine, any nation can prosecute universal offenses, even over the objection of the defendants' and victims' home states.[174] Allowing the adjudication of claims involving violations of the law of nations in United States courts under the ATS does not run contrary to established principles of international law.

Further, the legislative intent underlying the creation and interpretation of the ATS supports holding foreign defendants liable in the United States when a heinous violation of the law of nations in which the United States has a particular interest has occurred. The Supreme Court in *Sosa v. Alvarez-Machain* noted that the "First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations."[175] Historically, pirates were thought to be subject to jurisdiction in the courts of any nation because they did not operate within any jurisdiction.[176] Justice Breyer noted in his concurrence in *Kiobel* that like pirates, torturers and perpetrators of genocide are subject to jurisdiction wherever they are found.[177] They are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment."[178] If the Court's interpretation of the ATS furnishes jurisdiction for all claims that violate the law of nations, *a fortiori* courts

171. *See* 2 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 9:23 (2016). For a list of violations deemed cognizable under the ATS see *supra* Part I.B.1.

172. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (AM. LAW INST. 1987). A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present. *Id.*

173. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004).

174. *See id.*

175. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

176. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1667 (2013).

177. *See id.* at 1670–76 (Breyer, J., concurring).

178. *Id. See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 n.1 (AM. LAW INST. 1987) (internal quotation marks omitted) (quoting *In re* Demjanjuk, 612 F. Supp. 544, 556 (N.D.Ohio 1985)).

should have jurisdiction under the ATS to hear violations of the law of nations in which the United States has a specific interest.[179]

Moreover, the United States Congress is undoubtedly aware of cases in which courts have awarded civil damages under the ATS for violations of the law of nations, and Congress has not sought to limit the jurisdictional or substantive reach of the ATS.[180] For example, in 1980 the Second Circuit decided *Filartiga*,[181] which involved a group of citizens from Paraguay who alleged that the defendant, also a citizen of Paraguay, wrongfully caused the death of a family member. The plaintiffs alleged that the defendant tortured and killed the family member in retaliation for the family member's father's political actions and beliefs.[182] The court held that the ATS furnished jurisdiction and awarded the plaintiffs approximately $10 million in damages.[183] Indeed, Congress has enacted other statutes, both civil and criminal in nature, that allow the U.S. to prosecute or allow victims to obtain damages from foreign persons who injure foreign victims by

179. The Eleventh Circuit believes jurisdiction for violations of the law of nations should be limited. In *Cardona v. Chiquita Brands Int'l, Inc.* the court stated that it would potentially deny ATS claims alleging torture, employing in part a narrow reading of *Sosa*. 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015), *cert. denied sub nom*. Does 1-144 v. Chiquita Brands Int'l, Inc., 135 S. Ct. 1853 (2015). This language suggests the Eleventh Circuit would limit actionable claims under the ATS to those primary offenses that existed when the ATS was enacted. Nonetheless, the Eleventh Circuit's comments are dicta; the court ultimately dismissed the action because the relevant conduct occurred outside the United States and did not "touch and concern the United States." *Id*. at 1189. Judge Martin's dissent parallels other cases that furnish jurisdiction under the ATS for a violation of the law of nations. Specifically, he argues that U.S. corporate sponsorship of torture should be potentially actionable, despite the torture's occurrence outside the United States. *Id*. at 1192–93.

180. *See Kiobel*, 133 S. Ct. at 1677 (Breyer, J. concurring). If Congress did wish to limit the jurisdictional or substantive reach, Congress could do so. For example, in 2013, Congress passed a revised Stolen Valor Act after the Supreme Court invalidated the earlier version in June 2012. In *United States v. Alvarez*, the Court held that the prohibition on making false claims about receiving military honors violated the First Amendment's protection for freedom of speech. 132 S. Ct. 2537 (2012). Subsequently, Congress revised the Act so that only making false claims about military honors for financial gain or some other profit is a crime.

181. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that deliberate torture violates international law of human rights regardless of the nationalities of the parties, thus providing jurisdiction under the ATS).

182. *See id.* at 878.

183. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

committing heinous acts such as torture or genocide while abroad.[184] A number of these statutes were enacted after *Filartiga*.[185] Because Congress has not attempted to limit the jurisdictional scope of the ATS, defendant corporations that allegedly violate the law of nations should be subject to jurisdiction under the ATS when the United States has a specific interest in adjudication of the claim.

Last, granting United States courts jurisdiction over claims in which the country has a distinct interest conforms to the Supreme Court's ruling in *Kiobel*. To furnish jurisdiction under the ATS before the decision in *Kiobel*, a claim's allegation that a violation of the law of nations had occurred might have been sufficient.[186] The Court added another layer to the jurisdictional analysis, however, through its touch and concern language in *Kiobel*. This new layer is evidenced by the fact that the crimes alleged in *Kiobel* were violations of the law of nations, but the Court declined to furnish jurisdiction under the ATS.[187] The factor proposed is in line with the Court's decision in *Kiobel* because a claim touches and concerns the United States when the claim involves a violation of the law of nations in which the United States has a specific interest in prosecuting.

Certain violations of the law of nations specifically concern the United States and should be heard in the United States federal courts. The historical example of such a violation is piracy.[188] This crime persists today and affects both the United States economy and its citizens. Transportation of goods by water contributed $36 billion and 64,000 jobs to the U.S. economy in 2010.[189] By value, shipping vessels carry 53% and

184. *See, e.g.*, 18 U.S.C. § 2340A(b)(2) (2012) (authorizing prosecution of torturers if "the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender"); § 1091(e)(2)(D) (genocide prosecution authorized when "regardless of where the offense is committed, the alleged offender is . . . present in the United States"); Torture Victim Protection Act of 1991, §2(a), Pub. L. No. 102-256, 106 Stat. 73 (creating a private right of action on behalf of individuals harmed by an act of torture or extrajudicial killing committed "under actual or apparent authority, or color of law, of any foreign nation"); *Kiobel*, 133 S. Ct. at 1677.

185. *See supra* note 184.

186. John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1006 (S.D. Ind. 2007).

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

188. *See* Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 132 (2004).

189. *See* MATTHEW CHAMBERS & MINDY LIU, U.S. DEP'T OF TRANSP., MARITIME TRADE AND TRANSPORTATION BY THE NUMBERS (2011), http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/by_the_numbers/maritime_trade_and_transportation/index.html [https://perma.cc/X2EG-6PAF].

38% of U.S. imports and exports, respectively—the largest share of any mode of transportation.[190] Although a popular mode of transportation, this industry is increasingly facing the threat of piracy.[191] Not only does piracy endanger the lives and cargo on board both U.S. ships and foreign vessels travelling to the U.S.,[192] but it also has economic implications.[193] Because of the prominence of the maritime shipping industry within the United States, the federal courts have a special interest in adjudicating piracy cases.

If a defendant corporation is alleged to have violated the law of nations and the United States has a distinct interest in the adjudication of the violation, the corporation should be subject to the jurisdiction of United States courts under the ATS. As one court keenly observed, if corporations are capable of being found liable for war crimes, as indeed they are, then logically, corporations should be capable of being found liable for other international crimes.[194] This factor, along with the citizenship of the defendant and the location of the conduct, will provide certainty in an area of the law engulfed in ambiguity.

CONCLUSION

The courts, as well as plaintiffs and defendant corporations, would benefit tremendously from direction as to when conduct will "touch and concern" the United States with sufficient force to rebut the presumption against extraterritoriality. No clear consensus exists as to whether or when

190. *Id.*

191. For example, the number of piracy incidents worldwide increased 68% from 2000 to 2006, compared to the previous six-year period. *See Increase in Piracy and Terrorism At Sea; Little Evidence Supports Fear That the Two Crimes Are Merging*, RAND CORP. (June 5, 2008), http://www.rand.org/news/press/2008/06/05.html [https://perma.cc/P6MD-3ZBP].

192. *See, e.g.*, *Pirates Kidnap Two Americans in Ship Attack off Coast of Nigeria*, FOX NEWS (Oct. 25, 2013), http://www.foxnews.com/world/2013/10/24/americans-kidnapped-by-pirates-off-coast-nigeria-official-says/[https://perma.cc/5EET-CQ8R]; Mark Mazzetti and Sharon Otterman, *U.S. Captain Is Hostage of Pirates; Navy Ship Arrives*, N.Y. TIMES (Apr. 8, 2009), http://www.nytimes.com/2009/04/09/world/africa /09pirates.html?_r=0 [https://perma.cc/WM77-Y942].

193. According to international shipping organizations, insurance rates for ships rose from an estimated $500 per voyage in 2008 to $20,000 per voyage in 2009—a 40-fold increase—because of piracy. *See* Raymond Gilpin, Counting the Costs of Somali Piracy (June 22, 2009) (working paper) (on file with the *Louisiana Law Review*), http://www.usip.org/sites/default/files/resources/1_0.pdf [https://perma.cc/57MG-UZ4X].

194. William v. AES Corp., 28 F. Supp. 3d 553, 566 (E.D. Va. 2014).

a non-citizen under the ATS may hale into court a corporation for a harm the corporation causes overseas. Having a set of factors available for courts to utilize in determining jurisdiction will provide greater uniformity between the circuits, as well as certainty for litigants. Courts should consider the citizenship of the defendant, the location of the conduct, and the nature of the claimed violation when determining whether a claim sufficiently "touches and concerns" the United States for purposes of ATS jurisdiction. If the specific claim is relevant to one of these factors, the claim should be justiciable under the ATS because it rebuts the presumption against extraterritoriality. Utilization of these factors would allow corporations to conduct their businesses with greater certainty, while allowing plaintiffs to save time and resources on claims under which the ATS would ultimately not provide jurisdiction.

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